THE LAW

OF

PARTNERSHIP.

BY

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THE LAW OF PARTNERSHIP.

PART III.

DISSOLUTION AND WINDING UP.

CHAPTER I.

CAUSES OF A DISSOLUTION.

§ 570. Any change of membership.— Each change of partners, whether by the addition of a new member or the death or retirement of an old one, or the substitution of a new for an old member, is a dissolution as to all the partners, and not merely as to the one who has retired or died, and whether by consent or previous agreement or otherwise, and if the business is continued it is by a new partnership, whether the name be the same or not. No matter how numerous the changes without apparent break in the continuity of the business, at each change an existing firm dissolves and a new one is formed.[1]

Hence a winding up must be of each separately. This was shown in the case of White *v.* White, *supra*, where partners successively

[1] Heath *v.* Sansom, 4 B. & Ad. 172; Ross *v.* Cornell, 45 Cal. 133; Waller *v.* Davis, 59 Iowa, 103; Abat *v.* Penny, 19 La. Ann. 289; White *v.* White, 5 Gill, 359; Mudd *v.* Bast, 34 Mo. 465; Morss *v.* Gleason, 64 N. Y. 204, 207; Horton's Appeal, 13 Pa. St. 67; Clark *v.* Wilson, 19 id. 414; Roach *v.* Ivey, 7 S. Ca. 434; Bank of Mobile *v.* Andrews, 2 Sneed (Tenn.), 535; Peters *v.* McWilliams, 78 Va. 567. Though in Gossett *v.* Weatherby, 5 Jones (N. Ca.), Eq. 46, the withdrawal of one of three partners by consent was called a partial dissolution only, and held to furnish no inference of a dissolution as to the other two in an action for an accounting.

retired at intervals of a few years, and one of those remaining in the last firm filed a bill against all the others for an accounting, and the bill was held multifarious, because, as each firm must be separately wound up, the defendants who had retired earlier were not to be burdened with the cost or trouble of the transactions of the later firms.

Our law proceeds on the same principles as the civil law, that any change in the condition of one of the parties, which disables him to perform his part of the contract, is a dissolution, and doubtless when the cases arise, the civil law rules that make banishment, imprisonment, and the like, dissolution, will be applied.[1]

§ 571. Partnership at will.— A partnership formed for no specified time is a partnership at will, and may be dissolved at any time by any partner. Each partner may withdraw when he pleases, without liability to his associates for damages, if he acts without any fraudulent purpose.[2]

If a partnership, originally formed for a specified term, which has expired, is continued without further agreement, it becomes a partnership at will, although all other provisions of the articles may continue in force.[3]

Probably a contract of perpetual partnership is the same.[4]

The fact that the dissolution is at an unreasonable time does not prevent the exercise of the right,[5] and though the other partner had paid a bonus on entering the firm.[6] Yet if not in good faith, and if at a disadvantageous time, in order to appropriate expected profits, though there may not be a liability for loss, as to which the courts are not agreed, yet the unfair advantage will not

[1] See WALWORTH, Chancellor, in *Griswold v. Waddington*, 16 Johns. 438, 491.

[2] Howell *v.* Harvey, 5 Ark. 279, 289 (39 Am. Dec. 376); Lawrence *v.* Robinson, 4 Colorado, 537; Carlton *v.* Cummings, 51 Ind. 478; Whiting *v.* Leakin, 66 Md. 255; Fletcher *v.* Reed, 131 Mass. 312; Berry *v.* Folkes, 60 Miss. 576, 607; Skinner *v.* Tinker, 34 Barb. 333; Pine *v.* Ormsbee, 2 Abb. Pr. (N. S.) 375; McElvey *v.* Lewis, 76 N. Y. 373; Collins *v.* Dickinson, 1 Hayw. (N. Ca.) 240; McMahon *v.* McClernan, 10 W. Va. 419, 462.

[3] § 216.

[4] See Rutland Marble Co. *v.* Ripley, 10 Wall. 339, for an example of such partnership.

[5] McMahon *v.* McClernan, 10 W. Va. 419; Collins *v.* Dickinson, 1 Hayw. (N. Ca.) 240. *Contra*, Howell *v.* Harvey, 5 Ark. 270, 280 (39 Am. Dec. 376).

[6] Carlton *v.* Cummings, 51 Ind. 478. See § 803.

be allowed, but as equal an adjustment or division as possible will be made.[1]

§ 572. Partnerships for indefinite term are not always at will.— But merely that the partnership contract specifies no duration in express terms is not conclusive that it is at will. And if an intention appears in the articles to continue the partnership until certain objects are accomplished, it will not be considered a partnership at will, but one to continue until its purpose is completed, or the impracticability thereof demonstrated.

Thus, a partnership formed to erect a building or construct a railroad is not a partnership at will, but for the completion of the enterprise.[2]

In Gates *v.* Fraser, 6 Ill. App. 229, a partnership to obtain and operate a patent which proved successful was apparently regarded as a partnership for the life of the patent, seventeen years.

In Morris *v.* Peckham, 51 Conn. 128, 134, a similar partnership was interpreted to continue for a reasonable time, which was regarded as long enough to show that the business could not be made successful.

In Walker *v.* Whipple, 58 Mich. 476, where a partnership was formed to run a steam threshing machine, and, being dissolved at the end of the month by one partner, the other claimed in the accounting an allowance of damages for premature dissolution, and the court were equally divided, two judges refusing to engraft a limitation on the exercise of the legal right of dissolution by allowing damages, which they held could be allowed only in case of a partnership for a definite term, and saying that the reasons and motives for withdrawal could not be considered; and two judges holding that, considering the nature of the business, the fact that such business was a periodical one, the demand for work being for a season, and similar circumstances, the partnership should be deemed to have been contemplated for the season, which was two months, and that the allowance asked should be granted.

[1] Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 309; McMahon *v.* McClernan, 10 W. Va. 419, 462; Howell *v.* Harvey, 5 Ark. 270, 281 (39 Am. Dec. 376). See Walker *v.* Whipple, 58 Mich. 476, cited more fully in the next section.

[2] Pearce *v.* Ham, 113 U. S. 585; Holladay *v.* Elliott, 8 Oregon, 84, 98; Richards *v.* Baurman, 65 N. Ca. 162.

In Potter *v.* Moses, 1 R. I. 430, articles of partnership expressed no duration, but the fact that employees to be paid by a share in the profits in lieu of salary were engaged for a year by all the partners and furnished with transportation, was held to show by necessary implication that the partnership was to continue for at least the same period.

In Cole *v.* Moxley, 12 W. Va. 730, where M. had a contract for two years to carry the mails and formed a partnership in it with C., who had bought from him and paid for one-half of the contract, and M. assumed to dissolve and carried the mails himself, the partnership was held to be for the time of the contract, which was its sole object, and M. was held accountable for profits.

And where the time for completion of the contract is limited by the other contracting party and is afterwards extended, the partnership formed to complete the work contracted for continues until fulfillment of the contract.[1]

In Berry *v.* Folkes, 60 Miss. 576, 607, a partnership to buy a plantation on credit, operate it, and make the profits pay for the land and outlay, and to divide the land when paid for, was held too uncertain to sustain a claim that it was indissoluble until accomplishment of the object. The facts of the case, however, were that one partner was seeking to continue the partnership after the other's death, which he could not have done even had a specified duration been expressed, unless dissolution by death was also excluded in terms.

§ 573. But the purchase of a leasehold interest as part of a stock in trade is not evidence of an agreement of partnership commensurate with the duration of the lease.[2] And where the lessee of a coal mine took in a partner, there is no presumption that the partnership is for the term of the lease;[3] or where the firm took a lease for a definite term for its business;[4] or that it made contracts with its workmen employed to manufacture goods, for some time to run. Such contracts are made every day and do not prevent dissolution.[5]

[1] Abrahams *v.* Myers, 40 Md. 499, 510.

[2] Crawshay *v.* Maule, 1 Swanst. 495.

[3] Burdon *v.* Barkus, 4 De G. F. & J. 42.

[4] Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 307-8.

[5] Id. 308.

§ 574. Notice to dissolve.— A usual and proper method of exercising the right to dissolve is by notice to that effect to the other partners.

In some form or other the intention to dissolve or the fact of dissolution must be notified to the other partners, and there is no dissolution until it is communicated.[1]

But formal notice or express declaration is not necessary. A partner's retirement may be shown by tacit renunciation or implication from circumstances.[2] The dissolution is effectual from the time of notice and is not affected by the mental capacity of the partner notified; hence it is operative although he be then insane.[3]

So, if the articles provide that a dissolution may be on notice, and one of the partners becomes a declared lunatic, notice upon him is nevertheless sufficient; they need not find understanding for him.[4] So if the partner be blind and deaf.[5]

And a notice when given cannot be retracted, except by mutual consent of all.[6]

An invalid notice of expulsion under one clause of the articles will not serve as a good notice of intent to dissolve under another clause.[7]

Where by the articles a partnership is dissolvable only upon notice given a specified time beforehand, this clause is not in force after the expiration of the original term, the partnership being continued without further agreement.[8]

§ 575. Evidence of dissolution.[9]— Whether facts amount to a dissolution is a question of fact to be left to the jury,

[1] Van Sandau *v.* Moore, 1 Russ. 464; Wheeler *v.* Van Wart, 9 Sim. 193; Eagle *v.* Bucher, 6 Oh. St. 295, 300-1.

[2] Abbot *v.* Johnson, 32 N. H. 9. Thus filing a bill asking dissolution may operate as a dissolution if the partnership is at will, Whitman *v.* Robinson, 21 Md. 30.

[3] Mellersh *v.* Keen, 27 Beav. 236; Jones *v.* Lloyd, L. R. 18 Eq. 265.

[4] Robertson *v.* Lockie, 15 Sim. 285; 10 Jur. 533.

[5] Id.

[6] Jones *v.* Lloyd, L. R. 18 Eq. 265, 271.

[7] Smith *v.* Mules, 9 Hare, 556; Hart *v.* Clarke, 6 H. L. Cas. 633 (aff'g 6 De G. M. & G. 232).

[8] § 218.

[9] For the admissibility of reputation as evidence of dissolution, see § 1156.

if the question arises in an action at law.[1] And though the partnership agreement be in writing or under seal, the dissolution may be proved by parol.[2]

Though there be a written agreement of dissolution and a publication of the fact, a dissolution may be proved by parol and at an earlier date.[3]

To prove a dissolution on January 1st, a notice published on January 19, dated January 1, is competent evidence, not as sufficient, but as one of the circumstances.[4] And a writing by one partner to another, to the effect that the former had bought out the latter's interest, is admissible as part of the transaction. It is not a mere declaration.[5]

A resolution by the members appointing one of their number to take charge for the purpose of winding up proves a dissolution and is a dissolution.[6]

Expiration of the term of partnership and a continuance of the business by the managing and active partner, with the assets and under the same name, upon the same premises, and without an accounting to the sleeping partner, is not a dissolution, and profits must be divided as before.[7]

A dissolution may be shown inferentially, as by letters showing mutual dissatisfaction and a wish to close, with discontinuance of business;[8] or by a delay so long to act as to be a dissolution in fact.[9]

But a notice by one partner to the other that he dissolved, but the other did not assent, and nothing further was done, the notice not being acted on, this is not a dissolution.[10] Nor is such a notice construable into a continuing offer to dissolve, so as to be treated

[1] Roache *v.* Pendergast, 3 Har. & J. 33; Gulick *v.* Gulick, 14 N. J. L. 578, 582.

[2] Wood *v.* Gault, 2 Md. Ch. 433; Truesdell *v.* Baker, 2 Rich. (S. Ca.) L. 351; Dickinson *v.* Bold, 3 Desaus. (S. Ca.) 501; Gardiner *v.* Bataille, 5 La. Ann. 597. See Doe *v.* Miles, 4 Camp. 373; 1 Stark. 181, and *passim* in this chapter. *Contra*, see Hutchinson *v.* Whitfield, Hayes (Irish), 78.

[3] Emerson *v.* Parsons, 46 N. Y. 560 (aff. 2 Sweeney, 447).

[4] Boyd *v.* McCann, 10 Md. 118.

[5] Emerson *v.* Parsons, *supra*.

[6] Bank of Montreal *v.* Page, 98 Ill. 109.

[7] Parsons *v.* Hayward, 4 De G. F. & J. 474.

[8] Dickinson *v.* Bold, 3 Desaus. (S. Ca.) 501; Pearce *v.* Liudsay, 3 De G. J. & Sm. 139.

[9] Harris *v.* Hillegass, 54 Cal. 463.

[10] Sanderson *v.* Milton Stage Co. 18 Vt. 107.

as accepted, by allegations of the copartner in his answer in a subsequent suit, declaring himself desirous of dissolving.[1]

§ 576. —— **change of name.**— A mere change of name is not a dissolution and formation of a new partnership, where the members are the same.[2] But a discontinuance of the firm name of A. & B., and a new firm of A., B. & Co., tends to prove dissolution.[3]

Hence, where D. & H., commission merchants as D. & Co., were employed by plaintiff to purchase for him, and they afterwards changed their name to H. & Co. and continued to buy for plaintiffs, and some money on the last purchase was lost, the change of name without change of members did not revoke the agency, for the credit was given to the members, not to the name, otherwise other individuals adopting the former name might succeed to the agency.[4]

So, where F. sold his business to T. M. Gill & Co., and agreed not to go into a competing business so long as T. M. Gill & Co. were in the business, and T. M. Gill & Co. advertised a dissolution, to take effect in the future, but it never did take effect, and F. knew it, and the partnership remained as before, except that its name was changed to Gill & Garrett; Garrett, a former salaried clerk, now receiving one-third of the profits in lieu of compensation, but was not to bear losses, it was held that Garrett was not a partner, nor the firm a different one, and F. was enjoined from competing with Gill & Garrett.[5]

A change of name accompanied by removal of the place of business is not a dissolution and formation of a new firm.[6]

§ 577. **Right at will to dissolve partnership for fixed term.**— Whether in a partnership for a fixed term a member has the right to dissolve at will before expiration presents an interesting question on which courts are divided. On the one hand is the partnership agreement, a contract to

[1] Smith *v.* Mulock, 1 Robt. (N. Y.) 569; 1 Abb. Pr. (N. S.) 374. For other inferential evidence of dissolution, see Wood *v.* Fox, 1 A. K. Mar. (Ky.) 451.

[2] § 193. *Contra*, in Limited Partnerships, see Bates on Limited Partnerships, pp. 74, 115.

[3] Southwick *v.* Allen, 11 Vt. 75.

[4] Billingsley *v.* Dawson, 27 Iowa, 210.

[5] Gill *v.* Ferris, 82 Mo. 156.

[6] Mellinger *v.* Parsons, 51 Iowa, 58.

form a firm for a stated number of years, together with the fact that courts of equity entertain bills for dissolution of such partnerships for cause, and grant or refuse them according to the merits. At least four-fifths of the cases I have cited in this chapter of dissolutions for misconduct and dissension were partnerships for a fixed period unexpired. On the other hand is the unwisdom, not to say impossibility, of compelling an unwilling and dissatisfied partner to remain in a connection at the nearly certain risk of discord, litigation and consequent loss, with the fact that he can in several ways force a dissolution.

It might seem easy for the courts to rule — though I have never seen this suggested — that in those partnerships which require no capital, such as professional and some mechanical partnerships, the refusal of a partner to continue works a dissolution, leaving the copartner to his remedy by an action for damages for breach of contract; while in a partnership requiring capital or a plant, the reasoning might be as follows: A partner cannot be compelled to serve; yet if his refusal is not a dissolution he continues to get his share of the profits, his copartners doing all the work and contributing all the skill, unless the court would equalize this by resorting to the right to compensate them as for extra services, or, what is the same, dock him. But this is a measure, as shown in the chapter on extra compensation,[1] very unwillingly resorted to, and worthless, perhaps, if the concern is a losing one and never capable of accurate measurement. If, however, he can dissolve at will, he is allowed to break his contract, and the withdrawal of his capital, or an immediate winding up, might easily ruin the most prosperous business, for which an action for damages would afford no adequate compensation, and therefore a middle ground, partly avoiding both classes of difficulties, be chosen, namely, allow him to retire, and, by notice to actual dealers and by publication to others, terminate his liability for future contracts, except to the extent of the capital invested; but compel him to keep his contract by leaving his capital in the concern, giving him the agreed share of the profits less the proportion contributed by the others to employ a properly skilled subordinate in his place. This course may be practicable if the firm is prosperous; but if it becomes insolvent

[1] §§ 770–780.

a serious objection is apparent, in that the delinquent partner is not bearing a fair share of the losses which he perhaps occasioned. He is given the right to profits without the liability attached by law to that right, and is in effect a limited partner, without complying with the statute as to limited partnerships, and if his name is in the firm style, this complicates the difficulties. This can be obviated only by ruling that he forfeits all right to profits; for if the courts should regard him as a creditor entitled to a share of the profits in lieu of interest, the objection is that a lender so paid, but not entitled to a return of the loan in every event, has never been held anything but a partner,[1] and, moreover, this theory makes two firms one, consisting of all the original partners succeeded by one of all but the retired partner, and this involves two sets of creditors. This discussion will at least exhibit the difficulties of the subject.

In Solomon *v.* Kirkwood, 55 Mich. 256 (s. c. 21 N. W. Rep. 336, as Solomon *v.* Hollander), where H. and K. had formed a partnership for one year, in July, 1882, and in October, 1882, K. took sole possession of the business, excluding H., and gave notice of dissolution to dealers and made publication, and in November, 1882, H. executed a note in the firm name, on which the action was brought, and it was held that there was no such thing as an indissoluble partnership, and that every partner had an indefeasible right to dissolve by publishing his own volition to that effect, with the only consequence of being subjected to action for breach of covenant.

In Mason *v.* Connell, 1 Whart. 381, also, it was said that a partnership for a definite and unexpired period was dissolvable by either partner at any time; that it was for the public interest that no partner should be obliged to continue in a partnership against his will, inasmuch as a community of goods in such case engenders discord and litigation, and that such was the civil law.[2]

Skinner *v.* Dayton, 19 Johns. 513, 538, PLATT, J.: "There is no such thing as an indissoluble partnership. Every partner has an indefeasible right to dissolve the partnership as to all future con-

[1] § 49.

[2] This case was approvingly cited to the same point in Slemmer's Appeal, 58 Pa. St. 168, subject to liability for breach of contract. In Blake *v.* Dorgan, 1 G. Greene (Iowa), 537, 540, in a *dictum*, the court say they believe this to be the more reasonable doctrine, leaving the parties to their remedies on the articles or covenant. And see The Cape Sable Co.'s Case, 3 Bland (Md. Ch.), 606, 674.

tracts by publishing his own volition to that effect. . . . Even where partners covenant with each other that the partnership shall continue seven years, either partner may dissolve it the next day, by proclaiming his determination for that purpose; the only consequence being that he thereby subjects himself to a claim for damages for a breach of his covenant. The power given by one partner to another to make joint contracts for them both is not only a revocable power, but a man can do no act to divest himself of his capacity to revoke it."[1]

A voluntary but *bona fide* conveyance by one partner to a third person was held to be a dissolution at the election of either party, that is, even against the will of the other partners, holding that there is no distinction between voluntary and involuntary transfers and enabling the partner to break up the firm, basing the ruling upon the considerations that the other partners cannot be compelled to admit the assignee, or dispense with the services of the selling partner; and upon the further consideration that creditors trusted all the original firm, and they are prejudiced, and that the assignee should be allowed to have the benefit of his purchase, when *bona fide*, by an immediate accounting, as well as upon the right to revoke an agency. These, except the last, are considerations of policy rather than of logic.[2]

On the other hand, there are *dicta* by very able courts and judges denying or doubting the right of a partner to dissolve such a firm at will.[3]

[1] See Collins *v.* Dickinson, 1 Hayw. (N. Ca.) 240; but compare Richards *v.* Baurman, 65 N. Ca. 162.

[2] Such was the ruling in Marquand *v.* N. Y. Manuf. Co. 17 Johns. 525, which has been followed in Bank *v.* Railroad Co. 11 Wall. 624; Monroe *v.* Hamilton, 60 Ala. 226, 231; Miller *v.* Brigham, 50 Cal. 615 (which may have been a partnership at will for aught that appears in the report, and this may also be said of Heath *v.* Sansom, 4 B. & Ad. 172); Reece *v.* Hoyt, 4 Ind. 169; Receivers of Mechanics' Bank *v.* Godwin, 5 N. J. Eq. 331, 338; Bufort *v.* Neely, 2 Dev. (N. Ca.) Eq. 481; Cochran *v.* Perry, 8 W. & S. 262; Horton's Appeal, 13 Pa. St. 67, 71; Ballard *v.* Callison, 4 W. Va. 326; Fox *v.* Rose, 10 Up. Can. Q. B. 16. *Contra*, Ferrero *v.* Buhlmeyer, 34 How. Pr. 33, explaining away Marquand *v.* N. Y. Mfg. Co. *supra*.

[3] Pearpoint *v.* Graham, 4 Wash. C. C. 232; Johnston *v.* Dutton, 27 Ala. 245, 253; Howell *v.* Harvey, 5 Ark. 270, 281 (39 Am. Dec. 376); Berry *v.* Folkes, 60 Miss. 576, 607; Van Kuren *v.* Trenton Locomotive & Mach. Mfg. Co. 13 N. J. Eq. 302, 306; Hartman *v.* Woehr, 18 id. 383; Seighortner *v.* Weissenborn, 20 id. 172; Bishop *v.* Brecles, Hoffm. (N. Y.) Ch. 534; Ferrero *v.* Buhlmeyer, 34 How. Pr.

§ 578. Damages for premature dissolution.— Even conceding the power of dissolving a partnership for a fixed period to exist, there is no question but that the delinquent partner is responsible in damages for so doing;[1] and such damages may be allowed by the chancellor as an item against such partner in an accounting in equity, after decreeing a dissolution.[2]

In Hartman *v.* Woehr, 18 N. J. Eq. 383, a partnership of three persons, S., W. & H., to operate a brewery, was formed for five years, each partner to put in $10,000. S. and W. put in their agreed amounts and afterwards considerable more, H. having put in but little over $5,000, and, failing to put in more, S. and W. excluded him from the firm and advertised a dissolution. It was held on bill by H. for an accounting, that, as part of his capital had been accepted and used by the firm, he was a partner until legal dissolution, and that such exclusion and advertisement were not a dissolution, though grounds for it, and that H. is therefore entitled to a decree of dissolution and an accounting up to the time of legal dissolution, and accounting was awarded on the basis of interest to S. and W. on their excess of capital over $10,000, and interest against H. on his deficiency of capital, and an allowance to S. and W. for services in carrying on the business.

DISSOLUTION FOR CAUSE.

§ 579. It will conduce to clearness if we endeavor to classify the kinds or causes of dissolution.

I. Events which *per se* amount to a dissolution, divided

33; Durbin *v.* Barber, 14 Oh. 311, 315; Kinloch *v.* Hamlin, 2 Hill (S. Ca.), Ch. 19, 20 (27 Am. Dec. 441); Cole *v.* Moxley, 12 W. Va. 730. In Reboul *v.* Chalker, 27 Conn. 114, the question was raised, but the court express no preference. And see Richards *v.* Baurman, 65 N. Ca. 162. There is an excellent article strongly presenting this side of the question by Mr. Benj. F. Rex, of St. Louis, in 23 Am. Law Reg. (N. S.) 689.

[1] Bagley *v.* Smith, 10 N. Y. 489, 491 (61 Am. Dec. 756); Solomon *v.* Kirkwood, 55 Mich. 256, 259; Kinloch *v.* Hamlin, 2 Hill (S. Ca.), Ch. 19, 20 (27 Am. Dec. 441); Howell *v.* Harvey, 5 Ark. 270, 282 (39 Am. Dec. 376); Blake *v.* Dorgan, 1 G. Greene (Iowa), 537, 540; Doupe *v.* Stewart, 13 Grant's Ch. (Up. Can.) 637. And the cases noticed in the first part of the preceding section, and in § 585, all recognize this.

[2] Howell *v.* Harvey and Doupe *v.* Stewart, *supra.*

into (*a*) dissolution by operation of law, as death, lunacy, war, bankruptcy or declared insolvency, sale on execution of the share of a partner; (*b*) dissolution as a necessary consequence of the act of one or all of the partners, as sale of the entire interest of one partner, marriage of a *feme sole* partner, abandonment by all.

II. Events or acts which are grounds of dissolution: (*a*) those for which an injured or innocent partner may elect to consider the firm dissolved, as, for example, the absconding of a partner or abandonment by him; (*b*) those for which a dissolution may be decreed by a court of equity on the application of a partner, as fraud and misconduct; impracticability of continuing from impossibility of succeeding, and from impossibility of getting along together peaceably.

§ **580. By death.**— The death of a partner *per se* dissolves the firm at once and for all purposes. The reason of this arises out of the *delectus personarum*, for the surviving partners are not to be bound by the acts of agents not of their own choosing, as the representatives of the deceased partner would be. This being the reason of the principle, it follows that whether the partnership was for a fixed and agreed duration makes no difference. Although by agreement the death may not interrupt the firm, the simple provision for a fixed period is never deemed to be such an agreement. That the dissolution is a hardship on a surviving partner, who may lose heavily by the interruption, can make no difference, for the authority of the administrator is inadequate to continue the relation and hazard the assets of the estate in a continuance of the enterprise.[1]

[1] Chapman *v.* Beckinton, 3 Q. B. 703, 718; Burwell *v.* Cawood, 2 How. 560; Scholefield *v.* Eichelberger, 7 Pet. 586; Sims *v.* McEwen, 27 Ala. 184; Pitkin *v.* Pitkin, 7 Conn. 307 (18 Am. Dec. 111); Cobble *v.* Tomlinson, 50 Ind. 550; Goodburn *v.* Stevens, 5 Gill, 1; Washburn *v.* Goodman, 17 Pick. 519; Marlett *v.* Jackman, 3 Allen, 287, 291; Roberts *v.* Kelsey, 38 Mich. 602; Hoard *v.* Clum, 31 Minn. 186; Egbert *v.* Wood, 3 Paige, 517, 522-3; McNaughton *v.* Moore, 1 Hayw. (N. Ca.) 189; Smith's Estate, 11 Phila. 131; Jones *v.* McMichael, 12 Rich. (S. Ca.) L. 176; Alexander *v.* Lewis, 47 Tex. 481; Fulton *v.* Thompson, 18 id. 278, 286; Vilas *v.* Farwell, 9 Wis. 460; Frank *v.* Beswick, 44 Up. Can. Q. B. 1. In Egbert

Where the *delectus personarum* does not exist, as in mining partnerships, the reason of the rule and with it the rule fails, and death does not dissolve.[1]

Nor where the contrary is agreed, as where the character of the partnership shows that it was intended to continue, notwithstanding a change of membership, as in the case of unincorporated joint stock companies with transferable shares, for here there is *a fortiori* no *delectus personarum*.[2]

In Duffield *v.* Brainerd, 45 Conn. 424, where, on the death of a partner, his distributees and surviving partners joined in requesting the managing partner to continue the business. The business was continued, and they received their dividends for several years, and then filed a bill for an accounting from the date of death, and it was held that the partnership must be deemed to have continued and not to have been dissolved by the death, and the distributees of the deceased could not throw possible losses upon the active partner, as having exposed their property to the hazards of business. Yet I submit the same result would follow had the court regarded the continuance as a new firm.

In Butler *v.* American Toy Co. 46 Conn. 136, 145, where two firms, S. & Co. and B. & Co., had formed a third firm as The American Toy Co., and one of the partners of S. & Co. having died, the widow and children and surviving partners continued the business, and acted as a member of the Toy Co., and became incorporated in order that the corporation might be a member of the Toy Co., and the court regarded the firm of S. & Co. as not dissolved by death.

§ 581. Insanity.—The insanity of a partner does not *per se* work a dissolution, though in case of an active partner at least, who is thus incapacitated, it is ground for dissolution by decree.[3] But

v. Wood, 3 Paige, 517, 522–3, articles between A. and the firm of B. & C. provided that the partnership should continue until dissolved by mutual consent of all the partners, and that the share of a partner at death should be paid to his representatives shows no intention to continue the business after the death of C. Nor does the expression, if either happen to die previous to dissolution. Death is previous to dissolution.

[1] Jones *v.* Clark, 42 Cal. 180.

[2] Machinists' Nat'l Bk. *v.* Dean, 124 Mass. 81; Walker *v.* Wait, 50 Vt. 668; McNeish *v.* Hulless Oat Co. 57 id. 316; Tenney *v.* New England Protective Union, 37 id. 64.

[3] Sayer *v.* Bennett, 1 Cox, 107; Pearce *v.* Chamberlain, 2 Ves. Sr. 33; Wrexham *v.* Huddleston, 1 Swanst. 504, n.; Kirby *v.* Carr, 3 You. & Coll. Ex. 184; Leaf *v.* Coles, 1 DeG. M. & G. 171; Sadler *v.* Lee, 6 Beav. 324; Row-

the other partners cannot themselves terminate the partnership by their own act. They can only apply for a decree.[1]

But if the insanity is temporary, it seems a dissolution will not be decreed.[2] A mere diminution of capacity to attend to business is not sufficient;[3] and the court will refer this to a master to determine,[4] unless he has been found such by inquisition.[5] But the dissolution, if the partnership is for a term, will not retroact, and as the lunatic continued liable for the debts the dissolution will date from the decree;[6] hence the lunatic can share subsequently acquired profits,[7] and is liable for the subsequent misconduct of the other partners.[8] But if the partnership is at will, it is dissolved from the date given in the notice;[9] and so if dissolvable on notice.[10]

§ 582. War.—A declaration of war *per se* and at once dissolves a partnership between residents of the antagonist states. The reason is that the interdiction of commercial intercourse which is implied in the proclamation of hostilities renders the duties of the citizen and of the partner incompatible, extinguishes the business and prostrates the

lands *v.* Evans, 30 id. 202; Jones *v.* Lloyd, L. R. 18 Eq. 265; Jones *v.* Noy, 2 Myl. & K. 125; Helmore *v.* Smith, 35 Ch. D. 436; Raymond *v.* Vaughan, 17 Ill. App. 144; Reynolds *v.* Austin, 4 Del. Ch. 24. *Contra*, that an inquisition finding a partner to be a lunatic is *ipso facto* a dissolution, Isler *v.* Baker, 6 Humph. (Tenn.) 85; and *dicta* in Griswold *v.* Waddington, 15 Johns. 57, 72; Davis *v.* Lane, 10 N. H. 161; The Cape Sable Company's Case, 3 Bland (Md. Ch.), 606, 674. And such is perhaps the opinion of Story, Partnership, § 296, ex. *contra* of an adjudication where the insanity was only temporary and the copartner did not claim a dissolution. Raymond *v.* Vaughan, 17 Ill. App. 144.

[1] Waters *v.* Taylor, 2 V. & B. 299.

[2] Kirby *v.* Carr, 3 Younge & C. Ex. 184; Z. *v.* X. 2 K. & J. 441; Whitwell *v.* Arthur, 35 Beav. 140; Sayer *v.* Bennett, 1 Cox, 107.

[3] Sadler *v.* Lee, 6 Beav. 324.

[4] Sayer *v.* Bennett, 1 Cox, 107; Z. *v.* X. 2 Kay & J. 441; Kirby *v.* Carr, 3 Younge & C. Ex. 184.

[5] Milne *v.* Bartlett, 3 Jur. 358; Griswold *v.* Waddington, 15 Johns. 57, 72.

[6] Besch *v.* Frolich, 1 Phil. 172; 7 Jur. 73.

[7] Sadler *v.* Lee, *supra;* Raymond *v.* Vaughan, *supra;* Besch *v.* Frolich, *supra;* Jones *v.* Noy, 2 M. & K. 125; Sander *v.* Sander, 2 Coll. 276.

[8] Sadler *v.* Lee, *supra.*

[9] Mellersh *v.* Keen, 27 Beav. 236.

[10] Robertson *v.* Lockie, 15 Sim. 285; 10 Jur. 533.

prosecution of all continuous and unremitting enterprises implying intercommunication. (I insert this qualification lest the language be too broad; a contract of life insurance would continue valid no doubt, war notwithstanding.)[1]

Another reason may be urged more intimately connected with partnerships alone, namely, that the opportunity which each partner may have to watch the conduct of and prevent ill-advised contracts by a copartner, and the power to apply for a dissolution for cause being withdrawn, he would be defenseless if the partnership continued, and contracts with others and remedies *inter se* are incapable of enforcement.

These being the reasons, it follows that whether the hostilities be international or civil and sectional, if the partners reside on opposite sides of the lines of military occupation, makes no difference; or whether the partnership be between alien enemies or between citizens or neutrals, if they reside in hostile territories; and also that if the commercial or a limited degree of intercourse be permitted by the sovereign's proclamation, or the license of the commander, or only certain ports be interdicted, dissolution within these limits would not follow. The illegality of the partnership results, although the tendency of its continuance is not to assist or strengthen residents in the hostile territory, but to withdraw funds therefrom.[2] And though the partnership was not in commerce between the countries, but in the internal and neutral business in each.[3]

The duty to account to each other and to pay over a balance of profits earned before the war is not terminated.[4]

[1] Esposito *v.* Bowden, 7 El. & Bl. 763; Griswold *v.* Waddington, 15 Johns. 57; s. c. 16 id. 438; Seaman *v.* Waddington, 16 id. 510; Buchanan *v.* Curry, 19 id. 137; 10 Am. Dec. 200; Woods *v.* Wilder, 43 N. Y. 164; 3 Am. Rep. 684; Bank of New Orleans *v.* Matthews, 49 N. Y. 12, and on the same partnership, McStea *v.* Matthews, 50 id. 166; 91 U. S. 7; McAdams *v.* Hawes, 9 Bush, 15; Allen *v.* Russell (Louisville Ch. Ct. 1863), 3 Am. Law Reg. (N. S.) 361; Mut. Ben. L. Ins. Co. *v.* Hillyard, 37 N. J. L. 444, 463–4; Taylor *v.* Hutchison, 25 Gratt. 536; 18 Am. Rep. 699; Booker *v.* Kirkpatrick, 26 id. 145; Matthews *v.* McStea, 91 U. S. 7; s. c. 50 N. Y. 166; Hanger *v.* Abbott, 6 Wall. 532, 535. See, also, The William Bagaley, 5 Wall. 377; Prize Cases, 2 Black, 635; Douglas *v.* United States, 14 Ct. of Claims, 1.

[2] Per Rapallo, J., Woods *v.* Wilder, 43 N. Y. 164, 169; 3 Am. Rep. 684.

[3] Griswold *v.* Waddington, *supra.* And see argument in Bank of New Orleans *v.* Matthews, *supra.*

[4] Douglas *v.* United States, 14 Ct. of Claims, 1.

§ 583. Bankruptcy or insolvency of a partner.—The bankruptcy of a partner operates to dissolve the firm for much the same reason that death does; for the bankrupt's acts are void, and his assignees cannot carry on a trade, and the *delectus personarum* makes a dissolution essential in favor of the solvent partners.[1] And the same consequence follows for the same reason if one partner makes an assignment of his property for the benefit of his creditors; that the partnership is for a fixed term makes no difference, for otherwise a partner could lock up his capital for life.[2]

The mere insolvency of a member does not *per se*, where he has not assigned, dissolve the firm.[3]

Nor, of course, does mere insolvency of the firm operate as a dissolution or deprive them of their right to transact business, buy and sell, etc.,[4] but may be ground for a decree.[5]

Nor will bankruptcy of a partner dissolve if the adjudication was obtained by his copartner for that purpose and was not required for any other.[6] Nor where an execution and sale of one partner's interest was obtained by collusion between such partner and the purchaser to force a dissolution.[7]

Bankruptcy or declared insolvency, like death, only works a dissolution to the extent of stopping new engagements. Profits on unfinished contracts belong to the bankrupt's estate; in other words, his share is not to be settled as of its value at the date of

[1] Fox *v.* Hanbury, Cowp. 445, 448; Wilson *v.* Greenwood, 1 Swanst. 471; Morgan *v.* Marquis, 9 Ex. 145; Hague *v.* Rolleston, 4 Burr. 2174; Wilkins *v.* Davis, 15 Bankr. Reg. 60; McNutt *v.* King, 59 Ala. 597; Talcott *v.* Dudley, 5 Ill. 427; Marquand *v.* N. Y. Mfg. Co. 17 Johns. 525, 535; Halsey *v.* Norton, 45 Miss. 703 (7 Am. Rep. 745); Norcross, Matter of, 1 N. Y. Leg. Obs. 100; Blackwell *v.* Claywell, 75 N. Ca. 213.

[2] Ogden *v.* Arnot, 29 Hun, 146; Moody *v.* Rathburn, 7 Minn. 89, 98; Arnold *v.* Brown, 24 Pick. 89, 94 (35 Am. Dec. 296); Dearborn *v.* Keith, 5 Cush. 224; Conrad *v.* Buck, 21 W. Va. 396, 407; Hubbard *v.* Guild, 1 Duer, 662. And see Marquand *v.* N. Y. Mfg. Co. 17 Johns. 525; Saloy *v.* Albrecht, 17 La. Ann. 75.

[3] Arnold *v.* Brown, 24 Pick. 89 (35 Am. Dec. 296); Mechanics' Bank *v.* Hildreth, 9 Cush. 356.

[4] Siegel *v.* Chidsey, 28 Pa. St. 279.

[5] § 593.

[6] Per CLIFFORD, J., in Amsinck *v.* Bean, 22 Wall. 395.

[7] Renton *v.* Chaplain, 9 N. J. Eq. 62.

the bankruptcy, except under peculiar circumstances, but of the value after performance of the contracts.[1]

The solvent partner has generally the exclusive right of control and possession to wind up without interference.[2]

An assignment for benefit of creditors by the partnership or all the partners effects a dissolution.[3]

§ 584. Execution.— A levy of execution against one partner on his interest in the firm, and sale of such interest, dissolves the firm,[4] unless the levy and sale were collusive to force a dissolution and deprive the copartner of valuable rights;[5] but a mere attachment on mesne process does not dissolve the firm;[6] yet, if insolvency may result, the other partner may apply for dissolution and receiver.[7]

A levy of attachment or execution on the partnership property on a judgment against the firm is not a dissolution,[8] but it is a dis-

[1] King *v.* Leighton, 100 N. Y. 386 (rev. 22 Hun, 419).

[2] §§ 752-756.

[3] Pearpoint *v.* Graham, 4 Wash. C. C. 232; Allen *v.* Woonsocket Co. 11 R. I. 288; Simmons *v.* Curtis, 41 Me. 373; Wells *v.* Ellis, 68 Cal. 243; Gordon *v.* Freeman, 11 Ill. 14; Havens *v.* Hussey, 5 Paige, 30; Wells *v.* March, 30 N. Y. 344, 350; Brown *v.* Agnew, 6 W. & S. 238; Moddewell *v.* Keever, 8 id. 63, 65; McKelvy's Appeal, 72 Pa. St. 409; Dana *v.* Lull, 17 Vt. 391, 393; Cameron *v.* Stevenson, 12 Up. Can. C. P. 389; Pleasants *v.* Meng, 1 Dall. 380, 390, in this case it was said to be evidence of a dissolution and not a dissolution, and that opening subsequent transactions by the partners showed this. Deckard *v.* Case, 5 Watts, 22, 24 (30 Am. Dec. 287), also doubts if a voluntary transfer of all the assets of the firm is a dissolution, on the ground that its ability may be thereby increased; S. P. Anderson *v.* Tompkins, 1 Brock. 456, 461. But that a void or abortive assignment, being an unexecuted attempt to assign, was not a dissolution, and hence a subsequent note by one in the firm name bound all, was held in Simmons *v.* Curtis, *supra*. Where part of the property assigned is exempt from execution, as tools, etc., its delivery by the assignee to the assignors does not revive the partnership in it, Wells *v.* Ellis, 68 Cal. 243.

[4] Aspinall *v.* London & N. W. R'y Co. 11 Hare, 325; Habershon *v.* Blurton, 1 DeG. & Sm. 121; Skipp *v.* Harwood, 2 Swanst. 586, 587; Renton *v.* Chaplain, 9 N. J. Eq. 62; Carter *v.* Roland, 53 Tex. 540. And so held of a levy of execution before sale, Sanders *v.* Young, 31 Miss. 111. *Contra*, of mere levy, Choppin *v.* Wilson, 27 La. Ann. 444.

[5] Renton *v.* Chaplain, *supra*.

[6] Arnold *v.* Brown, 24 Pick. 89.

[7] Crooker *v.* Crooker, 46 Me. 250 (9 Am. Law Reg. (O. S.) 539).

[8] Foster *v.* Hall, 4 Humph. 346, 352. *Contra*, if all or a greater part

solution as to the property sold under the levy.[1] That a levy and sale is not necessarily a dissolution, though no business was done afterwards if suits to collect debts were brought by the partners, for this rebuts the idea of dissolution.[2]

In Helmore *v.* Smith, 35 Ch. D. 436, during a temporary insanity of one partner his copartner bought his interest at an execution sale, giving a check on the firm's bank deposit, and on this account the sale was set aside, and it was held that it was not a dissolution.

§ 585. Alienation of interest by a partner.— If the interest of one partner is conveyed to a third person, either voluntarily by him, or by coercive process as on execution, this *ipso facto* dissolves a partnership at will, and perhaps any partnership; at all events, if the firm is for a fixed unexpired term, the other partners can treat the act as a dissolution, or as a ground for it, and if the alienation is by sale on execution it is a dissolution; but this cannot be affirmed of a voluntary transfer with any certainty except where the power to dissolve a partnership for a term in violation of the contract be also conceded.[3]

of the property is seized it is a dissolution, Hershfield *v.* Claflin, 25 Kan. 166 (37 Am. Rep. 237).

[1] Nixon *v.* Nash, 12 Oh. St. 647, 650; Hershfield *v.* Claflin, 25 Kan. 166 (37 Am. Rep. 237).

[2] Barber *v.* Barnes, 52 Cal. 650.

[3] Heath *v.* Sansom, 4 B. & Ad. 172, a partnership at will or for an indefinite term, which is presumed to be at will; Bank *v.* Railroad Co. 11 Wall. 624, a voluntary transfer; Monroe *v.* Hamilton, 60 Ala. 226, 231, a voluntary transfer, held a dissolution at the election of either party; Miller *v.* Brigham, 50 Cal. 615, giving the assignee a right to an account, but this may be a partnership at will; Reece *v.* Hoyt, 4 Ind. 169, giving the buyer a right to an accounting; Barkley *v.* Tapp, 87 Ind. 25, here the buyer was taken in as partner, the seller claimed his lien continued, but the sale was held to be a dissolution and the lien lost; Blaker *v.* Sands, 29 Kan. 551, but this was a partnership at will; Wiggin *v.* Goodwin, 63 Me. 389, 391, a sale by one partner to the other; Receivers of Mechanics' Bank *v.* Godwin, 5 N. J. Eq. 334, 338, that a sale is a dissolution at the election of either party; Marquand *v.* N. Y. Manuf. Co. 17 Johns. 525, that a sale is a dissolution, though the other partners object; Buford *v.* Neely, 2 Dev. Eq. (N. Ca.) 481, 484, that a sale is a dissolution at the election of either party; Cochran *v.* Perry, 8 W. & S. 262, and Horton's Appeal, 13 Pa. St. 67, 71, that it is a dissolution at the option of either party; Carroll *v.* Evans, 27 Tex. 262, a sale by one partner to the other; held a dissolution, though neither knew or intended it to be so; Ayer *v.* Ayer, 41 Vt. 346,

In Bank *v.* Railroad Co. 11 Wall. 624, a partnership was formed for twenty-five years, and after a few years only one partner assigned his entire interest to a third person. Strong, J., said, "the effect of Graham's assignment was undoubtedly to dissolve the partnership," and give the assignee a right to enforce a settlement. The bill was, however, dismissed on other grounds.

In Carroll *v.* Evans, 27 Tex. 262, A. gave B. a receipt for live stock to be kept by A. in partnership with B. to raise and sell. B. assigned the receipt to C., to enable him to get from A. all B.'s interest in proceeds of the cattle in order to pay B.'s debt to C., and this assignment was held to effect a dissolution, though not so intended or understood.

So where a partner sells all his interest in the property, as a patent, in working which the partnership consists, it is a dissolution.[1]

In Cody *v.* Cody, 31 Ga. 619, where R., of C., R. & Co., sold to H. all his interest in the stock of goods of C., R. & Co., but not in the accounts, notes and other assets, and formed a firm of C., A. & Co., and C., R. & Co. never afterwards sold goods, this was held not *per se* to show a dissolution, and C., R. & Co. might still be liable on a note subsequently given to pay a debt.

If the sale was by collusion to force a dissolution, it will not have that effect if it deprives the copartner of valuable rights.[2]

If the partnership is for a fixed term, a gratuitous assignment of his interest by one partner will not be a dissolution, but will be ground for it unless it was an assignment to secure his creditors.[3]

The remaining partner is entitled to the sole possession in order to wind up, the purchaser's right being merely to receive the share of the seller after settlement.[4] But if he abuse his trust a receiver and injunction will be granted.[5]

one partner sold out and absconded; held a dissolution *ipso facto;* Ballard *v.* Callison, 4 W. Va. 326, a sale is a dissolution, and the assignee can compel an accounting and enjoin an abuse of assets. See Fox *v.* Rose, 10 Up. Can. Q. B. 16. *Contra*, Ferrero *v.* Buhlmeyer, 34 How. Pr. 33, that no voluntary act of a partner can break a contract.

[1] Parkhurst *v.* Kinsman, 1 Blatchf. 488.

[2] Renton *v.* Chaplain, 9 N. J. Eq. 62; Ferrero *v.* Buhlmeyer, 34 How. Pr. 33.

[3] Ferrero *v.* Buhlmeyer, 34 How. Pr. 33; and see Renton *v.* Chaplain, 9 N. J. Eq. 62.

[4] See § 756.

[5] Ballard *v.* Callison, 4 W. Va. 326; Renton *v.* Chaplain, 9 N. J. Eq. 62.

The rule is otherwise where there is no *delectus personarum;* thus a sale of all interest in a mining partnership does not dissolve it.[1]

A sale of his interest by one partner to another, though possibly not a dissolution *ipso facto*, but only evidence tending to show a dissolution, yet if the retirement of the seller is contemplated, or if the necessary effect of the sale is to require a settlement of the concern to determine the value of the interest sold, so that the inference of intended withdrawal follows, the evidence of a dissolution is conclusive.[2] The reason for distinguishing the act as evidence of a dissolution rather than a dissolution is that the seller may still retain his interest in the profits, or he may be allowed by his copartners to withdraw his capital and substitute his skill alone, and, therefore, a mere sale may not be a dissolution if there is no retirement.[3]

In McAdams *v.* Hawes, 9 Bush, 15, it was held that a lease by one partner to another partner for two years of the former's interest in the coal mines, constituting the business of the firm, was a dissolution, or, if the other partners assented, was a suspension, because a continuance was incompatible with the rights and responsibilities of the lessor as a partner.[4]

§ 586. **Sale of part of an interest.**— But if the partner parts with less than all his share and still retains an interest the partnership is not dissolved, provided, of course, no stranger is introduced thereby into the firm. Hence, a transfer by a partner to a copartner or a stranger of his in-

[1] Kahn *v.* Central Smelting Co. 102 U. S. 641; Skillman *v.* Lachman, 23 Cal. 199; Duryea *v.* Burt, 28 id. 569; Settembre *v.* Putnam, 30 id. 490; Taylor *v.* Castle, 42 id. 367.

[2] Waller *v.* Davis, 59 Iowa, 103; Monroe *v.* Hamilton, 60 Ala. 226, 232; Moody *v.* Rathburn, 7 Minn. 89; Spaunhorst *v.* Link, 46 Mo. 197; Taft *v.* Buffum, 14 Pick. 322; Lesure *v.* Norris, 11 Cush. 328, 329. That it is a dissolution, see Heath *v.* Sansom, 4 B. & Ad. 172; Horton's Appeal, 13 Pa. St. 67; Clark *v.* Wilson, 19 id. 414; Power *v.* Kirk, 1 Pitts. 510. See Armstrong *v.* Fahnestock, 19 Md. 59.

[3] Taft *v.* Buffum, 14 Pick. 322, 324–5; Russell *v.* Leland, 12 Allen, 349; Buford *v.* Neely, 2 Dev. (N. Ca.) Eq. 481.

[4] See, also, Moody *v.* Rathburn, 7 Minn. 89.

terest as security for a debt, contemplating his continuance in the firm, or a mortgage by the partner of his interest, does not effect a dissolution.[1] Hence, also, a partial assignment by a partner's admitting one to an interest in his share as sub-partner does not dissolve.[2]

§ 587. Sale of entire effects.— Where the entire property, the management, operation or sale of which constituted the only subject of partnership, or its sole business, is sold, the relation of partners is necessarily dissolved thereby.[3] So if the partnership consist in the operation of a single specific thing, its destruction dissolves the partnership.[4]

In Simmons *v.* Curtis, 41 Me. 373, 378, it was asked by the court, *arguendo*, whether, in case of sale of the entire effects, if the partners discovered fraud on the part of the buyer, they could not as partners procure a rescission and restoration, and in such case would continue as the original firm, and not as a new one.

A mortgage of the entire concern by the managing partner of a partnership at will, putting the mortgagee into actual possession, was said to be a dissolution.[5]

§ 588. Marriage.— Marriage of a *feme sole* partner dissolves the partnership. This has been placed upon the ground of alienation of the interest of the *feme sole* partner.[6] On this ground, if, by statute, a married woman retains

[1] Bentley *v.* Bates, 4 Younge & C. 182, 190; Monroe *v.* Hamilton, 60 Ala. 226; Du Pont *v.* McLaran, 61 Mo. 502; State *v.* Quick, 10 Iowa, 451; Receivers of Mechanics' Bank *v.* Godwin, 5 N. J. Eq. 334; Moore *v.* Knott, 12 Oregon, 260, 266; Bank *v.* Fowle, 4 Jones (N. Ca.), Eq. 8. But if the assignee can and does insist on a right to have the business closed and his share paid over, this effects a dissolution. Bank *v.* Fowle, *supra*.

[2] Burnett *v.* Snyder, 76 N. Y. 344 (11 Jones & Sp. 238).

[3] Thompson *v.* Bowman, 6 Wall. 316; Wilson *v.* Davis, 1 Montana, 183; Whitton *v.* Smith, 1 Freem. (Miss.) Ch. 231; Blaker *v.* Sands, 29 Kan. 551; Wells *v.* Ellis, 68 Cal. 243. It was doubted whether an assignment of the entire effects is necessarily a dissolution, because it may be for the benefit of the firm and increase its ability, in Deckard *v.* Case, 5 Watts, 22 (30 Am. Dec. 287). And where one partner had absconded, a sale of the entire effects by the other was said not *per se* to dissolve the firm. Arnold *v.* Brown, 24 Pick. 89 (35 Am. Dec. 296).

[4] Theriot *v.* Michel, 28 La. Ann. 107.

[5] Smith *v.* Vandenburg, 46 Ill. 34, 42.

[6] Pollock, Dig. of Part. art. 48.

all her property as her separate estate, the partnership would not be terminated, for a new proprietor is not introduced, by her marriage, to her property. The incapacities of infancy and lunacy do not render a partnership void;[1] but where the incapacity is total, and the contract void and not voidable merely, as in the case of a married woman, the partnership, it seems, is ended by the incapacity, which, therefore, is a dissolution *ipso facto*, and not merely a ground for it. But in so far as modern statutes have reduced or removed the incapacity, its consequences upon the partnership contract must necessarily be modified; though it would seem that if the other partners thus lose the benefit of an active partner in this way, it must always be a ground for dissolution at their option.

The marriage of a *feme sole* partner was said to dissolve the partnership so that the *feme* was not liable upon a note subsequently given in the firm name.[2]

A partnership between a man and a woman is instantly dissolved by their intermarriage, and he therefore does not hold her interest as surviving partner if she dies afterwards, for its use by the firm was by mere license which ceases at death.[3]

Suppose the firm was for an agreed term, and a female partner married a person other than one of the partners and thus dissolved the firm. The question would arise whether she was liable in damages. Though the marriage is not a breach of the contract, it is the necessary and proximate cause of the destruction of the partnership. But suppose the articles contained a stipulation against marrying before the expiration of the term. If this stipulation is against public policy, so that a direct breach of it could not be ground for damages, the same act would not be a cause of action by implication. By regarding marriage as analogous to death, an act of nature, of which all must take notice, not only would no action lie, but the much more important question would be solved, namely, that no notice of dissolution is necessary.

[1] § 135 *et seq.*

[2] Brown *v.* Chancellor, 61 Tex. 437, 445.

[3] Bassett *v.* Shepardson, 52 Mich. 3.

§ 589. Abandonment.— An abandonment of the enterprise is evidence of dissolution more or less strong according to the circumstances of each case.

Thus, where all the partners abandon the business and close up the concern, it is sufficient proof of a dissolution though there was no formal agreement shown.[1]

Converting the concern into a corporation is a species of dissolution of this kind.[2] But the mere fact of such incorporation is strong evidence of a dissolution,[3] rather than absolute proof of it; and if not a dissolution, a subsequent sale of his shares in the corporation by one partner would not necessarily dissolve the firm.[4]

The absconding of or abandonment by a partner does not *per se* dissolve the partnership so as to deprive the copartner of his right of control by making the partners tenants in common.[5] Yet refusal of a partner to perform his share of the agreed work may be ground for the copartner to elect to consider the partnership as abandoned.[6]

But mere neglect is not an abandonment, even in a partnership for a single transaction, provided there is no positive refusal to act.[7]

Nor will a temporary absence of a week or two justify an exclusion of such partner by the other.[8]

In such case, if the other partner conducts the enterprise to success, the deserter is not entitled to claim a share

[1] Spurck *v.* Leonard, 9 Ill. App. 174; Ligare *v.* Peacock, 109 Ill. 94. See Barber *v.* Barnes, 52 Cal. 650; Harris *v.* Hillegass, 54 Cal. 463, 470.

[2] See § 8.

[3] Goddard *v.* Pratt, 16 Pick. 412, 431; Shorb *v.* Beaudry, 56 Cal. 446.

[4] Goddard *v.* Pratt, 16 Pick. 433. In this case the partners continued business in their firm name, pursuant to a by-law of the corporation.

[5] Arnold *v.* Brown, 24 Pick. 89; 35 Am. Dec. 296 (disapproving Whitman *v.* Leonard, 3 Pick. 177). See Hamill *v.* Hamill, 27 Md. 679, and Ayer *v.* Ayer, 41 Vt. 346.

[6] Denver *v.* Roane, 99 U. S. 355; Beaver *v.* Lewis, 14 Ark. 138; Ligare *v.* Peacock, 109 Ill. 94; Smith *v.* Vanderburg, 46 Ill. 34, 41; Bryant *v.* Proctor, 14 B. Mon. 362; Rhea *v.* Vannoy, 1 Jones, Eq. (N. Ca.) 282; Durbin *v.* Barber, 14 Oh. 311.

[7] Henry *v.* Bassett, 75 Mo. 89, 93, of two attorneys undertaking the defense of a case.

[8] Ambler *v.* Whipple, 20 Wall. 546, 556.

thereof where neither his efforts nor capital have contributed.[1]

And if the labor or capital of the delinquent member has contributed to the final result, an absence or a delay, or refusal to contribute further, will not be deemed to create a presumption of abandonment;[2] nor entitle the others to exclude him and advertise a dissolution and continue the business for their own benefit.[3]

On the other hand, even when it is a dissolution, the copartners have a right of recourse upon the delinquent for subsequent profits made by him with their capital in the enterprise in which they had jointly engaged.

Thus, in Eagle *v.* Bucher, 6 Oh. St. 295, an association sent eight of its members to California to mine for gold, furnishing them with an outfit; they to work for two and a half years and return, giving to the association half the net accumulations. The eight members, on reaching California, divided up the outfit and determined to work each on his own account and did so. This was held to be a relinquishment of a right of recovery on each other, but as to the association whom they had not notified, is an act of bad faith and dishonesty, and the association can compel them to account for their earnings or sue each for breach of contract.

§ 590. The right of absenting himself may be reserved to one partner by the articles, and in such case the act cannot be treated as an abandonment by the copartner if within the reserved right.

In McFerran *v.* Filbert, 102 Pa. St. 73, F., a physician with an established and lucrative practice, sold an interest to M., a stranger, for $1,000 cash and a note of $500, and F. & M. becoming partners for five years, with a clause in the articles that F. should be

[1] Denver *v.* Roane, 99 U. S. 355; Bryant *v.* Proctor, 14 B. Mon. 362; Rhea *v.* Tathem, 1 Jones, Eq. (N. Ca.) 290.

[2] Waring *v.* Crow, 11 Cal. 366; Burn *v.* Strong, 14 Grant's Ch. (Up. Can.) 651.

[3] Hartman *v.* Woehr, 18 N. J. Eq. 388. In Beaver *v.* Lewis, 14 Ark. 138, the copartner elected to consider the partnership as terminated, but the delinquent was granted an account for such work and labor as he had done. For deduction as damages for neglect or breach of duty in an accounting, see § 780.

at liberty to carry on any other business and to absent himself as he should see fit. At the end of two years F. notified his partner that he should give up medicine and went away for the rest of the term. *Held*, he can recover on the note. The articles are perfectly unambiguous and he had a right to do as he did. He had no right to abandon the partnership and did not do it, but he merely abandoned the practice of medicine, which he had reserved a right to do.

In Frothingham *v.* Seymour, 121 Mass. 409, a partnership between physicans was on the terms that one might be absent six months in the year and the other when he pleased, neither receiving the income during his absence, and that if the first should withdraw altogether from the town, the other would pay him a certain sum. As soon as the articles were executed, the first absented himself, and thereupon the other wrote to him dissolving the partnership. Held, this did not prevent him from withdrawing from business altogether, and thereby becoming entitled to the sum agreed on.

§ 591. Misconduct.— Misconduct of a partner will be ground for decreeing a dissolution, on the application of any other than the guilty partner, if it is so grossly willful as to endanger the prosperity of the firm, or justly to destroy all mutual confidence, or if consisting of or accompanied by circumstances of fraud or bad faith,[1] but not for insignificant infractions; thus where the articles covenanted that a partner would not guaranty for any one, and a partner guarantied a small amount for the first time in eight years, dissolution was refused.[2]

Thus it is ground for dissolution that the managing partner made false entries in the books and defrauded the copartner of part of the receipts;[3] or lending money of the firm to a third person, though paid back, was assigned as a cause, but the dissolution was decreed on other grounds;[4] or where a partner turned over property of the firm to others at prices far below the market rates, and signed checks without authority, applying the proceeds to his own use, it was held that a request to charge that the copartner had a

[1] Cheesman *v.* Price, 35 Beav. 142, failing to account for collected money; Kennedy *v.* Kennedy, 3 Dana, 239.

[2] Anderson *v.* Anderson, 25 Beav. 190.

[3] Cottle *v.* Leitch, 85 Cal. 434.

[4] Dumont *v.* Ruepprecht, 38 Ala. 175.

right to dissolve, and that he was not liable in damages for so doing, should have been granted without qualification.[1] The refusal to account for assets, with violation of contract and abuse of trust, entitles the copartner to dissolution;[2] and collecting and converting to own use a large sum of money, and endeavoring to conceal the amount;[3] or refusing to give the complainant any part of the rents, issues or profits of the partnership property;[4] but otherwise of refusal to give complainant a sum due him, due to a mistake as to the amount;[5] or excluding a member from participation,[6] even if he is negligent and dissipated,[7] or has failed to put in half his agreed capital.[8]

Failure to keep books as required by the articles, and refusal to furnish the copartner with accounts on which actions were threatened, is ground for decreeing dissolution and receiver.[9]

Refusal to put in his agreed capital, or to manufacture as agreed, or to keep accounts open to the complainant's inspection, or to account and divide profits at reasonable times, is ground.[10] So is failure to put in a large part of his agreed capital.[11]

False entries and fraud in a former partnership between two is not ground for asking dissolution of a subsequent partnership consisting of these two and several others, on discovery of such fraud, for the others might not desire to dissolve.[12]

In Sutro *v.* Wagner, 23 N. J. Eq. 388; 24 id. 589, the defendant had voluntarily transferred his individual property, and this with other circumstances showing an intention to break up the firm and leave the complainant to pay the losses, together with very unfriendly relations between the parties, was held ground for dissolution, injunction and receiver.

In Newton *v.* Doran, 1 Grant's Ch. (Up. Can.) 590, where by the articles a majority could appoint and control a manager of the busi-

[1] Reiter *v.* Morton, 96 Pa. St. 229.

[2] Holladay *v.* Elliott, 3 Oregon, 340.

[3] Flammer *v.* Green, 47 N. Y. Superior Ct. 538.

[4] Werner *v.* Leisen, 31 Wis. 169.

[5] Cash *v.* Earnshaw, 66 Ill. 402.

[6] Bury *v.* Allen, 1 Coll. 589; Wilson *v.* Greenwood, 1 Swanst. 471; Smith *v.* Fagan, 17 Cal. 178; Gorman *v.* Russell, 14 Cal. 531; Kennedy *v.* Kennedy, 3 Dana, 239.

[7] See Ambler *v.* Whipple, 20 Wall, 546.

[8] Hartman *v.* Woehr, 18 N. J. Eq. 383.

[9] Gowan *v.* Jeffries, 2 Ashmead, 296.

[10] Wood *v.* Beath, 23 Wis. 254.

[11] Hartman *v.* Woehr, 18 N. J. Eq. 383.

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

ness, and they appointed one and subsequently dismissed him, the act of one partner in having such partner remain in the management was held to be an exclusion of the rest, and to be such mismanagement as to entitle them to a receiver.

Assuming a right to sell the mill in which the firm carried on its business, after he had already sold it to his copartner, and confessing judgment under which it was attempted to sell the mill, justifies holding that there is a dissolution.[1]

In Seighortner *v.* Weissenborn,[2] an unnecessary purchase by a partner, knowing that the firm had had heavy losses and that the partner who had made all the advances was anxious and uneasy about its success, together with a removal of goods secretly by night, was held ground of dissolution.

In Maher *v.* Bull, 44 Ill. 97, B. of Buffalo, and M. & K. of Chicago, formed a partnership to deal in coal; B. to send the coal, and M. & K. to sell it and pay the proceeds weekly to B. to the amount of the cost. M. & K.'s failure to pay over as agreed was held ground for sustaining a bill for dissolution, and that they could not claim damages for B.'s refusal to continue to ship after their breach, nor for a share of damages found against the firm on account of M. & K.'s failure to fulfill contracts, for that would be taking advantage of their own wrong.

In Abbot *v.* Johnson, 32 N. H. 9, an alteration of the articles in a material point, which was here engaging in trade in spirituous liquors, stipulated against in the articles, was held sufficient to warrant a partner in withdrawing.

§ 592. Same.—But a partnership will not be dissolved for minor misconduct and grievances which can be stopped by injunction. There must be a clear and strong case of positive and meditated abuse.[3] And though there be bad character, dishonesty and drunkenness which might be sufficient to obtain relief in a suit for dissolution on terms that would protect both parties, this will not justify the other partner in excluding the delinquent and depriving him of the benefits of their joint labors and property.[4] Nor that one

[1] Wilson *v.* Davis, 1 Montana, 183.
[2] 20 N. J. Eq. 172 (reversed on other points in 21 id. 483).
[3] Howell *v.* Harvey, 5 Ark. 270, 279; 39 Am. Dec. 376; Cash *v.* Earnshaw, 66 Ill. 402.
[4] Ambler *v.* Whipple, 20 Wall. 546.

is an unattentive and unprofitable partner, or his absence from family afflictions, if there are no overt acts of misconduct or gross negligence, will not justify an oppressive and unreasonable dissolution.[1] Or sales and credits resulting in losses, if not so improvidently made as to be regarded as wilful.[2]

The misconduct may consist in misrepresentation as to one's skill and capacity made prior to and operating as an inducement to form the partnership.[3]

§ 593. Hopelessness of success.—If the partnership adventure or business is unprofitable and cannot be continued without involving the partners in losses, they are not obliged to remain partners, for the object of forming the relation was profit, and, if this is no longer possible, the fact that the agreed term of partnership has not expired will not prevent the court from granting the prayer of a bill for dissolution after ascertaining the existence of such cause.

Thus, in Jennings *v.* Baddeley, 3 K. & J. 78, and Van Ness *v.* Fisher, 5 Lans. 236, the whole capital had been sunk. And insolvency was said to be good ground for dissolution in Williamson *v.* Wilson, 1 Bland (Md. Ch.), 418. And so in Seighortner *v.* Weissenborn, 20 N. J. Eq. 172,[4] and a dissolution was decreed. In Van Ness *v.* Fisher, a partner was sued for damages by his copartners for refusal to continue after loss of the capital, and was held not liable.

In Jackson *v.* Deese, 35 Ga. 84, the partnership property was destroyed by fire, the teams carried away by an invading army, and the partners so impoverished that their remaining assets could not be rendered profitable, and a dissolution was therefore decreed.

In Holladay *v.* Elliott, 8 Oregon, 84, a partnership was formed to take a contract to construct a railroad, payable in bonds of the railroad corporation, but the incorporation being of doubtful validity and the bonds unsalable, and no money could be obtained to prosecute the work, a dissolution was decreed because the object of the firm had become impracticable.

[1] Howell *v.* Harvey, 5 Ark. 270, 280; 39 Am. Dec. 376.

[2] Cash *v.* Earnshaw, 66 Ill. 402.

[3] Fogg *v.* Johnson, 27 Ala. 432; 62 Am. Dec. 771.

[4] The reversal of this case in 21 id. 483, is on other points.

In Brown *v.* Hicks, 8 Fed. Rep. 155, a partnership in a whaling voyage not exceeding three years was formed, but the master became short-handed by desertion, and an unsuccessful cruise for six months and other difficulties made want of success reasonably certain, and a discontinuance by one partner was held to be justified.

In Brien *v.* Harriman, 1 Tenn. Ch. 467, a farming partnership, by the articles of which the contributions of each partner were expressly limited to an amount which turned out to be below what was absolutely necessary to success, and the partnership was dissolved for this, owing to the absolute impossibility of getting on under such provision.

In Baring *v.* Dix, 1 Cox, 213, a partnership to spin cotton under a certain patent which proved worthless was dissolved on the above ground.

In Moies *v.* O'Neill, 23 N. J. Eq. 207, there was also a dissolution on this ground.

In Bailey *v.* Ford, 13 Sim. 495, dissolution was granted, the firm being insolvent and constantly becoming more so.

So if the scheme is visionary.[1]

§ 594. Dissensions and chronic hostility.— If dissension between the partners or an animosity towards each other has arisen, of so serious a nature as to render the continuance of the firm impracticable and injurious to one or both the partners, and destroy the necessary mutual confidence and harmony necessary to a concert of effort, so that they cannot get along together, and there is no reasonable prospect of reconciliation, a court of equity will dissolve the partnership.[2]

Mere dissatisfaction, quarreling, bad temper, and differences of opinion is not sufficient.[3]

[1] Lafond *v.* Deems, 81 N. Y. 507; 52 How. Pr. 41; 1 Abb. N. Cas. 518. See, also, Howell *v.* Harvey, 5 Ark. 270.

[2] Baxter *v.* West, 1 Drew. & Sm. 173; Watney *v.* Wells, 30 Beav. 56; Leary *v.* Shout, 33 id. 582; Atwood *v.* Maude, L. R. 3 Ch. App. 369; Meaher *v.* Cox, 37 Ala. 201; s. c. Ala. Sel. Cas. 156; Dumont *v.* Rueprecht, 38 Ala. 175, 179; Blake *v.* Dorgan, 1 G. Greene (Iowa), 537; Whitman *v.* Robinson, 21 Md. 30; Bishop *v.* Brecles, Hoff. (N. Y.) Ch. 534; Lafond *v.* Deems, 81 N. Y. 507 (52 How. Pr. 41; 1 Abb. N. Cas. 318); Singer *v.* Heller, 40 Wis. 544.

[3] Henn *v.* Walsh, 2 Edw. (N. Y.) Ch. 129; Fischer *v.* Raab, 57 How. Pr. 87; Lafond *v.* Deems, 52 How. Pr. 41; 1 Abb. N. Cas. 318; 81 N. Y.

Though a complainant must come into a court of equity with clean hands, yet the court will not inquire which party was the original author of the difficulties or which was most in the wrong, if there was no necessary connection between the wrong first committed by the complainant and the subsequent acts of the defendant.[1]

In Kennedy *v.* Kennedy, 3 Dana, 239, where the articles of partnership did not prescribe the operations of the firm, and the will of the majority must therefore determine them, dissatisfaction and disagreement as to this, though such as to limit or even stop the business, was held no ground for interference by the chancellor.

And a clause in the articles providing for the submission of disputes to arbitration does not oust the court of jurisdiction.[2]

§ **595. Disaffirmance for deception.**— A person induced to enter into a partnership by fraudulent misrepresentations, although he may have a dissolution on this ground, may also obtain a decree rescinding or canceling the partnership agreement *ab initio*,[3] even though the misrepresentations are not such as would entitle him to an action for deceit.[4] He can also have an action for deceit against the guilty partners.[5]

In such cases the chancellor will administer complete relief by ordering repayment of all sums advanced or ex-

507; Sloan *v.* Moore, 37 Pa. St. 217; Loomis *v.* McKenzie, 31 Iowa, 425 (*dictum*).

[1] Atwood *v.* Maude, L. R. 3 Ch. App. 369, 373, per Lord CAIRNS; Blake *v.* Dorgan, 1 G. Greene, 537; and see Bury *v.* Allen, 1 Coll. 589. And in Gerard *v.* Gateau, 84 Ill. 121 (25 Am. Rep. 438), where it appeared that the complainant need not go to the place of business at all, the defendant being manager and possessed of the requisite skill and probity, and his offensive bearing towards complainant and towards customers being due to infirmity of temper, and may have been induced by the complainant's having re-employed a nephew discharged for incapacity, a dissolution was refused.

[2] Meaher *v.* Cox, 37 Ala. 201; s. c. Ala. Sel. Cas. 156, and § 233.

[3] Newbigging *v.* Adam, 34 Ch. D. 582; Mycock *v.* Beatson, 13 id. 384; Fogg *v.* Johnston, 27 Ala. 432 (62 Am. Dec. 771), and cases cited below. For the action at law for such deception, see § 897.

[4] Newbigging *v.* Adam, 34 Ch. D. 582.

[5] § 897.

pended by the complainant, and compensation and indemnity. This is not giving damages, but is a proper consequence of rescinding the contract; and the complainant has a lien on the assets for what he has paid in,[1] or a return of part of the premium will be ordered in a proper case.[2]

But though the defrauded partner can recover of the copartner, and, *inter se*, bears no part of any loss, yet the rights of creditors who trusted the firm will be saved.[3]

Where an infant represented himself to be of age, this is ground for dissolution.[4] So if the amount of debts was grossly understated by a clerk, to the person who is buying an interest in a partnership, although such person could have ascertained the condition of the concern *aliunde* and had recovered damages against the original partner on account thereof.[5] So where one is thus induced to buy out the share of a partner in an existing firm of several, he can disaffirm, and notice of dissolution to the vendor is sufficient.[6]

But if several persons form a partnership, the fact that one was induced to go in on the faith of false representations of one other was held not to invalidate his contract as to the others who were innocent;[7] but a person thus induced to take shares in a joint stock company can recover his purchase money from those who deceived him without making the others parties who had nothing to do with it.[8]

The representations must be material, that is, such as, if true, would add to the value, and must be made either without a belief in their truth or reasonable ground for belief. Representations in

[1] Newbigging *v.* Adam, 34 Ch. D. 582; Mycock *v.* Beatson, 13 id. 384; Pillans *v.* Harkness (H. of L. 1713), Colles, 442; Charlesworth *v.* Jennings, 34 Beav. 96; Rawlins *v.* Wickham, 3 DeG. & J. 304 (s. c. below, 1 Giff. 355); Howell *v.* Harvey, 5 Ark. 270, 278–9 (39 Am. Dec. 376); Hynes *v.* Stewart, 10 B. Mon. 429; Perry *v.* Hale, 143 Mass. 540; Richards *v.* Todd, 127 id. 167; Smith *v.* Everett, 126 id. 304; Davidson *v.* Thirkell, 3 Grant's Ch. (Up. Can.) 330.

[2] Jauncey *v.* Knowles, 29 L. J. Ch. 95; Hamil *v.* Stokes, Daniell, 20; 4 Price, 161.

[3] Hynes *v.* Stewart, 10 B. Mon. 429; and see *Ex parte* Broome, 1 Rose, 69, as explained in Bury *v.* Allen, 1 Coll. 589, 607. See §§ 802–809.

[4] § 143.

[5] Rawlins *v.* Wickham, 3 De G. & J. 304 (s. c. below, 1 Giff. 355).

[6] Slaughter *v.* Huling, 4 Dana, 424.

[7] Kimmins *v.* Wilson, 8 W. Va. 584.

[8] Stainbank *v.* Fernley, 9 Sim. 556.

glowing and exaggerated colors of the prospects of the enterprise are not sufficient.[1]

The partner desiring to disaffirm on this ground should announce and act on his determination to rescind within a reasonable time after discovery of the fraud; a delay of two or three years and acting meanwhile as a partner waives the fraud or ratifies the contract.[2]

The defrauded partner can pray in the alternative for a cancellation, or for dissolution, accounting and injunction.[3] And this relief may be asked by cross-bill in a suit by the guilty partner asking dissolution for misconduct.[4] On the question whether a person was induced to join a partnership by false representations, it is not competent to prove that others joined without such representations;[5] nor that the guilty partner had acted fraudulently towards a former partner.[6]

In Van Gilder *v.* Jack, 61 Iowa, 756, the plaintiff purchased a half interest in defendant's business, under an agreement that if the profits for the first four months did not realize seventy-five per cent. on the investment he could rescind; and in an action for dissolution, alleging that the profits did not amount to this, the evidence being equally balanced, the case was dismissed.[7]

§ 596. **Completion of enterprise.**— On completion of the enterprise for which the partnership was formed, it determines *eo instanti*.[8] And so *ex vi termini*, on the expiration of its agreed period, unless continued by agreement or tacit consent.

In Phillips *v.* Reeder, 18 N. J. Eq. 95, R. and S. P., being lessees for three years of stone quarries, formed a partnership with P. to prepare stone for building, to continue for three years, and as

[1] Jennings *v.* Broughton, 17 Beav. 234 (aff'd in 5 De G. M. & G. 126).

[2] Evans *v.* Montgomery, 50 Iowa, 325; Richards *v.* Todd, 127 Mass. 167, 172.

[3] Bagot *v.* Easton, 9 Ch. D. 1.

[4] Richards *v.* Todd, 127 Mass. 167; and see article on cross-bills in 19 Am. Law Rev. 885, by Chas. E. Grinnell; More *v.* Rand, 60 N. Y. 208.

[5] Bruce *v.* Nickerson, 141 Mass. 403.

[6] Andrews *v.* Garstin, 10 C. B. N. S. 444.

[7] For a similar provision which was more successfully used, see Dunn *v.* McNaught, 38 Ga. 179.

[8] Sims *v.* Smith, 11 Rich. (S. Ca.) L. 565, 566, a partnership to erect a building. A partnership to buy eggs during a certain season, Bohrer *v.* Drake, 33 Minn. 408.

much longer as R. and S. P. should continue lessees under the lease, and this was held to be a partnership for three years, renewable at the option of R. and S. P. alone, and that they had the right to refuse to renew the lease, and to take a new lease of some of the quarries and form a new partnership with another person, although they may have spoken and acted during the term as if they expected to renew. The court cannot add an obligation to renew which the articles did not contain.

§ 597. Date of dissolution.— The date of dissolution is a question of fact. In case of a partnership strictly at will it dates from the notice of dissolution given to the copartners, or from the filing of the bill if there has been no notice.[1]

In Phillips *v.* Nash, 47 Ga. 218, the articles contained a right to dissolve on ten days' notice. Notice was given, and sometime afterwards an entry, showing dissolution and signed in the firm name, was made on the books, and it was held that the question whether the dissolution was at ten days after the notice or at the date of the entry was one for the jury.

In Heath *v.* Sansom, 4 B. & Ad. 172, partners agreed that all settlement of accounts and time and manner of dissolution should be left to an arbitrator, and each should bid on the works, and the arbitrator should declare the highest bidder to be the purchaser. A partner was declared to be the highest bidder and the works given up to him, and this was held to be the date of dissolution, although the arbitrator had made no order as to it, and that from that time the right to give notes in the firm name ceased.

If an agreement of dissolution provides that certain things shall be done or conditions fulfilled, the dissolution is deemed effectual from the time of actual retirement of a partner and delivery of possession to the continuing partner to do business with, although the condition has not been fulfilled,[2] but not without retirement.[3]

If the partnership is not strictly one at will, the dissolution by decree dates, at least as to third parties, from the

[1] Mellersh *v.* Keen, 27 Beav. 236; Shepherd *v.* Allen, 33 Beav. 577; Phillips *v.* Nash, 47 Ga. 218; Abrahams *v.* Myers, 40 Md. 499; Heath *v.* Sansom, 4 B. & Ad. 172.

[2] Bachia *v.* Ritchie, 51 N. Y. 677; Waterman *v.* Johnson, 49 Mo. 410.

[3] Magill *v.* Merrie, 5 B. Mon. 168.

date of the decree.[1] Even if the partnership is not for a fixed term, but in terms is unlimited, if it is for the completion of a particular enterprise, or is of a periodical character, as a farming partnership, the dissolution will date from decree and not from filing the bill.[2]

The court has power, however, when justice requires it, to date back the decree.

In Durbin *v.* Barber, 14 Oh. 311, D., having a valuable contract to construct parts of a public canal, took in B. & B. as partners to furnish part of the necessary funds as the work progressed. B. & B. afterwards ceased furnishing funds and collected the estimates from the state for the work and used the money in their private speculations, and afterwards D. gave them notice of dissolution for these causes; and it was held that the court could decree the dissolution to be as of the date of the notice; and D. having completed the contract, and B. & B. having contributed no more of their agreed advances, were held entitled only to such share of the subsequent profits as their contributions bore to the whole capital, treating the contract as part of D.'s capital and ascertaining its value and adding to it all he had borrowed from others since the dissolution.[3]

[1] Besch *v.* Frolich, 1 Phil. 172; Whitman *v.* Robinson, 21 Md. 30; Abrahams *v.* Myers, 40 id. 499; Lyon *v.* Tweddell, L. R. 17 Ch. Div. 529. See, also, § 574.

[2] Abrahams *v.* Myers, *supra;* Berry *v.* Folkes, 60 Miss. 576, 613.

[3] In Fogg *v.* Johnston, 27 Ala. 432 (62 Am. Dec. 771), and in Dumont *v.* Ruepprecht, 38 Ala. 175, the above case from Ohio was approved and a dissolution was decreed to date from the time the defendant abandoned the enterprise.

CHAPTER II.

CONTINUANCE AFTER DEATH.

§ 598. By will or contract.— Partners can agree that the death of any of their number shall not terminate the partnership or require a winding up.[1]

If this is not by agreement between the partners, but is a direction of the will of one of them, the consent of the surviving partner is of course necessary to carrying it out, and the doctrine of *delectus personarum* requires his further assent to an executor personally acting as partner.[2] Hence, the executors have no right to dissolve because the surviving partner acts contrary to their advice, nor can the courts enjoin him, though the continuance of the business was, by the agreement, to be subject to their advice and inspection.[3]

§ 599. Such agreement must be express.— But an agreement of this kind being of unusual occurrence and protracting the settlement of the estate indefinitely, besides involving an alteration in its amount, will not be implied from mere construction, but must appear, in express and unambiguous terms, to have been intended.[4]

[1] Scholefield *v.* Eichelberger, 7 Pet. 586; Burwell *v.* Mandeville, 2 How. 560; Jones *v.* Walker, 103 U. S. 444; Vincent *v.* Martin, 79 Ala. 540; Pitkin *v.* Pitkin, 7 Conn. 307 (18 Am. Dec. 111); Blodgett *v.* Amer. Nat'l B'k, 49 Conn. 9; Powell *v.* Hopson, 13 La. Ann. 626; Stanwood *v.* Owen, 14 Gray, 195; Exchange Bank *v.* Tracy, 77 Mo. 594; Nave *v.* Sturges, 5 Mo. App. 557; Gibson *v.* Stevens, 7 N. H. 352; Ballantine *v.* Frelinghuysen, 38 N. J. Eq. 266; Rammelsberg *v.* Mitchell, 29 Oh. St. 22; Kottwitz *v.* Alexander, 34 Tex. 689; Alexander *v.* Lewis, 47 id. 481; s. c. 51 id. 578; Davis *v.* Christian, 15 Gratt. 11. But a mere option in the articles, giving to the surviving partner, in the event of the death of either, a right to continue or not as he chooses, has been held to be void for want of mutuality and not binding upon the heirs, Hart *v.* Anger, 38 La. Ann. 341.

[2] Exchange Bank *v.* Tracy, 77 Mo. 594; Davis *v.* Christian, 15 Gratt. 11. See Wilson *v.* Simpson, 89 N. Y. 619; White *v.* Gardner, 37 Tex. 407.

[3] Gratz *v.* Bayard, 11 Serg. & R. 41.

[4] Kirkman *v.* Booth, 11 Beav. 273; Exchange Bank *v.* Tracy, 77 Mo. 594,

And if the profits depend on skill and not capital, this tends to preclude a construction of the articles in favor of a continuance after death.[1]

And a provision in the articles for continuing after death will not be construed to cover a branch business in another city subsequently undertaken and not then in contemplation.[2]

It was doubted whether such continuation of the business could be accurately termed a continuation of the old partnership, and said to be rather the creation of a new one,[3] and where carried on by a single survivor it was doubted whether it could be termed a partnership at all.[4] But in general it is not regarded as a new partnership,[5] doubtless because it does not take place by operation of law, but by the act of the parties.

§ 600. To what extent the estate is bound.— The testator has the right to bind his entire estate for the payment of business debts contracted after his death,[6] or he can restrict the future responsibility of his general estate to the capital already embarked in the partnership, or to be contributed, and exempt the rest.[7]

The continuance of a partnership after the death of a member *a fortiori* renders that portion of his estate already engaged subject to the vicissitudes of the business and the fluctuations of its career. If the rest of the estate were to be also liable to the same hazards, its settlement and division among the heirs or distributees might be protracted

601; Alexander *v.* Lewis, 47 Tex. 481; Berry *v.* Folkes, 60 Miss. 576, 607; Gratz *v.* Bayard, 11 Serg. & R. 41. Merely that the partnership is formed for a definite object or a specified time is not sufficient. See chapter on Dissolution. § 580.

[1] Carroll *v.* Alston, 1 S. Ca. 7 (a partnership between barbers).

[2] Rammelsberg *v.* Mitchell, 29 Oh. St. 22, 47.

[3] Exchange Bank *v.* Tracy, 77 Mo. 594, 600. See Pitkin *v.* Pitkin, 7 Conn. 307 (18 Am. Dec. 111).

[4] Gibson *v.* Stevens, 7 N. H. 352, 356.

[5] See Alexander *v.* Lewis, 47 Tex. 481; Edwards *v.* Thomas, 66 Mo. 468.

[6] Davis *v.* Christian, 15 Gratt. 11; Laughlin *v.* Lorenz, 48 Pa. St. 275.

[7] This has been settled law ever since Lord ELDON, in *Ex parte* Garland, 10 Ves. 110, refused to follow the apparently contrary ruling of Lord Kenyon in Hankey *v.* Hammock, Buck, 210, and 3 Madd. 148, note; *Ex parte* Richardson, 3 Madd. 138, 157; Thompson *v.* Andrews, 1 Myl & K. 116; Jones *v.* Walker, 103 U. S. 444; Burwell *v.* Mandeville, 2 How. 560, 576; Pitkin *v.* Pitkin, 7 Conn. 307 (18 Am. Dec. 111). See § 601.

for years; hence courts have refused to postpone the settlement of the rest of the estate, or allow it to be subject to these risks, unless the decedent or testator so intended, and have required such intention to appear in the most unequivocal terms.

In Burwell *v.* Mandeville, 2 How. 560, 577, STORY, J., says: "Nothing but the most clear and unambiguous language, demonstrating in the most positive manner that the testator intends to make his general assets liable for all debts contracted in the continued trade after his death, and not merely to limit it to the funds embarked in the trade, would justify the court in arriving at such a conclusion." [1]

§ 601. A mere provision in a will, or in the articles, that the business is to be continued is not sufficient to affect that part of the estate not already in the partnership.[2] Merely stating that his capital is to "remain" excludes the intent that additional assets are to be risked.[3]

And if the will, making the copartner executor, authorize him to use the residue of the estate in the business, until wanted for distribution, this was held not to contemplate an unnecessary prolongation of the business, and that the executor's duty was to pay off debts and settle the partnership, notwithstanding the clause.[4]

Ballantine *v.* Frelinghuysen, 38 N. J. Eq. 266, while recognizing that a direction to continue the testator's interest in a firm does not

[1] To a similar effect are *Ex parte* Garland, 10 Ves. 110; *Ex parte* Richardson, 3 Madd. 138, 157; Kirkman *v.* Booth, 11 Beav. 273; Skirving *v.* Williams, 24 id. 275; Pitkin *v.* Pitkin, 7 Conn. 307 (18 Am. Dec. 111); Lucht *v.* Behrens, 28 Oh. St. 231, 238; Brasfield *v.* French, 59 Miss. 632; Cook *v.* Rogers, 3 Fed. Rep. 69 (8 Am. Law Rec. 641).

[2] McNeillie *v.* Acton, 4 De G. M. & G. 744; Burwell *v.* Mandeville, 2 How. 560, 577; Cook *v.* Rogers, 3 Fed. Rep. 69; 8 Am. Law Rec. 641; 26 Int. Rev. Rec. 206; Vincent *v.* Martin, 79 Ala. 540; Brasfield *v.* French, 59 Miss. 632; Ballantine *v.* Frelinghuysen, 38 N. J. Eq. 266; Wild *v.* Davenport, 48 N. J. L. 129; Davis *v.* Christian, 15 Gratt. 11; Smith *v.* Smith, 13 Grant's Ch. (Up. Can.) 81; Alexander *v.* Lewis, 47 Tex. 481. But see Laughlin *v.* Lorenz, 48 Pa. St. 275, where the administrators, under a covenant that death should not dissolve the firm, were held authorized to bind the general estate by carrying on the business.

[3] Brasfield *v.* French, 59 Miss. 632; *Re* Clapp, 2 Lowell, 168; Wild *v.* Davenport, 48 N. J. L. 129.

[4] *Re* Clap, 2 Lowell, 168.

authorize his other property to be embarked in it, rules that his individual real estate and buildings, which are used by and essential to the firm, and private real estate over which buildings erected with partnership funds extended, is deemed intended by him to be left in the business.

In Stanwood *v.* Owen, 14 Gray, 195, it was urged in argument that a provision in the articles that the business might be carried on by the surviving partner for a year, for the benefit of both partners, was more extensive than one by which the assets should be continued in the firm, but the contrary was held.

§ 602. Where an intent appears in the articles of partnership that death shall not affect the rights of any of the parties which are incident to an ownership of a share in the business, liabilities are carried with the rights, for a partner may agree to indemnify his copartners for part of the losses of the continued business.

Thus a partnership with transferable shares providing that death should not work a dissolution, nor entitle representatives to an account, but that they should simply succeed to the shares of the decedent, is not the mere reservation of an option in the executor to take his place in the firm, or a covenant that he shall do so, giving an action for damages on refusal, but here profits and losses follow the certificate, and a partner who pays a debt of the association can compel the estate to contribute.[1]

In Blodgett *v.* Amer. Nat'l Bank, 49 Conn. 9, where the articles provided that the death of a partner should not dissolve the firm, but his executor should act in his stead, the court held the decedent's entire estate was liable for partnership debts, the firm having subsequently failed; the court claiming that in all cases of a less liability, the business was continued under a will and not in pursuance of a prior contract.[2]

If the will be positive that the legatee of a share shall continue the partnership, he must take the legacy on the terms in which it is given and submit to the inconvenience if he will enjoy the benefit.[3]

[1] Phillips *v.* Blatchford, 137 Mass. 510. And see Baird's Case, L. R. 5 Ch. App. 725.

[2] See, also, Kottwitz *v.* Alexander, 34 Tex. 689; but the contrary was held in Stanwood *v.* Owen, 14 Gray, 195.

[3] Crawshay *v.* Maule, 1 Swanst.

§ 603. Powers of executor.— We have already seen that the executor cannot be compelled by any agreement between the partner or mandate in the will to incur a personal responsibility by actual participation as a partner in place of the testator, even though the estate may be liable as for breach of contract upon his refusal.

A power given to an executor to manage and convey at discretion does not authorize him to continue the estate on a former partnership.[1] But a direction to continue business for two years, or "such further time" as is necessary to close up without injury, was held to empower the surviving partner to make a partnership contract after the two years, the creditors and distributees not objecting, though it was conceded that they could have then insisted on the estate being settled.[2] And if executors begin to carry on the business, dealers with the continued firm are entitled to notice of a second dissolution, and in the absence of it have the right to hold them or the estate on contracts made thereafter;[3] but not if they refuse to continue.[4]

Authority or direction to continue the business must be restricted to mean on the same terms and with the same partners as before. The executor, therefore, though acting under a general power to continue, cannot do so after one of the surviving partners has retired, for this change may take away the very person on whose judgment the testator relied, and besides it is a new firm and different firm; nor can the executor agree on new terms.[5] And the same rule might be applied if a new partner were taken in, unless the will or articles contemplated it, for it is a different firm.[6]

But the surviving partner under such power cannot continue a course of accommodation indorsements pursued by the firm in favor of a person who had given them security for such accommodation, or even renew a former indorse-

492, 512; Page *v.* Cox, 10 Hare, 163; Nave *v.* Sturges, 5 Mo. App. 557.

[1] Citizens' Mut. Ins. Co. *v.* Ligon, 59 Miss. 305.

[2] Brasfield *v.* French, 59 Miss. 632.

[3] Watterson *v.* Patrick (Pa. 1885), 1 Atl. Rep. 602.

[4] As in Edgar *v.* Cook, 4 Ala. 588.

[5] Berry *v.* Folkes, 60 Miss. 576, 611; Smith *v.* Ayer, 101 U. S. 320.

[6] See Alexander *v.* Lewis, 47 Tex. 481.

ment, this not being a continuance of the business, but outside its scope, and would have required the sanction of the deceased partner had he lived.[1]

In Watterson *v.* Patrick (Pa. 1885), 1 Atl. Rep. 602, authority in a will to continue a business, which was dealing in scrap iron, was held to confer a power to carry on a rolling mill to manufacture the scrap iron.

Authority in executors to form the partnership into a corporation and receive stock in place of the testator's interest authorizes the executors to act in forming the corporation and to convey to it the testator's interest, including his private real estate used by and essential to the firm, and to agree on a valuation of such real estate at that time, and of other private real estate on which the partnership had erected buildings at a valuation as of the time the firm appropriated it.[2]

If the will be merely that the testator's capital shall continue for a certain time, the executors cannot recover it during that time when not needed to pay debts, nor require security from the surviving partner.[3] And if the legatees permit the surviving partner to continue the business pursuant to a request in the will, he has the right to go on, and the legatees hold under the will.[4]

§ 604. A court of equity may authorize the continuance of a business for the benefit of infant children if the surviving partner consent,[5] but this does not implicate the rest of the estate.[6]

§ 605. **Subsequent accretions.** — Profits subsequently earned in a partnership continued under a will or articles are assets for which the executor is accountable and his bond responsible;[7] but they are part of the estate which is

[1] Nat'l Bk. of Newburgh *v.* Bigler, 83 N. Y. 51 (aff. 18 Hun, 400).

[2] Ballantine *v.* Frelinghuysen, 38 N. J. Eq. 266.

[3] Vernon *v.* Vernon, 7 Lans. 492 (not modified on this point in s. c. 53 N. Y. 351).

[4] Tillotson *v.* Tillotson, 34 Conn. 335, 358-9.

[5] Thompson *v.* Brown, 4 Johns. Ch. 619; Powell *v.* North, 3 Ind. 392 (56 Am. Dec. 513); Cock *v.* Carson, 45 Tex. 429.

[6] Cock *v.* Carson, 45 Tex. 429.

[7] Gandolfo *v.* Walker, 15 Oh. St. 251; Giblett *v.* Read, 9 Mod. 459; Palmer *v.* Mitchell, 2 Myl. & K. 672, n.; Cook *v.* Collingridge, Jacob, 607.

authorized to remain in the business, and are applicable to subsequent partnership debts.[1]

If a partnership is continued under a will for the benefit of one person for life, with remainders, a life tenant who gets the benefit of a profitable year cannot throw the whole loss of a losing year upon the capital at the expense of the remainder.[2]

It sometimes becomes a grave question under a will or under articles whether accumulations are intended to be capitalized or are governed by a devise of the fund. In such cases the will is construed in view of the provisions of the articles.

In Dean *v.* Dean, 54 Wis. 23, the articles recited that each partner had contributed $20,000 as capital, and provided that neither capital nor accrued but undivided profits were to be drawn out, and at dissolution the capital should be drawn out and the rest of the assets divided in the way provided for dividing profits. This makes a distinction between capital and undivided profits. Therefore, where the will of one of the partners required his "present capital" to be left in the firm for two years, and his assets in the business were $43,000, only the $20,000 original capital is meant, and the $23,000 undivided profits is not considered as capitalized, but is to be taken out. That such withdrawal would injure the business cannot be considered, since but for the will all must have been withdrawn.

The rule that the value must be fixed at the time the right of the first taker begins was applied where a testator bequeathed his property invested in a partnership in trust to A. for life, remainder to B., directing the investment to remain until March 1st after his death, and he died in the preceding June. At the date of his death his interest was worth about $160,000, and on March 1st following was worth $193,000. The bequest was held not to apply to the increase, and the value at the date of death was to be determined by ascertaining what sum, if received at the date of death, would, with six per cent. interest, yield the amount actually received at the time it was received, and such sum is principal and the rest income.[3]

In Mudge *v.* Parker, 139 Mass. 153, where the articles declared

[1] Gratz *v.* Bayard, 11 Serg. & R. 41.
[2] Gow *v.* Forster, 26 Ch. D. 672.
[3] Westcott *v.* Nickerson, 120 Mass. 410.

that no capital was needed or contributed, but provided that interest should be paid on loans by the partners to the firm, and that, in case of death, the executors should receive profits to the end of the second half year thereafter; and a partner died, directing by will his trustees to hold the residue of his property invested as they should receive it, this clause of the will was held to apply only to permanent investments, and not to those determined by death or prolonged thereafter, but not in such a way that the trustees could continue or abridge them, and therefore that profits received above interest on the testator's loans to the firm were capital and not income.

CHAPTER III.

NOTICE OF DISSOLUTION.

§ 606. On a principle analogous to that which holds secret restrictions on the powers of a particular partner not binding on those who have no knowledge of them, so a dissolution of the firm by act of the parties — as distinguished from dissolution by act of law — whether a complete discontinuance of the concern, or the retirement of a single partner, or the addition of a member, does not affect the outside world unless proper notice is given. The law says that actual notice must be brought home to former customers of the firm, and notice by publication to the other persons. The meaning of these loose phrases will be discussed hereafter; the reason of them is as follows:

One class of persons has become acquainted with the firm, and, by presumption of law, with its membership, so far, at least, as this is not dormant. These are entitled to the same certainty of notice of dissolution as they had of its existence, which is actual knowledge.

The rest of the world, *i. e.*, that part which has not given credit to the firm because acquainted with the fact of its existence from reputation, hearsay, or their own observation. And this is to be counteracted by a publicity of the same sort, and at least measurably as widely spread, viz., proper publication, generally by advertisement in the proper newspaper.[1]

It is true that the latter class may be as much misled by want of actual knowledge of dissolution as the dealer class, yet the partners cannot know who such persons are, and if more than constructive notice were required, a partner would, in the often quoted language of Lord Kenyon, in

[1] For an excellent statement of this principle see Vernon *v.* The Manhattan Co. 22 Wend. 183, 195, per Senator Verplanck.

Abel *v.* Sutton, 3 Esp. 108, "never know when he was to be at peace and freed from all the concerns of the partnership."

§ **607.** Hence a bill or note made by one partner after dissolution, of which no notice was given and no knowledge had, is the same as if given before dissolution.[1]

Where a firm orders goods or work from a person, and a partner retires without notice to him before delivery, he can hold the entire firm for the subsequently delivered goods or work;[2] but if he hears of the dissolution while all the goods are still in his hands, he cannot recover for them against the retired partner, provided the retirement was before the contract was made, so that such partner was not represented as a contracting party by the firm name.[3]

Where an agent of the firm mailed a written offer to the plaintiff, to be accepted by return mail, and it was not accepted by return mail, and a partner not known to the plaintiff retired without notice before the acceptance, the contract does not bind the retired partner.[4]

The reason why a notice of dissolution is necessary is the same as in cases of the revocation of other agencies, and is variously stated as arising from a species of estoppel to deny continuance of the agency, or on the ground of negligence, whereby credit is given, or from the presumption of a con-

[1] Booth *v.* Quinn, 7 Price, 193; Moline Wagon Co. *v.* Rummell, 12 Fed. Rep. 658; 2 McCrary, 307; s. c. 14 Fed. Rep. 155; Parker *v.* Canfield, 37 Conn. 250 (9 Am. Rep. 317); Ewing *v.* Trippe, 73 Ga. 776; Hunt *v.* Hall, 8 Ind. 215; Stall *v.* Cassady, 57 Ind. 284; Iddings *v.* Pierson, 100 Ind. 418; Merritt *v.* Pollys, 16 B. Mon. 355; Long *v.* Story, 10 Mo. 636; Ackley *v.* Winkelmeyer, 56 id. 562; Holt *v.* Simmons, 16 Mo. App. 97; National Bank *v.* Norton, 1 Hill, 572; Lamb *v.* Singleton, 2 Brev. (S. Ca.) 490; Long *v.* Garnett, 59 Tex. 229; Sanderson *v.* Milton Stage Co. 18 Vt. 107; Woodruff *v.* King, 47 Wis. 261, a chattel mortgage to secure an old debt. An indorsee with notice takes the title of his indorser who had no notice. Booth *v.* Quin, 7 Price, 193. Some cases confine this to new contracts, and hold that paper given after dissolution for an old debt does not bind the retiring partner, although no notice was given. Brisban *v.* Boyd, 4 Paige, 17; Morrison *v.* Perry, 11 Hun, 33.

[2] Kenney *v.* Altvater, 77 Pa. St. 34.

[3] Brisban *v.* Boyd, 4 Paige, 17, 22.

[4] Bernard *v.* Torrance, 5 Gill & J. 383.

tinuance of a state of affairs giving a person who once knows of the existence of a firm the right to assume that it remains the same. Or it may be stated that, until proper notice of dissolution, the partner's attitude is analogous to that of a partner by holding out.

§ 608. **Dormant partner.**—No notice of dissolution is necessary in the case of a dormant partner. He is not bound for contracts entered into after his retirement, though no notice thereof was published. He is liable while a partner, because he shares in the profits as an actual contracting partner, and not because of reliance on his credit, for he is *ex vi termini* unknown to third persons; hence, when his connection with the firm ceases, the reasons for holding him liable on subsequent contracts also ceases.[1]

Where goods were consigned to a firm for sale, and while still on hand a dormant partner retires, after which the consignor consents to such an alteration of the contract as would have amounted to a novation, had he known of such partner, and had notice of his retirement, the dormant partner is released, for as the plaintiff was not aware of his membership the non-notification is immaterial.[2]

But if the creditor knew of the dormant partner's connection with the firm before giving the credit, the reason of the rule is gone, and such partner is an ostensible one as to him.

[1] Evans *v.* Drummond, 4 Esp. 89; Newmarch *v.* Clay, 14 East, 239; Carter *v.* Whalley, 1 B. & Ad. 11; Heath *v.* Sansom, 4 B. & Ad. 172, 177; Grosvenor *v.* Lloyd, 1 Met. 19; Bigelow *v.* Elliot, 1 Cliff. 28; LeRoy *v.* Johnson, 2 Pet. 186, 199; Parker *v.* Wooten, 35 Ala. 242; Phillips *v.* Nash, 47 Ga. 218; Holland *v.* Long, 57 Ga. 36; Nussbaumer *v.* Becker, 87 Ill. 281 (29 Am. Rep. 53); Cregler *v.* Durham, 9 Ind. 375; Scott *v.* Colmesnil, 7 J. J. Mar. 416; Magill *v.* Merrie, 5 B. Mon. 168; Kennedy *v.* Bohannon, 11 B. Mon. 118; Bernard *v.* Torrance, 5 Gill & J. (Md.) 383; Goddard *v.* Pratt, 16 Pick. 412; Boyd *v.* Ricketts, 60 Miss. 62; Deering *v.* Flanders, 49 N. H. 225; Kelley *v.* Hurlburt, 5 Cow. 534; Holdane *v.* Butterworth, 5 Bosw. 1; Davis *v.* Allen, 3 N. Y. 168; Howell *v.* Adams, 68 id. 314; Armstrong *v.* Hussey, 12 S. & R. 315; Vaccaro *v.* Toof, 9 Heisk. (Tenn.) 194; Whitworth *v.* Patterson, 6 Lea, 119, 123; Benton *v.* Chamberlain, 23 Vt. 711; Pratt *v.* Page, 32 Vt. 13; Benjamin *v.* Covert, 47 Wis. 375, 382–3; Gilchrist *v.* Brande, 58 id. 184, 200.

[2] Phillips *v.* Nash, 47 Ga. 218.

It makes no difference how he became aware of such connection; the information need not be by the acts or declarations of the dormant partner, but may be the announcement of the ostensible partner or of an agent of the firm, or be discovered by accident. The sole test is, has the secrecy been maintained not only to dealers generally, but to the particular dealer.[1]

And on the other hand the above cases show that the absence of absolute secrecy and studied concealment will not deprive a dormant partner of his rights as such, except as to those knowing the connection.

§ 609. Any partner who was not known to the plaintiff before retirement is, as to him, a dormant partner and not liable on subsequent contracts, although he gave no notice of the dissolution, for the creditor is not misled, and on dealing with a firm for the first time should inquire as to who compose it, and cannot charge a person not a partner to whose credit he did not trust, on subsequently discovering that he had once been a partner and had not published the fact of retirement.[2]

In Carter *v.* Whalley, 1 B. & Ad. 11, persons were in partnership as "Plas Modoc Colliery Co.," which name obviously gave no information as to who composed the firm, and one of the partners,

[1] Farrar *v.* Defiance, 1 Car. & K. 580; Evans *v.* Drummond, 4 Esp. 89; United States Bank *v.* Binney, 5 Mason, 176, 185; Park *v.* Wooten, 35 Ala. 242; Davis *v.* Allen, 3 N. Y. 168; Phillips *v.* Nash, 47 Ga. 218; Holland *v.* Long, 57 id. 36; Ewing *v.* Trippe, 73 id. 776; Nussbaumer *v.* Becker, 87 Ill. 281 (29 Am. Rep. 53); Southwick *v.* McGovern, 28 Iowa, 533; Boyd *v.* Ricketts, 60 Miss. 62; Deering *v.* Flanders, 49 N. H. 225; Benton *v.* Chamberlain, 23 Vt. 711; Benjamin *v.* Covert, 47 Wis. 375, 382. And the burden of proof is on the creditor to show such knowledge. Evans *v.* Drummond, 4 Esp. 89; Kelley *v.* Hurlburt, 5 Cow. 534; Benton *v.* Chamberlain, 23 Vt. 711. As to what constitutes a dormant partner, see §§ 151–153.

[2] Evans *v.* Drummond, 4 Esp. 89; Newsome *v.* Coles, 2 Camp. 617; Warren *v.* Ball, 37 Ill. 76; Bank of Montreal *v.* Page, 98 id. 109; Chamberlain *v.* Dow, 10 Mich. 319; Dowzelet *v.* Rawlings, 58 Mo. 75; Cook *v.* Slate Co. 36 Oh. St. 135; Benton *v.* Chamberlain, 23 Vt. 711; Pratt *v.* Page, 32 id. 13; Waite *v.* Dodge, 34 id. 181; Benjamin *v.* Covert, 47 Wis. 375, 384; Darling *v.* Magnan, 12 Up. Can. Q. B. 471.

who had never appeared publicly or been generally known as such, or represented himself to be a partner, and who was not known to the plaintiff, retired without publication of the fact or notice to the plaintiff, and it was held that he was not liable to the plaintiff on a subsequent contract in the firm name.[1]

In Cook *v.* Slate Co. 36 Oh. St. 135, Cook, the capitalist of the firm of Hall & Cook, retired, his son taking his place in the firm and the name continuing the same. Old customers were notified, but no publication of the fact was made, and the plaintiff, who had never dealt with or known of the old firm during its existence, sold a bill of goods to the new firm after being led to suppose, from rumor and from inquiry in the neighborhood, that Cook, the father, was the partner. The court held that Cook, the father, was not chargeable, the firm having failed. Plaintiff should have inquired at headquarters and not from the neighborhood as to whom he was trusting.

The contrary has been held also, that the partner must be actually dormant. The mere fact that he is unknown to the plaintiff does not relieve him from the consequences of a failure to give notice of dissolution.[2] Nor can the entire firm be considered as composed only of dormant partners. In Elkinton *v.* Booth, 143 Mass. 479, plaintiff was a former dealer with the Spring Brook Mills Co. and knew it to be composed of responsible parties, but did not know who they were. The firm dissolved, published the fact, and sold out its entire business, the buyer continuing in the same name. The plaintiff, not knowing of the dissolution, sold goods to the new concern. It was held that he could assume the firm still to be constituted as it had been and could hold the original firm liable. That they owed him nothing at the time of dissolution does not relieve them. But where "& Co." was in the firm style, thus informing plaintiff that there are other partners, a partner unknown to him who retired without notice is not a dormant partner.[3] And no presumption of knowledge arises from

[1] This was followed in a similar case in Bernard *v.* Torrance, 5 Gill & J. (Md.) 383, where the defendant, being sued as a partner in "The Warren Factory," was allowed to prove that his former membership therein was not generally known in order to excuse non-publication of withdrawal.

[2] Princeton & Kingston Tp. Co. *v.* Gulick, 16 N. J. L. 161; Howell *v.* Adams, 68 N. Y. 314.

[3] Goddard *v.* Pratt, 16 Pick. 412,

having formerly discounted paper on which the firm name appeared.[1]

From the fact that the connection of a dormant partner with the firm may be inadvertently divulged, the only safe course on his retirement, or in case of any other dissolution, is to make proper publication.

§ 610. **Dissolution by operation of law.**—Dissolution by operation of law is presumed to be taken notice of by everyone. It is of a public and not a private nature, and hence no notice is necessary.

Thus, in case a partner dies, his estate at once ceases to be liable for future contracts entered into by the other partners, as in other cases of termination of an agency by death of the principal, independent of notice of the fact.[2] Hence, if the will or articles provide for a continuance of the firm after the death of a partner, and the surviving partner or executor continues it, third persons must take notice of the extent of their authority to bind the estate of decedent;[3] but notice of voluntary dissolution of this new firm is as necessary as in other cases.[4]

For the same reason notice of dissolution by bankruptcy is not necessary.[5] So of dissolution by declaration of war, as where one of the partners resides in the hostile territory after intercourse is prohibited.[6]

428–9; Shamburg *v.* Ruggles, 83 Pa. St. 148, 150–1.

[1] Bank of Montreal *v.* Page, 98 Ill. 109.

[2] Devaynes *v.* Noble (Houlton's Case), 1 Mer. 616; *Id.* Johnes' Case, id. 619; *Id.* Brice's Case, id. 620; Webster *v.* Webster, 3 Swanst. 490; Vulliamy *v.* Noble, 3 Mer. 592, 614; 2 Bell's Com. § 1234; Marlett *v.* Jackman, 3 Allen, 287; Williams *v.* Mathews, 14 La. Ann. 11; Caldwell *v.* Stileman, 1 Rawle, 212; Lyon *v.* Johnson, 28 Conn. 1; Dickinson *v.* Dickinson, 25 Gratt. 321, 329; Williams *v.* Rogers, 14 Bush, 776.

[3] Burwell *v.* Cawood, 2 How. 560; Alexander *v.* Lewis, 47 Tex. 481.

[4] Watterson *v.* Patrick (Pa.), 1 Atl. Rep. 602.

[5] Fox *v.* Hanbury, Cowp. 445; Thomason *v.* Frere, 10 East, 418; Morgan *v.* Marquis, 9 Exch. 145; Lyon *v.* Johnson, 28 Conn. 1; Dickinson *v.* Dickinson, 25 Gratt. 321, 329.

[6] Griswold *v.* Waddington, 16 Johns. 438 (aff'g 15 id. 57); Marlett *v.* Jackman, 3 Allen, 287, 293–4. If notice of dissolution should be published in case of dissolution by decree, the court can compel partners to sign the notice if the advertise-

§ 611. Notice necessary in all other cases.— In all other cases except dissolution by operation of law and dormant partnerships, proper notice of dissolution is necessary.

Even though a partnership be for a term and has expired by its own limitation, notice is necessary,[1] unless knowledge of the term of partnership be brought home to plaintiff.[2]

So if an existing partnership becomes incorporated, but continues dealing in the old way, they are liable as partners where the change of name does not convey information.[3]

Or where the partnership was agreed on and begun but abandoned because of inability to buy goods on credit, notice by publication is necessary, for the world cannot look to see if the partners actually traded.[4]

And the same rule was held to apply to changes of the relation of the firm to its property in Berks *v.* French, 21 Kan. 238, where B., a partner in the firm of L., W. & B., cattle dealers, bought a herd of cattle from the firm, and afterwards L., in the name of the firm, sold the same herd to one who had formerly dealt with the firm, and did not know of B.'s purchase, and it was held that F. had the better title; that the law of partnership and not of sale applied, and the sale to B. was a dissolution of the firm as to such herd.

So if an infant is a partner and acts as one, and on coming of age desires to disaffirm the partnership, he should give the proper notice of dissolution, else he is bound for subsequent sales by a former customer of the firm, who did not know of its dissolution.[5]

Where a person who did business in a firm name sold out to his son, who did business in the same name without notice of dissolution, a former dealer of the father who sold goods to the son without knowledge of the change can hold the father,[6] but not if

ment will not be inserted without signatures of all, Troughton *v.* Hunter, 18 Beav. 470; and the suit may be filed merely for this and no other relief. Hendry *v.* Turner, 32 Ch. D. 355.

[1] Ketcham *v.* Clark, 6 Johns. 144; Holt *v.* Simmons, 16 Mo. App. 97.

[2] Schlater *v.* Winpenny, 75 Pa. St. 321.

[3] Goddard *v.* Pratt, 16 Pick. 412; Willey *v.* Thompson, 9 Met. 329, 331; Martin *v.* Fewell, 79 Mo. 401; McGowan *v.* Amer. B'k Co. (S. C. U. S. 1887).

[4] Thurston *v.* Perkins, 7 Mo. 29.

[5] Goode *v.* Harrison, 5 B. & Ald. 147. But see King *v.* Barbour, 70 Ind. 35.

[6] Elverson *v.* Leeds, 97 Ind. 336 (49 Am. Rep. 458).

there was publication of the change and the seller was a non-dealer.[1]

The want of time to publish a notice between dissolution and the making of the note sued on by one partner in the name of the old firm cannot dispense with the rule of law; the obligation continues until notice is given.[2]

§ 612. **Former dealer.**— The following cases, in addition to those more particularly stated in this chapter, which it is not necessary here to repeat, decide the general principle that a prior dealer is entitled to actual notice.[3]

§ 613. **Who is a former dealer or customer.**—It is usual in text-books and decisions to say that actual notice or knowledge of dissolution must be brought home to a "former dealer" or "former customer" of the firm. These expressions are very vague; the phrase "former creditor" would be more accurate, but is too broad; for a person who holds paper of the partnership which he did not procure from or for them is certainly a creditor, and yet is not entitled to actual notice of a dissolution caused by the act of the parties. This statement shows the necessity of an examination of cases to ascertain what is meant by the common expression "former dealer."

One who has previously sold goods to the firm on credit is undoubtedly entitled to actual notice; all the foregoing

[1] Preston *v.* Foellinger, 24 Fed. Rep. 680.

[2] Bristol *v.* Sprague, 8 Wend. 423.

[3] Graves *v.* Merry, 6 Cow. 701 (16 Am. Dec. 471); Pecker *v.* Hall, 14 Allen, 532; Roakes *v.* Bailey, 55 Vt. 542; Davis *v.* Willis, 47 Tex. 154; Walton *v.* Tomlin, 1 Ired. L. 593; Burgan *v.* Lyell, 2 Mich. 102 (55 Am. Dec. 53) Haynes *v.* Carter, 12 Heisk. 7, and other Tennessee cases cited therein; Price *v.* Towsey, 3 Litt. (Ky.) 423; Nicholson *v.* Moog, 65 Ala. 471; Williams *v.* Bowers, 15 Cal. 321; Van Eps *v.* Dillaye, 6 Barb. 244; Stall *v.* Cassaday, 57 Ind. 284; Strecker *v.* Conn, 90 id. 469; Ennis *v.* Williams, 30 Ga. 691; Ransom *v.* Loyless, 49 Ga. 471; Dickinson *v.* Dickinson, 25 Gratt. 321; Hodgen *v.* Kief, 63 Ill. 146; Scarf *v.* Jardine, L. R. 7 App. Cas. 345; Schorten *v.* Davis, 21 La. Ann. 173; Mitchum *v.* Bank of K'y, 9 Dana, 166; Magill *v.* Merrie, 5 B. Mon. 168; Kennedy *v.* Bohannon, 11 id. 118; Nott *v.* Douming, 6 La. 680; Lowe *v.* Penny, 12 id. 773; Reilly *v.* Smith, 16 id. 31; Denman *v.* Dosson, 19 id. 9; Hammond *v.* Aiken, 3 Rich. Eq. (S. Ca.) 119; White *v.* Murphy, 3 Rich. L. 369.

phrases — actual dealer, former customer, creditor, or one who has trusted — will include him.

One who has lent money to the firm is a former dealer, entitled to actual notice of dissolution.[1]

So an individual or a bank that has discounted paper for the partnership is such dealer, and without actual notice the firm is bound on subsequent renewals or discounts by one partner without authority.[2]

And *vice versa*, a depositor in a banking partnership is a former dealer as to such partnership.[3] So is an accommodation indorser for the firm.[4]

So of notes which the firm signed or indorsed in accommodation for the payee, knowing he would procure the plaintiff to discount it; a mere publication of dissolution is not sufficient as to the plaintiff.[5]

But not one who merely dealt in paper on which the firm was responsible, but which he did not procure from them or at their request.[6]

A consignee or factor of the partners who has been in the habit of making advancements on their consignments is a former dealer, and if they make a consignment to him after dissolution, and he make advancements upon it without knowledge of dissolution, he will be protected.[7]

That the former dealings were so small in amount as to give no great reason to believe that the sellers took the

[1] Buffalo City Bank *v.* Howard, 35 N. Y. 500.

[2] National Bank *v.* Norton, 1 Hill, 572; Taylor *v.* Hill, 36 Md. 494; Rose *v.* Coffield, 53 Md. 18 (36 Am. Rep. 389); Mechanics' Bank *v.* Livingston, 33 Barb. 458; Bank of Commonwealth *v.* Mudgett, 44 N. Y. 514 (affg. 45 Barb. 663); Shoe & Leather Bank *v.* Herz, 89 N. Y. 629 (affg. 24 Hun, 260).

[3] Howell *v.* Adams, 68 N. Y. 314.

[4] Hutchins *v.* Sim, 8 Humph. 423; Hutchins *v.* Hudson, id. 426.

[5] Vernon *v.* The Manhattan Co. 22 Wend. 183 (aff. s. c. 17 Wend. 524); approved in Rose *v.* Coffield, 53 Md. 18; 36 Am. Rep. 389.

[6] City Bank of Brooklyn *v.* McChesney, 20 N. Y. 240, 242; Hutchins *v.* Bank of Tenn. 8 Humph. 418; and per Senator Verplanck, in Vernon *v.* The Manhattan Co. 22 Wend. 183, 195.

[7] Williams *v.* Birch, 6 Bosw. 299.

trouble to ascertain who the partners were, makes no difference; no distinction can be based on the amount.[1]

Nor on the fact that it was a single transaction only.[2]

Nor need the contract for credit be express; if credit was extended it is sufficient.[3]

In Amidown *v.* Osgood, 24 Vt. 278 (58 Am. Dec. 171), one O. retired from the firm on April 1st; on April 28th the plaintiff, for the first time, sold the firm a bill of goods, without knowledge of a dissolution. On April 29th or 30th the fact of dissolution was published. In October the plaintiff, still ignorant of O.'s retirement, sold a second bill of goods. The old sign had remained up, and O. was temporarily in the store as clerk. It was held that plaintiff was a former dealer, entitled to actual notice.

§ 614. Yet one who sells to the firm, not on credit but for cash, is not such a dealer as is entitled to actual notice of dissolution.[4]

An agent of the firm in another city is a former dealer as much as one who credits it with goods or money instead of services, and is entitled to notice of the retirement of a partner to discharge him from liability for the continued employment.[5]

[1] Clapp *v.* Rogers, 12 N. Y. 283, 287–8 (aff. 1 E. D. Smith, 549).

[2] Lyon *v.* Johnson, 28 Conn. 1; and see Rose *v.* Coffield, 53 Md. 18 (36 Am. Rep. 389), and National Bank *v.* Norton, 1 Hill, 572; Williams *v.* Bowers, 15 Cal. 321. In Wardwell *v.* Haight, 2 Barb. 549, there had been but two previous transactions.

[3] Clapp *v.* Rogers, 12 N. Y. 283, 289.

[4] Clapp *v.* Rogers, 12 N. Y. 283 (aff'd, 1 E. D. Smith, 549). This case was approved in Merrill *v.* Williams, 17 Kan. 287, where it was said that there must be a *habit* of dealing, and the second sale was two years afterwards, and six months after dissolution; but it was also said that a cash sale was not extending a credit. But Hand, J., in Clapp *v.* Rogers, p. 288, says it may be questionable whether one who has made extensive cash sales is not entitled to notice, and that credit may mean confidence in the solvency and probity of the firm, and merely an agreement for forbearance.

[5] Austin *v.* Holland, 69 N. Y. 571; 25 Am. Rep. 246. But in Costello *v.* Nixdorff, 9 Mo. App. 501, it was held that an employee of the firm was in the same category as those who dealt with the firm for cash or non-dealers, and was not entitled to actual notice of the retirement of a partner, in order to be unable to hold him for a subsequent loan to the

§ 615. The former dealing must of course have been within the agency of the partner with whom it was held to give the other party any rights.

Thus in Spurck *v.* Leonard, 9 Ill. App. 174, it was held that a guaranty by one of the firm, though pursuant to the usage of the firm and the express authority of the other partners, did not constitute the party a dealer, because no actual notice is necessary to revoke such an authority. The second dealings were, however, two years after the earlier ones.[1]

In James *v.* Pope, 19 N. Y. 324, P. & Co. leased premises from the plaintiff for three years with a privilege of renewal for three more, and, during the original term, two of the partners retired, without notice to plaintiff, and the continuing partners formed a new firm with other persons and continued the occupancy for a year after the original term had expired. The retired partners were held not liable, on the ground that the plaintiff was bound to know who occupied his premises.[2]

In Pomeroy *v.* Coons, 20 Mo. 597, where C. & G. dissolved and became C., G. & Co., and that was dissolved, and a third firm was formed under the original name of C. & G., and G. of the latter firm gave a note to one who had dealt with the first firm, but had no notice of dissolution, it was held that there was no presumption, even in favor of a former customer, that the note was that of the first firm, and, unless given on account of that firm, did not bind the retired partners. The case is undoubtedly right in holding the note to be *prima facie* that of the existing firm, but I submit that to treat a break in the continuity of the first and third firms as an element against a former dealer is unwarranted except

continuing partners. Yet in Dailey *v.* Blake, 35 N. H. 9, one who procured work to be done by a firm, and was therefore its debtor and not its creditor, the work to be paid for in produce, was held entitled, if he trusted one of them with more work, to pay for it also in produce, in the absence of actual notice of dissolution.

[1] Hicks *v.* Russell, 72 Ill. 230. But in Princeton & Kingston Tp. Co. *v.* Gulick, 16 N. J. L. 161, the majority of the court possibly seem to consider that the assent of the other partners put the contract on a par with one strictly within the scope of the business; it was, however, a continuing guaranty, and there was no notice of dissolution.

[2] For the completion of a continuing or unfulfilled contract the retired partners continue liable, for such is their contract. § 626.

as a circumstance tending to show notoriety and hence knowledge of dissolution.

We have thus seen the meaning of the expression "former dealer," or "old customer." Its shortcomings as a phrase are obvious; it is too broad to include only those who give credit; yet the word creditor also is defective, because it would include the indorsee of the firm's note, or the assignee of a claim against it, who are creditors, and yet not "former dealers," as we have seen, for they did not deal with the firm.

§ **616. Mailing is not actual notice.**— The requirement of actual notice, unlike notice of protest of a note, is not satisfied by mailing a letter or circular, postage prepaid, to the customer's address, unless actually received by him.[1]

It has been held, however, to be cumulative evidence to be left to the jury;[2] or *prima facie* evidence;[3] or not alone sufficient, but *prima facie* evidence, sufficient, with slight corroborative proof, to justify a verdict finding notice.[4]

A practice of the former and of the new firm to send out monthly statements to customers does not tend to show notice of the change of firm, for a mere habit does not prove a fact.[5]

§ **617. Subscriber of paper.**— The fact that a customer of the firm is a regular subscriber to the paper in which the dissolution was advertised does not amount in law to actual notice, but is a circumstance to go to the jury in connection with other evidence that he had seen the notice; and as the fact of former dealing is for the jury, it follows that the fact of advertising in a newspaper cannot be excluded in evidence,[6] even though there is a mark around the no-

[1] Carmichael *v.* Greer, 55 Ga. 116; Meyer *v.* Krohn, 114 Ill. 574; National Shoe & Leather Bk. *v.* Herz, 89 N. Y. 629; Kenney *v.* Altvater, 77 Pa. St. 34; Haynes *v.* Carter, 12 Heisk. 7, where a marked paper was sent. *Contra*, see Hutchins *v.* Bank of Tenn. 8 Humph. 418.

[2] In Hart *v.* Alexander, 7 C. & P. 746; Austin *v.* Holland, 69 N. Y. 571 (25 Am. Rep. 246); Eckerly *v.* Alcorn, 62 Miss. 228.

[3] Meyer *v.* Krohn, 114 Ill. 574, 580.

[4] Kenney *v.* Altvater, 77 Pa. St. 34.

[5] Hall *v.* Jones, 56 Ala. 493.

[6] Hart *v.* Alexander, 2 M. & W. 484; 7 C. & P. 746; Vernon *v.* The Manhattan Co. 22 Wend. 183 (affg. 17 id. 524); Watkinson *v.* Bank of Penn. 4 Whart. 482 (34 Am. Dec. 521); Zollar *v.* Janvrin, 47 N. H. 324; Smith *v.* Jackman, 138 Mass. 143; Reilly *v.* Smith, 16 La. Ann. 31; Roberts *v.* Spencer, 123 Mass. 397;

tice;[1] and other circumstances, such as the situation of the parties, the length of time, the nature of the new transaction, etc., are all to be considered.[2]

§ 618. To non-dealers.— As to non-dealears the law requires the notice to be by publication. The sufficiency of the publication is not defined, for no inexorable rule requires it to be by advertisement in a newspaper.

The usual statement is that advertisement in the "Gazette" is sufficient. But this was not by reason of a general perusal of the Gazette, but from the fact of notification of its contents being largely in other newspapers.[3]

Hence it followed that notice in a paper which the party was in the habit of taking was equivalent to notice in the Gazette.[4]

Although advertisement in a common newspaper was not regarded as equal to one in the Gazette.[5]

In this country it is generally regarded sufficient and safest to insert the notice in a newspaper in the town where the partnership has its business;[6] and is always recommended.[7] Though an occasional case seems to hold that publication by advertisement is essential.[8]

But this is not generally an inflexible standard, and any other reasonable opportunity to know the fact may suffice

Rabe *v.* Wells, 3 Cal. 148; Treadwell *v.* Wells, 4 Cal. 260. *Contra*, that it is equivalent to express notice. Bank of S. Ca. *v.* Humphreys, 1 McCord, L. 388.

[1] Haynes *v.* Carter, 14 Heisk. 7.

[2] Martin *v.* Walton, 1 McCord, L. 16.

[3] 7 Jarm. on Conv. 89.

[4] Id.

[5] Rooth *v.* Quin, 7 Price, 193; Hendry *v.* Turner, 32 Ch. D. 355, 359.

[6] Shurlds *v.* Tilson, 2 McLean, 458; Mauldin *v.* Branch Bank, 2 Ala. 502, 507; Stewart *v.* Sonneborn, 49 Ala. 178; Nicholson *v.* Moog, 65 Ala. 471; Mowatt *v.* Howland, 3 Day, 353; Martin *v.* Searles, 28 Conn. 43; Ellis *v.* Bronson, 40 Ill. 455; Solomon *v.* Kirkwood, 55 Mich. 256; Polk *v.* Oliver, 56 Miss. 566; Deering *v.* Flanders, 49 N. H. 225, 228; Lansing *v.* Gaine, 2 Johns. 300 (3 Am. Dec. 422); Ketcham *v.* Clark, 6 Johns. 144, 147–8; Walton *v.* Tomlin, 1 Ired. L. 593; Palmer *v.* Dodge, 4 Oh. St. 21, 28 (62 Am. Dec. 271); Watkinson *v.* Bank of Pennsyl. 4 Whart. 482 (34 Am. Dec. 521); Martin *v.* Walton, 1 McCord (S. Ca.). L. 16; Prentiss *v.* Sinclair, 5 Vt. 149 (26 Am. Dec. 288); Darling *v.* Magnan, 12 Up. Can. Q. B. 471.

[7] Mitchum *v.* Bank of Ky. 9 Dana, 166, and cases cited.

[8] Southwick *v.* McGovern, 28 Iowa, 533; City Bank of Brooklyn *v.* McChesney, 20 N. Y. 240, criticised in Lovejoy *v.* Spafford, 93 U. S. 430.

here. But publication may be otherwise than by advertisement. This was recognized in the above cases. Thus if the dissolution is made as notorious as the partnership, this of course would be sufficient. The question of reasonableness of the notice depends on the nature of the business and extent of its dealings and must be measured by a reasonable regard to circumstances. It is a question for the jury and is one of duty and diligence, and must be of sufficiency to advise the public. See more particularly the discussions in the cases cited below.[1]

Merely declaring the dissolution before witnesses, and its being generally known in the neighborhood, would not be sufficient.[2]

Nor where the dissolution of a partnership in running a cotton factory at a small place is notified by posting notices in four or five places in the town. A bank in another town twelve miles distant took a note of the firm subsequently made, and a verdict for the bank was not set aside, for the dealings of such a firm cannot be supposed to be confined to its town.[3]

Whereas, notice by the retiring partner to all the old customers, and a general knowledge of the dissolution among business men of the locality, is evidence of publication.[4]

That a public notice or publication of some kind is necessary, even as to non-dealers, to relieve parties from liability for each other's acts after dissolution, is held in the following cases in addition to those more particularly noticed in this chapter.[5]

[1] Vernon *v.* The Manhattan Co. 22 Wend. 183; Lovejoy *v.* Spafford, 93 U. S. 430; Mauldin *v.* Branch Bank, 2 Ala. 502; Mitchum *v.* Bank of Ky. 9 Dana, 166; Grinnan *v.* Baton Rouge Co. 7 La. Ann. 638; Solomon *v.* Kirkwood, 55 Mich. 256; Polk *v.* Oliver, 56 Miss. 566; Deering *v.* Flanders, 49 N. H. 225, 228; Martin *v.* Walton, 1 McCord, L. (S. Ca.) 16; Irby *v.* Vining, 2 id. 379.

[2] Bradley *v.* Camp. 1 Kirby (Conn.), 77 (1 Am. Dec. 13). And see Pursley *v.* Ramsey, 31 Ga. 403.

[3] Mitchum *v.* Bank of Ky. 9 Dana, 166.

[4] Lovejoy *v.* Spafford, 93 U. S. 430.

[5] Martin *v.* Searles, 28 Conn. 43; Southern *v.* Grim, 67 Ill. 106; Backus *v.* Taylor, 84 Ind. 504; Southwick *v.* McGovern, 28 Iowa, 533; Rose *v.* Coffield, 53 Md. 18, 23 (36 Am. Dec. 389); Stimson *v.* Whitney, 130 Mass. 591; Vernon *v.* The Manhattan Co. 22 Wend. 183; Graves *v.* Merry, 6 Cow. 701, 705 (16 Am. Dec. 471); Tudor *v.* White, 27 Tex. 584; White *v.* Tudor, 24 id. 639. The only de-

In Southwick *v.* McGovern, 28 Iowa, 533, the plaintiff had never heard of the firm until after dissolution, but learned of it before he sold the goods, and the publication was after the sale.[1]

§ 619. Substance of the publication.—In Vice *v.* Fleming, 1 Young & J. 227, a notice by a partner that he had sold his shares in the concern to others named, who would in future be the paymasters, was held, *per se*, not sufficient because not absolute, nor equivalent to a refusal to be further responsible, and that the sufficiency of it must be submitted to the jury.

In Southwick *v.* Allen, 11 Vt. 75, it was held that although a publication to the effect that the firm was discontinued, *i. e.*, not stating a discontinuance of its business, would import a dissolution, yet that a notice that the "business" would thereafter be done under the name of A., B. & Co. is not notice of the dissolution of the firm of A. & B., so as to render void a subsequent note by A. in the name of A. & B. against B.

In Clark *v.* Fletcher, 96 Pa. St. 416, it was held that merely omitting the name of a person from the advertised list of directors was at most a notice that he was no longer an active partner, but not that he had retired.[2]

A publication to the effect that one partner will not be liable for any future contracts of the firm merely announces a change in the mode of doing business and not a dissolution.[3]

And a notice advertising a sale of the firm's goods on account of dissolution, without stating whether it was past or prospective, was criticised in Hammond *v.* Aiken, 3 Rich. Eq. (S. Ca.) 119.

§ 620. By whom.—Publication as an editorial notice, without signatures, may be as valid as an advertisement purporting to issue by authority of the partners over their signatures.[4] And a notice may be given by any agent of the firm and the firm may adopt it.[5]

§ 621. Knowledge equivalent to notice; evidence of.—Knowledge of dissolution on the part of a former dealer is

cisions that a non-dealer is not entitled to any kind of notice are two in Kentucky: Kennedy *v.* Bohannon, 11 B. Mon. 119; Gaar *v.* Huggins, 12 Bush, 259.

[1] But compare §§ 608, 609.

[2] S. P. Uhl *v.* Harvey, 78 Ind. 26.

[3] Johnston *v.* Dutton, 27 Ala. 245.

[4] Solomon *v.* Lockwood, 55 Mich. 256; Young *v.* Tibbitts, 32 Wis. 79.

[5] Stewart *v.* Sonneborn, 51 Ala. 126.

sufficient. Actual notice is not necessary in such case, for he cannot have been misled by want of it. It makes no difference how the knowledge reaches him, so that he gets it or is put on inquiry. The question is, had he knowledge; not how he got it.[1] The burden to show this is on the partner.[2]

Such knowledge on the part of former dealers may be inferred from circumstances.[3]

As where the partnership was for a single transaction, as to buy a quantity of cotton.[4]

So bills and accounts rendered by plaintiff to the continuing partners alone is strong evidence of knowledge,[5] or his affidavit in proof of a claim in bankruptcy against the other partner alone.[6]

Where the plaintiff saw the published notice, the court said it must be inferred that he read it.[7] Even casual conversations on the street, which the parties may not clearly remember, cannot be excluded from the jury.[8] Intimacy between the families is a circumstance.[9] Even that the publication was inserted next to the plaintiff's advertisement was held to be a circumstance.[10]

Where an attorney employed by a firm brought a suit for them, describing one of the plaintiffs as late partner, this is evidence that he knew of the dissolution.[11]

In Hart *v.* Alexander, 2 M. & W. 484; 7 C. & P. 746, A., B., C. & D. were partners in Calcutta, and A. retired and came to England, and, becoming a candidate for a seat in the directory of the East India Co., published addresses in some thirteen newspapers to

[1] Gathright *v.* Burke, 101 Ind. 590; Ketcham *v.* Clark, 6 Johns. 144, 148.

[2] Uhl *v.* Bingaman, 28 Ind. 365.

[3] Mauldin *v.* Branch Bank, 2 Ala. 502; Coddington *v.* Hunt, 6 Hill, 595; Pope *v.* Risley, 23 Mo. 185; Martin *v.* Walton, 1 McCord, L. 16; Irby *v.* Vining, 2 id. 379; Laird *v.* Ivens, 45 Tex. 621; Dickinson *v.* Dickinson, 25 Gratt. 321; Gilchrist *v.* Brande, 58 Wis. 184.

[4] Williams *v.* Connor, 14 S. Ca. 621.

[5] Hall *v.* Jones, 56 Ala. 493; Smith *v.* Jackman, 138 Mass. 143.

[6] Roberts *v.* Spencer, 123 Mass. 397.

[7] Prentiss *v.* Sinclair, 5 Vt. 149; (26 Am. Dec. 288). See Bank *v.* Galliott, 1 McMull. 209 (36 Am. Dec. 256).

[8] Davis *v.* Keyes, 38 N. Y. 94; Holtgreve *v.* Wintker, 85 Ill. 470. In Schlater *v.* Winpenny, 75 Pa. St. 321, it was said that notice by a partner to plaintiff, that the partnership would expire in one year, was sufficient; but it is submitted that this is not proper notice.

[9] Hixon *v.* Pixley, 15 Nev. 475.

[10] Lyon *v.* Johnson, 28 Conn. 1.

[11] Cahoon *v.* Hobart, 38 Vt. 244.

stockholders, that his connection with mercantile concerns in India had ceased. Two of these papers were taken in a reading room of a town where a creditor of the old firm resided, and who had continued in communication with them, and who sent a power of attorney to prove a debt against the firm, naming the present partners. Lord Abinger speaks of the probability that the creditor would take an interest in Indian affairs, and that the retirement of a partner in an extensive firm would be known to investors in Indian securities, and the court held there was evidence of knowledge of the dissolution.

Registration of a mortgage or deed or other record from the continuing to the retiring partner on partnership property does not, as a matter of law, put the creditor on inquiry.[1]

That the creditor with reasonable diligence would have ascertained the fact is not sufficient unless the circumstances were such as to put him on inquiry.[2]

The question of notice being one of fact, it is error to charge the jury that if the partners ceased business, closed the store and kept it closed, and one moved away, and this was brought home to the plaintiff, this will charge him with notice, for though these facts may be sufficient they are not notice *per se*.[3]

§ 622. Notoriety as a substitute for notice.— One who actually derives notice of dissolution from public notoriety is sufficiently notified.[4] But whether the fact of general reputation or of notoriety — which is not admissible as evidence to prove a partnership — is evidence which can be introduced as showing knowledge of dissolution requires a comparison of the authorities.

In Goddard *v.* Pratt, 16 Pick. 412, it was held not thus admissible as a substitute for publication, to show that signature in the firm name meant the signature of a corporation into which it had been converted; and in Pitcher *v.* Barrows, 17 Pick. 361 (28 Am. Dec. 306), it was said that the notoriety could not be shown as evi-

[1] Zollar *v.* Janvrin, 47 N. H. 324; Pitcher *v.* Barrows, 17 Pick. 361 (28 Am. Dec. 306); Spaulding *v.* Ludlow Woolen Mill, 36 Vt. 150.

[2] Zollar *v.* Janvrin, 47 N. H. 324, 328.

[3] Dickinson *v.* Dickinson, 25 Gratt. 321. See Holt *v.* Simmons, 16 Mo. App. 97.

[4] Solomon *v.* Kirkwood, 55 Mich. 256, 261; Hart *v.* Alexander, 2 M. & W. 484; 7 C. & P. 746.

dence from which the jury could infer notice. But this ruling is generally limited. Thus in Lovejoy *v.* Spafford, 93 U. S. 430, a distinction was made against Pitcher *v.* Barrows, as being a mere unauthorized rumor, and it was held that there was no inflexible rule in favor of newspaper publication, and that any other notorious announcement would do, and where notoriety resulted from the efforts of the retired partner to notify every one, and that businen generally, where the claimant resided, knew of the dissolution, that these facts should not be excluded from the jury.[1]

In Treadwell *v.* Wells, 4 Cal. 260, where the plaintiff, a former dealer to whom no actual notice had been sent, took the newspaper in which the publication was, the fact of publication in other papers, which he did not take, was admitted in evidence as raising a presumption of knowledge from general notoriety.

In Martin *v.* Searles, 28 Conn. 43, it was ruled that some degree of notoriety would make no difference without a showing that plaintiff had some knowledge of it, since what is generally known may not be universally known.[2]

§ 623. Notice by change of name. — If the transaction on which retired partners are sought to be held is in a name so far different from the name of the former firm as to show that such partners are no longer in the firm, this is sufficient notice of dissolution. And so if the person seeking to hold the retired partners or the old firm on an unauthorized contract in its name, has known of such change of name, this is evidence of actual notice.[3]

In Barfoot *v.* Goodall, 3 Camp. 147, the dissolution of a banking firm was held to be known to those who have used the checks of the new firm, printed in the new name.

But the name must indicate the retirement of the particular partner sought to be held, for otherwise, though it be

[1] S. P. Holdane *v.* Butterworth, 5 Bosw. 1.

[2] Notoriety was considered an element also in Hixon *v.* Pixley, 15 Nev. 475. See also on this subject Shaffer *v.* Snyder, 7 S. & R. 503. Knowledge on the part of other business acquaintances seems to have been an element also in Coddington *v.* Hunt, 6 Hill, 595. Neighborhood notoriety will not, of course, affect a non-resident of the state with notice. Southwick *v.* Allen, 11 Vt. 75.

[3] Holdane *v.* Butterworth, 5 Bosw. 1, 10; Irby *v.* Vining, 2 McCord, L. 379, of a change from Vining & Wilson to Stewart, Vining & Co.

notice of dissolution of the identical partnership, it is also notice of the formation of a new one, in which all the former members may be presumed to continue.

In Howe *v.* Thayer, 17 Pick. 91, a change of a firm name from C. & F. to N. & F. is not notice of the retirement of any member but C., and is therefore not notice that F. had also retired. Hence, also, actual notice of the retirement of one partner is not notice of the retirement of another.

In American Linen Thread Co. *v.* Wortendyke, 24 N. Y. 550, it was held that a former dealer with "Wortendyke Bros." is not put upon inquiry by a change to "Wortendyke Bros. & Co.," but is warranted in assuming that all the old members continued.

In Coggswell *v.* Davis, 65 Wis. 191, a change in the name from "Davis Creamery" to "Beloit Creamery," and a change in the signature to checks from "Davis Creamery, per W. J. Davis," to "W. J. Davis" simply, gave no notice of the retirement of a known partner.[1]

In Newcomet *v.* Brotzman, 69 Pa. St. 185, Samuel N., of N. & Co., put his son, W. W. N., in the firm as manager. He afterwards bought out the whole firm and gave it to his son, the former partner remaining as clerk, but no notice of dissolution was given. It was held that the fact of the son making payments to a former dealer on subsequent sales by checks signed W. W. N., though "strong and cogent evidence of the change," and though very careless in the plaintiff not to have observed it, is yet not conclusive, especially as there was the same manager and the same clerks about, and the plaintiff may have believed the son was giving his personal checks for the firm's debt, and that it was a question for the jury whether this was notice of Samuel N.'s retirement.

In Clark *v.* Fletcher, 96 Pa. St. 416, it was held where the advertised list of directors of a firm called the "Titusville Savings Bank" contained F.'s name, subsequently dropping the name from the advertisement was not notice of his withdrawal, for it might be notice merely that he was no longer an active partner.

In Robinson *v.* Worden, 33 Mich. 316, a measurer's reports to plaintiff to enable him to settle with third persons, in which the

[1] And see Simonds *v.* Strong, 24 Vt. 642, where S. C. & Co. became C. S. & Co. on the retirement of W.

mill is described under the name of the continuing partner alone, is evidence of plaintiff's knowledge of a dissolution.

Where Smith and Patterson were partners as Patterson & Co., and Patterson retired, Smith continuing as Smith & Co., but Patterson remaining in the store as managing clerk, the jury were held justified in finding him liable.[1]

So if the note sued on is signed "in liquidation," this may import dissolution, and if so, notice thereof may be inferred from it.[2]

§ 624. Long interval of time or space.— A long interval of time between the former dealing and the one on which the old partners are sought to be held, or between the latter and dissolution, is a circumstance to be considered in determining whether the plaintiff was misled by want of notice in connection with other circumstances.

In Coddington *v.* Hunt, 6 Hill, 595, the note in suit, of which no publication was made, was made two years after a dissolution, and this, with the fact of notoriety, and the partners having gone into business separately on different streets, was held to warrant the jury in finding against one not a former dealer.

While in Simonds *v.* Strong, 24 Vt. 642, an interval of two years since dissolution was held not sufficient to exonerate a retired partner from liability on a note given by the successor firm, the names being about the same; and so where the interval was one year.[3]

In Treadwell *v.* Wells, 4 Cal. 260, the time was four months. The court say that if there is a lapse of time sufficient to put a reasonable man on his guard, the jury could find the party not to be an old dealer.

In Farmers' & Mech. Bank *v.* Green, 30 N. J. L. 316, where a firm dissolved in 1849, without publication, and in 1860 one of the former partners made a note in a different town in the firm name, and plaintiff, who had never heard of the firm, discounted it, the jury were held justified in finding in favor of the other partner.[4]

[1] Jordan *v.* Smith, 17 Up. Can. Q. B. 590.

[2] Burr *v.* Williams, 20 Ark. 171; Speake *v.* Barrett, 13 La. Ann. 479; Haddock *v.* Crocheron, 32 Tex. 276 (5 Am. Rep. 244).

[3] Princeton & Kingston Turnpike Co. *v.* Gulick, 16 N. J. L. 161. *Contra*, Spurck *v.* Leonard, 9 Ill. App. 174 (two years), and Long *v.* Garnett, 59 Tex. 229 (two years).

[4] Time was also an element in Holt-

In Clapp *v.* Upson, 12 Wis. 492, where a firm in Mobile, Ala., in 1855, customers of plaintiff, a New York house, were broken up by a mob and dissolved, and one of the partners went into business again in Milwaukee, Wis., in the old name, and bought goods of the plaintiff, who had heard of the mob but not of the dissolution, it was held that the distance and other circumstances were sufficient to put plaintiff on inquiry.

§ 625. To whom to give notice.— Notice need not be given to each member of a firm of customers of the dissolved firm, nor is a debtor firm obliged to be aware of every combination his creditors or each member of the creditor firm may make; but a notice to any one of the firm or to an authorized agent is sufficient.

Thus, notice to plaintiff's book-keeper, who had always deposited for him, of the addition of new partners in the banking firm, was held notice to plaintiff, so that a plea of non-joinder of the new partners was good.[1]

But going into a large store, such as that of A. T. Stewart & Co., and notifying some of the numerous clerks or agents there, is no notice at all unless such agent is shown to represent his principal in that particular.[2]

Where a payee firm, when receiving a note, knew that the maker firm had dissolved, and one of the payee firm was president of the bank which bought the note, the bank was held to have notice.[3] But where a director of a corporation saw a notice of dissolution in a newspaper, this was held not notice to the board of directors, though it may be otherwise had such director been deputed to act as to the renewal of the note sued upon, or been requested to carry notice to the board.[4]

Where a partnership is a customer of defendants, and one of its members retires but the rest continue without change of name, business or location, they, though a new firm, are former dealers of

greve *v.* Wintker, 85 Ill. 470 (three years); Lyon *v.* Johnson, 28 Conn. 1; Irby *v.* Vining, 2 McCord, L. 379 (two years); Spurck *v.* Leonard, 9 Ill. App. 174 (two years). See Hixon *v.* Pixley, 15 Nev. 475.

[1] Page *v.* Brant, 18 Ill. 37.

[2] Stewart *v.* Sonneborn, 49 Ala. 178.

[3] Easter *v.* Farmers' Nat'l Bk. 57 Ill. 215. See § 394.

[4] National Bank *v.* Norton, 1 Hill, 572. This case is approved in President *v.* Cornen, 37 N. Y. 320, 323, as being notice to the agent of an agent, the board itself being the agent.

defendant and entitled to actual notice of dissolution.[1] But a new firm which the retiring partner forms with third persons is not a former dealer, for a debtor is not obliged to keep track of new relations into which its creditors may enter.[2]

Notice to the principal is sufficient without notice to the agent who dealt with the firm. Thus, where "Louis Snider" had been a customer of a firm, but never "Louis Snider's Sons," and the latter firm sold them goods after dissolution and in ignorance of it, it was held that the firm were not obliged to notify "Louis Snider's Sons" nor their agent, who had been Louis Snider's agent.[3]

§ 626. On what contracts.— To hold a retiring partner where no notice was given, the subsequent contract must, of course, have been one on which he could have been bound if a partner.

Thus, he cannot be held on a contract not in the usual scope of the business,[4] or on the renewal of a contract of guaranty;[5] nor on one in which the creditor has given credit exclusively to the contracting partner and not to the firm.[6]

In Washburn *v.* Walworth, 133 Mass. 499, a partner retiring before the day when taxes are assessed was held not liable for taxes by reason of not giving notice of dissolution, for a tax is not a contract, and no credit to any one in particular is given by levying it.

If a partner retires without notice and a new partner comes in, and a former dealer without notice sells to the new firm, both firms cannot be liable, and the creditor must elect which to pursue.[7]

Where a commercial partnership dissolved without notice and then established a planting partnership, a creditor of the latter firm not a former dealer cannot hold them as commercial partners.[8]

Where a partner signed notes before dissolution and issued them

[1] Deering *v.* Flanders, 49 N. H. 225, 229.

[2] Gaar *v.* Huggins, 12 Bush, 259.

[3] Richardson *v.* Snider, 72 Ind. 425 (37 Am. Rep. 168).

[4] Whitman *v.* Leonard, 3 Pick. 177; Hicks *v.* Russell, 72 Ill. 230.

[5] Spurck *v.* Leonard, 9 Ill. App. 174.

[6] Le Roy *v.* Johnson, 2 Pet. 186, 199-200; Pratt *v.* Page, 32 Vt. 13; Dowzelot *v.* Rawlings, 58 Mo. 75; or if the outgoing partner acts professedly for himself, as where he draws on the firm, Taylor *v.* Young, 3 Watts, 339.

[7] Scarf *v.* Jardine, L. R. 7 App. Cas. 345.

[8] Stewart *v.* Caldwell, 9 La. Ann. 419.

after dissolution and publication, they were held to be notes only from the date of issue.[1]

§ 627. **Pleading and evidence.**—A former dealer, in order to rebut proof of actual notice of dissolution, cannot show that other dealers had not received notice, for the evidence does not tend to show want of notice on his part.[2]

In an action on a note against a firm, proof of dissolution and publication of the fact was held admissible under the general issue, not being matter of confession and avoidance.[3]

§ 628. **Holding out after.**— If, after dissolution, even with due notice, the partners hold themselves out as still being partners, they are liable on new contracts on that ground.[4]

[1] Lansing *v.* Gaine, 2 Johns. 300 (3 Am. Dec. 422); Ga'e *v.* Miller, 54 N. Y. 536. See Smyth *v.* Strader, 4 How. 404, of antedated notes; but see Lewis *v.* Reilly, 1 Q. B. 349.

[2] Coggswell *v.* Davis, 65 Wis. 191, 203; Howe *v.* Thayer, 17 Pick. 91.

[3] In Whitesides *v.* Lee, 2 Ill. 518, followed in Kettelle *v.* Wardell, id. 592; Washburn *v.* Walworth, 133 Mass. 499. A certificate of the publishers of a newspaper is not legal evidence of publication. Boyd *v.* McCann, 10 Md. 118.

[4] Spaulding *v.* Ludlow Woolen Mill, 36 Vt. 150; Amidown *v.* Osgood, 24 Vt. 278 (58 Am. Dec. 171); Spears *v.* Toland, 1 A. K. Mar. 203; Williams *v.* Rogers, 14 Bush, 776, 787; Lacy *v.* Woolcott, 2 Dow. & Ry. 458; Hixon *v.* Pixley, 15 Nev. 475; Ellis *v.* Bronson, 40 Ill. 455; Freeman *v.* Falconer, 44 N. Y. Superior Ct. 132; Speer *v.* Bishop, 24 Oh. St. 598; Richards *v.* Hunt, 65 Ga. 342; Richards *v.* Butler, 65 id. 593; *Re* Krueger, 2 Low. 66; 5 Bankr. Reg. 439; Jordan *v.* Smith, 17 Up. Can. Q. B. 590, noticed under § 623.

CHAPTER IV.

CONTRACTS OF DISSOLUTION.

§ 629. Debts due by or from retiring partner extinguished by his sale.— A frequent source of dispute, where one partner has assumed the debts and bought out from the retiring partner all the assets, book accounts, credits, notes, etc., of the concern, and where there is upon the books an account standing against the selling partner, or a note made by him to the firm, is whether the buyer has a right to collect this apparent debt due from the seller to the firm. The solution of this question is easily arrived at when we consider that the share of a partner in a concern is not an interest in any specific chattel or asset, but only in a balance after all debts are paid, and until then a partner is not a debtor or creditor of the firm or of his copartners for any particular item, which would enter into such an account and diminish or increase the share, and a sale of the interest of a partner is a sale of a resultant and unliquidated balance, deducting the debt; hence, it follows that such a sale extinguishes all accounts upon the books standing against the seller.[1]

[1] Beckley *v.* Munson, 22 Conn. 299; King *v.* Courson, 57 Ga. 11; Brewster *v.* Mott, 5 Ill. 378; Coffing *v.* Taylor, 16 Ill. 457; Norman *v.* Huddleston, 64 id. 11; Headley *v.* Shelton, 51 Ind. 388; Hasselman *v.* Douglass, 52 id. 252; Over *v.* Hethering-ton, 66 Ind. 365; Carl *v.* Knott, 16 Iowa, 379; Murdock *v.* Mehlhop, 26 id. 213; Wilson *v.* Soper, 13 B. Mon. 411; Conwell *v.* Sandidge, 5 Dana, 210; Conwell *v.* Sandidge, 8 Dana, 273; Wiggin *v.* Goodwin, 63 Me. 389; Farnsworth *v.* Whitney, 74 id. 370; Trump *v.* Baltzell, 3 Md. 295, 303; Lesure *v.* Norris, 11 Cush. 328; Stoddard *v.* Wood, 9 Gray, 90; Farnsworth *v.* Boardman, 131 Mass. 115; Gardiner *v.* Fargo, 58 Mich. 72; Sweet *v.* McConnel, 2 Neb. 1; Van Scoter *v.* Lefferts, 11 Barb. 140; Baldwin *v.* Bald, 48 N. Y. 673; Albright *v.* Voorhies, 36 Hun, 437; Klase *v.* Bright, 71 Pa. St. 186; Woodward *v.* Winfrey, 1 Cold. 478. *Contra*, Jones *v.* Bliss, 45 Ill. 143. The case of Finley *v.* Finley, 96 N. Y. 663 (reversing Finley *v.* Fay, 17 Hun, 67), was de-

And the same reasons apply to extinguish a claim standing on the books in favor of the retiring partner against the firm.[1]

§ 630. —— illustrations.— In Wright *v.* Troop, 70 Me. 346, a former partnership was, by agreement, continued on terms of giving to the plaintiff a salary of $1,500 and also one-half the profits. Afterwards the partnership was dissolved by agreement, the plaintiff assigning to his copartner all debts and sums owing to the plaintiff; the buyer, defendant, assuming all debts. This cancels the agreement to pay salary.

Nor are individual debts between the partners affected; hence if a partner indebted to the firm has given to his copartner a note for his proportion of the debt, this note not being partnership property, but the private property of payee, it being in effect a division *pro tanto* of partnership property, is not extinguished by the payee purchasing the maker's interest and assuming debts.[2]

In Patterson *v.* Martin, 6 Ired. L. 111, a partner, for advances by him to the firm, took the note of his copartner indorsed by a third person; he afterwards sold his interest to the copartner, who agreed to pay all debts. This settlement ended such claim as a debt of the firm.

If a partner bequeaths his whole interest in the firm to his copartner, the latter cannot collect from his estate a debt due by him to the firm, if his interest in the assets is sufficient to pay it.[3]

So where one partner sells out all his "interest" in the firm's property to his copartner, and the title to part of the property, a mill, failed entirely, proving to belong to a third person, as the continuing partner's knowledge of the title was the same as the selling

cided on a subsequent accounting and agreement to pay the balance found due after sale of interest and assumption of debts.

[1] Kimball *v.* Walker, 30 Ill. 482; Wright *v.* Troop, 70 Me. 346; Lambert *v.* Griffith, 50 Mich. 286; Gibbs *v.* Bates, 43 N. Y. 192; Patterson *v.* Martin, 6 Ired. L. 111. See, also, Drake *v.* Williams, 18 Kan. 98. *Contra*, see Hobart *v.* Howard, 9 Mass. 304, probably defectively reported. In Woodward *v.* Francis, 19 Vt. 434, a retiring partner's relinquishment of all his claims to the firm's stock and demands was held to be no defense against his claim for balance, on the ground that such claim was not on the firm, but on his copartner.

[2] Merrill *v.* Green, 55 N. Y. 270. And see Durham *v.* Hartlett, 32 Ga. 22; Chaffin *v.* Chaffin, 2 Dev. & Bat. Eq. 255.

[3] Painter *v.* Painter, 68 Cal. 395.

partner's, and the latter sold only his interest, there is no failure of consideration in the agreement of purchase.[1]

An agreement that the personal accounts of the partners shall stand due the concern in the same manner as the accounts of third parties is not equivalent to an agreement by the seller of his interest to pay the amount to the buyer, for, though the account is thus made an asset, the seller did not sell the assets but only his interest, which is his share in a balance less his indebtedness, and the clause will be considered as inserted to make the parties liable for interest *inter se*.[2]

§ 631. **Sale to other than continuing partners.**— Where the sale by the retiring partner is to a third person, his debt to the firm is not extinguished, and the continuing partner's lien on the entire assets is prior to the buyer's purchase money mortgage to the selling partner.[3] And if one of three partners buys out the interest of one of the others, the third partner's right against the share sold is not affected; and if he paid a debt of the firm he is entitled, on settlement of the concern, to a credit of two thirds of it against the buying partner.[4]

§ 632. **Debts not on the books.**— Although claims against each other are agreed to be mutually released by the terms of sale, yet such settlement is on the supposition that the books have been correctly kept; and if a charge against a selling partner is balanced by an improper credit, the buying partners can recover the amount from him with interest from the time of filing the bill.[5]

Yet it has been held that the buyer cannot recover from the seller the debt not charged on the books, and that his remedy is to rescind and not to bring an action at law as for an adjusted item.[6]

[1] Klase *v.* Bright, 71 Pa. St. 186.

[2] Murdock *v.* Mehlhop, 26 Iowa, 213; Wiggin *v.* Goodwin, 63 Me. 389.

[3] Conwell *v.* Sandidge, 8 Dana, 273.

[4] Kendrick *v.* Tarbell, 27 Vt. 512.

[5] Trump *v.* Baltzell, 3 Md. 295; Brewster *v.* Mott, 5 Ill. 378; Tomlinson *v.* Hammond, 8 Iowa, 40; Case *v.* Cushman, 3 W. & S. 544; McLucas *v.* Durham, 20 S. Ca. 302; Kintrea *v.* Charles, 12 Grant's Ch. (Up. Can.) 117. And see as sustaining the right to sue, Baldwin *v.* Bald, 48 N. Y. 673.

[6] Farnsworth *v.* Whitney, 74 Me. 370.

Where the assumption of debts is to include all liabilities, whether on the books or not, a debt due the firm from the selling partner, not on the books, is, in the absence of fraud or warranty, extinguished.[1]

§ 633. **What passes by a sale of a share.**— If the contract of sale manifests an intention to convey the entire interest in the business it will carry the interest in the accounts and debts which are upon the books, but such an intention is not shown by a sale of specific property of the firm.

Thus, a sale by a partner of all his interest in the business and everything pertaining to it includes the outstanding accounts and also a sum of money on deposit in his name as agent of the firm.[2]

A sale of "all the notes and accounts due said firm" and all interest in the store to the other partner, who agreed to pay the debts, carries a balance in bank standing to the credit of the firm, and oral testimony to the contrary is not admissible.[3]

But a sale of his whole interest in the brewery, consisting of the stock on hand, personal property and real estate, is not a sale of his whole interest in the partnership, and hence does not include money on hand or on deposit, or accounts or bills receivable;[4] and a balance of a bank account not then known to exist passes to the new firm;[5] and if a person acting as agent to collect and sell forms a partnership in the business, which is continued in his name, the firm has the right to collect accounts of previous sales, and therefore money collected on such sales and put in bank in such partner's name is deemed a partnership fund to be administered by the surviving partner, and not an individual debt.[6]

ASSUMPTION OF DEBTS BY CONTINUING PARTNER.

§ 634. **By implication.**— Where a partner retires with the consent of the rest, or sells out his interest to his copartners, but makes no bargain as to the debts, the continuing part-

[1] Hasselman *v.* Douglass, 52 Ind. 252 (two judges dissent).

[2] Albright *v.* Voorhies, 36 Hun, 437.

[3] Burress *v.* Blair, 61 Mo. 133.

[4] Garnier *v.* Gebhard, 33 Ind. 225.

[5] Cram *v.* Union Bank of Rochester, 4 Keyes, 558; 1 Abb. App. Dec. 461; 42 Barb. 426.

[6] Commercial Nat'l Bank *v.* Proctor, 98 Ill. 558. As to when contracts and debts owing to the old firm can be sued upon by the new, see §§ 1019–1021.

ners are impliedly bound to save him harmless to the extent of the assets they have received, and if they do not do so, and he is compelled to pay a debt, he can compel them to reimburse him to that extent.[1]

But more frequently the debts are assumed by the continuing partners where they design remaining in the business, and an agreement to that effect need not be in writing. It is not a collateral promise to pay the debts of another.[2]

The fact that the bond to indemnify against debts is dated several days later than the sale and delivery by the retiring partner, if on previous request, and as part of the original contract, is not on past consideration.[3]

On the purchase of the interest of a retiring partner by continuing partners, their note or promise to pay the price agreed upon can be sued on in an action at law, for the purchase is not a partnership transaction, and is perhaps after dissolution, or it may be regarded as a balance struck and promise to pay it;[4] or proved in bankruptcy.[5]

In *Re* White, 4 Ont. App. 416, the creditors of a firm of three agreed to extend the time on condition that G., one of the partners, would retire from the firm. This was done; but at such dissolution $1,198 stood on the books to G.'s credit, but nothing was said as to it. G. claimed this amount. It was held that the rights of creditors to go on all the assets, and their taking the notes of the other two partners, shows that they looked to the assets, and no presumption arose of an intention to diminish the security by allowing the retiring partner to claim as creditor, and hence the doctrine that a retiring partner can sue at law for the balance due him is distinguishable.

[1] Peyton *v.* Lewis, 12 B. Mon. 356; Hobbs *v.* Wilson, 1 W. Va. 50. See Lee *v.* Fontaine, 10 Ala. 755 (44 Am. Dec. 505).

[2] Lee *v.* Fontaine, 10 Ala. 755 (44 Am. Dec. 505); Haggerty *v.* Johnston, 48 Ind. 41; Vanness *v.* Dubois, 64 Ind. 338; Hunt *v.* Rogers, 7 Allen, 469; Brazee *v.* Woods, 35 Tex. 302.

[3] Robertson *v.* Findley, 31 Mo. 384. As to what constitutes an agreement by the creditor to look to the continuing partner alone, and release the outgoing partner, see NOVATION, §§ 502–531.

[4] Clark *v.* Fowler, 57 Cal. 142; Edens *v.* Williams, 36 Ill. 252; Reynolds *v.* Patrick, 52 Mich. 590. Compare, also, §§ 880, 892.

[5] *Ex parte* Hall, 3 Deac. 125; *Ex parte* Grazebrook, 2 Deac. & Ch. 186.

§ 635. By contract or bond.—The contract by which the debts are to fall upon the new firm may assume a variety of shapes—it may be to pay, or it may be merely that the retiring partner shall suffer no harm at the hands of creditors; and the question then arises, what is a breach of such contract, or whether the retiring partner can sue upon it without first having paid debts.

It may be laid down as a general rule, that to recover on a contract of indemnity merely, and nothing more, damage must be shown to have arisen from the breach. But that if the contract is an affirmative one to do a certain thing or pay a certain debt, the fact that the promisee has not been damnified is no defense, and the measure of damages is the amount agreed to be paid or the proper expense of doing the agreed thing.

If the covenant by the continuing partners or the new firm with the retiring partner be that the former will pay the debts, and they do not do so, it is perfectly clear that the retiring partner, after paying a debt, can recover the amount from them in an action at law, for no accounting or adjustment of the partnership affairs is necessary.[1]

The retiring partner may pay voluntarily or on demand, without compulsion, upon non-payment by the obligors.[2] And the same rule applies if the covenant be merely to save harmless; if the retiring partner has to pay a debt he can recover reimbursement in an action at law.[3]

If all the partners have given a note to one partner, and one of the debtor partners retires, and the others, including the payee, give him a bond to pay all the debts, this contract is merely a covenant not to sue, and although, as between the partners, it may be

[1] Saltoun *v.* Houstoun, 1 Bing. 433; Clark *v.* Clark, 4 Porter (Ala.), 9; Hinkle *v.* Reid, 43 Ind. 390; Vanness *v.* Dubois, 64 id. 338; Myers *v.* Smith, 15 Iowa, 181; Peyton *v.* Lewis, 12 B. Mon. 356; Hunt *v.* Rogers, 7 Allen, 469; Clough *v.* Hoffman, 5 Wend. 499; Hupp *v.* Hupp, 6 Gratt. 310; Jewell *v.* Ketchum, 63 Wis. 628; Hobbs *v.* Wilson, 1 W. Va. 50; Gray *v.* McMillan, 22 Up. Can. Q. B. 456.

[2] Hunt *v.* Rogers, 7 Allen, 469; Nichols *v.* Prince, 8 id. 404.

[3] See § 639, and Bunton *v.* Dunn, 54 Me. 152.

given the effect of a release to avoid circuity of action, it will not have this effect as a defense to the action of an assignee of the note.[1]

§ 636. Covenant to pay debts.— If the contract be to *pay* the debts, it is broken by mere non-payment, and the outgoing partner can maintain a suit without having paid anything himself. This is not like a contract of indemnity, for it is affirmative.[2]

So if the covenant be to pay debts and to indemnify or save harmless. Here are two stipulations, one to pay and one to save harmless or indemnify, and the former is not merged in the latter, but the obligee can rest upon either. And the covenant to pay is broken by non-payment, and a suit lies though the obligee has not actually paid.[3] The requirement of a covenant to pay debts is to pay at least within a reasonable time after they mature.[4]

The statute of limitations does not run against a covenant to save harmless until a right of action upon it arises; that is, until

[1] Richards *v.* Fisher, 2 Allen, 527.

[2] Hood *v.* Spencer, 4 McLean, 168; Clark *v.* Clark, 4 Porter (Ala.), 9; Hogan *v.* Calvert, 21 Ala. 194; Peacey *v.* Peacey, 27 id. 683; Faust *v.* Burgevin, 25 Ark. 170; Mullendore *v.* Scott, 45 Ind. 113; Dorsey *v.* Dashiell, 1 Md. 198; Brewer *v.* Worthington, 10 Allen, 329; Farnsworth *v.* Boardman, 131 Mass. 115; Olson *v.* Morrison, 29 Mich. 395; Ham *v.* Hill, 29 Mo. 275; *Ex parte* Negus, 7 Wend. 499; Sinsheimer *v.* Tobias, 53 N. Y. Superior Ct. 508; Gray *v.* Williams, 9 Humph. 503. See, also, the following, which, however, do not involve partnerships: Loosemore *v.* Radford, 9 M. & W. 657; Pierce *v.* Plumb, 74 Ill. 326; Gilbert *v.* Wiman, 1 N. Y. 550; Kohler *v.* Mattlage, 42 N. Y. Superior Ct. 247. *Contra*, because until actual payment there is no damage, and if the retiring partner is allowed to collect and does not pay, the others would have to pay twice. Gray *v.* McMillan, 22 Up. Can. Q. B. 456.

[3] Hood *v.* Spencer, 4 McLean, 168; Carter *v.* Adamson, 21 Ark. 287; Faust *v.* Burgevin, 25 id. 170; Lathrop *v.* Atwood, 21 Conn. 117; Farnsworth *v.* Boardman, 131 Mass. 115; Brewer *v.* Worthington, 10 Allen, 329, 330; Ham *v.* Hill, 29 Mo. 275; Gray *v.* Williams, 9 Humph. 503. *Contra*, that such a covenant is one of indemnity only, and therefore a plea of *non damnificatus* is good. Hough *v.* Perkins, 2 How. (Miss.) 724.

[4] Peacey *v.* Peacey, 27 Ala. 683; Carter *v.* Adamson, 21 Ark. 287, 292; Faust *v.* Burgevin, 25 id. 170; Lathrop *v.* Atwood, 21 Conn. 117; Berry *v.* McLean, 11 Md. 92; Dorsey *v.* Dashiell, 1 Md. 198; Sinsheimer *v.* Tobias, 53 N. Y. Superior Ct. 508.

actual payment;[1] but on a covenant to pay debts it begins upon a reasonable time thereafter.[2]

Where the continuing partner, to secure the purchase money, on buying out his copartner gave the latter a mortgage and notes for specified amounts, conditioned to be void if he paid the debts of the firm, the retiring partner can foreclose, alleging that outstanding debts had not been paid, without alleging that he had paid them.[3]

The continuing partner's obligation to meet all liabilities is not confined to obligations of which he had knowledge, but includes those of which he ought to have had knowledge; as where an agent of the firm had borrowed certain patterns for the firm, promising to return them, and the continuing partner knew they did not belong to the firm, but did not know of the promise to return them, yet as such promise would be implied by law, his ignorance of it is immaterial, and it was his duty to ascertain to whom he owed the duty to return the patterns, and he is liable to the outgoing partner against whom judgment for them has been obtained on his promise to discharge liabilities.[4]

§ 637. —— danger of obligee's misapplication of recovery. The very forcible objection that, if the outgoing partner is permitted to collect the amount covenanted to be paid and does not pay it, the new firm may be compelled to pay twice, has led to some embarrassment in providing a remedy. Thus it has been held that an account should be taken in chancery between the partners, because the damages are unliquidated.[5] It has also been held that resort to chancery could not be had, but that the remedy was at law,[6] and that the damages is the whole debt.[7] That under the code, which gives equity powers to a court of law, the court can permit the creditors to be made parties and allow the obligors to pay

[1] Carter *v.* Adamson, 21 Ark. 287; Rowsey *v.* Lynch, 61 Mo. 560.

[2] *Id.* and Dorsey *v.* Dashiell, 1 Md. 193.

[3] Clayton *v.* May, 67 Ga. 769.

[4] Farrington *v.* Woodward, 82 Pa. St. 259.

[5] Musson *v.* May, 3 Ves. & B. 194.

[6] Clark *v.* Clark, 4 Porter, 9.

[7] Hogan *v.* Calvert, 21 Ala. 194; Wilson *v.* Stillwell, 9 Oh. St. 467; Lathrop *v.* Atwood, 21 Conn. 117; Olson *v.* Morrison, 29 Mich. 395; Ham *v.* Hill, 29 Mo. 275. And see Peacey *v.* Peacey, 27 Ala. 683. *Contra*, that there can be no recovery except for debts that have been actually paid by the obligee. Gray *v.* McMillan, 23 Up. Can. Q. B. 456; Hough *v.* Perkins, 2 How. (Miss.) 724.

them off and credit the amount on the judgment, or otherwise secure the application of the fund.[1]

And if the obligor attempt to settle the judgment for a small amount, leaving the creditors unpaid, the settlement can be set aside and the amount paid merely credited.[2] The obligor who is compelled to respond to an obligee who has not paid the debts may apply to a court of chancery, where the obligee may make a wrong use of the money.[3]

§ 638. Covenant to release or to be solely responsible.— A covenant to release the retiring partner from all debts and liabilities is not a mere covenant of indemnity, but a covenant to pay the debts or procure releases, for in no other way could the obligee be released, and no time being fixed a reasonable time will be deemed intended, and the statute of limitations begin thereafter.[4]

A covenant to become "solely responsible" is likewise not a contract to indemnify, but to pay in a reasonable time, because equivalent to a promise to discharge the promisee from responsibility.[5]

So a covenant to indemnify against payments and actions is not for indemnity merely, but to protect, and is therefore a covenant to pay, upon which action can be brought without first having paid.[6]

Under a covenant against liability for damages, a judgment against the obligee is a liability; therefore he can sue without payment.[7]

§ 639. Covenant to indemnify or hold harmless.— The covenant may be to indemnify or hold harmless and noth-

[1] Wilson *v.* Stillwell, 9 Oh. St. 467; 14 id. 464; Ham *v.* Hill, 29 Mo. 275. See Devol *v.* McIntosh, 23 Ind. 529; Hood *v.* Spencer, 4 McLean, 168, which was not under the code.

[2] Wilson *v.* Stillwell, 14 Oh. St. 464.

[3] Smith *v.* Teer, 21 Up. Can. Q. B. 412, 416. As to whether the creditor can avail himself of the benefit of these bonds and sue upon them, see NOVATION.

[4] Dorsey *v.* Dashiell, 1 Md. 198; Griffith *v.* Buck, 13 Md. 102. This form of covenant also occurs in Nichols *v.* Prince, 8 Allen, 404.

[5] Peacey *v.* Peacey, 27 Ala. 683.

[6] Carr *v.* Roberts, 5 B. & Ad. 78; Warwick *v.* Richardson, 10 M. & W. 284; Smith *v.* Howell, 6 Exch. 730, 739.

[7] Chace *v.* Hinman, 8 Wend. 452.

ing more; in such case it is clear that the obligee must pay the debt or suffer damage, before he can recover on the covenant.[1]

Suffering judgment, though it is not paid, was held to entitle the obligee to sue on the covenant.[2]

Permitting a sale of the individual property of the retiring partner, which had been pledged for a debt of the firm, is a breach of the covenant.[3]

§ 640. **Covenant to assume the debts.**— A contract to assume the debts is a contract to indemnify rather than to pay, and to recover upon it the promisee must have paid the debts for which recovery is sought; the promisee becomes *inter se* a surety.[4]

But even here it seems he may resort to chancery on non-performance of the agreement.[5]

A contract to indemnify or save harmless from actions and from debts is broken by recovery of judgment against the obligee, who can then recover the full amount of the judgment from the obligor, though he has not paid it.[6]

A partner who assumed all the liabilities, a written statement purporting to contain them all being given, but saying nothing of taxes, interest or insurance, is nevertheless liable for these items to the selling partner, who had been compelled to pay them.[7]

The fact that judgment is recovered against the obligee, though it is not yet paid by him, is sufficient to enable him to recover upon a covenant to hold harmless from actions,[8] or to indemnify against or pay debts.[9]

[1] Carter *v.* Adamson, 21 Ark. 287; Griffin *v.* Orman, 9 Fla. 22; Lathrop *v.* Atwood, 21 Conn. 117; Gilbert *v.* Wiman, 1 N. Y. 550.

[2] Pope *v.* Hays, 19 Tex. 375; Chace *v.* Hinman, 8 Wend. 452; Fish *v.* Dana, 10 Mass. 46. And see cases under §§ 638, 640.

[3] Fay *v.* Finley, 14 Phila. 206.

[4] *Re* Phelps, 17 Bankr. Reg. 144; Meredith *v.* Ewing, 85 Ind. 410; Coleman *v.* Lansing, 65 Barb. 51; 1 Supr. Ct. 8; Brazee *v.* Woods, 35 Tex. 302.

[5] Scovill *v.* Kinsley, 13 Gray, 5.

[6] Smith *v.* Teer, 21 Up. Can. Q. B. 412; Warwick *v.* Richardson, 10 M. & W. 284; Carr *v.* Roberts, 5 B. & Ad. 78; Smith *v.* Howell, 6 Exch. 730.

[7] Wheat *v.* Hamilton, 53 Ind. 256.

[8] Smith *v.* Teer, 21 Up. Can. Q. B. 412.

[9] Pope *v.* Hays, 19 Tex. 375; Bennett *v.* Cadwell, 70 Pa. St. 253. But see Gray *v.* McMillan, 22 Up. Can. Q. B. 456.

If the outgoing partner, after judgment against him, give his note with surety to the creditor, this is a sufficient payment by him to sustain a right to recover.[1]

In an action against the continuing partner, who had agreed to pay the debt, by the retiring partner, against whom a judgment had been recovered, which he had paid, it is not necessary to aver notice of the debt to the defendant, or of the suit or payment;[2] and the validity of the judgment cannot be inquired into.[3]

§ 641. Covenant to apply assets to debts.— A covenant to take the assets and apply them to the debts is not an agreement to pay all outstanding debts; hence the retiring partner cannot compel reimbursement, having been compelled to pay a debt, until final settlement.[4]

And a covenant to pay the debts out of the assets will, in order to avoid a circuity of actions, be controlled by a subsequent purchase by the covenantee from the covenantor of the latter's interest, with bond to pay debts and indemnify, and will be similarly controlled by a sale of the effects by both partners to a third person, or by any agreement on the part of the covenantee, by which the covenantor no longer has the effects out of which to pay the debts.[5]

That such a covenant makes the buying partner a trustee.[6]

§ 642. Examples of constructions of covenants.— Where the intention that the continuing partners shall assume the debts is evident, statements to that effect in the contract will, if possible, be construed as a promise or covenant, and not as a mere recital.[7]

But a bond by the continuing partner to pay all debts contracted by him in the name of the firm must have the ordinary and natural interpretation, and be held to mean what it says, and does not include debts jointly contracted by the partners, nor their joint and several note.[8]

[1] Gray *v.* Williams, 9 Humph. 503.

[2] Clough *v.* Hoffman, 5 Wend. 499; Chace *v.* Hinman, 8 id. 452; Fish *v.* Dana, 10 Mass. 46.

[3] Bennett *v.* Cadwell, 70 Pa. St. 253; Valentine *v.* Farnsworth, 21 Pick. 176, but here the defendant had taken upon himself the defense of the former suit.

[4] Shattuck *v.* Lawson, 10 Gray, 405; Topliff *v.* Jackson, 12 id. 565.

[5] Austin *v.* Cummings, 10 Vt. 26.

[6] Marsh *v.* Bennett, 5 McLean, 117. See §§ 551–554.

[7] Saltoun *v.* Houstoun, 1 Bing. 433.

[8] Raymond *v.* Bigelow, 11 N. H. 466.

And where a third person bought the interest of a partner in the firm, and gave him a bond to pay debts not exceeding $6,000, and indemnify the seller therefrom, a payment of that amount of debts in conjunction with the remaining partners was held a defense to the bond, for the source of the funds and the state of accounts between the present partners is not involved.[1]

Where the bond is given to a partner to save him harmless from all loss in consideration of his not applying for an injunction against mismanagement on the part of the obligors, the obligee still continuing in the firm, the bond was construed as a contract of settlement of existing liabilities, and not of indemnity against subsequent charges.[2]

The amount of the bond will be treated as a penalty, and not liquidated damages, if it exceed the amount for which the retiring partner was made liable.[3]

Under articles of partnership by which, in case of the death or retirement of a partner, the continuing partners were to pay his capital as ascertained by the last stock-taking at the rate of £2,000 per annum, payable out of the business, the liability of the continuing partners is joint and several, it being a mere contract for buying the share of a deceased partner, postponing payments; but "out of the business" does not mean an agreement to look to the assets only.[4]

§ 643. What debts are included.— A bond to a retiring partner who had sold to his copartner all his interest in the assets, including real estate, to save harmless from all liabilities, is broken where a third person claimed an outstanding interest in the land and sued in partition, and judgment for a certain sum and costs was in his favor, and was paid by the retiring partner, and he can recover it from his vendee, the obligor of the bond.[5]

[1] Perry *v.* Spencer, 23 Mich. 89.

[2] Ackerman *v.* King, 29 Tex. 291.

[3] Johnson *v.* Coffee, 1 Ashmead, 96.

[4] Beresford *v.* Browning, 1 Ch. D. 30. In Wilmer *v.* Currey, 2 DeG. & Sm. 347, by deed of dissolution two partners bought out the third, agreeing to indemnify him against debts, and to pay him £3,000 in three annual instalments. In an action for unpaid instalments, non-payment of debts was held not to be enforcing the liability which existed independent of the deed, but that under the deed, and that the covenants were joint, and a survivor and the executrix of the deceased partner could be joined as defendants.

[5] Bunton *v.* Dunn, 54 Me. 152.

A bond to pay the debts of the firm of C., C. & Co. is not a bond to pay the debts of the firm of C. & C., and it cannot be shown by parol that such was the intention, although C., C. & Co. had assumed and agreed to pay all the debts of C. & C., unless the creditors have, by assenting to such substitution, made the old debts.[1]

Hence, where the firm of C. & C. bought property for the partnership, giving notes in their individual names for it, and W. became a partner, the name being changed to C., C. & Co., and afterwards one of the C.'s retired, C. & W. giving him a bond to pay all the debts of C., C. & Co., but he was compelled to pay one of the notes, and sued on the bond to recover such payment, it was held that an intention to include such notes as debts of C., C. & Co. which C. & W. had assumed, was not admissible in the absence of evidence that the creditors had elected to look to C., C. & Co. as their debtors.[2]

Where S. & R. agreed with A. to manufacture articles under A.'s patent in quantities sufficient to satisfy the market and pay A. a certain royalty, and M. joined the firm, which then became S., R. & M.; then S. retired, selling out to R. & M., who covenanted with him to pay the debts of the concern; then A., the patentee, got judgment for royalties on articles made by R. & M. against S. & R. S. paid the judgment and sued R. & M. for reimbursement under the covenant, and was held entitled to recover it. The obligation of S. & R. to A. to manufacture enough to satisfy the market was not a debt of S., R. & M., and therefore not covered by R. & M.'s assumption of the debts of S., R. & M., but S. had a right to be protected against payment of royalties on such number of articles as were actually made by R. & M. themselves, because as to them he is a surety.[3]

If the new firm, or a member of it, issue a note in the name of the old firm for one of the debts so assumed, and date it back, although it does not bind the ex-partner, and he and the creditor could have disowned it, yet if he choose to pay an old debt in this form, he can rightfully do so and recover on the indemnity, and if his averment was that he had paid a sum due at the time of

[1] See § 656.

[2] Childs *v.* Walker, 2 Allen, 259. See Parkes *v.* Parker, 57 Mich. 57, also excluding parol evidence. See, also, §§ 649, 650, 656.

[3] Sizer *v.* Ray, 87 N. Y. 220.

the retirement, this, though a variance, can be amended after verdict.[1]

On an agreement of dissolution of C. & Y., by which C. takes all the real estate and assumes certain debts, and all other debts are to be paid out of collections to be made, taxes on the real estate are to be paid out of the partnership funds.[2]

§ 644. **Concealed liabilities.**— These covenants do not cover debts which the covenantee on assigning his interest had withheld from the books, and hence were unknown to the assignee at the time of covenanting.[3]

Nor where the bond is to save harmless "from all and singular the debts and liabilities," and the bond contained the words "liabilities as per schedule of indebtedness hereto annexed." The obligors are not liable for a partnership debt not mentioned in the schedule, for otherwise the schedule would have no purpose whatever.[4]

Where, by improper conduct of the retiring partner, as by having made sales of defective commodities, the firm is subject to an action for damages which is unknown to the copartner, the latter's covenant to indemnify the former against all actions will not bar his suit against the former for the amount he had to pay.[5]

Where the selling partner had received cash and credits which he had not accounted for on the books, and was unknown to the buyer, who had assumed all debts, the latter can recover from him the entire amount, and not the half thereof, for he was to have all the assets and all the rights of the firm against either partner.[6]

And where the buying partner held a mortgage against the property of the selling partner's wife, and in part consideration of the sale surrendered the mortgage, and it appeared that the sale had been induced by misrepresentation of the seller as to how much he had withdrawn from the firm, the mortgage was ordered to stand good for the difference between the represented and actual amounts.[7]

[1] Nichols *v.* Prince, 8 Allen, 404.

[2] Young *v.* Clute, 12 Nev. 31.

[3] Case *v.* Cushman, 3 Watts & S. 544 (39 Am. Dec. 47); White *v.* Magann, 65 Wis. 86.

[4] Holmes *v.* Hubbard, 60 N. Y. 183.

[5] Kintrea *v.* Charles, 12 Grant's Ch. (Up. Can.) 123.

[6] Tomlinson *v.* Hammond, 8 Iowa, 40.

[7] Reed *v.* King, 23 Iowa, 500.

Where S., indebted on a note to the firm of V. & Y., paid his debt to V., who, not having the note, gave him, in good faith, a receipt for the money, containing a promise to deliver the note on demand. S. then left the state, and V. afterwards retired from the firm, Y. guarantying him against all debts. Y. afterwards brought suit on the unsurrendered note in the name of himself and V., but for his own benefit, attaching land of S., which was sold under the judgment. Y. died, and S. returned, sued V. on the receipt as surviving partner, and recovered judgment, which V. paid, and now sues Y.'s administrator on the guaranty to pay debts, and recovered. Although V. knew that S.'s judgment was on the note which had been paid, and yet released to S. his title in the land levied on, yet this did not prove him to be a participant in the fraud, for, having sold his interest in the firm to S., he was bound to release, and he could not restrain S. from bringing the suit because S. owned all the partnership interests.[1]

§ 645. Incoming partners.— Where two partners composing a firm sell an interest in the business to a third person who goes into partnership with them, and the purchase money is put into the new firm, this purchase money must be credited to the original partners, and, on settlement, allowed to them, and not to all three, for otherwise it would amount to a sale at only two-thirds of the agreed consideration.[2]

As the new partner and the new firm are not liable for the debts of the old, and the original partners have, of course, no lien to have the assets applied to the debts of the old firm, the creditors of the original firm cannot through them claim such right; hence, on dissolution of the new firm, an amount decreed to be due from the new firm to one of the original partners cannot be reached by bill by another original partner on behalf of the old creditors.[3] So where a firm becomes incorporated and the corporation takes the business and assets, the lien of the partners is gone.[4]

Where the new firm assumes and agrees to pay the debts, and pays them with the capital brought in by the new partner,

[1] Valentine *v.* Farnsworth, 21 Pick. 176.

[2] Evans *v.* Hanson, 42 Ill. 234; Ball *v.* Farley (Ala.), 1 So. Rep. 253.

[3] Coffin *v.* McCullough, 30 Ala. 107.

[4] Francklyn *v.* Sprague, 121 U. S. 215.

and then fails, the new partner has no right of action for breach of the agreement where the failure was not attributable to misappropriation of his capital.[1] And if a person largely in debt takes in a partner who contributes no capital, and the new firm assumes these debts and makes large profits, and compromises the debts, the original debtor is creditor of the firm, not on the basis of the original amount of the debts, but on the basis of the compromise only.[2]

If the new firm does not assume the debts of the old, but the original partners use its assets to pay the old debts, they are jointly and severally liable to the incoming partner for so doing.[3]

§ 646. Existing incumbrances or claims upon the property.— The interest of a person taken in as partner in the benefits of a contract, or in property incumbered by an equitable mortgage, is bound by the terms of the contract, or the burden of the lien existing in the hands of the original parties.

Thus where a buyer at administrator's sale, who purchased in special terms and without security, contrary to the statute, takes in a partner, the latter cannot object that the terms of sale were not in conformity to the statute;[4] and where the defendant employed H. as an attorney, at a certain compensation, and H. afterwards forms a partnership with A. and both perform the services, and after dissolution A. completes them, he must be considered, both during and after the partnership, to have been acting under the original employment, even if he did not know there was a special contract, unless it is shown the defendant knew he expected payment.[5]

In Mayer *v.* Taylor, 69 Ala. 402, P. having rented land mortgaged to Taylor the expected cotton crop to be raised by him or his procurement, but not yet planted; he then took K., who knew of the mortgage, into partnership, and together they planted the cotton and afterwards mortgaged it to Mayer, who also knew of Taylor's mortgage. In an action by Mayer against Taylor for conversion of the cotton, it was held that P. had only contributed

[1] Childs *v.* Seabury, 35 Hun, 548.
[2] Iddings *v.* Bruen, 4 Sandf. Ch. 223.
[3] Wentworth *v.* Raiguel, 9 Phila. 275.
[4] Allen *v.* Atchison, 26 Tex. 616, 628.
[5] King *v.* Barber, 61 Iowa, 674.

to the firm his interest subject to a mortgage, and K.'s interest was subject to the mortgage, and hence Taylor's mortgage was prior to Mayer's.

So in Giddings *v.* Seevers, 24 Md. 363, S. & H. bought machinery of G., the plaintiff, and to secure the purchase money gave him a deed of trust or mortgage on it, with an agreement therein to insure it for his benefit. S. & H. afterwards took in D. as a partner, with knowledge of G.'s deed of trust. The new firm effected insurance and a loss by fire occurred, and D. assigned the policies the next day to other creditors, who had not relied upon them in giving credit. It was held that the insurance by the new firm was affected by G.'s lien, and D. could not divert the fund from its purpose.

Although by statute of a state a mortgage on a stock of goods attaches to subsequent additions to the extent of replacing sales of the original stock, yet where the mortgagor takes in a partner, the mortgage does not attach to subsequent purchases by the firm.[1]

The new firm, composed of old partners and a new partner, is not to be invested with the rights of a *bona fide* buyer. For example, if grain on hand, put into the new firm as capital, is held on storage, the new firm is liable to the owner if it sells, unless the grain was mingled with that of the old firm at the time it was contributed.[2]

§ 647. Statute of frauds.— Where a partner retires upon the terms that the continuing partners shall assume the debts, no writing is required *inter se*. The promise is not collateral to pay the debts of another, but is both a promise to pay their own debts, and also a currency in which the consideration of the sale of his interest by the retiring partner is payable.[3]

So a verbal promise of one partner, after bankruptcy of the firm, to pay a debt, is a promise to pay his own debt, and is enforcible.[4]

[1] Anderson *v.* Howard, 49 Ga. 313.

[2] Rankin *v.* Shephardson, 89 Ill. 445, Illinois being one of the few states recognizing the doctrine of *bona fide* buyer of a chattel.

[3] Lee *v.* Fontaine, 10 Ala. 755 (44 Am. Dec. 505); Conger *v.* Cotton, 37 Ark. 286; Hopkins *v.* Carr, 31 Ind. 260; Haggerty *v.* Johnston, 48 Ind. 41; Vanness *v.* Dubois, 64 id. 338; Hunt *v.* Rogers, 7 Allen, 469; Davis *v.* Dodge, 30 Mich. 267; Townsend *v.* Long, 77 Pa. St. 143; Brazee *v.* Woods, 35 Tex. 302.

[4] Weatherly *v.* Hardman, 68 Ga. 592.

And as between the new debtors and the creditor, the consideration is the release of the original parties and adoption of the new debtors;[1] and if a partner has paid his individual debt with property of the firm, an oral ratification by the other partners is supported by the surrender of the debt as a consideration;[2] so if a firm takes goods contracted for by one partner on his own account, and promises to pay the debt, the statute of frauds does not apply.[3] So where a partner upon dissolution takes part of the accounts, agreeing to consider them as a definite share of his interest, the statute of frauds does not apply. It is not a promise to pay the debts of others, but is a purchase of his partner's interest.[4]

If the debt is one for which the other partner was not liable, nor the consideration received by him, his oral promise to assume it is not enforcible. Where one partner commits a tort for which the other is not liable, a surety of the former who had paid the judgment for the tort cannot enforce the oral promise of the other to pay the debt.[5] On the other hand, however, where a partner agrees that goods to be purchased from the firm shall be credited upon his individual debt to the buyer, ratification may be proved by parol;[6] or where a partner sets off a debt owed to the firm against his debt to the party, and credits the party with the difference upon the books as a debt against the firm, the verbal ratification of the other partner was held valid.[7] But it was held that the note of the firm, made by one partner for his separate debt, cannot be orally assumed by the copartner, if the payee knows the debt does not bind the firm.[8]

[1] § 505.

[2] Foster *v.* Fifield, 29 Me. 136.

[3] McCreary *v.* Van Hook, 35 Tex. 631; Hotchkiss *v.* Ladd, 36 Vt. 593; 43 id. 345. In this case, W., of W. & L., bought H.'s store and goods, giving his own notes. It was held that L.'s verbal promise to pay the notes was collateral under the statute of frauds, but that if the purchase was for both, a verbal agreement to pay the agreed price as specified in the notes, in consideration of a delivery to both, would be valid.

[4] Conger *v.* Cotton, 37 Ark. 286.

[5] Durant *v.* Rogers, 71 Ill. 121 (limited in other particulars by S. C. 87 id. 508).

[6] Rhodes *v.* McKean, 55 Iowa, 547.

[7] Corbin *v.* McChesney, 26 Ill. 231.

[8] Taylor *v.* Hillyer, 3 Blackf. 433 (26 Am. Dec. 430).

CHAPTER V.

SURETIES, HOW AFFECTED BY DISSOLUTION.

§ **648.** The effect of dissolution and formation of a new firm upon sureties is divisible into two parts:

1st. Where the sureties guaranty a firm against loss from a third person; these are sureties *to* a firm.

2d. Where the sureties guaranty a third person against loss from a firm; these are sureties *for* a firm.

§ **649. I. Sureties to a firm.**— If a person or persons become surety to a firm for anything, as for the fidelity of an employee, or that a person to whom credit is to be extended will pay, the surety's contract, unless otherwise expressed, is to the persons then constituting the firm, and is for the protection of such persons, and any change, whether of addition or taking from the membership, constitutes a new and different firm.

A. When the change in the firm is by loss of a member, as in case of death or retirement, the surety's risk is plainly altered, for he may not have been willing to secure or trust the other partners, and the membership of the particular partner, or reliance upon his discretion, may have been the inducement for giving the guaranty; hence in such cases the guaranty instantly ceases to cover additional credits, and a promise to pay money due persons does not mean to any part of them, even though the firm name continues the same.[1]

[1] Myers *v.* Edge, 7 T. R. 254; Strange *v.* Lee, 3 East, 484; Weston *v.* Barton, 4 Taunt. 673; Dry *v.* Davy, 10 A. & E. 30; 2 Perry & Dav. 249; Chapman *v.* Beckinton, 3 Q. B. 703, although the partnership was to run for twenty-one years, and executors were to be partners in place of any deceased partner, yet the bond was held to cease on the death of a partner. Holland *v.* Teed, 7 Hare, 50; Solvency Mut. Guarantee Co. *v.* Freeman, 7 H. & N. 17.

A bond was conditioned to secure all sums to become due from a person to A., B. & C., bankers, or the survivor or survivors of them. By the terms of the partnership of A., B. C., a partner could bequeath his share to executors in trust, and the executors were to become partners. But the sureties were held not liable to advances made by a firm of B. & C. and A.'s executors; the contract was to account for sums due to A., B. & C. or their survivors, and not a partnership of B. & C. and another.[1]

§ 650. Same when a partner is added.— B. The same rule applies where a new partner is added. Such change may alter the position of the surety for the worse, and moreover he did not agree to save a new person harmless, or to guaranty credit extended by persons other than the obligee.[2]

Where a bond for an employee's fidelity ran to A., B. & C. and their successors as governors of a society, and the society was afterwards incorporated, the bond ceased to be binding. The society may have been more careful than the corporation.[3]

A. agrees to be surety to B. for all sums B. may advance to C., and B. & Co. make the advances. C. is not liable on the guaranty; and so if the advances were by B. and another jointly, but not in partnership. The court will not sever the amount.[4]

In Barns *v.* Barrow, 61 N. Y. 39, A. guarantied B. against loss on any goods B. should supply to C. The goods furnished to C. were those of B. &. Co.; but this fact was not known either to A. or C. It was held that the firm of B. & Co. could not recover on the guaranty; that A. guarantied to be responsible to one certain person, and could stand on that.[5] Nor can any

[1] Pemberton *v.* Oakes, 4 Russ. 154. A mortgage to a firm to secure it on future indorsements for the accommodation of the mortgagor is valid to cover indorsements in the firm name after the secret withdrawal of a partner, and the lender will be subrogated to such mortgage. Buffalo City Bank *v.* Howard, 35 N. Y. 500.

[2] Wright *v.* Russell, 2 W. Bl. 934; 3 Wils. 530; Spiers *v.* Houston, 4 Bligh, N. R. 515; Pemberton *v.* Oakes, 4 Russ. 154; Barnett *v.* Smith, 17 Ill. 565; Barns *v.* Barrow, 61 N. Y. 39; Sollee *v.* Mengy, 1 Bailey (S. Ca.), 620; Stevenson *v.* McLean, 11 Up. Can. C. P. 208.

[3] Dance *v.* Girdler, 1 B. & P. N. R. 34.

[4] Stevenson *v.* McLean, 11 Up. Can. C. P. 208; Sollee *v.* Mengy, 1 Bailey (S. Ca.), 620; Greer *v.* Bush, 57 Miss. 575.

[5] See also *dicta* in Greer *v.* Bush, 57 Miss. 575, and Stevenson *v.*

recovery be had on the guaranty either by the promisee or his firm.[1]

In Roberts *v.* Griswold, 35 Vt. 496, R. was employed as attorney by a person, and G. guarantied payment of his fees. R. then went into partnership with C., another attorney, and subsequently performed the services. R. sued upon the guaranty, and it was claimed in defense that he had performed no services for which he could recover in his own name, and therefore had not performed the condition of the guaranty. It was held that the defendant was not discharged merely because C. was to share in the fees. An action for fees, perhaps, must have been by R. & C. jointly, but R. can sue alone on the guaranty. But here the contract is for the performance of one specific duty which the party performs through the agency of a firm.

Barnett *v.* Smith, 17 Ill. 565, is an interesting application of the principle. S., a banker doing business as S. & Co., had a teller who gave an official bond. S. afterwards held out W. as his partner. The sureties on the teller's bond were held to be discharged from liability for subsequent acts, because they may have relaxed their vigilance by reason of supposing there was a new firm.

A mortgage to one member of a firm individually to secure payment for goods to be sold by him to the mortgagor's husband may be shown by parol evidence to have been in contemplation of sales by the firm, although the wife did not know of the existence of the firm. This is not varying the mortgage, but merely showing that the mortgagee was to act in the capacity of a partner.[2]

§ 651. Sometimes, however, the obligation is not intended to be affected by changes in the firm, but is intended to be a continuing security to the house independent of the particular persons constituting it.[3]

McLean, 11 Up. Can. C. P. 208; but in the latter case the persons who contributed to furnish the advances were not partners of the promisee.

[1] Sollee *v.* Meugy, 1 Bailey (S. Ca.), 620.

[2] Hall *v.* Tay, 131 Mass. 192. See last note to § 655.

[3] Barclay *v.* Lucas, 3 Doug. 321; 1 T. R. 291, n. (This, the first case laying down the principle, has been much criticised, not because the principle is defective, but because the court should not have ruled that the obligation was to the house.) Metcalf *v.* Bruin, 12 East, 400 (aff. Metcalfe *v.* Bruin, 2 Camp. 422), where a clerk's official bond was to trustees of the company, and the intervention of trustees was held to

In Weston *v.* Barton, 4 Taunt. 673, Lord Mansfield held that a bond to repay advances by five persons or any of them, as bankers, did not cover advances by the four survivors as bankers after the death of one, and the words "or any of them" meant any on behalf of all five; that "the general understanding is that these securities are given to the banking house and not to the particular individuals who compose it, and we should readily so construe the bond if the words would permit." So where S. became surety for goods to be sold to Q., to C. & Sons, or "to the member or members for the time being constituting the said firm," death of a member dissolves the firm and ends the contract.[1]

Where the promise is in the form of negotiable paper it is deemed intended to inure to indorsees of the paper.[2]

B. made a note to the firm of C. & D. for future advances, and A. indorsed it for his accommodation. D. died and C. formed a partnership with E. as C. & E., to whom all the assets and business of the old firm were assigned, and this firm made the advances. A. is liable to the new firm.[3]

In Dulles *v.* De Forest, 19 Conn. 190, A. made a note with surety to the firm of D. & F., to secure advances that might be made by D. & F. or by any other person to whom they might indorse the note. They took in another partner and the new firm made the advances. A. is liable to the new firm.

§ 652. II. Sureties for a firm.— Where a person becomes surety for the fidelity of a person or firm, or for the repayment of credit given him or them, analogous doctrines apply where the person whose fidelity is guarantied takes in a partner or the firm is changed by a change of membership.

§ 653. A. —— change by loss of a member.— A bond to secure credit to be advanced to persons constituting a firm

remove any technical difficulties that would arise from intermediate change of shareholders; Chapman *v.* Beckinton, 3 Q. B. 703, 722. And see Kipling *v.* Turner, 5 B. & Ald. 261, where a cost bond, not to M & S., but to the defendants, describing them by character and not by name, was held good for costs awarded to one after the other's death; Pariente *v.* Lubbock, 8 De G. M. & G. 5.

[1] Starrs *v.* Cosgrave, 12 Duval (Canada), 571.

[2] Pease *v.* Hirt, 10 B. & C. 122; 5 M. & R. 88.

[3] Greer *v.* Bush, 57 Miss. 575.

becomes inoperative upon dissolution, not only because it contemplates advances upon partnership account, but because the surety may have relied upon the integrity and discretion of the very partner who has ceased to be a member.[1]

Thus a bond securing advancements on bills drawn by J. C. & T. C., or either of them, will not extend to bills drawn by J. C. after T. C.'s death.[2] So of a bond for the fidelity of B., C. & J., who had been appointed agents, and the survivor or survivors of them, and such other persons as should act as agents in partnership with them, the sureties were held not liable after J.'s retirement, but it was queried whether they would not have been had the bond been to the survivors of any or either of them.[3]

In Backhouse *v.* Hall, 6 Best & Sm. 507; 6 New Rep. Q. B. 98, defendants, in consideration that plaintiffs would open an account with the firm of G. W. H. & W. J. H., ship-builders, agreed to guaranty to plaintiffs moneys at any time due not exceeding £5,000. The only members of the firm then known to plaintiffs were the widows of G. W. H. & W. J. H., and one M. Another partner, E. H., died. Defendants knew this fact, but plaintiffs did not, and continued to lend to the firm; the guaranty was held to be no longer binding. The mercantile amendment act, that no obligation for the default of a person or firm shall be binding after a change in the person or firm, unless a contrary intention appear, applied, but Blackburn, J., said that the act was the same as the old law, and only fixed it.

A letter of guaranty asking advances to Messrs. S. & H. H. does not cover advances to each separately, but only those on partnernership account, and is revoked by dissolution.[4] So a bond for the fidelity of a firm as agent of an insurance company does not cover money received by the surviving partner as agent, nor sums received by sub-agents before the death of one partner, but paid to the survivor afterwards.[5] So a bond to hold B. harmless for all notes of a person indorsed by the firm of S., M. & G. does not in-

[1] Bank of Scotland *v.* Christie, 8 Cl. & Fin. 214.

[2] Simson *v.* Cooke, 1 Bing. 452; 8 Moo. 588.

[3] University of Cambridge *v.* Baldwin, 5 M. & W. 580.

[4] Cremer *v.* Higginson, 1 Mason, 323. See, also, Bill *v.* Barker, 16 Gray, 62.

[5] Connecticut, etc. Ins. Co. *v.* Bowler, 1 Holmes, 263.

clude notes signed by them after dissolution, when they had ceased to be a firm, but does include those given for the purpose of winding up, for they are liable upon them as partners.[1] So a surety for a firm on an appeal bond is not the surety of the individuals, nor bound by a judgment against one partner and in favor of the rest.[2]

§ 654. B. —— addition of a partner.—Where a person, advances to whom are guarantied, or whose fidelity is secured, takes another into partnership, the security becomes inoperative, although the security's liability for the faithfulness of such person necessarily includes responsibility for the conduct of his agents or employees. But a partner is more than an agent; and if the principal recognize the firm in his dealings, he cannot look to the surety, who contracted against advances to the individual and not to the firm. No change can make the surety liable for the good conduct of a person whom he did not undertake for.[3]

§ 655. —— illustrations.— Thus in Bellairs *v.* Ebsworth, 3 Camp. 53, John Nott became security to Bellairs that Philip Nott should account for moneys coming to his hands. Philip took in partners and formed the firm of Mingay, Nott & Co., with Bellairs' knowledge. Bellairs intrusted the agency to the new firm, but the responsibility of the sureties was at an end.[4]

So a guaranty of payment of goods to be furnished to F. does not cover a purchase by F. and his partner.[5] A bond with surety to pay a bank all sums that D. may become indebted for on bond, bill, note, account or otherwise, does not cover a debt of any trading firm he may be a member of, or a surety debt incurred for another's benefit, and therefore does not cover a note of his firm indorsed by him individually.[6]

A guaranty of such notes of A. as the plaintiff should indorse

[1] New Haven Co. Bank *v.* Mitchell, 15 Conn. 206.

[2] Grieff *v.* Kirk, 17 La. Ann. 25; McCloskey *v.* Wingfield, 29 id. 141, where one defendant died before judgment.

[3] See First Nat'l Bk. *v.* Hall, 101 U. S. 43.

[4] S. P. London Assur. Co. *v.* Bold, 6 Q. B. 514; Montefiori *v.* Lloyd, 15 C. B. N. S. 203. In both these cases the surety knew, at the time of contracting, that a partnership was intended.

[5] Shaw *v.* Vandusen, 5 Up. Can. Q. B. 353; and see Batavia Bank *v.* Tarbox, 38 Hun, 57.

[6] Donley *v.* Bank, 40 Oh. St. 47.

does not, A. having taken B. into partnership, cover notes of A. & B. indorsed by the plaintiff, although the latter notes were made to take up A.'s former notes; and although the surety is more safe, for he can stand on the terms of his contract. Nor does it cover notes by A. alone after dissolution, to take up the notes of A. & B. twelve years later, and not on the faith of the guaranty.[1]

So where D. was appointed agent of plaintiffs and gave bond to pay all notes to be made by him upon receiving plaintiffs' goods for sale, and then formed a partnership, the bond is good for all previous purchases, though the notes given for them are made in the firm name. Hence the note is not payment, and it is still his debt; but for all goods sent to D. & Co. the sureties are not bound; they did not agree to be liable for D.'s partners.[2]

And yet had the partner been an employee instead of a partner of D., the surety would have been liable.[3]

So where an agent took in a partner, but the principal never recognized the partner as agent, but shipped goods to and credited the agent alone, it was held that the surety is bound by the agent's default, because such agent could employ such means as he chose to assist him, either on a salary or on a share of the profits, and his carrying out the agency by means of a partnership does not release the sureties so long as the employer does not recognize the partner as a principal contractor.[4]

So a guaranty of debts that M. should owe to a bank for assistance to enable him to carry on business includes a debt incurred by him while trading in partnership;[5] but such a contract would not make the surety responsible for debts of the firm to which the debtor belonged, although he, as partner, was liable for them or became surety for them. Hence a bond to pay a bank all sums that D. might become indebted for to the bank on bond, bill, note,

[1] Russell *v.* Perkins, 1 Mason, 368; Bell *v.* Norwood, 7 La. 95.

[2] Parham Sewing Mach. Co. *v.* Brock, 113 Mass. 194.

[3] Montefiori *v.* Lloyd, 15 C. B. N. S. 203; Hayden *v.* Hill, 52 Vt. 259; Palmer *v.* Bagg, 56 N. Y. 523.

[4] Palmer *v.* Bagg, 56 N. Y. 523; Hayden *v.* Hill, 52 Vt. 259; and see Roberts *v.* Griswold, 35 Vt. 496. And see Hanson *v.* Dodge, 134 Mass. 273. Kuhn *v.* Abat, 2 Martin (La.), N. S. 168, holding that where plaintiff employs an auctioneer to sell goods for him, the auctioneer's sureties are liable for goods sold by him and his partner; he alone being licensed, it is regarded as his act, and the fact that he has a partner does not concern the public.

[5] Bank of British N. Amer. *v.* Cuvillier, 14 Moo. P. C. 187.

account, or otherwise, will not be extended to bind the sureties for a note made by D.'s firm upon which he and all the other partners indorsed their individual names, but will be confined to debts incurred by him individually as principal and for his own benefit.[1]

A bond to pay "any and every indebtedness" now existing, or which may hereafter in any manner be incurred, was held not to be limited to the debt of the principal, but included a note of his firm to the obligee.[2] But not a debt incurred by him for the benefit of another by becoming surety.[3]

But a firm of agents appointed in the place of one of their number who had formerly been sole agent, and giving bond, cannot charge the surety by assuming the debt of the former agent, though such part of that money as they actually collected would be covered by the bond.[4]

A mere change of name of a firm does not discharge the guaranty. Thus where S. gave a guaranty to a bank to secure its loans to N. & Co., but N. & Co.'s account with the bank and all its business was in the name of N. alone, the guarantor is liable.[5]

§ 656. Application of payments.—In all these cases, if there were credits given or defalcations made, both before and after the bond was held to have become inoperative, general payments thereafter made without specific appropriation will be applied to the older balances, thus reducing the surety's liability.[6]

[1] Donley *v.* Bank, 40 Oh. St. 47.

[2] Singer Mfg. Co. *v.* Allen, 122 Mass. 467. And a mortgage by A. to M. & S., who are partners, conditioned to secure M. & S. for liabilities incurred by them as sureties for A., includes not only his liabilities to them, but also to each separately, and to those incurred by the survivor of them, Natl. Bk. of Newburgh *v.* Bigler, 83 N. Y. 51 (aff. 18 Hun, 400); but parol evidence was held incompetent to show that a mortgage to cover subsequent purchases would cover goods bought by a subsequent partnership, Parkes *v.* Parker, 57 Mich. 57; Childs *v.* Walker, 2 Allen, 259. See last case in § 650.

[3] Donley *v.* Bank, 40 Oh. St. 47.

[4] Ball *v.* Watertown F. Ins. Co. 44 Mich. 137; and see Cochrane *v.* Stewart, 63 Mo. 424, that a guaranty of all debts does not cover the debts of a former firm assumed by the guarantied firm; and see § 643.

[5] Shine *v.* Central Sav. Bk. 70 Mo. 524.

[6] Strange *v.* Lee, 3 East, 484; Pemberton *v.* Oakes, 4 Russ. 154; Spiers *v.* Houston, 4 Bligh, N. R. 515; Bank of Scotland *v.* Christie, 8 Cl. & Fin. 214; Cremer *v.* Higginson, 1 Mason, 323.

CHAPTER VI.

GOOD WILL.

§ 657. The dissolution of a partnership calls into prominence an element in the strength and permanency of the firm, and in the value of its property, of too intangible a nature to have an independent existence; yet always, where it exists at all, regarded as having a value, even when this cannot and will not be estimated by the courts and frequently capable of specific appraisement; that is, what is termed the Good Will.

The oftenest quoted definition of good will is that of Lord Eldon,[1] as being nothing more than the probability that the old customers will resort to the old place, or per Sir John Leach,[2] the advantage attached to the possession of the house.

There are some partnerships in which there is no good will, as those formed to carry out a contract to build a hotel or railroad, or for any single enterprise. But most partnerships have an element of strength in a good will, and a moment's reflection will show the inadequacy of Lord Eldon's definition. Thus, in professional partnerships it is attached to the person and not to the locality, and so of any partnerships in employments as brokers, builders, etc. So even in partnerships operating with a capital whose customers are sellers and not buyers; for example, a partnership to go around the country and buy cattle to sell again; here the good will attaches to the name and credit, and is in part the chance that sellers will consign in a name they know. Hence modern decisions have described it in better terms, as resolving itself into reputation,[3] or better yet, as every possible advantage acquired by a firm in carrying on

[1] In Crutwell *v.* Lye, 17 Ves. 346.
[2] Chissum *v.* Dewes, 5 Russ. 29.
[3] Hoffman, J., in Howe *v.* Searing, 6 Bosw. 354, 363.

its business, whether connected with premises, or name or other matter.[1]

The good will cannot be partitioned, nor can one partner's interest in a trade-mark be sold upon execution, or on bill in equity against him, being too intangible an interest to reach;[2] nevertheless the good will may be sold as an entirety, so far as it is local.[3]

But the sale of the good will is a sufficient consideration for a note for its price, although the business was not afterwards successful;[4] and a sale of stock and good will may be rescinded for false representation as to the good will, although the stock alone is worth more than the price paid;[5] or an action or counter-claim for damages for deceit in its sale will lie;[6] and if the stock of goods was not delivered, but the good will was, an action by the seller for its value alone has been sustained.[7]

§ 658. Does not survive.— It was once thought that, upon the death of a partner, his interest in the good will ceased, and it survived to the surviving partner as his own property;[8] this was doubted in Crawshay *v.* Collins,[9] and is not now anywhere regarded as the law in trade partnerships, and though inseparable from the business, is an appreciable part of the assets in which the estate of a deceased partner can participate.[10]

[1] Per Jessel, M. R., in Ginesi *v.* Cooper, 14 Ch. D. 596.

[2] Taylor *v.* Bemis, 4 Biss. 406; Robertson *v.* Quiddington, 28 Beav. 529; Helmore *v.* Smith, 35 Ch. D. 436. Even the subscription list of a newspaper is not a separate asset, but passes as an incident with the sale of the materials on execution, McFarland *v.* Stewart, 2 Watts, 111.

[3] Allen *v.* Woonsocket Co. 11 R. I. 288, 299. Whether a trade name, used as a trade-mark, can be sold detached from the business, see Sohier *v.* Johnson, 111 Mass. 238, 242, question raised but not decided. Whether specific performance will be decreed of a contract to sell a good will, see Bryson *v.* Whitehead, 1 Sim. & Stu. 74; Baxter *v.* Connoly, 1 Jac. & W. 576.

[4] Smock *v.* Pierson, 68 Ind. 405. And see Buckingham *v.* Waters, 14 Cal. 146.

[5] Cruess *v.* Fessler, 39 Cal. 336.

[6] Herfoot *v.* Cramer, 7 Colorado, 483; Collins *v.* Jackson, 54 Mich. 186; Rawson *v.* Pratt, 91 Ind. 9; Hines *v.* Driver, 71 id. 125.

[7] Wallingford *v.* Burr, 17 Neb. 137.

[8] Hammond *v.* Douglas, 5 Ves. 539. The case of Lewis *v.* Langdon, 7 Sim. 421, does not necessarily hold this.

[9] 15 Ves. 218, 227.

[10] Wedderburn *v.* Wedderburn, 22

§ 659. Incident to locality oftener than to stock.— Good will in a trading partnership, as a mere incident of other property, more usually attaches to the premises than to the stock of goods.[1]

Thus, where a public house in which the decedent's business had been was sold, the court refused to apportion the proceeds between the heir and next of kin as partly due to good will.[2] And it passes with a mortgage of the house, and the mortgagee in possession need not account in bankruptcy or to the mortgagor for it.[3] But if it depends on the personal skill of the owner it does not pass to a mortgagee, and in such case, if the property is taken by condemnation proceedings under the right of eminent domain, the value of the good will goes to the owner and not to the mortgagee.[4]

Where a guardian leased his ward's hotel property for $300 per annum, and a bonus of $500 for the good will, and near the end of the term renewed the lease for eight years at $400 per annum and no bonus, the court said, "It seems to us to be improper to consider the good will separately from the rental. It was an incident so intimately blended with the house that for the purposes of leasing it should have been deemed a constituent part of the premises. Its integral character should have been recognized as one of the elements in fixing the value of the rental of the whole property."[5] So where lessees of a hotel were partners in running it, and near the expiration of the lease one died, and the surviving partner designed renewing the lease, and the executrix claimed in settlement with him that the good will should be valued as an asset, this was held not to be so. The enhanced value of the property on account of it would fall to the lessor on the expiration of the lease and be taken into account in fixing the rent on renewal, and the decedent's estate has no further interest in it.[6] Yet where

Beav. 84; Smith *v.* Everett, 27 id. 446; Hall *v.* Barrows, 4 DeG. J. & S. 150; Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68; Williams *v.* Wilson, 4 Sandf. Ch. 379; Howe *v.* Searing, 6 Bosw. 354, 363; Holden *v.* McMakin, 1 Pars. Sel. Cas. (Pa.) 270 of a subscription list of a newspaper.

[1] Rawson *v.* Pratt, 91 Ind. 9.

[2] Booth *v.* Curtis, 17 W. R. 393; 20 L. T. N. S. 152.

[3] *Ex parte* Punnett, 16 Ch. D. 226.

[4] Cooper *v.* Metropolitan Bd. of Wks. 25 Ch. D. 472.

[5] Thackray's Appeal, 75 Pa. St. 132. See, also, Musselman's Appeal, 62 id. 81.

[6] Chittenden *v.* Witbeck, 50 Mich. 401.

premises belonged to one partner, and on his death or retirement were sold, so much of an enhanced value as was attributable to good will is to be accounted an asset of the partnership as belonging to the business and not to the property.[1]

But a trade-mark is not attached to the premises, although established by the original owner of the business and property.[2]

§ 660. Court will protect it to effect sale.— The court will, as far as possible, interfere, if applied to, in order to preserve the good will until it can be sold,[3] as by enjoining an appropriation of it by one partner,[4] even by appointing a receiver to continue the business, so that it may be sold as a going concern.[5] And if it is salable, will order a sale of it at the request of any of the partners for the benefit of them all,[6] or permit a continuing partner to retain it on paying full value.[7]

§ 661. Valuation of good will.— Sometimes a good will must be valued apart from the property when the latter is not sold, as where a retiring partner is entitled by contract or otherwise to a share in the good will, or where surviving partners are entitled to continue business, or where the assets consist of nothing over the capital besides the good will, as in a banking firm. In these cases the good will is generally reckoned at so many years' purchase, based on average profits.[8]

And in an accounting between partners in the agency of insur-

[1] Smith *v.* Everett, 27 Beav. 446; Morris *v.* Moss, 25 L. J. Ch. 194; England *v.* Downs, 6 Beav. 269; Pawsey *v.* Armstrong, 18 Ch. D. 698.

[2] Sohier *v.* Johnson, 111 Mass. 238, 243.

[3] Turner *v.* Mayor, 3 Giff. 442; Pawsey *v.* Armstrong, 18 Ch. D. 698; Dayton *v.* Wilkes, 17 How. Pr. 510.

[4] Bininger *v.* Clark, 60 Barb. 113; 10 Abb. Pr. N. S. 264; Dayton *v.* Wilkes, 17 How. Pr. 510.

[5] Marten *v.* Van Schaick, 4 Paige, 479, of newspaper business; Jackson *v.* De Forest, 14 How. Pr. 81. And see Allen *v.* Hawley, 6 Fla. 142 (63 Am. Dec. 198), and Young *v.* Buckett, 51 L. J. Ch. 504; Levi *v.* Karrick, 8 Iowa, 150, 155.

[6] Bradbury *v.* Dickens, 27 Beav. 53.

[7] Sheppard *v.* Boggs, 9 Neb. 257.

[8] Austen *v.* Boys, 2 De G. & J. 626. Thus the good will of a banking business was rated at one year's average net profits. Mellersh *v.* Keen, 28 Beav. 453.

ance companies, a partner allowed to retain the business must pay the value of the agencies.[1]

If a value has been placed upon the good will by the articles of partnership, although not taken into the annual accounts, it must be allowed for in a settlement between the executor and surviving partner.[2] And so where a sum has been realized for its sale where it would not otherwise have been susceptible of valuation.[3]

The valuation, when not so determined, must have regard to the fact already stated, that a surviving partner has the right to go into the same kind of business; but it is not to be diminished because he can carry on business at the same place.[4] And hence it is rather an element in the value of the tangible property than an item of assets susceptible of independent valuation. Thus, in a settlement between the surviving partners and executors of a deceased partner of a firm of furniture dealers, an appraisement of the stock, based on current price lists, less reasonable percentage for the cost of selling, secures the value of the good will.[5]

A surviving partner who continues business which was insolvent at the time of his copartner's death, but is, by his efforts, made solvent and sold at a profit, is chargeable with the value of the good will only as at the date of the death, and not as of the time of the sale. If his own business was benefited by the use of the old stand and the old name, the estate has received its share in the enhanced value realized in selling.[6]

In other cases the court have found the good will not susceptible of valuation.[7]

An insurance company cannot establish its solvency so as to pre-

[1] Sheppard *v.* Boggs, 9 Neb. 257.

[2] Wade *v.* Jenkins, 2 Giff. 509.

[3] See under § 668.

[4] Reynolds *v.* Bullock, 47 L. J. Ch. 773; 39 L. T. N. S. 443; 26 W. R. 678. This case refuses to follow Burfield *v.* Roach, 31 Beav. 241, in which A. & B. were partners on A.'s premises, B. to have the right to buy the premises on A.'s retirement, at a valuation, and it was held that the valuation must be irrespective of the fact that the same kind of business had been there for thirty years, because the agreement was silent as to good will, and to make a difference because of business would be to add the value of the good will.

[5] Rammelsberg *v.* Mitchell, 29 Oh. St. 22, 54-5.

[6] Musselman's Appeal, 62 Pa. St. 81; Broughton *v.* Broughton, 44 L. J. Ch. 526; 23 W. R. 970.

[7] Steuart *v.* Gladstone, 10 Ch. D. 626.

vent enforced dissolution by proof that its good will is worth $100,000, for it is not an asset available to pay losses with.[1] Nor will it be added to the value of shares of stock as an element for taxable purposes.[2] Nor can an excessive verdict in a condemnation case be sustained by proof of a good will of a business that would be destroyed by the appropriation of the property.[3] Yet where a firm bought goods and six days afterwards were sued in attachment by other persons and failed, and the seller sought to rescind the sale and replevy on the ground of their insolvency at the time of purchase, the value of the good will as an element of strength and permanency was allowed to be proved in resistance to the rescission.[4]

§ 662. —— **in case of misappropriation.**— If one partner seeks to appropriate the good will to himself before final accounting, the misappropriation is an item in the account, and it is doubtful if it can be the subject of an action at law.[5] But when there are no unsettled accounts between the partners, as where one has retired, selling his interest and the good will, and then violates his contract by soliciting old customers, the damages is the injury sustained.[6]

Where a partnership in keeping a hotel was to expire with the expiration of the lease, and one partner clandestinely renewed the lease in his own name, and the court declared the new lease to be partnership property, but pending the litigation the partnership expired and the personal property was sold and the new lease expired, such partner having had the sole benefit of it, the other partner's recovery from him is to be arrived at by ascertaining the

[1] Chicago Life Ins. Co. *v.* Auditor, 101 Ill. 82.

[2] Spring Valley Water Works *v.* Schottler, 62 Cal. 69, 118.

[3] Chicago *v.* Garrity, 7 Ill. App. 474.

[4] Bell *v.* Ellis, 33 Cal. 620.

[5] Cook *v.* Jenkins, 79 N. Y. 575.

[6] In Burckhardt *v.* Burckhardt, 36 Oh. St. 261, a case of this kind, the court held that the amount of solicitation, irrespective of its effect, was not the measure of damages, but, subsequently recognizing the impossibility of tracing the loss of customers, modified the rule. 42 Oh. St. 474. In Dethlefs *v.* Tamsen, 7 Daly, 354, the plaintiffs were allowed to show the falling off of receipts after the opening of the competing store, as evidence of damages. So it has been held that no prospective damages will be allowed, because the defendant may never commit another breach, and if he does that other actions will lie, Hunt *v.* Tibbetts, 70 Me. 221.

past profits of the hotel, the rental called for in the new lease and from expert testimony of hotel men, the value of the lease with good will and furniture over and above the rent, after deducting the price received for the furniture.[1]

§ 663. Sale of good will.—The good will may be transferred by a contract which does not mention it specifically, if such intention appears or the nature of the contract implies it. Thus, a partner who sells his interest in the firm to his copartner, sells everything connected with it capable of producing a profit, and hence the good will[2] and exclusive right to use the firm's trade-marks[3] passes.

Thus in Shipwright *v.* Clements, 19 W. R. 599, plaintiff and defendants were in partnership as perfumers, and defendant sold to plaintiff all his interest in the firm. The defendant afterwards made a perfume known as the Zingari Bouquet, which the old firm had made and called by that name as a trade-mark. An injunction was granted, although the trade-marks had not been mentioned in the transfer, because it was one of the sources of profit to the old firm.

Where Beatty & Gage formed a partnership, whose most valuable asset was a series of copy books, known as "Beatty's Head Line Copy Books." They dissolved, Gage buying out Beatty's interest for $20,000. It was shown that a large part of the price was for the right to sell the copy books. A publishing company, with Beatty's assistance, got out a new series called "Beatty's New & Improved Head Line Copy Books." This was held to be an infringement of Gage's rights, the word Beatty, as applied to the books, being a valuable asset which passed to Gage.[4]

So where by the articles of partnership a person forming a partnership with another agrees to leave at the end of the term, he cannot, in a suit for an accounting, claim any allowance for a share

[1] Mitchell *v.* Read, 19 Hun, 418 (affirmed in 84 N. Y. 556).

[2] Churton *v.* Douglas, H. V. Johns. 174; Kellogg *v.* Totten, 16 Abb. Pr. 35; Hall *v.* Hall, 20 Beav. 139.

[3] Shipwright *v.* Clements, 19 W. R. 599; Durham Smoking Tobacco Case, 3 Hughes, 151; Hoxie *v.* Chaney, 143 Mass. 592; Glen & Hall Mfg. Co. *v.* Hall, 61 N. Y. 226 (rev. 6 Lans. 158). *Contra*, Huwer *v.* Dannenhoffer, 82 N. Y. 499; Hazard *v.* Caswell, 93 id. 259; Young *v.* Jones, 3 Hughes, 274.

[4] Gage *v.* Canada Pub. Co. 11 Ont. App. 402; aff'g 6 Ont. Rep. 68.

in the good will.[1] And where the articles provided that upon dissolution one partner was to have "all the benefits and advantages" of the firm, an injunction was granted restraining the other partner from soliciting business from the old customers.[2] But this was distinguished under an agreement that a delinquent partner should, on notice, be considered as quitting the business for the benefit of the copartner, and an injunction refused for involuntarily quitting the business is not such a transfer of the good will;[3] and where on dissolution of a partnership by decree, one partner consents to take the stock and effects at a valuation and the other to retire, the retiring partner is not entitled to an allowance for the good will.[4] So where a surviving partner agreed to buy from the executor of the deceased partner the "stock belonging to the partnership," the value of the good will and trade-marks must be considered in ascertaining the value.[5]

Where one partner in a firm of two cheesemongers retired, and it was left to arbitrators to determine how much was to be paid him for the good will among other things, and they, on the understanding that he would not set up the same business in the same street, awarded him £500, which was paid, but the award made no mention of the understanding, an injunction was granted upon this parol evidence against his opening the trade in the same street, and thus depriving the vendee of what he had sold.[6]

So a sale of a professional business, as of a physician's practice within a certain territory, was held to carry an implied covenant not to resume business within the territory.[7]

§ 664. Seller of good will can resume business.— The rule may be said to be universal, that the seller of a good will or

[1] Van Dyke *v.* Jackson, 1 E. D. Smith, 419.

[2] Burrows *v.* Foster, cited in Clark *v.* Leach, 32 Beav. 14, 18.

[3] Clark *v.* Leach, 32 Beav. 14, 23. And see § 667.

[4] Hall *v.* Hall, 20 Beav. 139; Hookham *v.* Pottage, 27 L. T. N. S. 595; 21 W. R. 47; L. R. 8 Ch. 91.

[5] Hall *v.* Barrows, 4 DeG. J. & S. 150.

[6] Harrison *v.* Gardner, 2 Madd. 198. The language of the opinion seems to regard it as a sale of good will, and that, although a sale of good will does not import restraint against going into business in another situation, yet that this is the same situation. By regarding the understanding as more than a sale of good will, but as being a covenant not to compete, it is not in conflict with other decisions.

[7] Dwight *v.* Hamilton, 113 Mass. 175; per Jessel, M. R., in Ginesi *v.* Cooper, 14 Ch. D. 596.

a partner who retires, assigning all his interest, including good will, to continuing partners, can immediately set up a similar business in the neighborhood and advertise his business. At most he is prohibited only from soliciting old customers, using the old name, representing himself as continuing or succeeding to the old business. These qualifications will be considered hereafter; but apart from them the sale of a good will does not import an agreement not to compete in business, as distinguished from claiming to be the same concern as before. And although advertisements may indirectly invite old customers as effectually as direct solicitation, yet if they avoid reference to the old firm, they are not a breach of the contract and the buyer must take the chances of obtaining the old custom.[1]

In Bond *v.* Milbourn, 20 W. R. 197, Milbourn having an established business, took Bond, who was inexperienced in it, into partnership, under the name of James Milbourn & Co.; Bond paying £325 for the value of a share of the good will upon entering the firm. The articles provided that either partner could dissolve upon six months' notice. Milbourn gave notice, retired and set up business as J. Milbourn & Co., trading with former customers and employing former workmen. Bond demanded back the £325 which he had paid for good will, thus rendered valueless; but as Milbourn had not committed any breach of contract nor been guilty of misconduct, it was held that there could be no recovery.[2]

[1] Cruttwell *v.* Lye, 17 Ves. 335; 1 Rose, 123; Kennedy *v.* Lee, 3 Mer. 452; Churton *v.* Douglas, H. V. Johns. 174, 187; Hudson *v.* Osborne, 39 L. J. Ch. 79; Davies *v.* Hodgson, 25 Beav. 177; Bradbury *v.* Dickens, 27 Beav. 53; Mellersh *v.* Keen, id. 236; Smith *v.* Everett, id. 446; Johnson *v.* Hellely, 34 Beav. 63; 2 DeG. J. & S. 446; Bond v. Milbourn, 20 W. R. 197; Hookham *v.* Pottage, 27 L. T. N. S. 595; 21 W. R. 47; L. R. 8 Ch. 91; Labouchere *v.* Dawson, L. R. 13 Eq. 322; Ginesi *v.* Cooper, 14 Ch. D. 596; Leggott *v.* Barrett, 15 id. 306; Pearson *v.* Pearson, 27 id. 145; Vernon *v.* Hallam, 34 id. 748; Porter *v.* Gorman, 65 Ga. 11; Wiley *v.* Baumgardner, 97 Ind. 66; Hoxie *v.* Chaney, 143 Mass. 592; Dayton *v.* Wilkes, 17 How. Pr. 510; White *v.* Jones, 1 Robt. (N. Y.) 321; 1 Abb. Pr. (N. S.) 328; Howe *v.* Searing, 6 Bosw. 354; Dethlefs *v.* Tamsen, 7 Daly, 354, 355; Moody *v.* Thomas, 1 Disney, 294; McCord *v.* Williams, 96 Pa. St. 78; Mossop *v.* Mason, 18 Grant's Ch. Up. Can. 453, 464.

[2] In Ginesi *v.* Cooper, 14 Ch. D. 596, it was held that he could not even deal with old customers, but this was disapproved in Leggott *v.*

§ 665. So can surviving partner.— The same rule applies to a surviving partner; he does not have to give up business, and may continue in the same kind of trade, and the interest of the deceased partner is necessarily limited by this fact; and sales of the business and good will by court are upon the understanding that the survivor can do so, the sale being of the chance which a buyer may get of retaining the old customers.[1]

The court, on ordering a sale of the good will of the business of a surviving and deceased partner, will, however, order the book debts to be sold with it, because the possession of them enables the buyer to secure to himself the customers of the old firm.[2]

§ 666. Seller's solicitation of old customers.— But the right of a partner who has voluntarily sold his interest in the good will, or the right of a seller of the good will of a business to open a similar business next door, has been generally supposed not to include any right to solicit the old customers until the doubt thrown by the very late English cases, or to represent himself as continuing the identical business. There is a difference between these two in this, that while the former is merely a breach of contract, the latter representation is also a deception upon the public.[3]

Barrett, 15 id. 306, and is utterly inconsistent with other English decisions, especially with the very late ones, which permit him to solicit old customers, as we shall see. In Dwight *v.* Hamilton, 113 Mass. 175, the sale of the practice and good will of a physician, within a certain locality, was held to carry an implied covenant that the seller would not do anything to injure the buyer in the enjoyment of his purchase, and a resumption of business by the seller will be enjoined. This is correct, on the distinction that the good will of such a business does not mean a probability of the old customers going to the old stand; but is a sale of the right to exercise personal influence within a certain territory. And see Ginesi *v.* Cooper, 14 Ch. D. 596, per Jessel, M. R.

[1] Cook *v.* Collingridge, Jac. 607, and decree in 27 Beav., n.; Farr *v.* Pearce, 3 Madd. 74; Davies *v.* Hodgson, 25 Beav. 177; Smith *v.* Everett, 27 id. 446; Johnson *v.* Hellely, 34 Beav. 63; 2 DeG. J. & S. 446 (aff. s. c. 10 Jur. N. S. 1141; 34 L. J. Ch. 32); Hall *v.* Barrows, 4 DeG. J. & S. 150; Reynolds *v.* Bullock, 47 L. J. Ch. 773; 39 L. T. N. S. 443; 26 W. R. 678; Rammelsberg *v.* Mitchell, 29 Oh. St. 22, 54–5.

[2] Johnson *v.* Hellely, *supra.*

[3] That he cannot solicit the old customers was held in Mogford *v.* Courtenay, 45 L. T. 303; 29 W. R.

But in Pearson *v.* Pearson, 27 Ch. D. 145, doubt was thrown upon Labouchere *v.* Dawson, two of the three judges holding it to be wrongly decided, one *contra*, but all concurred in holding that the contract in the case for a sale of the vendor's interest, reserving a right to carry on a like business in effect, placed him in the rights of a stranger, and he could not be enjoined from soliciting old customers.

And in Vernon *v.* Hallam, 34 Ch. D. 748, Hallam sold to Vernon his business, stock, fixtures and good will. Vernon died, and Hallam then issued circulars contrived so as to represent that his business was a continuation of that of the late Vernon, and solicited Vernon's customers. Vernon's administratrix was granted an injunction against the circulars, but it was refused against the solicitation of customers, on the ground that Labouchere *v.* Dawson had been overruled by Pearson *v.* Pearson. It is also there said that the court of appeals had recently decided the same way in Collier *v.* Chadwick.[1]

§ 667. —— **limitations of this doctrine.**— If the transfer of the interest of a partner is involuntary or his retirement enforced, he may solicit the old customers. The reason is that the duty not to solicit them arises from his implied contract not to detract from what he has sold, which is a personal obligation and not an incident to the transfer of property; and hence does not apply to compulsory alienation, as by a sale of his interest in bankruptcy,[2] or at sheriff's sale, or in case of his expulsion from the firm under a pro-

864; Labouchere *v.* Dawson, L. R. 13 Eq. 322; Hookham *v.* Pottage, L. R. 8 Ch. 91; Ginesi *v.* Cooper, 14 Ch. D. 596; Leggott *v.* Barrett, 15 id. 306. And see Cruttwell *v.* Lye, 17 Ves. 335. Where by agreement, upon expiration of the partnership, one partner was to have the good will, and the other opened a similar business, and advertised the fact, with "thanking you for your support in the past," is a suggestion to customers of the old firm to deal with him, and will be enjoined. Mogford *v.* Courtenay, 45 L. T. 303; 29 W. R. 864. And see below for imitations of the old name and trade-marks. But where a person sold the good will of a school, circulars of a rival school in which the vendor was principal are not admissible in evidence unless his knowledge of their issuance is shown. McCord *v.* Williams, 96 Pa. St. 78.

[1] I fail to find this latter case in the reports.

[2] Cruttwell *v.* Lye, 17 Ves. 335; 1 Rose, 123; Walker *v.* Mottram, 19 Ch. D. 355. See Iowa Seed Co. *v* Dorr (Iowa), 30 N. W. Rep. 866.

vision in the articles permitting it for misconduct, and has been repaid his share of the capital.[1]

But where a sale of the good will of a hospital for insane is by order of court for the benefit of the firm, all the partners except the one who purchases may be enjoined from conducting a competing business in order to give efficacy to the sale.[2]

So the contract may be merged by a subsequent partnership between buyer and seller, and the consequent change of relations. Thus where H. sold his business and good will to N. & C., and agreed not to go into business in the locality, N. having bought out C., took H. and another into partnership, and after this firm was dissolved, and H. went into business by himself as a competitor of N., his partnership with H. was held to absolve him from the original contract, and not merely to sustain its interdict by removing his disability, as much as if so expressed as a consideration of the partnership.[3]

Where a land agent, having the agency to sell several thousand acres of land for the various owners, sold his business and good will, with an agreement not to re-engage in the same business for three years, it was held that on the expiration of the three years he could compete in every respect, not merely by going into the same business, but by soliciting the same agency. No line can be drawn between such kinds of competition, and the sale of the good will is subject to the restriction as to time.[4]

§ 668. **Professional partnerships.**— Good will is not strictly applicable to a professional partnership, for its business has no local existence, but is entirely personal, consisting in a confidence in the integrity and ability of the individual.[5]

In case of the death of a member of a professional partnership, unlike the case of trading partnership, where the good will does

[1] Dawson *v.* Beeson, 22 Ch. D. 504. And see Clark *v.* Leach, 32 Beav. 14, 23, noticed under § 663. In Hudson *v.* Osborne, 39 L. J. Ch. 79, it was held that on a sale in bankruptcy the partner could not use the old trade-marks or represent himself as carrying on the identical business.

[2] Williams *v.* Wilson, 4 Sandf. Ch. 380.

[3] Norris *v.* Howard, 41 Iowa, 508.

[4] Hanna *v.* Andrews, 50 Iowa, 462.

[5] Austen *v.* Boys, 2 De G. & J. 626; Arundell *v.* Bell, 52 L. J. Ch. 537; 49 L. T. 345; 31 W. R. 477; Bozon *v.* Farlow, 1 Mer. 459, 474.

not survive to the surviving partners, the representatives of the deceased have no claim for a share of it, even if a premium had been paid for admittance into the firm, because, as we have seen, there is no good will to such a partnership, and if there was the surviving partner is not obliged to give up business and sell the connection for joint benefit, and yet unless he does so there can be no sale.[1] There is in a professional partnership nothing to sell except the offices, and these are of little value and are often changed.[2] And good will must, therefore, be taken to mean the interest which a retired partner would have had had he remained.[3] Hence, where in a partnership between solicitors formed for seven years, with a stipulation that if one partner retired the rest would pay him the value of his good will, and one partner retired two days before the expiration of the partnership, he was held entitled to the good will as of two days' duration and no more.[4]

Yet if the good will of such a partnership is sold, the implied covenant not to injure the buyer in the enjoyment of his purchase will sustain an injunction against his resumption of business in the locality.[5]

Nevertheless, after a fund is created representing the good will of a professional partnership, even if the good will was a barren ideality the fund is not, and is to be treated as an asset, just as an actual good will would have been.

Thus, in Christie *v.* Clarke, 16 Up. Can. C. P. 544, an instructive case, the administratrix of a deceased physician and surgeon leased the decedent's premises to the defendant at a rent of $100 per annum, and agreed to introduce and recommend him to decedent's practice and relinquish the same to him, as far as she could, for $200 per annum, and the action was to collect these amounts. The court say that good will of a professional business may be the subject of sale and the contract enforced, provided the price is fixed or means of fixing it provided, and it is then an asset, and though perhaps the personal representative could not have been compelled to find a sale for it, in which case it would not be an asset.

[1] Farr *v.* Pearce, 3 Madd. 74; Arundell *v.* Bell, 52 L. J. Ch. 537; 49 L. T. 345; 31 W. R. 477.

[2] Arundell *v.* Bell. See Morgan *v.* Schuyler, 79 N. Y. 490.

[3] Austen *v.* Boys, 2 De G. & J. 626.

[4] Austen *v.* Boys, 24 Beav. 598, aff'd 2 De G. & J. 626.

[5] Dwight *v.* Hamilton, 113 Mass. 175; Ginesi *v.* Cooper, 14 Ch. D. 596, per Jessel, M. R.

So in Smale *v.* Graves, 19 L. J. (N. S.) Ch. 157; 14 Jur. 662, a surgeon-dentist died. His widow, as executrix, sold the good will of his business at £500 and also the premises. She claimed the £500 to be for her personal influence, but the court held otherwise, saying that they might not have been able to hold her accountable had she done nothing, but as she sold the good will the price is part of the estate.[1]

RIGHT TO THE FIRM NAME AFTER DISSOLUTION.

§ 669. If the good will is not disposed of, either partner could use the old name in any way consistent with the fact of a new business, and which does not deceive the public or threaten to involve the other partners by holding them out as members, as by calling themselves successor to.[2]

Whether the seller of the good will of a business, be he an individual or a retiring partner, can or cannot solicit the old customers, he clearly cannot, directly or indirectly, represent that his new business is the same as the one he has sold. Hence, he cannot adopt the old firm name to designate his business, even if it consists of his own with & Co., for this is advertising himself as owner of what he has sold.

Thus, where John Douglas, of the firm of John Douglas & Co., stuff merchants, sold all his interest in the firm and good will to his copartners, the plaintiffs, who thereupon formed a partnership in their own names adding "late John Douglas & Co.," and he formed a partnership with former employees of the firm and opened business next door under the name of John Douglas & Co., it was held that he had a right to go into a similar business next door, but no right to use the old name, although made up of his own, and that the plaintiffs did have the right to represent themselves as successors of the old firm, and an injunction was granted.[3]

[1] If a price is offered to an administrator for the good will of a tavern and refused he is responsible for that amount. Wiley's Appeal, 8 W. & S. 244.

[2] Young *v.* Jones, 3 Hughes, 274, 275; Banks *v.* Gibson, 34 Beav. 566. So each can practice an invention which the now dissolved firm had been formed to work. Renny's Patent Button Holeing Co. *v.* Somervell, 38 L. T. N. S. 878; 26 W. R. 786; Morison *v.* Moat, 9 Hare, 241.

[3] Churton *v.* Douglas, H. V. Johns. 174; 28 L. J. Ch. 841. Yet in Iowa Seed Co. *v.* Dorr (Iowa), 30 N. W.

So, after a sale of the good will of a business carried on under the name of Mason's Hotel or Western Hotel, the seller cannot resume business as an innkeeper under those names, nor upon the same premises under any name whatever, nor hold himself out as successor of the business.[1]

In Hookham *v.* Pottage, L. R. 8 Ch. 91; 27 L. T. N. S. 595; 21 W. R. 47, it was said that the retired partner could say he was in the old firm, provided he did not do it in a way to create a belief that he was continuing the old firm's business. Hence, business next door under a sign, "S. Pottage, from Hookham & Pottage," so arranged that the old name was particularly conspicuous, which had misled people, was enjoined, for there was no right to use the old name.

So in Smith *v.* Cooper, 5 Abb. New Cas. 274, the retired partner opened a store within fifty feet of the old, and put his own name and "of the late firm of" in letters of four and a half inches long followed by the name of the firm in letters eleven and a half inches long, and an injunction was issued, though there was no fraudulent intent.[2] And in Binninger *v.* Clark, 60 Barb. 113; 10 Abb. Pr. N. S. 264, Abraham Binninger Clark, a partner in A. Binninger & Co., and usually signing his name Abm. B. Clark, having retired, was enjoined from carrying on a similar business as A. Binninger Clark, successor to A. Binninger & Co.

Nor can the selling partner form a corporation with a name imitating the old name, and will be enjoined if he attempts it;[3] and will be enjoined from using a trade-mark or any imitation thereof after he has sold it.[4]

Rep. 866, where the partnership name was the name of one partner, and the partners acquired great reputation as dealers in seeds with labels in this name, on sale of the good will after an assignment for benefit of creditors, the purchaser cannot prevent him from going into business under his own name.

[1] Mossop *v.* Mason, 18 Grant's Ch. (Up. Can.) 453 (aff'g S. C. 16 id. 302, and 17 id. 360); Hudson *v.* Osborne, 39 L. J. Ch. 79. And see generally White *v.* Jones, 1 Abb. Pr. (N. S.) 328; 1 Robt. 321; Dayton *v.* Wilkes, 17 How. Pr. 510; Cruttwell *v.* Lye, 17 Ves. 335; 1 Rose, 123.

[2] See Peterson *v.* Humphrey, 4 Abb. Pr. 394.

[3] Myers *v.* Kalamazoo Buggy Co. 54 Mich. 215.

[4] Hoxie *v.* Chaney, 143 Mass. 592, "A. N. Hoxie's mineral soap;" Dayton *v.* Wilkes, 17 How. Pr. 510, the seller of a newspaper enjoined from imitating its appearance when starting a new paper.

§ 670. Buyer's right to the old name.— Subject to the limitation given in the next section, continuing partners purchasing the good will from the retiring partner have the sole right to whatever benefit there is in the old name. And hence can adopt the old name where this does not expose the retiring partner to any risk.[1]

In Levy *v.* Walker, 10 Ch. D. 436, two ladies were partners as C. & W., in London. C. married L., the firm was dissolved and all the stock and good will were sold to the other partner, W., who continued business as C. & W. L. and his wife set up the same kind of business in Paris, under her maiden name, as C. & Co., and sought to enjoin W. from using the name of C. & W. Jessel, M. R., refused the injunction. Although the name included that of a living person, yet Mr. and Mrs. L. ran no risk, the dissolution of the old firm having been duly advertised, and as they were not in business in London, the name C. & W. was in effect a fancy name. James, L. J., regarded W. as entitled to the exclusive right to the name C. & W. by purchase, the other judges giving no opinion upon this point.

So the purchasing partners have the right to advertise themselves as successors to, or late of, the old firm.[2] But the buyer of the property at dissolution sale acquires no right either to use the name of the firm or advertise himself as its successor, and will be enjoined from so doing without proof of damages.[3]

§ 671. Retiring partner's name not to be used.— Where one partner sells out his interest in the business to the others without mentioning good will, the continuing partners cannot use his name in the firm style while he is alive, so as to give others reason to believe that he is still a partner, because it may impose liability upon him and may injure his own business.[4]

[1] Adams *v.* Adams, 7 Abb. New Cas. 292; Rogers *v.* Taintor, 97 Mass. 291, 298.

[2] Churton *v.* Douglas, H. V. Johns. 174. The buyer of the good will from an assignee having transferred it to a corporation, it was held that the corporation could not assume the firm name, but could hold itself out as successor to the firm. Hegeman *v.* Hegeman, 8 Daly, 1.

[3] Reeves *v.* Denicke, 12 Abb. Pr. N. S. 92. See Weed *v.* Peterson, id. 178.

[4] Scott *v.* Rowland, 26 L. T. N. S. 391; 20 W. R. 508; McGowan Bros. Pump and Mach. Co. *v.* McGowan, 22 Oh. St. 370 (affg. s. c. 2 Cinti.

And even if the good will had been assigned, it is doubtful if the name could have been continued if it would expose to risk.[1]

In Morgan *v.* Schuyler,[2] M. & S., dentists, dissolved, S. buying out M.'s interest in the property and lease, and putting up his own name and "successor to" in fine type over the old sign of M. & S.; an injunction was granted on the ground that he was not authorized to declare himself as successor of M. & S., no good will having been acquired except what was incident to a sole ownership of the rooms, the good will attaching to the person of a professional man not being transferable. Yet in Banks v. Gibson, 34 Beav. 566, where Banks and Gibson were partners as Banks & Co., and dissolved, dividing the assets and saying nothing as to the name, it was held that each could use the old name as an undivided asset, and Banks could not enjoin Gibson from using the name Banks & Co., whereas, had one partner taken all the assets, there would have been a valuation of the whole including the name.[3]

Certainly if the firm name was that of the retiring partner *simpliciter*, the buyer could not use it.[4]

And if the seller of a business and good will leaves a sign with his name upon it on the building, and submits for several years to the buyer's use of his name, this is at most a revocable license, and even as a license will not pass to a subsequent buyer so as to be irrevocable.[5] Nor is the right to use another's name assignable by the person using it, even to his future incoming partners, if he has retired or died.[6]

§ 672. Right of a continuing partner to the old name.— Where one partner sells out his interest in the business to the other, who is to continue it exclusively, the latter may

Ct. Rep. 313); Morgan *v.* Schuyler, 79 N. Y. 490 (35 Am. Rep. 543); but see Adams *v.* Adams, 7 Abb. N. Cas. 292.

[1] Scott *v.* Rowland, *supra.*

[2] *Supra.*

[3] Massachusetts has a statute forbidding the use of the name of a former partner without his consent or that of his legal representatives. See Rogers *v.* Taintor, 97 Mass. 291; Morse *v.* Hall, 109 id. 409; Sohier *v.* Johnson, 111 id. 238; Lodge *v.* Weld, 139 id. 499.

[4] Churton *v.* Douglas, H. V. Johns. 174, 190; 5 Jur. N. S. 887; 28 L. J. Ch. 841; Howe *v.* Searing, 6 Bosw. 354; 10 Abb. Pr. 264.

[5] Howe *v.* Searing, *supra;* Horton Mfg. Co. *v.* Horton Mfg. Co. 18 Fed. Rep. 816.

[6] Lodge *v.* Weld, 139 Mass. 499.

use the old name.[1] But the continuing partner cannot so use the old name as to give others reasonable ground to believe that the retiring partner is still a member, against the latter's objection, if such belief would injure him, and injunction will lie.[2]

Where a person allows a firm to use his name in its title, though it may acquire by such license an exclusive right to the name, yet it cannot transmit a right to its successor to use it against the will of such person, and no acquiescence on the latter's part will estop him from objecting;[3] unless perhaps where the name has become a trade-mark.[4]

If a partner sell out his interest to his copartners and engage in a competing business near by, putting up a sign with his own name and the words "of the late firm of" in small letters, followed by the name of the old firm in large type, an injunction will be granted, though there be no fraudulent intent.[5]

§ 673. Surviving partner's right to use name.— A surviving partner can use the name of the deceased partner in continuing business; the estate of the decedent is not hazarded by such use as a holding out.[6]

And if, by the articles, the representatives of the deceased partner can take the decedent's share in the business, the surviving partner will be enjoined from carrying on the business in any other

[1] Adams *v.* Adams, 7 Abb. New Cas. 292.

[2] See Routh *v.* Webster, 10 Beav. 561; Troughton *v.* Hunter, 18 id. 470; Bullock *v.* Chapman, 2 DeG. & Sm. 211; Scott *v.* Rowland, 26 L. T. N. S. 391; McGowan Bros. Pump & Mach. Co. *v.* McGowan, 22 Oh. St. 370 (aff'g s. c. 2 Superior Ct. Rep. 313); Peterson *v.* Humphrey, 4 Abb. Pr. 394; Hallett *v.* Cumston, 110 Mass. 29.

[3] Horton Mfg. Co. *v.* Horton Mfg. Co. 18 Fed. Rep. 816.

[4] Dixon Crucible Co. *v.* Guggenheim, 2 Brewst. 321.

[5] Smith *v.* Cooper, 5 Abb. New Cas. 274; Peterson *v.* Humphrey, 4 Abb. Pr. 394.

[6] Webster *v.* Webster, 3 Swanst. 490; Lewis *v.* Langdon, 7 Sim. 425; Robertson *v.* Quiddington, 28 Beav. 529, 536; Banks *v.* Gibson, 34 Beav. 566; Staats *v.* Howlett, 4 Den. 559. *Contra*, Fenn *v.* Bolles, 7 Abb. Pr. 202, that a surviving partner cannot use the old name in continuing business on his own account without the consent of the representatives of the deceased, for either the name perishes with the firm and neither can use it, or it is an interest in common possessed in law by the survivor, but for common benefit.

name until a reasonable time to elect to take has passed.[1] The representatives of the deceased partner may be enjoined from using the old name until their right to do so is established at law.[2]

Wm. P. Winchester, a manufacturer of soap doing business as E. A. & W. Winchester, which name he used as a trade-mark, took in the defendant as a partner, continuing the old name, with a privilege of dissolving at any time, in which case the defendant was to have no claim except for accrued profits, Winchester reserving the right to let certain relatives, by his will, into the firm, which should be continued under the old name. As Winchester did not dissolve the firm in his life-time, the provision for using the name after his death carried the good-will and right to use the name to the defendant. The defendant took in new partners after Winchester's death, but the firm was dissolved seventeen years afterwards. Winchester's will provided that the firm could use the premises at a certain rent if the defendant was a member of it. On dissolution, the executors sold the factory and sought to compel the defendant to unite with them in conveying the old name as a trade-mark to the buyer, and to enjoin the defendant from using it, but it was held that the exclusive right to it did not revert to the executors on the dissolution, not being attached to the premises, whether the defendant had a right to it afterwards or not.[3]

§ 674. Trade-name.— A trade-name, like a trade-mark, will be protected from infringement by third persons. Not that there is a property in the name, but because it is a fraud upon the owner that third persons should imitate it after he has established a trade.[4] So if a corporation adopts a name which imitates an existing trade-name, the individuals who procured the name to be given are probably subject to action.[5]

Partners as the Kalamazoo Wagon Co. sold out the concern and its good will to Myers, one of their number. Two of the

[1] Evans *v.* Hughes, 18 Jur. 691, injunction for three months.

[2] Lewis *v.* Langdon, 7 Sim. 425. And see Robertson *v.* Quiddington, 28 Beav. 536.

[3] Sohier *v.* Johnson, 111 Mass. 238.

[4] Lee *v.* Haley, L. R. 5 Ch. App. 161; Newby *v.* Oregon Co. 1 Deady, 609; Bell *v.* Locke, 3 Paige, 75, imitating the name of another's newspaper.

[5] Lawson *v.* Bank of London, 18 C. B. 84.

retiring partners, with other persons, formed a corporation as the Kalamazoo Buggy Co., in the vicinity, and issued circulars like those of the old concern and solicited its customers. It was held that an injunction would lie against using a name so similar as to mislead and draw off customers, it having been done in order to draw off customers and appropriate the good will, which had been sold. The court refused to order that mail matter should pass the scrutiny of the complainant, as that would cure a wrong by a wrong, but ordered the defendants to deliver to complainant all such mail matter as appeared to be for him. And the new members of the Buggy Company were enjoined as well as the former partners.[1]

But another person of the same name may use his own name in an honest and ordinary business manner. Thus, where the plaintiff stamped silverware, "Rogers & Bro., A. 1," and the defendant stamped his, "C. Rogers & Bros., A. 1," injunction was refused.[2]

A name attached to a building may become a trade-name, as the designation of such building.[3]

Where a clothing merchant had leased a building, put up a tower on it, and had a sign Tower Palace, and advertised largely; when he left the premises he moved his sign to his new place, and the defendant rented the old stand, put up a sign of Tower Palace, and caused the loss of some custom thereby to the former occupant, who thereupon sought to enjoin him from having the sign Tower Palace. The injunction was refused on the ground that the name described the building, and not the business or the person, and was not a trade-mark.[4]

Where plaintiff leased a lot and put a hotel on it which he named the "What Cheer House;" he then bought the adjoining lot, put a building on it, moved the old sign to the new building and operated both as the What Cheer House. He then surrendered

[1] Myers *v.* Kalamazoo Buggy Co. 54 Mich. 215.

[2] Rogers *v.* Rogers (Conn.). 21 Rep. 394.

[3] Howard *v.* Henriques, 3 Sandf. 725, Irving Hotel. The owner enjoined the defendant from naming his hotel by the same name, although the Irving Hotel did not have a sign on the building; Booth *v.* Jarrett, 52 How. Pr. 169, where the buyer of Booth's Theatre, on foreclosure, was held entitled to continue the name; Pepper *v.* Labrot, 8 Fed. Rep. 29. where "The Oscar Pepper Distillery" became the name of the property.

[4] Armstrong *v.* Kleinhaus, 82 Ky. 303.

the lease and confined himself to the lot he owned. The defendant took the lease and labeled the building, "The Original What Cheer House," but an injunction was granted against the defendant using this name.[1]

§ 675. **Trade-mark.**— Upon dissolution, if a trade-mark is not disposed of, either partner can continue to use it, where the others are not thereby rendered liable, and no false representations are involved in its use.[2]

Mitchell & Condy made "Condy's Fluid." They dissolved partnership. Mitchell engaged in business as "Condy's Fluid Co." As each partner has the right to use the trade-marks, Condy cannot enjoin him from selling a spurious article under the name of Condy's Fluid, so long as he does not deceive the public into believing that it is made by Condy.[3]

It is, however, an asset to be sold on dissolution, on demand of either party, in order to wind up.[4]

AGREEMENTS NOT TO COMPETE.

§ 676. **Reasonableness of.**— Contracts for the sale of a good will are frequently accompanied by an obligation not to go into the same business in competition with the buyer, for without such covenant the seller, as we have seen, can open a similar business again in the neighborhood. As these engagements are not peculiar to partnership law, their notice here will be brief.

The covenants are not an illegal restraint of trade if they are reasonable as to territory, the extent of which depends on the character of the business.[5]

[1] Woodward *v.* Lazar, 21 Cal. 448.

[2] Smith *v.* Walker, 57 Mich. 456; Huwer *v.* Dannenhoffer, 82 N. Y. 499; Hazard *v.* Caswell, 93 id. 259 (rev. 14 J. & Sp. 259); Young *v.* Jones, 3 Hughes, C. C. 274; Taylor *v.* Bothin, 5 Sawy. 584; 8 Reporter, 516; and if registered in the name of one he could be compelled to transfer an equal interest to his associates, Taylor *v.* Bothin.

[3] Condy *v.* Mitchell, 37 L. T. N. S. 766; 26 W. R. 269; affg. 37 L. T. N. S. 268.

[4] Hall *v.* Barrows, 4 De G. J. & Sm. 150; Bury *v.* Bedford, id. 352.

[5] See generally notes to Mitchel *v.* Reynolds, 1 Sm. Lead. Cas. 508; Goodman *v.* Henderson, 58 Ga. 567; Hubbard *v.* Miller, 27 Mich. 15; Stewart *v.* Challacombe, 11 Ill. App. 379.

The territorial limit must be reasonable. No rule can be laid down to determine what that is, for it varies according to the business.[1]

But if more than one limit is fixed, one of which is unreasonable and the other reasonable, the covenant will be treated as divisible, and the latter held valid.

Thus a covenant not to engage in the same business in the same county, nor within five years in the United States, is valid as to the first covenant, even if bad as to the latter, for the contract is divisible.[2]

It seems that a restriction in time is not necessary.[3]

[1] Oregon Steam Nav. Co. *v.* Winsor, 20 Wall. 64; Callahan *v.* Donnolly, 45 Cal. 152; Guerand *v.* Dandelet, 32 Md. 561; Warfield *v.* Booth, 33 id. 63; Maier *v.* Horman, 4 Daly, 168. If there is no territorial restriction, the covenant is void, Wiley v. Baumgardner, 97 Ind. 65 (49 Am. Rep. 427). An agreement not to practice as physician in a city "and vicinity" is valid. Warfield v. Booth, 33 Md. 63; Timmerman *v.* Dever, 52 Mich. 34; 50 Am. Rep. 240. Or within twenty miles. Butler *v.* Burleson, 16 Vt. 176. It need not be confined to state lines, Oregon Steam Nav. Co. *v.* Winsor, *supra;* Diamond Match Co. *v.* Roeber, 35 Hun. 421, sustaining an agreement not to manufacture friction matches in the United States, except in one state and territory.

[2] Dean *v.* Emerson, 102 Mass. 480; Lange *v.* Werk, 2 Oh. St. 519; Thomas *v.* Miles, 3 id. 274; Peltz *v.* Eichele, 62 Mo. 171. *Contra*, that the contract is entire and wholly void, More *v.* Bonnet, 40 Cal. 251. A covenant by the retiring partner of booksellers not to canvass within one hundred and fifty miles of the general postoffice, nor within fifty miles of Dublin or Edinburgh, nor in any town where the firm had an establishment, was sustained. Tallis *v.* Tallis, 1 E. & B. 391. But if the covenant be not to interfere with such branches as the covenantee might establish at any and all places it is to that extent void. Thomas *v.* Miles, 3 Oh. St. 274. A covenant that after dissolution neither party will continue business within one block of the old stand, for a certain period, is valid and enforcible by injunction, Shearman *v.* Hart, 14 Abb. Pr. 358.

[3] Cook *v.* Johnson, 47 Conn. 175; 36 Am. Rep. 64; Curtis *v.* Gokey, 68 N. Y. 300 (rev. 5 Hun, 555), as long as the buyer was in the business. In the following cases there was no limitation of time mentioned: Dean *v.* Emerson, 102 Mass. 480; Ropes *v.* Upton, 125 id. 258; Stewart *v.* Bedell, 79 Pa. St. 336; Jacoby *v.* Whitmore, 32 W. R. 18; 49 L. T. 335; Burrill *v.* Daggett (Me. 1885), 1 Atl. Rep. 677; Thayer *v.* Younge, 86 Ind. 259; Arnold *v.* Kreutzer, 67 Iowa, 214. See Curtis *v.* Gokey, 68 N. Y. 300, while the continuing partner is in business. And so of several English cases given below.

The covenant is deemed to be for the covenantor's life, and is not affected by the covenantee discontinuing business altogether, for the covenant adds to the value of the good will in selling, and passes to the buyer; nor by moving the shop, though it might if moved out of the neighborhood.[1] Nor is it affected by the covenantee's death, for the administrator may desire to realize by sale, or continue business.[2]

§ 677. Breaches.—One who agrees not to go into the same business, directly or indirectly, within certain limits, violates his contract by going into business outside the territory, and from thence supplying people within it.[3]

An agreement not to carry on a business, directly or indirectly, either alone or in partnership with, or with the assistance of, another, is broken by carrying it on as manager for another.[4] An agreement not to carry on or engage in, alone or with any other person, the business of tailor is broken by acting as foreman for another.[5]

A covenant not to be concerned in a business cannot be confined, like the word interested, to receiving a share of the profits, and is broken by being employed as a servant at a weekly salary.[6] And an agreement not to carry on or be concerned in carrying on, directly or indirectly, the business of a saddler, or sell any goods in any way connected with that trade, is broken by selling as journeyman for another.[7] And a sale of good will and agreement not to carry on or be concerned or interested in the business of tailor is broken by engaging as journeyman for a nephew of the same name.[8]

A sale of a bakery with a covenant not to engage in the business in the town, nor directly or indirectly engage in any business, or do any act interfering with the business for the sale of bread on

[1] Jacoby *v.* Whitmore, 32 W. R. 18; 49 L. T. N. S. 335.

[2] Vernon *v.* Hallam, 34 Ch. D. 748.

[3] Turner *v.* Evans, 2 E. & B. 512; 2 DeG. M. & G. 740; Brampton *v.* Beddoes, 13 C. B. N. S. 538; Sander *v.* Hoffman, 64 N. Y. 248 (rev. 7 J. & Sp. 307); Boutelle *v.* Smith, 116 Mass. 111; Duffy *v.* Shockey, 11 Ind. 71. Though done at the request of the customers, without solicitation; but an occasional sale to an old customer to oblige him was said not to be a breach, because not a carrying on business, Sander *v.* Hoffman, *supra*.

[4] Dales *v.* Weaber, 18 W. R. 993.

[5] Rolfe *v.* Rolfe, 15 Sim. 88.

[6] Hill *v.* Hill, 55 L. T. N. S. 769.

[7] Jones *v.* Heavens, 4 Ch. D. 636.

[8] Newling *v.* Dobell, 38 L. J. Ch. 111; 19 L. T. 408.

the several bread routes, is violated by driving on one of the former routes as employee of another baker in another town.[1]

A covenant not to carry on business in his own name, or that of another, is not violated by acting as manager for another on a salary.[2]

An agreement not to carry on the business of chemist, either in his own name or for his own benefit, or in the name of or for the benefit of another, is not broken by soliciting orders for another chemist.[3]

A sale to a copartner of the good will of a millinery business, with an agreement to forfeit $2,000 if he should buy or sell goods in the same business in the same city, is not violated by being employed as clerk in a competing establishment and being held out as a partner in it, with his consent, if in fact not a partner and having no joint interest in purchases and sales.[4]

A contract not to practice dentistry on one's own account or by agent is not violated by working for another.[5]

A covenant not to engage in a trade in a certain district is not broken by lending money to a competitor to enable him to carry on business, taking as security a mortgage upon his trade premises, and knowing that the mortgagor could not pay the debt except out of the profits,[6] nor by leasing premises to a person who intends to carry on a competing business.[7]

A sale of a barber shop, with a covenant never to open and keep another shop in the town, is violated by buying out another shop two years afterwards which was in existence at the time of the contract.[8]

Under a covenant by partners that they or either of them will not enter into the same business, both are liable for a breach by one.[9]

Under a covenant not directly or indirectly to carry on or be interested in a competing business, and violated by going into part-

[1] Boutelle *v.* Smith, 116 Mass. 111.

[2] Allen *v.* Taylor, 39 L. J. Ch. 627; 22 L. T. 651; 18 W. R. 888 (aff. on appeal, 19 W. R. 35); Allen *v.* Taylor, 24 L. T. 249; 19 W. R. 556.

[3] Clark *v.* Watkins, 9 Jur. N. S. 142; 8 L. T. 8; 11 W. R. 319.

[4] Greenebaum *v.* Gage, 61 Ill. 46.

[5] Bowers *v.* Whittle, 63 N. H. 147; 56 Am. Rep. 499.

[6] Bird *v.* Lake, 1 H. & N. 338.

[7] Bradford *v.* Peckham, 9 R. I. 250.

[8] Burrill *v.* Daggett (Me.), 1 Atl. Rep. 677.

[9] Boutelle *v.* Smith, 116 Mass. 111; Stark *v.* Noble, 24 Iowa, 71.

nership with another, and taking the financial management of the new concern, soliciting customers, introducing goods and receiving a commission, the covenantor may be found liable for all the injury done to the plaintiff by the new partnership, the inference being warranted that he participated in all its acts.[1]

A covenant not "to carry on the business of a manufacturer, either by himself or jointly with any other person, under said name or style of John Hallam or Hallam Brothers," is not a covenant not to compete generally, but not to do so in those names; the words "under said name," etc., qualify the whole covenant.[2]

§ 678. **Injunction.**— In this class of cases, injunction may be obtained; certainly so if the bond is for an amount which is not liquidated damages, payment of which satisfies the agreement, but a penalty; for it is then not the limit of recovery, and the difficulty of proving damages and the consequent inadequacy of the remedy at law gives equity a jurisdiction.[3]

Where the business and good will of a physician, yielding an annual income of $5,000, was sold, with an agreement not to compete, for $150, it was said that while the adequacy of the consideration would not be examined, yet when so disproportionate injunction could be refused.[4]

[1] Dean *v.* Emerson, 102 Mass. 480.

[2] Vernon *v.* Hallam, 34 Ch. D. 748.

[3] Whittaker *v.* Howe, 3 Beav. 383; Angier *v.* Webster, 14 Allen, 211; Ropes *v.* Upton, 125 Mass. 258; Butler *v.* Burleson, 16 Vt. 176; Shearman *v.* Hart, 14 Abb. Pr. 358; Mackinnon Pen Co. *v.* Fountain Ink Co. 48 N. Y. Superior Ct. 442.

[4] Thayer *v.* Younge, 86 Ind. 259. But see Pierce *v.* Fuller, 8 Mass. 223.

CHAPTER VII.

IMPLIED POWERS AFTER DISSOLUTION

§ 679. Upon dissolution, other than by death or bankruptcy, the authority or scope of agency of each partner at once changes, except as to persons not properly notified of dissolution, and becomes limited to what is necessary to wind up, that is, to collect credits, pay off debts and divide. In case of dissolution by death the whole title devolves upon the surviving partner, and hence he stands upon a different ground, which will be separately considered. But assuming a dissolution by efflux of time or consent, or in any other way, leaving each partner with capacity to act, their agency, which was one to carry on the business, is wholly gone, and has become a mere right to wind up. True, it is often said that a partnership continues for the purpose of winding up,[1] yet this is a mere figure of speech. The associates have ceased to be partners; their representative powers have disappeared, and the only shred of agency left is a right to wind up, involving powers of disposition, collection and payment, with the exception only of unfulfilled transactions and contracts which they are under obligations to carry out, and as to which they cannot change their relations, and the exception of dealings with those entitled to notice of the dissolution who have not received it.

Adams *v.* Bingley, 1 M. & W. 192, is an illustration of how completely the agency of a partner is terminated by dissolution. There C. borrowed money from the firm of A. & B., giving his note for the loan to B. only. A. knew of the loan, but not of the note.

[1] *Ex parte* Ruffin, 6 Ves. 119, 126; *Ex parte* Williams, 11 id. 5; Peacock *v.* Peacock, 16 id. 49, 57; Wilson *v.* Greenwood, 1 Swanst. 471, 480; Crawshay *v.* Maule, id. 495, 507. And the same statement will be found in numberless American cases, Brown *v.* Higgenbotham, 5 Leigh (Va.), 583 (27 Am. Dec. 618).

A. & B. dissolved, with notice to all persons to pay debts to A., and B. indorsed the note to A. for valuable consideration. A. can sue C. on the note, although B. had, after indorsing it to A., fraudulently obtained from C. other security under a promise to deliver up the note.

§ 680. **Power to pay debts.**—The process of winding up involves some powers, and among them is the power to pay debts, and each partner therefore has this right, the same as before dissolution, there being no reason to make a difference, for each partner, as we have seen, has an equitable right to insist upon the application of the joint funds to the joint debts, and unless each partner could make the application the right would be nugatory unless a court were called upon to do it for them.[1] So he may compromise a debt due by the firm,[2] or sign the certificate of discharge of a bankrupt debtor;[3] and may even agree upon and adjust the amount of an unliquidated claim against the firm.

For example, a nephew of three partners began to work for them at ten years of age and continued for seventeen years; they agreed to pay him wages all the time, and after the death of one partner the two survivors settled with the minor at $1,400, the administrator allowing the survivors $400 as the share of the deceased. This allowance is not to be struck out, the court saying that the settlement would have bound the deceased partner if alive, and binds his estate; it was the duty of the survivors to make it, and the administrator did right to allow it.[4]

And may authorize an agent of the firm to wind up his agency and adjust accounts with the customers he dealt with.[5]

So where a firm embarked with other persons in a large flour speculation, and the firm was dissolved by the retirement of the defendant and the speculation resulted in a considerable loss; one of the continuing partners adjusted the amount of the loss be-

[1] Rice *v.* McMartin, 39 Conn. 573; Schalck *v.* Harmon, 6 Minn. 265, 269.

[2] Bass *v.* Taylor, 34 Miss. 342; Cannon *v.* Wildman, 28 Conn. 472, 493. And see Union Bank *v.* Hall, Harper (S. Ca.), 245, where a member of a firm of indorsers consented to the holder compromising with the maker.

[3] *Ex parte* Hall, 17 Ves. 62.

[4] Moist's Adm'rs' Appeal, 74 Pa. St. 166.

[5] Ruffner *v.* Hewitt, 7 W. Va. 585.

tween the firm and the other joint speculators, and this settlement was held binding upon the retired partner in an action against his estate by one of the joint speculators for the share of loss owing by the firm.[1]

And no doubt a liquidating partner is under no obligation to treat creditors alike, but may pay them preferentially,[2] as a surviving partner may; and he may authorize a debtor of the firm to pay direct to a creditor, and the copartners cannot object.[3]

§ 681. Power to collect and receipt for debts.— So, also, each partner has the same power after dissolution as before to collect, discharge, release or receipt for debts due to the firm. If this were not so, the power to settle and wind up would be nullified, for it would be difficult, and sometimes impossible, for a debtor to pay his debt, or for the firm to wind up without litigation.[4]

§ 682. —— power not revocable by copartners.— Notice by the copartner to the debtor not to pay a partner will not prevent a payment to the latter being valid. Such notice

[1] Tutt *v.* Cloney, 62 Mo. 116.

[2] Smith *v.* Dennison, 101 Ill. 531. In Baldwin *v.* Johnson, 1 N. J. Eq. 441, it was said *arguendo* that a partner after dissolution must divide equally, and, hence, that a preferential mortgage on real estate in his name was unauthorized.

[3] Cannon *v.* Wildman, 28 Conn. 472, 493.

[4] Bristow *v.* Taylor, 2 Stark. 50; Duff *v.* East India Co. 15 Ves. 198; King *v.* Smith, 4 C. & P. 108; Brasier *v.* Hudson, 9 Sim. 1; Nottidge *v.* Prichard, 2 Cl. & F. 376 (aff. s. c. 8 Bli. New Rep. 493); Bradley *v.* Camp, Kirby (Conn.), 77 (1 Am. Dec. 13); Nichels *v.* Mooring, 16 Fla. 76 (26 Am. Rep. 709); Gregg *v.* James, Breese (Ill.), 107; Gordon *v.* Freeman, 11 Ill. 14; Granger *v.* McGilvra, 24 Ill. 152; Major *v.* Hawkes, 12 Ill. 298; Yandes *v.* Lefavour, 2 Blackf. 371; Combs *v.* Boswell, 1 Dana, 473; Lunt *v.* Stevens, 24 Me. 534; Tyng *v.* Thayer, 8 Allen, 391; Morse *v.* Bellows, 7 N. H. 549, 568; Napier *v.* McLeod, 9 Wend. 120; Ward *v.* Barber, 1 E. D. Smith, 423; Huntington *v.* Potter, 32 Barb. 300; Robbins *v.* Fuller, 24 N. Y. 570; Gillilan *v.* Sun Mutual Ins. Co. 41 id. 376; Sims *v.* Smith, 11 Rich. (S. Ca.) L. 565; Thrall *v.* Seward, 37 Vt. 573. But after a receiver is appointed, a payment to a partner by a debtor knowing this is void, and does not bind the other partner. Manning *v.* Brickell, 2 Hayw. (N. Ca.) 133. It has, however, been held that no implied power exists to take property in payment after dissolution, on the ground that the receipt of property is not in itself payment, and can only become so by agreement; whereas no new contract can be made after dissolution. Kirk *v.* Hiatt, 2 Ind. 322.

is not an injunction, and if the copartner's interests require such protection, he must apply for injunction and receiver.[1] And though the partner to whom payment is made is insolvent, for inability to pay his private debts does not deprive him of the powers of a partner nor operate as an injunction; and the debtor need not see to the application of the payment.[2]

In Gillilan *v.* Sun Mut. Ins. Co. 41 N. Y. 376, S. & Co., with others, were partners in a ship. S. & Co. were its agents, and procured insurance for the benefit of the owners, loss payable to them. A loss having occurred, another partner notified the insurance company not to pay S. & Co., on the ground that they were insolvent and were indebted to the firm. Nevertheless, payment by the company to S. & Co. after such notice was held to be a discharge of the debt.

§ 683. —— **where one partner becomes owner.**— If, on dissolution, a debt due the firm is, by agreement, made the property of one of the partners, a debtor with notice of this is not discharged by payment to any but the assignee,[3] but not if the debtor has not notice.[4]

In Hilton *v.* Vanderbilt, 82 N. Y. 591, on dissolution of U. & Co., V., one of the partners, assumed payment of all the debts and took exclusive charge of the liquidation. H., a factor, who had made advances to U. & Co. on consignments by them, had notice of the arrangement, and was instructed by V. not to sell below $1 per yard. H. disregarded this, and, after consultation with U., who had gone into his employ, and without notice to V., sold at less than $1 per yard, and was held liable to V. in an action by him against V. to recover a balance due on his advances. Here V.'s

[1] Gillilan *v.* Sun Mut. Ins. Co. 41 N. Y. 376; Cannon *v.* Wildman, 28 Conn. 472, 493; Granger *v.* McGilvra, 24 Ill. 152. *Contra*, Sims *v.* Smith, 11 Rich. L. 565, where, however, there was a release by a partner in consideration of the discharge of his private debt, and the decision should have been put on this ground.

[2] Major *v.* Hawkes, 12 Ill. 298; Gillilan *v.* Sun Mut. Ins. Co. 41 N. Y. 376; Heartt *v.* Walsh, 75 Ill. 200.

[3] Duff *v.* East India Co. 15 Ves. 198, 213; Davis *v.* Briggs, 39 Me. 304; Gram *v.* Cadwell, 5 Cow. 489; Bank of Montreal *v.* Page, 98 Ill. 109.

[4] Gillilan *v.* Sun Mut. Ins. Co. 41 N. Y. 376, 380; Huntington *v.* Potter, 32 Barb. 300.

power is more than a bare authority. U. had parted with all right to control the settlement and no interest remained in him, the agreement amounting to an absolute transfer.

§ **684.** But though another one of the partners is by the agreement of dissolution appointed by the rest to collect the debts, and the creditor knows this, for such agreement is only good *inter se*, and does not exclude third persons from dealing with a partner; unless the legal title is passed, such authority is revocable;[1] and though the power is declared to be irrevocable, for it is not an assignment of the debts;[2] or though a third person is, by agreement, appointed to collect and wind up.[3]

But a discharge of a debt without consideration, or in part for a debt due by the receipting partner alone, does not bind the copartner.[4]

§ **685. Nature of title not changed.**— In Abel *v.* Sutton, 3 Esp. 108, Lord Kenyon said: "The moment the partnership ceases the partners become distinct persons; they are tenants in common of the partnership property undisposed of from that period;" and Collyer[5] lends the great weight of his authority to the same proposition.[6] But though the control of each in order to wind up continues, thus implying a beneficial interest in the whole assets, it cannot be said now that the nature of the title is a tenancy in common; that it, on the contrary, remains joint, is shown by the fact that, if a partner dies after a dissolution has became complete, he nevertheless takes the whole legal title as a surviving partner.[7]

[1] King *v.* Smith, 4 C. & P. 108; Gordon *v.* Freeman, 11 Ill. 14. And see Arton *v.* Booth, 4 Moo. 192.

[2] Napier *v.* McLeod, 9 Wend. 120. *Contra*, Combs *v.* Boswell, 1 Dana, 473.

[3] Porter *v.* Taylor, 6 M. & S. 156; Bristow *v.* Taylor, 2 Stark. 50; Gordon *v.* Freeman, 11 Ill. 14.

[4] Lunt *v.* Stevens, 24 Me. 534; Sims *v.* Smith, 11 Rich. L. 565; Gram *v.* Cadwell, 5 Cow. 489.

[5] On Partnership, § 545.

[6] See the criticism upon this in Rice *v.* McMartin, 39 Conn. 573.

[7] Yale *v.* Eames, 1 Met. 486. 487; Strange *v.* Graham, 56 Ala. 614; Stillwell *v.* Gray, 17 Ark. 473; Ober *v.* Indianapolis & St. L. R. R. 13 Mo. App. 81; Murray *v.* Munford, 6 Cow. 441; Kinsler *v.* McCants, 4 Rich. L. 46 (53 Am. Dec. 711). See § 183, and see cases in the three following sections. If the articles of partner-

§ 686. **Power to dispose of property.**—The power to dispose of the assets, whether in payment of a debt or to convert them into money in the process of winding up, seems clearly to exist by the great weight of authority. For a long time the now exploded doctrine of title in the partners to specific chattels by moieties, and a doctrine that after dissolution the partners became tenants in common of the property, has confused the question by rendering it doubtful whether a buyer's title was sustained because of a power to sell in one partner, or because of the rule that one tenant in common cannot maintain trover against his co-tenant.[1]

In the course of settlement after dissolution, each partner has power to transfer an asset in payment of a debt or to sell property of the firm to raise money to discharge its liabilities.[2]

§ 687. **Illustrations.**—In Bach *v.* State Ins. Co. 64 Iowa, 595, plaintiff's insurance covered a refrigerator which he had purchased of one N., in whose possession it was left after dissolution of the firm of N. & M., whose property it was. It was held that the plaintiff had title in it, for where property is left with a partner after dissolution, he may be regarded as clothed with a power of disposition.

In Robbins *v.* Fuller, 24 N. Y. 570, a judgment in favor of a firm for $1,763.13 was, after dissolution, sold by an agent appointed by one partner in the firm name. The report does not state for what consideration, but the buyer afterwards released the judgment for

ship provide that the property shall be divided equally on dissolution, the property is held as tenants in common by force of the contract, and neither can dispose of the interest of another. Phillips *v.* Reeder, 18 N. J. Eq. 95. Property remaining after all debts are paid has been said to be held as tenants in common. Ruckman *v.* Decker, 23 N. J. Eq. 283 (reversed on other points in 28 N. J. Eq. 614); Hogendobler *v.* Lyon, 12 Kan. 276; Bilton *v.* Blakely, 6 Grant's Ch. (Up. Can.) 575, 576.

[1] As to the power of each partner over real estate, see under Real Estate, § 299.

[2] Stanton *v.* Lewis, 26 Conn. 444; Western Stage Co. *v.* Walker, 2 Iowa, 504; Bach *v.* State Ins. Co. 64 Iowa, 595; McClelland *v.* Remsen, 23 How. Pr. 175; aff'd in 3 Abb. App. Dec. 74; Robbins *v.* Fuller, 24 N. Y. 570; Bennett *v.* Buchan, 61 N. Y. 222; 53 Barb. 578; Thursby *v.* Lidgerwood, 69 N. Y. 198; Murphy *v.* Yeomans, 29 Up. Can. C. P. 421.

$100. The other partner sued the judgment debtor for his share of the judgment. It was held that the sale conveyed a valid title to the whole. It was further said that each partner has, after dissolution, the same authority as before to dispose of property, and that the right is not lost by the fact that all debts are paid. Nor, per SMITH, J., p. 575, does it depend on the state of the accounts between the partners as against those having no notice, and such buyers cannot ascertain this as their peril. DAVIES, J., dissented on the ground that the agency of a partner to dispose of property is gone on dissolution, and ALLEN, J., on the ground that a partner cannot appoint an agent after dissolution.

In Bennett *v.* Buchan, 61 N. Y. 222 (which reverses s. c. 53 Barb. 578, but only on a subordinate question), both courts agreed that a partner, after dissolution, could transfer an asset, though not make a new contract. Hence where the firm of R. & B. owned a judgment against four defendants, and R. had, without B.'s knowledge, released the only solvent one, and after dissolution R. sold the judgment to the plaintiff, covenanting as to its validity, it was held that the sale conveyed the title of both R. and B., but that the covenant did not bind B.

In Murphy *v.* Yeomans, 29 Up. Can. C. P. 421, G. & A., partners, dissolved, G. buying out A., but A. afterwards filed a bill to rescind the agreement because he was a minor. Plaintiff being without notice of this proceeding, but knowing of the dissolution, purchased a quantity of wheat of the firm from G. The court held that a sale by a partner, after dissolution, is a legitimate exercise of a power to convert assets into money to wind up, and passes title, and that the description of the power of a partner after dissolution in Lindley on Part. 412, is too narrow.

Where the terms of dissolution gave one partner power to sell assets, collect debts, using the firm name for the purpose, and wind up, this power to sell does not exclude but is in addition to the power to dispose of the assets, and a person to whom he had assigned an account due to the firm has a good title, and can sue the debtor.[1]

In Morse *v.* Bellows, 7 N. H. 549, 568,[2] it was said there seems to be no good reason why one partner may not assign a bond after

[1] Stanton *v.* Lewis, 26 Conn. 444. [2] 28 Am. Dec. 372.

the partnership is dissolved, because, unlike the indorsing over a note, it is not a new contract.

In Milliken *v.* Loring, 37 Me. 408, it was held that, after dissolution, a partner could assign a debt due to the firm to a creditor in payment of his debt, although it was argued that the partners were only tenants in common after dissolution.

And by Miller *v.* Florer, 15 Oh. St. 148, 153, it seems that the settling partner may put an asset into a creditor's hands as collateral, and a settling partner authorized to borrow can pledge assets as collateral for the loan, even though he cannot give a note,[1] as can also a surviving partner. See SURVIVING PARTNER.

In Thursby *v.* Lidgerwood, 69 N. Y. 198, partners had a judgment against the defendant and assigned for benefit of creditors. At assignee's sale the judgment was bought in for them, and afterwards one of the partners sold the judgment; it was held that the partners, after dissolution by the insolvency, owned the judgment, not as tenants in common, but as partners, hence either could sell and convey title to the whole of it to close up business.

In Van Doren *v.* Horton, 19 Hun, 7, a firm of four partners dissolved and divided its property except certain accounts, which were to be collected and used to pay debts by two of the partners, and an ice-house which, by agreement, was made into two parts for the term of one year, two partners occupying one part and two the other. During the year one of the partners, without the assent of the other, transferred the house to the plaintiff, and in an action by him for possession it was held that a partner's right of disposition was not terminated by dissolution, and the plaintiff recovered.

§ 688. —— to assign for creditors or confess judgment. A partner has no implied power after dissolution to assign the partnership assets for the benefit of creditors for reasons similar to those which prevent his having such power before dissolution.[2] Nor to confess judgment against the firm.[3]

[1] Smith *v.* Dennison, 101 Ill. 531.

[2] Egberts *v.* Wood, 3 Paige, 517; Deckert *v.* Filbert, 3 Watts & S. 454. *Contra*, if the non-executing partners are non-resident dormant partners, Power *v.* Kirk, 1 Pittsburg Rep. 218. All the continuing partners united can assign, Clark *v.* Wilson, 19 Pa. St. 414.

[3] Bennet *v.* Marshall, 2 Miles (Pa.), 436; Mair *v.* Beck (Pa. 1886), 2 Atl. Rep. 510.

§ 689. But the power to dispose of the assets has been held by some authorities to cease upon the cessation of a necessity for it; and after the debts are paid, is held in several decisions to exist no longer.

In Hogendobler *v.* Lyon, 12 Kan. 276,[1] it was held that, after all the debts are settled after dissolution, the partners become tenants in common of the assets, and neither can sell the share of the other in a chattel, and the other can maintain an action for conversion of his half against the buyer. This does not, therefore, deny the power of sale before the debts are paid, and is contrary to the *dicta* in Robbins *v.* Fuller, 24 N. Y. 570, *supra*, but not to the decision in that case.

So in Stair *v.* Richardson, 108 Ind. 429, where the holder of accounts and notes assigned to him by one partner was, in an action against the debtor, required to make out his title by proof of authority, on the ground that the partners were only tenants in common after dissolution.

In Halstead *v.* Shepard, 23 Ala. 558, a partner, after the firm's business had closed, though without formal dissolution, sold an overdue note belonging to the firm with the fraudulent intent of appropriating the proceeds; the buyer had notice that the copartner had an interest and rights in the note and that the selling partner was insolvent, and it was held that he must respond to the extent of the former's interest.[2]

§ 690. Power to convey negotiable paper made to the firm.— A source of great, yet perhaps unnecessary, dispute is in the right to indorse over negotiable paper made to the firm in order to pay debts. The rule forbidding a partner, after dissolution, to make any new contract or create any obligation prevents his indorsing the name of the firm, for

[1] And Bilton *v.* Blakely, 6 Grant's Ch. (Up. Can.) 575, 576.

[2] In Bank of Port Gibson *v.* Baugh, 9 Sm. & Mar. 290, and Roots *v.* Salt Co. 27 W. Va. 483, 492–3, it was said *obiter* that dissolution disabled a partner to buy, sell, or pledge. See, also, Baldwin *v.* Johnson, 1 N. J. Eq. 441, and Phillips *v.* Reeder, 18 id. 95, where the terms of dissolution provided for the disposition of the property, and a sale by a partner of the interest of all was held beyond his power. But in Robbins *v.* Fuller, 24 N. Y. 570, it was held that the right of each partner to adjust, collect and dispose of property was not lost by the fact that the debts are paid.

it is a new contract. On the other hand, the power of disposition of the assets in order to wind up makes such power a very necessary one, for no reasonable distinction appears between choses in action and more tangible assets. The two rules can both be enforced by permitting an indorsement merely to pass title as without recourse, which involves no liability except the implied one of genuineness, and yet, in the transfer of a chattel which is permitted, there is an analogous implied warranty of title, and doubtless, also, in the transfer of paper payable to bearer.

The cases denying the power to indorse over paper belonging to the firm, even in payment of existing debts, are numerous.[1]

In Yale *v.* Eames, 1 Met. 486, there was express authority given to sell the note, and this was held to imply an authority to convey title, and that an indorsement without recourse was proper, as it conveyed title and created no new obligation. From this it would follow that if the power to dispose of the paper exists under the general power of disposition contended for above, an indorsement without recourse is the proper method of exercising such power.[2]

And the power in one partner to pass title, after dissolu-

[1] Abel *v.* Sutton, 3 Esp. 108; Smith *v.* Winter, 4 M. & W. 454; Glasscock *v.* Smith, 25 Ala. 474; Humphries *v.* Chastain, 5 Ga. 166 (48 Am. Dec. 247); Curry *v.* Burnett, 36 Ind. 102; Whitworth *v.* Ballard, 56 Ind. 279; Stair *v.* Richardson (Ind.), 9 N. E. Rep. 300; Bogerau *v.* Gueringer, 14 La. Ann. 478 (but holding them not liable unless benefited); Lumberman's Bank *v.* Pratt, 51 Me. 563; Parker *v.* Macomber, 18 Pick. 505, 508; Fowle *v.* Harrington, 1 Cush. 146; Yale *v.* Eames, 1 Met. 486; Bryant *v.* Lord, 19 Minn. 396; McDaniel *v.* Wood, 7 Mo. 542; Mut. Sav. Inst. *v.* Enslin, 37 Mo. 453; Bredow *v.* Mut. Sav. Inst. 28 Mo. 181 (but see the later decisions in the next note); Fellows *v.* Wyman, 33 N. H. 351; Sanford *v.* Mickles, 4 Johns. 224; Fisher *v.* Tucker, 1 McCord, Ch. 169; Dickerson *v.* Wheeler, 1 Humph. 51; Tudor *v.* White, 27 Tex. 584; S. C. White *v.* Tudor, 24 id. 639; Dana *v.* Conant, 30 Vt. 246. Some of the above cases, as Abel *v.* Sutton, put this on the ground that the partners became tenants in common upon dissolution — a clearly false ground.

[2] If the indorsee has no notice of dissolution, the indorsement is, of course, good. Cony *v.* Wheelock, 33 Me. 366; and whether this is before or after maturity, of course, has nothing to do with the case.

tion, to paper payable to the firm was distinctly held to exist by some cases.[1]

In Smith *v.* Winter, 4 M. & W. 454, the retiring partner said he had left all the effects in the hands of his copartner for the purpose of winding up, and had no objection to the use of the partnership name, and the jury was held justified in concluding from this that the partner had authority to indorse over in the firm name a note belonging to the partnership.

§ 691. Paper made before and issued after dissolution.— As in the hands of the maker a note is of no effect until delivered, so, though signed before dissolution, a partner has no authority to issue it after.[2]

And the same ruling was made where paper was indorsed during the partnership, but not used; the surviving partner has no authority to deliver it, for delivery is equivalent to a new execution after death.[3]

Where the firm of M. & G. owed one H. $156 and H. owed G. $120, and G. paid H. $36 in cash and gave him a receipt in full of the debt H. owed him individually, and drew the firm's check to his own order for the $120, retaining this check in his hands until after dissolution, when he paid it to plaintiff to whom he was indebted; it was held to have no vitality, because deemed signed at the time of delivery, and could not be regarded as issued by the firm to H., and by him transferred to G., because H. never knew of it.[4]

A note made after dissolution, but antedated so as to appear perfect, is not valid in favor of persons with notice of dissolution,[5] but in the hands of an innocent holder such

[1] Lewis *v.* Reilly, 1 Q. B. 349; Chappell *v.* Allen, 38 Mo. 213; Waite *v.* Foster, 33 Me. 424 (without recourse). And see Morse *v.* Bellows, 7 N. H. 549, 568.

[2] Robb *v.* Mudge, 14 Gray, 534; Woodford *v.* Dorwin, 3 Vt. 82 (21 Am. Dec. 573); Lansing *v.* Gaine, 2 Johns. 300; Gale *v.* Miller, 54 N. Y. 536; aff'g 1 Lans. 451, and s. c. at an earlier stage, 44 Barb. 420.

[3] Abel *v.* Sutton, 3 Esp. 108; Glasscock *v.* Smith, 25 Ala. 474. *Contra dictum* in Chappell *v.* Allen, 38 Mo. 213, 224.

[4] Gale *v.* Miller, 54 N. Y. 536 (aff'g 1 Lans. 451, and s. c. at an earlier stage, 44 Barb. 520).

[5] Lansing *v.* Gaine, 2 Johns. 300; Smyth *v.* Strader, 4 How. 404.

note was held good, although the dissolution was by the death of a partner.[1]

Where a bill is duly signed and indorsed before dissolution, though the date and amount are left blank, and is delivered to an agent or clerk of the firm to fill up and negotiate, his authority to do so is not determined by death, and if he does so after the death of a partner, his authority having been derived from the firm, the survivors are held bound.[2]

In Lewis *v.* Reilly, 1 Q. B. 349,[3] a partner, duly authorized, drew a bill, payable to the firm's own order, before dissolution, and after dissolution indorsed it over in the firm name, and the indorsee, who had notice of the dissolution, was held entitled to recover against both partners. The partnership continued as to this bill.

In Parker *v.* Macomber, 18 Pick. 505, it was held that, though a partner could not, after dissolution, indorse over a note (in this case, made by another partner to the firm), since it was a mere voucher or item of account *inter se*, yet a note made by such partner to a third person, and indorsed by the latter and given to the settling partner in payment of a debt, could be delivered by the latter to a third person, because no indorsement of the firm was necessary, and the want of power to indorse was therefore not applicable.

In Roberts *v.* Adams, 8 Porter (Ala.), 297,[4] a firm obtained from the plaintiff his name on a blank note made to them, and, after dissolution, one partner filled up the amount and indorsed the firm name and used it to pay a partnership debt, and the plaintiff, having been compelled to pay it, was held entitled to reimbursement from both partners, because one was guilty of fraud and the other of negligence; yet the power to indorse over was involved also.

[1] Knapp *v.* McBride, 7 Ala. 19. A note by the firm to one partner may be indorsed over by him as well after as before dissolution. Temple *v.* Seaver, 11 Cush. 314.

[2] Usher *v.* Dauncey, 4 Camp. 97; Knapp *v.* McBride, 7 Ala. 19. See Bank of New York *v.* Vanderhorst, 32 N. Y. 553.

[3] This case, which was treated as good law in Garland *v.* Jacomb, L. R. 8 Ex. 216, 220, and the cases in the preceding note, seems inconsistent with the foregoing cases, and perhaps with Smith *v.* Winter, 4 M. & W. 454 (§ 690). In Fletcher *v.* Anderson, 11 Iowa, 228, a note indorsed by a firm before dissolution, and delivered after dissolution by one partner in whose hands it had remained, was held to be deemed, in the absence of evidence, to be the private property of such partner.

[4] 33 Am. Dec. 291.

§ 692. Expenses and contracts in winding up.— But a partner can incur expenses necessary to wind up and to protect property pending the closing.

Thus, he can retain a person already in charge of partnership property, although the other partner orders his discharge;[1] but cannot have compensation for necessary repairs done by himself.[2] And if a book-keeper is necessary, can employ one or continue an old one;[3] and may incur expenses in defending against invalid claims, prosecute appeals and procure sureties for the purpose;[4] and the partner engaged in winding up can employ an attorney to collect debts,[5] and can institute suits for the purpose;[6] and if the firm had paid a debt with the note of a third person, guarantying its payment, and it proves worthless, a partner, after dissolution, may receive it back.[7]

In Tyng *v.* Thayer, 8 Allen, 391, the partners authorized to wind up the firm's affairs, among which was a contract with a person to ship certain products, were compelled by him to allow him a higher than the agreed price, his being the only means of transportation, and it was held that in settling with the other partners they were to be allowed such higher price, for they had the same right after as before dissolution to use their best judgment in incurring expenses.

§ 693. He cannot borrow, even to pay debts.— But the rule that a partner cannot create any new liability is imperative and very strictly drawn. Thus, he cannot bind the firm by borrowing for any purpose, even to pay debts.[8]

[1] Holloway *v.* Turner, 61 Md. 217.

[2] Stebbins *v.* Willard, 53 Vt. 665.

[3] Holloway *v.* Turner, 61 Md. 217.

[4] Gard *v.* Clark, 29 Iowa, 189.

[5] Bradley *v.* Camp, Kirby (Conn.), 77 (1 Am. Dec. 13).

[6] Ward *v.* Barber, 1 E. D. Smith, 423; White *v.* Jones, 14 La. Ann. 681 (in his own name, in Louisiana).

[7] Torrey *v.* Baker, 13 Vt. 452.

[8] Kilgour *v.* Finlyson, 1 H. Bl. 155; Hayden *v.* Cretcher, 75 Ind. 108; Bowman *v.* Blodgett, 2 Met. 208, 310; Bank of Port Gibson *v.* Baugh, 9 Sm. & Mar. 290; Dowzelot *v.* Rawlings, 58 Mo. 75; Sutton *v.* Dillaye, 3 Barb. 529; Payne *v.* Gardiner, 29 N. Y. 146 (aff. s. c. as Payne *v.* Slate, 39 Barb. 634); Veale *v.* Hassan, 3 McCord, L. 278; Cotton *v.* Evans, 1 Dev. & Bat. Eq. 284, 307; Kendall *v.* Riley, 45 Tex. 20; Lee *v.* Stowe, 57 Tex. 444; Roots *v.* Salt Co. 27 W. Va. 483, 493, and the cases cited in the rest of this chapter. If a partner collects money as the agent of the plaintiff and uses it to pay partnership debts, the other partner is not liable for it. Dunlap *v.* Limes, 49 Iowa, 177.

In Butchart *v.* Dresser, 4 D. M. & G. 524; 10 Hare, 463, it was held that a partner could pledge unpaid-for goods to raise money to pay for such goods. And if a partner ask a person to pay a debt of the firm and such person complies, he has been held to become a creditor of the firm.[1]

Though a partner may, perhaps, in resisting an unfounded action against the firm procure a surety on its behalf in order to prosecute an appeal,[2] yet this must be distinguished from procuring a surety for any other purpose, as in order to secure the debt or obtain his own release; here, if the surety pays the debt, the firm is not bound by the contract. Thus, if an action is brought after dissolution against the former partners, and one is held to bail, and bail given, and, after judgment against both, the bail are compelled to pay the debt, they cannot recover any part from the other partner, but are in the same position as if the one partner had borrowed the money from them.[3]

§ 694. Nor sign negotiable paper.— So a partner after dissolution has no power to sign the firm name to negotiable paper, either by giving a note for an old debt or for a loan, either a maker, drawer, acceptor or indorser;[4] unless, per-

[1] Brown *v.* Higginbotham, 5 Leigh (Va.), 583 (27 Am. Dec. 618); Peyton *v.* Stratton, 7 Gratt. 380; but the contrary was held in Lee *v.* Stowe, 57 Tex. 444. Stebbins *v.* Willard, 53 Vt. 665, where a person paid off an incumbrance on partnership property at the request of a partner, to avoid foreclosure, and was subrogated to the mortgage.

[2] As was held in Gard *v.* Clark, 29 Iowa, 189.

[3] Bowman *v.* Blodgett, 2 Met. 308. See, also, Palmer *v.* Dodge, 4 Oh. St. 21 (62 Am. Dec. 271), more fully stated below, § 695.

[4] Paterson *v.* Zachariah, 1 Stark. 71; Kilgour *v.* Finlyson, 1 H. Bl. 155; Heath *v.* Sansom, 4 B. & Ad. 172; Draper *v.* Bissell, 3 McLean, 275; Lockwood *v.* Comstock, 4 id. 883; *Re* Weaver, 9 Bankr. Reg. 132; Tombeckbee Bank *v.* Dumell, 5 Mason, 56; Fontaine *v.* Lee, 6 Ala. 889; Cunningham *v.* Bragg, 37 id. 436; Burr *v.* Williams, 20 Ark. 171; Curry *v.* White, 51 Cal. 530; Humphries *v.* Chastain, 5 Ga. 166 (48 Am. Dec. 247); Bower *v.* Douglass, 25 Ga. 714; Easter *v.* Farmers' Nat'l Bk. 57 Ill. 215; Spurck *v.* Leonard, 9 Ill. App. 174; Taylor *v.* Hillyer, 3 Blackf. 433 (26 Am. Dec. 430); Conklin *v.* Ogborn, 7 Ind. 553; Falls *v.* Hawthorn, 30 Ind. 438; Floyd *v.* Miller, 61 Ind. 224; Hayden *v.* Cretcher, 75 id. 108; Merritt *v.* Pollys, 16 B. Mon. 355; Cronly *v.* Bank of Ky. 18 id. 405; Montague *v.* Reakert, 6 Bush, 393; Turnbow *v.* Broach, 12 id. 455; Nott *v.* Douming, 6 La. 680; Meyer *v.* Atkins, 29 La. Ann. 586; Lumberman's Bank *v.* Pratt, 51 Me. 563; Hurst *v.* Hill, 8 Md. 399 (63 Am.

haps, to transfer title (see § 690); nor in renewal of prior similar paper.[1]

§ 695. —— liquidating partner.—The fact that a particular partner is deputed to wind up or solely authorized to settle or adjust the firm's affairs and to sign the firm's name in liquidation does not enlarge his powers, but is a mere delegation of power to pay partnership demands and use the firm name for the purpose, as in giving receipts, and not to create any new obligation.

In Palmer *v.* Dodge, 4 Oh. St. 21,[2] Short & Palmer, partners, had given a note in the firm name for a loan. They dissolved and advertised this fact, with a statement that the "unsettled business of the firm will be adjusted by Short, who is hereby authorized to close all business transactions." Short then made a new note in the firm name to the creditor, who had actual knowledge of the dissolution, in place of the old note, and procured Dodge, who had only constructive notice of dissolution by the publication, but was not a former dealer to indorse it. Dodge had to pay the note, and now sues

Dec. 705); Eaton *v.* Taylor, 10 Mass. 54; Fowle *v.* Harrington, 1 Cush. 146; Parham Sewing Mach. Co. *v.* Brock, 113 Mass. 194; Matteson *v.* Nathanson, 38 Mich. 377; Jenness *v.* Carleton, 40 id. 343; 42 id. 110; Goodspeed *v.* South Bend Plow Co. 45 Mich. 237; Bryant *v.* Lord, 19 Minn. 396; Brown *v.* Broach, 52 Miss. 536; Maxey *v.* Strong, 53 Miss. 280; Richardson *v.* Moies, 31 Mo. 430; Moore *v.* Lackman, 52 id. 323; Central Sav. Bk. *v.* Mead, 52 id. 546; Morrison *v.* Perry, 11 Hun, 33; Haven *v.* Goodel, 1 Disney, 26; Gardner *v.* Conn, 34 Oh. St. 187; Bank *v.* Green, 40 id. 431, 439; Bank of S. Ca. *v.* Humphreys, 1 McCord, L. 388; Loomis *v.* Pearson, Harper, L. 470; Bank of Galliott, 1 McMull. 209 (36 Am. Dec. 256); Vanzant *v.* Kay, 2 Humph. 106, 110; Isler *v.* Baker, 6 id. 85; Fowler *v.* Richardson, 3 Sneed, 508; Hatton *v.* Stewart, 2 Lea, 233; Haddock *v.* Crocheron, 32 Tex. 276 (5 Am. Rep. 244); Seward *v.* L'Estrange, 36 Tex. 295; Torrey *v.* Baxter, 13 Vt. 452; Woodworth *v.* Downer, 13 id. 522 (37 Am. Dec. 611); Miller *v.* Miller, 8 W. Va. 542; Roots *v.* Salt Co. 27 W. Va. 483; Lange *v.* Kennedy, 20 Wis. 279.

[1] Spurck *v.* Leonard, 9 Ill. App. 174; Merritt *v.* Pollys, 16 B. Mon. 355; Cronly *v.* Bank of Ky. 18 id. 405; Lumberman's Bank *v.* Pratt, 51 Me. 563; Hurst *v.* Hill, 8 Md. 399 (63 Am. Dec. 705); Richardson *v.* Moies, 31 Mo. 430; Central Sav. Bank *v.* Mead, 52 id. 546; National Bank *v.* Norton, 1 Hill, 572; Bank of S. Ca. *v.* Humphreys, 1 McCord, L. 388; Bank *v.* Galliott, 1 McMull. 209 (36 Am. Dec. 256); Torrey *v.* Baxter, 13 Vt. 452; Lange *v.* Kennedy, 20 Wis. 279.

[2] 62 Am. Dec. 271.

Palmer. It was held that Palmer was not bound by the note nor obliged to indemnify Dodge; that the dissolution was an absolute revocation of all implied authority to bind by new engagements, though founded on an indebtedness of the firm, except to those who had no proper notice of dissolution; and that no such power could be inferred from the authority to close up, settle, etc., and though a partnership creditor has been paid in full, this gives Dodge no right to become a creditor without the assent of all the partners, and he must look to Short alone as his debtor.[1]

Hence such expressions of authority give the liquidating partner no power to sign notes or give paper for existing debts or outstanding accounts, or for money borrowed to pay debts.[2] Nor sign the firm name to mercantile paper in renewal.[3]

The signing partner, however, is himself bound.[4] The fact that before dissolution one partner gave the other written power to sign the firm name at discretion, which would authorize him to

[1] S. P. Haven *v.* Goodel, 1 Disney, 26.

[2] Abel *v.* Sutton, 3 Esp. 108; Kilgour *v.* Finlyson, 1 H. Bl. 155; Lockwood *v.* Comstock, 4 McLean, 383; Bank of Montreal *v.* Page, 98 Ill. 109; Hamilton *v.* Seaman, 1 Ind. 185; Chase *v.* Kendall, 6 id. 304; Conklin *v.* Ogborn, 7 id. 553; Cronly *v.* Bank of Ky. 18 B. Mon. 405; Johnson *v.* Marsh, 2 La. Ann. 772; Perrin *v.* Keene, 19 Me. 355; 36 Am. Dec. 759; Parker *v.* Macomber, 18 Pick. 505, 509; Smith *v.* Shelden, 35 Mich. 42; 24 Am. Rep. 529; Maxey *v.* Strong, 53 Miss. 280; Fellows *v.* Wyman, 33 N. H. 351; Sanford *v.* Mickles, 4 Johns. 224; Lusk *v.* Smith, 8 Barb. 570; Mauney *v.* Coit, 80 N. Ca. 300; 30 Am. Rep. 89; Foltz *v.* Pourie, 2 Desaus. (S. Ca.) 40; Martin *v.* Walton, 1 McCord, L. 16; Fowler *v.* Richardson, 3 Sneed, 503; White *v.* Tudor, 24 Tex. 639; Haddock *v.* Crocheron, 32 id. 276; 5 Am. Rep. 244; Brown *v.* Chancellor, 61 id. 437; Conrad *v.* Buck, 21 W. Va. 396. And see Fontaine *v.* Lee, 6 Ala. 889.

[3] Myatts *v.* Bell, 41 Ala. 222, 231; First Nat. Bank *v.* Ells, 68 Ga. 192; Van Valkenburg *v.* Bradley, 14 Iowa, 108 (overruling Kemp *v* Doggett, 3 G. Greene, 190); Long *v.* Story, 10 Mo. 636; National Bank *v.* Norton, 1 Hill, 572; Palmer *v.* Dodge, 4 Oh. St. 21; 62 Am. Dec. 271; Martin *v.* Kirk, 2 Humph. 529; Hatton *v.* Stewart, 2 Lea, 233; White *v.* Tudor, 24 Tex. 639; Haddock *v.* Crocheron, 32 id. 276; 5 Am. Rep. 244; Brown *v.* Chancellor, 61 id. 437; Parker *v.* Cousins, 2 Gratt. 372; 44 Am. Dec. 388.

[4] Ramsbottom *v.* Lewis, 1 Camp. 179; Myatts *v.* Bell, 41 Ala. 222, 232; Brown *v.* Broach, 52 Miss. 536; Fowle *v.* Harrington, 1 Cush. 146; Prentiss *v.* Foster, 28 Vt. 742.

sign obligations not connected with the firm, gives him, after dissolution, no power to sign any paper whatever.[1]

In Pennsylvania, however, the liquidating partner, but no other, may borrow on the credit of the firm for the purpose of paying its debts and give a note for the purpose, the loan not being regarded as a new obligation, but a mere change of creditor. In all these cases, however, the proceeds of the loan was proved to have gone for the purposes of the firm, and the court seem to have required evidence of such application.[2] Or may renew a note;[3] or may give a note for an outstanding debt or in settlement of past business.[4] No other member of the firm, however, has this authority.[5] The authority to act as liquidating partner does not require an express and specific appointment, but a partner who so acts with the knowledge, and hence with the presumed permission, of his late partners, has the above powers.[6] And a stipulation that such partner shall act under the advice of the others, and had not done so, does not bind the creditor.[7]

And in South Carolina it was left to the jury to infer from the customs of trade and usages of merchants whether a power to settle and use the firm name extended to renewing existing notes, since the power to do so need not be given by writing, and its denial should be *strictissimi juris*, but no injustice was done thereby, as the firm received the benefit.[8]

§ 696. Power to waive demand.— A partner may, after dissolution, waive demand and notice on paper not yet matured, upon which the firm is an indorser, for this is not a new contract, but a mere modification of an existing liabil-

[1] Conly *v.* Bank of Ky. 18 B. Mon. 405.

[2] Estate of Davis & Desauque, 5 Whart. 530; 34 Am. Dec. 574; Whitehead *v.* Bank of Pittsburg, 2 Watts & S. 172; Houser *v.* Irvine, 3 W. & S. 345; Robinson *v.* Taylor, 4 Pa. St. 242; Heberton *v.* Jepherson, 10 id. 124; McCowin *v.* Cubbison, 72 id. 358; Lloyd *v.* Thomas, 79 id. 68; Fulton *v.* Central Bank of Pittsburgh, 92 id. 112; Siegfried *v.* Ludwig, 102 id. 547. See, also, Prudhomme *v.* Henry, 5 La. Ann. 700.

[3] Fulton *v.* Central Bank of Pittsburgh, 92 Pa. St. 112; Earon *v.* Mackey, 106 id. 452.

[4] Robinson *v.* Taylor, 4 Pa. St. 242; Brown *v.* Clark, 14 id. 469.

[5] McCowin *v.* Cubbison, 72 Pa. St. 358; Lloyd *v.* Thomas, 79 id. 68.

[6] Fulton *v.* Central Bank of Pittsburgh, *supra;* Siegfried *v.* Ludwig, *supra.*

[7] Siegfried *v.* Ludwig, *supra.*

[8] Myers *v.* Huggins, 1 Strob. L. 473.

ity by dispensing with certain evidence.[1] But after the liability is once discharged by the paper having matured without being protested, a partner cannot waive the want of it or revive the debt by a new promise, except as against himself.[2]

§ 697. **Demand upon one.**—A demand on one of a dissolved firm of makers or acceptors is sufficient in order to charge an indorser.[3] And so notice of protest, after dissolution, upon one partner of an indorsing firm is sufficient.[4]

Notice to take depositions served upon one partner after dissolution is sufficient, the copartners being abroad.[5]

A power given to a firm as such is terminated by dissolution and cannot be exercised by the members; *contra* of a power given them individually.[6]

§ 698. **Ratification or authority.**—But the copartners may, by previous authority or subsequent assent or ratification, make themselves liable on negotiable paper or other contracts made in the firm name by a partner after dissolution; and this may be shown by parol or inferred from circumstances; for rules made for their benefit may be waived by them orally, just as the right to the exercise of a power before dissolution not in the scope of the business may be.[7]

[1] That he can, Darling *v.* March, 22 Me. 184; Star Wagon Co. *v.* Swezey, 52 Iowa, 394; s. c. 59 id. 609; Seldner *v.* Mt. Jackson Nat. Bk. (Md.) 8 Atl. Rep. 262. See, also, Myers *v.* Standart, 11 Oh. St. 29, which, however, was not put on this ground. But see Mauney *v.* Coit, 80 N. Ca. 300 (30 Am. Rep. 80), a *dictum*, for the note itself was made after dissolution.

[2] Schoneman *v.* Fegley, 7 Pa. St. 433; Hart *v.* Long, 1 Rob. (La.) 83; Central Sav. Bk. *v.* Mead, 52 Mo. 546.

[3] Brown *v.* Turner, 15 Ala. 832; Coster *v.* Thomason, 19 id. 717; Crowley *v.* Barry, 4 Gill, 194; Fourth Nat'l B'k *v.* Heuschen, 52 Mo. 207; Gates *v.* Beecher, 60 N. Y. 518 (19 Am. Rep. 207); or even on the agent of one partner, Brown *v.* Turner, *supra*.

[4] § 398.

[5] Gilly *v.* Singleton, 3 Litt. (Ky.) 249.

[6] Bank of Mobile *v.* Andrews, 2 Sneed (Tenn.). 535. And see § 333.

[7] Smith *v.* Winter, 4 M. & W. 454, here the partner said he had no objection to the firm name being used; Kelly *v.* Crawford, 5 Wall. 788; Draper *v.* Bissell, 3 McLean, 275, by promise to pay; Catlin *v.* Gilders, 3 Ala. 536, 544, by admissions; New Haven County Bank *v.* Mitchell, 15 Conn. 206, that a power to sign and indorse notes necessary in winding up is a power to renew; Bower *v.*

In Wilson *v.* Forder, 20 Oh. St. 89 (5 Am. Rep. 627), a partner after dissolution renewed firm notes, but made the interest usurious and included a separate debt of his own. The copartner, supposing the note to be a mere renewal at legal interest, promised to pay it. The consideration was held to be several and the ratification good as to the amount of the original note with simple interest.[1]

A request of the firm to the payee bank for permission to renew during a certain period does not authorize a partner to renew after a dissolution though before expiration of the period.[2]

In McArthur *v.* Oliver, 53 Mich. 299, going on with an arbitration, merely saying that he is not to be subjected to any liability in consequence of it, was said not to be sufficient to ratify a copartner's submission of a controversy to arbitration.

In Carter *v.* Pomeroy, 30 Ind. 438, the nature of the consideration of a note was held to be admissible as evidence that it was made, though after dissolution, with the consent of copartners.

§ 699. Admissions after dissolution.— As to the power of a partner to bind the firm after dissolution by his admissions, the cases range themselves under two conflicting authorities, decided in the same year (1808), one in England and one in New York, neither of them reasoned out with much care. The cases are not all as hopelessly conflicting as they seem, for all concede the inability of a partner after

Douglass, 25 Ga. 714, the copartners were present when the note was made; Easter *v.* Farmers' Nat'l Bank, 57 Ill. 215; Van Valkenburg *v.* Bradley, 14 Iowa, 108; Leonard *v.* Wilde, 36 Me. 265; Eaton *v.* Thayer, 10 Mass. 54, by paying part and taking security from the signing partner; Yale *v.* Eames, 1 Met. 486, that authority to sell a note is authority to make title and justifies indorsement without recourse; Swan *v.* Stedman, 4 Met. 545; Richardson *v.* Moies, 31 Mo. 430, by prior agreement to do the act; Graves *v.* Merry, 6 Cow. 701, 705 (16 Am. Dec. 471), not resisting on the ground of want of authority and admitting the honesty of the debt; Randolph *v.* Peck, 1 Hun, 138, by assent; McElroy *v.* Melear, 7 Cold. 140; Anderson *v.* Norton, 15 Lea, 14, 24.

But "perhaps they will be paid some time, hold on, I will see about it," is not a ratification, Conklin *v.* Ogborn, 7 Ind. 553; mere silence is not sufficient, Hatton *v.* Stewart, 2 Lea, 233.

[1] See Bank *v.* Green, 40 Oh. St. 431, 439.

[2] Bank of S. Ca. *v.* Humphreys, 1 McCord, L. 388. *Contra*, if they agreed with the holder to renew a particular note, Richardson *v.* Moies, 31 Mo. 430.

dissolution to create a new liability, and an admission going to this extent is, so far at least, incompetent. It is to be remembered that we are not now speaking of dissolutions by death, for in such case there is no joint liability between the representatives and survivors, and these rules do not apply except as between two or more survivors.

In Hackley *v.* Patrick, 3 Johns. 536, Patrick & Hastie became partners in 1800. They dissolved December 31, 1801. Notice of dissolution was published, requiring all persons to call upon Hastie for adjustment. Hastie wrote upon an account rendered by the plaintiff that if the dates of the items were correct Hastie & Co. owed him $747.37. Following is the opinion entire: "This is a very clear case. After a dissolution of a copartnership the power of one party to bind the other wholly ceases. There is no reason why his acknowledgment of an account should bind his copartner any more than his giving a promissory note in the name of the firm or any other act. The plaintiff ought to have produced further evidence of the debt; the acknowledgment of Hastie alone was not sufficient to charge Patrick. There must be a new trial, with costs to abide the event of the suit."

In Wood *v.* Braddick, 1 Taunt. 104, plaintiff's assignors had shipped linens, as they alleged, to defendant jointly with one Cox, his then partner, but, as defendant contended, to Cox only. The question was on the admissibility of a letter by Cox, dated subsequently to the time it was agreed that the dissolution should date from, stating a balance was due plaintiff's assignor of £919 on the consignment. Mansfield, C. J.: "Clearly the admission of one partner, made after the partnership has ceased, is not evidence to charge the other, in any transaction which has occurred since their separation; but the power of partners with respect to rights created pending the partnership remains after the dissolution. Since it is clear that one partner can bind the other during all the partnership, upon what principle is it that, from the moment it is dissolved, his account of their joint contracts should cease to be evidence, and that those who are to-day as one person in interest should to-morrow become entirely distinct in interest in regard to past transactions which occurred while they were so united?"

Heath, J.: "Is it not a very clear proposition that when a partnership is dissolved it is not dissolved with regard to things past,

but only with regard to things future? With regard to things past the partnership continues and always must continue."

§ 700. Following Hackley *v.* Patrick, and generally with an express disapproval of Wood *v.* Braddick, are a large number of American cases. The reason of this theory is that the partners, being no longer such after dissolution, can no more bind each other than could an agent, and as the declarations, admissions or acknowledgments of an agent are incompetent to affect his principal after the termination of his agency, so in case of the agency of a partner, they cannot be allowed to bind the firm.[1]

[1] Bispham *v.* Patterson, 2 McLean, 87, acknowledgment of the justice of plaintiff's account; Thompson *v.* Bowman, 6 Wall. 316, that he had agreed that plaintiff should receive a commission for effecting a sale of the entire partnership property, which sale dissolved the partnership; Burns *v.* McKenzie, 23 Cal. 101, that a partnership note was not for his private debt, but for a firm debt; Curry *v.* White, 51 Cal. 530; Brewster *v.* Hardeman, Dudley (Ga.), 138 (except as cumulative evidence); Miller *v.* Neimerick, 19 Ill. 172, admissions of payments not credited to claimant; Winslow *v.* Newlan, 45. Ill. 145; Yandes *v.* Lefavour, 2 Blackf. 371, that a different kind of payment had been agreed on (but see Indiana cases in the next section); Walker *v.* Duberry, 1 A. K. Mar. (Ky.) 189, admitting correctness of the sum claimed; Spears v. Toland, 1 id. 203, admissible if they continue business after dissolution; Craig v. Alverson, 6 J. J. Mar. 609; Bentley *v.* White, 3 B. Mon. 263, 266; Daniel *v.* Nelson, 10 id. 316, that plaintiff was not a partner and therefore could sue defendant at law for services; Hamilton *v.* Summers, 12 id. 11 (54 Am. Dec. 509), that notes were firm debts and that copartner had assumed all firm debts; Conery *v.* Hayes, 19 La. Ann. 325, that he cannot admit the correctness of a debt; Ostrom *v.* Jacobs, 9 Met. (Mass.) 454, that a note signed by copartner in his own name was a joint debt; Maxey *v.* Strong, 53 Miss. 280 (in effect overruling Curry *v.* Kurtz, 33 id. 24, on this point), of creditors on an account; Owings *v.* Low, 5 Gill & J. 134, that a debtor was to pay in goods to a partner who had bought out declarant's interest; Brady *v.* Hill, 1 Mo. 315 (13 Am. Dec. 503), acknowledging an account; Little *v.* Ferguson, 11 id. 598; Pope *v.* Risley, 23 id. 185, that an agent was authorized to execute the note sued on; American Iron Mountain Co. *v.* Evans, 27 id. 552; Flowers *v.* Helm, 29 id. 324; Dowzelot *v.* Rawlings, 58 id. 75, *dictum* only; Hackley *v.* Patrick is followed by all the N. Y. cases, viz.; Walden *v.* Sherburne, 15 Johns. 409, acknowledging an account; Hopkins *v.* Banks, 7 Cow. 650; Gleason *v.* Clark, 9 Cow. 57; Baker *v.* Stackpoole, 9 id. 420 (18 Am. Dec. 508); Lockw. Rev. Cas. 389, acknowledging an account; Brisban *v.* Boyd, 4

An admission by a partner after dissolution will, of course, affect himself, and through him may seriously affect his copartners indirectly; that where the admission of a partner is that he had released the defendant and had no right to sue, thus disqualifying himself as plaintiff, this would defeat the right of all the partners upon a claim on which he is a necessary co-plaintiff.[1]

§ 701. Following Wood *v.* Braddick and the English decisions, and disapproving the New York rulings, are the following, which hold the admissions receivable. They proceed on the theory that the partners after dissolution are still a firm as to things past, and, as each has power to pay debts, this implies the right to judge of whether the debt exists and its amount, and that the denial of this power is

Paige, 17, acknowledgment of the debt; Williams *v.* Manning, 41 How. Pr. 454 (Ct. App. 1870, not elsewhere reported); letters of a former partner not admissible: Nichols *v.* White, 85 N. Y. 531; Pringle *v.* Leverich, 97 id. 181 (49 Am. Rep. 522), to prove a debt; Bank of Vergennes *v.* Cameron, 7 Barb. 143, that a note had been protested; Mercer *v.* Sayre, Anth. 119; Hart *v.* Woodruff, 24 Hun, 510, sending statement of account; Willis *v.* Hill, 2 Dev. & Bat. (N. Ca.) L. 231, to prove a debt; Tassey *v.* Church, 4 Watts & S. 141 (39 Am. Dec. 65), *dictum;* Hogg *v.* Orgill, 34 Pa. St. 344, that a note was for partnership purposes; Crumless *v.* Sturgess, 6 Heisk. (Tenn.) 190, that copartner had assumed the firm's liabilities; Hawkins *v.* Lee, 8 Lea, 42 (Martin *v.* Kirk, 2 Humph. 529, 532, had ruled *contra*); Speake *v.* White, 14 Tex. 364, to prove a debt; Lacoste *v.* Bexar County, 28 id. 420 (*dictum*); *contra*, if the partners are plaintiffs seeking to collect a bill, Nalle *v.* Gates, 20 id. 315; Shelton *v.* Cocke, 3 Munf. (Va.) 191, admission of the existence of a debt; Rootes *v.* Wellford, 4 id. 215, one cannot allow a credit not on the bill, here he allowed $600 attorneys' fees as a credit; Bispham *v.* Patterson, 2 McLean, 87, acknowledging correctness of account. In Jeffries *v.* Castleman, 75 Ala. 262, and Hatheway's Appeal, 52 Mich. 112, the admission was excluded, but the partner had sold his interest to the other, and hence his statement was not against interest. It makes no difference whether the dealer knew of the dissolution or not, for this is a question of evidence; he is not misled, Pringle *v.* Leverich, 97 N. Y. 181 (49 Am. Rep. 522); Brisban *v.* Boyd, 4 Paige, 17. *Contra*, Myers *v.* Standart, 11 Oh. St. 29. In Hart *v.* Woodruff, 24 Hun, 510, *supra*, by agreement of dissolution all the partners were to assist in the winding up at the store, and yet it was held that a statement of account by one, sent to the plaintiff, did not bind the rest.

[1] Cochran *v.* Cunningham, 16 Ala. 448 (50 Am. Dec. 186). In Pennsylvania a liquidating partner's admissions are competent. Houser *v.* Irvine, 3 W. & S. 345; and see § 695.

inconsistent with the power to settle and pay. It will be noticed from the short statement of the nature of the several admissions which I have appended to the cases that they all relate exclusively to transactions occurring during the existence of the partnership, and that in nearly every case there was proof *aliunde* either of a debt, the amount alone being unascertained, or there was proof of the fact of prior transactions, leaving the fact of a balance and its amount unsettled, and that in but one or two cases was the admission received as the only evidence of a partnership transaction. Hence nearly all these cases do not strictly infringe the rule that a partner cannot after dissolution create a new liability. The converting an account current into a stated account, in the Massachusetts case given below, was regarded not as creating a new debt, but merely as a new statement of the old, though how this differs from renewing a note after dissolution is hard to see. The admissions are, all of them, against interest, that is, none were admitted to saddle an individual debt upon the partnership, and none of them were to prolong or remove the bar of the statute of limitations, as to which see hereafter.[1]

[1] Austin *v.* Bostwick, 9 Conn. 496 (25 Am. Dec. 42), that a debt is still due; Munson *v.* Wickwire, 21 id. 513, 518, admission of amount due is good; Taylor *v.* Hillyer, 3 Blackf. 433 (26 Am. Dec. 430), and Kirk *v.* Hiatt, 2 Ind. 322, that admissions, if relating to previous firm transactions or in receiving money, are good; Parker *v.* Merrill, 6 Me. 41; Foster *v.* Fifield, 29 id. 136, this and the preceding show that the declarant must have an interest contrary to his declaration; Hinkley *v.* Gilligan, 34 Me. 101, nature of the admission is not shown; Cady *v.* Shepherd, 11 Pick. 400 (22 Am. Dec. 379), that the other party had performed his contract; Bridge *v.* Gray, 14 id. 55 (25 Am. Dec. 358), by the acting partner that a receipt was by mistake and a balance is still due; Vinal *v.* Burrell, 16 id. 401, that an account is correct; Ide *v.* Ingraham, 5 Gray, 106, by liquidating partner acknowledging indebtedness; Gay *v.* Bowen, 8 Met. 100, that plaintiff's acceptance was for the firm's accommodation; Buxton *v.* Edwards, 134 Mass. 567, an accounting with plaintiff and finding a sum due him; Pennoyer *v.* David, 8 Mich. 407, that the previous dealings must be proved *aliunde* by general evidence at least; Mann *v.* Locke, 11 N. H. 246, that the items of an account sued on were correct; Pierce *v.* Wood, 23 id. 519, 531; Rich *v.* Flanders, 39 id. 304, 338–9, amount due for goods sold to the firm; McElroy *v.* Ludlum, 32 N. J. Eq. 828,

In Pattee *v.* Gilmore, 18 N. H. 460 (45 Am. Dec. 385), where plaintiff claimed to have consigned goods to a firm and sued them for conversion, it was held that a denial by one partner after dissolution that the goods had been received was not evidence against the other of the fact of conversion because there was no partnership at the time of the conversion, which would be so proved.

If the admission is of a nature to show that the proceeds of a transaction with the declaring partner went to the use of the firm and was a partnership transaction, it was held not admissible, for this would enable any partner to cast his own debts upon the shoulders of the firm, or for the more strictly legal reason that such a declaration is not against interest, but in his own favor.[1]

To determine the admissibility of the evidence under the former cases requires the ascertainment of the date of dissolution. This

inconclusive; Feigley *v.* Whitaker, 22 Oh. St. 606 (10 Am. Rep. 778), a statement of account or balance due by the firm is competent provided there is proof *aliunde* that the firm had some account with the party to prove the state of such accounts, but is not conclusive; Myers *v.* Standart, 11 id. 29, as to defect in notice of protest and waiving it; Geddes *v.* Simpson, 2 Bay (S. Ca.), 533, of justness of account current; Chardon *v.* Oliphant, 3 Brev. 183 (6 Am. Dec. 572), that articles charged for were duly received; Fisher *v.* Tucker, 1 McCord, Ch. 169, is evidence of the debt itself, but not conclusive; Beckham *v.* Peay, 1 Bailey, 121, that a debt is paid; Kendrick *v.* Campbell, 1 id. 522, that an acceptance was before dissolution; Tripp *v.* Williams, 14 S. Ca. 502, as to a debt whose existence had been proved *aliunde;* Hunter *v.* Hubbard, 26 Tex. 537, but here they all claimed to be partners still; Woodworth *v.* Downer, 13 Vt. 522 (37 Am. Dec. 611), stating an account is good as an admission, but not binding as a contract; Loomis *v.* Loomis, 26 id. 198, admission of one of plaintiff firm that goods were delivered by both to pay a debt due from one of them. In Garland *v.* Agee, 7 Leigh (Va.), 362, it was ruled that, after dissolution and sale by one partner to the other who undertook to pay all debts, an admission of the latter of an amount due a creditor, by rendering him an account showing a balance due him, bound the retiring partner. The ground of the ruling does not appear; probably it was because such an arrangement was deemed to confer the authority, for Virginia does not seem to follow Wood *v.* Braddick. That the rule would have been the other way by the law of the partner's domicile, of course does not affect the admissibility of the evidence, Parker *v.* Merrill, 6 Me. 41, 48.

[1] Uhler *v.* Browning, 28 N. J. L. 79; Thorn *v.* Smith, 21 Wend. 365; Parker *v.* Merrill, 6 Me. 41, 48; but even such admission is competent if made during the existence of the partnership, Klock *v.* Beekman, 18 Hun, 502.

is a question for the court solely, as on *voir dire*.[1] It was also held, where the date of dissolution was uncertain, the admissions could go in for what they were worth,[2] for the jury could decide the date;[3] that the court could exclude them because the party offering them should show the date, or perhaps leave the date to the jury.[4]

§ **702. Statute of limitations.**— The competency of admissions, acknowledgments or part payments of a partner, after dissolution, to affect the statute of limitations as against his copartners, must be considered in two aspects:

1st. When the debt is extinct, to revive it.

2d. When the debt is not yet barred, to prolong the time.

§ **703. To revive an extinct debt.**— As a partner cannot after dissolution bind the firm to new liabilities, it is nearly universally held that he cannot by an acknowledgment or part payment of a debt already barred toll the statute of limitations so as to render his copartners liable. There is no difference between reviving an old debt and creating a new one, except that the consideration of the former is pre-existing. As the debt is extinct and had ceased to be a cause of action, the power to make it one does not exist.[5]

[1] See Harris *v.* Wilson, 7 Wend. 57.

[2] American Iron Mountain Co. *v.* Evans, 27 Mo. 552.

[3] Jameson *v.* Franklin, 6 How. (Miss.) 376.

[4] Little *v.* Ferguson, 11 Mo. 598.

[5] Bell *v.* Morrison, 1 Pet. 351, 373-4; Wilson *v.* Torbert, 3 Stew. (Ala.) 296 (21 Am. Dec. 632); Espy *v.* Comer, 76 Ala. 501; Bissell *v.* Adams, 35 Conn. 299; Conkey *v.* Barbour, 22 Ind. 196; Merritt *v.* Pollys, 16 B. Mon. 355, 357; Walsh *v.* Kane, 4 La. Ann. 533; Ellicott *v.* Nichols, 7 Gill, 85; Newman *v.* McComas, 43 Md. 10; Whitney *v.* Reese, 11 Minn. 138; Van Keuren *v.* Parmelee, 2 N. Y. 523 (51 Am. Dec. 322), (overruling Smith *v.* Ludlow, 6 Johns. 267); Bloodgood *v.* Bruen, 8 N. Y. 362; Payne *v.* Slate, 39 Barb. 634; Graham *v* Selover, 59 id. 313; Kauffman *v.* Fisher, 3 Grant's Cas. (Pa.) 302; Reppert *v.* Colvin, 48 Pa. St. 248; Steele *v.* Jennings, 1 McMull. (S. Ca.) 297; Belote *v.* Wayne, 7 Yerg. (Tenn.) 534; Cocke *v.* Hoffman, 5 Lea, 105, 111. And *dicta* in Burr *v.* Williams, 20 Ark. 171; Bissell *v.* Adams, 35 Conn. 299, 302; Fisher *v.* Tucker, 1 McCord (S. Ca.), Ch. 169. The authorities denying the power to prolong the time, also necessarily sustain the proposition. *Contra*, Wheelock *v.* Doolittle, 18 Vt. 440 (46 Am. Dec. 163); but altered by statute since, see Carlton *v.* Ludlow Woolen Mill, 27 id. 496; McIntire *v.* Oliver, 2 Hawks (N. Ca.), 209, altered by statute since, as to claims already barred, see Wood *v.*

That it makes no difference whether the creditor knew of the dissolution or not, for if the debt is barred the want of notice has not misled him.[1] If the debt was not barred at the time of the partial payment, see below, p. 000.

In Conrad *v.* Buck, 21 W. Va. 396, 412, it was said that another partnership creditor could plead the statute against the claimant if the other partners failed to do so.

If a partial payment was made, but the creditor cannot show which partner made it, neither is liable.[2]

§ **704. To prolong the time.**— Few questions have been more zealously contested than this one. The question is not quite the same as that involved in the admission or exclusion of declarations after dissolution to prove a debt, for it assumes the existence of the debt as admitted or proved *aliunde;* but the partners being still joint debtors, the question is the same as in case of other joint debtors or joint makers of paper.

On the one hand there are good reasons why the acknowledgment should be excluded. The partners are no longer one in interest, but may be, and frequently are, hostile. The creditor is not in any way prejudiced, but even the contrary; for a partner ought to have a right to pay part of his own debt without being obliged to affect injuriously his former copartners, as to whom he is in the position of a discontinued agent, and any power left in him is not so left for such purpose. Moreover the doctrine that a payment by one person can be a promise by other persons to pay some more is upon its face an absurd pretense,[3] even though the partner who

Barber, 90 N. Ca. 76, 79; Goddard *v.* Ingram, 3 Q. B. 839. In Ford *v.* Clark, 72 Ga. 760, the new promise was by the partner in his individual capacity and for himself, and it was held to be not for all but by a different party, and a new cause of action. S. P. Stewart's Appeal, 105 Pa. St. 307; Wood *v.* Barber, 90 N. Ca. 76; Turner *v.* Ross, 1 R. I. 88. But not where the creditor was not aware that the payment was on individual account, as where the paying partner had agreed with the other to assume all the debts, and the creditor did not know this, Bissell *v.* Adams, 35 Conn. 299.

[1] Tate *v.* Clements, 16 Fla. 339.

[2] Conkey *v.* Barbour, 22 Ind. 196.

[3] Following are the decisions denying the power to prolong time: Watson *v.* Woodman, L. R. 20 Eq. 721; Myatts *v.* Bell, 41 Ala. 222; Curry *v.* White, 51 Cal. 530; Tate *v.* Clements,

made the promise or part payment was the liquidating partner authorized to settle or compromise.[1] But the assent of the other partner may be shown, and in that case he also is bound.[2]

If one partner has assumed the payment of debts, a partial payment is on his own behalf, and does not bind the retired partner.[3] Part payment by the executor of one partner does not affect the surviving partner.[4] Nor does the latter's payment affect the former,[5] for they are not joint debtors.

§ 705. Contra.— On the other hand is the consideration of the presumed agency of each for all continuing as to things past for the purpose of winding up; and winding up includes the power to make payments which are on behalf of all, and for the benefit of all, as constituting a joint debtor.[6]

16 Fla. 339 (26 Am. Rep. 709); Yandes *v.* Lefavour, 2 Blackf. 371; Kirk *v.* Hiatt, 6 Ind. 322; Carroll *v.* Gayarré, 15 La. Ann. 671; Peirce *v.* Tobey, 5 Met. 168; Sigler *v.* Platt, 16 Mich. 206; Gates *v.* Fisk, 45 id. 522; Mayberry *v.* Willoughby, 5 Neb. 368 (25 Am. Rep. 491); Mann *v.* Locke, 11 N. H. 246, 250; Tappan *v.* Kimball, 30 id. 136; Shoemaker *v.* Benedict, 11 N. Y. 176, of a joint note; Payne *v.* Slate, 39 Barb. 634; Graham *v.* Selover, 59 id. 313; Levy *v.* Cadet, 17 S. & R. 126 (17 Am. Dec. 650); Wilson *v.* Waugh, 101 Pa. St. 233; Meggett *v.* Finney, 4 Strobh. (S. Ca.) L. 220; Fortune *v.* Hayes, 5 Rich. (S. Ca.) Eq. 112; Muse *v.* Donelson, 2 Humph. (Tenn.) 166 (36 Am. Dec. 309); Haddock *v.* Crocheron, 32 Tex. 276 (5 Am. Rep. 244); Carlton *v.* Ludlow Woolen Mills, 27 Vt. 496 (but if paid out of partnership funds it seems that the rule is the other way, see S. C. 28 id. 504, and Mix *v.* Shattuck, 50 Vt. 421; 28 Am. Rep. 511); Conrad *v.* Buck, 21 W. Va. 396; Cronkhite *v.* Herrin, 15 Fed. Rep. 888.

[1] Myatts *v.* Bell, 41 Ala. 222; Sigler *v.* Platt, 16 Mich. 206; Wilson *v.* Waugh, 101 Pa. St. 233; Cronkhite *v.* Herrin, 15 Fed. Rep. 888; Conrad *v.* Buck, 21 W. Va. 396.

[2] Wilson *v.* Waugh, 101 Pa. St. 233, 238; and Meggett *v.* Finney, 4 Strobh. (S. Ca.), L. 220, in this case it is said that in all the cases where a part payment was held to prevent the statute running as to all, evidence of their assent *aliunde* was had.

[3] Watson *v.* Woodman, L. R. 20 Eq. 721.

[4] Slater *v.* Lawson, 1 B. & Ad. 396.

[5] Atkins *v.* Tredgold, 2 B. & C. 25.

[6] Following are the decisions admitting the power: Whitcomb *v.* Whiting, Dougl. 652; *Ex parte* Dewdney, 15 Ves. 499, remedied now by act of Parliament; Reimsdyk *v.* Kane, 1 Gall. 630, 635; Burr *v.* Williams, 20 Ark. 171; Bissell *v.* Adams, 35 Conn. 299; Beardsley *v.* Hall, 36 id. 270 (4 Am. Rep. 74); Brewster *v.* Hardeman, Dudley (Ga.), 138; Van Staden *v.* Kline, 64 Iowa, 180, where the reasoning confines

If no notice of the dissolution was given, and there was no knowledge of it on the part of the creditor, he might justly refrain from reducing his claim to judgment in time in reliance on the part payment as a protection from the statute.[1] This doctrine would not apply to a claim barred at the time of the part payment. Even payment of a dividend in bankruptcy by one partner has been urged to deprive the other of the benefit of the statute,[2] but not of an unauthorized payment by a receiver.[3]

In Turner *v.* Ross, 1 R. I. 88, where a statute allowed any partner after dissolution to compromise for his own share of a debt, a compromise thereunder is on his own account and does not affect the copartner.

§ **706.** As a surviving partner is not a joint debtor with the estate of the deceased partner, his payments do not toll the statute as to the latter. See Surviving Partner. It has also been held that as a surviving partner is in law the sole debtor, a payment by him after the debt is barred cannot be complained of by the representatives of the decedent,[4] though secured on partnership real estate held by him and the heirs as tenants in common;[5] but his acknowledgment will not revive a debt so as to make it a claim against the

the case to a surviving partner; Greenleaf *v.* Quincy, 12 Me. 11 (28 Am. Dec. 145); White *v.* Hale, 3 Pick. 291, but this was changed by statute, which, however, in the two following cases (Sage *v.* Ensign, 2 Allen, 245; Buxton *v.* Edwards, 134 Mass. 567), was held not to apply to a creditor without notice of the dissolution; McClurg *v.* Howard, 45 Mo. 365; Merritt *v.* Day, 38 N. J. L. 33 (20 Am. Rep. 362); Casebolt *v.* Ackerman, 46 id. 169; Willis *v.* Hill, 2 Dev. & Bat. (N. Ca.) L. 231; Walton *v.* Robinson, 5 Ired. (N. Ca.) L. 341; Wood *v.* Barber, 90 N. Ca. 76; Houser *v.* Irvine, 3 Watts & S. 345 (38 Am. Dec. 768), if by a liquidating partner in winding up. See Turner *v.* Ross, 1 R. I. 88; Fisher *v.* Tucker, 1 McCord (S. Ca.), Ch. 169; Veale *v.* Hassan, 3 McCord, L. 278; Wheelock *v.* Doolittle, 18 Vt. 440; Mix *v.* Shattuck, 50 Vt. 421 (28 Am. Rep. 511), but it seems that this is not so if the payment was not out of partnership funds, see Carlton *v.* Ludlow Woolen Mill, 27 id. 496; s. c. 28 id. 504; Shelton *v.* Cocke, 3 Munf. (Va.) 191.

[1] See Kenniston *v.* Avery, 16 N. H. 117; Tappan *v.* Kimball, 30 id. 136; Sage *v.* Ensign, 2 Allen, 245; Buxton *v.* Edwards, 134 Mass. 567; Gates *v.* Fisk, 45 Mich. 522, 528.

[2] *Ex parte* Dewdney, 15 Ves. 479, 499.

[3] Whitley *v.* Lowe, 25 Beav. 421, 2 De G. & J. 704.

[4] Forward *v.* Forward, 6 Allen, 494.

[5] Van Staden *v.* Kline, 64 Iowa, 180.

individual estate,[1] even though he be also the executor, for his act has no reference to the executorial character;[2] but whether he could even pay it out of the firm property so as to reduce their interests was queried in Espy *v.* Comer, *supra.*

Where a partner who cannot bind the firm after dissolution to pay a debt already barred revives the debt as to himself by such promise, and has to pay it, he cannot coerce contribution from the copartners;[3] but where by non-residence of a partner he is not saved from the statute, and is compelled to pay, he can call on the other for contribution, although the statute would have protected the latter from a direct suit by the creditor.[4]

§ **707. Unfulfilled contracts.**— As partners cannot release themselves from an incompleted contract by dissolving, or, as has been said, have no right to dissolve as to such contracts, and as death does not discharge the obligation, each partner has the power after dissolution to carry out such contract, and the other partners are bound by his acts and his fidelity in so doing. In case there is a new firm, composed of continuing partners alone, or with an incoming partner, their assumption of the debt with the creditor's assent may amount to a novation. See Novation. And what one does in fulfillment of the contract is done for both, and both may join as plaintiffs in seeking to recover upon the contract.[5]

Thus, where a firm contracted to build eight houses, but one partner died before their completion, the other can execute the contract and charge the estate of the former with his share of the expense.[6] So where, in contemplation of the expiration of the partnership, the partners contracted to sell out the entire stock and business, one partner can carry this into effect after dissolution;[7]

[1] Bloodgood *v.* Bruen, 8 N. Y. 362; Espy *v.* Comer, 76 Ala. 501.

[2] Brown *v.* Gordon, 16 Beav. 302; Thompson *v.* Waithman, 3 Drew. 628.

[3] Merritt *v.* Pollys, 16 B. Mon. 355, 357; and in Cocke *v.* Hoffman, 5 Lea, 105, 111, it is said that even the promisor is not bound if the debt was already barred, because that would bind the other partner through him.

[4] Town *v.* Washburn, 14 Minn. 268.

[5] Page *v.* Wolcott, 15 Gray, 536; Holmes *v.* Shands, 27 Miss. 40.

[6] Rust *v.* Chisholm, 57 Md. 376.

[7] Western Stage Co. *v.* Walker, 2 Iowa, 504.

or had contracted before dissolution to renew a note made by them.[1]

It has been held that where a firm requests a person, as an accommodation to it, to pay certain bills of the firm, a payment after dissolution creates a partnership debt;[2] and the right of attorneys employed to litigate a case for an interest in the proceeds, with power to compromise, is not affected by dissolution.[3]

So uncompleted contracts made in favor of a person or firm are not released by the addition of a partner by the promisee.[4]

If goods are ordered before dissolution, a delivery or tender to one partner after is sufficient, and one partner has power to receive them, and his misappropriation charges the firm.[5]

Thus, where M. & Co. ordered a quantity of books from the plaintiffs in April, 1810, in July, 1810, F. retired from the firm and notified plaintiffs. The last shipment of the books was in September, 1811. F. continued liable, and his liability was enforceable in the same form of action as if he had remained a partner.[6] So where plaintiffs were employed by the firm of H., H. & C. to prosecute a particular claim, and before action was begun C. had retired and plaintiffs knew of the dissolution, yet they held all the partners liable for fees, for the notice of dissolution is not notice that C. had ceased to have an interest; but this would have been otherwise had H., H. & C.'s cause of action arisen after dissolution.[7]

But if there is no contract until acceptance, there is no power to accept after dissolution, for this revokes the offer; and the seller's agent, who, knowing of the dissolution, ships goods thus ordered before, it cannot hold the retiring partner.[8] Nor can the continuing partner waive any conditions; as where the goods were shipped

[1] Richardson *v.* Moies, 31 Mo. 430.

[2] Lee *v.* Stowe, 57 Tex. 444.

[3] Jeffries *v.* Mut. L. Ins. Co. 110 U. S. 305.

[4] Cramer *v.* Metz, 57 N. Y. 659, where C. bought out M.'s business, M. agreeing to furnish him with orders to the amount of $30,000 within a year. The fact that C. takes in a partner, and will fill the orders through the instrumentality of a partnership, makes no legal difference to M.

[5] Kenney *v.* Altvater, 77 Pa. St. 34; Cady *v.* Shepherd, 11 Pick. 400 (22 Am. Dec. 379); White *v.* Kearney, 2 La. Ann. 639; Hubbard *v.* Matthews, 54 N. Y. 43, 51 (13 Am. Rep. 562).

[6] Whiting *v.* Farrand, 1 Conn. 60.

[7] Cahoon *v.* Hobart, 38 Vt. 244.

[8] Goodspeed *v.* Wiard Plow Co. 45 Mich. 332.

at a different time from that required in the order, it is a new contract and not binding on the ex-partner.[1] If goods are ordered to be paid for by a note without interest, and the firm then dissolves without the vendor's knowledge who shipped the goods, but, after the vendor had received notice of dissolution, the partner who had ordered the goods sent a note bearing ten per cent. interest, the ex-partner is not liable on this note, but is liable on the original contract.[2]

Where goods are shipped to a commission house on a contract to sell them for the plaintiff, and are not sold until after the death or retirement of a partner, the consignor's right to the proceeds is a debt of all the partners; for they are not mere agents, but are bound by contract.[3]

Inter se the settling partner has no right after dissolution to receive goods consigned to the firm for sale prior to the dissolution, and a purchase of the goods from him by a person, with notice to pay a debt due him from the partnership, is void.[4] If the consignor firm and the consignee firm have a common partner, whose death dissolves both firms, the other partners in the latter, it seems, are not bound to continue to receive.[5]

Where a firm, both before and after dissolution by the death of a partner, shipped goods to a factor for sale, and he made advances upon them before such dissolution, and the proceeds of sales were insufficient to reimburse him, his claim for the deficiency on the goods sold after as well as before is chargeable on the assets in the hands of the surviving partners, before the estate of the deceased partner can claim its interest.[6]

The doctrine that a firm is not dissolved as to continuing contracts has been carried to the extent of implying authority in a partner to borrow money and pledge an asset, in order to obtain means to complete it;[7] or give a note for the purpose.[8] If a firm

[1] Goodspeed *v.* Wiard Plow Co. 45 Mich. 322.

[2] Goodspeed *v.* South Bend Plow Co. 45 Mich. 237.

[3] Wells *v.* Ross, 7 Taunt. 403; Offutt *v.* Scott, 47 Ala. 104; Hall *v.* Jones, 56 id. 493; Johnson *v.* Totten, 3 Cal. 343 (58 Am. Dec. 412); Briggs *v.* Briggs, 15 N. Y. 471 (aff. s. c. 20 Barb. 477); Washburn *v.* Goodman, 17 Pick. 519. See Whitney *v.* Farrand, 1 Conn. 60.

[4] Stirnermann *v.* Cowing, 7 Johns. Ch. 275.

[5] Oliver *v.* Forrester, 96 Ill. 315.

[6] Washburn *v.* Goodman, 17 Pick. 519.

[7] Butchart *v.* Dresser, 10 Hare, 463; 4 DeG. M. & G. 542.

[8] Mason *v.* Tiffany, 45 Ill. 392.

is bound by contract to indorse notes, one partner can indorse the firm name after dissolution in fulfillment of it; and as a partner can waive demand and notice, and as a guaranty is but an indorsement with such waiver, a partner may guaranty the notes.[1]

§ 708. Distinctions.— There is a distinction to be made between contracts to do all work of a certain description, or to receive all commodities of a certain kind, and a contract to complete a particular thing. The latter only is within the rule; but the former is not and is terminated by dissolution.[2]

Hence an authority given to an agent, by written power of attorney, to buy and sell goods and sign notes, is revoked by dissolution;[3] but continued dealing may be a ratification, as where a firm sent a promise to a cotton buyer to honor his drafts, then a partner retired and the rest formed a new firm and continued to honor the drafts, without revoking the letter of credit, they have ratified it and are liable on refusal to accept.[4]

Where partners in a lottery employed an attorney as counsel "for said firm" "during the existence or operation of said lottery," dissolution was held to end the employment, and those who continued the lottery were not bound;[5] but where A. gave a guaranty to be responsible for paper discounted for the "firm" of S., M. & G., this was held to cover paper given in renewal after dissolution by an authorized agent, for this is firm paper.[6]

§ 709. Time contracts.— Where the contract with a firm is for a specified length of time, dissolution does not release the partnership.

Thus a contract with an employee is not rescinded by the appointment of a receiver, and the transfer of all the assets to

[1] Star Wagon Co. *v.* Swezey, 52 Iowa, 391; 59 id. 609.

[2] Caldwell *v.* Stileman, 1 Rawle, 212. We shall see most important instances of this in the next chapter.

[3] Schlater *v.* Winpenny, 75 Pa. St. 321.

[4] Smith *v.* Ledyard, 49 Ala. 279.

[5] Lochrane *v.* Stewart (Ky.), 2 S. W. Rep. 903; Tasker *v.* Shepherd, 6 H. & N. 575; Henry *v.* Mahone, 23 Mo. App. 83, of a contract with a firm for materials for a building, one partner's retirement breaks the continuity of the account, and the new firm cannot file a lien for the entire account.

[6] New Haven County Bk. *v.* Mitchell, 15 Conn. 206.

him.[1] So where a firm makes a contract for three years, and before its expiration one partner retires, the creditor knowing of his retirement, the others agreeing to save him harmless, yet he continues liable for the actions of the continuing partners under the contract.[2] And a retiring partner continues liable for rent of premises leased to the firm.[3]

So if it be for a particular service the firm is not released by dissolution; as where a firm of attorneys got judgment for a client and dissolved, and one collected the amount and kept it, the other is liable, for the duty of each to the client continues; the business is not transferred to one unless the client is notified and has a chance to exercise his option,[4] and the partner who completes the business does so under the old contract as to fees.[5]

Contracts of employment by the firm have been held to be conditioned on the firm not being dissolved by death; that is, that the engagement of an agent or employee for a specified time is with a subsisting firm only, and in case of death the surviving partner is not obliged to carry out such contract, because it implies a necessity to continue business, which is beyond his powers.[6] A further distinction has been made in case the contract is between one partner and the firm, instead of with a third person. Thus, where J. leased a building to his firm, J. & H., for the purposes of the business for five years, and the partnership was for five years, this was held to be subject to the continuance of the firm, and to cease on dissolution, except that if the firm's business is all done in one season of each year, and one partner died after the season was over, the firm has had the substantial benefit of the building for the

[1] Bird *v.* Austin, 8 Jones & Sp. 109.

[2] Oakford *v.* European & Am. Steam Shipping Co. 1 H. & M. 182, 191; Swire *v.* Redman, 1 Q. B. D. 536.

[3] Graham *v.* Whichelo, 1 C. & M. 188.

[4] Smyth *v.* Harvie, 31 Ill. 62; Bryant *v.* Hawkins, 47 Mo. 410; Poole *v.* Gist, 4 McCord, L. 259; Waldeck *v.* Brande (Wis.), 21 N. W. Rep. 533; Williams *v.* Whitmore, 9 Lea, 262.

[5] Moses *v.* Bagley, 55 Ga. 283.

[6] Tasker *v.* Shepherd, 6 H. & N. 575; Burnet *v.* Hope, 9 Ontario Rep. 10. *Contra*, Fereira *v.* Sayres, 5 W. & S. 210 (40 Am. Dec. 496).

Where a partner after dissolution collected more than the firm was entitled to, and the firm was held responsible for the excess. And such liability was said to exist, although the dissolution was by the death of a partner before collection made, McGill *v.* McGill, 2 Met. (Ky.) 258. *Contra*, Johnson *v.* Wilcox, 25 Ind. 182, that death revokes the agency.

year, and the rent for the whole year must be credited to the lessor for the entire year.[1]

Nor can the other party to the contract claim that dissolution rescinds it.

Thus an agreement to give a lease to A., B. and C., partners as A., B. & Co., of a building when completed, is enforcible by the partners notwithstanding dissolution, if they are willing to take the lease jointly, for they did not promise not to dissolve.[2]

So on an agreement by a firm to sell a person's goods for five years, dissolution otherwise than by death will not authorize such person to refuse to furnish goods or relieve from liability to account for sales to the firm's customers direct.[3]

So where one F. sold machinery to a firm and agreed to take payment in having his logs sawed, and one partner sold out his interest in the firm to the others and retired, F. is not relieved of his contract to furnish logs, because the contract is not for the personal skill or services of the ex-partner.[4]

§ 710. But if the contract is a personal one, in reliance upon a particular partner, his disability or retirement will release the other contracting party.

Thus in Robson *v.* Drummond, 2 B. & Ad. 303, A., a coachmaker having a silent partner, C., agreed to rent a carriage to B. for five years, at seventy-five guineas per year, payable in advance. Before three years A. & C. dissolved, A. assigning his interest in the firm to C., who continued the business. B., who had not been aware of the partnership, refused to continue the contract with C. and returned the carriage, and was held not to be liable for the rent of the two remaining years, the court saying that B. made the contract by reason of personal confidence in A.

So of a contract between an author and a publishing firm, the firm cannot assign the contract to its successor.[5]

Where goods are sold to a firm on an express agreement that one partner shall superintend their sale, his death is cause for

[1] Johnson *v.* Hartshorne, 52 N. Y. 173; Doe *ex d.* Colnaghi *v.* Bluck, 8 C. & P. 464, 468.

[2] Palmer *v.* Sawyer, 114 Mass. 1.

[3] Dickson *v.* Indianapolis Cotton Mfg. Co. 63 Ind. 9.

[4] Jones *v.* Foster, 67 Wis. 296.

[5] Stevens *v.* Benning, 1 K. & J. 168; 6 DeG. M. & G. 223.

rescission by the seller if the parties can be put *in statu quo*, and he can stop them *in transitu* if on the way.[1]

In First National Bank *v.* Hall, 101 U. S. 43, a bank had made a contract with a firm for the cashing of drafts drawn on the firm, by which it agreed not to cash drafts unless they represented actual shipments, and the firm having paid a draft to the bank and found there had been no goods shipped, brought suit for the recovery of the payment from the bank. The court said that the contract was terminated by new members being taken into the firm, because a new party could no more be imported into the contract and imposed upon the bank without its consent than any other change, and the bank had a right to decide for itself if it would contract with new parties.[2]

And so if the dissolution disables the firm to carry out its contract.

Thus a contract to work for a firm for a year as an employee is not broken by the employee's refusal to work after the retirement of one partner and the addition of another, for the contract is not assignable, and he can recover a proportion of the compensation.[3]

So if a boy is apprenticed to a firm and his father took him away and the firm afterwards dissolved, it can recover damages only to the date of dissolution.[4]

It has been held that a client had an option to consider the dissolution of a law firm as a discharge of his contract for their services.[5]

On the other hand it has been held that the arrangement of their affairs between the partners does not concern the client, and he is not released by dissolution; but here the services were performed by one of the partners and no objection was made until action for fees in the name of both.[6]

§ 711. —— surviving partners.— The foregoing principles as to continuing contracts apply also to surviving partners.

[1] Fulton *v.* Thompson, 18 Tex. 278.

[2] This ruling, however, is *obiter*, the court having found there was no contract. See §§ 648–656.

[3] Redheffer *v.* Leather, 15 Mo. App. 12.

[4] Hiatt *v.* Gilmer, 6 Ired. L. 450.

[5] Griffiths *v.* Griffiths, 2 Hare, 587; Rawlinson *v.* Moss, 7 Jur. N. S. 1053.

[6] Page *v.* Wolcott, 15 Gray, 536.

If the firm has entered into an executory contract which is only partially fulfilled at the death of one partner, his death does not absolve either party from performance, and the existence of the partnership with its active functions continues in the surviving partner for the purpose and with the duty of fully performing the contract.[1]

So where a firm ordered boilers to be made, and one partner died, and the surviving partners received the boilers and gave notes for them, the estate of the decedent was held liable for the consideration.[2]

And the estate of the deceased is liable to the creditor for losses occurring in the effort of the surviving partner to carry out the unfulfilled contract,[3] or his misconduct.[4]

Contracts between the partners as to the mode of conducting the business cannot be carried out by the surviving partners, for that is continuing the business. Thus, where the firm of A. & B. agreed with the firm of A., B. & C. for the shipment of lumber by one to the yard of the other. Here A.'s death, dissolving both firms, terminates the agreement at once, and subsequent shipments (they were destroyed by fire) are at the risk of the surviving partners.[5]

But the contract may expressly require the personal attention of the deceased partner, and in such case his death will justify the other partner in rescinding it if the parties can be placed *in statu quo.*

[1] Denver *v.* Roane, 99 U. S. 355, of a firm of lawyers and claim agents; Davis *v.* Sowell, 77 Ala. 262, of a contract to cut and manufacture thirteen million feet of lumber; Ayres *v.* Chicago, Rock Isl. & Pac. R. R. 52 Iowa, 478, of a contract to build a railroad; McGill *v.* McGill, 2 Met. (Ky.) 258, of a contract by attorneys to make a collection; Pingree *v.* Coffin, 12 Gray, 288, 314, of a contract to assign a bond to convey land; Tompkins *v.* Tompkins, 18 S. Ca. 1; Connell *v.* Owen, 4 Up. Can. C. P. 113, of a contract to teach an apprentice. An executor is not generally bound to carry out such contract, being a personal one, but *contra* of a surviving partner.

[2] Mason *v.* Tiffany, 45 Ill. 392.

[3] Tompkins *v.* Tompkins, 18 S. Ca. 1.

[4] McGill *v.* McGill, 2 Met. (Ky.) 258.

[5] Oliver *v.* Forrester, 96 Ill. 315. See. also, Johnson *v.* Hartshorne, 52 N. Y. 173, noticed in § 709.

As where a person sold goods to a firm on credit on the express agreement that one partner should personally look after the disposition of them. Upon his death, while the goods are on the way, the seller can rescind and stop them *in transitu*.[1]

[1] Fulton *v.* Thompson, 18 Tex. 278. It was hinted in two cases that if the contract requires professional skill it may be intended to be a personal one and terminated by death. McGill *v.* McGill, 2 Met. (Ky.) 258; Ayres *v.* Chicago, R. I. & P. R. R. 52 Iowa, 478. And in Johnson *v.* Wilcox, 25 Ind. 182, death was held to revoke the employment of a firm of attorneys.

CHAPTER VIII.

SURVIVING PARTNERS.

§ **712.** It is often said that partners are joint tenants without benefit of survivorship.

The maxim *Jus accrescendi inter mercatores locum non habet* expresses the same idea. But, as Mr. Jarman has said,[1] the words "*inter se*" should be added.

It is true that the legal title of real estate does not devolve upon the surviving partner, but is governed by the law of real property, because the title, if in the names of more than one of the partners, is, in legal contemplation, held by them as tenants in common, and not as joint tenants. But as to personal property, the title to choses in action has always been deemed to belong to the surviving partners, and they alone have the right of action upon them. And the doctrine that in other personal property of the firm the representatives of the deceased partner and the survivor become tenants in common, countenanced by some decisions, is contrary to the great weight of authority; the existence and precise nature of a beneficial interest in them being unsettled.[2]

§ **713. Surviving partner, who is a — Dissolution before death.**— To constitute the relation of surviving partner, with the powers and title and responsibility incident thereto, it is not necessary that the death should have caused or antedated the dissolution. No difference seems to be made between such case and one where there is a dissolution be-

[1] 7 Jarm. Conv. 67. I have taken this citation from Bisset on Partnership.

[2] We have already seen that death dissolves the partnership unless the contrary has been agreed upon, §§ 580, 598, and that the executors cannot become partners with the survivors, even if decedent has by will so directed, unless the surviving partners assent. § 158 *et seq.*

tween living partners and death occurs afterwards, unless one has sold his interest to the other. This is inconsistent with the doctrine that upon dissolution the partners become mere tenants in common, without right in either to dispose of a chattel or chose in action, or of any interest therein beyond his own; for how could death of one enlarge the title of the other, which it must do, since the survivor's powers arise from his having the entire title, and not the title from the powers; and this, to my mind, is an argument against dissolution changing a partner's interest.[1]

In Strange *v.* Graham, 56 Ala. 614, a partner died six years after dissolution, yet the title of all the personal property was held to be cast upon him, and he has a lien upon it all for the payment of debts and for his own share before the administrator is entitled to claim any property in in it.

In Ober *v.* Indianapolis & St. L. R. R. 13 Mo. App. 81, the same ruling was made, THOMPSON, J., p. 83, saying that the conventional dissolution for the purpose of discontinuing business and going into liquidation has no effect on the ownership of property, unless the contract of dissolution so provides.

In Kinsler *v.* McCants, 4 Rich. (S. Ca.) L. 46,[2] where, after dissolution between living partners, notes are left in the hands of one of them, and he places them in an attorney's hands for collection, and afterwards dies, it was held that the title to them vests in the surviving partner, and if the attorney, after collection, pays the amount to the administrator in disregard of the survivor's notice to pay him, he can be compelled to pay over again to the survivor.[3]

If, on dissolution, one partner buys out the interest of the other, the property, on the death of the purchaser, goes to his administrator, and the seller cannot claim it as surviving partner.[4] But

[1] Murray *v.* Mumford, 6 Cow. 441, that dissolution does not make them tenants in common; Stillwell *v.* Gray, 17 Ark. 473.

[2] 53 Am. Dec. 711.

[3] *Contra*, Mutual Sav. Inst. *v.* Enslin, 37 Mo. 453, holding that the case of death of one partner after dissolution is not the same as dissolution by death; that on dissolution by death the survivor can transfer a note in settling the concern, but that on dissolution without death the partners are tenants in common, and subsequent death does not enlarge the survivor's title.

[4] White *v.* Parish, 20 Tex. 688. *Contra*, Felton *v.* Reid, 7 Jones (N. Ca.), L. 269. See Valentine *v.* Farnsworth, 21 Pick. 176, where a judg-

even in this case, if the seller agrees to leave his name in the firm for a period, and plaintiff does not know this until after the death of the seller, he can proceed against the other as surviving partner.[1]

§ 714. Death of both partners — Administrator of last survivor. — Under the usual rule of the *jus accrescendi*, on the death of the last survivor of joint parties his rights and liabilities at law descend upon his legal representative. Thus in enforcing partnership claims the representative of the last surviving partner is the proper plaintiff to collect outstanding accounts.[2] So in enforcing claims against the partnership, the representative of the last survivor is the proper party.[3]

Where both partners die and the same person is administrator of both, he cannot be sued in his double capacity; nor could the several administrators of each estate be sued.[4]

The administrator of the surviving partner is charged with the duty of completing the settlement, not as owner, but as trustee in possession.[5]

ment had been recovered against such retired partner as surviving partner, in the court below.

[1] Wright *v.* Storrs, 6 Bosw. 600, 609 (affd. 31 N. Y. 691).

[2] Richards *v.* Heather, 1 B. & A. 29; Calder *v.* Rutherford, 3 Brod. & Bing. 302; Costley *v.* Wilkerson, 49 Ala. 210; Copes *v.* Fultz, 1 Sm. & Mar. 623, that a judgment in favor of the last survivor must be revived in the name of his administrator, and not of the administrator of the former decedent; Carrere *v.* Spofford, 46 How. Pr. 294; Nehrboss *v.* Bliss, 88 N. Y. 600, 604. *Contra*, Felton *v.* Reid, 7 Jones, L. 269. And if both partners die their administrators can agree that the representative of the one who died first shall wind up the partnership business, Griffin *v.* Spence, 69 Ala. 393.

[3] Calder *v.* Rutherford, 3 Brod. & Bing. 302; Whitney *v.* Cook, 5 Mass. 139; Gere *v.* Clarke, 6 Hill, 350; Bridge *v.* Swain, 3 Redf. (N. Y.) 487, holding that, both partners being dead, a creditor can procure an order to sell real estate of the last survivor, although the partner first dying left sufficient assets to pay. But in Carter *v.* Currie, 5 Call (Va.), 158, on bill for relief concerning a lost bill of exchange filed against surviving partner and executor, the former having died *pendente lite*, decree was rendered against the executor without revivor against the estate of the former.

[4] McNally *v.* Kerswell, 37 Me. 550.

[5] Dayton *v.* Bartlett, 38 Oh. St. 357; Thomson *v.* Thomson, 1 Bradf. (N. Y.) 24; Brooks *v.* Brooks, 12 Heisk. 12; and see McGilway *v.* Clement, 6 Mo. App. 597–8.

In Kottwitz *v.* Alexander, 34 Tex. 689, two partners, A. & B., both died. A.'s administrator lived and administered in L. county and B.'s in M. county. An action was brought against both in L. county, and it was held that there was no misjoinder, and that B.'s administrator could not object that he should have been sued in his own county.

Where the administrators of the two deceased partners agreed that the administrator of the one who died first should wind up the partnership business, and he got decree against a debtor and died, as this decree merged the debt his successor in the administration of such partner's estate must collect, and not the representative of the last survivor, for it is assets of such estate, although in trust for the partnership.[1]

§ 715. **Survivor alone entitled to wind up.**— The surviving partner has the exclusive right of possession, management and control of the entire property for the purpose of winding up.[2] We shall elsewhere see that he is not generally entitled to compensation for the performance of this duty.[3] If there are two survivors this right and duty devolves equally on both.[4]

And the surviving partner alone is entitled to the possession of the books, and cannot be compelled to give them up even to allow the representatives of the deceased to examine the correctness of the accounts.[5]

[1] Griffin *v.* Spence, 69 Ala. 393.

[2] Bohler *v.* Tappan, 1 Fed. Rep. 469; 1 McCrary, 134; Davis *v.* Sowell, 77 Ala. 262; Farley *v.* Moog, 79 id. 148; Marlatt *v.* Scantland, 19 Ark. 443; Allen *v.* Hill, 16 Cal. 113; McKay *v.* Joy (Cal.), 9 Pac. Rep. 940; Florida Territory *v.* Redding, 1 Fla. 279; People *v.* White, 11 Ill. 341, 350; Miller *v.* Jones, 39 id. 54; Cobble *v.* Tomlinson, 50 Ind. 550; Willson *v.* Nicholson, 61 id. 241; Anderson *v.* Ackerman, 88 Ind. 481; Ely *v.* Horine, 5 Dana, 398; Wilson *v.* Soper, 13 B. Mon. 411 (56 Am. Dec. 573); Barry *v.* Briggs, 22 Mich. 201; Merritt *v.* Dickey, 38 Mich. 41, 44; Carrere *v.* Spofford, 46 How. Pr. 294, and cases under §§ 718, 719. Surviving law partners are not chargeable with rent for the use of the library while winding up, Starr *v.* Case, 59 Iowa, 491 But in Louisiana the right is not absolute, but depends on the consent of an heir capable of accepting the succession, McKowen *v.* McGuire, 15 La. Ann. 637; and cases cited in the following notes. As to REAL ESTATE, see § 300.

[3] § 772.

[4] Davis *v.* Sowell, 77 Ala. 262; Heartt *v.* Walsh, 75 Ill. 200.

[5] Waring *v.* Waring, 1 Redf. 205; Murray *v.* Mumford, 6 Cow. 441 (rev.

And can refuse permission to the appraisers of the decedent's estate to go into the place of business to appraise without committing contempt of court; the appraisers could not learn anything of the decedent's interest.[1]

But the administrators have a right to inspect the books and be informed of the proceedings, progress of the winding up, and an exclusion of them in these respects is ground for equitable interference.[2]

That the survivor was a dormant partner cannot, it is conceived, impose any disability upon him as having the right to take possession and wind up.[3]

The insolvency of the surviving partner does not deprive him of this right;[4] nor even his temporary insanity; he is still entitled with his committee to bring actions for the recovery of debts due to the firm.[5] And contracts by the administrators during such temporary insanity will not be enforced, even as against themselves, if this would impair the survivor's rights, as where the administrators agreed with mortgagees of the partners for a foreclosure.[6]

§ 716. —— **interference by the administrator.**— Hence if a debtor of the firm pay any part of the debt to the administrator, the surviving partner can compel him to pay it over again.[7] Or he can compel the administrator to pay over the money thus wrongfully collected by him.[8] So if the admin-

Anth. N. P. 294); Platt *v.* Platt, 61 Barb. 52; 11 Abb. Pr. (N. S.) 110.

[1] Camp *v.* Fraser, 4 Demarest (N. Y.), 212.

[2] Bilton *v.* Blakely, 6 Grant's Ch. (Up. Can.) 575.

[3] This was said to be uncertain in Johnson *v.* Ames, 6 Pick. 330, 334, but was sustained in Beach *v.* Hayward, 10 Oh. 455; and in limited partnerships the special partner's relation is analogous to that of a dormant partner, and his right to wind up seems clear. See Bates on Limited Partnership, p. 197.

[4] Heartt *v.* Walsh, 75 Ill. 200; McCandless *v.* Hadden, 9 B. Mon. 186, he was bankrupt here.

[5] Uberoth *v.* Union Nat'l Bk. 9 Phila. 83.

[6] Lockwood *v.* Mitchell, 7 Oh. St. 387.

[7] Wallace *v.* Fitzsimmons, 1 Dall. 248; Calvert *v.* Marlow, 18 Ala. 67, *arguendo;* Rice *v.* Richards, Busb. (N. Ca.) Eq. 277; Shields *v.* Fuller, 4 Wis. 102, 105.

[8] Shields *v.* Fuller, 4 Wis. 102; Calvert *v.* Marlow, 18 Ala. 67, *arguendo;* Sweet *v.* Taylor, 36 Hun, 256, of firm money deposited in the name of the deceased and paid to the executor, who received it knowing its character; McCarty *v.* Nixon, 2 Dall. 65, 66, note, where the administrator collected money on notes taken by

istrator obtains possession of any of the assets, the surviving partner may sue him at law to get possession of it. Thus detinue has been sustained against him for a note payable to the firm;[1] or an action for the possession of chattels;[2] or for conversion.[3] The administrator, by ignorantly taking possession of the books and collecting some of the debts, does not become liable to the survivor for all of them, as for conversion.[4] He should not sue the administrator in a representative capacity, for the tort was not committed by the deceased, but by the administrator.[5]

It has been doubted whether the administrator could be sued in his representative capacity, so as to recover from the estate.[6] But in another case it was held that, if the administrator had administered partnership assets as part of the deceased's estate and had rendered his accounts and been discharged, the survivor could sue the administrator *de bonis non*, but not if the fund had not gone into the estate.[7] And where the deceased partner had collected and

the deceased in his own name. But if he has given the administrator accounts to collect and the administrator has been compelled to allow set-off to the debtor, he is liable only for the balance, Ely *v.* Horine, 5 Dana, 398.

[1] Calvert *v.* Marlow, 18 Ala. 67.

[2] McKay *v.* Joy (Cal.), 9 Pac. Rep. 940; Smith *v.* Wood, 31 Md. 293; Berolzheimer *v.* Strauss, 51 N. Y. Superior Ct. 96.

[3] Stearns *v.* Houghton, 38 Vt. 583.

[4] Alexander *v.* Coulter, 2 S. & R. 494. Some of the cases, which held to the old notion that the executor was tenant in common with the survivor, held that the survivor had no exclusive right to possession, except to pay debts, and could not, therefore, sue the executor for conversion or for possession. Strathy *v.* Crooks, 2 Up. Can. Q. B. 51; Canfield *v.* Hard, 6 Conn. 180.

[5] Smith *v.* Wood, 31 Md. 293; Davis *v.* Sowell, 77 Ala. 262; Shields *v.* Fuller, 4 Wis. 102; Stearns *v.* Houghton, 38 Vt. 583.

[6] Shields *v.* Fuller, 4 Wis. 102; Stearns *v.* Houghton, 38 Vt. 583.

[7] Marlatt *v.* Scantland, 19 Ark. 443. And see Davis *v.* Sowell, 77 Ala. 262. In the latter case, Davis & Sullivan were partners in a milling business, Sullivan having an outside business in lumber, and having agreed to furnish a certain quantity to a person in New York; the firm contracted with Sullivan as an individual, in order to enable him to fill his contract, to make for him a stated quantity of lumber each month. Sullivan died, and the mill burned down, and Davis, as surviving partner, in order to complete the contract, procured Sowell & Co. to make the rest of the lumber at the latter's mill, and now complains that Sowell & Co. are delivering the lumber direct to Sullivan's executor and asks an injunction. It was held that, if Sowell fail

not accounted for a sum of money, and the administrator received it undistinguished from the mass of the individual property, it is not subject to any trust or equitable lien, and the surviving partner cannot maintain a bill in equity for it, but must prove his claim in the probate court.[1]

§ 717. —— **waiver of the right to wind up.**—This right to wind up is a personal privilege which may be waived or resigned to the representative of the other partner.[2]

And where the surviving partner cannot be found, as where the survivor of a medical partnership collected sufficient to amount to his share of the profits and had then absented himself, the administrator can file a bill in equity as *cestui que trust*, where the trustee neglects to assert his rights at law, to recover a debt due to the firm.[3] So when the surviving partner refuses to bring an action, as where the firm's affairs were all settled up when an uncollected debt was discovered, the surviving partner refusing to collect it, the administrator can file a bill against the debtor for a discovery and accounting.[4]

§ 718. **Title of surviving partner.**—The surviving partner is, in law, the owner of the chattel property as well as of the choses in action. The representatives of the deceased partner have a right to the balance that will be found to

to deliver as contracted, Davis could sue them for the breach; if they deliver to S.'s executor, ignoring Davis' rights, the executor's possession would be wrongful and he would be liable personally to Davis; and if the executor applied the lumber on the decedent's contract with the New York party, his estate would be liable to Davis for goods sold and delivered, and hence, as Davis had these three remedies at law, injunction would not lie without other reasons for equitable interference.

[1] White *v.* Chapin, 134 Mass. 230, there were in this case no partnership debts to pay, and half of the sum was due the surviving partner for himself, the firm being a partnership of attorneys; Allison *v.* Davidson, 1 Dev. & Bat. Eq. 46; Calvert *v.* Marlow, 6 Ala. 337, that he cannot be sued at law in such case.

[2] Griffin *v.* Spence, 69 Ala. 393; Welborn *v.* Coon, 57 Ind. 270; Black *v.* Bush, 7 B. Mon. 210; Vetterlein *v.* Barnes, 6 Fed. Rep. 693, holds that a surviving partner who has permitted the representative to take the assets of the old firm and with it as capital form a new firm, has lost his right to wind up the old firm; ten years, however, had elapsed.

[3] Drake *v.* Blount, 2 Dev. (N. Ca.) Eq. 353.

[4] Kirby *v.* Lake Shore & M. S. R. R. 8 Fed. Rep. 462; s. c. 14 id. 261.

belong to the decedent, and to an account; they also have a right to compel the surviving partner to apply the assets to the debts, and not to waste it or delay settlement. This is obviously not a tenancy in common, even in equitable contemplation, and though the representatives of the deceased have often been called *cestuis que trustent*, and the survivor a trustee for them, this doctrine is, at most, but partially true, and is distinctly repudiated by some very great courts.

In Knox *v.* Gye, L. R. 5 H. L. 656, the executor of the deceased partner sued the surviving partner for an accounting, some ten years after the dissolution by death, and the question was on the statute of limitations. Lord WESTBURY, who delivered the principal opinion, said: "In deciding this case, it must be recollected that the representative of a deceased partner has no specific interest in or claim upon any particular part of the partnership estate. The whole property therein accrues to the surviving partner, and he is the owner thereof both at law and in equity. The right of the deceased partner's representative consists in having an account of the property, of its collection and application, and in receiving that portion of the clear balance that accrues to the deceased's share and interest in the partnership."

"Another source of error in this matter is the looseness with which the word 'trustee' is frequently used. The surviving partner is often called a 'trustee,' but the term is used inaccurately. He is not a trustee, either expressly or by implication. On the death of a partner, the law confers on his representatives certain rights, as against the surviving partner, and imposes upon the latter correspondent obligations. The surviving partner may be called, so far as these obligations extend, a trustee for the deceased partner; but when these obligations have been fulfilled, or are discharged, or terminate by law, the supposed trust is at an end."

Then, after illustrating the danger of an inaccurate use of a term, as where the rules of trusts were attempted to be applied to a vendor as a trustee of the purchaser, and citing Lord Mansfield's remark, that nothing in law is so apt to mislead as a metaphor, he continues: "In like manner here, the surviving partner may be called a trustee for the dead man, but the trust is limited to the discharge of the obligation which is liable to be barred by lapse of time." . . . "There is nothing fiduciary between the surviving

partner and the dead partner's representative, except that they may respectively sue each other in equity. There are certain legal rights and duties which attach to them; but it is a mistake to apply the word 'trust' to the legal relation thereby created." [1]

In Bush *v.* Clark, 127 Mass. 111, it was held that the survivor's title was absolute and that he is not a trustee, and from this it was held to follow that, on the death of the survivor, his widow's year's allowance would be taken out of any estate he left, even though it

[1] A distinction had been made between choses in action and chattels in Buckley *v.* Barber, 6 Exch. 164 (1851), holding that, although as to choses in action the remedy survives, and the survivor alone can sue on them, yet, as to the joint chattels, there is no survivorship at law, and on death, therefore, they do not belong to the survivor, nor has he even a *jus disponendi* by virtue of the partnership relation, and hence cannot sell more than his own undivided share, even to pay debts, the buyer becoming tenant in common with the administrator; or if he has such power it is only in order to pay debts, and cannot dispose of the property otherwise. This case is criticised in Lindley on Partnership, 666, as making a useless distinction between land debts and chattels, and as involving the consequence that a surviving partner could sell only his own share in a chattel, and as inconsistent with the principles that are acted on in granting a receiver at the instance of the executor against the survivor. That distinction was announced as being the law by EARL, Com., in Tremper *v.* Conklin, 44 N. Y. 58, 61-2. Thus, at the death of either, his share in such effects, subject to the partnership debts, devolves on his personal representatives, who thereupon become, both at law and in equity, tenants in common with the surviving partner. . . As he becomes liable for all the debts, the law gives him the control of the partnership effects, simply for the purpose of holding and administering the estate until the effects are reduced to money and the debts are paid. As to the choses in action, the survivor takes the legal title to them, simply for the purpose of reducing them to possession. He takes by virtue of his original title and not as assignee. Prior to these cases, it had been said that the personal representatives became tenants in common with the survivors, of property in possession, as distinguished from choses in action, in Adams *v.* Ward, 26 Ark. 135; Skipwith *v.* Lea, 16 La. Ann. 247; McKowen *v.* McGuire, 15 La. Ann. 637; Stanhope *v.* Suplee, 2 Brewst. (Pa.) 453; Rathwell *v.* Rathwell, 26 Up. Can. Q. B. 179; Trammell *v.* Harrell, 4 Ark. 602, 610; Wilson *v.* Soper, 13 B. Mon. 411 (56 Am. Dec. 573), but admitting the right to sell in order to pay and wind up; Bredow *v.* Mutual Sav. Institution, 28 Mo. 181, *arguendo*. And the doctrine that the survivor does not hold the entire legal title is necessarily involved in the decision of Weil *v.* Jones, 70 Mo. 560, where, in an action against the survivor on his individual debt, he was not allowed to set off a debt due the firm.

came to him as surviving partner, and though it may compel the estate of the other partner to pay partnership debts.[1]

In Mutual Life Ins. Co. *v.* Sturges, 33 N. J. Eq. 328 (rev. s. c. 32 id. 678), an agreement by the surviving partner that a mortgage made to the firm should be postponed to a later mortgage was held valid to bind him and his assignee of the mortgage, without inquiring into its effect on the deceased partner's interest.

In Hogg *v.* Ashe, 1 Hayw. (N. Ca.) 471, 477 (1797), Haywood, J., in sustaining the right of set-off of individual debt in an action by one surviving partner, says that he takes all the firm's effects *in jure proprio*, and can sell them, give them away, etc., and that the executors cannot object to his disposition of them or claim any particular article and share; when he sues it is without the addition of "surviving partner," the executor's only claim being to an accounting.

In Holbrook *v.* Lackey, 13 Met. 132 (46 Am. Dec. 726), purporting to follow the rule that individual debts of the surviving partner can be set off against partnership demands, the statute says that a demand, to be set off, must be due to the defendant in his own right, and excludes trustees and all persons suing or being sued in a representative capacity. The case therefore necessarily holds the surviving partner not to be a trustee, but a holder in his own right.

§ 719. It is very doubtful whether the House of Lords, in Knox *v.* Gye, and the American cases which hold the surviving partner not to be a representative in any respect, do not go too far. He may not be such a trustee that the statute of limitations will apply, and yet may hold the property by a species of bailment for the benefit of himself and of the estate, with power of disposition, yet so that the purposes of holding cannot be frustrated by his individual creditors, although as to choses in action they have rights of set-off in actions at law where the state of accounts and existence of partnership creditors cannot be investigated. Why should the accident of death enlarge the

[1] It was remarked of this case in Crescent City *v.* Camp, 64 Tex. 521, that the report does not show but that the estate of the last surviving partner was not sufficient to pay all debts, after his widow's allowance was deducted.

rights of third persons not creditors; or if misconduct or use of assets for his own benefit by the surviving partner is ground for depriving him of them, how do third persons obtain through him rights which he has not in himself? If the doctrine of the above cases be literally correct, the next step will be to award an exemption from execution to the surviving partner in the assets in an action by a partnership creditor.

In Berry *v.* Harris, 22 Md. 30, it was held that the legal interest in the assets is absolutely transferred to the survivor, and his individual creditor may garnishee a claim due to the firm without showing the state of accounts between him and the decedent, courts of equity being open, however, to the administrator and to creditors of the firm to interfere; S. P. Knox *v.* Schepler, 2 Hill (S. Ca.), L. 595, holding that the garnishee would be ordered to pay to the separate creditor, but that the latter must give bond to answer any claim made on the fund, for he takes it subject to the claims of partnership creditors. In Barber *v.* Hartford Bank, 9 Conn. 407, the right of an heir and representative, and Thompson *v.* Lewis, 34 Me. 167, the right of a partnership creditor, to interpose and defeat such attachment as a diversion of partnership funds to pay a separate debt was maintained.

In Crescent City *v.* Camp, 64 Tex. 521, insurance issued to a surviving partner, who was also administrator, on the partnership stock of goods, was held void under a clause requiring that if the insured is not the sole and unconditional owner for his own use and benefit, it shall be so stated; and as he has both the right and the remedy, unlike an executor, a promise to him, taking the case out of the statute of limitations, saves the old remedy, and the new promise need not be declared on.[1] Yet continuing running accounts with the survivor will not be deemed intended to save from the statute a prior account due to the firm.[2]

In Smith *v.* Walker, 38 Cal. 385, the survivor is said not to be a tenant in common, but is called a trustee to wind up and account for the balance; and in most of the American cases he is called a trustee or a quasi-trustee. If he were not such, the joint assets would, upon his bankruptcy, go to his joint and separate creditors equally.[3]

[1] Barney *v.* Smith, 4 Har. & J. 485.

[2] Stewart's Appeal, 105 Pa. St. 307.

[3] The doctrine of a tenancy in common is repudiated, and that of his

§ 720. —— execution against deceased.— As the property vests in the surviving partner, an execution against an individual partner which has not become a lien upon his interest in the partnership before his death cannot be afterwards levied on partnership effects.[1]

And though the levy was in a foreign country, and the property was decreed by a competent court to belong to the deceased, yet the separate creditor, who had notice before attaching of the surviving partner's claim, is bound to refund.[2]

§ 721. —— pardon of survivor.— A pardon to a surviving partner for an offense committed by both the partners prior to the death of one, against the government, whereby the entire property became liable to confiscation, entitles the surviving partner to have the entire property awarded to him.[3]

§ 722. Cannot join administrator as co-plaintiff.— In consequence of the survivorship of the title of all choses in action vesting in the surviving partners, they alone must bring all suits relating to the affairs of the partnership, and

sole ownership maintained, also, in Bohler *v.* Tappan, 1 Fed. Rep. 469; 1 McCrary, 134; Andrews *v.* Brown, 21 Ala. 437; Strange *v.* Graham, 56 id. 614; Filley *v.* Phelps, 18 Conn. 294, 301; Smith *v.* Wood, 31 Md. 293; Berry *v.* Harris, 22 Md. 30; Barry *v.* Briggs, 22 Mich. 201; Pfeffer *v.* Steiner, 27 Mich. 537; Bassett *v.* Miller, 39 Mich. 133; Hanway *v.* Robertshaw, 49 Miss. 758; Robertshaw *v.* Hanway, 52 Miss. 713; Adams *v.* Hackett, 27 N. H. 289; 59 Am. Dec. 376; SAWYER, J., in Benson *v.* Ela, 35 id. 402, 409; Bernard *v.* Wilcox, 2 Johns. Cas. 374; Holmes *v.* D'Camp, 1 Johns. 34 (3 Am. Dec. 293); Betts *v.* June, 51 N. Y. 274; Mendenhall *v.* Benbow, 84 N. Ca. 646; Oram *v.* Rothermel, 98 Pa. St. 300; Knox *v.* Schepler, 2 Hill (S. Ca.), 595; Stearns *v.* Houghton, 38 Vt. 583. Thus, if the firm possessed a chattel interest in land as a leasehold, ejectment is to be brought against the surviving partners alone. Oram *v.* Rothermel, 98 Pa. St. 300. And a notice to obtain the benefit of a privilege of renewal in the lease and enforce the right must be by the surviving partners. Betts *v.* June, 51 N. Y. 274.

[1] Newell *v.* Townsend, 6 Sim. 419; Bank of N. America *v.* McCall, 3 Binn. 338; 4 id. 371, 373. And see Vienne *v.* McCarty, 1 Dall. 154.

[2] Bank of N. America *v.* McCall, *supra*. Costs of an action against a surviving partner on a partnership debt cannot be collected from the estate of the deceased partner, for as to his individual estate the execution is a nullity. Duquesne Natl. Bk. *v.* Mills, 2 Fed. Rep. 611.

[3] United States *v.* The Athens Armory, 35 Ga. 344.

the representatives of the deceased cannot be joined as co-plaintiffs with them,[1] though the survivor was a dormant partner.[2]

Even if the survivor and administrator have adjusted all their matters, and agreed to divide equally the proceeds of the demand sued upon, this is not a severance which will subject the debtor to two actions, and an action by the administrator will be dismissed.[3]

Or though the decedent's estate was to have the entire beneficial interest in the debt, if the defendant was not party to the agreement.[4] That the action is for injury to the personal property of the partnership makes no difference; the survivor alone must sue;[5]

[1] Martin *v.* Crump, 2 Salk. 444; 1 Ld. Ray. 340; Comb. 474; Kemp *v.* Andrews, Carth. 170; 3 Lev. 290; 1 Show. 188, 189; Smith *v.* Barrow, 2 T. R. 476; Hancock *v.* Haywood, 3 id. 433; Dixon *v.* Hammond, 2 B. & Ald. 310; Golding *v.* Vaughan, 2 Chit. 436; Haig *v.* Gray, 3 DeG. & Sm. 741; Kirby *v.* Lake Shore & M. S. R. R. 8 Fed. Rep. 62; Calvert *v.* Marlow, 18 Ala. 67; Costley *v.* Wilkerson, 49 id. 210; Davidson *v.* Weems, 58 id. 187; Belton *v.* Fisher, 44 Ill. 32; Willson *v.* Nicholson, 61 Ind. 241; Nicklaus *v.* Dahn, 63 id. 87; Brown *v.* Allen, 35 Iowa, 306; Morrison *v.* Winn, Hardin (Ky.), 480; Wilson *v.* Soper, 13 B. Mon. 411; Stevens *v.* Rollins, 34 Me. 226; Strang *v.* Hirst, 61 Me. 9; Barney *v.* Smith, 4 Har. & J. 485; Stafford *v.* Gold, 9 Pick. 533; Holbrook *v.* Lackey, 13 Met. 132 (46 Am. Dec. 726); Oakman *v.* Dorchester Mut. F. Ins. Co. 98 Mass. 57; Pfeffer *v.* Steiner, 27 Mich. 537; Bassett *v.* Miller, 39 id. 133; Robinson *v.* Thompson, Sm. & Mar. Ch. (Miss.) 454; Copes *v.* Fultz, 1 Sm. & Mar. 623; Ambs *v.* Caspari, 13 Mo. App. 586; Matney *v.* Gregg Bros. Co. 19 id. 107; Bohm *v.* Dunphy, 1 Montana, 333; Quillen *v.* Arnold, 12 Nev. 234; Manning *v* Smith, 16 id. 85; Reese *v.* Kindred, 17 id. 447; Ledden *v.* Colby, 14 N. H. 33 (40 Am. Dec. 173); Bernard *v.* Wilcox, 2 Johns. Cas. 374; Holmes *v.* D'Camp, 1 Johns. 34 (3 Am. Dec. 293); Murray *v.* Mumford, 6 Cow. 441; Egbert *v.* Wood, 3 Paige, 517; Pinckney *v.* Wallace, 1 Abb. Pr. 82; Daby *v.* Ericsson, 45 N. Y. 786; Manning *v.* Brickell, 2 Hayw. (N. Ca.) 133; Felton *v.* Reid, 7 Jones, L. 269; Rice *v.* Richards, 1 Busb. Eq. 277; Beach *v.* Hayward, 10 Oh. 455; Wallace *v.* Fitzsimmons, 1 Dall. 248; McCartney *v.* Nixon, 2 id. 65, n.; Davis *v.* Church, 1 W. & S. 240; Kinsler *v.* McCants, 4 Rich. (S. Ca.) L. 46 (53 Am. Dec. 711); Watson *v.* Miller, 55 Tex. 289; Shields *v.* Fuller, 4 Wis. 102; Roys *v.* Vilas, 18 id. 169; McCartney *v.* Hubbell, 52 id. 360; Bolckow *v.* Foster, 24 Grant's Ch. (Up. Can.) 333; affd. 25 id. 476 (overruling 9 id. 9); and cases cited in the next two notes.

[2] Beach *v.* Hayward, 10 Oh. 455.

[3] Peters *v.* Davis, 7 Mass. 257.

[4] Clark *v.* Howe, 23 Me. 580; Daby *v.* Ericsson, 45 N. Y. 786; McCandless *v.* Hadden, 9 B. Mon. 186.

[5] Brown *v.* Allen, 35 Iowa, 306; Pfeffer *v.* Steiner, 27 Mich. 537; Hunt *v.* Drane, 32 Miss. 243; Bohm *v.* Dunphy, 1 Montana, 333, where the

or is on a mortgage to the firm as partners, and not as tenants in common;[1] or is for the rescission of a purchase made for the firm by an agent for himself in fraud of the firm;[2] or on a policy of insurance issued to the partnership on a house owned by them as tenants in common.[3]

He can even unite a cause of action in himself on a claim due to the partnership with one due to himself, for in both cases he sues in his own right, and not *en autre droit*.[4]

Hence a surviving partner of two different firms may join in one action claims due from the defendant to each firm.[5]

§ 723. **Set-off of individual debts.**— Another legal consequence flowing from the survivorship is that, as the debt to or against the firm becomes separate by death, a set-off of partnership against individual demands between the surviving partners and others is allowed, thus:

1. If the surviving partner is sued in his individual capacity on a non-partnership claim, he may set off a debt due to him as surviving partner.[6]

2. Or when sued on a partnership liability he may set off his individual demand.[7]

3. Or if the surviving partner sues on a non-partnership demand, a partnership liability may be set off against it.[8]

right to exemplary damages was held to survive.

[1] Robinson *v.* Thompson, Sm. & Mar. Ch. 454; Bolckow *v.* Foster, 24 Grant's Ch. (Up. Can.) 333; affd. 25 id. 476; overruling 9 id. 9.

[2] Bischoffsheim *v.* Baltzer, 20 Fed. Rep. 890.

[3] Oakman *v.* Dorchester Mut. F. Ins. Co. 98 Mass. 57.

[4] Smith *v.* Barrow, 2 T. R. 476; Hyat *v.* Hare, Comb. 383; Adams *v.* Hackett, 7 Foster (27 N. H.), 289 (59 Am. Dec. 376); Quillen *v.* Arnold, 12 Nev. 234; Nehrboss *v.* Bliss, 88 N. Y. 600, 604, *arguendo;* Smith *v.* Wood, 31 Md. 293, that he can replevy joint and individual property in the same action; Berry *v.* Harris, 22 Md. 30, 40, *arguendo;* Davis *v.* Church, 1 W. & S. 240, 242; McCartney *v.* Hubbell, 52 Wis. 360; Stafford *v.* Gold, 9 Pick. 533; Bernard *v.* Wilcox, 2 Johns. Cas. 374.

[5] Stafford *v.* Gold, 9 Pick. 533; Adams *v.* Hackett, 7 Foster (27 N. H.), 289 (59 Am. Dec. 376).

[6] Slipper *v.* Stidstone, 5 T. R. 493; 1 Esp. 47; Golding *v.* Vaughan, 2 Chitty, 436; Trammell *v.* Harrell, 4 Ark. 602; Harris *v.* Pearce, 5 Ill. App. 622; Johnson *v.* Kaiser, 40 N. J. L. 286; but see Hughes *v.* Trahern, 64 Ill. 148. *Contra,* Weil *v.* Jones, 70 Mo. 560.

[7] Lewis *v.* Culbertson, 11 S. & R. 48.

[8] French *v.* Andrade, 6 T. R. 582.

4. Or if he sues on a partnership demand a debt due from him individually may be set off.[1]

In White *v.* Union Ins. Co. 1 Nott & McC. (S. Ca.) 556; 9 Am. Dec. 726, it was held that in an action by the assignee of the partnership assets from the surviving partner for the benefit of creditors, the debtor could not set off a liability of the surviving partner as indorser on a bill of exchange.

These doctrines do not, however, prevent the set-off in equity of debts due from the firm against a claim made by the surviving partner, which he derived from the firm as a partner.[2]

§ 724. Practice.— The surviving partner may, although the authorities are not unanimous upon this, sue in his own right instead of as surviving partner, or in a representative capacity.[3]

Nevertheless it has been called the better practice to sue in his rep-

[1] Holbrook *v.* Lackey, 13 Met. 132 (46 Am. Dec. 726); Meader *v.* Leslie, 2 Vt. 569; Meader *v.* Scott, 4 Vt. 26; Cowden *v.* Elliott, 2 Mo. 60; Hogg *v.* Ashe, 1 Hayw. (N. Ca.) 471; s. c. Cam. & N. 3. The doctrine is also recognized in *dicta* in the following cases: Berry *v.* Harris, 22 Md. 30, 40; Dalton City Co. *v.* Dalton Mfg. Co. 33 Ga. 243, 251; Nehrboss *v.* Bliss, 88 N. Y. 604, 609; Masterson *v.* Goodlett, 46 Tex. 402; Lawrence *v.* Vilas, 20 Wis. 381. Where the surviving partner was insolvent it was doubted whether the doctrine would be applied, in Waln *v.* Hewes, 5 S. & R. 467. And *contra*, that there is no set-off, Ross *v.* Pearson, 21 Ala. 473. In French *v.* Lovejoy, 12 N. H. 458, the debtor probably received the fund for the express purpose of paying the partnership debt only, hence set-off was refused. If the plaintiff is a surviving dormant partner, a debt due from the ostensible partner or from the firm may be set off, Beach *v.* Hayward, 10 Oh. 455. In Missouri, where the legal title of the surviving partner is not recognized, a set-off of a demand due the firm in an action against him on his individual debt is not allowed. Weil *v.* Jones, 70 Mo. 560. See, also, Welborn *v.* Coon, 57 Ind. 270, where an administrator of a deceased partner, having sold the interest of the estate to the surviving partner, sued him on the purchase money notes and the survivor sought to set off a judgment rendered in his favor against the administrator; this was rejected on the ground that the claims were not due between the parties in the same capacity.

[2] Smith *v.* Parkes, 16 Beav. 115.

[3] Smith *v.* Wood, 31 Md. 293; Farwell *v.* Davis, 66 Barb. 73; Hogg *v.* Ashe, 1 Hayw. (N. Ca.) 471, 477; Meader *v.* Leslie, 2 Vt. 569. *Contra*, Brown *v.* Allen, 35 Iowa, 306, and Reeder *v.* Sayre, 70 N. Y. 180, 190, allowing an amendment in the reviewing court. And this must necessarily be the doctrine of the cases which authorize a joinder of individual with joint claims, § 722.

resentative capacity.[1] And in such case it is sufficient to allege the partnership and its ownership, the death, and that plaintiff is the sole surviving partner.[2] The omission of an averment of death is immaterial if the plaintiff sues as surviving partner, because the implication of death necessarily arises.[3]

And so if he is sued on a contract for the purchase of goods made by the firm, he can be charged in *indebitatus assumpsit* without noticing the fact of partnership, death or survivorship.[4]

That he describes himself as surviving partner when the claim arose after the death, as on a loan of money, is not fatal under the code practice.[5] On the other hand, under common law systems, where a tort was committed after the death, and the action was brought by the plaintiff as surviving partner, there was said to be a fatal variance, because a tort against two partners was averred and the proof is of a tort against one. The case, however, was of false warranty in the sale of a horse to the plaintiff.[6] And if the action by the surviving partner as such be for the return of money loaned or paid, he must prove that he paid it on behalf of the firm, for an action by him as such is equivalent to an action by the firm.[7]

If the representatives have been joined, an amendment striking them out will be allowed;[8] and the misjoinder is waived if not objected to in the trial court.[9]

[1] Reese *v.* Kindred, 17 Nev. 447, 449. And see Berolzheimer *v.* Strauss, 51 N. Y. Superior Ct. 96.

[2] Reese *v.* Kindred, 17 Nev. 447; Bolckow *v.* Foster, 24 Grant's Ch. (Up. Can.) 333.

[3] Patterson *v.* Chalmers, 7 B. Mon. 595; Ledden *v.* Colby, 14 N. H. 33 (40 Am. Dec. 173).

[4] Hyat *v.* Hare, Comb. 383; Richards *v.* Hunter, 3 B. & B. 302; Richards *v.* Heather, 1 B. & Ald. 29; Mountstephen *v.* Brooke, id. 214; Culbertson *v.* Townsend, 6 Ind. 64; Goelet *v.* McKinstry, 1 Johns. Cas. 405. And so if sued on his individual note given as collateral to a debt of the firm, Offutt *v.* Scott, 47 Ala. 104, 129.

[5] Quillen *v.* Arnold, 12 Nev. 234; Kinsler *v.* McCants, 4 Rich. (S. Ca.) L. 46 (53 Am. Dec. 711).

[6] Mead *v.* Raymond, 52 Mich. 14.

[7] Stevens *v.* Rollins, 34 Me. 226.

[8] Davidson *v.* Weems, 58 Ala. 187; Ambs *v.* Caspari, 13 Mo. App. 586. So if they are joined as defendants, Hoskisson *v.* Eliot, 62 Pa. St. 393, 404.

[9] Belton *v.* Fisher, 44 Ill. 32; Nicklaus *v.* Dahn, 63 Ind. 87; Matney *v.* The Gregg Bros. Co. 19 Mo. App. 107. And so where the survivor brought suit in the names of himself and the deceased partner, the judg-

§ 725. —— death of partner pendente lite.— As all rights vest in the surviving partner, and he is neither a representative nor successor, if, pending an action by partners, one dies, the action does not abate, nor is the administrator to be made a party; but the death is suggested and the action proceeds.[1] So if one of plaintiffs in error, partners, dies.[2] So if the partners are defendants and one dies, the action can proceed against the survivor alone.[3]

And where an action was brought by a partnership after the death of one of them, an amendment substituting surviving partners was allowed, and former depositions held good.[4]

§ 726. General powers.— A surviving partner has power to receive payments, collect debts and settle claims, and his receipt is a valid discharge;[5] and each of several surviving partners has power to collect a debt and settle a claim.[6]

He has a right to use the firm name to draw checks on the firm's account.[7]

He can vote on corporate stock owned by the firm.[8]

He is not obliged to pay creditors *pro rata* in winding up, but may pay in such proportions and such order as he pleases,

ment cannot be collaterally attacked. Fuqua *v.* Mullen, 13 Bush, 467.

[1] Phœnix Ins. Co. *v.* Moog (Ala.), 1 South. Rep. 108; Atlanta *v.* Dooby, 74 Ga. 702; Childs *v.* Hyde, 10 Iowa, 294; McCandless *v.* Hadden, 9 B. Mon. 186; Sprawles *v.* Barnes, 1 Sm. & Mar. 629; Dunman *v.* Coleman, 59 Tex. 199.

[2] Gunter *v.* Jarvis, 25 Tex. 581.

[3] See § 1055.

[4] Cragin *v.* Gardner (Mich.), 31 N. W. Rep. 206.

[5] Brasier *v.* Hudson, 9 Sim. 1; Philips *v.* Philips, 3 Hare, 281; Hodgkins *v.* Merritt, 53 Me. 208; Heartt *v.* Walsh, 75 Ill. 200; Barry *v.* Briggs, 22 Mich. 201.

[6] Heartt *v.* Walsh, 75 Ill. 200; Davis *v.* Sowell, 77 Ala. 262.

[7] Backhouse *v.* Charlton, 8 Ch. D. 414; Commercial Nat'l Bk. *v.* Proctor, 93 Ill. 558. And see Bank of N. Y. *v.* Vanderhorst, 32 N. Y. 553, in this case it was held that a power given to an agent to draw checks which he continued to exercise in good faith, after the undiscovered death of one partner, was a protection to the bank which had paid the checks, because the surviving partner could have done so.

[8] Kenton Furnace & Mfg. Co. *v.* McAlpin, 5 Fed. Rep. 737; Allen *v.* Hill, 16 Cal. 113, though part of it is held in the name of the deceased, where no statute makes the corporation's books the sole evidence of ownership.

although he thus prefers one creditor at the expense of others.[1]

§ 727. —— **no power to contract.**— But as his possession is exclusive only for the purpose of winding up, a surviving partner has as little right as any other partner after dissolution to make new contracts or change the form of old ones. Hence he cannot give a note binding the firm, even for a pre-existing debt.[2] Nor can a note made by one surviving partner in the joint name bind his co-survivors without their assent.[3] Nor can he agree to pay usurious interest on debts.[4] Nor give a note and warrant to confess judgment in the name of the firm; and a judgment on it against the firm is void.[5]

Nor is a judgment against him, established by his admissions, evidence against the individual estate of the decedent, for he cannot bind it in any way. He can only bind the property in his hands by his notes, acknowledgments or admissions;[6] nor is a receipt by the new firm, composed of the survivors, admissible as evidence of payment of a debt due to the old.[7]

[1] Emerson *v.* Senter, 118 U. S. 3; Wilson *v.* Soper, 13 B. Mon. 411 (56 Am. Dec. 573); Roach *v.* Brannon, 57 Miss. 490, 500; Crow *v.* Weidner, 36 Mo. 412; Easton *v.* Courtwright, 84 id. 27; Collier *v.* Cairns, 6 Mo. App. 188; Egbert *v.* Wood, 3 Paige, 517, 526; Hutchinson *v.* Smith, 7 Paige, 26; Loeschigk *v.* Hatfield, 51 N. Y. 660 (aff. 5 Robt. 26; 4 Abb. Pr. (N. S.) 210); Nelson *v.* Tenney, 36 Hun, 327; Williams *v.* Whedon, 39 Hun, 98, 102; Kreis *v.* Gorton, 23 Oh. St. 468, 473. *Contra*, that in his position as trustee he cannot give preferences, Salsbury *v.* Ellison, 7 Colorado, 167; 49 Am. Rep. 347; Barcroft *v.* Snodgrass, 1 Cold. (Tenn.) 430; Anderson *v.* Norton, 15 Lea, 14, 18; Watkins *v.* Fakes, 5 Heisk. 185. The creditors may require ratable distribution. Anderson *v.* Norton, *supra*. So may the administrator. Watkins *v.* Fakes, *supra*.

[2] Lang *v.* Waring, 17 Ala. 145; Matteson *v.* Nathanson, 38 Mich. 377; Jenness *v.* Carleton, 40 Mich. 343; Carleton *v.* Jenness, 42 id. 110; Bank of Port Gibson *v.* Baugh, 9 Sm. & Mar. 290; Citizens' Mut. Ins. Co. *v.* Ligon, 59 Miss. 305, although the executors had consented to his continuing business; Central Sav. B'k *v.* Mead, 52 Mo. 546.

[3] Matteson *v.* Nathanson, 38 Mich. 377; Jenness *v.* Carleton, 40 Mich. 343; Carleton *v* Jenness, 42 id. 110. As to his power to indorse over paper belonging to the firm, see *infra*, § 731.

[4] Wiesenfeld *v.* Byrd, 17 S. Ca. 106.

[5] Castle *v.* Reynolds, 10 Watts, 51.

[6] Rose *v.* Gunn, 79 Ala. 411.

[7] Adams *v.* Wood, 26 Ark. 135.

But an expenditure on the continuance of the business, however necessary, is wholly unauthorized, and a contract for it by the surviving partners does not bind the estate.[1]

If the survivors continue the business without authority they are liable to account to the estate of the decedent, either for the profits made or for interest on his capital, at the election of the administrator, and if losses occur must bear the entire loss.[2] That the administrator sees the expenditure going on and does not forbid it does not estop him to resist the claim for contribution. Hence, in Remick *v.* Emig, 42 Ill. 342, where the surviving partners built a granary, which was necessary for a successful continuation of the business, with the executor's assent, no part of the cost can be recovered by them from the estate.[3]

Nor can the surviving partner bind the estate for debts incurred after death, even though he continue business under the authority of the court, unless the representative ratify it by sharing in the profits.[4] And hence where the surviving partners undertook to form a new firm and continue in business with the old assets, and made an assignment for the benefit of the creditors of the new firm, and the assignee sold the property, the buyer was held not to have received a valid title, and could therefore rescind his purchase.[5]

In Forrester *v.* Oliver, 1 Ill. App. 259, one partner of a lumber firm died in July, 1872. The surviving partner afterwards purchased more lumber under a continuing contract for lumber with another concern, made before the dissolution. On October 8 and 9 the Chicago fire destroyed the lumber yard. It was held that the surviving partner must account for the fair cash value of the assets destroyed; for, although the time had been short, yet his steps were towards a continuance of business with the capital of the firm.[6]

[1] See §§ 772, 773.

[2] See § 794.

[3] That the court of equity may allow the business to be continued, with the surviving partner's consent, for the benefit of infant children, was held in Thompson *v.* Brown, 4 Johns. Ch. 619, and Powell *v.* North, 3 Ind. 392 (56 Am. Dec. 513).

[4] Cock *v.* Carson, 45 Tex. 429.

[5] Tiemann *v.* Molliter, 71 Mo. 512.

[6] Yet in S. C. as Oliver *v.* Forrester, 96 Ill. 315, 323, it was held that a surviving partner could make small purchases so as to render the stock more salable. If, however, they continue business without interference by the representatives of the decedent, their liability is only an accountability for profits, and intermediate dispositions of the property will be valid if not fraudulent in fact, Fitzpatrick *v.*

As to the powers of a surviving partner when the articles or will provide that death shall not dissolve the firm, see § 601 *et seq.*

Where a lease with privilege of renewal on three months' notice was made to a firm, and before the expiration of the original term one partner died, it was held that the other could give the notice and enforce the renewal; and it was said on page 278 that it was his duty to do so if he believed it advantageous either for closing out or because it had a value, for he takes as survivor and not as assignee, and if he had taken the renewal for his own benefit would have had to account for it. The administrator here, however, had concurred, and only the lessor was objecting.[1]

§ 728. —— **expenses.**— Nevertheless, liability for expenses proper to the legitimate winding up of the business, as distinguished from continuing it, may be incurred.

Thus the surviving partner may bring suits to collect debts, and if he fail in them, the estate of the deceased must contribute to pay the costs.[2]

So an investment by the survivor in a retail liquor license to enable him to realize more on the stock, although its effect was to put the joint assets into his own name as to his separate creditors, where he had no separate creditors, was held not to be fraudulent or ground of attachment.[3]

If the stock consists of a large amount of unfinished work and raw material, salable only at a sacrifice, and the surviving partner borrows money to work it up, the loan can be paid out of the assets.[4] And where he raised money on his individual credit and paid partnership debts with it, his use of the assets to repay the loan was said not to be ground of attachment.[5]

§ 729. **Sales of the stock.**— In winding up, the surviving partner need not force sales in a dull part of the year, but may de-

Flannagan, 106 U. S. 648, 657. The continuance of business by the surviving partners without authority is as a new firm, and it is not dissolved by a bill for an account of the old concern filed by the representatives, Foster *v.* Hall, 4 Humph. 346.

[1] **Betts** *v.* June, 51 N. Y. 274. For the consequences of his undertaking to renew leases for his own benefit see § 305.

[2] Allen *v.* Blanchard, 9 Cow. 631.

[3] Roach *v.* Brannon, 57 Miss. 490.

[4] Calvert *v.* Miller, 94 N. Ca. 600.

[5] Fitzpatrick *v.* Flannagan, 106 U. S. 648, 654.

lay a reasonable time, and a loss by fire while so waiting is not to be charged wholly upon him.[1]

He may sell the stock as a whole if advisable, and cannot be compelled to sell at retail only, and although the landlord has a lien on the stock, if the fund is secure in the partner's hands he will not be interfered with.[2]

§ 730. —— **continuing contracts.**— So it is the duty as well as the right of the surviving partner to complete unfinished contracts, from which death does not absolve the firm,[3] and for this purpose may even borrow money and pledge an asset,[4] or give a note.[5]

This principle does not apply to contracts *inter se* as to the mode of conducting the business, for that is continuing the business. Thus if the firm of A. & B. agree with the firm of A., B. & C. for the shipment of lumber by one firm to the lumber yard of the other, it was held that the death of A., thus dissolving both firms at once, terminated the agreement, and lumber thereafter shipped and lost by fire was at the risk of the survivors[6] (three judges dissenting).

But it is held that he is not obliged to carry out incompleted contracts for services; as where the firm employed an agent for a certain time, the contract is terminated by the death of a partner.[7]

§ 731. **Power of disposition in winding up.**— The surviving partner, for the purpose of winding up, has full power

[1] Oliver *v.* Forrester, 96 Ill. 315.

[2] Milner *v.* Cooper, 65 Iowa, 190.

[3] Denver *v.* Roane, 99 U. S. 355; Davis *v.* Sowell, 77 Ala. 262; Mason *v.* Tiffany, 45 Ill. 392; Ayres *v.* Chic., Rock Isld. & P. R. R. 52 Iowa, 478; Tompkins *v.* Tompkins, 18 S. Ca. 1; Connell *v.* Owen, 4 Up. Can. C. P. 113. In Miller *v.* Hoffman, 26 Mo. App. 199, it was held that he could complete the delivery of materials agreed to be furnished for a building as a running account, and that his last item would be the date from which the time to file a mechanics' lien would begin to run, but that he could not add items to the old contract as part of the account to extend the time.

[4] Butchart *v.* Dresser, 10 Hare, 463; 4 DeG. M. & G. 542.

[5] Mason *v.* Tiffany, 45 Ill. 392.

[6] Oliver *v.* Forrester, 96 Ill. 315.

[7] Tasker *v.* Shepherd, 6 H. & N. 575; Burnet *v.* Hope, 9 Ontario Rep. 10. *Contra*, Fereira *v.* Sayres, 5 W. & S. 210 (40 Am. Dec. 496).

of disposing of the assets and turning them into distributable form, whether they consist of choses in action or of tangible property;[1] or may pledge an asset as security for a debt,[2] or for a temporary advance for partnership purposes.[3]

As an incident to his legal title in choses in action, the right of a sole surviving partner to transfer them by sale or to pay a debt in the process of closing up is unquestionable,[4] and this power is not confined to selling, but he may also pledge or mortgage them to secure a debt of the firm.[5]

He can transfer a note of the firm by indorsement; the indorsement is not operative against the estate of the deceased partner as a new contract, but is valid to pass title.[6] And an indorsement thus: A. B., surviving partner of A. B. & Co., is sufficient to pass title.[7]

[1] Bohler *v.* Tappan, 1 Fed. Rep. 469; 1 McCrary, 134; Allen *v.* Hill, 16 Cal. 113; Milner *v.* Cooper, 65 Iowa, 190; Wilson *v.* Soper, 13 B. Mon. 411 (56 Am. Dec. 573); Barry *v.* Briggs, 22 Mich. 201; Roach *v.* Brannon, 57 Mo. 490; Hogg *v.* Ashe, 1 Hayw. (N. Ca.) 471, 477; Calvert *v.* Miller, 94 N. Ca. 600; Loeschigk *v.* Hatfield, 51 N. Y. 660 (aff. 5 Robt. 26; 4 Abb. Pr. (N. S.) 210); Knott *v.* Stephens, 3 Or. 269; Smith's Estate, 11 Phila. 131; Allen *v.* Nat'l Bank, 6 Lea, 558, 563; Herd *v.* Delp, 1 Heisk. 530; Fulton *v.* Thompson, 18 Tex. 278, 286–7; Bilton *v.* Blakely, 6 Grant's Ch. (Up. Can.) 575, the latter case denies the power of sale after the debts are paid. And so of real estate, see § 300.

[2] *In re* Clough, L. R. 31 Ch. D. 324; Bohler *v.* Tappan, 1 Fed. Rep. 469; 1 McCrary, 134; Breen *v.* Richardson, 6 Colorado, 605, a mortgage of real estate.

[3] Butchart *v.* Dresser, 4 D. M. & G. 542.

[4] Bohler *v.* Tappan, 1 Fed. Rep. 469; 1 McCrary, 134; Johnson *v.* Berlizheimer, 84 Ill. 54 (25 Am. Rep. 427); Willson *v.* Nicholson, 61 Ind. 241; Jones *v.* Thorn, 2 Mart. (La.) N. S. 463; Scott *v.* Tupper, 8 Sm. & Mar. 280; Bredow *v.* Mut. Sav. Institution, 28 Mo. 181; Mut. Sav. Inst. *v.* Enslin, 37 Mo. 453, *arguendo;* French *v.* Lovejoy, 12 N. H. 458; Pinckney *v.* Wallace, 1 Abb. Pr. 82; Daby *v.* Ericsson, 45 N. Y. 786; Roys *v.* Vilas, 18 Wis. 169.

[5] Bohler *v.* Tappan, 1 Fed. Rep. 469; 1 McCrary, 134; *In re* Clough, 31 Ch. D. 324. *Contra*, that he cannot mortgage, Bank of Port Gibson *v.* Baugh, 9 Sm. & Mar. 290, in this case to borrow to pay debts.

[6] Bredow *v.* Mut. Sav. Institution, 28 Mo. 181; Johnson *v.* Berlizheimer, 84 Ill. 54 (25 Am. Rep. 427); Pinckney *v.* Wallace, 1 Abb. Pr. 82.

[7] Johnson *v.* Berlizheimer, *supra*. *Contra*, that a surviving partner cannot indorse over a bill or note, Cavitt *v.* James, 39 Tex. 189; but this was a *dictum*, for the note was made to the firm after the death, and his

That the firm and every surviving member of it is insolvent is no impediment to a *bona fide* transfer with the ostensible purpose of closing up — the transfer is presumed to be for a legitimate purpose.[1]

But he cannot assign or transfer to pay separate debt or a debt of another firm in which he is also surviving partner.[2]

In Thompson *v.* Rogers, 69 N. Ca. 357, on a sale of personal property by consent of the administrator, at auction, it was bought for a firm in which the surviving partner was a member, but being in good faith, was held valid. The surviving partner offered half the price to the administrator, who refused it. He then invested that half in Confederate bonds, and it was lost. It was held that the loss should not fall upon him solely, but that the half not lost is held for the firm, and the loss is also to be divided, as he held it all for the firm.

In Holland *v.* Fuller, 13 Ind. 195, A. was indorser for the accommodation of the firm of C. & D. D. died, leaving the debts unpaid. A. then indorsed for C. on his credit alone, and C. used the proceeds of the paper to pay the former notes. A. is thus a separate creditor of C., and C.'s delivery to him of property of the former firm as security, it was held, would be set aside on behalf of partnership creditors. A. will not be substituted to the claims of creditors for whom he first indorsed.

§ 732. Power to assign for benefit of creditors.— As a surviving partner has the entire title and sole control of the property, and represents the power of all the former partners; and as they all could have assigned the property for the benefit of creditors, so the surviving partner has, at least in case of insolvency, in order to wind up, the same power, and can transfer the property to an assignee for the benefit, not of his separate creditors, but of the partnership creditors.[3]

indorsement was held good, because the note was in effect to a fictitious payee and therefore to bearer.

[1] Willson *v.* Nicholson, 61 Ind. 241.

[2] Scott *v.* Tupper, 8 Sm. & Mar. 280; Allen *v.* Nat'l Bank, 6 Lea, 558. *Contra*, if in good faith, Fitzpatrick *v.* Flannagan, 106 U. S. 648, 657.

[3] Shanks *v.* Klein, 104 U. S. 18; Emerson *v.* Senter, 118 id. 3; Salsbury *v.* Ellison, 7 Colorado, 167 (49 Am. Rep. 347); Wilson *v.* Soper, 13 B. Mon. 411 (56 Am. Dec. 573); Gable

If there are two surviving partners, one cannot assign for benefit of creditors without the assent of the other.[1]

And as he can pay some creditors in full to the prejudice of others, so it has been held that, if the local law does not forbid in case of other assignments for creditors, he can assign with preferences.[2]

The survivors cannot assign for the payment of a separate debt of the deceased;[3] nor for their own subsequent debts incurred by continuing the business without authority.[4]

If by the articles of partnership the surviving partner is to continue business for joint benefit, subject to the advice and inspection of the other's executor, is was held that this gave the executor no remedy if the partner went counter to his advice in making the assignment.[5]

An assignment for the benefit of "my" creditors by a surviving partner of all partnership and individual property will be construed as of the former for the benefit of partnership creditors, and the latter for separate creditors, and will be held valid, for they are all his creditors.[6]

§ 733. Statutory administrator of a partnership.—Several states have provisions for the appointment of an administrator of the partnership dissolved by the death of a

v. Williams, 59 Md. 46, 52; Burnside *v.* Merrick, 4 Met. 537, 544; Moody *v.* Downs, 63 N. H. 50; Hutchinson *v.* Smith, 7 Paige, 26; Stanford *v.* Lockwood, 95 N. Y. 582, 588; Gratz *v.* Bayard, 11 S. & R. 41; White *v.* Union Ins. Co. 1 Nott & McC. 556 (9 Am. Dec. 726); Gault *v.* Calland, 7 Leigh, 594. *Contra*, unless the administrator assent, see Nelson *v.* Tenney, 36 Hun, 327, and Barcroft *v.* Snodgrass, 1 Cold. 431. And see Tieman *v.* Molliter, 71 Mo. 512; Vosper *v.* Kramer, 31 N. J. Eq. 420; but even then it is held that the assignment with preferences is valid as against creditors until attacked by the administrator on the ground of want of assent, Williams *v.* Whedon, 39 Hun, 98.

[1] Egbert *v.* Wood, 3 Paige, 517, 526.

[2] Emerson *v.* Senter, 118 U. S. 3; Wilson *v.* Soper, 13 B. Mon. 411 (56 Am. Dec. 573); Hutchinson *v.* Smith, 7 Paige, 26; Loeschigk *v.* Hatfield, 5 Robt. 26; 4 Abb. Pr. (N. S.) 210; 51 N. Y. 660; Williams *v.* Whedon, 39 Hun, 98. *Contra*, that in his position as trustee he cannot give preferences in the assignment, Salsbury *v.* Ellison, 7 Colorado, 167 (49 Am. Rep. 347); Barcroft *v.* Snodgrass, 1 Cold. (Tenn.) 430; Anderson *v.* Norton, 15 Lea, 14.

[3] Hutchinson *v.* Smith, 7 Paige, 26.

[4] Tiemann *v.* Molliter, 71 Mo. 512.

[5] Gratz *v.* Bayard, 11 S. & R. 41.

[6] Moody *v.* Downs, 63 N. H. 50; and see Scott *v.* Tupper, 8 Sm. & Mar. 280.

partner. In these the surviving partner is preferred, but on his failure to qualify by giving bond, the administrator of the deceased partner may be appointed. I have not space to attempt a concordance of statutes important to but three or four states, but will give the result of decisions.

A statutory provision that if the surviving partner, "having been duly cited for that purpose," do not give bond, the administrator of the deceased partner, on giving bond, shall take the partnership estate, makes the citation jurisdictional only in the sense that a summons is jurisdictional, and a bond given after the voluntary appearance and renunciation by the surviving partner is valid.[1]

The appointment and qualifying is not the source of the power of a surviving partner to wind up, but a mere condition not interfering with his common law right to settle the partnership, and he does not, when appointed, act as an administrator or legal representative, but is a surviving partner and sues as such.[2]

Hence he is not entitled to commissions under a statute allowing commissions to administrators.[3] And if the administrator of the deceased partner, on the renunciation of the survivor, qualifies, he acts, not as administrator, but as a special trustee.[4] Hence, also, failure to give bond only subjects the surviving partner to the contingency of being ousted and having the assets taken away by the administrator of the deceased coming forward and giving an additional bond, but until then can collect, sue and distribute.[5]

A note payable to the administrator of the partnership for a sale

[1] Carr *v.* Catlin, 13 Kan. 393.

[2] Denny *v.* Turner, 2 Mo. App. 52; Gregory *v.* Menefee, 83 Mo. 413; Easton *v.* Courtwright, 84 id. 27; Holman *v.* Nance, id. 674; Blaker *v.* Sands, 29 Kan. 551. And hence is not within an exception permitting "legal representatives" to testify as to facts occurring before death. Holmes *v.* Brooks, 68 Me. 416.

[3] Gregory *v.* Menefee, 83 Mo. 413.

[4] Carr *v.* Catlin, 13 Kan. 393.

[5] Bredow *v.* Mut. Sav. Institution, 28 Mo. 181; Easton *v.* Courtwright, 84 id. 27; Holman *v.* Nance, id. 674; Blaker *v.* Sands, 29 Kan. 551. But in Maine a sale by the surviving partner who had not given bond is void. Cook *v.* Lewis, 36 Me. 340; Putnam *v.* Parker, 55 id. 235. Even though in accordance with the will of the deceased. Hill *v.* Treat, 67 Me. 501. Though in an action to collect a debt by the surviving partner, the objection that he has not given bond must be made by plea in abatement or it is waived. Strang *v.* Hirst, 61 Me. 9.

made by him must be sued upon, after his death, by his personal representatives and not by the administrator *de bonis non* of the partnership estate.[1]

A non-resident surviving partner cannot become administrator of the partnership, hence the administrator of the decedent is entitled to qualify at once;[2] but the survivor who has qualified is not removable on subsequently becoming non-resident.[3]

If the same person is administrator of the deceased partner and of the partnership estate, an exhibition and allowance of a partnership note against the firm is not an exhibition and allowance of it against the individual estate;[4] nor is his bond as administrator of the deceased partner liable for his malversation of the partnership assets.[5]

§ 734. Presentation of a claim for allowance to a surviving partner who has qualified is not necessary to an action for the debt, for he is not an administrator;[6] although it may be necessary to his administrator after his death, for this is a different form of administration.[7] His promise to pay is equivalent to an allowance by a court so as to stop the statute of limitations,[8] but to render his bond liable presentation is necessary; although he must know of all the debts, and is always personally liable, yet the debt must be recognized by him.[9] His bond is liable for a conversion of the partnership estate.[10]

He can pay off demands without presentation to the probate court for allowance.[11] He need not pay *pro rata*, but may pay one claim in full to the exclusion of another.[12] The probate court cannot allow a claim until the surviving partner has refused to allow it, and cannot require him to pay claims allowed by it in preference to those presented only to him.[13]

If the administrator of the deceased qualifies as administrator of

[1] McGilway *v.* Clement, 6 Mo. App. 597-8.

[2] Denny *v.* Primeau, 35 Mo. 529.

[3] Green *v.* Virden, 22 Mo. 566.

[4] Burton *v.* Rutherford, 49 Mo. 255.

[5] Orrick *v.* Vahey, 49 Mo. 428.

[6] Carr *v.* Catlin, 13 Kan. 393.

[7] Denny *v.* Turner, 2 Mo. App. 52, 57.

[8] Denny *v.* Turner, 2 Mo. App. 52.

[9] State *v.* Woods, 36 Mo. 73.

[10] Carr *v.* Catlin, 13 Kan. 393. For a further ruling as to the bond, see State *v.* Myers, 9 Mo. App. 44.

[11] Easton *v.* Courtwright, 84 Mo. 27, 34; Collier *v.* Cairns, 6 Mo. App. 188.

[12] Collier *v.* Cairns, 6 Mo. App. 183; Crow *v.* Weidner, 36 Mo. 412; Easton *v.* Courtwright, 84 Mo. 27.

[13] Easton *v.* Courtwright, 84 Mo. 27.

the partnership, a creditor of the firm can sue him, for there is no one else to sue;[1] and if the claim is allowed in his hands, the surviving partner cannot appeal from the allowance, for the administrator has the management.[2]

The administrator of the deceased who has qualified as administrator of the partnership has been held entitled to a possession before approval of husband,[3] and can obtain a citation against the surviving partner to show cause why he should not turn over the property;[4] but appeal lies from this. In Maine, where a sale by a surviving partner who has not qualified, is void, as what cannot be sold cannot be attached, the administrator who has qualified can replevy from the officer who has attached in an action against the surviving partner at the suit of a partnership creditor.[5]

The administrator becoming also administrator of the partnership, must keep the accounts separate, since each estate is primarily liable for its own debts, and a single account and settlement will be presumed to be of one estate only; hence an order in such settlement to pay creditors will not sustain an action on the bond unless it appear that the settlement was of the partnership estate.[6]

The surviving partner who has qualified must account to the probate court, even for the beneficial interest in real estate; but if there are no debts, and he has leased the land without order from the court, his accounting for rents received is with the heirs as co-tenants.[7] A settlement by him in the probate court and an award to the estate of the deceased partner of a certain amount was not formerly conclusive on his sureties, because *ex parte*, and the court had no means of knowing whether all the notes were paid,[8] but is evidence in favor of the decedent's estate against him as an admission.[9] But now he must publish notice of final settlement, like other administrators, and if he does not, it is open to review,[10] and the settlement is not *ex parte*, but binds his sureties.[11] He is so far an administrator that he need not give bond on appeal from the order of his distribution.[12]

[1] Bass *v.* Emery, 74 Me. 338
[2] Asbury *v.* McIntosh, 20 Mo. 278.
[3] James *v.* Dixon, 21 Mo. 538.
[4] McCrary *v.* Menteer, 58 Mo. 446.
[5] Putnam *v.* Parker, 55 Me. 235.
[6] Glass Co. *v.* Ludlum, 8 Kan. 40.
[7] Hartnett *v.* Fegan, 3 Mo. App. 1.
[8] State *v.* Baldwin, 27 Mo. 13.
[9] State *v.* Baldwin, 31 Mo. 561.
[10] State *ex rel. v.* Donegan, 12 Mo. App. 190 (aff'd, 83 Mo. 374).
[11] McCartney *v.* Garneau, 4 Mo. App. 566–7.
[12] *In re* Bruening, 42 Mo. 276.

The probate court has exclusive jurisdiction of the administration, and it cannot be ousted by a bill in equity;[1] but if a settlement of the partnership and a partition of real estate, and division of the proceeds, is necessary, a probate court, which can only authorize him to sell real estate to pay debts, has no jurisdiction.[2]

§ 735. Surviving partner's rights against the administrator.— If the partnership is indebted to the surviving partner or to others, and there are not sufficient assets to pay, or if, in other words, the estate of the deceased partner is debtor to the firm, the remedy of the survivor is controlled by the principles stated in the chapter on Actions between Partners;[3] and the legal relation of debtor and creditor does not arise until the partnership is settled and the balance is struck after all the debts are paid. The surviving partner cannot sue the administrator on an unsettled account.[4]

Nor need he present his claim for what the estate owes him until final balance has been struck.[5] The mere fact that the surviving partner can show certain expenditures is not sufficient;[6] nor that the deceased partner in his life-time had received and appropriated the proceeds of specific property of the partnership, the title or possession of which was in him;[7] or that the balance is deducible from the books, for there may be false entries and omissions,[8] unless the deceased partner held the property for the firm, and had promised to transfer it; for the court will not force the parties into a judicial accounting if it can do justice without.[9]

[1] Gray *v.* Clement, 12 Mo. App. 579; Farmers' & Traders' Sav. Inst. *v* Garesché, 12 id. 584.

[2] Burnside *v.* Savier, 6 Oregon, 154.

[3] § 849 *et seq.*

[4] Cannon *v.* Copeland, 43 Ala. 201; Painter *v.* Painter (Cal.), 9 Pac. Rep. 450; White *v.* Waide, Walk. (Miss.) 263; Ozeas *v.* Johnson, 4 Dall. 434; 1 Bin. 191; Huff *v.* Lutz, 87 Ind. 473; Grim's Appeal, 105 Pa. St. 375, 382; Wilby *v.* Phinney, 15 Mass. 116, 122; that he may sue the administrator in *assumpsit* on a promise to account, Wilby *v.* Phinney, 15 Mass. 116.

[5] Gleason *v.* White, 34 Cal. 258; Manuel *v.* Escolle, 65 Cal. 110. *Contra* now by change of statute requiring presentation of "contingent" claims. McKay *v.* Joy (Cal.), 9 Pac. Rep. 940.

[6] Warren *v.* Wheelock, 21 Vt. 323. If the estate of the deceased partner consists chiefly in real estate from which contribution is sought the heirs have been made defendants, Cannon *v.* Copeland, 43 Ala. 201.

[7] Stanberry *v.* Cattell, 55 Iowa, 617.

[8] Andrews *v.* Allen, 9 S. & R. 241.

[9] Berolzheimer *v.* Strauss, 51 N. Y. Superior Ct. 96.

The surviving partner can file a bill for an accounting of the partnership affairs against the representatives of the deceased partner;[1] and, in order to reach funds appropriated by the deceased and invested in the name of his wife or third persons, can make the wife or such person party;[2] and if a tract of land in the names of the partners as tenants in common is probably part of the partnership assets, an injunction may be granted against a proceeding by the administrator to sell it.[3]

§ 736. The survivor is, however, entitled to recover of the estate his share of what is due him when the share is ascertained,[4] and can file his claim against the estate as a debt due to him;[5] and the commissioners of the separate estate, it seems, may entertain the claim, although unliquidated, before the partnership is wound up.[6]

Where a deceased insolvent member of an insolvent firm had, in fraud of the copartners, appropriated partnership funds to the purchase of property in the name of his wife, the surviving partner's bill to subject the property was sustained, although in the absence of fraud the administrator would have been the proper applicant, but in such case the administrator can apply to have the proceeds paid direct to the partnership creditors and thus secure the estate.[7]

But if, after death, the widow collects partnership money or sells partnership property held in her name, the surviving partner cannot charge the estate with it in his account with the administrator any more than if any other stranger did so,[8] nor can he set off what he has furnished to the widow out of the stock.[9]

The fact that the survivors are sued on notes made by the deceased partner in the firm name, but in fraud of the firm, for his own use, was held not to create a contingent claim, authorizing

[1] §§ 921–929.

[2] White *v.* Russell, 79 Ill. 155.

[3] Williams *v.* Moore, Phil. (N. Ca.) Eq. 211.

[4] Morris *v.* Morris, 4 Gratt. 293, a perplexing case, as the court were equally divided on nearly all points. And if the estate consists largely of real property, has been allowed to join the widow and heirs, Cannon *v.* Copeland, 43 Ala. 201.

[5] Olleman *v.* Reagan, 28 Ind. 109; Hunt *v.* Gookin, 6 Vt. 462; Chapman *v.* Chapman, 13 R. I. 680.

[6] Francisco *v.* Fitch, 25 Barb. 130; Chapman *v.* Chapman, 13 R. I. 680.

[7] White *v.* Russell, 79 Ill. 155.

[8] Price *v.* Hicks, 14 Fla. 565.

[9] State *ex rel. v.* Donegan, 12 Mo. App. 190 (aff'd, 83 Mo. 374).

the probate judge to hold back funds in the distribution, for the contingency is one of evidence, not of law; the surviving partners either owe or do not owe the amount; if they do not owe it, the possibility that they may have to pay is not regarded as a contingency; if they do owe it, they should pay at once and make their proof against the estate.[1]

And it is also held that he may recover from the estate of the deceased partner, if it is not insolvent, and if the partnership is insolvent, the amount due, for the benefit of the creditors in an action at law before paying the creditors [2]

For the priorities of separate over joint creditors in the distribution of the separate estate, see § 828.

§ 737. Judgment as evidence.— Courts seem about equally divided as to the effect of a judgment against the surviving partner in favor of a creditor of the firm as evidence against the estate of the deceased partner in favor of the creditor, or of the surviving partner who has paid it.

As the surviving partner is authorized and expected to wind up the estate, his payment of a judgment against him is doubtless like the payment of any other debt of the estate when he renders his account. In case he is seeking contribution from the administrator for a balance due, the judgment would seem to be *res inter alios acta* and not *prima facie* evidence, but like any other item in his own favor; but where he is defendant and the administrator is disputing his management, there is no reason why any usual presumptions in favor of fidelity should not obtain as much to a payment after litigation as before, though if the resistance to the claim were wanton, the costs would doubtless be his sole debt, but no presumption to this effect ought to arise from the want of success in his resistance to the creditor.[3]

[1] French *v.* Hayward, 16 Gray, 512.

[2] Bird *v.* Bird, 77 Me. 499; 1 Atl. Rep. 455. And that a set-off due from him individually to the decedent cannot be allowed, Ross *v.* Pearson, 21 Ala. 473. See Moffatt *v.* Thomson, 5 Rich. Eq. 155 (57 Am. Dec. 737), cited in the next section.

[3] Hanna *v.* Wray, 77 Pa. St. 27, 30, held that a judgment against a surviving partner, paid by him, could be given in evidence by him against the administrator in a settlement of accounts. See, also, Black *v.* Struthers, 11 Iowa, 459. Willey *v.* Thompson, 9 Met. 329, 331, held that such a judgment established the liability of the estate equally with the sur-

§ 738. Administrator's rights and duties as to the survivor.—The right of the representatives of the deceased partner, where there is no misconduct or unnecessary delay on the part of the surviving partners, is to receive the share of the decedent after the winding up is completed. The surviving partners can retain possession of the partnership estate until the account is made and the debts paid.[1]

After all the debts are paid, the survivor ought to pay over to the administrator his share of collections as fast as realized.[2]

If any part of the individual estate of the decedent has come into the surviving partner's hands, the administrator can compel him to deliver or pay it over, though there are partnership debts outstanding.[3]

vivor, both at law and equity; and in Valentine *v.* Farnsworth, 21 Pick. 176, where the heir took upon himself the defense, it was held that he could not show, in the subsequent action, that the claim would have been barred had not the survivor avoided the statute of limitations by an acknowledgment, for that the judgment was conclusive unless fraud or collusion were shown. Logan *v.* Greenlaw, 29 Fed. Rep. 299, held that a judgment against the survivor and administrator binds the land of the partnership, the title of which is in the heir, and he cannot compel the plaintiff to re-establish the debt, for the land is personalty until debts are paid. On the other hand, Sturges *v.* Beach, 1 Conn. 507, held that a judgment against the survivor was *res inter alios acta*, and not evidence against the administrator, for otherwise the survivor might establish an unfounded claim. So in Hamilton *v.* Summers, 12 B. Mon. 11 (54 Am. Dec. 509), that it would not be evidence on a question of contributing. In Buckingham *v.* Ludlum, 37 N. J. Eq. 137, that it does not conclude the representatives. So Trustees of Leake & Watts Orphan House *v.* Lawrence, 11 Paige, 80 (affirmed on other points in Lawrence *v.* Trustees, 2 Den. 577), and Rose *v.* Gunn, 79 Ala. 411, held that if the judgment was established only by the surviving partner's admissions, the survivor, in turning over to the administrator his surplus, must show that the judgment was based on a debt incurred before the death. That costs of an execution against the surviving partner on the judgment cannot be collected from the estate, Duquesne Nat'l B'k *v.* Mills, 22 Fed. Rep. 611.

[1] Shearer *v.* Paine, 12 Allen, 289, 291; Roberts *v.* Kelsey, 38 Mich. 602; Scott *v.* Searles, 5 Sm. & Mar. 25; Walmsley *v.* Mendelsohn, 31 La. Ann. 152; Brooks *v.* Brooks, 12 Heisk. 12.

[2] Heath *v.* Waters, 40 Mich. 457, 466-7.

[3] Roberts *v.* Law, 4 Sandf. (N. Y.) 642; and though the estate is indebted to the survivor individually, Moffatt *v.* Thompson, 5 Rich. Eq. 155 (57 Am. Dec. 737). See Ross *v.* Pearson,

The administrator has a right to maintain an action at law for the share of the deceased after the debts of the partnership have been paid and the balance ascertained, for the relation of debtor and creditor then arises.[1]

But prior to that time the right is to have an accounting, and to compel the surviving partners to proceed with the winding up, and can apply to equity to restrain any misconduct on their part.[2]

§ 739. The administrator or executor has the same equity that the deceased partner had to have the assets applied to the debts, and the concern wound up and balance distributed.[3] And has the same right against the purchaser of a surviving partner's interest;[4] and hence has a right to require an accounting from the surviving partners of the partnership estate;[5] though the partnership is insolvent, and there will be no surplus coming to the estate, the administrator may compel the survivor to wind up the business, and apply

21 Ala. 473, cited in the preceding section.

[1] Holman *v.* Nance, 84 Mo. 674; and see Krutz *v.* Craig, 53 Ind. 561, in which demand seems to be required to be made; Robinson *v.* Wright, Brayton (Vt.), 22. See § 857.

[2] See § 923.

[3] Hoyt *v.* Sprague, 103 U. S. 613; *Re* Clap, 2 Lowell, 168; Hoard *v.* Clum, 31 Minn. 186; Egberts *v.* Wood, 3 Paige, 517, 526; Watkins *v.* Fakes, 5 Heisk. 185, 189; Allen *v.* Nat'l Bank, 6 Lea, 558.

[4] Williams *v.* Love, 2 Head, 80. And this equity was held to exist even where the administrator sold his interest to the surviving partner, which was held to mean only an expected surplus, and the lien was not gone, Deveau *v.* Fowler, 2 Paige, 400; but not if he sold one-half specifically not subject to debts, Wilson *v.* Soper, 13 B. Mon. 411 (56 Am. Dec. 573). On this subject see Retiring Partner's Lien, §§ 550-554.

[5] Heyne *v.* Middlemore, 1 Rep. in Ch. 138; Hackwell *v.* Eustman, Cro. Jac. 410; Wickliffe *v.* Eve, 17 How. 468; Denver *v.* Roane, 99 U. S. 355; McLaughlin *v.* Simpson, 3 Stew. & Por. (Ala.) 85; Costley *v.* Towles, 46 Ala. 660; Tate *v.* Tate, 35 Ark. 289; Miller *v.* Jones, 39 Ill. 54; Freeman *v.* Freeman, 13 Mass. 260; Cheeseman *v.* Wiggins, 1 Thomp. & C. 595; Grim's Appeal, 105 Pa. St. 375, 382; Tillinghast *v.* Champlin, 4 R. I. 173; Watkins *v.* Fakes, 5 Heisk. 185; Jennings *v.* Chandler, 10 Wis. 21. And if the administrator pays debts he can compel contribution, Sells *v.* Hubbell, 2 Johns. Ch. 394. In Indiana it seems that a demand for an accounting is necessary before suit. Anderson *v.* Ackerman, 88 Ind. 481; Skillen *v.* Jones, 44 id. 136.

the assets to the debts so as to reduce the liability of the estate.[1]

The decree in favor of the administrator for a sum due should be against the surviving partners jointly. If the assets have been divided up between the survivors, the administrator cannot be compelled to accept a several decree against each for a proportionate amount, though otherwise had the division been made before the death by the consent of the testator.[2]

In Alston *v.* Rowles, 13 Fla. 117, the executor of the deceased partner was said to be so far a creditor of the surviving partner that he could attack a conveyance by him to his wife as in fraud of creditors.

The executor or administrator, in the absence of express authority by the will, cannot bind the estate by continuing business and incurring debts; the legatees do not hold their legacies subject to every venture which they cannot control;[3] though if the next of kin are parties to the transaction they are precluded from objecting to the payment of losses.[4]

The submission to arbitration of the account between the surviving partner and the administrator is not an interference with the jurisdiction of the probate court to settle estates, for the controversy is of equitable and not probate cognizance.[5]

[1] Jennings *v.* Chandler, 10 Wis. 18 [21].

[2] Bundy *v.* Youmans, 44 Mich. 376,

[3] *Ex parte* Garland, 10 Ves. 110; Kirkman *v.* Booth, 11 Beav. 273; Lovell *v.* Gibson, 19 Grant's Ch. (Up. Can.) 280; Lucht *v.* Behrens, 28 Oh. St. 231; Wood's Estate, 1 Ashm. (Pa.) 314. And even if the will authorize such continuance, this will only hazard that part of the estate already embarked in the business, unless the will is explicit and unambiguous to the contrary. See § 600.

[4] If the executor acquiesces in a continuance of the business with the old assets, his lien for an accounting and payment, which is still superior to newly incurred debts in such of the assets as remain unchanged, yet is gone as to new property, which in the course of business takes the place of the old, and cannot share even *pari passu* with creditors of the new firm, but if there are no new creditors his lien extends to the whole. Hoyt *v.* Sprague, 103 U. S. 613, 624–6. On the other hand, if the surviving partner continues the business, and so mingles the old with new stock as to destroy its identity, the lien attaches to the whole as against him and his individual creditors other than *bona fide* buyer or owners of specific liens by levy. Hooley *v.* Gieve, 9 Daly, 104; 9 Abb. New Cas. 271 (affd. without opinion, 73 N. Y. 599).

[5] Anderson *v.* Beebe, 22 Kan. 768;

§ 740. Duty of the administrator.— In case of negligence on the part of the surviving partner to wind up, or misconduct in misapplying the partnership funds, or otherwise endangering a loss to the individual estate, it is not only the right of the administrator to apply for the interference of a court of equity, but it is his imperative duty to do so, for neglect of which he may be liable.[1]

It is his duty to apply for an injunction in case of laches or bad faith,[2] or for a removal of the survivor and the appointment of a receiver,[3] or to file a bill for an accounting;[4] and a neglect of the administrator to make the surviving partner account renders his bond liable.[5] If, however, the partnership is insolvent at the time of the death, and the administrator permits the surviving partner to continue, and though still insolvent at the time of winding up, an increase of value had been effected by continuing the business, and many debts paid off and no property of the estate lost, the administrator is neither personally liable nor is he deprived of compensation.[6]

After the administrator has settled the individual debts of his decedent, he must still retain and apply the surplus to pay the deceased's share of partnership debts.[7]

That the administrator has paid partnership debts with the funds of the estate before individual debts does not render his bond liable to the heirs or next of kin, for the order of payment is nothing to them unless it be shown that there are partnership assets not applied;[8] and if there are sufficient funds of the firm, an administrator who is also a surviving partner renders his bond liable by selling fixed property of the estate (slaves in this case) to pay partnership debts.[9]

but if the surviving partner is also administrator, he cannot by agreement with the widow submit to arbitration, for he is acting in a double capacity, representing both debtor and creditor, and the widow is neither. Boynton *v.* Boynton, 10 Vt. 107.

[1] People *v.* White, 11 Ill. 341, 350; McKean *v.* Vick, 108 Ill. 373; Watkins *v.* Fakes, 5 Heisk. 185; Barcroft *v.* Snodgrass, 1 Cold. 431; Gynne *v.* Estes, 14 Lea, 662; Wayt *v.* Peck, 9 Leigh, 434.

[2] People *v.* White, 11 Ill. 341, 350.

[3] McKean *v.* Vick, 108 Ill. 373.

[4] Watkins *v.* Fakes, 5 Heisk. 185.

[5] Wayt *v.* Peck, 9 Leigh, 434.

[6] Stern's Appeal, 95 Pa. St. 504.

[7] Laurens *v.* Hawkins, 1 Desaus. 144.

[8] People *v.* Lott, 36 Ill. 447.

[9] Boyle *v.* Boyle, 4 B. Mon. 570.

Where F. & Son borrowed money from S., and the son died appointing his father executor with power to carry on the business, and F. three years afterwards mortgaged the whole stock to S. to secure the debt of the firm to him, and also an individual debt due from F. to S., on distribution upon foreclosure of the mortgage it was held that the lien of the deceased partner to have the assets applied to the debts descends upon his executor, and the executor's duty is to do it. As the executor is surviving partner he ought to do it of his own accord, and if he disregards the duty the law will make the appropriation, and the creditor and survivor cannot dispose of the assets to the prejudice of the decedent's estate, and they will be applied to discharge the partnership part of the debt but not the individual part.[1]

§ 741. —— in case of misconduct of survivor.— If the surviving partner is guilty of misconduct or bad faith in winding up the business, as if he is misapplying the funds, or in any way diverting the assets, he can be controlled by application to a court of equity and an injunction obtained either with or without a receiver.[2] A continuance of the business with the old assets is an abuse of trust;[3] and waste, negligence, misconduct or other violation of duty will be ground of obtaining interference.[4] If the surviving partner mix the partnership assets with his own and keep no separate account, and use the proceeds to support his family, it is an abuse of trust and ground for injunction, receiver and accounting.[5]

[1] Strauss *v.* Frederick, 91 N. Ca. 121.

[2] Hartz *v.* Schrader, 8 Ves. 317; People *v.* White, 11 Ill. 341, 350; Fletcher *v.* Vandusen, 52 Iowa, 448; Gable *v.* Williams, 59 Md. 46, 52; Scott *v.* Tupper, 8 Sm. & Mar. 280; Citizens' Mut. Ins. Co. *v.* Ligon, 59 Miss. 305, 313; Stanhope *v.* Supplee, 2 Brews. (Pa.) 455; Fulton *v.* Thompson, 18 Tex. 278, 286–7; Foster *v.* Shephard, 33 id. 687. See § 999.

[3] Jennings *v.* Chandler, 10 Wis. 18 [21]; Hooley *v.* Gieve, 9 Daly, 104; 9 Abb. New Cas. 271 (aff'd without opinion, 73 N. Y. 599).

[4] Farley *v.* Moog, 79 Ala. 148. Where the doctrine obtains that the surviving partner is but a tenant in common, the administrator can sue him in trover, as for conversion, if he sell with intent to misappropriate, Rathwell *v.* Rathwell, 26 Up. Can. Q. B. 179.

[5] Jennings *v.* Chandler, 10 Wis. 18 [21]; Hooley *v.* Gieve, 9 Daly, 104; 9 Abb. New Cas. 271 (aff'd without opinion, 73 N. Y. 599).

A mingling beyond the possibility of identification of partnership goods by the surviving partner with his own gives the creditors no right in the whole beyond the proportion representing the partnership property. Hence it was held not to be fraudulent towards the partnership creditors to pay out of such fund an individual debt not in excess of the proportion due to the private estate.[1]

If the surviving partner invests the funds in land in his own name, the heirs or representatives of the decedent can ratify the investment and claim a share in it, or recover the money and fasten a lien upon the land for it, but, until a right to the land is asserted, the claim is a money demand *ex contractu* within the statute of limitations.[2]

If the surviving partner is bound by the articles to liquidate the concern within a certain time, he is liable for the value of all assets as at the expiration of it, if they cannot be returned *in integrum*.[3]

§ 742. **Survivor appointed executor.**— Although it may be improper to appoint the surviving partner administrator of a deceased partner, by reason of the conflict of inconsistent duties,[4] yet his appointment as executor by the deceased often occurs. The advantage in this is, that resort to a sudden and forced winding up is unlikely, and its disadvantage is that settlement between the estate and the surviving partners in any way other than by an accounting and winding up is greatly embarrassed, as will be seen.

Where a surviving partner is executor of a deceased partner, and the will does not empower him to continue the business, it has been held that his account of the estate must be rendered in the probate court, because he cannot be called to an account. Although there is a co-executor and a co-survivor, yet they could not sue him for a balance;[5] and the account of the estate necessarily involves his account as surviving partner, and any creditor of the estate can inquire into settlement of the partnership with a view to ascertain the correctness of the balance due the estate, and he is,

[1] McGinty *v.* Flannagan, 106 U. S. 661.

[2] Morgan *v.* Morgan, 68 Ala. 80.

[3] Klotz *v.* Macready (La.), 2 So. Rep. 203.

[4] Heward *v.* Slagle, 52 Ill. 336; White *v.* Gardner, 37 Tex. 407.

[5] Forward *v.* Forward, 6 Allen, 494.

therefore, bound to render an account of both estates to the probate judge.[1]

He is not, however, entitled to any commissions for the administration of partnership affairs, although the separate estate has no other assets.[2] In qualifying and giving bond as administrator, he must value the interest in the partnership property undiminished by deduction for liabilities of the firm;[3] but is not to settle the partnership accounts in the probate court in connection with the estate, that court having no jurisdiction over such accounts.[4] His power to bind the estate in the name of the firm is not enlarged by being administrator, and a contract with him, as surviving partner, does not charge the estate.[5]

Partnership funds coming to his hands are received as surviving partner, and his bond as administrator is not liable for them.[6] And if a surviving partner, as administrator, inventory the partnership effects at one-half the value, as part of the decedent's estate, and pay the debts of the firm, he can charge one-half the debts against such inventoried property charged against himself.[7] And if he uses partnership money to pay a separate debt of the deceased, he may set off such payment when sued by the administrator *de bonis non* for money belonging to the estate.[8]

§ 743. Purchase by surviving partners from executor of deceased.— Although the surviving partners are not obliged to retire from business, yet the usual rule of winding up applies, namely, that to ascertain the interest of the deceased, the partnership assets, including the good will, must

[1] Leland *v.* Newton, 102 Mass. 350. But see Stewart *v.* Burkhalter, 28 Miss. 396.

[2] Dodson *v.* Dodson, 6 Heisk. 110. And see Gregory *v.* Menefee, 83 Mo. 413; Scudder *v.* Ames, 89 id. 496, 509; Cooper *v.* Reid, 2 Hill's Ch. (S. Ca.) 519.

[3] *Re* Surrogate Court, 44 Up. Can. Q. B. 207.

[4] Vincent *v.* Martin, 79 Ala. 510.

[5] Pyke *v.* Searcy, 4 Porter (Ala.), 52.

[6] Pearson *v.* Keedy, 6 B. Mon. 128; 43 Am. Dec. 160. But if he inventory the interest of the deceased in the partnership goods, the fact that they came to him as surviving partner is no defense to an action on his bond by the administrator *de bonis non.* Grant *v.* McKinney, 36 Tex. 62. In People *v.* White, 11 Ill. 341, it was held that if the administrator, with the assent of the survivor, takes possession of the whole partnership effects, his bond was liable both to partnership and individual creditors.

[7] Mead *v.* Byington, 10 Vt. 116.

[8] Skillen *v.* Jones, 44 Ind. 136.

be converted into money. The surviving partners have no priority of right to purchase or pre-emption over other buyers,[1] and cannot estimate the value and take the property to themselves at such value without the assent of the representatives of the deceased, and if they do so, the representatives may elect to compel them to account for subsequent profits, regardless of the fairness of the valuation.[2]

The articles of partnership may, however, give a surviving partner a right of pre-emption at a valuation, or provide that the assets shall vest in the survivor, who shall then be debtor to the estate for the value. In such cases a *bona fide* settlement with the administrator binds the distributees;[3] and in some states, by statute, the surviving partner may take the assets and business at an appraisement.[4]

Statute and articles apart, the forced conversion of a large stock into money is almost sure to be attended with the most ruinous consequences, not only to the surviving partners, but to the estate of the deceased. The easiest and most rational solution of which difficulties is a purchase by the survivors of the unascertained share at a just and *bona fide* valuation. Hence, although both parties are in a sense trustees of the deceased's interest, and there is generally a dangerous inequality of knowledge in respect to the subject-matter of the sale, yet such transaction is within the powers of each to make, provided one of the surviving partners is not also an executor; and such sale, though liable to suspicion, is, if in perfect fairness, reasonable, and in good faith, valid, and binding on the heirs, or distributees, or cred-

[1] Brown *v.* Gellatly, 31 Beav. 243.

[2] Ogden *v.* Astor, 4 Sandf. 311.

[3] Holmes' Appeal, 79 Pa. St. 279; Gaut *v.* Reed, 24 Tex. 46, 54, holding that he may re-sell, even to the executor as well as a stranger; Eldred *v.* Warner, 1 Ariz. 175, an agreement that the survivor should have the assets and pay the debts of the firm and of the deceased held valid; it was urged in the dissenting opinion that this was invalid because not a will and for want of delivery.

[4] In such case, that he is also a trustee under the will does not deprive him of the benefit of the statute; but the provision applies to real estate to the extent only that it is assets, and not in so far as the heir has an interest, for the only adversary party is the administrator. Rammelsberg *v.* Mitchell, 29 Oh. St. 22.

itors, and will be ratified by court,[1] or may come to some other final settlement.[2]

Such settlement will be deemed *prima facie* fair[3] and bind creditors as well as heirs,[4] and will not be disaffirmed except for mistake, fraud, or some such ground.[5]

Where the executrix of the deceased partner was the widow, and was sister-in-law of the surviving partner, and had great confidence in him, it was held that he should show her what the assets were and put her in as complete a state of knowledge as himself, and where he did not do this, and inventoried the property at its cost instead of at its value, and also misrepresented, the sale was set aside, and he could be (p. 469) required to account for the profits arising from the continued use of the property.[6]

Where the partnership business consisted in the buying and selling real estate as a commodity, the administrator's settlement will bind the heirs, though the settlement consists in relinquishing all claims to real estate held by an executory contract rather than pay the deceased's share of the price. The contract here consisted of land scrip, which was personalty.[7]

It has also been held that the administrator may receive payment in a chose in action on the ground that the parties can make a specific division of assets after the debts are paid, instead of selling.[8]

[1] Chambers *v.* Howell, 11 Beav. 6; Moses *v.* Moses, 50 Ga. 9; Wilson *v.* Soper, 13 B. Mon. 411; 56 Am. Dec. 573; Kimball *v.* Lincoln, 99 Ill. 578 (aff. s. c. 7 Ill. App. 470, which had reversed 5 Ill. App. 316); Heath *v.* Waters, 40 Mich. 457; Ludlum *v.* Buckingham, 35 N. J. Eq. 71; Sage *v.* Woodin, 66 N. Y. 578; Ludlow *v.* Cooper, 4 Oh. St. 1; Grim's Appeal, 105 Pa. St. 375; Roys *v.* Vilas, 18 Wis. 169; *Ex parte* Sessions, 2 Up. Can. Chy. Cham. 360.

[2] Davies *v.* Davies, 2 Keen, 534; Smith *v.* Everitt, 27 Beav. 446; Yeatman *v.* Yeatman, 7 Ch. D. 210; Hoyt *v.* Sprague, 12 Chic. Leg. News, 25; affd. 103 U. S. 613; Sage *v.* Woodin, 66 N. Y. 578.

[3] Moses *v.* Moses, 50 Ga. 9.

[4] Sage *v.* Woodin, *supra.*

[5] Kimball *v.* Lincoln, *supra;* Sage *v.* Woodin, *supra.*

[6] Heath *v.* Waters, 40 Mich. 457, 467-9.

[7] Ludlow *v.* Cooper, 4 Oh. St. 1.

[8] Roys *v.* Vilas, 18 Wis. 169. A difficulty in case part of the assets, consisting of real estate, was inventoried, and a remedy for it, suggested by SHARSWOOD, J., in Foster's Appeal, 74 Pa. St. 391, 396-7 (15 Am. Rep. 553; 3 Am. Law Rec. 230), that personalty must pay the debts before realty can be resorted to, and hence, that a surviving partner cannot sell the real estate in conjunction with the personalty, but must sell the lat-

§ 744. —— same where a survivor is an executor.— If a surviving partner has been made executor or administrator he must necessarily be both buyer and seller, and it seems in such case to be impossible to make any arrangement that cannot be successfully attacked by heirs or distributees, unless they also assented to it; and neither good faith, adequacy of consideration, or the advice of counsel, will protect the title of a trustee buying at his own sale, the policy of the law being to deem such transaction fraudulent *per se* and not sustainable by explanations when objected to by a party in interest.[1]

Thus, where the surviving partners, one of whom was executor of the deceased partner, formed a new firm and bought the assets of the old firm from themselves, and filed a bill to confirm their title, offering to show that the price given was greatly in advance of what could be otherwise realized, the court dismissed the bill substantially for the reasons above stated.[2]

In a similar case, a bill was filed to obtain power to make the sale and for specific performance of the contract, and it was held that the court would not confirm the contract if opposed by beneficiaries under the will, much less grant specific performance.[3]

In Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 M. & Cr. 41; 22 Beav. 84, the surviving partners were executors and made an account of the partnership assets, credited the decedent's estate with a share, but never paid it over, and continued business; the firm was insolvent, but by the care and prudence of the survivors, and their obtaining money on their own responsibility, became solvent, several changes being meanwhile made in the firm. An accounting was required on behalf of the estate against the surviving partners and executors, but under the circumstances the complainant's share of the profits was held to be covered by interest on the original unpaid valuation of the decedent's share.

ter separately, but that the administrator and guardian may obtain leave to sell to the surviving partner at an advantageous price, on a showing that a sale in portions would be prejudicial. The assumption that the personalty must be sold first is probably gratuitous, the partnership real estate being personalty for the purposes of the firm without any preference over other personalty in winding up. See REAL ESTATE.

[1] Case *v.* Abeel, 1 Paige, 393.

[2] Nelson *v.* Hayner, 66 Ill. 487.

[3] Colgate *v.* Colgate, 23 N. J. Eq. 372.

If the trustee is in a situation to give more than any other purchaser would give, it has been held that the court might authorize a sale by him to the firm of which he was a member, after directing the guardian *ad litem* of the heir to employ counsel approved by the court.[1]

The same case held that, as one of two executors has power to sell personal property, if he sell to a firm of which his co-executor is a member the sale is not void, but if both sell to such firm the sale would be set aside for inadequacy of price.[2] But in another case, where two of three administrators sold the deceased's interest in the firm to the third administrator, who was one of the two surviving partners, it was said to be voidable at the election of any party in interest, regardless of the *bona fides;* in fact, however, the other survivor would have given a five times higher price, and the buyer afterwards sold for about five times as much as he gave, and the administrators were held chargeable in their accounts with the actual value.[3]

Where the administrator, who was one of three surviving partners, sold the stock on hand to the three survivors, who formed a new firm, each of the three giving his individual note for one-third of the amount, payable to the new firm, they were held jointly liable to the estate of the deceased, for although the administrator could discharge the joint liability of the survivors and become himself chargeable with the amount, yet his act here was not as administrator and did not bind the estate.[4]

Where executors sold to the surviving partners and they subsequently resold to one of the executors, the sale was set aside and an accounting ordered.[5] But this doctrine was held not to apply where the assets were by the articles to vest in the surviving partner, who was to become debtor to the estate for their value, because in such case, as owner, he could sell to the executor as well as to a stranger.[6]

§ 745. ——**ratification of same.**—In the absence of actual fraud an executor who is a surviving partner, in making a sale in which he is himself interested, as the fraud is

[1] Colgate *v.* Colgate, *supra.*
[2] Id.
[3] Gilbert's Appeal, 78 Pa. St. 266.
[4] Washburn *v.* Goodman, 17 Pick. 519, 525.
[5] Cook *v.* Collingridge, Jacob, 607.
[6] Gaut *v.* Reed, 24 Tex. 46, 54.

constructive only, it is voidable rather than void, to the extent of being capable of ratification.

In Grim's Appeal, 105 Pa. St. 375, the executor of a deceased partner bought the unascertained interest of the decedent in the firm and became a partner therein, at the solicitation of the heirs, who took the proceeds and continued to approve. This was held valid, although the fact that a third person had offered to buy on the same terms at a larger price is immaterial, since the surviving partners cannot be compelled to have a new partner forced on them; and the further fact that some of the heirs are married women is immaterial, for though a *feme covert* cannot part with her property by estoppel, yet this is not a sale of the interest, but merely an approval of a course of procedure to ascertain their shares.[1]

In Filley *v.* Phelps, 18 Conn. 294, 304, where C., of A., B. & C., partners, died and A. became his administrator, and at the sale of the decedent's interest in the firm A. became the buyer, it was held that, though illegal, the court in a proper case would compel him to fulfill the contract. The other partner would not be injured by this, for his share has no greater liability than before; nor could subsequent creditors complain, for they could not hold C.'s estate.

In Ludlum *v.* Buckingham, 35 N. J. Eq. 71; 39 id. 563, pending a suit between the surviving partner and the executrix for settlement of partnership affairs, the parties agreed to sell all the real estate of the firm to the executrix, who was also devisee of the testator's interest, at a price which would have paid off all the incumbrances, but by reason of failure on the part of the executrix to perform, the property was sold on foreclosure of mortgages at a sacrifice. The court refused to compel her to account or to charge the losses against her, when the surviving partner was deeply a debtor to the firm and held a large amount of its funds, which, had he paid them over, would have given her the means to fulfill her contract.

In Moses *v.* Moses, 50 Ga. 9, it was held that an executor could purchase an interest in the concern for himself from the surviving partner.[2]

[1] But see Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 M. & Cr. 41; 22 Beav. 84, where releases had been given.

[2] S. P. Simpson *v.* Chapman, 4 DeG. M. & G. 154.

CREDITORS' REMEDY.

§ 746. Against surviving partners.— In collecting claims due from the firm by action against the surviving partner, the remedy is at law and not in chancery, for the survivor has all the assets, and there is no need to apply to equity, and the creditor has no lien; and the same principles apply as nearly as possible that govern an action by the surviving partner to collect a claim.[1]

The surviving partner is severally liable in all jurisdictions whether the administrator can also be sued or not; death severs the promise, and though it may become joint and several by statute or decision, it is after death nowhere joint.[2] And as the debt is no longer joint, a payment by the executor will not affect the statute of limitations as to the survivor,[3] nor *vice versa;*[4] and he is the only necessary defendant to a bill in chancery.[5]

Hence, as in suing a single partner, it is not necessary to aver a joint contract, but the omission of the others can be taken advantage by plea in abatement only. So it was said by Lord Holt as early as 1696, in Hyat *v.* Hare, Comb. 383, "if there be two partners in trade, and one of them buy goods for both, and the other dieth, the survivor may be charged by *indebitatus assumpsit* generally, without taking notice of the partnership, or that the other is dead and he survived."[6]

But the general practice is to declare on a contract as made both with the deceased and the survivors.[7] But this cannot be done if the cause of action arose after death.[8]

It has been held also that the action against the surviving partner must be brought against him as such, and not as an individual

[1] Pearson *v.* Keedy, 6 B. Mon. 128 (43 Am. Dec. 160).

[2] Forward *v.* Forward, 6 Allen, 494, 496; Rice, Appellant, 7 Allen, 112, 115; Southard *v.* Lewis, 4 Dana, 148; Fogarty *v.* Cullen, 49 N. Y. Superior Ct. 397; Carrere *v.* Spofford, 46 How. Pr. 294.

[3] Slater *v.* Lawson, 1 B. & Ad. 396.

[4] Atkins *v.* Tredgold, 2 B. & C. 25.

[5] Jones *v.* Hardesty, 10 Gill & J. 404; 32 Am. Dec. 180; Robertshaw *v.* Hanway, 52 Miss. 713, to reach assets; Cullum *v.* Batre, 1 Ala. 126, to foreclose where the title was not in the decedent.

[6] This case was followed in Goelet *v.* McKinstry, 1 Johns. Cas. 405; and Butler *v.* Kirby, 53 Wis. 188.

[7] Spalding *v.* Mure, 6 T. R. 363. Bovill *v.* Wood, 2 M. & S. 25.

[8] Tone *v.* Goodrich, 2 Johns. 213.

contractor, in order that the judgment may be evidence in his favor against the estate of the decedent.[1]

So also the plaintiff may recover in the same action a demand due from the surviving partner, as such, and another due from him individually,[2] and if he is a non-resident, may attach on that ground.[3]

It is also held that if the surviving partner become bankrupt or insolvent, the joint creditors can insist upon the property being applied to the partnership debts, because it is not the survivor's solely.[4]

§ 747. —— **estate of deceased liable.**— The doctrine of law that the death of a joint contractor discharges his estate from liability on the contract has no application in equity to partnership debts, and it is universally true that a partnership creditor can resort in some form or other to the estate of the deceased partner if necessary.[5]

[1] Black *v.* Struthers, 11 Iowa, 459.

[2] Richards *v.* Heather, 1 B. & A. 29; Calder *v.* Rutherford, 7 J. B. Moore, 158; Jell *v.* Douglas, 4 B. & A. 374; Fitzgerald *v.* Boehm, 7 J. B. Moore, 332; Friermuth *v.* Friermuth, 46 Cal. 42; Nehrboss *v.* Bliss, 88 N. Y. 600, 604, *arguendo;* Butler *v.* Kirby, 53 Wis. 188, a running account held to be a single cause of action. Tissard *v.* Warcup, 2 Mod. 279, *contra.*

[3] Wiley *v.* Sledge, 8 Ga. 532; Roach *v.* Brannon, 57 Miss. 490.

[4] *Re* Clap, 2 Lowell. 168; Farley *v.* Moog, 79 Ala. 148.

[5] Lane *v.* Williams, 2 Vernon, 292; *Ex parte* Kendall, 17 Ves. 514; Vulliamy *v.* Noble, 4 My. & Cr. 109; 3 Mer. 619; Holme *v.* Hammond, L. R. 7 Ex. 218; Waldron *v.* Simmons, 28 Ala. 629; Storer *v.* Hinkley, Kirby (Conn.), 147; Pendleton *v.* Phelps, 4 Day, 481; Filley *v.* Phelps, 18 Conn. 294, 301-2; Pullen *v.* Whitfield, 55 Ga. 174; Anderson *v.* Pollard, 62 id. 46; Vance *v.* Cowing, 13 Ind. 460; McGill *v.* McGill, 2 Met. (Ky.) 258; Southard *v.* Lewis, 4 Dana, 148; McCulloh *v.* Dashiell, 1 Har. & Gill, 96; Allen *v.* Wells, 22 Pick. 453; Dahlgren *v.* Duncan, 7 Sm. & Mar. 280; Buckingham *v.* Ludlum, 37 N. J. Eq. 137; Wilder *v.* Keeler, 3 Paige, 167, 172; Jenkins *v.* De Groot, 1 Cai. 122; Grant *v.* Shurter, 1 Wend. 148; Hamersley *v.* Lambert, 2 Johns. Ch. 508; Slatter *v.* Carroll, 2 Sandf. Ch. 573; Copcutt *v.* Merchant, 4 Bradf. 18; Stahl *v.* Stahl, 2 Lans. 60; Voorhis *v.* Childs, 17 N. Y. 354, 355-6; Richter *v.* Poppenhausen, 42 N. Y. 373; Pope *v.* Cole, 55 id. 124; 14 Am. Rep. 198; First Natl. Bk. *v.* Morgan, 73 id. 593 (aff. 6 Hun, 346); Horsey *v.* Heath, 5 Oh. 353; Lang *v.* Keppele, 1 Bin. (Pa.) 123; Cope *v.* Warner, 13 S. & R. 411; Caldwell *v.* Stileman, 1 Rawle, 212; Pearce *v.* Cooke, 13 R. I. 184; Wardlaw *v.* Gray, Dudley (S. Ca.), Eq. 85; Fisher *v.* Tucker, 1 McCord, Ch. 169; Linner *v.* Dare, 2 Leigh (Va.), 588; Sale *v.*

§ 748. **English law.**— It was for a long time a subject of controversy whether the estate of a deceased partner could be resorted to in the first instance or only in case of the insufficiency or insolvency of the joint estate. When the right to resort to the separate estate was deemed to be subject to the equity of each partner to have the joint debt paid out of the assets, the creditor was required to show the insolvency of the partnership fund before he could pursue the administrator. But the later decisions have now settled the law in England the other way. A creditor of the partnership can pursue his remedy not only against the surviving partner, but also against the estate of the deceased without exhausting his remedy against the survivor first, whatever may be the state of the accounts between the partners.[1] This was subject to the priorities of separate creditors in the separate estate, which question was ascertained on distribution, but did not interfere with the allowance of the claim of the first creditor. And if the creditor chose to pursue the estate of the deceased partner, it was necessary to make the surviving partners parties, as they were interested in the result of the suit.[2] And the same rules obtain under the present judicature acts.[3]

This doctrine, which has always been regarded as difficult to account for logically, and has been rejected in at least half the American states, found its justification in what SELDEN, J., in Voorhis *v.* Childs, 17 N. Y. 354, 355, calls a sort of equitable transfer to the creditor of the right of the surviving partner to compel the estate of the decedent to contribute. The consequence of the doctrine was that until within a very few years partnership debts have been said to be, in equity, joint and several; and this expression was then, by a species of inversion, substituting the effect

Dishman, 3 Leigh (Va.), 548. See, also, Hubbell *v.* Perin, 3 Oh. 287.

[1] Devaynes *v.* Noble, 1 Mer. 530; affd. in 2 R. & M. 495; Wilkinson *v.* Henderson, 1 M. & K. 582; Thorpe *v.* Jackson, 2 Y. & C. Ex. 553; Winter *v.* Innes, 4 M. & C. 101.

[2] See above cases and Hills *v.* McRae, 9 Ha. 297; Sleech's Case, 1 Mer. 539; Stephenson *v.* Chiswell, 3 Ves. 566.

[3] *In re* Hodgson, L. R. 31 Ch. Div. 177.

for the cause, used as the reason for the doctrine out of which it had originated. That partnership debts are not in fact joint and several, in equity, is now recognized.[1]

§ 749. Same; American law.— In this country the practice is divided. Thus it is held that the creditor may at his option proceed at law against the surviving partner, or may go in the first instance into equity against the representatives of the deceased without exhausting his remedy against the living, in the cases cited in the note, the claim in equity being joint and several.[2] And in such case could join the

[1] See Kendall *v.* Hamilton, 4 App. Cas. 504; *In re* Hodgson, L. R. 31 Ch. Div. 177. In the former case Lord Cairns, p. 516, said it was only a compendious expression to be interpreted with reference to the functions of the court of equity. Upon death the debts become, in the eye of a court of law, the debts of the survivors, who had a right to prevent any part of the assets being withdrawn until the debts were paid, and equity, in administering the estate of a deceased partner, would, in order to clear his estate, ascertain his liabilities to the partnership, and for this purpose would ascertain the debts due from the partnership. "From this the transition was easy to giving the creditors of the partnership a direct right and not merely an indirect right through the surviving partners to come for payment against the assets of the deceased partner; and from this again the transition was easy to the expression which said that partnership debts in the eye of a court of equity were joint and several; not thereby meaning that a court of equity altered or changed a legal contract, but merely that the court, in order, before distributing assets, to administer all the equities existing with regard to them, would go behind the legal doctrine that a partnership debt survived as a claim against the surviving partner only, and would give the creditor the benefit of the equity which the surviving partners might have insisted on." See, also, the other opinions in this case.

[2] Nelson *v.* Hill, 5 How. 127; McLain *v.* Carson, 4 Ark. 164 (37 Am. Dec. 777); Camp *v.* Grant, 21 Conn. 41; Fillyau *v.* Laverty, 3 Fla. 72; Mason *v.* Tiffany, 45 Ill. 392; Silverman *v.* Chase, 90 Ill. 37; Eads *v.* Mason, 16 Ill. App. 545; Braxton *v.* State, 25 Ind. 82; Ralston *v.* Moore, 105 Ind. 213; Postlewait *v.* Howes, 3 Iowa, 365; Maxey *v.* Averill, 2 B. Mon. 107; Rice, appellant, 7 Allen, 112; Sampson *v.* Shaw, 101 Mass. 145; Manning *v.* Williams, 2 Mich. 105; Simpson *v.* Schulte, 21 Mo. App. 639; Freeman *v.* Stewart, 41 Miss. 138; Irby *v.* Graham, 46 Miss. 425; Moore's Appeal, 34 Pa. St. 411; Blair *v.* Wood, 108 Pa. St. 278; Gaut *v.* Reed, 24 Tex. 46; Wardlaw *v.* Gray, Dudley (S. Ca.), Eq. 85, a *dictum;* Higgins *v.* Rector, 47 Tex. 361; Cocke *v.* Upshaw, 6 Munf. (Va.) 464; Creswell *v.* Blank, 3 Grant's Cas. (Pa.) 330. Hence if the administrator

surviving partners as co-defendants in order to obtain judgment against both, not by virtue of his lien, but because the debt is joint and several.[1]

But the creditor's suit, not being based on his lien, cannot take the form of seeking to subject assets before he has recovered judgment.[2]

§ 750. But the majority of American cases hold, contrary to the English doctrine, that the executors cannot be sued in equity or under the code if a remedy at law exists against the surviving partners, for the debt is joint and not joint and several, and hence in pleading the insolvency of the surviving partner must be alleged.[3]

sues a debtor of the estate the debtor could set off a debt due him from the decedent's partnership. Blair *v.* Wood, 108 Pa. St. 278. Although the claim has been allowed by the firm's assignee for creditors and will be paid in full out of the partnership assets, and the decedent's estate will not pay its debts in full. Simpson *v.* Schulte, 21 Mo. App. 639.

[1] Nelson *v.* Hill, 5 How. 127; Dowell *v.* Mitchell, 105 U. S. 430, holding that an action on a note against the survivor and administrator was at law and not in equity; Garrard *v.* Dawson, 49 Ga. 434; Maxey *v.* Averill, 2 B. Mon. 107; Freeman *v.* Stewart, 41 Miss. 138; Hamersley *v.* Lambert, 2 Johns. Ch. 508; Butts *v.* Genung, 5 Paige, 254; Wiesenfeld *v.* Byrd, 17 S. Ca. 105, because the code allows actions in equity and at law to be joined, but does not decide but that the insolvency of the survivor must be alleged; Jackson *v.* King, 8 Leigh, 689, where a creditor got judgment against the survivor, the survivor having died and his administrator having used all his separate assets to pay other debts, no bill by the creditor against the administrator, it is proper to make the representatives of the other partner parties. But amendment striking out the parties will be allowed, Hoskisson *v.* Eliot, *supra;* Nelson *v.* Hill, 5 How. 127, decides that creditors of two firms having a common partner may file a creditors' bill against the representatives of two deceased partners of both firms and a surviving partner of one of the firms. *Contra,* that both administrator and survivor cannot be thus joined as defendants, because the judgment against one is *de bonis propriis,* and against the other *de bonis testatoris.* Childs *v.* Hyde, 10 Iowa, 294; Hoskisson *v.* Eliot, 62 Pa. St. 393, 404; Hedden *v.* Van Ness, 2 N. J. L. 84.

[2] Freeman *v.* Stewart, 41 Miss. 138.

[3] Van Reimsdyk *v.* Kane, 1 Gall. 371; West *v.* Randall, 2 Mason, 181; Troy Iron & Nail Factory *v.* Winslow, 11 Blatchf. 513; Sturges *v.* Beach, 1 Conn. 507; Alsop *v.* Mather, 8 Conn. 584 (21 Am. Dec. 703); Filley *v.* Phelps, 18 Conn. 294, 301–2; Currey *v.* Warrington, 5 Harr. (Del.) 147; Roosvelt *v.* McDowell, 1 Ga. 489; Daniel *v.* Townsend, 21 Ga. 155; Pullen *v.* Whitfield, 55 id. 174;

Laches in not pursuing the surviving partner will not exonerate the estate of the decedent.[1]

The action lies if the surviving partner is bankrupt,[2] or is insolvent.[3] No particular kind of proof of insolvency is necessary; if the remedy at law is shown to be unavailing, this is sufficient. Thus a judgment is not necessary;[4] or if a judgment has been had, execution is not necessary.[5]

Hamersley *v.* Lambert, 2 Johns. Ch. 508; Bloodgood *v.* Bruen, 8 N. Y. 362; Richter *v.* Poppenhausen, 42 N. Y. 373; 9 Abb. Pr. (N. S.) 263; Riper *v.* Poppenhausen, 43 N. Y. 68; Haines *v.* Hollister, 64 N. Y. 1; First Nat'l Bk. *v.* Morgan, 73 N. Y. 593 (aff. 6 Hun, 316); Parker *v.* Jackson, 16 Barb. 33; Voorhis *v.* Baxter, 18 Barb. 592; Lawrence *v.* Trustees of Leake & Watts Orphan House, 2 Den. 577; s. c. 11 Paige, 80; Voorhis *v.* Childs, 17 N. Y. 354; Hoyt *v.* Bonnett, 50 N. Y. 538 (rev. 58 Barb. 529); Pope *v.* Cole, 55 N. Y. 124 (14 Am. Rep. 198); Moore *v.* Brink, 6 Thomp. & C. 22; 4 Hun, 402; Bridge *v.* Swain, 3 Redf. 487; Burgwyn *v.* Hostler, Tayl. (N. Ca.) 124; 1 Am. Dec. 582 (altered by statute); Jarvis *v.* Hyer, 4 Dev. L. 367; Gowan *v.* Tunno, Rich. Eq. Cas. (S. Ca.) 369, 377; Sale *v.* Dishman, 3 Leigh (Va.), 548; Barlow *v.* Coggan, 1 Wash. Ty. 257; Sherman *v.* Kreul, 42 Wis. 53. And see cases cited in next notes. In Roosvelt *v.* McDowell, 1 Ga. 489, a statute that where a note is signed by two or more persons and one die, his representative may be joined, it was held, must be strictly construed, as being in derogation of the common law, and does not enlarge the remedy, where a partnership name only is used, especially as the survivors control all the assets.

[1] Lane *v.* Williams, 2 Vern. 292; Mason *v.* Tiffany, 45 Ill. 392; Silverman *v.* Chase, 90 Ill. 37; Doggett *v.* Dill, 108 Ill. 560 (48 Am. Rep. 565); Sale *v.* Dishman, 3 Leigh (Va.), 548; Winter *v.* Innes, 4 My. & Cr. 101. *Contra*, see Jackson *v.* King, 12 Gratt. 499. See § 534.

[2] Storer *v.* Hinkley, Kirby (Conn.), 147; Lang *v.* Keppele, 1 Bin. (Pa.) 125. In Pullen *v.* Whitfield, 55 Ga. 174, 176, is a statement that a discharge of the survivor in bankruptcy is not sufficient, giving as a reason that that does not release the partnership assets; but a contrary *dictum* is announced in Anderson *v.* Pollard, 62 Ga. 46. And see Rice, appellant, 7 Allen, 112.

[3] Emanuel *v.* Bird, 19 Ala. 596 (54 Am. Dec. 200); Filley *v.* Phelps, 18 Conn. 294, 301; Vance *v.* Cowing, 13 Ind. 460; Wilder *v.* Keeler, 3 Paige, 167, 172; Stahl *v.* Stahl, 2 Lans. 60; Pope *v.* Cole, 55 N. Y. 124 (14 Am. Rep. 198); First Nat'l Bk. *v.* Morgan, 73 N. Y. 593; Horsey *v.* Heath, 5 Oh. 353; Caldwell *v.* Stileman, 1 Rawle, 212; Pearce *v.* Cooke, 13 R. I. 184; Wardlaw *v.* Gray, Dudley, Eq. 85; Fisher *v.* Tucker, 1 McCord, Ch. 169; Sale *v.* Dishman, 3 Leigh, 548.

[4] Vance *v.* Cowing, 13 Ind. 460; Slatter *v.* Carroll, 2 Sandf. Ch. 573; Copcutt *v.* Merchant, 4 Bradf. 18; Pope *v.* Cole, 55 N. Y. 124 (14 Am. Rep. 198); First Nat'l Bk. *v.* Morgan, 73 N. Y. 593; Horsey *v.* Heath, 5 Oh. 353; Sale *v.* Dishman, 3 Leigh, 548.

[5] Stahl *v.* Stahl, 2 Lans. 60.

Execution returned *nulla bona* is sufficient proof of insolvency,[1] and probably if the survivor has absconded and is out of the jurisdiction.[2] Where the survivor had assigned for benefit of creditors, it was held not to be necessary to wait until the assignment was wound up;[3] on the other hand, it has been said that the firm assets should be exhausted.[4]

The surviving partner is a necessary party, because he is interested in taking the account.[5]

That he is a proper, but not always a necessary, party has also been held.[6]

A statute allowing an administrator to be sued with the surviving partner does not change the primary liability of the latter, so as to make a judgment against the former alone and a dismissal of the latter valid, unless there are allegations of the firm's insolvency.[7]

A statute that, on judgment against a joint debtor, a proceeding may be filed against the co-debtor to make him party to the judgment, has no application to executors of a deceased partner, for they are not joint debtors, and cannot be reached by an attempt to make them parties to the judgment.[8]

§ 751. Private creditors, etc., of the decedent's estate.— Generally, there being no privity between those beneficially interested in the separate estate, but not representing it, they cannot maintain a bill for an accounting against the surviving partners, but their only remedy is to compel the administrator to account, as if he had performed his duty in

[1] Fillyau *v.* Laverty, 3 Fla. 72; Pope *v.* Cole, 55 N. Y. 124; 14 Am. Rep. 198; Pearce *v.* Cooke, 13 R. I. 184.

[2] See Horsey *v.* Heath, 5 Oh. 353, 355; Drake *v.* Blount, 2 Dev. (N. Ca.) Eq. 353.

[3] Pearce *v.* Cooke, 13 R. I. 184.

[4] Waldron *v.* Simmons, 28 Ala. 629; Pullen *v.* Whitfield, 55 Ga. 174; McGill *v.* McGill, 2 Met. (Ky.) 258; Buckingham *v.* Ludlum, 37 N. J. Eq. 137.

[5] Fillyau *v.* Laverty, 3 Fla. 72.

[6] Stahl *v.* Stahl, 2 Lans. 60; Butts *v.* Genung, 5 Paige, 254. If the general estate is by the will embarked in the business, a creditor, in suing the survivor and administrator, need not make a residuary legatee party, but may join him as having an interest and he alone can object. Burwell *v.* Cawood, 2 How. 560, 575.

[7] Pullen *v.* Whitfield, 55 Ga. 174.

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

requiring a winding up of the partnership estate, or to seek his removal. But in case of fraud or collusion between the administrator and the surviving partners, or where the administrator is a surviving partner, or where the administrator has in some way, by his conduct or relations with the survivors, disqualified himself to protect the separate estate against them, or in case of other special circumstances rendering an accounting necessary to protect the separate estate, it will be ordered.[1]

SOLVENT PARTNER.

§ 752. When one partner makes an assignment of his effects in bankruptcy this action dissolves the firm (§ 583), which, in consequence, must be wound up. The assignee in bankruptcy is entitled, not to any specific share of the assets, but to the share of the bankrupt as defined in section 180; that is to say, the operation of the two principles — the right of each partner to have the joint debts paid, so as to reduce his own individual liability and preserve his balance, which right belongs to each solvent partner and to the assignees of the bankrupt, and the right of *delectus personarum*,[2] which prevents the assignee becoming a partner in the place of the bankrupt — require the solvent partners to wind up at once.

§ 753. The assignee in bankruptcy acquires all the rights of the bankrupt partner, except as modified by the right of *delectus personarum*. The bankrupt is not *civiliter mortuus*, and the solvent partner does not, like a surviving partner, receive the entire title; hence it is very common to say that the assignee and the solvent partners become tenants in common in the assets.[3] And this extends to choses in action; hence the solvent partners cannot sue alone to collect a debt, but must join the assignee as co-plaintiff.[4] Nor can

[1] See Accounting, who can ask, §§ 925, 926.

[2] § 184.

[3] Holderness *v.* Shackles, 8 B. & C. 612; Forsaith *v.* Merritt, 1 Lowell, 336; Wilkins *v.* Davis, 2 id. 511; Halsey *v.* Norton, 45 Miss. 703; Murray *v.* Murray, 5 Johns. Ch. 60, 70.

[4] Thomason *v.* Frere, 10 East, 418; Graham *v.* Robertson, 2 T. R. 282; Eckhardt *v.* Wilson, 8 id. 140; Halsey *v.* Norton, 45 Miss. 703; Murray

the assignee of the bankrupt sue without joining the solvent partner.[1] Hence the assignee of one partner cannot recover back a fraudulent payment made by the firm, for only the firm or its assignee can claim such fund.[2]

§ **754.** The solvent partner is almost always in possession of the assets, and this possession is not disturbed. The bankrupt has parted with his power over his own property and has no capacity to contract in relation to it, and the right of *delectus personarum* prevents the assignee from acting in his place; hence the general principle is that the solvent partners have the sole right to wind up the partnership, and for that purpose are entitled to the exclusive possession of the assets.[3]

But it seems that this right is not an absolute one but is subject to the power of the court; and where the assignee is in possession of the assets of the partnership or of part of them, he will not be disturbed without good cause, but can administer them by payment of joint creditors and copartners, in the same order that the solvent partners would have done.[4]

v. Murray, 5 Johns. Ch. 60, 70; Browning *v.* Marvin, 22 Hun, 547.

[1] Eckhardt *v.* Wilson, 8 T. R. 142; Forsaith *v.* Merritt, 1 Lowell, 336, 337; Hudgins *v.* Lane, 11 Bankr. Reg. 462, 468.

[2] Amsinck *v.* Bean, 22 Wall. 395; Wright *v.* Condict (Supr. Ct. U. S. 1881), Lawyers' Coop. Book 26, p. 562; Forsaith *v.* Merritt, 1 Low. 336; Wallace *v.* Milligan, 110 Ind. 498; Grant *v.* Crowell, 42 N. J. Eq. 524; the creditors were allowed to intervene in an action for an accounting to reach and share property fraudulently converted by the partners, Grossini *v.* Perazzo, 66 Cal. 545; but not to obtain personal judgments against the partners, Seligman *v.* Kalkman, 17 Cal. 152.

[3] Fox *v.* Hanbury, Cowp. 445; Allen *v.* Kilbre, 4 Madd. 464; *Ex parte* Finch, 1 D. & Ch. 274; Fraser *v.* Kershaw, 2 K. & J. 496; *Ex parte* Owen, 13 Q. B. D. 113; Amsinck *v.* Bean, 22 Wall, 395; Tallcott *v.* Dudley, 5 Ill. 427; Hanson *v.* Paige, 3 Gray, 239, 242; Schalck *v.* Harmon, 6 Minn. 265, 270; Ogden *v.* Arnot, 29 Hun, 146; Renton *v.* Chaplain, 9 N. J. Eq. 62. And see Dearborn *v.* Keith, 5 Cush. 224; Autenreith *v.* Hessenbauer, 43 Cal. 356; Cunningham *v.* Munroe, 15 Gray, 471.

[4] Amsinck *v.* Bean, 22 Wall. 395; Wilkins *v.* Davis, 2 Low. 511, 515; 15 Bankr. Reg. 60; *Re* Shanahan, 6 Biss. 39; Murray *v.* Murray, 5 Johns. Ch. 60, 78; Hubbard *v.* Guild, 1 Duer, 662. But query, *contra*, Hudgins *v.* Lane, 11 Bankr. Reg. 462, 468.

And if the assignee is in possession, he can proceed without special investment of power from the court,[1] and the solvent partners cannot annul his acts or compel him to account, or compel a debtor from whom he has collected to pay over again;[2] and it has even been said that the court could have the assignee wind up the partnership, and refuse the solvent partners this power, but would act with great caution in so doing;[3] if the solvent partner is absent from the country, the assignee can take the property and administer.[4]

§ 755. The solvent partner has all the powers necessary to a winding up, but no others; hence he can collect the debts;[5] and if he has to sue the debtors by reason of the assignee having forbidden the debtors to pay him, the assignee may be made liable for costs,[6] and can sell the effects,[7] and can pay the debts,[8] and can give a chattel mortgage for that purpose to a creditor,[9] or deliver goods in payment,[10] and consequently need not pay *pro rata*, but may prefer creditors.[11]

This power to wind up is personal to himself and cannot be assigned by him.

Hence a judgment and execution against him by his creditor, and a sale and purchase of his interest, will not transfer the right, and the assignee of the bankrupt partner can obtain injunction against the buyer at the execution sale interfering,[12] and if he

[1] Wilkins *v.* Davis, 2 Low. 511, 515; 15 Bankr. Reg. 60; but assets of the firm in the hands of the bankrupt are not assets of the separate estate, and if the assignee gets them he must account to the partnership creditors for the proceeds, Jones *v.* Newsom, 7 Biss. 321.

[2] Murray *v.* Murray, 5 Johns. Ch. 60, 73, 78.

[3] Parker *v.* Muggeridge, 2 Story, 334, 347; Tallcott *v.* Dudley, 5 Ill. 427, 437; Wilkins *v.* Davis, 2 Low. 511; 15 Bankr. Reg. 60.

[4] Barker *v.* Goodair, 11 Ves. 78, 86; Murray *v.* Murray, 5 Johns. Ch. 60, 76.

[5] Harvey *v.* Crickett, 5 M. & S. 336; Freeland *v.* Stansfeld, 2 Sm. & G. 479; Ogden *v.* Arnot, 29 Hun, 146.

[6] Freeland *v.* Stansfeld, *supra.*

[7] Fox *v.* Hanbury, Cowp. 445; Fraser *v.* Kershaw, 2 Kay & J. 496; Morgan *v.* Marquis, 9 Exch. 145; Ogden *v.* Arnot, 29 Hun, 146.

[8] Harvey *v.* Crickett, 5 M. & S. 336; Woodbridge *v.* Swann, 4 B. & Ad. 633; Ogden *v.* Arnot, 29 Hun, 146.

[9] Ogden *v.* Arnot, 29 Hun, 146.

[10] Smith *v.* Oriell, 1 East, 368.

[11] Ogden *v.* Arnot, *supra.*

[12] Fraser *v.* Kershaw, 2 Kay & J. 496.

delays to assert his right, and allows the assignee in bankruptcy to take possession and wind up, he has waived it.[1]

The solvent partner has no right to make new contracts involving a continuance, instead of a closing of business; and if he trades on the assets or capital instead of winding up, it will be at his own risk, and the assignee will have the option of requiring him to account for profits or to pay interest.[2]

§ 756. **Remaining partner after sale of share.**— The same principles apply where the dissolution is caused by one partner selling his interest in the firm to a third person. The right of *delectus personarum* excludes the latter from participation in the winding up, and his only right is to receive his share of the surplus as soon as it can be ascertained; but the duty of paying debts, collecting credits and disposing of the assets devolves upon the remaining partners.[3] If the remaining partners abuse their trust, the interference of the chancellor can of course be obtained, and an injunction and receiver will be granted if necessary.[4]

[1] Vetterlein *v.* Barnes, 6 Fed. Rep. 693; Tracy *v.* Walker, 3 West. L. Month. 574; 1 Flip. 41.

[2] See Crawshay *v.* Collins, 15 Ves. 218; 2 Russ. 325; and see §§ 794–801. In England the effect of the assignment in bankruptcy will date back to the commission of the act of bankruptcy, except as against *bona fide* intervening rights. See Thomason *v.* Frere, 10 East, 418; *Ex parte* Robinson, 3 Dea. & Ch. 376; 1 Mont. & A. 18; Craven *v.* Edmonson, 6 Bing. 734; Lacy *v.* Woolcott, 2 D. & R. 458; Heilbut *v.* Nevill, L. R. 4 C. P. 354. Hence a commission in bankruptcy supersedes an attachment levied since the act of bankruptcy. Dutton *v.* Morrison, 17 Ves. 193; *Re* Wait, 1 Jac. & W. 605. *Contra*, Fern *v.* Cushing, 4 Cush. 357; Forsaith *v.* Merritt, 1 Low. 336, 337; 3 Bankr. Reg. 11.

[3] Miller *v.* Brigham, 50 Cal. 615; Reece *v.* Hoyt, 4 Ind. 169; Saloy *v.* Albrecht, 17 La. Ann. 75; Choppin *v.* Wilson, 27 id. 444; Hamill *v.* Hamill, 27 Md. 679; Renton *v.* Chaplain, 9 N. J. Eq. 62; McGlensey *v.* Cox, 1 Phila. 387; 5 Pa. L. J. Rep. 203; Fox *v.* Rose, 10 Up. Can. Q. B. 16. And see Farley *v.* Moog, 79 Ala. 148. Compare § 1111.

[4] Renton *v.* Chaplain, 9 N. J. Eq. 62; Ballard *v.* Callison, 4 W. Va. 326. See §§ 988–1008.

CHAPTER IX.

WINDING UP INTER SE.

§ 757. The proceedings necessary to obtain a winding up by decree of court will be treated under Remedies, but the considerations which govern the distribution of assets belong here, for they are the same whether the winding up is by the chancellor or by a surviving or solvent or remaining partner or by a liquidating or settling partner.

§ 758. **Time covered by an accounting.**— In taking an account by a master or by the chancellor the accounting must begin, where there has been no partial settlement, from the beginning of the joint dealings. But if the parties have at any time come to a settlement of past transactions, or have periodically made final settlements, these are conclusive between them, and the account will be taken from the date of the last settlement, or, in other words, will embrace the unsettled matters only. The stated accounts can be reopened or surcharged and falsified for proper cause, but this subject will be considered in treating of defenses to the suit for an accounting.

The accounting must of course end with the cessation of the partnership dealings, and if these dealings are continued after dissolution without authority by some of the partners with the assets of the firm, these subsequent matters are to be included in the account, and items of debit or credit made after the suit for an accounting has been begun.[1] Certain items, arising sometimes by reason of provisions in the articles, and sometimes by reason of the conduct or misconduct of the partners, in addition to charges of collections and payments, frequently have to be considered by

[1] As, for example, appropriations by a partner, Robinson *v* Bland, 2 Burr. 1086; Day *v.* Lockwood, 24 Conn. 185; or rents and profits of the property which accrue pending an appeal, Clark *v.* Jones, 50 Cal. 425.

the master, such as compensation to some partners, deductions against others, interest charges, expenses and outlays by some of the partners in the prosecution of business, to which are applied, for convenience, the general phrase: Just allowances. These and the usual items will now be considered.

§ 759. **Losses in general.**— A partner who has paid more than his share of the losses is entitled to be reimbursed the excess. What is such share, when the capital has been impaired, will be considered in speaking of distribution. The ratio of division of losses is governed by the articles, and where they are silent, is a question to be determined from other circumstances with a presumption in favor of equality.[1]

If by the partnership contract a partner is not to bear any part of the losses, he can require reimbursement for the entire amount which he has paid.[2]

Where partners were required to deposit collateral in New York, and one partner let the firm have bonds for the purpose, and they were stolen in the bank in New York, the firm is liable to the partner who owned them for the loss.[3]

So where a partner paid an award made against the firm, the award is conclusive on a question of contribution, and so a referee's finding on a question between the firm and third persons is binding when settlement is sought between the partners.[4]

If he be a nominal partner, and hence not a proper party to an accounting, he recovers by an action at law what he has been compelled to pay,[5] as does also a retired partner who has not preserved his lien.[6] And if a partner incurs a personal liability on behalf of the firm he is entitled to indemnity in regard to it.[7]

§ 760. **When some are unable to contribute.**— If one partner has paid all the debts and some of the other partners are insolvent, he is entitled to compel indemnity from the remaining solvent partners as if they were the only co-

[1] See § 181.

[2] Geddes *v.* Wallace, 2 Bligh's Rep. 270; Gillan *v.* Morrison, 1 De G. & S. 421.

[3] Archer *v.* Walker, 38 Ind. 472.

[4] Evans *v.* Clapp, 123 Mass. 165, 172.

[5] Latham *v.* Kenniston, 13 N. H. 203.

[6] § 550.

[7] Wright *v.* Hunter, 5 Ves. 792.

partners, so that the loss from the insolvency of some of the partners shall be shared equally by the rest.[1]

So if the executor of the liquidating partner, who dies insolvent and indebted to the firm, pays to some of the partners their shares without the consent of the others, the sums so received must be accounted for to and divided among all the surviving partners;[2] and if the liquidating partner dies insolvent, appointing one of the co-partners executor, who retains out of the estate his own share of profits as a debt due from the decedent, he must account for it to the other survivors.[3]

LOSSES CAUSED BY A PARTNER.

§ 761. Through culpability. — A partner is liable for losses arising from culpable neglect of duty or breach of good faith, or breach of the partnership agreement, or acts beyond his authority, and such losses will, on an accounting, be charged to him alone or deducted from his profits.[4] As where he invests its funds or buys property foreign to the scope of the partnership objects, or prohibited by the articles, or in excess of the limited price, or diverts the funds or credit;[5] or if he cause loss by interference with a partner

[1] *Ex parte* Moore, 2 Gl. & J. 166; *Ex parte* Plowden, 2 Dea. 456; 3 Mont. & A. 402; *In re* Dell, 5 Sawy. 344; Whitman *v.* Porter, 107 Mass. 522; Scotto *v.* Bryan (N. Ca. 1887), 3 S. E. Rep. 235. And so if one has removed without the jurisdiction, Whitman *v.* Porter, *supra;* Henry *v.* Jackson, 37 Vt. 431.

[2] Allison *v.* Davidson, 2 Dev. Eq. 79.

[3] Id. And see Solomon *v.* Solomon, 2 Ga. 18. If the partners have estimated the debts and apportioned the amount, the court will follow the apportionment on finding the debt exceeded the estimate, Edwards *v.* Remington, 60 Wis. 33, 39.

[4] See on the general principle, Hubbard *v.* Price, 34 Ark. 80; Morrison *v.* Kramer, 58 Ind. 38; Carlin *v.* Donegan, 15 Kan. 495; Murphy *v.* Crafts, 13 La. Ann. 519; Walpole *v.* Renfroe, 16 id. 92; Hellman *v.* Reis, 1 Cint. Superior Ct. Rep. 30 (aff'd in 25 Oh. St. 180); Devall *v.* Burbridge, 6 W. & S. 529; Holmes *v.* Bigelow, 3 Desaus. (S. Ca.) 497. As to the jurisdiction to consider claims for unliquidated damages in an accounting, see § 780. Cameron *v.* Watson, 10 Rich. Eq. 64; Soules *v.* Burton, 36 Vt. 652. In the last two cases the other partners had ratified or approved the act.

[5] Honore *v.* Colmesnil, 1 J. J. Mar. (Ky.) 506; Looney *v.* Gillenwaters, 11 Heisk. (Tenn.) 133; Roberts *v.* Totten, 13 Ark. 609; Pierce *v.* Daniels, 25 Vt. 624; Smith *v.* Loring, 2 Oh. 440; Reis *v.* Hellman, 25 Oh. St. 180; Tomlinson *v.* Ward, 2 Conn. 396.

having the exclusive management of the business or its winding up,[1] or by culpable neglect of a charge he has undertaken.[2]

Thus where the managing partner in a colliery, without proper inquiry as to the boundaries of the property, and after notice from the adjoining owner, recklessly, and with culpable negligence, continues work beyond the boundaries, he cannot have contribution from the copartners;[3] or where a partner compromise a debt due without cause,[4] or paying a debt of the firm, knowing the creditor to be owing the firm, without deducting the set-off,[5] or pays an unfounded claim.[6]

Of course misconduct or breach of contract may disentitle a partner to claim reimbursement when the loss was his own fault. Thus a partner who had agreed to put in all the capital, and the enterprise failed from his not doing so, cannot call upon his partner for reimbursement.[7] And a partner who had agreed to contribute an equal amount with the others and only paid in half his share, cannot, on dissolution, have a full share of profits.[8]

So where B., of Buffalo, and M. & K., of Chicago, formed a partnership in the coal business, B. to furnish all the coal and M. & K. to sell it and remit the proceeds, to the amount of the cost, to B. weekly. Here M. & K.'s failure to remit the proceeds as agreed disentitles them to damages for B.'s consequent refusal to continue to ship coal, and M. & K.'s colorable sales, in order to compel B. to continue the supply, will be charged against them as sales for cash. And B. will not be compelled to pay a share of

[1] Haller *v.* Willamowicz, 23 Ark. 566; Richardson *v.* Wyatt, 2 Desaus. (S. Ca.) 471. A partner who, on dissolution, takes possession of machinery which it was agreed that the copartner should take back at the value at which he contributed it, is chargeable only with its actual value at the time of dissolutiou. Weldon *v.* Beckel, 10 Daly, 472.

[2] Pratt *v.* McHatton, 11 La. Ann. 260, neglect to collect; Bohrer *v.* Drake, 33 Minn. 408, where a partner allowed eggs to get rotten from want of care; Grove *v.* Miles, 85 Ill. 85, neglect and refusal to rent when good tenants could be had.

[3] Thomas *v.* Atherton, 10 Ch. D. 185.

[4] Honore *v.* Colmesnil, 1 J. J. Mar. 506.

[5] Cockrell *v.* Thompson, 85 Mo. 510.

[6] *Re* Webb, 2 J. B. Moore, 500; McIlreath *v.* Margetson, 4 Doug. 278.

[7] Bonis *v.* Louvier, 8 La. Ann. 4.

[8] Smith *v.* Hazleton, 34 Ind. 481; Durbin *v.* Barber, 14 Oh. 311. And see § 780.

damages found against the firm on account of M. & K.'s failure to fulfill contracts of sale, for that would be to let them take advantage of their own wrong.[1]

Or if the managing partner borrow money, agreeing to pay a large share of the profits in lieu of interest, and this is beyond his express or implied authority, he can only be credited with the amount and surplus interest.[2] And where a partner arbitrarily and ill-advisedly sells the entire assets at a low price, he will be charged with their real value, and an account of stock taken shortly before will be evidence thereof.[3]

In Mitchell *v.* Read, 84 N. Y. 556 (aff'g 19 Hun, 418), at the expiration of a partnership in a hotel, one partner procured a renewal of the lease in his own name and for his own benefit, in consequence of which the sale of the partnership effects upon decree of dissolution produced only the value of the furniture and nothing for the good will. Such partner was charged with the loss.

So of losses by the illegal acts of a partner,[4] unless the partnership is itself illegal or the partner claiming reimbursement be *particeps criminis;*[5] but breaches of trust do not belong to this category;[6] or if he signs the firm name as surety he must bear the loss whether he or another partner pays it,[7] or uses the assets to pay the debts of a former firm without the incoming partner's consent;[8] or makes a loan for speculation not within the scope of his authority.[9]

If a partner, on dissolution, pays over such funds as are in his hands to the acting partner, he is not liable for its loss upon the insolvency of the latter. But if, after final settlement, he leaves his share in the hands of the acting partner, it is at his own risk.[10]

Where a firm is a member of another firm, negligence of one of its partners in his capacity of agent of the larger firm, and mismanagement, is not chargeable to the other members of the former firm. Thus, in Fordyce *v.* Shriver,[11] a partnership was composed of

[1] Maher *v.* Bull, 44 Ill. 97.
[2] Chandler *v.* Sherman, 16 Fla. 99.
[3] Crawford *v.* Spotz, 11 Phila. 255.
[4] Campbell *v.* Campbell, 7 Cl. & Fin. 166.
[5] §§ 119–129.
[6] Ashurst *v.* Mason, L. R. 20 Eq. 225.
[7] Berryhill *v.* McKee, 1 Humph. 31. 37; Smith *v.* Loring, 2 Oh. 440.
[8] Wentworth *v.* Raiguel, 9 Phila. 275.
[9] Cooke *v.* Allison, 30 La. Ann. Part II, 963.
[10] Allison *v.* Davidson, 2 Dev. Eq. 79. 115 Ill. 530.

three members, the firm of A. & B. being one, the firm of C. & D. another, and the firm of E., F. & G. being the third. E. was made manager and superintendent of the partnership, and heavy losses resulted from his mismanagement. It was held that he alone, and not the firm of E., F. & G., was liable to the other partners for the loss.

§ 762. **As to amount.**— But the delinquent partner is only chargeable to the extent of losses proven; his claim is not for services forfeitable for breach of contract, nor a claim on *quantum valebat*, and his right to a share of profits beyond such loss is not extinguished.[1]

Thus where S. & C. operated a mill belonging to them jointly, each running one saw, and the dam broke and S. began to mend it, but C. took down the breast of the dam opposite his saw and never put it up again, and without it the mill could not be operated, here S. is entitled as against C. only to the cost of replacing the breast, because the duty to repair devolves equally on both.[2]

And if the act was authorized or ratified, the loss falls on the firm.[3]

Thus where there was a depreciation in business owing to the bad habits of one partner, the copartner, who did not dissolve until he had reformed, cannot recoup on this ground.[4]

The other partners do not, by attending the arbitration of damages claimed against a firm from the acts of one partner, ratify or agree to contribute to them.[5]

Assent to the appropriation of partnership property to pay the private debt of one partner does not defeat the right of the other partners to be allowed the amount in settlement.[6]

§ 763. **Mistakes of judgment.**— Though the degree of loyalty required from a partner to his firm is *uberrima fides*, a similar degree of care or of judgment is not required. And the consequences of an honest mistake of judgment

[1] See Tutt *v.* Land, 50 Ga. 339.

[2] Stallings *v.* Corbett, 2 Spears (S. Ca.), L. 613.

[3] Cameron *v.* Watson, 10 Rich. (S. Ca.) Eq. 64; Soules *v.* Burton, 36 Vt. 652; Cragg *v.* Ford, 1 Younge & Coll. Ch. Cas. 285; Murphy *v.* Crafts, 13 La. Ann. 519.

[4] Mills *v.* Fellows, 30 La. Ann. 824.

[5] Thomas *v.* Atherton, 10 Ch. D. 185.

[6] Currier *v.* Bates, 62 Iowa, 527.

or trivial departure from the agreement in exceptional exigencies, or want of extraordinary caution, will not be visited upon him, provided he acted *bona fide* and with a fair degree of care, and the loss must fall on the firm.[1]

In Lyles *v.* Styles, 2 Wash. C. C. 224, two persons were partners in a cargo, and one wrote to the other, who was master of the ship, to sell for cash. He sold for bills on the French government, which were not paid, and the loss was held to fall on both, his conduct being *bona fide* and according to his best judgment, for he had the right of disposition and the other partner could only advise and not order.

So in Cragg *v.* Ford, 1 Younge & Coll. Ch. Cas. 280, the defendant engaged in winding up after dissolution was requested by his partner to sell their cotton at once, but he delayed and the price fell. He does not have to bear the entire loss if his judgment was for delay. The other partner could have sold it himself.

In Caldwell *v.* Leiber, 7 Paige, 483, 507, one partner ordered goods removed from the cellar, fearing danger from rising of water; the other countermanded the order, supposing in good faith there was no danger, and the goods were injured; the latter will not be charged with the loss, but it will be presumed that he needed the clerk's services elsewhere and not that he intended to thwart his copartner.

In Hall *v.* Sannoner, 44 Ark. 34, partners had agreed not to sell on credit. One did, with the other's assent, sell on credit, and on a later sale a loss resulted. It was presumed that in being permitted to give credit a reasonable discretion was given him, and the loss is mutual if he acted as seemed most beneficial.

So in Tillotson *v.* Tillotson, 34 Conn. 335, the sole managing partner of a plantation in Louisiana received payment in parish scrip, then current but subsequently proved worthless, and also incurred the injudicious expense of building a barn.

In Morrison *v.* Smith, 81 Ill. 221, the partners deposited their

[1] But in Stidger *v.* Reynolds, 10 Oh. 351, the sole managing partner, whose copartner was a female and all the capital had been contributed by her, and who accounted honestly for everything, was held bound to do more and to explain by proof the causes of his failure to make ordinary profits, because he has incurred the obligation to render his trust profitable, and the adoption of a less stringent rule was deprecated as affording temptation and opportunity. But a partner is not a trustee.

funds in a bank, and one partner, by arrangement with the bank, took control of the fund to prevent his partner from taking it, but without intent to appropriate it, nor did he prevent the other from securing the debt, and the bank failed; the loss falls on both.[1]

In Starr *v.* Case, 59 Iowa, 491, a partner who paid over money in his hands to its owner, who was indebted to the firm, is not to be charged with the amount as if he still had it.

In Blair *v.* Johnston, 1 Head (Tenn.), 13, two of the partners of a firm organized to lay out and build a town, lent money of the firm to the town, believing this would promote its growth. The loss was held to be that of the company and not of such partners.

So if a partner in winding up sells at an injudicious time,[2] or fails to collect the purchase money without fault or negligence,[3] or takes in payment securities then considered good, which turn out worthless;[4] or invests collections in such securities in good faith,[5] the loss will fall upon the firm, and will not be imposed upon him alone.

§ 764. **Diligence.**— So if, in settling up the partnership, claims are in the hands of one partner for collection, where he has not contracted to assume the exclusive duty of so doing, and he uses the care that he might have used in his own business, and a reasonable diligence, he is not chargeable for non-collection,[6] or depreciation of currency,[7] or neglect of a competent attorney whom he employed,[8]

[1] See, also, Campbell *v.* Stewart, 34 Ill. 151. But a partner who mixes the funds with his own and deposits them in his own name and uses and controls them himself, must bear the loss of failure of the bank, Lefever *v.* Underwood, 41 Pa. St. 505; but not if they were so kept and mixed by mutual consent and charged on the books to such partner, merely to show in whose hands they were, Campbell *v.* Stewart, 34 Ill. 151.

[2] Morris *v.* Allen, 14 N. J. Eq. 44.

[3] Peters *v.* McWilliams, 78 Va. 567.

[4] Mayson *v.* Beazley, 27 Miss. 106.

[5] Thompson *v.* Rogers, 69 N. Ca. 857.

[6] Wilder *v.* Morris, 7 Bush, 420; Cunningham *v.* Smith, 11 B. Mon. 325, 329; Grove *v.* Fresh, 9 Gill & J. 280; Hollister *v.* Barkley, 11 N. H. 501; Jessup *v.* Cook, 6 N. J. L. 434, 437; Phelan *v.* Hutchison, Phil. (N. Ca.) Eq. 116; McRae *v.* McKenzie, 2 Dev. & Bat. Eq. 232; Richardson *v.* Wyatt, 2 Desaus. 471.

[7] McNair *v.* Ragland, 1 Dev. Eq. 516. *Contra*, Succession of Wilde, 21 La. Ann. 371, where a surviving partner took payment in Confederate notes. And see Garrett *v.* Bradford, 28 Gratt. 609.

[8] Aiken *v.* Ogilvie, 12 La. Ann. 353.

though he has sole possession of the books and accounts, there being no element of exclusion.[1]

In Cunningham *v.* Smith, 11 B. Mon. 325, 329, and De Lazardi *v.* Hewitt, 7 id. 697, he was said not to be liable in the absence of culpable negligence. And in Hollister *v.* Barkley, 11 N. H. 501, and Wilder *v.* Morris, 7 Bush, 420, it was held that a partner was not to be charged with accounts which by reason of his neglect or non-action had become barred by time, for the other partner might have brought suits on them, or had a receiver to collect.

So if a partner in good faith instruct an agent of the firm, who had been employed to collect, to suspend collecting, and some of the claims were consequently lost, he is not chargeable.[2] And he is not liable for losses by defalcations and disobedience of a clerk of the firm under his control.[3] If a partner who has agreed to bear all losses on sales to irresponsible parties, is prevented by injunction from collecting from buyers, he is not liable.[4] But if a partner is appointed receiver he is chargeable with debts lost by delay or neglect.[5]

If the partner having charge of the winding up produce part of the invoices, and overcharges in his own favor appear in them, the court will presume that similar overcharges will appear in those not produced, and will deduct accordingly.[6]

§ 765. **Must account for assets he has received.**—In settling accounts a partner proved to have received tangible property of the firm is chargeable with its value unless he shows a disposition of it, because another rule would impose an undue burden on the other partner.[7]

[1] Story *v.* Moon, 3 Dana, 331; Wilder *v.* Morris, 7 Bush, 420; Grove *v.* Fresh, 9 Gill & J. 280; Randle *v.* Richardson, 53 Miss. 176; McRae *v.* McKenzie, 2 Dev. & Bat. Eq. 232; Richardson *v.* Wyatt, 2 Desaus. 471. *Contra*, Lee *v.* Lashbrooke, 8 Dana, 214.

[2] Day *v.* Lockwood, 24 Conn. 185.

[3] Roberts *v.* Totten, 13 Ark. 609. And see Aiken *v.* Ogilvie, 12 La. Ann. 353.

[4] Maher *v.* Bull, 44 Ill. 97.

[5] Honore *v.* Colmesnil, 1 J. J. Mar. 506.

[6] Bush *v.* Guion, 6 La. Ann. 797.

[7] Laswell *v.* Robbins, 39 Ill. 209; Webb *v.* Fordyce, 55 Iowa, 11. Thus if continuing partners take judgment on a partnership debt and execution is returned satisfied, it will be presumed that they received the avails. Boyd *v.* Foot, 5 Bosw. 110. And I submit that this rule should have been adopted in Jenkins *v.* Peckinpaugh, 40 Ind. 153, where in

But if the other partner has refused to assist in winding up, the partner who attempted to discharge his duty is not to be made to account primarily for the assets, or charged on mere probabilities, where to make him more answerable than the one who failed to do so would be offering a premium to delinquency.[1]

Nor will surviving partners be charged with amounts not collected on their sales in winding up in the absence of proof of bad faith or negligence.[2] Nor does it follow that a partner having possession of the books is to be charged with all credits therein as if collectible; on the contrary, he does not have the burden of proving the accounts to be uncollectible.[3]

EXPENSES AND OUTLAYS.

§ 766. It seems obvious enough that in an accounting each partner is to be credited with all proper items of expense incurred by him on behalf of the firm in the ordinary conduct of the business, and proper exercise of the powers which he possesses,[4] unless unnecessary,[5] even though he neglects or refuses to account.[6]

Expenses were disallowed to a partner in one case where the agreed compensation he was to receive for the services in which

an action by an administrator for an accounting it appeared that the deceased partner had left the place of business with money of the firm to make purchases for it, and had never been seen or heard of since; and on the doctrine that misconduct is not presumed but must be proved, the loss was held to fall upon the partnership, and not upon the estate alone.

[1] Hall *v.* Clagett, 48 Md. 223, 242.

[2] Miller *v.* Jones, 39 Ill. 54.

[3] Phelan *v.* Hutchinson, Phil. (N. Ca.) Eq. 116; McCrae *v.* Robeson, 2 Murph. (N. Ca.) 127; Randle *v.* Richardson, 53 Miss. 176; Story *v.* Moon, 3 Dana, 331. *Contra*, Bush *v.* Guion, 6 La. Ann. 798, that he will be charged with the claims as cash, unless he shows due diligence by himself or insolvency of the debtors.

[4] Thornton *v.* Proctor, 1 Anstr. 94; *Ex parte* Chippendale, 4 DeG. M. & G. 19; Burdon *v.* Barkus, 4 DeG. F. & J. 42; Nichol *v.* Stewart, 36 Ark. 612; King *v.* Hamilton, 16 Ill. 190; Savage *v.* Carter, 9 Dana, 408; Stegman *v.* Berryhill, 72 Mo. 307; Coddington *v.* Idell, 29 N. J. Eq. 504; and see Newell *v.* Humphrey, 37 Vt. 265.

[5] Zimmerman *v.* Huber, 29 Ala. 379, 381; Rodes *v.* Rodes, 6 B. Mon. 400.

[6] Harvey *v.* Varney, 104 Mass. 436.

they were incurred was very generous.[1] And disbursements not made in the name of the firm must be affirmatively shown to be beneficial to it.[2]

Only the actual outlay can be allowed; the rule of good faith will not permit a partner to make a commission out of the firm; thus if a partner in winding up employ one of his own clerks at $2 per day, he cannot charge the firm more because the clerk was worth $4 per day;[3] and so where he settled with a debtor at a reduced price.[4]

In Brigham *v.* Dana, 29 Vt. 1, where a partner was sent out to dig gold, expenses of his sickness on the way home are to be allowed, and after his return, if before he was well enough to resume travel, but not his time while so delayed.

Compensation to or for children of a partner as employees in the business is allowed unless excessive and indicating culpable disregard of the rights of copartners;[5] even though one of the partners who hire the child is receiving a salary as manager;[6] but not for apprentices beyond expenses, for they are deemed apprentices of the firm.[7]

If one partner is to furnish all the capital for the cash payment of a purchase of land, and the copartner is to furnish services in buying it and selling lots, the latter is entitled to charge necessary outlays for surveyors' services.[8] So the expenses of exploring the firm's property, consisting of mines, have been held reasonable.[9]

Where the articles provided that each partner should pay his own individual expenses, and that one member should be liable for all debts and engagements made in New York of which it does not receive the full benefit, the expenses referred to mean private and family expenses at home, and traveling expenses and board bills of the member in New York are chargeable to the firm, for they are neither debts nor engagements.[10]

[1] Mumford *v.* Murray, 6 Johns. Ch. 1.

[2] Rodes *v.* Rodes, 6 B. Mon. 400.

[3] Porter *v.* Wheeler, 37 Vt. 281.

[4] Boyd *v.* Foot, 5 Bosw. 110.

[5] Wilson *v.* Lineberger, 83 N. Ca. 524; Zimmerman *v.* Huber, 29 Ala. 379; Lymau *v.* Lyman, 2 Paine, C. C. 11, 35.

[6] Wilson *v.* Lineberger, *supra.*

[7] Zimmerman *v.* Huber, 29 Ala. 379.

[8] Burleigh *v.* White, 70 Me. 130; and see Pratt *v.* McHatton, 11 La. Ann. 260. In Richardson *v.* Wyatt, 2 Desaus. (S. Ca.) 471, a partner who kept the house was allowed expenditures for boarding the hands.

[9] Sweeney *v.* Neely, 53 Mich. 421.

[10] Withers *v.* Withers, 8 Pet. 355.

§ 767. Useless expenditures.— An expenditure which is both unauthorized and unnecessary cannot be charged to the firm;[1] for example, the payment of an unfounded claim;[2] yet will be allowed if made with the assent or on the request of the copartners, as where a patent right is bought in at the request of the firm, and it proves useless.[3]

In Onderdonk *v.* Hutchinson, 6 N. J. Eq. 632 (reversing s. c. id. 277), both partners had agreed to give $500 to a person who had largely indorsed for and made loans to them, and on dissolution the partner who was winding up actually paid the amount, and it was allowed him, though had it not been paid the court would have excluded it as usurious.

In Tomlinson *v.* Ward, 2 Conn. 396, where by the custom of the house a partner could use its credit to secure his private debts, yet if he then borrows money at excessive interest to redeem such credit, the excess of interest must be borne by him.

In Berry *v.* Folkes, 60 Miss. 576, 613, a surviving partner contracted a usurious obligation to another firm in which the estate of the deceased partner had an interest, and the heir paid the debt and usury without objection by the surviving partner, and the latter was allowed to charge the estate with the usury only to the extent it received the benefit of it.

In Godfrey *v.* White, 43 Mich. 171, 188, the expense of having the books examined and the balances struck, which saved confusion and was of benefit, though there was a subsequent suit for an accounting, was not regarded as unnecessary and was allowed.

In Meserve *v.* Andrews, 106 Mass. 419, A. had underlet part of his shop to B., who carried on a gift enterprise, and afterwards agreed to assist B. for part of the profits. The expense of defending a criminal prosecution for carrying on the business not arising out of acts of A. or with his consent is not a matter of joint concern, although had the prosecution resulted adversely he would probably have abandoned the business.

The expenses and costs of an unsuccessful defense by a surviving partner to an action to collect a claim adjudged to be just are to be allowed as a charge on the partnership estate, and against his

[1] Zimmerman *v.* Huber, 29 Ala. 879, 881.

[2] § 761.

[3] Gleadow *v.* Hull Glass Co. 13 Jur. 1020.

copartner's estate, if he resisted in good faith and did what a man of ordinary prudence would have done; whereas, if he knew it was a good claim and could have compromised at less than the recovery, he can only be allowed the lowest sum for which it could have been settled.[1]

A singular case of outlays arose in Tillotson *v.* Tillotson, 34 Conn. 335, where S., a partner in a plantation, left a will bequeathing all his property to his family and requesting that the plantation be kept running until the parties wished to dissolve, his copartner R. to have the principal management. And for ten years R. ran the plantation, when a bill was filed against him for an accounting. In the management his general course was similar to that of the deceased, and he incurred expenses in supporting a preacher on the plantation, which was of pecuniary value in promoting the good behavior of a hundred slaves; he repaired a building for worship, distributed $140 of provisions in relieving distress in the neighborhood during a crevasse, expended over $3,000 in attending congress to defeat legislation affecting title to lands in the neighborhood, including their own (S. had also done this in his life-time), and was not in fault in not having secured contributions from those similarly interested. All these sums were set down in gross and not itemized, but this was held to go to the evidence and not the legality of the charges, and all were allowed.

§ 768. **Permanent improvements.**—In case of outlays of a permanent character with the expectation of a continuance of the partnership for a long enough time to receive the benefit of them, but where the partnership is suddenly dissolved without fault, it may be said that if the improvement is on the land of a partner an allowance may be made, but if on the land of a third person an allowance cannot be made merely on the ground that a partner may get the benefit of it.

In Burdon *v.* Barkus, 3 Giff. 412 (aff'd, 4 DeG. F. & J. 42), a managing partner had made an improvement on the land of a copartner, and with his knowledge, for partnership purposes, and the firm being unexpectedly terminated, an inquiry as to propriety of an allowance was ordered.

In Chittenden *v.* Witbeck, 50 Mich. 401, C. & W. were partners

[1] Lee *v.* Dolan, 39 N. J. Eq. 193.

in a leased hotel, and when the lease had nearly expired they partially concluded oral arrangements with the lessor for a renewal and for improvements, and in the progress of the improvements the hotel was not available for use and entailed expense, and before completion of the improvements or final agreement for renewal W. died, and his executrix, in the accounting, claimed an allowance because of the loss of profits and increased expense due to the improving, and because the survivor would get the whole benefit of them, but this was disallowed, for the surviving partner may or may not be benefited; he may have to pay more rent and he has lost the benefit of his partner, and it must be regarded merely as a case where death has disappointed expectations.

In Dunnell *v.* Henderson, 23 N. J. Eq. 174, where a partner contributed as his capital the use of his mill, engines and business, and it was agreed that repairs to the machinery, new machinery and fixtures to supply the place of any worn out, should be paid for out of the profits, but that additions to the mill and machinery were to be paid for by him, it was held that a new foundation for a new engine in place of a discarded engine, built because the old foundation would be insufficient even if repaired, must be considered as an addition and as part of the new engine.

§ 769. After dissolution.— The expenses and outlays of a partner continuing the business after dissolution for mutual benefit are allowed;[1] and expenses by a surviving or liquidating partner in winding up.[2] And so of his expenses for the preservation of the property, as insurance premiums,[3] but not those to restore it after destruction, if against the will of the copartners.[4]

Where one partner agreed to take all the real estate and assume certain debts, and that all other debts should be paid out of collections, taxes on the real estate are to be paid out of the joint fund.[5]

[1] Mellersh *v.* Keen, 27 Beav. 236; Airey *v.* Borham, 29 id. 620; Gyger's Appeal, 62 Pa. St. 73 (1 Am. Rep. 382).

[2] Burden *v.* Burden, 1 Ves. & B. 172; Washburn *v.* Goodman, 17 Pick. 519, 526; Tillotson *v.* Tillotson, 34 Conn. 335; Griffey *v.* Northcutt, 5 Heisk. 746, 760; O'Reilly *v.* Brady, 28 Ala. 530.

[3] Conrad *v.* Buck, 21 W. Va. 396, 413. And see *Ex parte* Chippendale, 4 D. M. & G. 19; Burdon *v.* Barkus, 4 D. F. J. 42, 51.

[4] Stebbins *v.* Willard, 53 Vt. 665.

[5] Young *v.* Clute, 12 Nev. 31.

EXTRA COMPENSATION.

§ 770. No right to.—There is no implied contract to compensate a partner who does a larger share of the work of the concern than his copartners. In the absence of a contrary contract or understanding, each is expected to do his best without other reward than the general benefit. It can seldom be supposed that each one will be as valuable or as skilful or as useful or as industrious as the other. The diligent partner's remedy for a failure of duty by the other is to ask a dissolution, but the law cannot measure the unequal services nor settle the comparative value of each, in order to reward the more diligent. Again, there are certain risks, as sickness, temporary absence, or death or other casualties, which are mutual hazards, and trouble of disproportionate labor so occasioned must lie where it falls. This principle, subject to certain guarded limitations hereafter shown, is as inexorable as it is universal.

Thus, where one partner left the business and gave it almost no attention, and the other worked hard at it for over twenty years, he cannot claim compensation,[1] though he is managing partner who has the sole superintendence of the business.[2] The following authorities show the universality of the rule.[3]

[1] Forrer *v.* Forrer, 29 Gratt. 134; for eight years in Thornton *v.* Proctor, 1 Anstr. 94; and in Stratton *v.* Tabb, 8 Ill. App. 225, 227, one of three partners with equal capital did all the work, and the rest attended mainly to other pursuits.

[2] Hutcheson *v.* Smith, 5 Irish Eq. 117; Pierce *v.* Scott, 37 Ark. 308; Randle *v.* Richardson, 53 Miss. 176; Philips *v.* Turner, 2 Dev. & Bat. Eq. 123.

[3] Thornton *v.* Proctor, 1 Anstr. 94; Holmes *v.* Higgins, 1 B. & C. 74; Robinson *v.* Anderson, 20 Beav. 98; Webster *v.* Bray, 7 Hare, 179; Whittle *v.* McFarlane, 1 Knapp, 311; Robinson *v.* Davison, 6 Ex. 269; Boast *v.* Firth, L. R. 4 C. P. 1; Hutcheson *v.* Smith, 5 Irish Eq. 117; Denver *v.* Roane, 99 U. S. 355; Lyman *v.* Lyman, 2 Paine, 11; Zimmerman *v.* Huber, 29 Ala. 379, 380; Shelton *v.* Knight, 68 id. 598; Haller *v.* Willamowicz, 23 Ark. 566; Pierce *v.* Scott, 37 id. 308; Griggs *v.* Clark, 23 Cal. 427; Tillotson *v.* Tillotson, 34 Conn. 335; Ligare *v.* Peacock, 109 Ill. 94; Askew *v.* Springer, 111 id. 662; Roach *v.* Perry, 16 id. 37; Lewis *v.* Moffett, 11 id. 392; Hanks *v.* Baber, 53 id. 292; Strattan *v.* Tabb, 8 Ill. App. 225, 229; McBride *v.* Stradley, 103 Ind. 465; Boardman *v.* Close, 44

§ 771. **Compensation for winding up.**— The same rule by the current of authorities applies after dissolution to forbid the partner winding up the concern to receive extra compensation for so doing. In the case of dissolution by death this is the more justifiable, since it is an equal risk on each partner that he or another may have to do this; but where the dissolution leaves all the partners equally capable of sharing the labors of closing, there would seem to be more reason for compensating any one who relieved the others of their share of it. Nevertheless, the preponderance of adjudication withholds any allowance for merely winding up in the absence of contract, where the business is not continued for the benefit of all; and certainly if all the partners assist the comparative value of the services of each cannot be estimated.[1]

Iowa, 428; Starr *v.* Case, 59 id. 491; Lee *v.* Lashbrooke, 8 Dana (Ky.), 214; Hill *v.* Latta, 12 La. Ann. 179; Mills *v.* Fellows, 30 id. (2d part) 824; Bevans *v.* Sullivan, 4 Gill (Md.), 383; Duff *v.* Maguire, 107 Mass. 87; Dunlap *v.* Watson, 124 id. 305; Heath *v.* Waters, 40 Mich. 457; Godfrey *v.* White, 43 id. 171; Loomis *v.* Armstrong, 49 id. 521; Randle *v.* Richardson, 53 Miss. 176; Berry *v.* Folkes, 60 id. 576, 614; Bennett *v.* Russell, 34 Mo. 524; Stegman *v.* Berryhill, 72 id. 307; Henry *v.* Bassett, 75 id. 89; Scudder *v.* Ames, 89 id. 496; Kaiser *v.* Wilhelm, 2 Mo. App. 596; Younglove *v.* Leibhardt, 13 Neb. 557, 558; Bradford *v.* Kimberly, 3 Johns. Ch. 431; Paine *v.* Thacher, 25 Wend. 450; Caldwell *v.* Leiber, 7 Paige, 483; Dougherty *v.* Van Nostrand, Hoff. Ch. 68; Coursen *v.* Hamlin, 2 Duer, 513; Gilhooly *v.* Hart, 8 Daly, 176; Coddington *v.* Idell, 29 N. J. Eq. 504; Buford *v.* Neely, 2 Dev. (N. Ca.) Eq. 481; Anderson *v.* Taylor, 2 Ired. Eq. 420; Philips *v.* Turner, 2 Dev. & Bat. Eq. 123; Butner *v.* Lemly, 5 Jones, Eq. 148; Stidger *v.* Reynolds, 10 Oh. 351, 353–4; Scott *v.* Clark, 1 Oh. St. 382, 385; Cameron *v.* Francisco, 26 id. 190; Mann *v.* Flanagan, 9 Oregon, 425; Brown's Appeal, 89 Pa. St. 139; Gyger's Appeal, 62 id. 73 (1 Am. Rep. 382); Marsh's Appeal, 69 Pa. St. 30 (8 Am. Rep. 206); Cunliff *v.* Dyerville Mfg. Co. 7 R. I. 325; Lane *v.* Roche, Riley (S. Ca.), Ch. 215; Cothran *v.* Knox, 13 S. Ca. 496; Piper *v.* Smith, 1 Head, 93; Berry *v.* Jones, 11 Heisk. 206; Griffey *v.* Northcutt, 5 id. 746; Stebbins *v.* Willard, 53 Vt. 665; Pierce *v.* Daniels, 25 id. 624, 634; Forrer *v.* Forrer, 29 Gratt. (Va.) 134; Frazier *v.* Frazier, 77 Va. 775; Roots *v.* Salt Co. 27 W. Va. 483; Jardine *v.* Hope, 19 Grant's Ch. (Up. Can.) 76.

[1] Brown's Appeal, 89 Pa. St. 139; Cothran *v.* Knox, 13 S. Ca. 496; McMichael *v.* Raoul, 14 La. Ann. 307; Bennett *v.* Russell, 34 Mo. 524; Coursen *v.* Hamlin, 2 Duer, 513; Dunlap *v.* Watson, 124 Mass. 305; Anderson *v.* Taylor, 2 Ired. Eq. (N. Ca.) 420. And see Osment *v.* McElrath, 68 Cal. 466. So if the guardian or parent of

On the other hand, it has been said that there is no reason why one partner who gives all his time should not be paid, and an allowance was made, notwithstanding that by the articles such partner was to serve as the active partner without compensation unless profits were realized during the term of the partnership, for this was held not to apply after dissolution.[1]

And in Stidger *v.* Reynolds, 10 Oh. 351, 353–4, a compensation for collecting was allowed the liquidating partner on the ground that the debts might have been divided, and therefore he was under no obligation to collect them. The reason is not very sound, for such division is generally impracticable.

And in Honore *v.* Colmesnil, 1 J. J. Mar. (Ky.) 506, a partner appointed receiver was allowed compensation as such; but the contrary was ruled where he was appointed receiver at his own instance, in Berry *v.* Jones, 11 Heisk. 206; and where he was appointed administrator, no compensation was allowed as to the partnership assets, though there were no other.[2]

§ 772. So of surviving partner winding up.— The principle applies to the burden of winding up after death, and the surviving partner can claim no extra compensation for it, death of a copartner being one of the risks necessarily incurred by each.[3]

an infant partner render services in winding up, he cannot claim compensation from the firm, but only from his ward's estate. McMichael *v.* Raoul, 14 La. Ann. 307.

[1] Bradley *v.* Chamberlain, 16 Vt. 613. A small amount allowed by the master where the trouble was considerable was not disturbed in Setzer *v.* Beale, 10 W. Va. 274, 298, and in Hutchinson *v.* Onderdonk, 6 N. J. Eq. 277 (this point not affected by the reversal of the case, id. 632).

[2] Dodson *v.* Dodson, 6 Heisk. 110.

[3] Burden *v.* Burden, 1 Ves. & Bea. 172, foll. by Stocken *v.* Davison, 6 Beav. 371; Denver *v.* Roane, 99 U. S. 355; Colgin *v.* Cummins, 1 Port. (Ala.) 148; Shelton *v.* Knight, 68 Ala. 598; Griggs *v.* Clark, 23 Cal. 427; Kimball *v.* Lincoln, 5 Ill. App. 316 (this point not affected by the reversal in 7 id. 470 and 99 Ill. 578); Hite *v.* Hite, 1 B. Mon. 177; Washburn *v.* Goodman, 17 Pick. 519; Schenkl *v.* Dana, 118 Mass. 236; Loomis *v.* Armstrong, 49 Mich. 521; Buford *v.* Neely, 2 Dev. (N. Ca.) Eq. 481; Beatty *v.* Wray, 19 Pa. St. 516; Cooper *v.* Reid, 2 Hill (S. Ca.), Ch. 549; Piper *v.* Smith, 1 Head, 93; Griffey *v.* Northcutt, 5 Heisk. 746; Berry *v.* Jones, 11 Heisk. 206; Patton *v.* Calhoun, 4 Gratt. 138. And so where the surviving partner is by statute obliged to give bond and take out letters in order to administer the partnership affairs after dissolution by death, for he is not an administrator in the sense of the

If, however, the surving partner dies, his administrator is entitled to compensation out of the partnership funds for completing the settlement whether there is a surplus or not.[1]

§ 773. Services in excess of mere winding up.—But the rule applies merely to the simple and immediate winding up by collecting the assets, paying the debts and accounting for the surplus as is necessarily involved in the creation of a partnership and implied in the contract; but for time, skill and trouble expended beyond this, and inuring to the general benefit, the reason of the rule fails; as where, after dissolution, a partner successfully continues the business of the firm, using the original capital, good will or other assets, and a benefit is received from his efforts, he is allowed to deduct from the profits a compensation, varying according to the state of the accounts, the nature of the business, the difficulty and results of the undertaking, and perhaps its necessity or desirability.[2]

The most usual application of this limitation of the principle is in the case of a surviving partner continuing the firm business or completing the enterprise of the partners.

statute allowing commissions to administrators. Gregory *v.* Menefee, 83 Mo. 413; § 733.

[1] Dayton *v.* Bartlett, 38 Oh. St. 357. In Miller's Appeal (Pa.), 7 Atl. Rep. 190, executors who settled the partnership affairs because the surviving partner had not capacity to do so, it was held, could not charge the decedent's estate for having performed the survivor's duty. In NORTH CAROLINA the surviving partner is entitled to be compensated. Royster *v.* Johnson, 73 N. Ca. 474. And there is a *dictum* to the same effect in Wilby *v.* Phinney, 15 Mass. 116, 120, but is hardly consistent with the later decisions of that state above cited.

[2] Thus compensation was allowed in such case in Mellersh *v.* Keen, 27 Beav. 236; Airey *v.* Borham, 29 id. 620; Gyger's Appeal, 62 Pa. St. 73 (1 Am. Rep. 382); Newell *v.* Humphrey, 37 Vt. 265. And where one of the partners in a mercantile firm was a lawyer, and on dissolution collected certain accounts, those collected without suit were held gratuitous, but where suit was necessary he was allowed the usual value of such professional services. Vanduzer *v.* McMillan, 37 Ga. 299. But the contrary was held where the firm was a legal and not a mercantile one, in Starr *v.* Case, 59 Iowa, 491. And a lawyer member of a manufacturing firm was not allowed to charge compensation for attending to suits when not employed by the firm to do so. Pierce *v.* Daniels, 25 Vt. 624, 634.

In Brown *v.* De Tastet, 1 Jacob, 284, where the surviving partner continued the business with the original capital and was required to account for the profits, allowances were ordered to be made to him, not necessarily as wages (p. 298), but such as the master should find proper.

In Cameron *v.* Francisco, 26 Oh. St. 190, where the surviving partner, without being under contract to do so, continued the business (the publication of a newspaper), and by thus being enabled to sell it as a going concern, preserved a valuable good will which would otherwise have been lost, and the personal representatives on electing to share the profits were required to deduct a reasonable compensation.

In Schenkl *v.* Dana, 118 Mass. 236, the property of the firm consisted of patents for improvements in weapons of war and valuable contracts with the government, and a manufactory and stock for fulfilling them, and the surviving partner having completed the contracts and entered on new ones was held entitled to extra compensation for all services in excess of mere winding up.

In Griggs *v.* Clark, 23 Cal. 427, where the value of the assets was enhanced by the labor and time of the surviving partner to the extent of $6,000, he was allowed $1,400 out of the profit from the enhanced value.

In O'Reilly *v.* Brady, 28 Ala. 530, and Calvert *v.* Miller, 94 N. Ca. 600, the surviving partner was allowed all expenses in continuing the business, but nothing further was decided.

In Sears *v.* Munson, 23 Iowa, 386, compensation was allowed for superintending real estate and managing improvements thereon, but the court seemed to think there had been an understanding to that effect between the partners.

In Denver *v.* Roane, 99 U. S, 355, Strong, J., after stating the rule that winding up by a survivor is gratuitous, says: "There may possibly be some reason for applying a different rule to cases of winding up partnerships between lawyers and other professional men, where the profits of the firm are the result solely of professional skill and labor." This doctrine was commented upon and an allowance made in Osment *v.* McElrath, 68 Cal. 466.

In Hite *v.* Hite, 1 B. Mon. 177, where the case of a large landed estate paying taxes, prosecuting and defending law suits, selling and collecting, was involved, the labor being extraordinary and perplexing, of which the infant heirs got the benefit, remuneration

was allowed; even in this case, however, the other partner had while alive been manager, and as such received an allowance, and the compensation complained of now had been received by the surviving partner in a settlement sixteen years before.

In Newell *v.* Humphrey, 37 Vt. 265, partners in the business of buying cattle on commission had canvassed the territory, made many contracts, and ascertained who would have cattle to sell, without contracting with them, and then one partner died. Much time and labor having been spent, the commissions on these inchoate transactions were held to be partnership assets, but an allowance to the surviving partner for his time and expenses in completing them was held just and proper.[1]

§ 774. But if the agreement of the parties provides for continuing the business after the death of either, without providing for compensation, none will be allowed.[2]

Compensation was refused, where the business, a plantation, was continued by the request of the deceased in his will, and the surviving partner ran it for ten years;[3] and so where the surviving partner drew the will, but no mention of compensation was made though brought to the attention of the parties incidentally.[4] It was refused also where the surviving partner, without necessity for so doing, continued the business for four years, but his duties were not more arduous than before the death;[5] and where he continued the business and finally bought it in.[6]

In O'Neill *v.* Duff, 11 Phila. 244, the articles provided for a salary to the managing partner and for an immediate winding up on dissolution. The other partner died and the managing partner continued the business beyond the time when it could have been closed up and without profits. Compensation was refused.

[1] But where one of three survivors of a commission firm of four received all the assets and sold cotton consigned to the firm for sale, no compensation therefor was allowed. Shelton *v.* Knight, 68 Ala. 598.

[2] Burden *v.* Burden, 1 Ves. & B. 172; Cameron *v.* Francisco, 26 Oh. St. 190; Washburn *v.* Goodman, 17 Pick. 519; Frazier *v.* Frazier, 77 Va. 775.

[3] Tillotson *v.* Tillotson, 34 Conn. 335.

[4] Berry *v.* Folkes, 60 Miss. 576, 614.

[5] Kimball *v.* Lincoln, 5 Ill. App. 316 (reversed on other points, 7 id. 470 and 99 Ill. 578).

[6] Colgin *v.* Cummins, 1 Porter (Ala.), 148.

§ 775. Express agreements for. — If the agreement of the parties contemplates compensation for carrying on or winding up the business to a surviving partner or other partner, it is of course allowed; and if found regularly credited upon the books, is as express an agreement as if contracted for in the articles,[1] but no other or further allowance will be made to him.[2]

Such partner is not deprived of the benefit of such agreement by forming a new partnership, and carrying on the same business at the same place while winding up.[3] Nor is a failure to claim agreed commissions until dissolution a waiver, even after the other partner had claimed a right to abrogate such allowance.[4]

Where the contract was for such compensation as should be agreed upon, and no agreement was made because the parties were separated by the war, the court fixed the amount.[5]

But where there was an understanding for compensation, though a vague one, with certain of the partners, but not with others, it was allowed as against the former but not the latter.[6]

An agreement that one should collect "at the proper cost and charges" of both was held to justify allowing him commissions on collections, and interest on the other's share of advancements.[7]

An agreement not to take out of the business more than $700 per annum is not an agreement for salary or compensation, but limits the withdrawal for the protection of the capital against diminution.[8] An agreement giving one partner $900 per annum as managing partner, which he had relinquished on resigning the personal management, does not apply to him in winding up as surviving partner, for he then is acting on account of his own interest.[9]

Articles providing for compensation to the active partners apply, as is the usual rule, to a continuance of the business after expiration of the term,[10] and also apply where the non-active partner sold out his interest to a third person, who allowed the business to continue without interruption.[11]

[1] Pratt *v.* McHatton, 11 La. Ann. 260.
[2] Denver *v.* Roane, 99 U. S. 355.
[3] Sangston *v.* Hack, 52 Md. 173.
[4] Askew *v.* Springer, 111 Ill. 662.
[5] Garrett *v.* Bradford, 28 Gratt. 609.
[6] Godfrey *v* White, 43 Mich. 171.
[7] Wood *v.* Wood, 26 Barb. 356.
[8] Trump *v.* Baltzell, 3 Md. 295.
[9] Anderson *v.* Taylor, 2 Ired. Eq. (N. Ca.) 420.
[10] § 216.
[11] Wilson *v.* Lineberger, 83 N. Ca. 524.

Charging an absent partner on the books for his absences, when it is not shown that he was aware of the entries, does not prove assent.[1]

If the partnership is rescinded by decree as void in its inception, for the defendant's fraud in inducing the other to enter it, the latter may recover compensation.[2] If a dissolution by decree is dated back, allowance may be made to the defendant for services rendered after the date of dissolution.[3]

But a subsequent promise of an extra allowance for past services, or the expression of a willingness to pay them, being founded on a past consideration, is a *nudum pactum* unless the services were performed by request.[4] And where an executrix gave the surviving partner an asset as compensation, it was held an illegal disposition of the estate, and the recipient was compelled to account for it;[5] but a subsequent promise was held available in proof of a prior intention to allow extra compensation where the active partner kept on working.[6]

§ 776. Services in other capacity than as partner.— Where the services were not performed in the capacity of partner, the reason of the rule fails.

Thus, where one of the partners forms a sub-partnership, by selling half his share to a third person, who is appointed agent and manager of the firm, such person not being a partner of the other partner, is entitled to compensation as against him.[7] So where six persons appointed one of their number to go to California in search of a mining investment, of which he was to be superintendent when found, and he found one, but the enterprise was abandoned, he is entitled to compensation, although a sum was advanced to him for expenses; for they never became partners, and his expectation of the superintendency does not import that he risked more than his proportion.[8] But services rendered in preparing the mill of one partner for the use of the firm are deemed to have been rendered in

[1] Boardman *v.* Close, 44 Iowa, 428.

[2] Richards *v.* Todd, 127 Mass. 167. § 897.

[3] Dumont *v.* Ruepprecht, 38 Ala. 175, 184.

[4] Paine *v.* Thacher, 25 Wend. 450; Butner *v.* Lemly, 5 Jones' Eq. (N. Ca.) 148. But a mere general allegation of request was held bad in McBride *v.* Stradley, 103 Ind. 465.

[5] Heath *v.* Waters, 40 Mich. 457.

[6] Cramer *v.* Bachmann, 68 Mo. 310.

[7] Newland *v.* Tate, 3 Ired. Eq. (N. Ca.) 226.

[8] Duff *v.* Maguire, 107 Mass. 87.

the capacity of partner, unless a different relation is shown, and must be gratuitous.[1]

§ 777. Implied agreements for.— Some of the cases state the rule that no compensation can be allowed unless there is an *express* agreement. These are but *dicta*.[2] But the general rule seems to be that an intention to make an extra allowance may be shown by circumstances, and that the agreement need not be express, but may be *implied* from the course of business or circumstances.[3]

Agreements to pay extra compensation have been implied in cases where the services were extraordinary and unusual, and such as could not reasonably have been contemplated.

Thus, where one partner was superintendent, and the work involved hazard, and a large amount of skill, and capacity, and personal presence both day and night.[4]

Or where, the partners being equal in capital, one was wholly engaged in another business at a high salary, and his capital belonged to his daughters, and therefore imposed upon the other partner a liability to repay it in case of loss, and by the latter's energy a great success was achieved.[5]

Or where one partner, who was not obliged to render any services by the articles, does on request render services which could not have been expected from a partner.[6]

Or where some of the partners received supplies from the firm

[1] Cunliff *v.* Dyerville Mfg. Co. 7 R. I. 325.

[2] Forrer *v.* Forrer, 29 Gratt. 134; Bennett *v.* Russell, 34 Mo. 524; Mann *v.* Flanagan, 9 Oregon, 425; Lee *v.* Lashbrooke, 8 Dana, 214.

[3] Levi *v.* Karrick, 13 Iowa, 344; Cramer *v.* Bachmann, 68 Mo. 310; Godfrey *v.* White, 43 Mich. 171. 183; Emerson *v.* Durand, 64 Wis. 111; Lewis *v.* Moffett, 11 Ill. 392. As by being charged on the books and settlements being made on that basis, Gage *v.* Parmalee, 87 Ill. 329. And *dicta* in Haller *v.* Willamowicz, 23 Ark. 566; Marsh's Appeal, 69 Pa. St. 30 (8 Am. Rep. 206); Caldwell *v.* Leiber, 7 Paige, 483; Lee *v.* Davis, 70 Ind. 464, 469.

[4] Levi *v.* Karrick, 13 Iowa, 344.

[5] Emerson *v.* Durand, 64 Wis. 111. The dissenting opinion of Orton, J., in this case is very strong.

[6] Lewis *v.* Moffett, 11 Ill. 392; Godfrey *v.* White, 43 Mich. 171; Bradford *v.* Kimberly, 3 Johns. Ch. 431, of one partner appointed by the rest as agent, to receive and sell cargo which constituted the entire business.

without charge, and lived in its houses, rent free, the other was allowed compensation.[1]

So a stockholder in a joint stock company is entitled to compensation for acting as agent.[2]

§ 778. **Amount of.** — The amount of the compensation will be fixed in view of the opinions of experts, without being bound by them, and considering the time, talent, and also the results.[3]

§ 779. **Is a debt of the firm and not of copartner.** — The allowance, however, is not made against the other partners or taken out of their shares, but is part of the expenses of the firm and to be borne by all, including the recipient, although a percentage or a fixed amount was agreed on.[4]

Thus, if it was agreed that a partner should receive $500 per annum as salary or five per cent. commissions, the meaning is that the firm, and not the others, are to pay it, although this lessens the aggregate amount he derives.[5] Though the promise may be a personal one of the other partner, in which case the promise is actionable.[6] Where, however, it was agreed that, if one partner failed to furnish a certain amount of labor, $100 per annum was to be deducted from his share, it was held this sum was not to be shared by him, for it was supposed to pay for labor in lieu of his.[7] On the other hand, where partners were to devote their whole time to the business and one agreed to pay $1,000 for the privilege of undertaking other business, it was held that this sum belonged to the firm and not to the other partners, because his time was withdrawn from the firm, and it, and not they alone, sustained the loss.[8] And

[1] Mann *v.* Flanagan, 9 Oregon, 425.

[2] Spence *v.* Whitaker, 3 Porter (Ala.), 297. For another case of allowance, see Cramer *v.* Bachmann, 68 Mo. 310.

[3] Lewis *v.* Moffett, 11 Ill. 392. A "liberal allowance" to a surviving partner of a professional firm who continued the business, Featherstonhaugh *v.* Turner, 25 Beav. 382, 389. A bare remuneration for the trouble, not sufficient to tempt avarice, to a surviving partner under the facts stated above in § 773, Hite *v.* Hite, 1 B. Mon. 177.

[4] Askew *v.* Springer, 111 Ill. 662; Cook *v.* Phillips, 16 Ill. App. 446; Crouch *v.* Woodruff, 63 Ala. 466; Hills *v.* Bailey, 27 Vt. 548; O'Lone *v.* O'Lone, 2 Grant's Ch. (Up. Can.) 125; Funck *v.* Haskell, 132 Mass. 580.

[5] Shaver *v.* Upton, 7 Ired. L. 458.

[6] § 885.

[7] Frederick *v.* Cooper, 3 Iowa, 171.

[8] Couch *v.* Woodruff, 63 Ala. 466.

an agreement, on dissolution, that $1,182 is due C., and that collections shall be applied to pay him that sum and the balance shall go to the copartner, means that his copartner owes him that sum and not that the firm owes him.[1]

An agreement that one partner should receive a percentage on his capital, and also for his services "ten per cent. on the business," means on the profits, he being a partner and not a stranger; for if there were losses he might have to pay back, if paid on the gross amount. The provision relates to his share as a partner, that is out of profits.[2]

Where an employee is to receive part of the net profits as compensation, the agreed salaries of the partners are to be first deducted as part of the expenses before computing net profits.[3]

§ 780. Damages for breach of contract or duty.[4]— Claims by one partner against another for unliquidated damages for malfeasances, misfeasances or non-feasances, by which loss to the firm was caused, may constitute a just allowance to be considered in equity on the accounting;[5] and the defendant may file a cross-bill to claim indemnity on this account.[6] But if this claim forms the whole ground of relief, and not as an item in the account, it is not so clear that it is an equity matter,[7] for it may then be enforced by action at law.[8] And damages may be allowed against a partner who has failed to furnish his agreed capital, for losses consequent thereon.[9]

[1] Corning *v.* Grobe, 65 Iowa, 328.

[2] Funck *v.* Haskell, 132 Mass. 580.

[3] Fuller *v.* Miller, 105 Mass. 103.

[4] As to allowing one partner interest on his excess of capital where the other has not contributed his agreed share, see § 788.

[5] Bury *v.* Allen, 1 Coll. 589, 604; Boyd *v.* Mynatt, 4 Ala. 79, 83; Nichol *v.* Stewart, 36 Ark. 612, 623–4; Morrison *v.* Kramer, 58 Ind. 38, Carlin *v.* Donegan, 15 Kan. 495; Sexton *v.* Lamb, 27 id. 426; Richards *v.* Todd, 127 Mass. 167; Singer *v.* Heller, 40 Wis. 544; Davidson *v.* Thirkell, 3 Grant's Ch. (Up. Can.) 330. See, also, Bonis *v.* Louvrier, 8 La. Ann. 4; Maher *v.* Bull, 44 Ill. 97; Dunnell *v.* Henderson, 23 N. J. Eq. 174. And see § 761.

[6] Morrison *v.* Kramer, 58 Ind. 38; Richards *v.* Todd, 127 Mass. 167.

[7] Singer *v.* Heller, 40 Wis. 544; Nichol *v.* Stewart, 36 Ark. 612, 623–4.

[8] Maude *v.* Rodes, 4 Dana, 144; Eagle *v.* Bucher, 6 Oh. St. 295.

[9] Boyd *v.* Mynatt, 4 Ala. 79, 83; Sexton *v.* Lamb, 27 Kan. 426; Bonis *v.* Louvrier, 8 La. Ann. 4; Smith *v.* Hazleton, 34 Ind. 481.

In Reid *v.* McQuesten, 61 N. H. 421, R. & McQ. were partners in cutting timber, and R. engaged to sell to McQ. one-half his timber land, the land then to become partnership property, but broke his agreement. In a suit for an accounting, the court refused to entertain the question of damages for breach of this contract on the ground that it was not a partnership transaction, but the agreement of the parties as individuals preliminary to a partnership in the land.

Analogous to the case of a compensation by previous agreement is the case of a specific agreement in the articles of partnership that each partner shall give his entire time, where one of the partners withdraws or wilfully abandons his post, and leaves the burden on the other. In such case the court may make a deduction from his share for the value of his services, and this is in effect compensating the other.[1] And so where a specific part of the work is allotted to one partner and he fails to perform it.

Thus in Stegman *v.* Berryhill, 72 Mo. 307, plaintiff had agreed to grow a crop of fruit upon defendant's farm and gather the

[1] Airey *v.* Borham, 29 Beav. 620; Bury *v.* Allen, 1 Coll. 589, 604; Marsh's Appeal, 69 Pa. St. 30 (8 Am. Rep. 206); Nichol *v.* Stewart, 36 Ark. 612, 623–4; Morrison *v.* Kramer, 58 Ind. 38; Leighton *v.* Hosmer, 39 Iowa, 594; Noel *v.* Bowman, 2 Litt. (Ky.) 46; Funk *v.* Leachman, 4 Dana, 24, where the consequent additional expenses only were charged; Hartman *v.* Woehr, 18 N. J. Eq. 383, where partners who had wrongfully excluded another partner because of his failure to pay part of his capital were nevertheless decreed compensation for services in continuing without him. But see Thornton *v.* Proctor, 1 Anstr. 94, and Hutcheson *v.* Smith, 5 Irish Eq. 117, where two persons formed a partnership in a wine house, lived at the place of business, but shortly afterwards one went elsewhere and the other continued the business for eight years, doing all the work and was at considerable expense in the necessary treating of customers; but the court allowed him nothing, there being no contract. And so in Murray *v.* Johnson, 1 Head (Tenn.), 353, where one not only neglected his share of work, but failed to furnish his agreed stock, yet the court refused to inquire into the inequality of the services. And see, also, Henry *v.* Bassett, 75 Mo. 89, where two lawyers, not otherwise partners, jointly undertook the defense of a case and one did all the work and the other neglected it, but extra compensation was refused; and Robinson *v.* Anderson, 20 Beav. 98. The former case admits, p. 93, that a refusal to act in a partnership for a single transaction might be an abandonment.

crop on shares, but neglected to gather it, and defendant was compelled to go to the expense of hiring it done. This expense was held to be chargeable to him.

But incapacity from an act of God, for example, sickness, is a risk assumed by all, and absence from business on account of it is not a breach of an express agreement to give entire time to the partnership.[1]

INTEREST CHARGES AND ALLOWANCES.

§ 781. On capital.—In distributing the property of a dissolved partnership among partners, capital does not bear interest. A partner who has contributed all the capital, or whose share of it is larger than the other, is not entitled to interest on it or on the excess, in the absence of express agreement or a usage of the firm to allow it; for it is presumed that the other partner's contribution of time or skill was reckoned as equalizing the apparent disproportion.

As where one partner is to contribute the entire capital and the other his time and skill;[2] nor on excess where one has agreed to contribute more capital than the other;[3] nor on extra capital subsequently contributed by one partner.[4]

Where one partner has failed to contribute his agreed capital, the authorities are not harmonious as to whether the partner contributing it is entitled to interest on half the excess, or, what is the same thing, the firm is charged interest on the whole.[5]

[1] For such is the rule in other contracts. See Boast *v.* Firth, L. R. 4 C. P. 1; Robinson *v.* Davison, L. R. 6 Exch. 269.

[2] Stevens *v.* Cook, 5 Jur. N. S. 1415; Rishton *v.* Grissell, L. R. 5 Eq. 326; Tirrell *v.* Jones, 39 Cal. 655; Jackson *v.* Johnson, 11 Hun, 509; Day *v.* Lockwood, 24 Conn. 185; Tutt *v.* Land, 50 Ga. 339; Jardine *v.* Hope, 19 Grant's Ch. (Up. Can.) 76; and see Lee *v.* Lashbrooke, 8 Dana, 214.

[3] Desha *v.* Smith, 20 Ala. 747.

[4] Cooke *v.* Benbow, 3 De G. J. & Sm. 1. But see Hartman *v.* Woehr, 18 N. J. Eq. 383; Jardine *v.* Hope, *supra*.

[5] That he is, Reynolds *v.* Nardis, 17 Ala. 32; Ligare *v.* Peacock, 109 Ill. 94; Montague *v.* Hayes, 10 Gray, 609, 612; Hartman *v.* Woehr, 18 N. J. Eq. 383; and see Turnipseed *v.* Goodwin, 9 Ala. 372. *Contra*, Clark *v.* Warden, 10 Neb. 87; Stokes *v.* Hodges, 11 Rich. Eq. 135; Wilson *v.* McCarty, 25 Grant's Ch. (Up. Can.) 152.

§ 782. **Special agreement for interest.**— But there may be an agreement in the articles, or subsequently, that capital shall draw interest.

Thus an agreement that each shall keep the other in funds to the extent of one-half the amount of purchases of stock was held to imply an agreement to pay interest on funds provided by the other partner in excess of his half.[1] If the original capital bears interest, additional capital put in by one partner on request will bear it.[2] Whether an agreement to allow interest on balances means interest on capital while used, or interest on advances until they are repaid, depends on intention.[3]

Such agreement is implied from a usage crediting interest on the books before and after the time in question.[4] But rendering accounts with such interest for three months without objection is not sufficient to preclude objecting.[5]

If the partner entitled to interest receives most of the proceeds of sales, which are practically identical with his advances, he will be allowed interest only on the surplus, as where the firm is to deal in real estate and buys a tract with such capital, and on sale the contributing partner receives all the proceeds, which are again similarly reinvested with similar disposition of proceeds.[6]

In Wells *v.* Babcock, 56 Mich. 276, a partner was to be paid interest on his capital and advances, and he furnished timbered land, to be lumbered and returned to him when stripped. The agreed cost of timber was considered as the cost of the land, less its value as cleared, since the land itself was not used.

§ 783. —— **ends at dissolution.**— An agreement that interest will be allowed on capital ceases to operate at dissolution. Its earning capacity has then ceased, and it is no longer beneficial to the other partners in making profits, but is resolved into property held only for purposes of distribution.[7] But if there is unreasonable delay after dis-

[1] Pim *v.* Harris, Irish Rep. 10 Eq. 442.

[2] Gilhooly *v.* Hart, 8 Daly, 176.

[3] Bradley *v.* Brigham, 137 Mass. 545, 546.

[4] Millar *v.* Craig, 6 Beav. 433; Lloyd *v.* Carrier, 2 Lans. 364; Pratt *v.* McHatton, 11 La. Ann. 260.

[5] Jardine *v.* Hope, 19 Grant's Ch. (Up. Can.) 76.

[6] Wells *v.* Babcock, 56 Mich. 276.

[7] Watney *v.* Wells, L. R. 2 Ch. App. 250; Barfield *v.* Loughborough, 8 id. 1 (overruling Pilling *v.* Pilling, 3 DeG. J. & Sm. 162; Bradley *v.* Brigham, 137 Mass. 545; Johnson *v.*

solution in paying it back, interest may be allowed thereafter.[1]

§ 784. Usury laws.— The usury laws do not apply to agreements to pay interest on capital; hence it is legal to agree that capital shall bear interest in excess of the legal rate.[2]

Where it was agreed in a banking partnership that each partner should receive six and a half per cent. on his deposits, but must pay ten per cent. if he overdrew his account, and a partner gave a mortgage to secure overdrafts, which was foreclosed, the agreement was held to be valid if not a device, but a contribution to profits equal to the estimated earning power of the capital. It was further held that outstanding notes indorsed by the partners, but which *inter se* were to be paid by one partner, and which were taken up and renewed by the firm, and the advances to take them up charged to him with interest at such rates, were overdrafts covered by the agreement.[3]

§ 785. On advances or loans.— Advances or loans to the partnership are not like capital, but like borrowing from a third person, and interest is allowed on them.[4] So if the advances are made after dissolution by paying debts.[5]

Hartshorne, 52 N. Y. 173, 177; Wilson *v.* McCarty, 25 Grant's Ch. (Up. Can.) 152.

[1] Johnson *v.* Hartshorne and Bradley *v.* Brigham, *supra*.

[2] Cunningham *v.* Green, 23 Oh. St. 296; Campbell *v.* Coquard, 16 Mo. App. 552; Coleman *v.* Garlington, 2 Spears (S. Ca.), L. 238. In this case a partner sold out to his copartner, the value of his interest being ascertained by paying back the capital, with ten per cent. interest from a certain date. This is not usurious, because not a forbearance of money, but fixing a price. But the agreement to repay the amount thus found in annual instalments, with ten per cent. interest, was held a forbearance of money and usurious.

[3] Payne *v.* Freer, 91 N. Y. 43; 43 Am. Rep. 640 (aff'g 25 Hun, 124).

[4] *Ex parte* Chippendale, 4 DeG. M. & J. 19, 36; Hart *v.* Clarke, 6 DeG. M. & G. 232, 254; *In re* Norwich Yarn Co. 22 Beav. 143, 167; Troup's Case, 29 id. 353; *Re* Beulah Park Estate, L. R. 15 Eq. 43; Baker *v.* Mayo, 129 Mass. 517; Berry *v.* Folkes, 60 Miss. 576, 608; Morris *v.* Allen, 14 N. J. Eq. 44; Coddington *v.* Idell, 29 id. 504; Lloyd *v.* Carrier, 2 Lans. 364; Rensselaer Glass Factory *v.* Reid, 5 Cow. 587; Hodges *v.* Parker, 17 Vt. 242 (44 Am. Dec. 331); Emerson *v.* Durand, 64 Wis. 111, 122; Davidson *v.* Thirkell, 3 Grant's Ch. (Up. Can.) 330; *Re* Cleverdon, 4 Ont. App. 185.

[5] Collender *v.* Phelan, 79 N. Y. 366;

But interest cannot be allowed on advances or payments without an agreement, usage or understanding. As the other partners may not wish to be borrowers, the mere fact of an advance is not enough, any more than a mere deposit would be; and because, until an accounting, it cannot be known whether the lender is really a creditor or not.[1]

Where two of the three partners are to put in all the capital, and the amount of it is not limited, they cannot charge the firm with interest on money borrowed in their own names to carry on the business.[2]

Profits ascertained and apportioned, but left undrawn, are not entitled to draw interest,[3] unless by the articles to be treated as a loan.[4]

Where advances are agreed to be reimbursed out of the proceeds of the business, this will not be construed as only so payable in case of dissolution before the proceeds are sufficient to reimburse the advances.[5]

§ 786. On general accounting.— It has been not infrequently said that there is no rule as to charging or allowing interest in settling partnerships, but that each case must

Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68, 69; Gyger's Appeal, 62 Pa. St. 73 (1 Am. Rep. 382); Edwards *v.* Remington, 60 Wis. 33; Sangston *v.* Hack, 52 Md. 173. Even a prior agreement to advance such sums as should be necessary was held not to indicate an intention not to charge interest where it was merely meant that the objects of the firm should not fail for want of money, Berry *v.* Folkes, 60 Miss. 576, 608.

[1] Godfrey *v.* White, 43 Mich. 171; Prentice *v.* Elliott, 72 Ga. 154; Jones *v.* Jones, 1 Ired. (N. Ca.) Eq. 332; Lee *v.* Lashbrooke, 8 Dana, 214. And see Morris *v.* Allen, *supra*, and Miller *v.* Lord, 11 Pick. 11, 26; Holloway *v.* Turner, 61 Md. 217. It was refused on arrears of salary in Rensselaer Glass Factory *v.* Reid, 5 Cow. 587; unless perhaps where the advances are made necessary by refusal of the copartner to contribute his agreed amount, Turnipseed *v.* Goodwin, 9 Ala. 372; and a partner who has borrowed for the firm is entitled to the expense of a discount and interest he has paid, Bundy *v.* Youmans, 44 Mich. 376; and to discounts on notes belonging to the firm and assigned to him as reimbursement for advances, Fletcher *v.* Reed, 131 Mass. 312.

[2] See Topping *v.* Paddock, 92 Ill. 92.

[3] Dinham *v.* Bradford, L. R. 5 Ch. App. 519.

[4] As in Wood *v.* Scoles, 1 id. 369.

[5] Merriwether *v.* Hardeman, 51 Tex. 436.

stand on its own circumstances.[1] It is true that there is no unbending rule similar to the disallowance of extra compensation for additional services on the part of a partner; nevertheless, certain general guiding principles can be laid down.

As a general rule, no interest is allowed or charged in partnership accounts prior to final ascertainment of balances, neither from the time the uncertain balance is found to have accrued, nor on balances ascertained by periodical statements of account, or on money in a partner's hands.[2]

Nor is interest chargeable on a sum collected by a partner after dissolution, which he did not use for private purposes, for he has a right to hold it.[3]

In Gilman *v.* Vaughan, 44 Wis. 646, it was ruled that the sale of all the machines, and receiving and enjoying the receipts for two or three years by one partner, where the other had also sold a few and had the proceeds, and the delay in settlement was partly due to his neglect in neither asking settlement, nor making appointments for it, is not sufficient to alter the general rule disallowing interest; nor on sums withdrawn by consent and appropriated.[4]

In McCormick *v.* McCormick[5] some of the partners had with the consent of all so largely overdrawn as to impair the capital

[1] Beacham *v.* Eckford, 2 Sandf. Ch. 116; Johnson *v.* Hartshorne, 52 N. Y. 173; Buckingham *v.* Ludlum, 29 N. J. Eq. 345, 357; Gyger's Appeal, 62 Pa. St. 73, 76 (1 Am. Rep. 382); Dexter *v.* Arnold, 3 Mason, 284; Rensselaer Glass Factory *v.* Reid, 5 Cow. 587.

[2] Meymott *v.* Meymott, 31 Beav. 445; Cooke *v.* Benbow, 3 DeG. J. & Sm. 1; Turner *v.* Burkinshaw, L. R. 2 Ch. App. 488; Stevens *v.* Cook, 5 Jur. N. S. 1415; Dexter *v.* Arnold, 3 Mason, 284; Moss *v.* McCall, 75 Ill. 190; Gage *v.* Parmalee, 87 id. 329; Cooper *v.* McNeill, 14 Ill. App. 408; Bowling *v.* Dobyns, 5 Dana, 434; Taylor *v.* Young, 2 Bush, 428; Hilligsberg *v.* Burthe, 6 La. Ann. 170; Sweeney *v.* Neely, 53 Mich. 421; Gregory *v.* Menefee, 83 Mo. 413; Buckingham *v.* Ludlum, 29 N. J. Eq. 345; Rensselaer Glass Factory *v.* Reid, 5 Cow. 587; Holden *v.* Peace, 4 Ired. (N. Ca.) Eq. 223; Brown's Appeal, 89 Pa. St. 139 (Brown's Estate, 11 Phila. 127); McKay *v.* Overton, 65 Tex. 82; Waggoner *v.* Gray, 2 Hen. & M. (Va.) 603; Gilman *v.* Vaughan, 44 Wis. 646. And see Prentice *v.* Elliott, 72 Ga. 154.

[3] Holloway *v.* Turner, 61 Md. 217.

[4] Miller *v.* Lord, 11 Pick. 11, where the sums were weekly amounts allowed by the articles; McCormick *v.* McCormick, 7 Neb. 440; *Re* Cleverdon, 4 Ont. App. 185. *Contra,* Gridley *v.* Conner, 2 La. Ann. 87.

[5] 7 Neb. 440.

and cripple the firm, and thus contributed to its insolvency; but there was no such intent, for all the partners supposed it was prosperous, and the plaintiff in particular knew nothing of the books, but attended to the selling, yet interest was not allowed on the balances due at each annual rest in favor of the other partners, even from the time that borrowing became necessary to repair the capital.

§ 787. **On balance struck.**— As soon, however, as the balances are ascertained, it becomes the duty of the partners who hold or have received the most to pay the others, and interest begins at once.[1]

A surviving partner was held chargeable with interest from the time the master had ascertained the balance against him, although the suit is still progressing, because he could have paid the amount into court.[2] But where the copartner is an alien and the settling partner *bona fide* pays his share into the treasury, under confiscation acts, he is not liable for interest upon it, for he has made none, whatever be the effect on the principal.[3]

§ 788. **Misconduct.**— Even before the balance is struck, a partner will be charged with interest in case of misconduct, fraud, delay in accounting, etc., or uncandid retention.

As where the debtor partner or surviving partner has the books, and knew or should have known what was due the others, and delayed or neglected to compute the amount, or neglects for an unreasonable time to proceed with the winding up or division of the amount in his hands,[4] unless both

[1] McColl *v.* Oliver, 1 Stew. (Ala.) 510; Clark *v.* Dunnam, 46 Cal. 205; Sanderson *v.* Sanderson, 20 Fla. 292, 331; Beacham *v.* Eckford, 2 Sandf. Ch. 116; Holden *v.* Peace, 4 Ired. (N. Ca.) Eq. 223; Mourain *v.* Delamre, 4 La. Ann. 78; Hilligsberg *v.* Burthe, 6 id. 170. In Stoughton *v.* Lynch, 2 Johns. Ch. 209, 219, Chancellor Kent seems to hold the date of dissolution as the time from which the balances should bear interest.

[2] In Sanderson *v.* Sanderson, 20 Fla. 292, 334.

[3] McNair *v.* Ragland, 1 Dev. Eq. 516.

[4] Russell *v.* Green, 10 Conn. 269; Derby *v.* Gage, 38 Ill. 27; Pearce *v.* Pearce, 77 Ill. 284; Scroggs *v.* Cunningham, 81 id. 110; Cooper *v.* McNeill, 14 Ill. App. 408; Hite *v.* Hite, 1 B. Mon. 177; Bowling *v.* Dobyns, 5 Dana, 434; Honore *v.* Colmesnil, 7 Dana, 199; Taylor *v.* Young, 2 Bush, 428; Washburn *v.* Goodman, 17 Pick. 519; Dunlap *v.* Watson, 124 Mass. 305; Crabtree *v.* Randall, 133 id. 552; Bradley *v.* Brig-

are remiss, as where both should have rendered an account but neither one offered or demanded it.[1]

And conversely, a partner having charge of the winding up as surviving partner or otherwise, who has delayed settlement beyond a reasonable time, can neither have interest on a balance due him,[2] nor be allowed interest which he has been compelled to pay to creditors by reason of the delay. But mere delay to render accounts may not have this effect.[3]

So in case of misconduct, as where one partner wrongfully collects and withholds money,[4] or makes an overdraft in anticipation of dissolution,[5] or where directors vote themselves an unauthorized increase of compensation,[6] or if a partner mingles the assets with his own and uses them for his private benefit, or has wilfully misappropriated them.[7]

ham, 137 Mass. 545; Wells *v.* Babcock, 56 Mich. 276; Buckingham *v.* Ludlum, 29 N. J. Eq. 345, 358; Rensselaer Glass Factory *v.* Reid, 5 Cow. 587; Dimond *v.* Henderson, 47 Wis. 172; Simpson *v.* Feltz, 1 McCord (S. Ca.), Ch. 213; Hutcheson *v.* Smith, 5 Irish Eq. 117. In Donahue *v.* McCosh, 70 Iowa, 733, where by agreement of settlement the partner who should be found indebted was to have the right to pay the balance due by short notes, without interest, and after settlement it was found that by a mistake in the computation the defendant owed the plaintiff, yet as the defendant was as responsible as the plaintiff for the mistake, and had not offered to give the notes or pay up, and had had the use of the money, interest was charged against him from the time of settlement and not merely from the discovery of the mistake.

[1] Beacham *v.* Eckford, 2 Sandf. Ch. 116. One bought out the other at a price payable out of money to be realized from the assets, nothing being said as to interest; one failed to try to convert assets into money, and the other made no demand; no interest was allowed, Whitney *v.* Burr, 115 Ill. 289.

[2] Forward *v.* Forward, 6 Allen, 494; O'Lone *v.* O'Lone, 2 Grant's Ch. (Up. Can.) 125.

[3] Winsor *v.* Savage, 9 Met. 346; Boddam *v.* Ryley, 1 Bro. C. C. 239; 2 id. 2; 4 Bro. P. C. 561, where interest was refused to a partner who kept the books in a culpably negligent manner.

[4] Turner *v.* Otis, 30 Kan. 1; Sanders *v.* Scott, 68 Ind. 130.

[5] Buckingham *v.* Ludlum, 29 N. J. Eq. 345, 358-9.

[6] Evans *v.* Coventry, 8 DeG. M. & G. 835, 845.

[7] Solomon *v.* Solomon, 2 Ga. 18; Mooe *v.* Story, 8 Dana, 226; Dunlap *v.* Watson, 124 Mass. 305; Crabtree *v.* Randall, 133 id. 552, 553; Coddington *v.* Idell, 30 N. J. Eq. 504; Buckingham *v.* Ludlum, 29 N. J. Eq. 345, 358-9; Wilson *v.* McCarty, 25 Grant's Ch. (Up. Can.) 152.

But merely depositing with his own funds may not be misconduct, or even preclude him from agreed interest on balances in his favor.[1]

So if he has wilfully or fraudulently denied or understated the amount due to his copartner,[2] or if he ejected the plaintiffs from the business,[3] or improperly refused to concede a right to assign his interest in the firm, and excluded his assignee.[4]

So a partner asking affirmative relief may be required to pay interest if justice requires it.[5] As where execution against a partner on an individual debt was levied on his interest in the firm, and the other partners bought at the sale and excluded the debtor from the firm, an accounting was granted to him, but interest on the amount paid was charged against him.[6]

§ 789. Compound.— Where interest is allowed, whether on capital or advances, the general rule is against compounding; hence annual rests will not be made and interest capitalized therefrom,[7] although partial payments are as in contracts credited first to extinguish interest and balance to reduce the principal.[8]

The rate is the ordinary and not the conventional rate.[9]

In case of bad faith, compound interest may be allowed, that is, the computation will be made with annual rests *in odium spoliatoris*,[10] but not merely for neglect or refusal to account.[11]

[1] Baker *v.* Mayo, 129 Mass. 517.

[2] Simpson *v.* Feltz, 1 McCord (S. Ca.), Ch. 213; Dunlap *v.* Watson, 124 Mass. 305.

[3] Mooe *v.* Story, 8 Dana, 226.

[4] Marquand *v.* N. Y. Mfg. Co. 17 Johns. 525.

[5] Cooper *v.* McNeill, 14 Ill. App. 408.

[6] Perens *v.* Johnson, 3 Sm. & G. 419.

[7] Colgin *v.* Cummins, 1 Porter (Ala.), 148; Sanderson *v.* Sanderson, 17 Fla. 820; Sangston *v.* Hack, 52 Md. 173, 201; Wells *v.* Babcock, 56 Miss. 276; Johnson *v.* Hartshorne, 52 N. Y. 173.

[8] Stewart *v.* Stebbins, 30 Miss. 66.

[9] Mourain *v.* Delamre, 4 La. Ann. 78; Pratt *v.* McHatton, 11 id. 260. But whether a charge of the conventional rate in the books will amount to an agreement to pay it, compare Millaudon *v.* Sylvestre, 8 La. 262, with Mourain *v.* Delamre, *supra*.

[10] Heath *v.* Waters, 40 Mich. 457; Pomeroy *v.* Benton, 77 Mo. 64; Johnson *v.* Hartshorne, 52 N. Y. 173; Stoughton *v.* Lynch, 1 Johns. Ch. 467; 2 id. 209. And see Colgin *v.* Cummins, 1 Porter, 148.

[11] Harvey *v.* Varney, 104 Mass. 436.

CLANDESTINE PROFITS.

§ 790. Before dissolution.— If a partner abstracts funds of the firm, and uses them in private speculations for his own advantage, or invests them in property or in his own business, or makes private profit by misusing the credit of the firm, he is accountable to his copartners for the profits made thereby, and if there are no profits is, of course, liable for the loss;[1] or the partners may follow and claim the property in which the funds are invested, whether the title be in the guilty partner or his wife or any other volunteer.[2]

§ 791. Illustrations.— In Shaler *v.* Trowbridge, 28 N. J. Eq. 595, the guilty partner took out life insurance on his life, paying the premiums out of partnership money, and it was held to stand on the same ground, although its value was contingent and might be profitable or not, and his wife, to whom they were transferred, cannot take the excess over premiums or the appreciation of real estate which he had purchased in her name with the joint funds, but is trustee of the entire value for the firm.

In Brown *v.* Schackelford, 53 Mo. 122, the funds were abstracted by a draft on a consignee of the firm, and the consignee deducted interest on the draft in settling with him, and the partner was held liable to the firm for the interest, there being no profits.

In Stoughton *v.* Lynch, 1 Johns. Ch. 467; 2 id. 209, a partner who had invested firm funds in his private business was held account-

[1] Love *v.* Carpenter, 30 Ind. 284; Scruggs *v.* Russell, McCahon (Kan.), 39; Anderson *v.* Whitlock, 2 Bush, 398; McAdams *v.* Hawes, 9 id. 15; Brown *v.* Schackelford, 53 Mo. 122; Pomeroy *v.* Benton, 57 id. 531 (14 Am. Law Reg. (N. S.) 306); Shaler *v.* Trowbridge, 28 N. J. Eq. 595; Partridge *v.* Wells, 30 id. 176; Stoughton *v.* Lynch, 1 Johns. Ch. 467; 2 id. 209; Herrick *v.* Ames, 8 Bosw. 115.

[2] Kelley *v.* Greenleaf, 3 Story, 93; Shinn *v.* Macpherson, 58 Cal. 596; Kayser *v.* Maughan, 8 Col. 339; Smith *v.* Ramsey, 6 Ill. 373; Renfrew *v.* Pearce, 68 id. 125; Croughton *v.* Forrest, 17 Mo. 131; Evans *v.* Gibson, 29 id. 223; Catron *v.* Shepherd, 8 Neb. 308; Holdrege *v.* Gwynne, 18 N. J. Eq. 26; Shaler *v.* Trowbridge, 28 id. 595; Partridge *v.* Wells, 30 id. 176; Coder *v.* Huling, 27 Pa. St. 84, Howell *v.* Howell, 15 Wis. 60; Miller *v.* Price, 20 id. 117; Bergeron *v.* Richardott, 55 id. 129; Prentiss *v.* Brennan, 1 Grant's Ch. (Up. Can.) 484. But a mere incidental payment out of partnership funds of an instalment due on an antecedent private purchase gives no title to the other partners except for reimbursement; nor do mere overdrafts. § 839.

able both for profits and interest,— simple interest if he makes no profits, and otherwise compound.

In Tebbetts *v.* Dearborn, 74 Me. 392, insurance procured on partnership property with its funds by and in the name of one partner for his own benefit must be accounted for to the firm by him.

In Potter *v.* Moses, 1 R. I. 430, Potter furnished his partners with an outfit to go to California and mine; one deserted and died, the rest earned profits, and it was held that they could not claim a dissolution, never having notified Potter of such claim, and must account.

In Cheeseman *v.* Sturges, 6 Bosw. 520; 9 id. 246, a person conveyed property to another in trust to erect an ice house on it, and run the establishment in partnership with him, but not to dispose of it except on mutual consent. The trustee having in good faith, on a mistaken supposition of consent, exchanged the property for stock in a corporation, the other partner was held entitled to elect to affirm and receive a share of the stock on paying the trustee for advances made by him to the firm, or to dissent and charge the trustee with the value of the property sold in an accounting, but cannot charge the trustee with the stock at face value, it being below par, in satisfaction of the advances, and claim a share of the residue in the stock, for this is affirming in part and repudiating in part.

§ 792. **Implied duty not to compete.**— We have already seen, in treating of good faith, that a partner has no right to engage in transactions on his own behalf in the same line of business as that of the firm, depriving the firm of the skill, time and fidelity he owes to it, and if he does so he is accountable for the profits.[1] And so of any other secret advantage obtained at the expense of the firm or in violation of the good faith he owes it; as where he obtains rewards from those dealing with the firm,[2] or buys interests in property owned or used by the firm.[3]

[1] Todd *v.* Rafferty, 30 N. J. Eq. 254; Bast's Appeal, 70 Pa. St. 301; McMahon *v.* McClernan, 10 W. Va. 419.

[2] See §§ 307–310. But this will not include his share of commissions paid to another firm in which he is a member on an employment with the consent of the plaintiff, and beneficial to the employing firm. Freck *v.* Blakiston, 83 Pa. St. 474.

[3] See § 305.

In fact all such ventures will be deemed to have been made by the partner on behalf of the firm.[1]

Shipments by one partner to another who is at a distance, made in the ordinary course of their trade, will be held to be on joint account unless conclusively shown to be the contrary.[2]

So if the partners undertake to exclude one of their number and deny that he is a partner, subsequent purchases of land by them inure to his benefit.[3]

Where plaintiff, pursuant to a written contract, furnishes the money to send defendant to California to dig for gold, and when there he goes into a trading business which the correspondence shows was regarded as for joint benefit, he must account for the profits of it.[4]

§ 793. Dealings not in competition with firm.—Where the articles do not prohibit a partner from dealings on his own account, nor limit his time exclusively to the business, there is no presumption that his ventures in other lines not competing with the firm are upon its behalf.

Thus, in Drew *v.* Beard, 107 Mass. 64, a partnership was formed for the purpose of trading, and especially for the sale in the south of merchandise bought in the north, one partner being in the north and the other in the south. The latter's contract with the government to collect, re-bale and ship condemned cotton is not within the scope of the business, for it is a contract for services; and so of a purchase and shipment of metals; and he is not accountable to his copartners in regard to it.[5]

So, also, the custom of the partners, or of other firms in the same business, may be such that their business includes these outside ventures.

[1] Fletcher *v.* Ingram, 46 Wis. 191, where the copartners were held liable for conversion of the money used by one partner to make purchases.

[2] The Francis, 1 Gall. 618; The San Jose Indiano, 2 id. 268. In Murrell *v.* Murrell, 33 La. Ann. 1233, it was held that where one partner embarks assets in another firm, his copartner is not entitled to profits thereof, but to damages only.

[3] Settembre *v.* Putnam, 30 Cal. 490.

[4] Brigham *v.* Dana, 29 Vt. 1.

[5] Sanderson *v.* Sanderson, 17 Fla. 820, one of a firm of attorneys cannot claim a share in sums received by the other for services not professional, as for selling railroad stock.

As where a partnership between attorneys includes by custom sales of railroad stock on commission, each partner is entitled to share in earnings so made by one partner.[1]

The same rule applies where a partner has agreed not to engage in any other business. If he does so in violation of the articles, the copartner can claim damages.[2]

§ 794. After dissolution.— If, after dissolution, one or some of the partners continue the business with the capital of the former associates, or engage the assets in new ventures, they can be held answerable to the other partners, or their representatives if dead, bankrupt or lunatic, for a share of the profits thereby earned, whether the dissolution was by the bankruptcy of a partner, death, lunacy, retirement, abandonment, expulsion, or otherwise.[3]

But if from the nature of the concern and the state of the accounts the assets cannot be realized except by continuing business, and the surviving partners continue as a new firm, debiting themselves with old assets, they are not accountable for profits;[4] and

[1] Sanderson *v.* Sanderson, 20 Fla. 292.

[2] Dean *v.* Macdowell, 8 Ch. D. 345; Moritz *v.* Peebles, 4 E. D. Smith, 135. And see § 306 for a full examination of this subject. Inventions made by a partner to facilitate the partnership business, and patented, belong to him after dissolution. See § 266.

[3] Crawshay *v.* Collins, 15 Ves. 218; 1 J. & W. 267; 2 Russ. 325; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Turner *v.* Major, 3 Giff. 442; Parsons *v.* Hayward, 31 Beav. 199; affd. in 4 DeG. F. & J. 474; Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 Myl. & Cr. 41; Nerot *v.* Bernand, 4 Russ. 247; 2 Bli. N. S. 215; Brown *v.* De Tastet, Jacob, 284; 4 Russ. 126; Yates *v.* Finn, 13 Ch. D. 839; Bernio *v.* Vandever, 16 Ark. 616; Stephens *v.* Orman, 10 Fla. 9; Fitzpatrick *v.* Flannagan, 106 U. S. 648, 657; Goodburn *v.* Stevens, 5 Gill, 1; Freeman *v.* Freeman, 136 Mass. 260; Chittenden *v.* Witbeck, 50 Mich. 401; Mayson *v.* Beazley, 27 Miss. 106; Long *v.* Majestre, 1 Johns. Ch. 305; Ogden *v.* Astor, 4 Sandf. 311; Skidmore *v.* Collier, 8 Hun, 50; Fithian *v.* Jones, 12 Phila. 201; Brown's Appeal, 89 Pa. St. 139; Hay's Appeal, 91 Pa. St. 265; Potter *v.* Moses, 1 R. I. 430, where one had abandoned the enterprise; Shiddell *v.* Messick, 4 B. Mon. 157, where the partnership was carried on by permission of the chancellor, instead of being sold out at once; Mellersh *v.* Keen, 27 Beav. 236, a case of dissolution by lunacy. And see *Re* Clap, 2 Lowell, 168. As to compensation where there has been no breach of trust, see §§ 772-774.

[4] § 798; Wedderburn *v.* Wedderburn, 22 Beav. 84. And see Gyger's Appeal, 62 Pa. St. 73 (1 Am. Rep. 382); § 769; and Stern's Appeal, 95 Pa. St. 504.

though the partnership was in the proceeds and not in the stock.[1]

§ 795. On unfinished contracts.— After dissolution, the partner engaged in winding up the business must account for all profits made upon contracts not completed at the date of dissolution.[2]

Even in professional partnerships, where one partner completes the contract, he must account, although a large part of the earnings may be due to his efforts upon the unfinished business.[3]

Where a retiring partner received from the other partners a sum as an estimate of his interest, but they were to pay him or receive from him what would equalize his share as ascertained on final settlement, the partnership must be deemed to continue as to unfinished business; and hence, where advances to the firm on a particular adventure were not realized, he, with the others, owes the difference, and had it been profitable would have shared the profits; but the settling partners cannot deduct from him on account of this until they have paid it to the creditor; hence no final decree in an accounting can be had unless the retiring partner chooses to deduct from any sum finally to be due him the amount due the rest.[4]

If the dissolution is caused by the bankruptcy of one partner, his interest in the unfinished contract is upon the value after it is performed, and not as of the date of bankruptcy, although, if the circumstances are peculiar, the latter may be the criterion.[5] And so if the dissolution result from the death of a partner.[6]

In Richards *v.* Burden, 59 Iowa, 723, 746, a partner taking the assets to wind up appropriated to himself certain bonds then worth seventy-eight cents on the dollar, but which had since risen in price; he was held chargeable with the present value of those retained, and the value at the time of sale of those sold.

In Washburn *v.* Goodman, 17 Pick. 519, ostensible partners in a partnership for five years took a lease in their own names of a

[1] Pine *v.* Ormsbee, 2 Abb. Pr. (N. S.) 375.

[2] Tolan *v.* Carr, 12 Daly, 520; Newell *v.* Humphrey, 37 Vt. 265. See §§ 707–711.

[3] Osment *v.* McElrath, 68 Cal. 466.

[4] Tyng *v.* Thayer, 8 Allen, 391.

[5] King *v.* Leighton, 100 N. Y. 386 (rev. 22 Hun, 419).

[6] McClean *v.* Kennard, L. R. 9 Ch. App. 336, Powell *v.* Robinson, 58 Ga. 26. And see Collender *v.* Phelan, 79 N. Y. 366, 372.

store occupied by the firm. The silent partner died; the active partners disposed of the residue of the term at an advance rent. The estate of the silent partner is entitled to a share in the advance.

In Whitesides *v.* Lafferty, 3 Humph. 150, a partner appointed receiver of the firm, who speculates with the funds, was held accountable for profits, not to the partners but to the court whose officer he is.

In Freeman *v.* Freeman, 136 Mass. 260, letters patent belonged to partners, not as joint owners but as partnership assets, and a manufacture of goods under the patent after the death of one partner was held to be a use of it, and the surviving partner was accountable for the profits.

If a partner, or each partner, after dissolution, remains in possession of part of the assets, so that it can be reasonably regarded as an agreed division, and no demand for settlement was made *pro tanto*, the rule requiring accounting for profits will not be applied, but each will be charged the value of what he received.[1]

Where a partner held exclusive possession and refused to admit the other, he was held responsible for the use of the property withheld,[2] and for the restoration of the excluded partner's interest, to be paid out of the property as a prior claim,[3] and for property purchased on partnership account during such exclusion.[4]

§ 796. **Wrongful dissolutions.**— The same rules apply where a dissolution of a partnership has been set aside as fraudulent, if the business was continued, and profits are to be accounted for, not only to the end of the term, but until final settlement;[5] nor in a partnership at will, can a partner by dissolving exclude another from the benefits of uncompleted transactions, or appropriate valuable assets.[6]

In a partnership at will, A. furnished $1,000, and B. his patent,

[1] Ligare *v.* Peacock, 109 Ill. 94; Barclay's Appeal (Pa.), 8 Atl. Rep. 169; Randle *v.* Richardson, 58 Miss. 176.

[2] In Adams *v.* Kable, 6 B. Mon. 384 (44 Am. Dec. 772).

[3] In Jones *v.* Morehead, 3 id. 377.

[4] Settembre *v.* Putnam, 30 Cal. 490.

[5] Brown *v.* Vidler, cited and approved in Crawshay *v.* Collins, 2 Russ. 325, 341; Cook *v.* Collingridge, Jac. 617; Buford *v.* Neely, 2 Dev. Eq. 481, where a partner sold all the joint effects, bought them himself, and then took another into partnership.

[6] Pearce *v.* Ham, 110 U. S. 585; Holladay *v.* Elliott, 8 Oregon, 84, 98; Cole *v.* Moxley, 12 W. Va. 730. And see Airey *v.* Borham, 21 Beav. 620.

proceeds of the *sale* or *lease* of territory to be divided, and at dissolution a division of assets instead of a sale to be had, each taking back what he put into the business. B., the patentee, afterwards granted to R. the exclusive right to manufacture under the patent, reserving a royalty, and then dissolved. A. is entitled to half the royalty, for the grant to R. is the same as a sale or lease.[1]

§ 797. What amount to be accounted for.— This rule being founded on the misuse of another's property, held for other purposes only, and on its exposure to risks the share of profits to be accounted for is measured by the amount attributable to that source; hence if the subsequent profits are partly or wholly due to the skill of the remaining partners, a special inquiry is necessary to ascertain the amount. No general rule can be made.[2]

But where a partner uses his copartner's funds in a business with others, he is accountable only upon the basis of his own share of profits, and not of the entire profits; that is, he need answer only to the amount he himself has received.[3]

In Crawshay *v.* Collins,[4] after the bankruptcy of a partner whose share in the firm was three-eighths, the solvent partners continued business without paying over his interest and were compelled to account to the assignees for three-eighths of the profits; although the bankrupt was indebted to the firm, and this therefore lessened the amount of payment, it was not allowed to diminish the proportion in reckoning profits, and although the continuing partners had in the meantime contributed large additional capital, for they had no right to diminish the proportion of profits by increasing their own interest. And the accounting was required up to the time of final adjustment, that is, pending the litigation, although the only reason for not settling before was the dispute as to whether the assignees were entitled to profits subsequent to the bankruptcy.

[1] Norris *v.* Rogers, 107 Ill. 148.

[2] Featherstonhaugh *v.* Turner, 25 Beav. 382; Airey *v.* Borham, 29 Beav. 620.

[3] Vyse *v.* Foster, L. R. 8 Ch. App. 309, and L. R. 7 H. L. 318; Washburn *v.* Goodman, 17 Pick. 519 (treating the election to take profits as an adoption of the acts, which involves adoption of the whole, that is, profits as reduced by losses). See Hay's Appeal, 91 Pa. St. 265.

[4] 2 Russ. 325; 1 Jac. & W. 267; 15 Ves. 218.

Just allowances were made, however, to the partners, for services and money expended in continuing the business.

Profits in the ratio of the other partner's capital employed to the whole capital have been allowed in other cases.[1] On the other hand, it is denied that the aliquot shares of capital furnish either a just, or reasonable, or invariable rule.[2] But just allowances to the continuing partners are always made,[3] and if the main contribution to subsequent success is the skill, time and diligence of each partner, it is difficult or impossible to say how much of the profits is to be allowed for or deducted for the services of incoming new partners, and if an accountability for profits would be unjust, the court may allow interest only.[4]

§ 798. Survivor's occupation of property.—If after dissolution one partner keeps exclusive possession of the premises belonging to the firm, upon which the business was conducted, he will be charged rent for it the same as a surviving partner would be.[5]

And a partner who, with his family, occupied a dwelling-house belonging to the firm, has been held accountable for rent, though no agreement was made or charge entered upon the books in his life-time.[6]

But no allowance for rent will be made where one partner owned the property on which the firm conducted its business while the firm was in operation, in the absence of agreement, for the use will be regarded as a contribution to capital.[7]

Surviving law partners are not chargeable with rent for the use of the library when division or winding up has not been delayed.[8]

And the surviving partner of a firm of barbers was not held to account for subsequent profits.[9]

So where the deceased partner owes the firm more than the amount of his alleged interest in it, and therefore in fact has no interest, and the subsequent profits arose from the prudence, skill and industry of the remaining partners.[10]

[1] See Durbin *v.* Barber, 14 Oh. 311, and Yates *v.* Finn, 13 Ch. D. 839.

[2] Willett *v.* Blanford, 1 Hare, 253; Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 Myl. & Cr. 41.

[3] § 766.

[4] Phillips *v.* Reeder, 18 N. J. Eq. 95.

[5] Stoughton *v.* Lynch, 2 Johns. Ch. 209; Ligare *v.* Peacock, 109 Ill. 94.

[6] Holden *v.* Peace, 4 Ired. Eq. 223.

[7] Lee *v.* Lashbrooke, 8 Dana, 214.

[8] Starr *v.* Case, 59 Iowa, 491.

[9] Carroll *v.* Alston, 1 S. Ca. 7.

[10] Simpson *v.* Chapman, 4 De G. M.

So in Taylor *v.* Hutchison, 25 Gratt. 536 (18 Am. Rep. 699), a partnership was dissolved by war and the business was continued by one partner. As the other partner had no capital in the concern, but was indebted to it, it was held that he was not entitled to share the profits.

In Chittenden *v.* Witbeck, 50 Mich. 401, C. & W. were partners in a leased hotel, and shortly before the expiration and renewal of the lease W. died. On C.'s proposing to remove the furniture the executrix enjoined him from taking it out of the house. The court said that strictly he had no right to continue the use of the furniture for a single day; that had he removed it and substituted new no part of the profits could have been claimed by the executrix; had he ceased to use it the hotel must have been closed and his business destroyed; and it was held that he was not liable for a share of the profits, but only for the deterioration of the furniture during his use of it and for interest on its value.

§ 799. Purchase of share at a valuation.— If the share of the deceased or retired partner is converted into a debt by agreement of purchase by the continuing partners, mere non-payment of the debt gives no claim to subsequent profits.[1]

But the sale must be a legal one. A sale by the executors of a deceased partner to the surviving partners, which may be proper enough, being followed by a resale by them to one of the executors, may be set aside and an account ordered.[2]

In Demarest *v.* Rutan, *supra*, where a partner died and his interest in the firm was purchased by a third person from one whom he believed to be the administrator, but who was not appointed until a later date, the administrator made no claim for three years, and the buyer being ready to pay the purchase money, the claim for an accounting was refused.

& G. 154; Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 Myl. & Cr. 41; aff. 22 Beav. 84; Hyde *v.* Easter, 4 Md. Ch. 80; Gyger's Appeal, 62 Pa. St. 73 (1 Am. Rep. 382). See Stern's Appeal, 95 id. 504.

[1] Demarest *v.* Rutan, 40 N. J. Eq. 356; Hourquebie *v.* Girard, 2 Wash. C. C. 212.

[2] Cook *v.* Collingridge, Jacob, 607; Stocken *v.* Dawson, 9 Beav. 239, and on app. 17 L. J. Ch. 282. And see Ogden *v.* Astor, 4 Sandf. 311. As to the legality of such sales, see § 743.

§ 800. And in case of the reinvestment of the receipts of the partnership adventure by one partner in similar ventures, the partnership is presumed to continue in the latter.[1]

And so where surviving partners and others were appointed executors, the articles of partnership providing that the capital should remain in the business on interest after death, but on certain security being given, but no security was given until many years afterwards, and then very inadequate and unauthorized security.[2]

§ 801. **Interest in lieu of profits.**— The complainant may elect to receive interest on the capital used instead of profits in these cases.[3]

When executors terminate a partnership to which they have consented the firm is no longer accountable for profits.[4]

If heirs elect to take rent in case of a farming partnership instead of profits, the crops become the property of the surviving partner and there is no lien upon them for the settlement of accounts.[5]

And the heirs may consent to a continuance of the partnership for a time and take a share of profits, and may then terminate it and elect whether to take profits or rent for the future. They are not forced to take profits because for a time they elected to do so.[6]

A buyer on execution of the interest of a partner has been held not to be entitled to an account of subsequent profits, but may have a reasonable compensation for the use of his share instead of interest, if the property is liable to deterioration.[7]

RETURN OF PREMIUM.

§ 802. A person is often required to pay a certain sum as a consideration for admittance into an established business

[1] Cameron *v.* Bickford, 11 Ont. App. 52; Patterson *v.* Ware, 10 Ala. 444. See Hourquebie *v.* Girard, 2 Wash. C. C. 212.

[2] Townend *v.* Townend, 1 Giff. 201.

[3] Booth *v.* Parks, 1 Moll. 465; Beatty, 444. See, also, Clements *v.* Hall, 2 De G. & J. 186; Toulmin *v.* Copland, 2 Ph. 711 (rev'g 4 Ha. 41); Bernie *v.* Vandever, 16 Ark. 616; Goodburn *v.* Stevens, 5 Gill, 1; Crabtree *v.* Randall, 133 Mass. 552; Brown's Appeal, 89 Pa. St. 139.

[4] Colgate *v.* Colgate, 23 N. J. Eq. 372, 384.

[5] Berry *v.* Folkes, 60 Miss. 576, 613.

[6] Berry *v.* Folkes, 60 Miss. 576, 612–13.

[7] Carter *v.* Roland, 53 Tex. 540.

or firm. This is called the premium. The sum paid becomes the separate property of the seller and not part of the capital.

In case of premature dissolution, or in case of a partnership at will, a dissolution by the recipient of the premium, when the payer of the premium has not received consideration for the payment, a return of part of the premium is frequently obtained, either as an item in the accounting or by an action at law, if all other items of account are settled so that a law court would have jurisdiction. The claim for an apportionment of premium is where the partnership is for a term and is prematurely terminated by the recipient, founded upon breach of contract; but in other cases is treated as being for partial failure of consideration.[1]

The terms of dissolution, both as to a return of premium and the amount to be returned, rest very largely in the discretion of the court which hears the case.[2]

§ 803. Partnerships at will.— In case of a partnership at will, a person paying a premium is deemed to pay it not merely for admittance into the firm, but also under an expectation that the partnership will be continued, and if the recipient of the premium exercises his right to dissolve at once or shortly afterwards, he will be compelled to refund it.[3]

The difficulty in cases of partnerships at will is to determine when there may be a dissolution without return of premium, or how much premium is to be returned, there being no term to fix the proportion.

In Carlton *v.* Cummings, 51 Ind. 478, defendant, a dentist, sold

[1] Edmonds *v.* Robinson, 29 Ch. D. 170.

[2] Lyon *v.* Tweddell, 17 Ch. D. 529; Edmonds *v.* Robinson, 29 id. 170, and other cases *passim*.

[3] Featherstonhaugh *v.* Turner, 25 Beav. 382, where a person sold part of his business as surgeon, the buyer to become a partner for such term as they should mutually agree to continue, and the seller then dissolved. Burdon *v.* Barkus, 4 DeG. F. & J. 42, where a partner of the owner of a coal mine sunk a new pit, paid for out of partnership funds. But the copartner having dissolved shortly after, an inquiry into the proper allowance to the former for the expense was ordered. Rooke *v.* Nisbet, 50 L. J. Ch. 588; 29 W. R. 842, the facts of which are given in § 804.

to plaintiff an undivided half of the good will, tools and furniture of his business and one-half the profits, in consideration of a conveyance to him of eighty acres of land, valued at $3 600, of which $2,000 was afterwards agreed as representing the good will; plaintiff to be a silent partner, but to put his son, a young dentist, in as his substitute. A year afterwards the defendant dissolved the firm. The plaintiff claimed damages, and that the period of the partners' joint lives was the period for which the premium was a consideration. But the defendant was held to have a right to dissolve without liability.[1]

§ 804. **Options to dissolve on notice.**— An option in the contract of partnership to terminate it on notice is construed as a right to dissolve only, and not a right also to retain the premium, and part must be returned on such dissolution.

In Rooke *v.* Nisbet, 50 L. J. Ch. 588; 29 W. R. 842,[2] R. & N., attorneys and solicitors, formed a partnership for twelve years, terminable at the option of either, on three months' notice, with a right in R. to increase his share of profits by paying N. £600. At the end of ten years he paid N. the £600, and N. soon after dissolved by notice under the articles. R. was held entitled to a return of premium.

But if the partner who received the premium has the right to retire on notice, leaving the payer in possession of the premises and good will, no return of premium is contemplated.[3]

§ 805. **Misconduct.**— If the recipient of the premium has been guilty of fraud in the formation or conduct of the business, or has been the sole cause of dissolution, there can, of course, be no question as to a return of premium, either in part or wholly.[4] And the guilty partners are jointly and

[1] In Dulaney *v.* Rogers, 50 Md. 524, Mrs. D. gave two hundred acres of land, valued at $6,000, to R. to take her son in partnership, R. agreeing in case of dissolution to pay back the difference between $6,000 and what the son received as profits. The son dissolved, and the land was then found to be worth but $3,000. Reformation of the contract was prayed for, but of course could not be granted for a mistake not mutual, for that would be making a new contract.

[2] Also entitled Daw *v.* Rooke, in this last report.

[3] Bond *v.* Milbourn, 20 W. R. 197. Read the facts of this case in § 664.

[4] Such were the cases of Hamil *v.* Stokes, 4 Price, 161; Dan. 20; Pillans

severally liable to repay the amount,[1] and the defrauded partner has a lien on the assets for the amount.[2]

That the payer of the premium or incoming partner is in fault will not deprive him of a return of part of the premium, as where both parties were in the wrong.[3] And if such partner was in fault chiefly or solely, he will not necessarily be deprived of a return of premium. For example, incompetency will not bar the right to any part of it unless it caused injury to the firm.[4] Even misconduct, unless it is gross, will not deprive him of an apportionment. What constitutes gross misconduct is a question of fact for the trial court to decide.[5]

v. Harkness, Colles, 442; Freeland *v.* Stansfeld, 2 Sm. & G. 479; Mackenna *v.* Parkes, 36 L. J. Ch. 366; 15 W. R. 217; Jauncey *v.* Knowles, 29 L. J. Ch. 95; Mycock *v.* Beatson, 13 Ch. D. 384; Newbigging *v.* Adam, 34 id. 582; Richards *v.* Todd, 127 Mass. 167; Boughner *v.* Black, 83 Ky. 521.

[1] Newbigging *v.* Adam, 34 Ch. D. 582.

[2] Mycock *v.* Beatson, 13 Ch. D. 384; Freeland *v.* Stansfeld, 2 Sm. & G. 479.

[3] Pease *v.* Hewitt, 31 Beav. 22, where an idle quarrel arose and both got so exasperated as to dissolve; Astle *v.* Wright, 23 id. 77, a dissolution for disagreements with fault on both sides; Bury *v.* Allen, 1 Coll. 589, where the recipient of the premium excluded the payer, but on considerable provocation they had a fight; Mycock *v.* Beatson, 13 Ch. D. 384.

[4] Atwood *v.* Maude, L. R. 3 Ch. App. 369, where the other partner knew of the incompetency and had charged a higher premium in consequence; Brewer *v.* Yorke, 46 L. T. N. S. 289, here the court suppose the case of a young doctor, whose friends pay to have him associated with an older one, and who, not knowing the difference between a vein and an artery, bleeds a patient; here the incompetency is clear, but should not entitle the other to keep the whole premium.

[5] So ruled in Brewer *v.* Yorke, 46 L. T. N. S. 289, which held that unfounded imputations of misconduct against the copartner in the suit between them are not sufficient misconduct, for they do not affect the partnership; Wilson *v.* Johnstone, L. R. 16 Eq. 606, where the partner seeking the apportionment had appropriated assets to discharge his own debts, hurt the firm's credit by not paying his notes, retained collections, but being very young and grossly careless, but not having acted so fraudulently as to compel dissolution, the court said it would be unjust to deprive him of the premium and the court will not fine for immorality or dishonesty in the abstract; Bluck *v.* Capstick, 12 Ch. D. 863.

§ 806. **Voluntary dissolutions.**—The question of a return of part of the premium may also depend on whether the dissolution was voluntary on the part of the claimant; thus where he rescinded the partnership agreement without any excuse and before the term is ended or the premium paid, he cannot avail himself of his own wrong and demand back the premium, but if he had good cause for his action he is not barred by having dissolved or by himself filing the bill to dissolve.[1]

Where the dissolution is by mutual agreement, the agreement controls, and if unconditional, and a stipulation for a return of premium seems to be excluded, such intention will control.[2]

[1] Bluck *v.* Capstick, 12 Ch. D. 863, where he was compelled also to pay in unpaid instalments. Fry, J., p. 867, says a return of premium takes place only when neither is in fault, or when there is fault on both sides, or when the recipient is in fault, and not when the dissolution is from the misconduct of the one who paid the premium. In Bullock *v.* Crockett, 3 Giff. 507, the incoming partner voluntarily dissolved the firm, but for cause, and an apportionment was awarded. And in Atwood *v.* Maude, L. R. 3 Ch. App. 369, Maude demanded a dissolution and Atwood then filed a bill for dissolution and return of premium. It was held to make no difference who filed the bill if the feeling between the partners made a dissolution necessary. And in Edmonds *v.* Robinson, 29 Ch. D. 170, the claimant filed the bill for dissolution, and while the court did not deny but that he would have been entitled to an apportionment, refused it because the complainant had not made a claim for it until a very late stage of the case.

[2] Thus in Lee *v.* Page, 7 Jur. N. S. 768; 30 L. J. N. S. Ch. 857, the facts were, a partnership for fourteen years between attorneys, a premium of £1,000 being paid by one to the other, and an unconditional dissolution in three years; and the court held that there no return of premium was contemplated, and was granted only in adverse dissolutions and not those by consent. But this case is now always distinguished as based on an exclusion of a return of premium and not on mere silence. In Pease *v.* Hewitt, 31 Beav. 22, was a dissolution by agreement, yet an apportionment was ordered. In Durham *v.* Hartlett, 32 Ga. 22, H. having a brickyard formed a partnership with D. for three years, D. giving his note for $456, for half the brick and a half interest. They dissolved in eleven months, D. having paid $200 on his note and claimed that this should end his liability. The contract of dissolution said nothing about the note, but it was not surrendered, and the court held that he must pay it.

If, however, the dissolution by consent is after suit to dissolve and wind up has begun, an apportionment of premium is ordered.[1]

§ 807. **Death and bankruptcy.**— In case of dissolution by death it seems that no part of the premium is to be returned, the contract being impliedly for a partnership for a term, provided the partners live so long.[2] But in case of fraud or breach of contract this rule ceases to be applicable, as where the recipient knew of the probability of his death and failed to disclose it.

In Mackenna *v.* Parkes, 36 L. J. Ch. 366; 15 W. R. 217, P. took M. into a partnership as physicians, M. paying £1,250 premium; P. to have a right to absent for three months and to introduce M. to his patients. And P. had Bright's disease and the gout, and failed to introduce M., and after six months' absence died from these diseases. The court said it was "extraordinary" that P. did not disclose his state of health, and that M. had not received the benefit agreed on and was entitled to an apportionment.

Dissolution by bankruptcy of the firm, when unaccompanied by concealment or misrepresentation practiced upon the incoming partner, would doubtless not entitle the latter or his creditors to claim a return of any part of the premium because it is a risk which neither party wholly assumes. If, however, the bankruptcy of the recipient of the premium terminates the partnership prematurely, a part of the premium must be returned, for the consideration has partly failed.[3]

[1] Bury *v.* Allen, 1 Coll. 589; Astle *v.* Wright, 23 Beav. 77; Wilson *v.* Johnstone, L. R. 16 Eq. 606.

[2] Farr *v.* Pearce, 3 Madd. 74; Whincup *v.* Hughes, L. R. 6 C. P. 78.

[3] Freeland *v.* Stansfeld, 2 Sm. & G. 479, a partnership for nine years as surgeons, F. paying £900 premium. His partner became bankrupt in a year and a half. Akhurst *v.* Jackson, 1 Swanst. 85, P., a fishmonger, agreed to take J. and H. into partnership for twenty-one years, they paying a premium of £3,500, payable in instalments. P. became bankrupt in five months. The only difference between this and the preceding case is that J. and H. knew of P.'s being embarrassed in circumstances. The court held that J. and H. had got what they bargained for; that the loss was not a breach of contract, and the future instalments must be paid as they matured.

Where, however, there is any fraud, as where the recipient of the premium sues out a commission in bankruptcy against his copartner, thus causing a dissolution, he must repay all the premium advanced by the latter and deliver up the securities for the future instalments.[1]

§ 808. If no partnership ever was consummated and the payer of the premium has not been held out as a partner, his payment is a debt for which he can prove in bankruptcy.[2]

If the payer became a partner, but the partnership is rescinded and he is excluded, he becomes a creditor of the continuing partner, and may prove against his estate in its subsequent bankruptcy.[3]

If the firm is dissolved without retirement of the claimant, as by bankruptcy of the other partner, the claimant has a lien upon the assets for such part of the premium as may be found due him, the same as for any other item in his general balance.[4]

§ 809. Apportionment.— The very general rule as to the amount of premium to be returned is to measure it by the proportion that the unexpired time of the partnership bears to the whole time. Thus, if a partnership is for ten years,

[1] Hamil *v.* Stokes, 4 Price, 161; Dan. 20, where in a partnership between attorneys for five years one of them took this step in fourteen months.

[2] *Ex parte* Turquand, 2 M. D. & D. 339, where a firm proposed to admit E. as a partner on certain terms, among which were that "& Co." should be added to the name and E. should pay £2,000. E. paid the amount and "& Co." was added; but E. did nothing else, and refused to be a partner. He was held entitled to prove his advances in bankruptcy as a debt, never having become a partner.

[3] Bury *v.* Allen, 1 Coll. 589. Yet in *Ex parte* Broome, 1 Rose, 69, A. being insolvent, and in order to retrieve his fortunes induced B. to pay him a premium for admission into a partnership with him. B., learning the facts, applied to have the partnership declared void for fraud. A receiver was granted; and A. becoming bankrupt, Lord Eldon at first was inclined to allow him to prove his claim *pari passu* with separate creditors, but, on consideration, as B. had become liable as partner to third persons, he was allowed to prove, but subject to the priority of separate creditors.

[4] Freeland *v.* Stansfeld, 2 Sm. & G. 479; Mycock *v.* Beatson, 13 Ch. D. 384.

and the premium is £1,000, and it is dissolved in two years, the premium is regarded as extending over ten years and £800 must be returned,[1] without interest, for debts between partners bear no interest until ordered paid.[2] But this rule is only a general one and liable to change according to circumstances and to the agreement of the parties, and the cause of loss in business, which may be from the caprice of one or negligence of the other.

Thus incompetency of the payer of the premium causing an injury to the business may reduce the amount, or, if his admission into the firm was at a reduced premium owing to the belief of the other partner that he would be value and he proved utterly valueless.[3] Fraud or gross misconduct will reduce it;[4] and the nature of the agreement also, as where a larger proportion of the consideration for the premium has been received than would be measured by a proportion of time.[5]

Where the original partnership term was seven years, but was, by a subsequent agreement, shortened to six and a half years, the proportionate part of the premium to be returned was measured by the latter time.[6]

[1] Bury *v.* Allen, 1 Coll. 589; Freeland *v.* Stansfeld, 2 Sm. & G. 479; Astle *v.* Wright, 23 Beav. 77; Airey *v.* Borham. 29 id. 620; Pease *v.* Hewitt, 31 id. 22; Atwood *v.* Maude, L. R. 3 Ch. App. 369; Wilson *v.* Johnstone, L. R. 16 Eq. 606; Brewer *v.* Yorke, 46 L. T. N. S. 289.

[2] Brewer *v.* Yorke, 46 L. T. N. S. 289, 295.

[3] Brewer *v.* Yorke, *supra.*

[4] Astle *v.* Wright, 23 Beav. 77, 79.

[5] Bullock *v.* Crockett, 3 Giff. 507, where an attorney took in a clerk as partner for fourteen years at £600 premium, with an agreement that his share of profits for the first three years should not be less than £300 per annum, and they were considerably more. The dissolution took place in seven years, but a most important part of the consideration having been received, only £100 was decreed to be returned. In Hamil *v.* Stokes, 4 Price, 161; Dan. 20, the entire premium was ordered returned, and so in many cases of rescission for deception; while in Jauncey *v.* Knowles, 29 L. J. Ch. 95, a dissolution for this cause, one-half was decreed. In Taylor *v.* Hare, 1 B. & P. N. R. 260, no part of the premium was returned. Here A., a patentee, by contract lets B. use his patent on payment of a certain annual sum, which was paid for several years; then B. discovers that A. was not the inventor, and, therefore, not entitled to the patent, and sues to get back his payments, but both were equally innocent, and B. may have made considerable profits and hence recovery was not allowed.

[6] Wilson *v.* Johnstone, L. R. 16 Eq. 606.

ORDER OF DISTRIBUTION BETWEEN PARTNERS.

§ 810. **Statement of the account.**— The generally recommended method for taking a partnership account is the same or nearly the same as that stated by Mr. Lindley, and is repeated generally in the cases cited hereafter.[1] 1. Ascertain how the firm stands towards non-partners, including co-adventurers who are not partners. 2. Ascertain what each is entitled to charge in account with his copartners, including whatever each has brought in, whether as capital or as advances, and what each should have brought in but has not done so, and what each has taken out more than he ought. 3. Apportion profits to be divided or losses to be made good, ascertaining what each must pay to the others, so as to settle cross-claims.

In stating partnership accounts after dissolution, where one partner has had the entire charge of the business, it is error to deduct the gross losses and expenses from the gross receipts and out of the balance restore to each his original capital, calling the rest profits, but such partner should be debited with the entire capital placed in his hands, as well as with the proceeds of sales, and if part of the capital consisted of stock which was contributed at a valuation and it has been used in the business or disposed of and the proceeds charged against him, he should be credited with the stock as a disbursement to the amount of its original valuation. The balance, less the original capital and uncollectible assets, is the profits, and each is entitled to his original capital and his share of the profits out of the balance. If a party is entitled to interest on an excess of capital over his share, a proportion of that interest is to be deducted from the others' shares.[2]

[1] Lindley on Partnership, p. 973; West *v.* Skip, 1 Ves. Sr. 242; Collins *v.* Owens, 34 Ala. 66; Chambers *v.* Crook, 42 id. 171; Neudecker *v.* Kohlberg, 3 Daly, 407; Schulte *v.* Anderson, 45 N. Y. Superior Ct. 489; Myers *v.* Bennett, 3 Lea, 184, and cases hereafter cited in this chapter.

[2] Gunnell *v.* Bird, 10 Wall. 304; approved in Keaton *v.* Mayo, 71 Ga. 649. If plaintiff has agreed that defendant shall retain certain shares of stock belonging to the firm until a claim against the firm is settled, the court will not, in an action to wind up, render judgment directing conveyance of them to plaintiff, without proof that the claim has been settled. Harper *v.* Lamping, 33 Cal. 641. M., A. & R., partners, dissolved. M., the creditor partner, received claims due the firm in payment of his interest,

It must be remembered that in an accounting all the partners are actors, and it is therefore erroneous to state a mere debtor and creditor account between two partners on one side who are complainants and another who is defendant.[1]

§ 811. Order of distribution.—In distributing the proceeds, the following order of priority obtains:

1. The debts or liabilities due to third persons.
2. In repaying to each partner his advances, for as to these he is a creditor *inter se.*
3. In repaying each partner his capital.
4. Dividing the balance as profits.

Where a partner has failed to put in his share of capital, the deficiency is a debt due to the firm which may be retained out of his share.

§ 812. Capital is to be repaid before dividing profits.—Whatever dispute there may be as to the equality of shares of profits, yet when there is no loss impairing the capital, the fund on winding up is to be first applied to repaying to each partner the capital contributed by him, whether contributed by each equally or unequally, or wholly by one partner. Only the surplus after repaying the capital, debts being first paid, of course, is profits. In other words, first repay the excess of capital to the partner who put in the most, and then divide the balance of the assets.[2]

with an agreement that if any proved uncollectible other claims would be transferred to him. In settling the partnership, M. is to be credited as of the date of the agreement with a debt returned and to be charged with the claim, principal and interest, substituted for it as of the date of the transfer, and A., the active partner, who transferred the claim to him, is to be credited with the same amount as of same date as if it had been paid in money. Robertson *v.* Read, 17 Gratt. 544.

[1] Smith *v.* Hazelton, 34 Ind. 481; Conwell *v.* Sandidge, 8 Dana, 273; Neudecker *v.* Kohlberg, 3 Daly, 407; Schulte *v.* Anderson, 13 Jones & Sp. 489; Moore *v.* Wheeler, 10 W. Va. 35. Compare also § 780.

[2] Gunnell *v.* Bird, 10 Wall. 304; Nims *v.* Nims (Fla.), 1 South. Rep. 527; Keaton *v.* Mayo, 71 Ga. 649; Taylor *v.* Coffing, 18 Ill. 422; Jackson *v.* Crapp, 32 Ind. 422; Lord *v.* Anderson, 16 Kan. 185, 187; Norman *v.* Conn, 20 id. 159; Frigerio *v.* Crottes, 20 La. Ann. 351; Livingston *v.* Blanchard, 130 Mass. 341; Randle *v.* Richardson, 53 Miss. 176; Raymond *v.* Putnam, 44 N. H. 160; Marquand *v.* N. Y. Mfg. Co. 17 Johns. 525, 531;

A. put in most of the capital but no time; B. put in less capital but gave all his time; profits and losses were to be shared equally, but the articles were silent as to the relative interests in the capital or how to divide it. The business was a losing one. The property or capital must be divided *pro rata* according to the contributions, and each must pay half the debts to the other, else one could dissolve or die next day and get more than he put in.[1]

Thus in Norman *v.* Conn, 20 Kan. 159, the capital was contributed unequally, and profits were to be equally divided; total of the expenditures are to be deducted from the total of the capital and receipts, the capital is then to be paid back, and the balance is to be divided equally as profits, thus:

If the capital was - - - - -	$1,000
The cash receipts - - - - - -	2,000
The accounts due - - - - -	500
The total is - - - - - -	$3,500
If the expenses were - - - - -	2,000
Leaving a balance of - - - - -	$1,500
The capital is to be repaid - - - -	1,000
And the balance is divisible equally as profits - -	$500

So in Livingston *v.* Blanchard, 130 Mass. 341, 342, L. had put in all the capital, $3,300; the other partner, B., was to receive a salary as part of the expenses. On dissolution the whole assets sold for $3,718.26. The salary had been paid, and of the proceeds $3,300 was paid to L. as his capital, together with one-half the profits less one-half the depreciation in value of the fixtures, and the balance to B. This was held to be as favorable to B. as he was entitled to.

Where capital is contributed unequally, and each partner is to have interest on the excess of his capital over the smallest share put in by any one, and certain salaries or wages are to be paid to some of the partners for services, and profits and losses are to be equal, and on winding up the assets are to be divided in proportion to capital, if each partner has a right by the articles to increase his capital, the capital of each will be regarded as the sum of his

Neudecker *v.* Kohlberg, 3 Daly, 407; Phila. 362; Shea *v.* Donahue, 15 Lea, Conroy *v.* Campbell, 45 N. Y. Su- 160; Moore *v.* Wheeler, 10 W. Va. 35.
perior Ct. 326; Rowland *v.* Miller, 7 [1] Jackson *v.* Crapp, 32 Ind. 422.

original contribution with interest on the excess over the lowest share, and with undrawn salary or wages added, and any other amounts paid by each added, and deducting what each owed the firm for articles he had received.[1]

§ 813. **Losses when capital is impaired.**— If there are no profits and the capital has been impaired or wholly lost, in dividing losses the deficit must be repaid like any other loss, for impairment of capital is a loss the same as any other, and is not to be reimbursed out of profits merely. That the capital has been contributed unequally and losses are to be equal makes no difference, or if the capital has been wholly paid by one partner, the other contributing services and skill, the latter who has lost his time owes to the former the same proportion of a loss of capital that he would be chargeable with had the losses not reached the capital, but had simply diminished the profits.[2]

§ 814. **Illustrations.**— Thus, in Taylor *v.* Coffing, 18 Ill. 422, C. contributed $10,000 capital, and T. $5,000, and they were to share losses equally. All the property of the firm having been destroyed or exhausted in paying debts, T. owes C. $2,500; or, to describe it in the mercantile way, the firm owes to C. $10,000 and to T. $5,000, that is, the firm is $15,000 in debt, which is $7,500 due from each partner, or T. owes $2,500 more than the firm owes him, and C. $2,500 less.

In Sangston *v.* Hack, 52 Md. 173, three partners were to bring in each one-third of the capital, two of them at once, and the other as soon as he could realize the amount from other sources; but, in fact, he never brought in anything. The firm failed and the cap-

[1] Raymond *v.* Putnam, 44 N. H. 160, 168. It seems to me that part of this ruling must be taken with a qualification, viz.: if the undrawn wages were subject to call at any time they are not additional capital, but rather a loan, if anything, and should only be treated as such if it was agreed that they should remain in.

[2] Wood *v.* Scoles, L. R. 1 Ch. App. 369; Raymond *v.* Putnam, 44 N. H. 160; Neudecker *v.* Kohlberg, 3 Daly, 407; Johnson *v.* Kelly, 2 Hun, 139; 4 Thomp. & C. 417; *Ex parte* Maude, L. R. 6 Ch. App. 51; Nowell *v.* Nowell, L. R. 7. Eq. 538; *Re* Anglesea Colliery Co. 2 id. 371; 1 Ch. App. 555; Pearce *v.* Pearce, 77 Ill. 284; Jackson *v.* Crapp, 32 Ind. 422; Foster *v.* Chaplin, 19 Grant's Ch. (Up. Can.) 251.

ital was lost. The latter partner must make good the agreed share, that is, he must share the loss of capital.

In Hasbrouck *v.* Childs, 3 Bosw. 105, H. and C. formed a partnership, each contributing $2,000, H. giving his whole time and C. a small part of his time, H. to receive three-fourths of the profits and C. one-fourth; but nothing was said as to losses. There were no profits, but the capital was heavily impaired, only $879.80 being left. It was held that this must be equally divided; that H.'s excess of profits was for extra services and payable only out of profits if any were made, and that losses were to be shared equally.

In Jones *v.* Butler, 87 N. Y. 613 (affirming 23 Hun, 367), articles of partnership between J. and B. stated that J. had put in stock estimated to be worth $15,000, and B. stock estimated at $3,000, all profits and losses, whether from bad debts, depreciation of goods or otherwise, to be equally divided. And a loss of capital occurred, chiefly by depreciation in the value of stock, much of which was worthless at the start, the estimates being based on cost prices; this loss, it was held, must be equally divided. A further provision that at dissolution the stock should be sold and the proceeds divided, after paying debts, in proportion to capital, was held not to alter the construction, because it relates only to a sale and not to profits or losses. But in equalizing the loss of the capital the valuation on the articles, being put down without reference to real worth, is not binding, and B. is responsible only for half the actual loss.

The rule was applied where the partner who furnished all the capital was to be reimbursed out of the proceeds of the enterprise, and the firm was dissolved by mutual consent before there is sufficient means to repay him, and he was held entitled to require repayment from the copartner.[1]

Where A. is to furnish $20,000 capital and B. to manage the business, keeping up the stock to this value, and on dissolution deliver to A. the stock on hand to the value of $20,000, losses by bad debts excepted; profits, after paying rent, taxes and expenses, to be equally divided; losses by bad debts must be taken first out of profits, so as to leave the stock of $20,000 as far as possible unimpaired.[2]

[1] Merriwether *v.* Hardeman, 51 Tex. 436.

[2] Leach *v.* Leach, 18 Pick. 68.

§ 815. Same when one furnishes it all and the other services.— As already stated, the fact that one partner has furnished all the capital and the other all the services does not alter the rule; the loss of capital is like any other loss, and the partner who contributes his services and loses them is debtor to the other for such share of the capital as represents the amount of loss he is to bear.

Thus where A. furnishes the money and G. buys the land forming the subject of the partnership, and the land depreciated, the loss must be divided.[1]

In Hanks *v.* Baber, 53 Ill. 292, H. was to furnish all the capital in a cattle adventure, and B. the labor, and losses were to be shared equally. H. bought the cattle for $1,425. They were sold for $432, making a loss of $993. One-half the loss is $496.50, that is, the amount which B. must pay H. if the $432 had been equally divided. In this case H. borrowed $432 of his capital, which of course was his private debt. The firm paid the debt. B. has all the proceeds of the sale of the cattle; hence there is due from B. to H. $496.50.

Where one partner is to furnish all the capital and the other the experience, and the latter is to bear half the losses, but only losses arising from or incident to the business, a loss by the great Chicago fire was held to be a loss within this clause, fire being a natural and ordinary peril, and the firm and not the capitalist partner alone must bear it.[2]

So where the losses which are to be shared are those arising "in all business transactions," this does not confine the losses to transactions disconnected with those of capital, and includes a loss by fire to a building contributed as part of the capital by one partner.[3]

[1] Richards *v.* Grinnell, 63 Iowa, 44 (50 Am. Rep. 727), noticed under § 33; Brinkley *v.* Harkins, 48 Tex. 225, noticed under § 35. Also Olcott *v.* Wing, 4 McLean, 15, but there losses were by specific agreement to be divided.

[2] Savery *v.* Thurston, 4 Ill. App. 55.

[3] Taft *v.* Schwamb, 80 Ill. 289. In Gill *v.* Geyer, 15 Oh. St. 399, one member of the concern furnished all the capital and profits were to be divided; it was uncertain whether the other associate was a partner or a mere employee on shares. A loss by fire occurred which consumed part of the profits but did not impair the capital; the latter associate claimed that the stock belonged to the former, and the loss was therefore his loss, and that the latter's share of profits was not at the haz-

In Carlisle *v.* Tenbrook, 57 Ind. 529, A. furnished the capital and B. the time and skill; losses to be borne equally. This covers loss by fire as well as by bad debts; and where A. bought land for the firm in his own name and erected buildings upon it for the business, a stave factory, B. must share a loss by fire.

Where the whole capital is contributed by two partners, A. and B., in unequal proportions, and a third partner, C., contributes his time and skill only, and each is to receive one-third of the net profits, and A. and B. interest on their capital, and the business results in a loss, the capital constitutes a debt to which all are bound to contribute equally; and if one partner is insolvent, the others must bear the loss equally.[1] In such case, then, the assets must be divided to the two former partners, in the proportion of their contributions to the common stock, and the deficiency must be borne in the proportions in which they were to bear losses.[2]

That one is an infant does not throw the deficiency upon the rest.[3]

§ 816. Contrary cases.— There are some cases to the contrary, holding that, where one partner contributes all the capital and the other services, and the capital is lost, the partner who contributed the services cannot be required in addition to his loss of time to pay back a share of the capital.[4]

In Knapp *v.* Edwards, 57 Wis. 191, each of two partners was to put in an equal amount, but one of them, the managing partner, put in more than his amount. The whole property was destroyed by fire. It was held that the other partner was not chargeable beyond his investment, and that it would be unjust to require him to pay an additional amount; but no reasoning is given to show how the conclusion is arrived at.

ard of fire. It appeared, however, by the course of dealings and the accounts, that *net* profits were divided, and the court for this reason divided the surplus after deducting the loss by fire. See, also, Meserve *v.* Andrews, 106 Mass. 419.

[1] Whitcomb *v.* Converse, 119 Mass. 38 (20 Am. Rep. 311); Moley *v.* Brine, 120 Mass. 324.

[2] Moley *v.* Brine, 120 Mass. 324.

[3] Id., and § 144.

[4] Everly *v.* Durborrow, 8 Phila. 93; 1 Pa. Leg. Gaz. 127; Cameron *v.* Watson, 10 Rich. Eq. 64 (the latter case is, however, explained and the former denied in Whitcomb *v.* Converse, 119 Mass. 38 (20 Am. Rep. 311). And dissenting opinion in Hasbrouck v. Childs, 3 Bosw. 105; Wood *v.* Scoles, L. R. 1 Ch. App. 369, was on the construction of a particular agreement.

In Yohe *v.* Barnet, 3 W. & S. 81, Yohe and two others formed a partnership, the latter to put in $3,000 each, and profits and losses to be shared equally. The court ruled that in case of loss of capital, it was a question for the jury to determine on what consideration Yohe was to receive a third of the profits, and if the others, besides capital, were to give time and skill, the question whether Yohe should not pay one-third of the deficiency was also for the jury; but the court also queried whether Yohe was not obliged, on the face of the paper, to contribute to loss of capital.

§ 817. **Examples of calculating.**— Two equal partners, W. & B., dissolved.

W. had advanced -	$580.80	B. had advanced -	$166.75
		His receipts over dis-	
And had received -	227.32	bursements were -	30.86
W.'s net advance is	$353.48	B.'s net advance is	$135.59

Deducting B.'s balance from W.'s balance leaves $217.69, which the firm owes to W., and therefore B. owes W. one-half of it, or $108.84.[1]

If of three partners A. puts in $2,000, B. $1,000 and C. $1,000, and A. is to draw interest on $1,000, being on his excess of capital, profits and losses to be equal, the assets to be divided in proportion to capital, if at the close of the partnership they have made $3,000, each gets back his capital and each receives $1,000 profits.[2]

If, however, they have lost $3,000, each must lose $1,000. It makes no difference whether each pays in his share of loss in cash and then divide the assets in proportion to the capital of each, or offset the loss from his share of the assets. Thus $3,000 is left out of $4,000 capital. It is the same whether A. takes the $1,000 remaining, and the others nothing, or each pays in $1,000 and then divide, to A. $2,000, B. $1,000, and C. $1,000. The loss of B. and C. is equal to their capital, and A.'s loss is one-half his capital.[3]

Suppose the loss is $6,000, that is, $2,000 more than the capital. Here B. and C. each pay in $1,000 besides losing their capital, and A. loses only his capital, for that is double their capital and his loss is the same.[4]

[1] White *v.* Bullock, 18 Mo. 16.
[2] Raymond *v.* Putnam, 44 N. H. 160, 172–3.
[3] Id.
[4] Id.

Now suppose A. puts in $2,200, B. $1,100 and C. $700, that is, $4,000 in all, and there is a loss of $3,000. If each pays his share of the loss, that is, $1,000 each, the capital is restored, and each can take what he invested. But if, instead of paying in, each offsets his share of loss against his capital, A. would receive $1,200, B. $100, and C. would owe $300, being the amount his capital fails to pay his share of loss.[1]

Or suppose in the last case A. has the $1,000, being all the assets except the $300 due from C.; and C. becomes bankrupt and fails to pay his $300, and B. calls upon A. to livide in proportion to capital. The firm owes to A. $200, and to B. only $100. If this loss by C. is to be in proportion to capital, neither could claim anything of the other, for although B. has received nothing and A. has received $1,000, yet the amounts they have lost over and above their $1,000 each is just in proportion to their capital, viz., two to A. and one to B. But if the loss by C. is to be borne equally (as it doubtless is) like other losses, A. can call on B. for $50 to equalize the loss by C., after having shared equally in the general loss by the firm.[2]

A. is to put in assets of a former firm of no designated value, but worth less than $4,000, and B. is to put in $14,000, but puts in $12,000. Profits and losses are to be equally divided. Each may draw a fixed weekly sum for his own use, and at dissolution the assets are to be divided in proportion to the contribution of each. The accounting is to be upon the following terms:

1. The capital B. failed to put in is assets for which he is chargeable.

2. The excess drawn out by each for his own use beyond the agreed amount is assets and chargeable to each.

3. The amounts collected by each and retained by him is assets and chargeable to each.

4. Also the loss, no part of which either had paid back.

5. The amount one had drawn for his own use in excess of the other could not be charged against him, but must be returned.

6. The assets contributed by A. must be taken at their actual value.[3]

[1] Raymond *v.* Putnam, 44 N. H. 160, 172-3.

[2] Id.

[3] Schulte *v.* Anderson, 13 Jones & Sp. 489.

§ 818. Rule altered by agreement.—The rule may be altered by the nature of the agreement of the parties, and there are two kinds of partnership contracts which may have this effect:

1st. Where the capital contributed by one partner is to be considered as offset by the services of the other, that is, where each is to be half owner of the entire assets regardless of the ratio of original contributions.

2d. Where only the use of property and not the property itself is contributed.

Where the articles do not state how much capital each put in, and no credit is given on the books to any partner for an excess of capital, and each is to share equally, and on dissolution divide equally, no decree will be entered in favor of one against the other for any sum for capital in addition to his share of the effects, although he may, in fact, have contributed the entire capital.[1]

Where A. contributes the money and B. his time, labor and skill, but no money, and A. is to have one-fourth "interest in the business," and B. three-fourths, here it was held that in case of loss each loss is to be borne exclusively by the loser, A. his money and B. his time, and A. cannot call upon B. for contribution.[2]

So where a product is created by the union of labor and capital, which offset each other, as where one buys raw material and the other expends his labor in elaborating or manufacturing it. "Thus, if I give a weaver £100 to buy wool, and he makes cloth of it, computing his labor at £100, it is manifest that here both of us have an equal interest in the cloth, and when it is sold, the money must be equally divided, nor in fairness could I deduct the £100 contributed at first and then divide the remainder with him."[3]

§ 819. Partnership in profits without title in the property.—If the mere use of capital is contributed by one partner, as is often the case in partnerships for a single transaction, the contribution remaining the property of such member, and the partnership being in profits and losses

[1] Adams *v.* Gordon, 98 Ill. 598.

[2] Manley *v.* Taylor, 50 N. Y. Superior Ct. 26, approves and follows Hasbrouck *v.* Childs, 3 Bosw. 105.

[3] Puffendorf, lib. 5, c. 8, cited in Collyer, Part. § 168.

merely, and not in property, any loss or destruction of the property falls upon its owner, for the property never was owned by the firm, and the firm owes nothing in relation to it.[1] This is undoubtedly the explanation of the following cases:

In Tutt *v.* Land, 50 Ga. 339, one partner contributed the entire capital, consisting of a stock of drugs and fixtures valued at $29,000, and it was agreed that he should keep up that sum or its equivalent in goods for the use of the firm, and the profits were to be reckoned after deducting expenses. It was held that a loss by ordinary and natural depreciation in the value of the stock must be borne by him, and is not chargeable to the firm as an expense or loss. The court said it was as if one person furnished a farm and the other the animals to work it, where the depreciation by use of the animals is not chargeable to the firm; or the depreciation of a house furnished to the firm. The court evidently construed the articles as leaving the title to the stock of goods in the partner who furnished it, and the partnership was in the profits alone, for otherwise the case is not sustainable, nor the analogy of the farm and the animals in point.

In Rau *v.* Boyle, 5 Bush, 253, R. & R. agreed to contribute all the capital needed to buy tobacco during the war, and B. & B. agreed to contribute permits to protect it in shipment to market for half the profits. Nothing was said about losses. The adventure having involved a loss, B. & B. were held not liable to reimburse R. & R. for any part of it.

In Shaw *v.* Gandolfo, 9 La. Ann. 32, the defendants agreed to sell the merchandise to be bought by plaintiffs without charging commissions, to allow him interest on his advances for buying, and divide profit and loss. By defendants' consent the property was shipped to New York and sold at a sacrifice. The defendants were held not liable for the loss, whether they were agents or partners.

In a single adventure, particularly where one contributes the stock and the other the services, the latter's services are his capital and equivalent to the contribution of the other, and if the money or property is lost, is not liable to repay any part of it.[2]

[1] Whitcomb *v.* Converse, 119 Mass. [2] Heran *v.* Hall, 1 B. Mon. 159 (35
38, 43 (20 Am. Rep. 311); and see Am. Dec. 178).
§§ 257–260.

CHAPTER X.

DISTRIBUTION AS TO THIRD PERSONS.

§ 820. **Partner's lien and its consequences.**— While creditors have no lien nor claim upon the partnership assets, other than any individual creditor has against his debtor's property, except as derived in consequence of the partner's equity, as will be seen, yet each partner has an equity to compel the application of the assets to the joint debts. This right is generally called the partner's lien. It differs from a common law lien in that it is not dependent on possession, and any single partner can convey a good title to specific chattels by a *bona fide* sale in the course of trade; and a lien does not involve the right to deal with the property, whereas the partner's equity is a right to have it applied for certain purposes, and the one partner cannot assert the lien as a sole plaintiff.

But that this equitable right exists is universally conceded, and it is recognized in all the cases cited in this chapter.

The existence of this equity may be explained in a variety of ways, as on an implied contract that the assets shall not be used for private purposes; on the doctrine of suretyship, since each partner is liable *in solido* for the debts, and therefore, *inter se*, virtually a surety for the copartners for their proportions, and entitled to have the assets applied so as to relieve him.

And the equity extends not merely to having the debts due creditors of the firm paid with the assets, but to have the surplus applied to the debt due to himself on partnership account, and secures to him the adjustment of balances and cross-demands between the partners. And the lien for balances is not merely for inequality of capital and shares, but is for advances and expenditures for paying debts or

any other personal account with the firm;[1] and for claims arising after as well as before dissolution;[2] and for the premium which he has paid into the firm for admittance therein, when upon dissolution the court has decreed repayment of any part of it to him;[3] and for a salary or other agreed extra compensation.[4]

§ 821. The lien is not for private debts.— The lien of a partner upon the surplus assets after payment of debts for his own claim against the firm does not extend to his claim against the copartner, not arising out of partnership transactions. The mere fact that the creditor is a partner does not in such case give him a security that the other separate creditors do not have.[5]

Partnership notes given for his separate debt by one partner with the consent of the other, which the latter had to pay, are a partnership debt, and the payment is therefore a claim prior to a mortgage by the other partner upon his interest in the firm to his separate creditor. The fact that the debtor partner made a mortgage to the creditor partner, which never was recorded, does not affect the latter's rights, for they rest upon his equitable lien.[6]

A partner became insolvent; his copartner thereupon advanced money to him, to enable him to purchase goods for and on account of the joint adventure for his agreed share. This is not a private debt, but a firm debt, equivalent to a purchase of the goods, and therefore a preferred claim. *Contra* of moneys or payments on other accounts.[7]

[1] Allen *v.* Hawley, 6 Fla. 142; 63 Am. Dec. 198; Hodges *v.* Holeman, 1 Dana, 50; Crooker *v.* Crooker, 52 Me. 267; Wilson *v.* Davis, 1 Montana, 183; Hill *v.* Beach, 12 N. J. Eq. 31; Uhler *v.* Semple, 20 id. 288; Buchan *v.* Sumner, 2 Barb. Ch. 165; Lane *v.* Jones, 9 Lea, 627. See generally under "Share," §§ 180-190.

[2] Hodges *v.* Holeman, 1 Dana, 55; Edwards *v.* Remington, 60 Wis. 33.

[3] Freeland *v.* Stansfeld, 2 Sm. & G. 479.

[4] Luce *v.* Hartshorn, 7 Lans. 331, affd. in 56 N. Y. 621.

[5] Warren *v.* Taylor, 60 Ala. 218; Nichol *v.* Stewart, 36 Ark. 612; Lewis *v.* Harrison, 81 Ind. 278; Pierce *v.* Tiernan, 10 Gill & J. 253; Hill *v.* Beach, 12 N. J. Eq. 31; Uhler *v.* Semple, 20 id. 288; Mumford *v.* Nicoll, 20 Johns. 611 (rev. s. c. 4 Johns. Ch. 522); Evans *v.* Bryan, 95 N. Ca. 174; Moffatt *v.* Thomson, 5 Rich. (S. Ca.) Eq. 155 (57 Am. Dec. 737).

[6] Warren *v.* Taylor, 60 Ala. 218.

[7] Pierce *v.* Tiernan, 10 Gill & J. 253.

A surviving partner having paid individual debts of the deceased partner, whose estate was insolvent, on which the survivor was surety, cannot set off these payments in accounting with the administrator in regard to the partnership, for he can only share equally with other separate creditors, but he may retain or set off such *pro rata* amount as he would be entitled to from the administrator.[1]

Whether the fact that the debtor partner, on borrowing money from the other partner, promised the other a lien upon his interest creates a priority over the separate creditor's claims upon the surplus, is unsettled.[2] If partners can convert a separate debt into a joint one, as they certainly can, their agreement for such lien should be equally valid;[3] and the separate creditor should not be in a better position than his debtor would have been towards his copartner. The fact that the creditor partner has possession of all the joint assets does not give him such lien for a debt disconnected with the partnership.[4]

§ 822. Reaches real estate and property in name of one partner.—The equitable lien of a partner for payment of debts, including his own advances or the balance due him, extends to the real estate of the partnership wherever the legal title be; and each partner holds whatever legal title is in him for this purpose before his separate creditors are let in. The whole chapter on Real Estate substantiates this, but the cases cited below settle the question specifically.[5]

[1] Mack *v.* Woodruff, 87 Ill. 570.

[2] That it does was held in Lewis *v.* Harrison, 81 Ind. 278, and Cox *v.* Russell, 44 Iowa, 556. *Contra*, Hill *v.* Beach, 12 N. J. Eq. 31; but query had they notice of the agreement, Uhler *v.* Semple, 20 id. 288, 292.

[3] See Taylor *v.* Farmer (Ill. 1886), 4 N. E. Rep. 370.

[4] Mumford *v.* Nicoll, 20 Johns. 611; Hill *v.* Beach, 12 N. J. Eq. 31.

[5] Thrall *v.* Crampton, 16 Bankr. Reg. 261; 9 Ben. 218; Duryea *v.* Burt, 28 Cal. 569; Taylor *v.* Farmer (Ill. 1886), 4 N. E. Rep. 370; Roberts *v.* McCarty, 9 Ind. 16; Evans *v.* Hawley, 35 Iowa. 83; Pennypacker *v.* Leary, 65 id. 220; Divine *v.* Mitchum, 4 B. Mon. 488; 41 Am. Dec. 241; Hodges *v.* Holeman, 1 Dana, 50; Hewitt *v.* Sturdevant, 11 B. Mon. 453, 459; Galbraith *v.* Gedge, 16 id. 631; Bryant *v.* Hunter, 6 Bush, 75; Spalding *v.* Wilson, 80 Ky. 589; Burleigh *v.* White, 70 Me. 130; Fall River Whaling Co. *v.* Borden, 10 Cush. 458, 461; Dyer *v.* Clark, 5 Met. 562; 39 Am. Dec. 697; Howard *v.* Priest, id. 582; Arnold *v.* Waiuwright, 6 Minn. 358; Dilworth *v.* Mayfield, 36 Miss. 40; Whitney *v.* Cotten, 53 id. 689; Priest *v.* Choteau, 85 Mo. 398; Hiscock *v.*

That personal property is in the name of the debtor partner does not destroy the equitable lien of the copartners, but the lien extends to assets in his hands or in his name,[1] and partners can follow funds fraudulently abstracted by one of their number and invested in the names of third persons.[2]

Thus in Hobbs *v.* McLean, 117 U. S. 567, P., who had a contract to furnish material to the United States government, took in two partners in the contract. After furnishing the material he sued the government for the amount due, and got judgment in his own name, he being the only partner to whom the government was bound. He then made an assignment in bankruptcy, and the money was paid by the government to the assignee, and died pending the bankruptcy indebted to the firm. The other two partners were held entitled to be paid out of the fund before the creditors of P. and before the assignee. The statute, R. S. § 5057, that a claim against an assignee in bankruptcy must be brought within two years, in this case means two years from the time the assignee was liable to a suit for an accounting, which is two years from the time he received the money.

Two firms agree to pack pork on joint account for one season, sharing profit and loss; one firm has the control of the product, with a right to sell it, yet the other can require its application to the joint debts as against the creditors of the former.[3]

In Palmer *v.* Tyler, 15 Minn, 106, the articles of partnership between P., T. and B. provided that T. and B. would contribute a mill and P. money, and that, on dissolution, T. and B. would retain the mill, and after repaying P. his capital would divide everything else. This was held to refer merely to the manner of distribution, and P. has a lien on the mill for the balance due him. The reverting of the mill to T. and B. and payment to P. must be contemporaneous.

In Meridian National Bank *v.* Brandt, 51 Ind. 56, B. & C., part-

Phelps, 49 N. Y. 97; 2 Lans. 106; Tarbel *v.* Bradley, 7 Abb. N. Cas. 273; Mendenhall *v.* Benbow, 84 N. Ca. 646; Boyers *v.* Elliott, 7 Humph. 204; Williams *v.* Love, 2 Head, 80; Lane *v.* Jones, 9 Lea, 627; Diggs *v.* Brown, 78 Va. 292.

[1] Hobbs *v.* McLean, 117 U. S. 567; Meridian Nat'l Bk. *v.* Brandt, 51 Ind. 56; Dieckmann *v.* St. Louis, 9 Mo. App. 9; Frith *v.* Lawrence, 1 Paige, 424; Allison *v.* Davidson, 2 Dev. Eq. 79. And see other examples under Real Estate.

[2] See § 545.

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

ners, bought land, and while still indebted for part of the purchase money sell it to D. again, taking notes, payable to the firm, in payment. B. transferred one of the notes to E. in payment of his separate debt. C. has the right to require this note to be used to pay for the land, and E. can have only B.'s share of the surplus.

§ 823. —— but not debtor's individual property.— The lien of a partner to compel application of property to debts due to creditors and to himself extends only to partnership property and not to the individual property of his copartner.[1]

§ 824. Creditors have no lien.— As stated at the beginning of this chapter, the partnership creditors, except when they are given the benefit of the partners' equity, have of themselves no other claim than any creditor has on his debtor's property. The right of a partnership creditor to be paid has been extended in many jurisdictions beyond what the logic of its original foundation will warrant. The partners have jointly the same right of absolute disposition of their joint property that any individual has. They may sell it, pledge it, convert it into other forms, divide it up among themselves, devote it to the payment of debts or part of the debts, or exercise other ownership over it subject only to each other's rights, and to the operation of statutes forbidding voluntary conveyances to hinder and defraud creditors.[2]

[1] Mann *v.* Higgins, 7 Gill, 265; Mosteller *v.* Bost, 7 Ired. (N. Ca.) Eq. 39. See Henry *v.* Henry, 10 Paige, 314.

[2] That partnership creditors have no lien except through the partners, see the following cases for example: Case *v.* Beauregard, 99 U. S. 119 (1 Woods, C. C. 127); Fitzpatrick *v.* Flannagan, 106 U. S. 648, 655; Hoxie *v.* Carr, 1 Sumn. 173; Reese *v.* Bradford, 13 Ala. 837; Coffin *v.* McCullough, 30 id. 107; Mayer *v.* Clark, 40 id. 259; Nichol *v.* Stewart, 36 Ark. 612, 621; Allen *v.* Center Valley Co. 21 Conn. 130 (54 Am. Dec. 333); McDonald *v.* Beach, 2 Blackf. 55; Schaeffer *v.* Fithian, 17 Ind. 463; Weyer *v.* Thornburgh, 15 id. 124; Frank *v.* Peters, 9 id. 343; Dunham *v.* Hanna, 18 Ind. 270; Kistner *v.* Sindlinger, 33 id. 114, 117; Hawkeye Woolen Mills *v.* Conklin, 26 Iowa, 422; Ely *v.* Hair, 16 B. Mon. 230; Jones *v.* Lusk, 2 Met. (Ky.) 356; Couchman *v.* Maupin, 78 Ky. 33; Harris *v.* Peabody, 73 Me. 262, 267-8; Glenn *v.* Gill, 2 Md. 1, 16; Guyton *v.* Flack, 7 id. 398; Griffith *v.* Buck, 13 id. 102; Thompson *v.* Frist, 15 id. 24; Coakley *v.* Weil, 47 id. 277; Schalck *v.* Harmon, 6 Minn. 265,

§ 825. Joint creditors prior in joint property and separate in separate.— When a court of bankruptcy had charge of the partnership estate it enforced the equity of the individual partners by extending it to give the joint creditors a preference in distribution over the creditors of the individual partners by a species of subrogation, and created in the creditors a right to this priority independent of any wishes of the partners.

When a court of bankruptcy came to distribute the separate property of the individual partners it adopted a rule, difficult to sustain on logical principles, giving the separate creditors a priority in the private property of their debtor. On strict common law principles it would seem that the partnership creditors who had not been paid in full out of the joint fund could claim as individual creditors *pari passu* with the other individual creditors of each partner, yet the courts, in distributing the estate of a bankrupt or deceased partner, gave the individual creditors a preference over joint creditors in the separate estate as a correlative to the priority of the latter in the joint assets, merely carrying over the balance of each fund after satisfying its class of creditors to supply a deficiency in the other fund. The English courts of bankruptcy seem to have been for more than a hundred

269; Parish *v.* Lewis, 1 Freem. Ch. 299; Freeman *v.* Stewart, 41 Miss. 138; Williams *v.* Gage, 49 id. 777; Young *v.* Frier, 9 N. J. Eq. 465; Mittnight *v.* Smith, 17 id. 259; Ross *v.* Titsworth, 37 id. 333; Robb *v.* Stevens, Clarke, Ch. (N. Y.) 191; Saunders *v.* Reilly, 105 N. Y. 12; Allen *v.* Grissom, 90 N. Ca. 90, 95 (explaining Ross *v.* Henderson, 77 id. 170); Strauss *v.* Frederick, 91 N. Ca. 121; McGregor *v.* Ellis, 2 Disney, 286; Rodgers *v.* Meranda, 7 Oh. St. 179; Doner *v.* Stauffer, 1 Pa. (Pen. & W.) 198; Foster *v.* Barnes, 81 Pa. St. 377; Fain *v.* Jones, 3 Head, 308; Jackson Ins. Co. *v.* Partee, 9 Heisk. 296; White *v.* Parish, 20 Tex. 688 693; De Caussey *v.* Baily, 57 Tex. 665, 669; Bardwell *v.* Perry, 19 Vt. 292 (47 Am. Dec. 687); Washburn *v.* Bank of Bellows Falls, 19 id. 278, 289; Rice *v.* Barnard, 20 id. 479 (50 Am. Dec. 54); Shackelford *v.* Shackelford, 32 Gratt. 481; Maxwell *v.* Wheeling, 9 W. Va. 206, 210; and see § 559 *et seq.* *Contra*, in New Hampshire, where they have an independent right not resting upon the partners' equity, Ferson *v.* Monroe, 1 Foster (21 N. H.), 462; Jarvis *v.* Brooks, 3 Foster (23 N. H.), 136, 146; Benson *v.* Ela, 35 N. H. 402, 410; Tenney *v.* Johnson, 43 N. H. 144.

years unsettled on this point. In 1715, in *Ex parte* Crowder, 2 Vernon, 706, on application of separate creditors to be let in to prove against the joint estate, it was held that the joint funds went to the partnership creditors and the individual estate to the separate creditors, the surplus in each fund being carried over. This was followed, in 1728, by Chancellor King in *Ex parte* Cook, 2 P. Wms. 500, and by Lord Hardwicke, in 1742, in *Ex parte* Hunter, 1 Atk. 228.[1] But in 1785 Lord Thurlow broke in on the rule in *Ex parte* Hodgson, 2 Brown's Ch. 5, holding that in the distribution of the separate estates there were no classes of creditors, but that joint and separate creditors shared it *pari passu.* Lord Loughborough, however, in 1796, restored the old rule in *Ex parte* Elton, 3 Ves. Jr. 238, excepting only that he allowed joint creditors to prove against the separate estate, but without receiving any dividend. Lord Eldon, without approving and sometimes complaining of this rule, followed his immediate predecessor rather than to have the uncertainty of constant change.[2] And such has been the rule ever since. In Gray *v.* Chiswell, 9 Ves. 118, the same rule of priority of separate creditors in the separate estate is shown to be extended to the distribution in equity of the property of a deceased partner.

Objections to this rule in favor of the separate creditors have frequently been urged on the ground that it is not founded on principle and that it affords facility for the shifting of funds from one portion of one's estate to another; which latter objection is answered by the consideration that this will always happen where a debtor may prefer a creditor by paying or securing one and not another.[3]

On the other hand, the doctrine has been justified on considerations of convenience in administration, and as a reciprocal rule founded on justice, since the separate creditors may have contributed to swell the joint estate.[4]

[1] Twiss *v.* Massey, 1 Atk. 67.

[2] *Ex parte* Clay, 6 Ves. 813; *Ex parte* Taitt, 16 id. 193.

[3] Washburn *v.* Bank of Bellows Falls, 19 Vt. 278, 289.

[4] These considerations will be found

The cases cited in the note, though in many the statements as to the priority of the separate creditor are *dicta*, show the universality of the recognition that joint estate goes primarily to joint creditors and separate to separate, in bankruptcy, assignments or insolvency, and in the distribution of decedents' estates.[1] The exceptions will be noted hereafter.

stated at length in Rodgers *v.* Meranda, 7 Oh. St. 179.

[1] *Ex parte* Clay, 6 Ves. 813; *Ex parte* Chandler, 9 id. 35; *Ex parte* Taitt, 16 id. 193; Gray *v.* Chiswell, 9 Ves. 118; Lodge *v.* Prichard, 1 DeG. J. & S. 610; Murrill *v.* Neill, 8 How. 414; *Re* Montgomery, 3 Bankr. Reg. 429; *Re* Blumer, 12 id. 489; *Re* Morse, 13 id. 376; *Re* Smith, 13 id. 500; *Re* Savage, 16 id. 368; *Re* Leland, 5 Ben. 168; 5 Bankr. Reg. 222; *Re* Berrian, 6 Ben. 297; affg. 44 How. Pr. 216; *Re* Dunkerson, 4 Biss. 277, 323; 12 Bank. Reg. 391 South Boston Iron Co. *v.* Holmes, 4 Cliff. 343; *Re* Estes, 3 Fed. Rep. 134; 6 Sawy. 459; *Re* Hollister, 3 Fed. Rep. 452; *Re* Lloyd, 22 Fed. Rep. 90; *Re* Warren, 2 Ware, C. C. 322; *Re* Ingalls, 5 Boston Law Reporter, 401; *Re* Williams, id. 402; Emanuel *v.* Bird, 19 Ala. 593 (54 Am. Dec. 200); Smith *v.* Mallory, 24 id. 628; Van Wagner *v.* Chapman, 29 id. 172; Bridge *v.* McCullough, 27 id. 661; Evans *v.* Winston, 74 Ala. 349; Forbes *v.* Scannell, 13 Cal. 242, 287; Charles *v.* Eshelman, 5 Colorado, 107; Bailey *v.* Kennedy, 2 Del. Ch. 12; Thornton *v.* Bussey, 27 Ga. 302; Toombs *v.* Hill, 28 id. 371; Keese *v.* Coleman, 72 id. 658; Pahlman *v.* Graves, 26 Ill. 405; Moline Water Power & Mfg. Co. *v.* Webster, 26 id. 233; National Bank *v.* Bank of Commerce, 94 id. 271; McIntire *v.* Yates, 104 id. 491; Doggett *v.* Dill, 108 id. 560; 48 Am. Rep. 565; Preston *v.* Colby, 117 id. 477, 483; Weyer *v.* Thornburgh, 15 Ind. 124; Dean *v.* Phillips, 17 Ind. 406; Bond *v.* Nave, 62 id. 505; Hardy *v.* Mitchell, 67 id. 485; Blake *v.* Smiley, 84 id. 212; Huff *v.* Lutz, 87 id. 471; New Market Bank *v.* Locke, 89 id. 428; Warren *v.* Able, 91 id. 107; Hubbard *v.* Curtis, 8 Iowa, 1; Miller *v.* Clarke, 37 id. 325; Fullam *v.* Abrahams, 29 Kan. 725, 727; Harris *v.* Peabody, 73 Me. 262; M'Culloh *v.* Dashiell, 1 Har. & G. (Md.) 96 (18 Am. Dec. 271); Somerset Potters Works *v.* Minot, 10 Cush. 592; Catskill Bank *v.* Hooper, 5 Gray, 574; Thomas *v.* Minot, 10 Gray, 263; Barclay *v.* Phelps, 4 Met. 397; Jewett *v.* Phillips, 5 Allen, 150; Nutting *v.* Ashcraft, 101 Mass. 330; Bush *v.* Clark, 127 Mass. 111, 113; Oakey *v.* Robb, 1 Freem. (Miss.) Ch. 546; Arnold *v.* Hamer, id. 569; Irby *v.* Graham, 46 Miss. 425 (overruling Dahlgren *v.* Duncan, 7 Sm. & Mar. 280); Schmidlapp *v.* Currie, 55 id. 597 (30 Am. Rep. 530); Level *v.* Farris, 24 Mo. App. 445; Ruth *v.* Lowry, 10 Neb. 260, 263, 264; Jarvis *v.* Brooks, 3 Foster (23 N. H.), 136; Crockett *v.* Crain, 33 N. H. 542; Holton *v.* Holton, 40 id. 77; Treadwell *v.* Brown, 41 id. 12; Fellows *v.* Greenleaf, 43 N. H. 421; Weaver *v.* Weaver, 46 id. 188, 191; Davis *v.* Howell, 33 N. J. Eq. 72; Wilder *v.* Keeler, 3

And where a bankrupt is a member of two or more firms, one of which is also bankrupt, after his individual assets have gone to his individual creditors in full, and the assets of each firm to its creditors, the surplus of individual assets go *pro rata* among all the creditors of any firm of which he is a member.[1]

§ 826. Contrary cases.— *Contra*, preferring Lord Thurlow's rule that the priority of partnership creditors in joint assets is not accompanied by a reciprocal priority of separate creditors in separate assets, but that both classes share ratably in individual property.[2]

Paige, 167; Nicoll *v.* Mumford, 4 Johns. Ch. 522; 20 Johns. 611; Muir *v.* Leitch, 7 Barb. 341; Kirby *v.* Carpenter, 7 id. 373; Ganson *v.* Lathrop, 25 id. 455; Terry *v.* Butler, 43 id. 395; North River Bk. *v.* Stewart, 4 Bradf. (N. Y.) 254; 4 Abb. Pr. 408; Meech *v.* Allen, 17 N. Y. 300; Rodgers *v.* Meranda, 7 Oh. St. 179; D'Invillier's Estate, 13 Phila. 362; Black's Appeal, 44 Pa. St. 503; Heckman *v.* Messinger, 49 id. 465; Hartman's Appeal, 107 id. 327, 335-6; Woddrop *v.* Price, 3 Desaus. (S. Ca.) 203; Hall *v.* Hall, 2 McCord, Ch. 269; Sniffer *v.* Sass (1828), reported in note in 14 Rich. L. 20. [*Contra*, Wardlaw *v.* Gray, Dudley, Eq. 85; Wilson *v.* McConnell, 9 Rich. Eq. 500; Fleming *v.* Billings, 9 Rich. Eq. 149; Gadsden *v.* Carson, 9 id. 252.] See Kuhne *v.* Law, 14 Rich. L. 18, and Adickes *v.* Lowry, 15 S. Ca. 128, 136, favoring this rule. Pennington *v.* Bell, 4 Sneed (Tenn.), 200; Jackson Iron Co. *v.* Partee, 9 Heisk. 295; Fowlkes *v.* Bowers, 11 Lea, 141; Cowan *v.* Gill, 11 id. 674; McCullough *v.* Sommerville, 8 Leigh, 415; Morris *v.* Morris, 4 Gratt. 293 (court equally divided); Gordon *v.* Cannon, 18 id. 387, 407-8; Straus *v.* Kerngood, 21 id. 584. But see Ashby *v.* Porter, 26 Gratt. 455, as to decedents' estates. Lord *v.* Devendorf, 54 Wis. 491, 495; *Re* Walker, 6 Ont. App. 169; Baker *v.* Dawbarn, 19 Grant's Ch. 113.

[1] *Re* Dunkerson, 4 Biss. 323; 12 Bank. Reg. 391; *Re* Williams, 5 Law Reporter, 402; *Re* Savage, 16 Bankr. Reg. 368.

[2] Camp *v.* Grant, 21 Conn. 41 (54 Am. Dec. 321); Sparhawk *v.* Russell, 10 Met. 305 (now changed by statute); Schackleford *v.* Clark, 78 Mo. 491 (but this is called a *dictum* and is denied in Level *v.* Farris, 24 Mo. App. 445); Pearce *v.* Cooke, 13 R. I. 184 (by statute); Hutzler *v.* Phillips (S. Ca.), 1 S. E. Rep. 502; White *v.* Dougherty, M. & Y. (Tenn.) 309; Higgins *v.* Rector, 47 Tex. 361, 365; Cox *v.* Miller, 54 id. 16; Bardwell *v.* Perry, 19 Vt. 292 (47 Am. Dec. 687). (REDFIELD, J., gives one of the best examinations of this side of the question I have met with, but his rulings are all *dicta*, for in fact there was no joint estate nor living solvent partner, see p. 302.) See also the overruled and *contra* cases in Mississippi, South Carolina and Virginia in the foregoing list.

§ 827. **Kentucky rule.**— If the firm is insolvent, and there is partnership property and partnership creditors, and separate property and separate creditors, after the partnership creditors have exhausted the joint property they must wait until the separate creditors have received an equal percentage from the separate estate, and then the balance is distributed *pari passu* among both classes.[1]

§ 828. **—— so in case of estate of deceased partner.**—The cases cited in the note show that the same rule applies in equity as in bankruptcy on distributing the separate estate of a deceased partner. There is no reason why the accident of death should better the condition of the joint creditors by giving them an equality in the private property which they would not have had in bankruptcy;[2] and if the survivor be-

[1] Northern Bank of Ky. *v.* Keizer, 2 Duvall, 169; Whitehead *v.* Chadwell, 2 id. 432; Fayette Natl. Bank *v.* Kenney, 79 Ky. 133. In Brock *v.* Bateman, 25 Oh. St. 609, it seems to be hinted that such a question might be raised in Ohio, but this is contrary to all previous expressions of the court. In Bell *v.* Newman, 5 Serg. & R. 78, it had been ruled that if a surviving partner die, leaving partnership and separate creditors and partnership and separate property, the separate creditors shall receive as much from the separate property as the joint creditors receive from their share in the joint property, and the balance of the seperate property shall be divided equally; but this was qualified in Black's Appeal, 44 Pa. St. 503, 507–9.

[2] Gray *v.* Chiswell, 9 Ves. 118; Lodge *v.* Prichard, 1 De G. J. & S. 610; Harris *v.* Farwell, 13 Beav. 403; Ridgway *v.* Clare, 19 id. 111; Emanuel *v.* Bird, 19 Ala. 596 (54 Am. Dec. 209); Smith *v.* Mallory, 24 id. 628; Bridge *v.* McCullough, 27 id. 661; Charles *v.* Eshelman, 5 Colorado, 107; Toombs *v.* Hill, 28 Ga. 371; Bagwell *v.* Bagwell, 72 id. 92; Moline Water Power and Mfg. Co. *v.* Webster, 26 Ill. 233; Doggett *v.* Dill, 108 id. 560 (48 Am. Rep. 565); Weyer *v.* Thornburgh, 15 Ind. 124; McCulloh *v.* Dashiell, 1 H. & G. (Md.) 99; Bush *v.* Clark, 127 Mass. 111, 113 (the contrary decision in Sparhawk *v.* Russell, 10 Met. 305, making a difference between decedents' estates and insolvent estates, having been altered by statute); Level *v.* Farris, 24 Mo, App. 445; Fowlkes *v.* Bowers, 11 Lea, 144; Straus *v.* Kerngood, 21 Gratt. 584; but see Ashby *v.* Porter, 26 id. 455; Baker *v.* Dawbarn, 19 Grant's Ch. (Up. Can.) 113. *Contra*, that there is no difference in the distribution of decedents' estates between joint and separate creditors, Camp *v.* Grant, 21 Conn. 41 (54 Am. Dec. 321); Sparhawk *v.* Russell, 10 Met. 305, altered by statute; Dahlgren *v.* Duncan, 15 Miss. 280; Grosvenor *v.* Austin, 6 Oh. 103 (25 Am. Dec. 743; a *dictum*, for there was no joint estate nor solvent partner); and so in Higgins *v.* Rector, 47 Tex. 361; Bardwell *v.* Perry, 19 Vt. 292.

comes bankrupt, the assignee must keep their partnership and individual assets separate and distribute each to its own class of customers.[1]

Hence, where one partner, as administrator of the other, sold real estate of the firm to one X., who agreed to transfer his bid to the administrator partner in consideration of the latter paying a debt owed by the firm to X. The administrator paid part of the price into the estate and the rest to X., in extinguishment of the partnership debt. This is a use of separate property to pay a joint debt, and hence specific performance of the agreement will not be awarded against X.[2]

Statutes making partnership debts joint and several were not intended to affect the distribution of funds and do not give the joint creditors a right to participate *pari passu* with the separate creditors after exhausting the joint estate.[3] Nor does a statute requiring distribution of insolvent estates and by administrators *pro rata* among creditors.[4]

§ 829. **Joint debts which are not partnership debts.**—As a partner has no equity to have joint assets applied to joint debts which are not partnership liabilities, hence the mere fact that a claim is against all the partners jointly does not entitle it to share in the partnership assets if it is not a liability of the firm.[5]

[1] *Ex parte* Smyth, 3 Dea. 597; *Re* Stevens, 5 Bankr. Reg. 112; 1 Sawyer, 397; *Re* Clap, 2 Low. 168; Gordon *v.* Kennedy, 36 Iowa, 167; Benson *v.* Ela, 35 N. H. 402; Bell *v.* Newman, 5 S. & R. 78; Brooks *v.* Brooks, 12 Heisk. 12; Cowan *v.* Gill, 11 Lea, 674. *Contra*, that the survivor becomes sole proprietor of the assets and sole debtor, and hence all classes of creditors share *pari passu* in the fund composed of partnership and individual assets commingled, *Re* Mills, 11 Bankr. Reg. 74.

[2] Bagwell *v.* Bagwell, 72 Ga. 92.

[3] Smith *v.* Mallory, 24 Ala. 628; Irby *v.* Graham, 46 Miss. 425 (overruling 7 S. & M. 280); Level *v.* Farris, 24 Mo. App. 445. *Contra*, see Ashby *v.* Porter, 26 Gratt. 455, a case of death.

[4] Smith *v.* Mallory, 24 Ala. 628; Rodgers *v.* Meranda, 7 Oh. St. 179, 192; Level *v.* Farris, 24 Mo. App. 445. *Contra*, of such a statute as to decedents' estates, Grosvenor *v.* Austin, 6 Oh. 103 (25 Am. Dec. 743); but there was no joint estate or solvent partner.

[5] *Re* Roddin, 6 Biss. 377; *Re* Nims, 16 Blatchf. 439 (reversing s. c. 18 Bankr. Reg. 91); Mack *v.* Woodruff, 87 Ill. 570; *Ex parte* Weston, 12 Met. 1; Buffum *v.* Seaver, 16 N. H. 160; Forsyth *v.* Woods, 11 Wall. 484; Saunders *v.* Reilly, 105 N. Y. 12;

§ 830. Contra of petitioning joint creditor.—Where a joint creditor petitions for the bankruptcy of a separate partner he is entitled to a dividend *pari passu* with the separate creditors. This is on the doubtful ground that a petition in bankruptcy is in the nature of an action and an execution or attachment. Nevertheless, the petitioning creditor alone, and not the other joint creditors, shares with the separate creditors.[1]

§ 831. Exception in favor of the government.—Where one partner is indebted to the government its statutory priority will not override the rights of joint creditors, and the debt will be paid only in the surplus coming to such partner after the joint liabilities are satisfied, and if they absorb the whole fund the government gets nothing.[2]

But if the firm is indebted to the government and the separate estates of some of the partners are in court for distribution, the claim of the government is enforcible against the property of such individual partners prior to their separate debts and without exhausting collaterals held by the government.[3]

§ 832. Exceptions; no joint estate nor living solvent partner.—The priority of the separate creditors in the private property does not exist when the joint creditors have had no fund or means of satisfaction of any kind, which is the case where there is no joint estate or living solvent partner. It is disputed whether this is an exception or is

Hulse's Estate, 11 Weekly Notes (Pa.), 499, 500. And see §§ 452–454. *Contra*, Hoare *v.* Oriental Bank Corporation, L. R. 2 App. Cas. 589. And see Mosteller *v.* Bost, 7 Ired. (N. Ca.) Eq. 39. In *Re* Nims, *supra*, N. & L., partners as N. & Co., dissolved owing debts. They afterwards formed a new partnership and subsequently became bankrupt with assets; it was held that creditors of the former firm could not share in the assets with those of the latter.

[1] *Ex parte* Elton, 3 Ves. Jr. 238; *Ex parte* Crisp, 1 Atk. 133; *Ex parte* Abell, 4 Ves. 837. But see Murrill *v.* Neill, 8 How. 414.

[2] Rex *v.* Sanderson, Wightwick, 50; Rex *v.* Rock, 2 Price, 198; Rex *v.* Hodgson, 12 id. 537; Spears *v.* Lord Advocate, 6 Cl. & Fin. 180; United States *v.* Hack, 8 Pet. 271; United States *v.* Duncan, 4 McLean, 607.

[3] United States *v.* Lewis, 92 U. S. 618 (affirming s. c. 13 Bankr. Reg. 33); United States *v.* Shelton, 1 Brock. 517

part of the rule, but in fact there seems to be as little in the logic of the law for it to rest upon as there is for the separate creditor's priority. The doctrine, however, is perfectly well settled and was first recognized by Lord Thurlow in *Ex parte* Hayden, 1 Brown's Ch. 453, and applies not only in bankruptcy but also in assignments in insolvency and in the distribution of the estate of a deceased partner. Both the conditions must co-exist; there must be neither joint assets nor a living solvent partner.[1]

If one partner has retired and the other has taken all the assets and assumed all the debts and become bankrupt, so that there is no

[1] *Ex parte* Hayden, 1 Bro. Ch. 453; *Ex parte* Hill, 2 B. & P. 191, note; *Ex parte* Kensington, 14 Ves. 447, here there was one solvent partner and no joint estate; *Ex parte* Janson, 3 Madd. 229; Buck, 227; *Ex parte* Sadler, 15 Ves. 52; Cowell *v.* Sikes, 2 Russ. 191; *Re* Jewett, 1 Bankr. Reg. 491; *Re* Downing, 3 id. 748; 1 Dill. 33; *Re* Leland, 5 Bankr. Reg. 222; *Re* Goedde, 6 id. 295; *Re* Knight, 8 id. 436; 2 Biss. 518; *Re* Rice, 9 Bank. Reg. 373; *Re* Collier, 12 id. 266; *Re* Pease, 13 id. 168; *Re* Litchfield, 5 Fed. Rep. 47; *Re* Long, 7 Ben. 141; *Re* Blumer, 12 Fed. Rep. 489; Emanuel *v.* Bird, 19 Ala. 596 (54 Am. Dec. 200); Van Wagner *v.* Chapman, 29 Ala. 172; Ladd *v.* Griswold, 9 Ill. 25 (46 Am. Dec. 443); Pahlman *v.* Graves, 26 Ill. 405; Westbay *v.* Williams, 5 Ill. App. 521; Harris *v.* Peabody, 73 Me. 262, 269; Davis *v.* Howell, 33 N. J. Eq. 72; M'Culloh *v.* Dashiell, 1 Har. & G. (Md.) 96 (18 Am. Dec. 271); Wilder *v.* Keeler, 3 Paige, 167; Grosvenor *v.* Austin, 6 Oh. 103; Miller *v.* Estill, 5 Oh. St. 508; Rodgers *v.* Meranda, 7 id. 179, 191; Brock *v.* Bateman, 25 id. 609 (15 Am. Law Reg. N. S. 216); *Ex parte* Sperry, 1 Ashm. 347; D'Invillier's Estate, 13 Phila. 362; Alexander *v.* Gorman (R. I.), 7 Atl. Rep. 243; Higgins *v.* Rector, 47 Tex. 361; Straus *v.* Kerngood, 21 Grat. 584, 592; Bardwell *v.* Perry, 19 Vt. 292; Curtis *v.* Woodward, 58 Wis. 499 (46 Am. Rep. 647). *Contra*, that the separate creditors retain a priority in the separate estate, although there was no joint estate or living solvent partner, the only question being not whether there are two classes of property but are there two classes of creditors, Murrill *v.* Neill, 8 How. 414, 427; *Re* Byrne, 1 Bank. Reg. 464; *Re* McLean, 15 id. 333, 337; Weyer *v.* Thornburgh, 15 Ind. 124; Olleman *v.* Reagan, 28 Ind. 109; Eaton *v.* Able, 91 id. 107 (unless a continuing partner has assumed the debts, Warren *v.* Farmer, 100 Ind. 593); Howe *v.* Lawrence, 9 Cush. 553 (57 Am. Dec. 68); Robb *v.* Mudge, 14 Gray, 534; Wild *v.* Dean, 3 Allen, 579; Somerset Potters' Works *v.* Minot, 10 Cush. 592, 598–601; Oakey *v.* Rabb, 1 Freem. (Miss.) Ch. 546; Arnold *v.* Hamer, 1 id. 509; Weaver *v.* Weaver, 46 N. H. 188, 192; North River B'k *v.* Stewart, 4 Bradf. (N. Y.) 254; *Re* Walker, 6 Ont. App. 169, 172. See query in *Re* Johnson, 2 Low. 129; *Re* Marwick, 2 Ware, 233.

joint estate, although there is a living solvent partner, yet he is as to the continuing partner a surety and not primarily liable for the debts, at least *inter se*. In such case the joint creditors may share *pari passu* with the separate creditors of the buying partner in his estate.[1]

The fact that there is no separate estate does not give the separate creditors any claim to equality with the joint creditors, in the joint fund. The priority of partnership creditors, being founded on the equity of the partners to have the debts paid, is not affected by the condition of the separate creditors.[2]

§ 833. —— **what is "no joint estate."**— The test of no joint estate seems to depend on whether the joint creditors can get anything from it; that is, whether there is a joint estate for distribution. If they can get a dividend, no matter how small, they cannot share with the separate creditors in the separate estate. But if there were joint effects, but of so little value as to be all consumed in costs, there is no joint estate for distribution. And if secured claims absorb the entire proceeds of the joint estate, there is then no joint estate for distribution, even if the secured creditors are the only creditors, and they can rank on the separate estate for unpaid balances, for such joint estate as existed was never in the hands of the assignee for administration.

In *Ex parte* Hill, 2 B. & P. 191, note, C. & M. bought rum, and pledged it to the petitioners for a loan to pay for it, and the rum sold for less than the loan. There was held to be no joint estate.[3]

In *Ex parte* Peake, 2 Rose, 54, the joint estate was only £1 11*s*. 6*d*. Lord Eldon said the creditors could not go on the separate estate though there had been but 5*s*. But had the joint estate been of such a nature or in such circumstances that to bring it in reach of the joint creditors must be deemed desperate, or in

[1] *Re* Rice, 9 Bankr. Reg. 373; *Re* Lloyd, 22 Fed. Rep. 88; 5 Am. Law Rec. 679; *Re* Collier, 12 Bankr. Reg. 266.

[2] In United States *v.* Hack, 8 Pet. 271, there was no individual estate, and the separate creditors got nothing, the joint creditors absorbing all the joint estate.

[3] And see *Ex parte* Geller, 2 Mad. 262; *Re* Goedde, 6 Bankr. Reg. 295.

point of expense unwarrantable, there would then have been no joint property.[1]

In the United States there must be a joint fund for distribution among creditors. If the partnership assets are so small as to be all consumed in the payment of costs, there is no joint fund for distribution and the partnership creditors share *pari passu* with the separate creditors in the individual estate.[2]

In *Re* Marwick, 2 Ware, 233, the only joint assets were some worthless claims for which a separate creditor gave $40, and thus created a joint fund, and by this device obtained nearly his entire debt, leaving the joint creditors to divide the $40.

In Miller *v.* Estill, 5 Oh. St. 508, T., of T., E. & B., assigned all his interest in the firm for the benefit of his separate creditors; afterwards E. and B. agreed to pay all the joint debts, and paid over to T.'s assignee T.'s share of the capital stock. It was held that, after such apportionment and division of the assets, there was no joint fund to pay the debts of T., E. & Co., and the fund in the hands of T.'s assignee, which was derived in part from his individual property, inured to both classes of creditors.

§ 834. —— what is "no living solvent partner."—If there are no joint assets, but there is a living solvent partner within the jurisdiction, the joint creditors cannot prove upon the separate estate with the separate creditors.[3]

[1] In McCulloh *v.* Dashiell, 1 Har. & G. 96 (18 Am. Dec. 271), there was a very small joint estate.

[2] Brock *v.* Bateman, 25 Oh. St. 609 (15 Am. Law Reg. (N. S.) 216); *Re* Slocum, 5 Fed. Rep. 50; *Re* McEwen, 12 Bankr. Reg. 11; 6 Biss. 294; Harris *v.* Peabody, 73 Me. 262, where the cost of selling would consume the proceeds. *Contra* in England, *Ex parte* Kennedy, 2 DeG. M. & G. 228, where the joint estate was £13 4*s.* 6*d.* and would be exhausted by costs, proof was not allowed. And in *Ex parte* Clay, 2 DeG. M. & G. 230, n., where the joint estate was an old stool and map, worth 3*s.* 6*d.* and a bad debt, proof was not allowed. And in *Re* Blumer, 12 Fed. Rep. 489, a small balance of joint assets which remained after payment of costs was wholly consumed by protracted and expensive litigation by the assignee in attempting to realize more, but which expense the register found to be proper and necessary, but it was held that the expenditure did not change the rule that if there are any joint assets the joint creditors cannot divide the personal estate with the separate.

[3] *Ex parte* Kensington, 14 Ves. 447; *Ex parte* Sadler, 15 id. 52, 56; *Ex parte* Janson, 3 Mad. 229; Buck, 227.

The solvent partner must be alive; that the estate of a deceased partner is solvent will not prevent the joint creditors sharing the separate estate of the bankrupt partner.[1]

By no living "solvent" partner is meant a partner from whom no fund however small can be derived. His mere insolvency does not, as his bankruptcy would, entitle the joint creditors to prove upon the separate estate of the other partner.[2]

And if at the time the debt was contracted with a person he had a dormant partner not known to the creditor, the creditor may share *pari passu* with the separate creditors.[3]

And if the living solvent partner is in a foreign country and "not likely to return," the proof has been allowed.[4]

It has been suggested that as the priority of separate creditors follows as a correlative of that of the joint creditors, the surrender by the latter of all the joint property, leaving the whole estate of all classes for general division, unincumbered by distinctions of classes, would take away all grounds for giving the separate creditors priority in the separate estate.[5]

If the joint creditor has released a partner he is the separate creditor of a single remaining partner and cannot go upon the joint assets.[6]

§ 835. **No interest to the separate creditors.**— In distributing the separate estate after the principal debt was paid in full, formerly no interest was allowed upon it until the joint creditors were made equal with the separate creditors;[7] but now it is allowed down to the adjudication,[8] and the joint

[1] *Ex parte* Bauermann, 3 Dea. 476.

[2] *Ex parte* Janson, 3 Mad. 229; Buck, 227; M'Culloh *v.* Dashiell, 1 Har. & G. (Md.) 96, 105 (18 Am. Dec. 271); *In re* Marwick, 2 Ware, 233. And see Eden's note to *Ex parte* Hodgson, 2 Bro. Ch. 5, that a partner is meant against whom there is no commission in bankruptcy issued, citing *Ex parte* Janson, *supra*, and Everett *v.* Backhouse, 10 Ves. 100.

[3] *Ex parte* Hodgkinson, 19 Ves. 291, 294.

[4] *Ex parte* Pinkerton, 6 Ves. 814, n.

[5] Northern Bank of Ky. *v.* Keizer, 2 Duv. 169, 171.

[6] January *v.* Poyntz, 2 B. Mon. 404; Linford *v.* Linford, 28 N. J. L. 113; Curtis *v.* Woodward, 58 Wis. 499 (46 Am. Rep. 647).

[7] *Ex parte* Boardman, 1 Cox, 275; *Ex parte* Clarke, 4 Ves. 677; *Ex parte* Reeve, 9 id. 588; *Ex parte* Rix, Mont. 237; *Ex parte* Minchin, 2 Gl. & J. 287; *Ex parte* Wood, 2 M. D. & D. 283.

[8] *Ex parte* Findlay, 17 Ch. D. 334; Thomas *v.* Minot, 10 Gray, 263; *Re*

creditors are allowed interest before the surplus is carried to the separate estate.[1]

§ 836. Separate estate cannot prove against joint estate.— A creditor partner or his estate cannot, of course, prove against the bankrupt estate of the firm for an amount owed him by the firm in competition with joint creditors, for he is their debtor, and the court will enforce the lien of the other partners to have the assets applied to the creditors.[2]

Even though he had retired and the copartners had agreed to purchase his share at a valuation, under a provision to that effect in the articles.[3]

But there must be joint debts actually proved; a mere possibility that such may come in is not sufficient to exclude the claim of an ex-partner.[4]

§ 837. To this there are exceptions.

1st. Where the estate of a partner becomes a creditor in respect of a fraudulent conversion of his estate to the use of the partnership;[5] a circumstance that very rarely occurs, but follows as a correlative of the rule where a partner fraudulently appropriates partnership property.

Berrian, 6 Ben. 297; 44 How. Pr. 217. *Contra*, allowing interest to the time of distribution, *Re* Shipman, 61 How. Pr. 518; *Re* Duncan, 10 Daly, 95, in an assignment for benefit of creditors; Level *v.* Farris, 24 Mo. App. 445.

[1] *Ex parte* Ogle, Mont. 350; *Ex parte* Reeve, 9 Ves. 588.

[2] *Ex parte* Reeve, 9 Ves. 588; *Ex parte* Adams, 1 Rose, 305; *Ex parte* Harris, id. 437; *Ex parte* Sillitoe, 1 Gl. & J. 374; *Ex parte* Edmonds, 4 De G. F. & J. 488; *Ex parte* Sheen, 6 Ch. D. 235; *Ex parte* Westcott, L. R. 9 Ch. App. 626; *Ex parte* Blythe, 16 Ch. D. 620; Nanson *v.* Gordon, 1 App. Cas. 195; aff. 10 Ch. App. 160; Read *v.* Bailey, 3 App. Cas. 94; *In re* Jewett, 1 Bankr. Reg. 495 (7 Am. Law Reg. (N. S.) 294); *In re* Savage, 16 Bankr. Reg. 368; *In re* Lane, 2 Low. 333; Houseal's Appeal, 45 Pa. St. 484; Rodgers *v.* Meranda, 7 Oh. St. 179, 193; *In re* Rieser, 19 Hun, 202; Amsinck *v.* Bean, 22 Wall. 395; Strattan *v.* Tabb, 8 Ill. App. 225; Gordon's Estate, 11 Phila. 136; Bennett's Estate, 13 id. 331. It was originally held by Lord Hardwicke, that although a partner could not prove in competition with the joint creditors, yet his separate creditors could make the claim through him, for this would not be for his benefit. *Ex parte* Hunter, 1 Atk. 228.

[3] Nanson *v.* Gordon, *supra*.

[4] *Ex parte* Andrews, 25 Ch. D. 505.

[5] *Ex parte* Sillitoe, 1 Gl. & J. 374, 382; *Ex parte* Harris, 1 Rose, 437; 2 Ves. & B. 210; Rodgers *v.* Meranda, 7 Oh. St. 179, 194.

2d. Where a partner carries on another business independent of the firm and becomes a creditor in respect to that business, or where two firms, having members in common, have distinct trades, and one firm is a creditor of the other for a trading debt, the proof may be made.

The debt must be a transaction arising between trade and trade, as where the articles of one trade have been furnished to another, and does not include the case where some of the partners of a firm, being engaged in a distinct business, have indorsed the name of the second firm as accommodation for the former, or lent it money.[1] But the application of this principle has been denied in this country, where the firms did not have distinct partners, as where one firm included all the members of the other.[2]

Thus, in *Ex parte* Sillitoe,[3] where six persons were partners as bankers and two of them were partners as iron-mongers, and the latter firm indorsed for the former, and thus became its creditors, this is not a demand arising out of a distinct trade, or a transaction between trade and trade, but a mere loan by two of the partners to the firm, and does not entitle the estate of the creditor firm to prove. The rule applies to cases where the articles of one trade have been furnished to another.

Even where the indorsing partner carried on the separate business of a banker, and by accepting for the firm became its creditor, his estate was not allowed to prove against the joint estate.[4]

A partner in a banking firm owed individually several distinct banks in other cities which became debtors of the partnership bank. The rule that the joint estate cannot prove against the separate, nor the separate against the joint, was held to apply, and

[1] *Ex parte* St. Barbe, 11 Ves. 413, 414; *Ex parte* Sillitoe, 1 Gl. & J. 374; *Ex parte* Hargreaves, 1 Cox, 440; *Ex parte* Williams, 3 M. D. & D. 433; *Ex parte* Hesham, 1 Rose, 146; *Ex parte* Cook, Montagu, 228; *Ex parte* Maude, L. R. 2 Ch. App. 550; *Re* Buckhause, 2 Low. 331; 10 Bankr. Reg. 206; *Re* Lane, 2 Low. 333, 335; Buckner *v.* Calcote, 28 Miss. 432; Rodgers *v.* Meranda, 7 Oh. St. 179; Houseal's Appeal, 45 Pa. St. 484. *Contra*, *Re* Rieser, 19 Hun, 202; and see *Re* Savage, 16 N. B. R. 368.

[2] See *Re* Lane, *supra*, and Somerset Potters Works *v.* Minot, 10 Cush. 592, and comments upon it in *Re* Buckhause, *supra*.

[3] *Supra*.

[4] *Ex parte* Maude, L. R. 2 Ch. App. 550.

said to be of universal application where there was no fraudulent abstraction of funds.[1]

3d. A partner who has been discharged in bankruptcy and has afterwards become a creditor of his former partnership can prove the debt.

§ 838. Joint estate cannot prove against separate estate. The joint estate cannot, until the separate creditors are paid, prove against the separate estate for a debt owed by one partner to the firm, where his debt to the firm was not incurred fraudulently in order to augment the separate estate at the expense of the joint creditors. In fact any other rule would be full of embarrassments, because the actual liability of the debtor partner to the firm might not be ascertainable until all the partnership liabilities are liquidated and outstanding debts got in.[2]

Thus where each of a firm of two gave mortgages in their individual names upon partnership property to secure joint and several notes signed by them as individuals, and which were therefore not partnership debts, the proceeds of which one partner had for his private purposes, and the assignee of the firm in insolvency applied the property to the payment of the mortgages, this gives the partnership creditors no right to contribution from the separate estate. The property had thus been converted into separate property.

[1] *In re* Lloyd, 22 Fed. Rep. 90.

[2] *Ex parte* Lodge, 1 Ves. Jr. 166. This is the leading case establishing the principle; but in fact the application of the circumstances to this rule was in this case much strained, for it was in fact a case of fraudulent appropriation by the partner, and was called by Lord Eldon in *Ex parte* Yonge, 3 Ves. & B. 31, "a case of as scandalous a breach of justice and as much hardship as I remember." *Ex parte* Harris, 2 Ves. & B. 210; 1 Rose, 437; *Ex parte* Smith, 1 Glyn. & J. 74; *Ex parte* Turner, 4 D. & C. 169; 1 Mont. & A. 54; *Ex parte* Hinds, 3 DeG. & S. 613; *Ex parte* Maude, L. R. 2 Ch. App. 550; Walton *v.* Butler, 29 Beav. 428; Amsinck *v.* Bean, 22 Wall. 395; *Re* Lane, 2 Low. 333; 10 Bankr. Reg. 135; *Re* McEwen, 6 Biss. 294; 12 Bankr. Reg. 11; *Re* Cooke, 12 Bankr. Reg. 30; *Re* McLean, 15 Bankr. Reg. 333; *Re* May, 19 Bankr. Reg. 101; *Re* Hamilton, 1 Fed. Rep. 800; Harmon *v.* Clark, 13 Gray, 114; Somerset Potters Works *v.* Minot, 10 Cush. 592; Cowan *v.* Gill, 11 Lea, 674. That the proof may be made after the separate creditors are paid, *Re* McLean, 15 Bankr. Reg. 333.

No equity exists between the partners as to it, and it cannot, therefore, be reclaimed for the benefit of the joint estate.[1]

§ 839. —— **fraud.**— But where the claim of the joint estate against the separate estate has a tortious origin, as where it arises from the clandestine appropriation by the individual partner of firm assets to his own use, proof is allowed.[2]

Thus where a partner abstracted funds of the firm, not by assent of his copartners, but in fraud of their rights, without any subsequent acquiescence or ratification, the innocent copartners, though they could not have sued at law, can, under the equitable nature of bankruptcy proceedings — and their joint estate, had the firm been bankrupt, also can — prove the claim against the separate estate in bankruptcy of the guilty partner.[3]

So where the managing partner drew sums out of the firm without entering them upon the books, so that there is no element of contract or implied assent in the transaction, the joint estate can prove against the separate estate in bankruptcy in respect to the sums so drawn out.[4]

In Lacey *v.* Hill,[5] it was said that mere constructive knowledge of the copartners was not sufficient to constitute an assent to take a case out of the rule, but that the acquiescence must be real. Hence the doctrine of constructive notice, which, in *Ex parte* Yonge, it was intimated would have been sufficient, is not applicable. The court also disregarded the argument that the separate estate must have been augmented by the overdraft.

Mere overdrafts not fraudulent nor to benefit separate creditors give no right of proof until separate creditors are paid in full.[6] And the same rule prevails in equity. Thus where a partner in fraud of his copartners used the firm name upon bills for his private bene-

[1] Harmon *v.* Clark, 13 Gray, 114.

[2] *Ex parte* Harris, 2 Ves. & B. 210; 1 Rose, 437; and see cases cited under § 790.

[3] *Ex parte* Yonge, 3 Ves. & B. 31; 2 Rose, 40.

[4] Read *v.* Bailey, L. R. 3 App. Cas. 94 (aff. s. c. sub nom. Lacey *v.* Hill, 4 Ch. D. 537); *In re* Hamilton, 1 Fed. Rep. 800.

[5] *Supra.*

[6] Cowan *v.* Gill, 11 Lea, 674; *In re* Hamilton, 1 Fed. Rep. 800. See, also, § 545. And so a mere incidental payment out of partnership funds of an instalment due on an antecedent private purchase gives the other partners no lien except for reimbursement, Wheatley *v.* Calhoun, 12 Leigh (Va.), 264.

fit, which they were compelled to pay, these can be proved by them against his estate in the hands of his administrator.[1] But as payment, or something equivalent thereto, of the joint debts is necessary, the assignee for benefit of creditors of the surviving partners who has not paid the debt can prove only for an amount equal to the dividend he will probably be able to pay out of the joint estate to the holders of the claims.[2]

In Wimpee *v.* Mitchell, 29 Ga. 276, P., of W. & P., died. W., to whom all the assets were turned over, gave to P.'s administrator a mortgage, probably on his separate estate, but the report is not clear, to secure an individual debt due by W. to P., and to secure the estate against the payment of partnership debts. P.'s administrator foreclosed and the partnership creditors claimed the fund. It was held that the estate had a priority as to the individual debt, and also that the creditors could not share in the proceeds of the foreclosure, the mortgage not having been given to secure them but to secure the estate, and the creditors must own the estate, which was solvent, directly and not indirectly.

§ 840. —— **dormant.**— As an ostensible partner who is apparently sole dealer may be regarded as such, so creditors who have dealt with him in ignorance of the partnership relation may treat their claims as joint or separate, and can elect to prove against his separate estate or against the joint estate.[3]

It must be noted that the converse of this rule does not obtain; that is, where a sole trader does business in a partnership name, his business creditors have no priority over other creditors in the business assets, because, though he may be estopped to deny a firm, they are not; and because the priority of business creditors is worked out only through the equity of a partner, which does not exist here.

If the joint creditors elect to go upon the separate estate of the ostensible partner *pari passu* with his separate cred-

[1] Baker *v.* Dawbarn, 19 Grant's Ch. (Up. Can.) 113.

[2] Id.

[3] *Ex parte* Reid, 2 Rose, 84; *Ex parte* Watson, 19 Ves. 459; *Ex parte* Norfolk, id. 455; Van Valen *v.* Russell, 13 Barb. 590; Cammack *v.* Johnson, 2 N. J. Eq. 163; Elliot *v.* Stevens, 38 N. H. 311.

itors, the latter will be subrogated to the priority of the former in the joint assets.[1]

Thus, where B. had a dormant partner, S., and the firm became bankrupt, and the joint creditors elected to consider themselves as creditors of the separate estate of the visible partner alone, whereby his separate estate, which otherwise would have paid the separate creditors in full, was deficient, B.'s separate creditors will be subrogated to B.'s claim against the joint estate after the joint claims against it have been satisfied.[2] No doubt it would have been just to have subrogated B.'s separate creditors not only to B.'s claim against his separate estate, but to his claim against his copartner also. Thus, had the joint assets been £5,000, and the debt £10,000, and B.'s estate had paid the £10,000, B. would have been entitled to the £5,000 of the joint estate and to half the deficiency, or to £2,500, from S. The creditors do not seem to have been subrogated to the latter claim.

The doctrine which once prevailed, that the entire property would be deemed to belong to the ostensible partner and would pass to his assignee in bankruptcy, has been overruled.[3]

§ 841. **Double proof.**— In the United States, where a creditor of the firm also holds the several promises of all or any of the individual partners, he can prove against both the joint and separate estates in bankruptcy.[4]

In England, the original rule was that, on a joint and several debt, the creditor must elect, and his only advantage over joint creditors was such right of election. The cases upon this were numerous. They were, however, subject to exception where the creditor did not know the separate promisor was a member of the firm. The rule has been largely changed in England (32 and 33 Vic. c. 71, § 37), so that a bankrupt liable "in respect of distinct contracts, as a member of two or more distinct firms, or as a sole contractor and also as member of a firm, the circumstance that such firms are, in whole or in part, composed of the same individuals, or

[1] Compare § 842.

[2] *Ex parte* Reid, 2 Rose, 84.

[3] Reynolds *v.* Bowley, L. R. 2 Q. B. 474. See *Ex parte* Hayman, 8 Ch. D. 11.

[4] *In re* Farnum, 6 Law Reporter, 21; Mead *v.* Nat'l Bk. of Fayetteville, 2 Bankr. Reg. 173; 6 Blatch. 180; 7 Am. Law Reg. (N. S.) 818.

that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of such contracts against the properties respectively liable upon such contracts."[1]

There was a similar provision in the United States bankrupt laws. R. S. of U. S. § 5074.[2]

§ 842. Separate security.— Both in England and here, if a joint creditor had also separate security upon the property of one of the partners, or a separate creditor had also security given by the firm upon joint property,[3] such creditor could prove his debt and also realize upon his security.[4]

[1] Simpson *v.* Henning, L. R. 10 Q. B. 406; *Ex parte* Honey, L. R. 7 Ch. App. 178; *Ex parte* Wilson, id. 490; *Ex parte* Stone, L. R. 8 Ch. App. 914; Banco de Portugal *v.* Waddell, 11 Ch. D. 317.

[2] Mead *v.* Bank of Fayetteville, 2 Bankr. Reg. [65] 173; 6 Blatchf. 180; 7 Am. Law Reg. (N. S.) 818; *In re* Bigelow, 2 Bankr. Reg. [121] 371; 3 Ben. 146; *In re* Howard, 4 Bankr. Reg. 571; Emery *v.* Canal Nat'l Bk. 7 id. 217; 3 Cliff. 507; *Re* Lewis, 8 Bankr. Reg. 546; 2 Hughes, 320; Stephenson *v.* Jackson, 9 Bankr. Reg. 378; 2 Hughes, 204; *Re* Tesson, 9 Bankr. Reg. 378; *Re* Foot, 12 id. 337; 8 Ben. 228; *Re* Thomas, 17 Bankr. Reg. 54; 8 Biss. 139; *Re* Baxter, 18 Bankr. Reg. 62; *Re* Jordan, 2 Fed. Rep. 319; *Re* Bradley, 2 Biss. 515; Drake *v.* Taylor, 6 Blatchf. 14; National Bank *v.* Bank of Commerce, 94 Ill. 271; *Ex parte* Nason, 70 Me. 363; Fuller *v.* Hooper, 3 Gray, 334; Borden *v.* Cuyler, 10 Cush. 476; Berkshire Woolen Co. *v.* Juillard, 13 Hun, 506; Fowlkes *v.* Bowers, 11 Lea, 144, of a note signed by each and also in the firm name; Morris *v.* Morris, 4 Gratt. 293; Ashby *v.* Porter, 26 id. 455, 465. But see *In re* Blumer, 13 Fed. Rep. 622; Fayette Nat'l Bk. *v.* Kenney, 79 Ky. 133; *In re* Chaffy, 30 Up. Can. Q. B. 64. And compare, also, Stevens *v.* West, 1 How. (Miss.) 308.

[3] *Re* Plummer, 1 Ph. 56; *Ex parte* Thornton, 5 Jur. N. S. 212; *Ex parte* English & American Bank, L. R. 4 Ch. App. 49. *Contra*, Harmon *v.* Clark, 13 Gray, 114, 122.

[4] *Ex parte* Bate, 3 Deac. 358; *Ex parte* Parr, 1 Rose, 76; *Ex parte* Turney, 3 M. D. & D. 576; *Ex parte* Peacock, 2 Gl. & J. 27; *Ex parte* Bowden, 1 Deac. & Ch. 135; *Ex parte* Groom, 2 Deac. 265; *Ex parte* Connell, 3 Deac. 201; *Ex parte* Smyth, 3 Deac. 597; *Ex parte* Adams, 3 Mont. & Ayr. 157; *Ex parte* Biddulph, 3 DeG. & Sm. 587; *Ex parte* Leicestershire Banking Co. DeGex, 292; *Ex parte* Manchester, etc. Bank, L. R. 18 Eq. 249; *Ex parte* Dickin, L. R. 20 Eq. 767; *Re* Collie, 3 Ch. D. 481; Couldery *v.* Bartrum, 19 Ch. D. 394; *Re* Holbrook, 2 Low. 259; *Re* Lewis, 8 Bankr. Reg. 546; 2 Hughes, 320; *Re* Foot, 12 Bankr. Reg. 337; 8 Ben. 228; *Re* Thomas, 17 Bankr. Reg. 54; 8 Biss. 139; *Re* May, 17 Bankr. Reg. 192; Miller's River Nat'l Bk. *v.* Jefferson, 138 Mass. 111; Wilder *v.* Keeler, 3 Paige, 167; Beesley *v.* Lawrence, 11 id. 581. *Contra*, White *v.* Dougherty, Mart. & Y. 309.

If a partnership creditor has security on separate property, the separate creditors can compel him to prove the whole debt against the joint assets, and the deficiency only against the separate.[1]

If the joint creditor gets payment out of the separate estate, the separate creditors will be subrogated to his claim against the joint property for an equal amount, for the partner is not a mere joint debtor, but a surety, and the joint estate is the primary fund; not, however, in priority to the other general creditors of the firm, but on an equality with them.[2] He may prove his whole debt against the partnership estate, although such partner owes no separate debts.[3]

If a creditor of a firm holds as collateral notes made by the firm to two partners, given for advances, and transferred by them to the creditor, he can prove his debt and the collateral also, because they represent distinct debts upon which he could have sued.[4]

§ 843. One partner cannot compete with joint creditors against separate estate.— A solvent partner or his estate is not permitted to prove against the separate estate in bankruptcy of his copartner until the joint debts are paid in full. The reason is that if, after payment of the separate creditors of the partner in full, there is any surplus, such surplus goes to the joint creditors if they are unpaid. And to allow the other partner to claim as separate creditor is to increase the number of separate creditors and diminish the surplus for joint creditors, and thus he would be competing with his own creditors.[5]

[1] *In re* Collie, 3 Ch. D. 481; *Re* May, 17 Bankr. Reg. 192; Scull *v.* Alter, 16 N. J. L. 147. See Leach *v.* Milburn Wagon Co. 14 Neb. 106.

[2] *Re* Foot, 12 Bankr. Reg. 337; 8 Ben. 223; Averill *v.* Loucks, 6 Barb. 470; Kendall *v.* Rider, 35 Barb. 100; National Bank *v.* Cushing, 53 Vt. 321. *Contra*, Harmon *v.* Clark, 13 Gray, 114.

[3] *Re* Thomas, 8 Biss. 139; 17 Bankr. Reg. 54.

[4] Miller's River Nat'l Bk. *v.* Jefferson, 138 Mass. 111.

[5] *Ex parte* Ellis, 2 Gl. & J. 312; *Ex parte* Carter, 2 id. 233; *Ex parte* Butterfield, DeGex, 570; *Ex parte* Collinge, 4 D. J. & S. 533; *Ex parte* Maude, L. R. 2 Ch. App. 550; *Ex parte* Kendall, 17 Ves. 514, 521; *Ex parte* Adams, 1 Rose, 305; *Ex parte* Reeve, 9 Ves. 588; *Ex parte* Shean, 6 Ch. D. 235; Amsinck *v.* Bean, 22 Wall. 395; Hill *v.* Beach, 12 N. J. Eq. 31.

If the firm creditors have all been paid, the rule does not apply.[1] And if the claims of the joint creditors are, as against such partner, barred by limitation, as where a partner retires from a firm and afterwards pays some debts and lends his copartners money, his proof against their estate in bankruptcy is not in competition with his own creditors, if the statute of limitations prevents their collecting from him;[2] or if the joint creditors have assented to a discharge of a retiring partner, and agreed to look to the others alone, the former may prove against the estate of the latter.[3]

§ 844. —— **fraud.**— If the claim sought to be proved arises out of a fraud or a breach of trust on the part of the bankrupt, it is an exception and provable.[4]

In one case it was held that if there would be no surplus in the separate estate of the bankrupt for the joint creditors, the reason of the rule fails and the copartner may receive a dividend.[5]

The other rule might work injustice; thus, per LORD WESTBURY, in *Ex parte* Topping, *supra:* "Suppose the separate estate of one partner to be £10,000 and his separate debts to be £10,000, exclusive of a debt due his copartner, if proof of his copartner's debt were not admitted the other separate creditors would be paid in full. But if he owed £10,000 to his copartner and proof were admitted, then the creditors would receive only 10*s.* in the pound. Now suppose the copartner to be indebted to his separate creditors to the extent of £1,000, but to have no assets beyond the debt which is due him from his partner." This will realize £5,000 for the separate estate of the copartner, the surplus of which, deducting the £1,000 separate debts, *i. e.*, £4,000, will remain for the joint creditors. Hence the original rule, adopted nominally for the benefit of the joint creditors, if applied here, would deprive them of £4,000.

And yet in an analogous case where it was sought to show that the joint assets would pay the joint debts in full, and therefore proof by a partner against the separate estate of his copartner

[1] *Ex parte* Grazebrook, 2 D. & C. 186; *Ex parte* Edmonds, 4 D. F. & J. 488. See Weaver *v.* Weaver, 46 N. H. 188.

[2] *In re* Hepburn, 14 Q. B. D. 394.

[3] *Ex parte* Grazebrook, *supra; Ex parte* Hall, 3 Deac. 125.

[4] *Ex parte* Westcott, L. R. 9 Ch. App. 626; *Ex parte* Butterfield, DeGex, 570; *Ex parte* Broome, 1 Coll. 598, note.

[5] *Ex parte* Topping, 4 DeG. J. & S. 551; *Ex parte* Sheen, 6 Ch. D. 235.

would not compete with the joint creditors, the court refused to admit the evidence because it would involve an inquiry in every case of the sufficiency or insufficiency of the other estate; and to declare a dividend and set it aside to await the result of administering the joint estate might hinder the carrying over of the surplus.[1]

And so in Nanson *v.* Gordon, L. R. 1 App. Cas. 195, a retired partner had sold out to his continuing partners at an amount payable in instalments, to run through fourteen years. Before it was paid the continuing partners had become bankrupt; leaving many of the original debts unpaid. The retired partner had died, and his executor sought to prove the claim against the continuing partners' estates, but it was not allowed.

§ 845. ——but can compete with separate creditors.— The solvent partner, having paid the debts of the firm, can come upon the separate estate of the bankrupt partner *pari passu* with the separate creditors for the amount owing by the bankrupt.[2]

If the joint creditors have released the firm with the reservation that the individual liability of the bankrupt partner for the residue should not be impaired, the other partner cannot prove against his estate in competition with the creditors.[3] And so, also, if, without paying the partnership debts, he indemnify the joint estate against them so that his proof will not come in conflict with that of the joint creditors.[4]

The assignee for the benefit of creditors has been allowed to prove against the administrator of a deceased partner without having paid the debts when the amount to be received by him did not

[1] *Ex parte* Bass, 36 L. J. Bkcy. 39.

[2] *Ex parte* King, 17 Ves. 115; *Ex parte* Terrell, Buck, 345; *Ex parte* Drake, cited 1 Atk. 225; Fereday *v.* Wightwick, Taml. 250; *Ex parte* Reeve, 9 Ves. 588; Taylor *v.* Fields, 4 Ves. 396; 15 id. 559, n.; Craven *v.* Knight, 2 Ch. Rep. 226; *Ex parte* Taylor, 2 Rose, 175; Holderness *v.* Shackels, 8 B. & C. 612; Amsinck *v.* Bean, 22 Wall. 395; *In re* Dell, 5 Sawy. 344; Busby *v.* Chenault, 13 B. Mon. 554; Olleman *v.* Reagan, 28 Ind. 109; Price *v.* Cavins, 50 Ind. 122; Hill *v.* Beach, 12 N. J. Eq. 31; Payne *v.* Matthews, 6 Paige, 19; Scott's Appeal, 88 Pa. St. 173; Morris *v.* Morris, 4 Gratt. 293.

[3] *In re* Hamilton, 1 Fed. Rep. 800.

[4] *Ex parte* Ogilby, 3 Ves. & B. 133; 2 Rose, 177. *Contra*, that indemnifying the joint estate is not sufficient; the debt must be paid or barred, *Ex parte* Moore, 2 Glyn. & J. 166.

exceed the amount which the joint creditors would receive from the partnership estate.[1]

Cases of necessity will also qualify the general rule. Thus, if the solvent partner is unable to procure a discharge of a firm debt by reason of the lunacy of the creditor, he might be permitted to prove against the separate estate on giving security.[2]

Formerly the rule was that the right of contribution must have accrued before the other partner became bankrupt,[3] but this was changed by statute.[4]

§ 846. If one of several partners is bankrupt and others insolvent, the solvent partner who has paid the debts can prove for half of them against the estate in bankruptcy, that is, the loss by inability of some to contribute will be divided and not thrown upon him alone.[5] And where on the retirement of a partner the other had assumed all the debts, but, having become bankrupt, the retired partner had to pay them, the latter as surety can prove for the whole against the bankrupt's estate.[6]

Where one partner made a note in the name of the firm for his separate debt, and there being a surplus in the joint estate coming to such partner, the innocent partner has a lien upon it for any balance due him recognizable in bankruptcy, and his separate creditors may take advantage of it.[7]

Where the bankrupt partner was indebted to his copartner on a

[1] Baker *v.* Dawbarn, 19 Grant's Ch. 113. Here the claim arose from a fraudulent use of the firm name. In the latter case the claim was on a mere balance of accounts, and the proof was not of all the deceased owed the firm, but of the balance after reckoning in the amount owed to the firm by the surviving partner. McCormick's Appeal, 55 Pa. St. 252. Here the assignee for creditors of a surviving partner was allowed to prove only for the amount the deceased partner owed the firm, deducting the amount the firm owed him. But *contra*, Stratton *v.* Tabb, 8 Ill. App. 225.

[2] Collyer on Part. p. 658; citing *Ex parte* Yonge, 3 Ves. & B. 31.

[3] Wright *v.* Hunter, 1 East, 20; 5 Ves. 792.

[4] 49 Geo. III. c. 121, § 8; 6 Geo. IV. c. 16, § 52.

[5] § 760.

[6] Parker *v.* Ramsbottom, 3 B. & C. 257; 5 D. & R. 138; Wood *v.* Dodgson, 2 M. & S. 195; 2 Rose, 47; *Ex parte* Carpenter, 1 M. & M. 1; Scott's Appeal, 88 Pa. St. 173.

[7] *Ex parte* King, 17 Ves. 115; *Ex parte* Reid, 2 Rose, 84; *Re* Cleverdon, 4 Ont. App. 185. See Moody *v.* King, 2 B. & C. 558.

contract independent of the partnership, and his estate will not more than pay his separate creditors, so that there will be no surplus for the joint creditors, the creditors of the estate of the other partner in bankruptcy may prove against the estate of the debtor partner, for there is no competition with joint creditors.[1]

§ 847. **Legal liens on private estate.**— Although, as elsewhere shown, the separate creditors of a partner are preferred over the joint creditors in the distribution of his individual estate, yet if a legal lien has been created upon the separate estate in favor of a joint creditor this lien will be observed, and a court of equity will not displace or take away its priority. The rule of distribution does not amount to a lien and prevails only in the disposition of equitable assets.

Thus if an execution is obtained in good faith upon separate property the statutory lien will not yield to the equities of separate creditors on application of the assignee on the subsequent bankruptcy or insolvency of the individual partner.[2]

So the lien of a judgment for a partnership debt on separate estate cannot be superseded in favor of the lien of a junior judgment for a separate debt, or upon a subsequent execution on behalf of a separate creditor levied upon the same property.[3]

[1] *Ex parte* Topping, 4 DeG. J. & S. 551; *Ex parte* Sheen, 6 Ch. D. 235. But it is doubtful if this could be done had there been a surplus for joint creditors, Lacey *v.* Hill, L. R. 8 Ch. App. 441, 445.

[2] *Re* Lewis, 8 Bankr. Reg. 546; *Re* Sandusky, 17 id. 452; Cunningham *v.* Gushee, 73 Me. 417; Allen *v.* Wells, 22 Pick. 450 (33 Am. Dec. 757); Howell *v.* Teel, 29 N. J. Eq. 490.

[3] Cleghorn *v.* Insur. Bank of Columbus, 9 Ga. 319; Baker *v.* Wimpee, 19 id. 87; Thornton *v.* Bussey, 27 Ga. 302; Preston *v.* Colby, 117 Ill. 477; Dean *v.* Phillips, 17 Ind. 406; Louden *v.* Ball, 93 Ind. 232; 18 Centr. L. Jour. 401 and note; Hamsmith *v.* Espy, 13 Iowa, 439; Gillaspy *v.* Peck, 46 Iowa, 461; Wisham *v.* Lippincott, 9 N. J. Eq. 353; Howell *v.* Teel, 29 id. 490; Meech *v.* Allen, 17 N. Y. 300; Cummings' Appeal, 25 Pa. St. 268; Baker *v.* Finney, 2 Pears. (Pa.) 177; Hutzler *v.* Phillips (S. Ca.), 1 S. E. Rep. 502; Gowan *v.* Tunno, Rich. Eq. Cas. (S. Ca.) 369; Kuhne *v.* Law, 14 Rich. L. 18 (overruling Roberts *v.* Roberts, 8 id. 15); House *v.* Thompson, 3 Head, 512; Straus *v.* Kerngood, 21 Gratt. 584.

And the same principle prevails where an attachment or garnishment in an action by a partnership creditor is levied upon the property of or credits due to an individual partner. It is not displaced by a junior attachment sued out by a separate creditor.[1]

And so if a partnership creditor after judgment seek to reach equities or credits by proceedings in aid of execution,[2] or file a creditor's bill to reach concealed assets of one partner.[3]

The above rules have not been adopted in New Hampshire.[4]

That an individual creditor was induced to delay attaching individual property by false representations of a partnership creditor that he had already attached, whereby the latter got time to attach first, is no ground for postponing this attachment. It is just such a falsehood as the former might have expected, and, if he had confidence in the assertion, has himself to blame.[5]

§ 848. Marshaling.—Equity courts have, however, afforded a certain measure of relief by compelling the partnership creditor to exhaust the partnership property before resorting to the separate property, on the principle that he who has the right to go upon two funds can be compelled by a person who can go upon but one of them to take payment, if possible, from the fund to which he can resort exclusively.[6]

[1] Fullam *v.* Abrahams, 29 Kan. 725; Cunningham *v.* Gushee, 73 Me. 417; Allen *v.* Wells, 22 Pick. 450 (33 Am. Dec. 757); Stevens *v.* Perry, 113 Mass. 380.

[2] Straus *v.* Kerngood, 21 Gratt. 584.

[3] Preston *v.* Colby, 117 Ill. 477. *Contra* until joint assets are exhausted, Hubble *v.* Perrin, 3 Oh. 287.

[4] Jarvis *v.* Brooks, 23 N. H. 136; Crockett *v.* Crain, 33 id. 542; Weaver *v.* Weaver, 46 id. 188; Holton *v.* Holton, 40 id. 77. See Bowker *v.* Smith, 48 id. 111; 2 Am. Rep. 189; unless the separate debt was contracted after the lien attached, Miles *v.* Pennock, 50 N. H. 564.

[5] Bardwell *v.* Perry, 19 Vt. 292, 302 (47 Am. Dec. 687).

[6] *Re* Lewis, 8 Bankr. Reg. 546; 2 Hughes, 320; *Re* May, 17 id. 192; *Re* Sandusky, 17 id. 452; Filley *v.* Phelps, 18 Conn. 294, 301-2; Newson *v.* McLendon, 6 Ga. 392; Clayton *v.* May, 68 Ga. 27; Adams *v.* Sturges, 55 Ill. 468; Hamsmith *v.* Ely, 13 Iowa, 439; Wilder *v.* Keeler, 3 Paige, 167; Averill *v.* Loucks, 6 Barb. 470; Hubble *v.* Perrin, 3 Oh. 287; Smead *v.* Lacey, 1 Disney, 239, 247; Frow, Jacobs & Co.'s Appeal, 73 Pa. St. 459, 466; Stoney *v.* Shultz, 1 Hill (S. Ca.), Ch. 465, 496; Wardlaw *v.* Gray, Dudley, Eq. 85; White *v.* Dougherty, Mart. & Yer. (Tenn.) 309; Bardwell *v.* Perry, 19 Vt. 292

That a partnership creditor levying execution on the individual property of one partner has a mortgage on partnership property will not postpone his execution to that of a separate creditor,[1] or a mortgage on separate and another on joint property.[2] And so if an individual partner gives a mortgage to partnership creditors upon individual as well as partnership property, a separate creditor can require the latter security to be exhausted first.[3] But if the mortgage is upon individual property only, and is given to secure separate debts and firm debts, the private creditor cannot claim priority in the proceeds, for there is but one fund.[4]

But the separate creditor cannot compel a resort to the property of the other partner — his averment must be that the firm has sufficient property. The principle does not apply where the funds belong to different persons.[5] Thus, if a partnership creditor levies upon and sells individual property of one partner, the latter's separate creditor is not entitled to be subrogated to the former creditor's right so as to be able to proceed against the other partner's individual property; certainly unless the latter partner was indebted to the former.[6]

So, also, a partner may give a partnership creditor a mortgage on his individual estate, and in the enforcement of liens those prior in time will be preferred.[7]

A compromise of the debt with the other partner is a satisfaction of the mortgage.

Thus where A., F. & C., a firm, owned firm R. E. in their names, and W. became a member of the firm, and the property was improved with funds of this firm, and afterwards A. retired, selling out his interest and deeding his interest in the real estate to F. and C., who

(47 Am. Dec. 687). *Contra*, House *v.* Thompson, 3 Head, 512. And see Dean *v.* Phillips, 17 Ind. 406.

[1] Roberts *v.* Oldham, 63 N. Ca. 297.

[2] Tiffany *v.* Crawford, 14 N. J. Eq. 278.

[3] Bass *v.* Estill, 50 Miss. 300.

[4] Shackleford *v.* Clark, 78 Mo. 491.

[5] Meech *v.* Allen, 17 N. Y. 300.

[6] Sterling *v.* Brightbill, 5 Watts, 229 (30 Am. Dec. 304).

[7] McIntire *v.* Yates, 104 Ill. 491; Hardy *v.* Overman, 36 Ind. 549; Bass *v.* Estill, 50 Miss. 300; White *v.* Dougherty, Mart. & Yer. (Tenn.) 309; Tiffany *v.* Crawford, 14 N. J. Eq. 278; Pike *v.* Hart, 30 La. Ann. Part II, 868. In the foreclosure of a mortgage made by one partner on his own property, to secure a partnership note, a personal judgment for a deficiency may be had against the mortgagor alone. Merchants' Nat'l B'k *v.* Raymond 27 Wis. 567.

mortgaged it back to him to secure a part of the price, and the firm paid part of the mortgage with firm funds. A. signed with other creditors of the new firm a composition agreement with the firm, agreeing to take forty cents on the dollar. Held, this is a defense to foreclosure by A. of his mortgage, for, although the mortgage was against F. and C., yet the debt was a debt of the firm of F., C. & W. If the firm was not liable to pay the mortgage, the members were under obligations to each other to pay it, and either one could have paid it and enforced contribution from his copartners.[1]

[1] Baxter *v.* Bell, 86 N. Y. 195 (rev. 19 Hun, 367).

PART IV.

REMEDIES.

CHAPTER I.

ACTIONS AT LAW BETWEEN PARTNERS.

§ 849. One partner cannot maintain an action at law against another to recover an amount claimed by him by reason of partnership transactions, until there has been a final settlement of the affairs of the concern by discharging its liabilities, collecting its assets, and definitely ascertaining the surplus, to a share of which he is entitled. Up to that time, a partner's only remedy is to apply to a court of equity for a dissolution and accounting and ascertainment of such balance.

The reasons for this very general and sweeping rule may be variously stated:

If a partner who has loaned money to the firm or paid a debt out of his private means could recover contribution for the same, it could not be ascertained how much each of the others should contribute, as they, too, may have made similar advances, unless the entire accounts of the firm were gone into; and it might well be that the very next day another partner would, by paying a debt, acquire a similar claim against the firm, including the former plaintiff, or by collecting a claim become again the debtor of the former plaintiff. And even if there are no debts, yet collections must be received unequally by the partners. The mutual balances are, therefore, constantly fluctuating quantities, and a judgment on any one item would settle nothing, and, if allowed, would produce a multiplicity of suits. And if

the firm has been dissolved and dealings have ceased, the ascertainment of balances requires examining all dealings from its beginning, an investigation which cannot safely be submitted to a jury, especially if there are more than two partners.

Or again, a partner's claim is a liability of the firm and is payable primarily out of its resources; to allow a recovery against the firm at law is to deplete the assets and convert them into the separate property of one partner, at the expense of creditors, without the consent of the copartners, and in violation of their lien or equity to have assets applied to debts. Besides, an insuperable technical difficulty is encountered in attempting to sue the firm, in that the plaintiff is on both sides of the record, being one of the defendants, and seeking to recover a judgment against himself.

Or again, the debt is partnership assets; hence one partner cannot collect and keep it.[1]

§ 850. Set-off.— And for the same reasons, if one partner sues another on independent transactions, the latter cannot

[1] See in addition to the cases hereafter cited the following: Ozeas *v.* Johnson, 4 Dall. 434 (S. C. below, 1 Bin. 191); Lamalere *v.* Caze, 1 Wash. C. C. 435; Morrow *v.* Riley, 15 Ala. 710; Broda *v.* Greenwald, 66 id. 538; Houston *v.* Brown, 23 Ark. 333; Russell *v.* Byron, 2 Cal. 86: Ross *v.* Cornell, 45 id. 133; Fisher *v.* Sweet, 67 id. 228; Wetmore *v.* Woodbridge, Kirby (Conn.), 164; Beach *v.* Hotchkiss, 2 Conn. 425; S. C. id. 697; Mickle *v.* Peet, 43 id. 65; Price *v.* Drew, 18 Fla. 670; Chadsey *v.* Harrison, 11 Ill. 151; Burns *v.* Nottingham, 60 id. 531; Briggs *v.* Daugherty, 48 Ind. 247; Krutz *v.* Craig, 53 Ind. 561; Lang *v.* Oppenheim, 96 Ind. 47; Williamson *v.* Haycock, 11 Iowa, 40; Simrall *v.* O'Bannons, 7 B. Mon. 608; Austin *v.* Vaughan, 14 La. Ann. 43; Succession of Powell, id. 425; Seelye *v.* Taylor, 32 id. 1115; Learned *v.* Ayers, 41 Mich. 677; Miner *v.* Lorman, 56 id. 212; White *v.* Waide, Walk. (Miss.) 263; Ivy *v.* Walker, 58 Miss. 253; Scott *v.* Caruth, 50 Mo. 120; Mulhall *v.* Cheatham, 1 Mo. App. 476; Perley *v.* Brown, 12 N. H. 493; Wright *v.* Cobleigh, 21 id. 339; Towle *v.* Meserve, 38 id. 9; Harris *v.* Harris, 39 id. 45; Young *v.* Brick, 3 N. J. L. 241, 490, 664; Niven *v.* Spickerman, 12 Johns. 401; Halsted *v.* Schmelzel, 17 id. 80; Casey *v.* Brush, 2 Caines, 293; Pattison *v.* Blanchard, 6 Barb. 537; Buell *v.* Cole, 54 id. 353; Emrie *v.* Gilbert, Wright (O.), 764; Ferguson *v.* Wright, 61 Pa. St. 258; Dowling *v.* Clarke, 13 R. I. 134; S. C. id. 650; Spear *v.* Newell, 13 Vt. 288; Warren *v.* Wheelock, 21 id. 323; Newbrau *v.* Snider, 1 W. Va. 153. *Contra*, Johnson *v.* Kelly, 4 Th. & C. (N. Y.) 417.

set up as a counter-claim or set-off that the plaintiff is his debtor on a balance on unsettled partnership account between them.[1]

That the suit for an accounting is already pending and a cross-demand may arise out of it will not confer the right to an equitable offset.[2]

It has been suggested that, in case of insolvency, fraud, etc., of the plaintiff, relief, by staying the suit until an accounting or other equitable relief, might be had,[3] and the same suggestion has been made in case of non-residence.[4]

§ 851. **Advances or loans.**— Hence a partner cannot recover at law for advances or loans made by him to the firm.[5]

§ 852. **Debts paid by one partner.**— Nor obtain reimbursement at law for money paid or debts settled by him out of his private estate for the firm, nor can he obtain contri-

[1] Fromont *v.* Coupland, 2 Bing. 170; Scott *v.* Campbell, 30 Ala. 728; Burney *v.* Boone, 32 id. 486; Case *v.* Maxey, 6 Cal. 276; Haskell *v.* Moore, 29 id. 437; Johnson *v.* Wilson, 54 Ill. 419; Wilt *v.* Bird, 7 Blackf. 258; Austin *v.* Vaughan, 14 La. Ann. 43; Starbuck *v.* Shaw, 10 Gray, 492; Hess *v.* Final, 32 Mich. 515; Elder's Appeal, 39 id. 474; Gardiner *v.* Fargo, 58 id. 72; Finney *v.* Turner, 10 Mo. 207; Wright *v.* Jacobs, 61 id. 19; Leabo *v.* Renshaw, 61 id. 292; Odiorne *v.* Woodman, 39 N. H. 541; Hewitt *v.* Kuhl, 25 N. J. Eq. 24; Ives *v.* Miller, 19 Barb. 196 (denying Gage *v.* Angell, 8 How. Pr. 335); Cummings *v.* Morris, 25 N. Y. 625; Love *v.* Rhyne, 86 N. Ca. 576; Neil *v.* Greenleaf, 26 Oh. St. 567; Roberts *v.* Fitler, 13 Pa. St. 265; Klase *v.* Bright, 71 id. 186; Wharton *v.* Douglass, 76 id. 273; Linderman *v.* Disbrow, 31 Wis. 465; Tomlinson *v.* Nelson, 49 Wis. 679. *Contra*, Irish *v.* Snelson, 16 Ind. 365; Greathouse *v.* Greathouse 60 Tex. 597.

[2] Hewitt *v.* Kuhl, 25 N. J. Eq. 24.

[3] Love *v.* Rhyne, 86 N. Ca. 576, 579; Leabo *v.* Renshaw, 61 Mo. 292; Jones *v.* Shaw, 67 Mo. 667; Linderman *v.* Disbrow, 31 Wis. 465; Foulks *v.* Rhodes, 12 Nev. 225; Ives *v.* Miller, 19 Barb. 196; Neil *v.* Greenleaf, 26 Oh. St. 567 (*dictum*).

[4] Pool *v.* Delaney, 11 Mo. 570.

[5] Perring *v.* Hone, 4 Bing. 28; Richardson *v.* Bank of England, 4 Myl. & Cr. 165; Colley *v.* Smith, 2 Moo. & Rob. 96; Houston *v.* Brown, 23 Ark. 333; Mickle *v.* Peet, 43 Conn. 65; Price *v.* Drew, 18 Fla. 670; Elliott *v.* Deason, 64 Ga. 63; Wilson *v.* Soper, 13 B. Mon. 411 (56 Am. Dec. 573); Bracken *v.* Kennedy, 4 Ill. 558; Hennegin *v.* Wilcoxon, 13 La. Ann. 576; Crottes *v.* Frigerio, 18 La. Ann. 283; Springer *v.* Cabell, 10 Mo. 640; Seighortner *v.* Weissenborn, 20 N. J. Eq. 172; Gridley *v.* Dole, 4 N. Y. 486; Payne *v.* Freer, 91 N. Y. 43, 50 (43 Am. Rep. 640); aff. 25 Hun, 124; Haskell *v.* Vaughn, 5 Sneed, 618; O'Neill *v.* Brown, 61 Tex. 34.

bution in equity apart from a general accounting and settlement.[1]

In Pollard *v.* Stanton, 5 Ala. 451, a note given to a partnership creditor was signed by one partner as principal and by the other as surety. The latter, having had to pay the whole note, cannot sue the other at law, for his payment was on account of the firm.

No distinction can be made on the ground that the payment by the plaintiff was compulsory, as where judgment was rendered against all the partners, and execution levied on the property of one who is thus coerced into paying the entire debt.[2]

§ 853. **Goods sold.**— Nor can a partner recover at law the price of goods sold by him to the firm.[3]

[1] Robson *v.* Curtis, 1 Stark. 78; Goddard *v.* Hodges, 1 Cr. & M. 33; Pearson *v.* Skelton, 1 M. & W. 504; Brown *v.* Tapscott, 6 M. & W. 119; Halderman *v.* Halderman, Hempst. C. C. 559; Philips *v.* Lockhart, 1 Ala. 521; DeJarnette *v.* McQueen, 31 id. 230; Ross *v.* Cornell, 45 Cal. 133; Price *v.* Drew, 18 Fla. 670; Crossley *v.* Taylor, 83 Ind. 337; Lawrence *v.* Clark, 9 Dana (Ky.), 257 (35 Am. Dec. 133); Camblat *v.* Tupery, 2 La. Ann. 10; Hennegin *v.* Wilcoxon, 13 id. 576; Kennedy *v.* McFadon, 3 Har. & J. 194; Haskell *v.* Adams, 7 Pick. 59; Myrick *v.* Dame, 9 Cush. 248; White *v.* Harlow, 5 Gray, 463; Phillips *v.* Blatchford, 137 Mass. 510; Glynn *v.* Phetteplace, 26 Mich. 383; Morin *v.* Martin, 25 Mo. 360; Scott *v.* Caruth, 50 id. 120; Bond *v.* Bemis, 55 id. 524; Wright *v.* Jacobs, 61 id. 19; Cockrell *v.* Thompson, 85 id. 510; Younglove *v.* Liebhardt, 13 Neb. 557; Tucker *v.* Peaslee, 36 N. H. 167; Harris *v.* Harris, 39 id. 45; Murray *v.* Bogert, 14 Johns. 318; Westerloo *v.* Evertson, 1 Wend. 532; Ives *v.* Miller, 19 Barb. 196; Torrey *v.* Twombley, 57 How. Pr. 149; Booth *v.* Farmers' & Mech. B'k, 74 N. Y. 228 (s. c. below, 11 Hun, 258); Leidy *v.* Messinger, 71 Pa. St. 177; Fessler *v.* Hickernell, 82 id. 150; Fulton's Appeal, 95 id. 323; Merriwether *v.* Hardeman, 51 Tex. 436; Lockhart *v.* Lytle, 47 Tex. 452; Warren *v.* Wheelock, 21 Vt. 323; Kendrick *v.* Tarbell, 27 id. 512; Drew *v.* Person, 22 Wis. 651; Sprout *v.* Crowley, 30 id. 187; Tomlinson *v.* Nelson, 49 id. 679; Small *v.* Riddle, 31 Up. Can. C. P. 373.

[2] Sadler *v.* Nixon, 5 B. & Ad. 936; Pearson *v.* Skelton, 1 M. & W. 504; Dewit *v.* Staniford, 1 Root (Conn.), 270; Lawrence *v.* Clark, 9 Dana, 257; Kennedy *v.* McFadon, 3 Har. & J. 194; Stothert *v.* Knox, 5 Mo. 112; Murray *v.* Bogert, 14 Johns. 318; Westerloo *v.* Evertson, 1 Wend. 532; Booth *v.* Farmers' & Mech. Bank, 74 N. Y. 228 (aff. 11 Hun, 258); Fessler *v.* Hickernell, 82 Pa. St. 150; Fulton's Appeal, 95 id. 323; Scripture *v.* Gordon, 7 Up. Can. C. P. 164.

[3] Bullard *v.* Kinney, 10 Cal. 60; Dale *v.* Thomas, 67 Ind. 570; Marks *v.* Stein, 11 La. Ann. 509; Marx *v.*

§ 854. **Labor and services.**— Nor for labor or services rendered by him to the firm in relation to the partnership business;[1] even where the compensation is fixed by agreement or by the articles, as it is payable out of the assets and therefore a debt of the firm, and not a personal contract of some of the partners other than plaintiff.[2]

In Hills *v.* Bailey,[3] the agreement was that defendant should furnish all the capital and plaintiff should be the active partner, and defendants in consideration of his services would pay him $500 a year. This agreement, though indicative of a personal contract, it was held, must be construed with reference to the subject-matter and situation of the parties, and means that the compensation is payable from the firm, and therefore he cannot sue the defendants at law.[4]

§ 855. **Rent.**— Where a partner owns the premises in which the business of the firm is conducted, and the firm is

Bloom, 21 id. 6; Course *v.* Prince, 1 Mill (S. Ca.), 416.

[1] Holmes *v.* Higgins, 1 B. & C. 74, where associates for the purpose of obtaining a bill from parliament to make a railway employ one of their number as surveyor, he cannot recover from them at law for his work; Milburn *v.* Codd, 7 B. & C. 419, where two partners in a trading company, being sued by its creditors, employed another partner, who was an attorney, to defend, the latter cannot recover his bill of costs from them at law, for he is jointly liable for the expense of defending; S. P. Drew *v.* Person, 22 Wis. 651. Lucas *v.* Beach, 1 M. & G. 417; Goddard *v.* Hodges, 1 Cr. & M. 33; Causten *v.* Burke, 2 Har. & G. 295; Taylor *v.* Smith, 3 Cranch, C. C. 241; Robinson *v.* Green, 5 Harr. (Del.) 115; Clonan *v.* Thornton, 21 Minn. 380; Younglove *v.* Liebhart, 13 Neb. 557; Warren *v.* Wheelock, 21 Vt. 323; Lower *v.* Denton, 9 Wis. 268.

[2] Causten *v.* Burke, 2 Har. & G. 295; Wright *v.* Troop, 70 Me. 346; Duff *v.* Maguire, 99 Mass. 300, 304; Wood *v.* Cullen, 13 Minn. 394, 397; Hills *v.* Bailey, 27 Vt. 548; and see Holyoke *v.* Mayo, 50 Me. 385. *Contra*, that he can recover, Lassiter *v.* Jackman, 88 Ind. 118; Covington *v.* Leak, 88 N. Ca. 133.

[3] *Supra.*

[4] *Contra*, Covington *v.* Leak, 88 N. Ca. 133. In Paine *v.* Thacher, 25 Wend. 450, the compensation was expressly to be out of defendant's share and was therefore recoverable. So of Aldrich *v.* Lewis, 60 Miss. 229. In Robinson *v.* Green, 5 Harr. (Del.) 115, it was said *obiter* that an action at law could be maintained for a salary payable out of profits if plaintiff showed profits sufficient to pay it. But this involves taking an account, and does not remove the objection that plaintiff must be one of the defendants. The case is merely a charge to the jury.

by agreement to pay a stipulated rent for them, he cannot recover the rent at law, for the rent is a partnership debt, and *non constat* but that he may owe the firm more than it owes him, and besides it is his debt as well as that of his copartners, and he cannot be both plaintiff and defendant. The same rule that applies to furnishing money to the firm applies to furnishing a building.[1] Nor maintain a suit to recover possession for non-payment of the rent.[2]

But the rent claim stands on the same footing as if in favor of a third person, where the other partner and not the firm is to pay it.[3]

§ 856. **Share of collections.**—So where one or more partners less than all collects money due to the firm or receives funds for its use, or otherwise appropriates more than his share, the other partners cannot sue them or the firm at law for their proportion, for the firm as a whole, including the plaintiff, is the real debtor.[4]

§ 857. **For final balance.**—If, however, all the partnership affairs are wound up, its debts collected and liabilities paid, and the balances due the partners ascertained and nothing remains but to pay them, the right to receive the balance and the duty on the part of the debtor partner to pay it has become a several and private right which can be enforced by action at law, and by that only.

[1] Pico *v.* Cuyas, 47 Cal. 174; Johnson *v.* Wilson, 54 Ill. 419; Estes *v.* Whipple, 12 Vt. 373. See Kinloch *v.* Hamlin, 2 Hill (S. Ca.), Ch. 19. See Hayes *v.* Fish, 36 Oh. St. 498, an agreement by all the partners to pay for the land of one in instalments. But see Allen *v.* Anderson, 13 Ill. App. 451.

[2] Pico *v.* Cuyas, 47 Cal. 180.

[3] Kinney *v.* Robison, 52 Mich. 389.

[4] Fromont *v.* Coupland, 2 Bing. 170; Lewis *v.* Edwards, 7 M. & W. 300; Bovill *v.* Hammond, 6 B. & C. 148. And see Lyon *v.* Haynes, 5 M. & G. 504; Thomas *v.* Thomas, 5 Ex. 28, of tenants in common; Burney *v.* Boone, 32 Ala. 486; Russell *v.* Byron, 2 Cal. 86; Dana *v.* Gill, 5 J. J. Mar. (Ky.) 242; 20 Am. Dec. 255; Stanton *v.* Buckner, 24 La. Ann. 391; Pray *v.* Mitchell, 60 Me. 430; Riarl *v.* Wilhelm, 3 Gill (Md.), 356; Howard *v.* Patrick, 38 Mich. 795; Gardiner *v.* Fargo, 58 id. 72; Stothert *v.* Knox, 5 Mo. 112; Springer *v.* Cabell, 10 id. 640; McKnight *v.* McCutchen, 27 id. 436; Smith *v.* Smith, 33 id. 557; Wright *v.* Cobleigh, 21 N. H. 339; Towle *v.* Meserve, 38 N. H. 9; Young

We have elsewhere seen that, where a partner retires, selling out his interest for an agreed amount, he can recover this amount in an action at law; and where the continuing partners assume payment of the debts, the retiring partner can, by action at law, recover reimbursement of such as he has thereafter been required to pay.

§ 858. **Express promise.**— An express promise to pay such balance was specially ruled not to be necessary in the following cases.[1] And the following cases also hold that *assumpsit* lies for final balance ascertained after full settlement, without mentioning an express promise as also necessary.[2]

Earlier cases in some of the above states had used language importing that an express promise was an ingredient of the right of action.[3]

§ 859. **Must be in full settlement.**— The adjustment is final if a recovery of the balance will be a final winding up of the partnership affairs. If it will not accomplish this,

v. Brick, 3 N. J. L. 663; Graham *v.* Holt, 3 Ired. (S. Ca.) L. 300; Cook *v.* Garrett, 1 Brev. (S. Ca.) 388.

[1] Rackstraw *v.* Imber, Holt, N. P. 368; Brierly *v.* Cripps, 7 C. & P. 709; Wray *v.* Milestone, 5 M. & W. 21; Lamalere *v.* Caze, 1 Wash. C. C. 435; McColl *v.* Oliver, 1 Stew. 510; McGehee *v.* Dougherty, 10 Ala. 863; Bean *v.* Gregg, 7 Colorado, 499, 500; Martin *v.* Solomon, 5 Harr. (Del.) 344; Price *v.* Drew, 18 Fla. 670, 682; Purvines *v.* Champion, 67 Ill. 459; Riarl *v.* Wilhelm, 3 Gill (Md.), 356; Wilby *v.* Phinney, 15 Mass. 116, 121; Fanning *v.* Chadwick, 3 Pick. 420 (15 Am. Dec. 233); Williams *v.* Henshaw, 11 id. 79; 22 Am. Dec. 366; Scott *v.* Caruth, 50 Mo. 120; Holman *v.* Nance, 84 id. 674; Cochrane *v.* Allen, 58 N. H. 250; Jaques *v.* Hulit, 16 N. J. L. 38; Mackey *v.* Auer, 8 Hun, 180; Van Amringe *v.* Ellmaker, 4 Pa. St. 281; Knerr *v.* Hoffman, 65 id. 126, 130; McNichol *v.* McEwen, 3 Up. Can. Q. B. (old ser.) 485.

[2] Brierly *v.* Cripps, 7 C. & P. 709; Halderman *v.* Halderman, Hempst. 559; Pope *v.* Randolph, 13 Ala. 214; Mount *v.* Chapman, 9 Cal. 294; Wycoff *v.* Purnell, 10 Iowa, 332; Treadway *v.* Ryan, 3 Kan. 437; Dana *v.* Barrett, 3 J. J. Mar. (Ky.) 8; Robinson *v.* Williams, 8 Met. 454; Hunt *v.* Morris, 44 Miss. 314; Wright *v.* Jacobs, 61 Mo. 19; Wicks *v.* Lippman, 13 Nev. 499; Goodin *v.* Armstrong, 19 Oh. 44; Andrews *v.* Allen, 9 Serg. & R. 241; Yohe *v.* Barnet, 3 Watts & S. 81.

[3] Foster *v.* Allanson, 2 T. R. 479; Moravia *v.* Levy, id. 483, n.; Goldsborough *v.* McWilliams, 2 Cranch, C. C. 401; Pote *v.* Phillips, 5 id. 154; Burns *v.* Notthingham, 60 Ill. 531; Nims *v.* Bigelow, 44 N. H. 376; Gulick *v.* Gulick, 14 N. J. L. 578; Murray *v.* Bogert, 14 Johns. 318; 7 Am. Dec. 466; Clark *v.* Dibble, 16 Wend. 601; Koehler *v.* Brown, 21 How. Pr. 235; Killam *v.* Preston, 4 Watts & S. 14.

the balance sued for is not final and will not sustain an action, for otherwise the number of actions might be indefinite, and a partner would recover on one day what he had been adjudged to pay over on a preceding day.

In Arnold *v.* Arnold, 90 N. Y. 580, a partnership of three persons had been dissolved, all the debts paid and a division had of the cattle, constituting the stock of the business. One of the partners had died in possession of a bond which he had purchased in his own name with funds of the partnership. In an action by one of the survivors against the administrator for one-third of the proceeds of the bond, it was held that the above facts did not show a general settlement.

In Shattuck *v.* Lawson, 10 Gray, 405, after a dissolution and agreement, leaving all the assets with one partner to be applied to the payment of debts, the other partner was compelled to pay a debt and brought an action against the former for the amount of it. It was claimed that the settlement was final, but the court held otherwise, for it should appear that a surplus was left in the defendant's hands or that his own claims on the assets had been satisfied, or that this was the only outstanding claim, and even if the assets were then sufficient they might not ultimately be so.

In Ross *v.* Cornell, 45 Cal. 133, a partner who owed the firm sold out to his copartners, all except his share in certain lumber, which he left with them to sell and apply to his debt. There being still a deficiency after the sale, they, after paying all the debts, sued him at law. It was held that the action would not lie, for the sale of the lumber, the amount realized, the expenses, and the application of the proceeds and their sufficiency to pay the debt, were unsettled matters.

In De Jarnette *v.* McQueen, 31 Ala. 230, an agreement between the partners to "quit even," so as to save the expense of a chancery suit, was held not to give to one who had subsequently paid an outstanding note signed by all for a firm debt a right to recover contribution at law, for if there is a liability to account to each other for the payment of a debt by one or the collection of assets by another the remedy must be by an accounting in chancery, for otherwise there would be a separate action at every occurrence of an item in the account.

In Burns *v.* Nottingham, 60 Ill. 531, the statement was of the

amount of profits, but not stating which partner held them or the amount each should receive, or whether each had received back his capital or accounted for the funds, if any, drawn out, and was held not to be an accounting which would sustain an action at law.

In Gleason *v.* Van Aernam, 9 Oregon, 343, an adjustment after dissolution of accounts by the partners, as far as then occurring to them, with an agreement to meet again to divide some partnership lumber and finish the settlement, but which they never did, was held very properly not to be so final as to bar a suit for an accounting.

An agreement by both partners to settle and pay their accounts at a given period will not sustain a suit by one to recover the charges on the books against the other except for settlement of accounts in chancery.[1] And if, after arbitration, all the debts are assigned to the copartner, his action at law must be on the award and not on the supposed adjustment.[2]

An action for balance on settlement is not sustained by proof of an award of arbitrators who settled the partnership. The award should have been declared upon.[3]

§ 860. What is an agreed final balance.—To constitute such final balance as to support an action, it must have received the assent of the partners so as to bind them to an admission of its correctness.

If the balance is fixed by decree of a court of chancery that is sufficient, and an action will lie upon it.[4]

If it is struck by a book-keeper requested to state the account, especially if he is an employee of the debtor interest, it is *prima facie* evidence of an adjustment,[5] but not if a right to disagree with his results is reserved.[6]

It is not enough that the balance be deducible from the books; it must have been struck by agreement.[7] But if the items have all been mutually ascertained and nothing remains but a simple computation from the agreed figures or the correction of a footing, this is sufficient.[8]

[1] Judd *v.* Wilson, 6 Vt. 185, 189.

[2] Id.

[3] Wood *v.* Dutchman, 80 Ind. 524.

[4] Henley *v.* Soper, 8 B. & C. 16; s. c. 2 Man. & Ry. 166; Thrall *v.* Waller, 13 Vt. 231 (37 Am. Dec. 592).

[5] Goodin *v.* Armstrong, 19 Oh. 44.

[6] Morrow *v.* Riley, 15 Ala. 710.

[7] Harris *v.* Harris, 39 N. H. 45; Judd *v.* Wilson, 6 Vt. 185; Morrow *v.* Riley, 15 Ala. 710; Andrews *v.* Allen, 9 S. & R. 241.

[8] Jacques *v.* Hulit, 16 N. J. L. 38; Treadway *v.* Ryan, 3 Kan. 437, 443.

A statement of account in the handwriting of one partner in the possession of the other is evidence of a balance due.[1] The fact that the partner to whom a statement was sent by the other retained it for a long time was held sufficient evidence of his concurrence to make it an agreed adjustment.[2]

That the defendant partner has absconded does not enlarge the right to sue at law.[3]

In Pool *v.* Perdue, 44 Ga. 454, it was held that one partner could sue another at law if he can show that the affairs of the firm are so far settled that the jury can ascertain what is justly due him; but the court admitted that the law of that state was very broad as to the right to sue at law.

In Beach *v.* Hotchkiss, 2 Conn. 425; s. c. id. 697, where the sole managing partner in a voyage paid one of his two copartners a certain sum as his share, with a statement of account showing this to be the balance, this was held not to be equivalent to a liquidation or adjustment so as to enable the other copartner to sue him at law for an equal amount.

In Bloss *v.* Chittenden, 2 Thomp. & C. 11, a firm owning three banks dissolved, B. taking one bank and C., D. & E. taking the other two. Of the latter two banks, one owed the first bank $1,000 and the other owed it $3,000. C., D. & E. promised B. in writing to pay the $3,000 as soon as they conveniently could, and D. promised to pay the balance as soon as it was possible without pressing the banks. This agreement was held not enforcible at law, because neither a final accounting nor an express promise.

In Knerr *v.* Hoffman, 65 Pa. St. 126, a third person had sued one partner and garnished the other, and both partners went to a justice of the peace for advice, and the garnished partner told him that the amount coming to the other was some $620. This was held some evidence from which a jury could find a settlement and balance struck so as to make it an attachable debt.

Stowe *v.* Sewall, 3 Stew. & Por. (Ala.) 67, held that if an action at law was brought before settlement, but settlement was had and balance found before trial, it would be presumed to have been had with a view to the pending action and so would be evidence to sustain the action.

[1] Yohe *v.* Barnet, 3 Watts & S. 81. C. 435. *Contra*, Killam *v.* Preston,
[2] In Lamalere *v.* Caze, 1 Wash. C. 4 Watts & S. 14.
[3] Stowe *v.* Sewall, 3 Stew. & Port. 67.

§ 861. **Partial balances.**— Balances on partial settlements, somewhat like other single items in the course of partnership to be recoverable at law, must be separated or taken out of the domain of partnership law and converted into an individual matter. An express promise is the most satisfactory evidence of an intention to make this change.[1]

That a debt had been paid by the administrator of a deceased partner, at the request of the surviving partner, does not import such special promise to repay;[2] nor does an admission by the defendant that the amount is due.[3]

Where a balance is agreed on as a final one, showing an amount due to plaintiff without express promise to pay, and the partners afterwards continue the business, no action can be brought for such balance.[4] But a note made by one partner to the other, for a balance on amicable adjustment, although the business is still carried on, is enforceable, for otherwise the intention of balancing the accounts would be defeated, and the claim which before was against the firm now becomes by substitution one against the copartner personally.[5]

§ 862. **Pleading.**— Without designing to enter upon the subject of pleading, it may be noticed here that the declaration or petition should show clearly that the settlement is

[1] In the following cases the partial balances were not recovered, holding an express promise to be necessary: Harris *v.* Harris, 39 N. H. 45; Westerlo *v.* Evertson, 1 Wend. 532; Allan *v.* Garven, 4 Up. Can. Q. B. 242; Merriwether *v.* Hardeman, 51 Tex. 436; Davenport *v.* Gear, 3 Ill. 495; Burns *v.* Nottingham, 60 Ill. 531; Murdock *v.* Martin, 20 Miss. (12 Sm. & M.) 661; Curry *v.* Allen, 55 Iowa, 318; Wright *v.* Cobleigh, 21 N. H. 339. And in the following they were allowed: Brierly *v.* Cripps, 7 C. & P. 709, where there was no express promise; Gibson *v.* Moore, 6 N. H. 547, and Blakly *v.* Graham, 111 Mass. 8, where a controversy was settled by arbitration; Foster *v.* Rison, 17 Gratt. 321; Wetmore *v.* Baker, 9 Johns. 307, which is scarcely a case of partnership. See, also, Carr *v.* Smith, 5 Q. B. 128, and Sturges *v.* Swift, 32 Miss. 239, a *dictum*.

[2] Harris *v.* Harris, *supra*.

[3] Murdock *v.* Martin, *supra*.

[4] Allan *v.* Garven, 4 Up. Can. Q. B. 242; Fromont *v.* Coupland, 2 Bing. 170; but it was suggested in the former case and also in Carr *v.* Smith, 5 Q. B. 128, that an express promise might have had the effect to make it individual property.

[5] Preston *v.* Strutton, 1 Anstr. 50; McSherry *v.* Brooks, 46 Md. 103; Rockwell *v.* Wilder, 4 Met. 553; Sturges *v.* Swift, 32 Miss. 239; Van Amringe *v.* Ellmaker, 4 Pa. St. 281. And see preceding note.

such that the account is no longer a matter of controversy.[1] That a special demand for the balance is not necessary.[2] That an action for a balance is not supported by evidence of a promise to pay a sum if plaintiff will leave the firm;[3] or that defendant had sold out to plaintiff.[4] That the subject-matter of an action was a partnership contract.[5]

§ 863. **Liability for ascertained balance is several.**— After the accounts are all settled and the balance due each partner is struck, if the proceeds of the partnership property is in the hands of one partner, the claims of the copartners against him are several and not joint, and they cannot jointly sue without an express promise to them jointly.[6]

But a stipulation in the articles will, unless otherwise expressed, be deemed a joint one in favor of the copartners, and not a several one, where the injury to each is the same in kind, and the delinquent partner cannot be subjected to two actions.[7] And a claim against a partner for fraud belongs to the copartners jointly, and they must join, for if one could sue alone, the whole amount cannot be adjudged to him.[8]

§ 864. **Exceptions — Massachusetts rule.**— In certain cases, however, courts of law have entertained cases which involved accounting, when, from the simplicity or from other causes, adequate relief could be given and the judgment would terminate all controversies between the partners arising out of the partnership.

In Massachusetts, at a time when there were no equity courts in the state, such an action was allowed, and if there were outstanding credits the plaintiff could prove they were worthless or agree

[1] Wycoff *v.* Purnell, 10 Iowa, 332.

[2] Robinson *v.* Williams, 8 Met. 454.

[3] Crawford *v.* Thoroughman, 13 Mo. App. 579.

[4] Whitney *v.* Purrington, 59 Cal. 36.

[5] But if no objection on this ground is made until after judgment, the objection was held to be waived, in Smith *v.* Allen, 18 Johns. 245; Tolford *v.* Tolford, 44 Wis. 547; Whetstone *v.* Shaw, 70 Mo. 575; Williamson *v.* Haycock, 11 Iowa, 40. On the other hand the omission to allege or prove a balance struck was held a fatal defect even after verdict in Ozeas *v.* Johnson, 4 Dall. 434, and Bean *v.* Gregg, 7 Colorado, 499.

[6] Farrar *v.* Pearson, 59 Me. 561; Riarl *v.* Wilhelm, 3 Gill, 356; Masters *v.* Freeman, 17 Oh. St. 323.

[7] Capen *v.* Barrows, 1 Gray, 376 (overruling Dunham *v.* Gillis, 8 Mass. 462). See § 872.

[8] Maude *v.* Rodes, 4 Dana, 144.

that they should belong to the defendant.[1] But if there are outstanding debts he cannot sustain his action by offering to assume them, because he has no right to deprive the other partner of his authority over the debts nor compel him to assume the risk of plaintiff's solvency,[2] unless plaintiff will give credit for the debt on his judgment.[3]

In Wheeler *v.* Arnold, 30 Mich. 304, one partner had died, there were no assets left after the debts were all paid, and the surviving partner, who had paid more than his share of debts, was allowed to sue the administrator at law for contributions.[4]

And a *dictum* to the same effect was made by Osler, J., in Hall *v.* Lannin, 30 Up. Can. C. P. 204, 209, based on the ground that the claim was a pure money demand, involving the indebtedness between two persons, the decision in the case being that all the debts being paid and assets collected, the claim of the creditor partner was to be considered as so far liquidated as to be provable against the estate of the copartner in bankruptcy.[5]

§ 865. —— in single transaction.— Where the partnership consists of a venture in a single transaction or single purchase, which is closed up and finished, and there are no accounts with third persons to adjust or debts to be provided for by sale and distribution of effects, but the sole question is how much one partner owes the other, an action at law has been sustained between them, being purely a money demand on a single item. This exception is not clearly established, for some of the cases are not true partnerships but are mere joint ventures. The courts at one time, apparently, were in the habit of calling any contract relation a partnership in which an accounting could be demanded.[6]

[1] Bond *v.* Hays, 12 Mass. 34; Wilby *v.* Phinney, 15 id. 116; Fanning *v.* Chadwick, 3 Pick. 420; Brinley *v.* Kupper, 6 id. 179; Williams *v.* Henshaw, 11 id. 79; Vinal *v.* Burrill, 16 id. 401; Dickinson *v.* Granger, 18 id. 315; Rockwell *v.* Wilder, 4 Met. 556; Shepard *v.* Richards, 2 Gray, 424; Sikes *v.* Work, 6 id. 433; Shattuck *v.* Lawson, 10 id. 405; Wiggin *v.* Cummings, 8 Allen, 353; Wheeler *v.* Wheeler, 111 Mass. 247.

[2] Williams *v.* Henshaw, 12 Pick. 378 (23 Am. Dec. 614).

[3] Vinal *v.* Burrill, 16 Pick. 401.

[4] Also McGunn *v.* Hanlin, 29 Mich. 476.

[5] See, also, Biernan *v.* Braches, 14 Mo. 24.

[6] Bovill *v.* Hammond, 6 B. & C. 151; Wann *v.* Kelly, 5 Fed. Rep. 584; 2 McCrary, 628 (in a purchase of stock on speculation); Myers *v.* Winn, 16 Ill. 135 (in a single drove of

§ 866. —— single unadjusted item.— In apparent analogy to the foregoing doctrine of settling at law the affairs of a partnership for a single transaction, are several cases where partnership affairs have been fully adjusted by the parties, except as to particular piece of property or single matter, and has thus been in effect reduced to a partnership in a single item not involving creditors, and the controversy as to this has been settled at law, although there has been no special promise in regard to it between the parties.

In Purvines *v.* Champion, 67 Ill. 459, one partner in a livery business sold out to his copartner everything except a span of horses. He was held liable at law for half their value.

In Whetstone *v.* Shaw, 70 Mo. 575, all accounts had been fully settled except an item of credit, a note. The defendant having collected it, the plaintiff recovered his share at law, there being nothing else to settle between them.[1]

In Farwell *v.* Tyler, 5 Iowa, 535, the defendant, on dissolution, had given a note to his partner, M., for the balance due him, but having subsequently had to pay an outstanding debt, was allowed to set it off against the note and require contribution.

In Brown *v.* Agnew, 6 Watts & S. 235, more than six years after the firm had made an assignment for the benefit of creditors, a

cattle); Crossley *v.* Taylor, 83 Ind. 337; Pettingill *v.* Jones, 28 Kan. 749; Jenkins *v.* Howard, 21 La. Ann. 597; Byrd *v.* Fox, 8 Mo. 574; Buckner *v* Ries, 34 Mo. 357 (for the sale of a single hogshead of tobacco); Silver *v.* St. L., I. M. & S. R'y, 5 Mo. App. 331 (aff'd, 72 Mo. 194, in receipts of a cargo, but the account was agreed on); McCormick *v.* Largey, 1 Montana, 158 (in the subletting of a government contract); Foster *v.* Vanaukee, 4 N. J. L. 109 (in earning a reward); Musier *v.* Trumpbour, 5 Wend. 274 (in one burning of a lime kiln); Galbreath *v.* Moore, 2 Watts, 86; Wright *v.* Cumpsty, 41 Pa. St. 102; Meason *v.* Kaine, 63 Pa. St. 335 (buying a particular farm); Fry *v.* Potter, 12 R. I. 542 (purchase and sale of a tract of land, which resulted in a loss, and plaintiff had put in all the capital); Lawrence *v.* Clark, 9 Dana (Ky.), 257, 258 (35 Am. Dec. 133, a *dictum*); Knerr *v.* Hoffman, 65 Pa. St. 126, 128 (a *dictum*). *Contra*, Ozeas *v.* Johnson, 4 Dall. 434 (S. C. 1 Bin. 191); Price *v.* Drew, 18 Fla. 670; Halsted *v.* Schmelzel, 17 Johns. 80. And see Leidy *v.* Messinger, 71 Pa. St. 177; Scott *v.* McIntosh, 2 Camp. 238.

[1] S. P. Dale *v.* Thomas, 67 Ind. 570; Moran *v.* LeBlanc, 6 La. Ann. 113; Feurt *v.* Brown, 23 Mo. App. 332; Osler, J., in Hall *v.* Lannin, 30 Up. Can. C. P. 204, 209.

partner who had paid a debt was allowed to recover contribution at law, in the absence of a showing by defendant that the partnership accounts were still open, the presumption being that they were not.

In Gibson *v.* Moore, 6 N. H. 547, there was an adjustment of a single item, and a promise to pay it, and an action was sustained on the promise.

§ 867. **Violation of rights and duties.**— There are certain classes of cases where an action may be brought by one partner against another for violation of rights of or duties owing to him personally from the other personally. Such are:

1. Breach of contracts independent of the partnership.
2. Breach of the contract to be a partner, whether by refusing to form the firm or premature dissolution.
3. Failure to perform acts to launch the partnership.
4. Breach of express promises between the partners, which may include promises to reimburse for payment of debts. Special rights given in the articles or other contract.
5. Torts.

§ 868. **On contracts independent of the business.**— In matters disconnected with the partnership, the rights and remedies of the partners as against each other are not affected by the fact of their constituting or being in a firm together in other matters, and that the firm still continues or its affairs are not settled.

For example, if one partner as agent of the other collects his rents or receives money belonging to him individually, he is liable to an action for the amount, and cannot relieve himself by putting the amount into the firm, or by the fact that the firm's affairs are not finally settled.[1] So, if one sells land to the other, he is liable to an action for the price,[2] though it be land upon which they are to become partners, as in a saw-mill.[3] So, if one partner lend money to the

[1] Windham *v.* Paterson, 1 Stark. 144; Smith *v.* Barrow, 2 T. R. 476; Paine *v.* Moore, 6 Ala. 129; Seaman *v.* Johnson, 46 Mo 111.

[2] Burt *v.* Wilson, 28 Cal. 632; Elder *v.* Hood, 38 Ill. 533.

[3] Durden *v.* Cleveland, 4 Ala. 225; Reid *v.* McQuesten, 61 N. H. 421.

other or indorse for him, he can recover the money and foreclose a mortgage securing it.[1] And so, even though the amount lent was to be used to pay partnership debts,[2] or if he advances to each of the others their share of the capital as a loan.[3] Where one partner was to loan money to the firm, to be repaid out of profits, but the other partner died before the enterprise was begun, the stipulated mode of payment being impracticable, the loan was allowed to be proved as a claim against his estate.[4] Even if property is occupied by the firm, but is owned by them as tenants in common and not as partnership property, and it is sold and the purchase money comes into the possession of one of them, or it takes fire and one collects the insurance money, the other can compel him to pay over the plaintiff's share by an action at law.[5] So of partnership property sold by the firm and notes for a proportion of the amount made to each partner; this being a conversion of joint into separate property, a partner to whom the buyer pays all the notes can be sued by each of his copartners.[6] Or if one pays more than his share of purchase money on the land, he can sue the other at law for reimbursement;[7] or renders services before he became a partner;[8] or deposits money with the firm (a bank) held by him in the capacity of executor.[9]

§ 869. So in Tunis *v.* Lotze, 1 Mo. App. 211, plaintiff shipped to defendant three thousand three hundred hoop poles for sale, for the proceeds of which the action is brought. The fact that the parties subsequently became partners in the purchase and sale of hoop poles, and that the business was not yet settled, was held to be no defense.

And in Carpenter *v.* Wells, 65 Ill. 451, W. & X., being partners

[1] § 878.

[2] Gridley *v.* Dole, 4 N. Y. 486; Chamberlain *v.* Walker, 10 Allen, 429.

[3] Park, J., in Helme *v.* Smith, 7 Bing. 709, 714; § 875.

[4] Biernan *v.* Braches, 14 Mo. 24.

[5] Coles *v.* Coles, 15 Johns. 159 (8 Am. Dec. 231); Howard *v.* France, 43 N. Y. 593.

[6] Shafer's Appeal, 106 Pa. St. 49.

[7] Soule *v.* Frost, 76 Me. 119; Sikes *v.* Work, 6 Gray, 433; Howe *v.* Howe, 99 Mass. 71.

[8] Lucas *v.* Beach, 1 M. & G. 417; Boyd *v.* Brown, 2 La. Ann. 218.

[9] McCracken *v.* Milhous, 7 Ill. App. 169.

and about to dissolve, agreed with C., a debtor of the firm, that he should pay W. alone. W.'s right to recover from C. on the promise is not affected by the fact that W. and C. afterwards went into partnership, unless the debt was by agreement put into the firm as part of its capital or assets.

In Mullany *v.* Keenan, 10 Iowa, 224, L. & K., a firm, being entitled to certain profits already earned by building the "Odd Fellows' Hall," agreed to give M. one-third of these profits, in consideration of his coming into the firm and assuming one-third of its liabilities. M. having come into the firm on these terms can sue L. and K. at law on their promise to pay him the third of the profits, for the promise was by the old firm and not the new one, and does not involve the transactions or accounts of the new firm.

In Penn *v.* Stone, 10 Ala. 209, S., a partner, sold out his interest in a firm to P., who became partner in his stead and assumed all S.'s liabilities, and afterwards acquired a note made by the firm before he became a member, and it was held he could sue any of the makers other than S. upon it.

So one person can sue another whom he takes into partnership for the premium promised to him by the latter.[1]

§ 870. Refusal to form the partnership.— An action at law lies for damages for breach of a contract to form a partnership or enter into a firm, or to admit, or procure the admittance of, the plaintiff into a firm; for in such case partnership accounts have not been created or business transacted.[2] And the same rule would apply if there is an actual partnership *in presenti* formed, but the defendant refuse to permit the business to be launched and exclude

[1] Walker *v.* Harris, 1 Anstr. 245. In Blount *v.* Williams, 28 Ark. 374, it was held that a person who sells out one-half his business to another person, payable on time, can sue the other for the payments although they have become partners.

[2] Gale *v.* Leckie, 2 Stark. 107; Anonymous, 2 Ves. Sr. 629; McNeill *v.* Reid, 9 Bing. 68; Scott *v.* Rayment, L. R. 7 Eq. 112, 115; Goldsmith *v.* Sachs, 17 Fed. Rep. 726; 8 Sawy. 110; Stone *v.* Dennis, 3 Porter (Ala.), 231; Crosby *v.* McDermitt, 7 Cal. 146; Powell *v.* Maguire, 43 id. 11. See Goodson *v.* Cooly, 19 Ga. 599, 601; Wilson *v.* Campbell, 10 Ill. 383; Byrd *v.* Fox, 8 Mo. 574; Vance *v.* Blair, 18 Oh. 532 (51 Am. Dec. 467). See Reis *v.* Hellman, 25 Oh. St. 180; Lane *v.* Roche, Riley (S. Ca.). Ch. 215; Terrill *v.* Richards, 1 Nott & M. 20; Hill *v.* Palmer, 56 Wis. 123 (43 Am. Rep. 703).

the plaintiff from participation from the beginning, so that no joint business has been transacted.[1] So of partial exclusion.[2]

§ 871. In Stone *v.* Dennis, 3 Porter (Ala.), 231, under a contract to furnish part of the labor and material to build a mill, and when completed, the mill was to be operated in partnership; on refusal by the defendant to enter into the business after completion of the mill, an action at law was held to lie, whether the partnership was deemed future or even from the start. But where there was a partnership from the start, and work has been done on the mill, it was held that no action at law would lie.[3]

In Crosby *v.* McDermitt, 7 Cal. 146, where, in a partnership to erect and operate a mill, the plaintiffs to advance the money and furnish the lumber and the defendants were to erect the mill, and the defendants removed the lumber to another place and appropriated it and kept the money and refused to complete the mill, they were held liable at law for damages.

So in Reis *v.* Hellman, 25 Oh. St. 180. If in a partnership to buy cotton the whole capital is intrusted to one partner to make the purchase, and he convert it to his own use, his copartner can recover his contribution at law.[4]

In Vance *v.* Blair, 18 Oh. 532 (51 Am. Dec. 467), five persons, V. & X., B., C. & H., signed articles agreeing to bid for a construction contract and work it in partnership. B., who was intrusted with the bidding, put in a bid in his own name, and the contract was awarded to him; he then bought out the interests of C. & H. and worked the contract with great profit, and V. & X. sued him jointly and recovered; the obligation of B. to the plaintiffs was held to be joint as well as several.

§ 872. It seems that the excluded partners may sue jointly or severally.[5]

[1] Stone *v.* Dennis, 3 Porter, 231; Crosby *v.* McDermitt, 7 Cal. 146; Reis *v.* Hellman, 25 Oh. St. 180; Hill *v.* Palmer, 56 Wis. 123 (43 Am. Rep. 703).

[2] Kerrigan *v.* Kelly, 17 Mo. 275.

[3] See Lower *v.* Denton, 9 Wis. 268.

[4] And see Hale *v.* Wilson, 112 Mass. 444.

[5] The contract was held to be joint as well as several in Vance *v.* Blair, 18 Oh. 532 (51 Am. Dec. 467); while in Goldsmith *v.* Sachs, 17 Fed. Rep. 726; 8 Sawy. 110, a separate action by each against the others jointly was held proper; and in Hill *v.* Palmer, 56 Wis. 123 (43 Am. Rep. 703), and Crosby *v.* McDermitt, 7 Cal. 146,

Where a person having an established business made a contract of partnership admitting two others, and afterwards absconded, each brought an independent action against him for breach of contract and injury resulting to the business.[1]

§ 873. For wrongful dissolution.— It seems, also, that an action for damages will lie for a premature dissolution in violation of agreement, as where one partner repudiates the contract, excludes and ejects the other from participation before the expiration of the term of partnership. For unless the plaintiff could recover damages as amends for the loss of future results he might be remediless.

To sustain such an action, the claim must be for the wrong done to plaintiff personally as distinguished from breach of duty owing to the firm, and not to recover any share of profits or agreed compensation due him from the firm. The difference is between an entire repudiation of the contract or a conversion or destruction of the plaintiff's interest therein, on the one hand, and a refusal to make the payments and divide the profits as agreed on the other hand. The latter claim cannot be sustained, for it is a claim for not performing duty as a party. Such duty is owing to the firm and not to the plaintiff alone.[2]

But if the action purports to be for the balance of profits

the action was by the excluded partners jointly, though no remark was made upon the point except in the dissenting opinion in the former; in Dunham *v.* Gillis, 8 Mass. 462, a several action in a somewhat similar case was sustained, but the case was overruled in Capen *v.* Barrows, 1 Gray, 376, 380–1.

[1] In Child *v.* Swain, 69 Ind. 230.

[2] Greenham *v.* Gray, 4 Irish C. L. 501; Jones *v.* Morehead, 3 B. Mon. 377; Wadsworth *v.* Manning, 4 Md. 59, 70; Dunham *v.* Gillis, 8 Mass. 462 (overruled in part in Capen *v.* Barrows, 1 Gray, 376, 380–1); Terry *v.* Carter, 25 Miss. 168; Bagley *v.* Smith, 10 N. Y. 489 (61 Am. Dec. 756; s. c. 19 How. Pr. 1); Addams *v.* Tutton, 39 Pa. St. 447; Hunter *v.* Land, 81½ id. 296; Reiter *v.* Morton, 96 id. 229; Brassfield *v.* Brown, 4 Rich. (S. Ca.) L. 298; Ball *v.* Britton, 58 Tex. 57. And see Stone *v.* Dennis, 3 Porter, 231, and Crosby *v.* McDermitt, 7 Cal. 146, cited under the preceding section; and McArthur *v.* Ladd, 5 Oh. 514, 521, where the partner who was to contribute the land warrants in which the firm was to deal sold them and thus disabled himself to carry out the contract. Cases like Gale *v.* Leckie, 2 Stark. 107; Madge *v.* Puig, 12 Hun, 15, cited in the next section, might also belong here.

due to the excluded partner, or for a share of profits or compensation, it cannot be maintained.[1]

§ 874. Contracts in order to launch the partnership.— Contracts between the partners in order to launch the partnership, as where one or each agrees to contribute a certain capital at the start, or where one contributes the goods and the other agrees to pay him half their cost; or if one gives his note to the other to pay his share of the capital.

Thus, where the defendant partner agrees to pay half the cost of the goods with which or property on which they are to trade, or repay to the plaintiff partner a certain amount of goods furnished or to be furnished by him, the legal obligation is not affected by the fact of subsequent partnership accounts between them relating to the same goods, and an action at law lies on the promise.[2]

In Foulks *v.* Rhodes, 12 Nev. 225, the consideration of A.'s conveyance to B. of a half interest in a mill in which they became partners was B.'s agreement to build a flume and convey half of it to A. Though they were to become partners in the flume and had become partners in the mill does not affect B.'s liability to A. for breach of his contract. It is just as if his promise had been to pay a note.

§ 875. Reimbursement of excess of contribution.— So where one partner advances for the other all or part of the

[1] Lower *v.* Denton, 9 Wis. 268; Gomersall *v.* Gomersall, 14 Allen, 60; Ryder *v.* Wilcox, 103 Mass. 24; Stone *v.* Fouse, 3 Cal. 292. For the measure of damages, see Reiter *v.* Morton; Hunter *v.* Land; Bagley *v.* Smith; Jones *v.* Morehead, *supra.*

[2] Venning *v.* Leckie, 13 East, 7; Scott *v.* Campbell, 30 Ala. 728; Bailey *v.* Starke, 6 Ark. 191; Blunt *v.* Williams, 28 id. 374; Thomas *v.* Pyke, 4 Bibb (Ky.), 418; Kinney *v.* Robison, 52 Mich. 389; Morgan *v.* Nunes, 54 Miss. 308; Wills *v.* Simmonds, 8 Hun, 189; 51 How. Pr. 48; Collamer *v.* Foster, 26 Vt. 754; Sprout *v.* Crowley, 30 Wis. 187, the agreement in this case was that defendant would manufacture and sell at joint profit and loss; Gale *v.* Leckie, 2 Starkie, 107, where an author failed to continue furnishing the manuscript to his partner, the publisher, after part of the book had been printed; Madge *v.* Puig, 12 Hun, 15, where the defendant failed to ship the proper kind of goods to his partner to sell; Townsend *v.* Goewey, 19 Wend. 424, failure to pay agreed weekly calls or assessments on stock.

capital which the other had agreed with him to contribute, or pays a note signed for that purpose by all the partners, he can compel a reimbursement by action at law, for it is an independent promise.[1] So if one advances all the labor.[2] A note given by a third person to pay the agreed capital of one partner, of course, can be enforced.[3]

§ 876. So if one partner promises to the other to contribute capital, whether payable in advance or in instalments as required during the progress of the work, or to contribute the work, articles, machinery, etc., and does not do so, the other can recover from him by action at law on the express promise.[4] So if a specific amount of property was to be put in.

Thus in Truitt *v.* Baird, 12 Kan. 420, T. & B. formed a partnership in the nursery business, B. agreeing to put in the nursery

[1] Helme *v.* Smith, 7 Bing. 709, 714; Venning *v.* Leckie, 13 East, 7; Bumpass *v.* Webb, 1 Stew. (Ala.) 19 (18 Am. Dec. 34); Grigsby *v.* Nance, 3 Ala. 347; Williams *v.* Henshaw, 11 Pick. 79 (22 Am. Dec. 366); Marshall *v.* Winslow, 11 Me. 58 (25 Am. Dec. 264); Wetherbee *v.* Potter, 99 Mass. 354; Mitchell *v.* Wells, 54 Mich. 127; Cinnamond *v.* Greenlee, 10 Mo. 578, 582; Currier *v.* Webster, 45 N. H. 226; Currier *v.* Rowe, 46 id. 72; Gordon *v.* Boppe, 55 N. Y. 665; Terrill *v.* Richards, 1 Nott & McC. (S. Ca.) 20.

[2] Lawson *v.* Glass, 6 Colorado, 134.

[3] Benson *v.* Tilton, 54 N. H. 174; Gordon *v.* Boppe, 55 N. Y. 665.

[4] Brown *v.* Tapscott, 6 M. & W. 119; Elgie *v.* Webster, 5 M. & W. 518; Graves *v.* Cook, 2 Jur. N. S. 475; Boyd *v.* Mynatt, 4 Ala. 79; Wadsworth *v.* Manning, 4 Md. 59, 70; Williams *v.* Henshaw, 11 Pick. 79, 83-4; Pillsbury *v.* Pillsbury, 20 N. H. 90, failure to pay his subscription towards the purchase of the mill; Townsend *v.* Goewey, 19 Wend. 424; Glover *v.* Tucker, 24 Wend. 153; Terrill *v.* Richards, 1 Nott & McC. (S. Ca.) 20; Collamer *v.* Foster, 26 Vt. 754, failure to make agreed advances on shipments; Wright *v.* Michie, 6 Gratt. 354, failure to put machinery into the mill and build dam; Jowers *v.* Baker, 57 Ga. 81, and Robinson *v.* Bullock, 58 Ala. 618, failure to furnish sufficient logs to keep the mill running at full capacity as agreed in the articles. In Sprout *v.* Crowley, 30 Wis. 187, the agreement of partnership was that C. would manufacture and sell at joint profit and loss, and that S. would repay him one-half the cost of manufacture. This express promise was held to make S. a debtor of C. independent of the partnership relation. See Grigsby *v.* Nance, 3 Ala. 347; and Scott *v.* Campbell, 30 Ala. 728, where the action was on a note for half the stock; and see Coffey *v.* Brian, 10 Moo. 341.

fifty thousand trees at as low a price as they were selling at, and put them in representing the price as at $50 per thousand, when it was $35 only, and T. put in an equivalent amount. B. then procured T. to buy him out, and on B.'s suing T. for the purchase money T. was allowed to set off the breach of contract because it does not involve reopening the partnership affairs.[1]

§ 877. But if the partnership adventure has been finished without calling upon the delinquent it is too late, for at that time the original amount may be no longer justly due from him, and it is not required for the business.[2] And the mere fact that one partner purchased and paid for the entire stock of goods does not imply a promise by the copartner to contribute before final settlement.[3]

Yet in Smith *v.* Riddell, 87 Ill. 165, where F., the owner of a distillery owing certain taxes to the government, took R. into partnership, F. agreeing to pay the tax, and giving R. a note with sureties to secure the payment, but paid the tax out of the partnership moneys, it was held that as R. could not be injured by such payment except as unfavorably affecting his interest as a partner, he could not recover more than nominal damages on the note until an accounting and settlement in equity is had to determine the amount of damages.

§ 878. **Express promises by one partner to another.**— Partners can, by agreement, separate any part of the business from the general rule of partnership and make a separate and individual obligation of it as between each other, and, in such case, the liability can be enforced at law independent of the state of the partnership accounts. But the real test is not solely whether the action can be tried without going into the partnership accounts, but whether the defendant has bound himself personally to the plaintiff.[4]

[1] And see Wadsworth *v.* Manning, 4 Md. 59. And the receiver of a partnership may sue a partner for an amount due the firm, although ultimately the partner may have a share in the balance. Lathrop *v.* Knapp, 37 Wis. 307, 310.

[2] Gordon *v.* Boppe, 55 N. Y. 665; Buckmaster *v.* Gowson, 81 Ill. 153.

[3] Williams *v.* Henshaw, 11 Pick. 79.

[4] Ryder *v.* Wilcox, 103 Mass. 24, 29; Bedford *v.* Brutton, 1 Bing. N. C. 399. Where the trustees of the company agreed to pay rent to a partner, he can sue them on the promise.

Thus, where a partner, being under no legal obligation to lend money to the firm, lends it on condition, as that it shall be paid out of the proceeds of a particular sale, or that another partner shall give his personal note or mortgage, he can enforce the condition; in the former case by suing the partner holding the proceeds of the sale for money had and received to his use, and in the latter by action or suit on the note or security.[1]

In Tibbetts *v.* Magruder, 9 Dana, 79, one partner made notes, payable to the other, to be by him sold and the proceeds used to pay partnership debts; the payee did not sell them, but paid the debts out of his own pocket and a judgment on the notes was taken by the payee. The court refused to enjoin the judgment, holding that the payee might be treated as the expected purchaser of the notes, the maker being still a debtor to the payee after adjustment.

§ 879. **Paying debt on promise to repay.**—If one partner agrees with another to pay a partnership debt, or some of the debts or all of them, out of his private means, or to indemnify the other from liability on them, an action at law may be maintained on breach of the agreement. This is especially frequent where, on dissolution, a retiring partner's interest is purchased by continuing partners, with an agreement to assume and pay the debts.[2]

[1] Coffee *v.* Brian, 3 Bing. 54; Van Ness *v.* Forrest, 8 Cranch, 30; Elwood *v.* West. Un. Tel. Co. 45 N. Y. 545; Lyon *v.* Malone, 4 Porter (Ala.), 497; Elliott *v.* Deason, 64 Ga. 63; Battaille *v.* Battaille, 6 La. Ann. 682; Hess *v.* Final, 32 Mich. 515; Chamberlain *v.* Walker, 10 Allen, 429; Gridley *v.* Dole, 4 N. Y. 486. *Contra*, Robson *v.* Curtis, 1 Stark. N. P. 78. And see opinion of BEST, C. J., in Perring *v.* Hone, 4 Bing. 28, where one partner loaned money to the firm and received a note signed by all the other partners individually, and no recovery was allowed, because of an alteration of the note and because plaintiff was a partner.

[2] White *v.* Ansdell, Tyr. & Gra. 785; Want *v.* Reece, 1 Bing. 18; Saltoun *v.* Houstoun, id. 433; Wilson *v.* Cutting, 10 id. 436; Barker *v.* Allan, 5 H. & N. 61; Haddon *v.* Ayers, 1 E. & E. 118; Hood *v.* Spencer, 4 McLean, 168; Clark *v.* Clark, 4 Porter (Ala.), 9; Hogan *v.* Calvert, 21 Ala. 194; Peacey *v.* Peacey, 27 id. 683; Faust *v.* Burgevin, 25 Ark. 170; Lathrop *v.* Atwood, 21 Conn. 117; Adams *v.* Funk, 53 Ill. 219; Shennefield *v.* Dutton, 85 id. 503; Mullendore *v.* Scott, 45 Ind. 113; Farnsworth *v.* Boardman, 131 Mass. 115; Cilley *v.* Van Patten, 58 Mich. 404; Whitehill *v.* Sickle, 43 Mo. 537; Halliday *v.* Carman, 5 Daly, 422; Frow, Jacobs & Co.'s Est. 73 Pa.

§ 880. Note by one partner to other.— An absolute promissory note made by one partner to another can be sued upon at law.[1]

In several cases the notes were given for the estimated balance.[2]

In several other cases one partner made a note to the other for the use of the partnership, and the payee recovered on it at law for the use of the partnership, on the ground that the promise was separated from the partnership accounts.[3]

In Comer *v.* Thompson, 4 Up. Can. Q. B. (old ser.) 256, a managing partner lent money of the company to a partner, taking his note payable to the former, and it was held he could sue on it in his own name, like any agent lending his principal's money.

An indorsee of a note made by one or more partners to the firm can prove against the separate estates of the makers.[4]

§ 881. But where a note is signed by all the partners in their individual names for a partnership debt, and is paid by one of them, his payment extinguishes the debt, and is like the payment of any other partnership debt, and he cannot enforce a contribution apart from a general accounting.[5] And so of a note signed by all the partners but one in their individual names, and indorsed by that one, if he has to pay a

St. 459; Coleman *v.* Coleman, 12 Rich. (S. Ca.) L. 183; Hupp *v.* Hupp, 6 Gratt. 310; Jewell *v.* Ketchum, 63 Wis. 628; Gray *v.* McMillan, 22 Up. Can. Q. B. 456. See § 636 *et seq.*

[1] Neale *v.* Turton, 4 Bing. 149, 151; Huyck *v.* Meador, 24 Ark. 191; Perkins *v.* Young, 16 Gray, 389; Jones *v.* Shaw, 67 Mo. 667; Cummings *v.* Morris, 25 N. Y. 625; Miller *v.* Talcott, 54 id. 114 (aff'g 46 Barb. 171); Sturges *v.* Swift, 32 Miss. 239.

[2] McSherry *v.* Brooks, 46 Md. 103; Merrill *v.* Green, 55 N. Y. 270; Kidder *v.* McIlhenny, 81 N. Ca. 123; McKay *v.* Overton, 65 Tex. 82; Burnes *v.* Scott, 117 U. S. 582; Powell *v.* Graves, 9 La. Ann. 435. In Boughner *v.* Black, 83 Ky. 521, the note was for a purchase of part of the interest in partners' shares by an incoming partner.

[3] Mahan *v.* Sherman, 7 Blackf. 378; Bonnaffe *v.* Fenner, 6 Sm. & Mar. 212 (45 Am. Dec. 278); Van Ness *v.* Forrest, 8 Cranch, 30; Anderson *v.* Robertson, 32 Miss. 241; Grigsby *v.* Nance, 3 Ala. 347. See, also, Jemison *v.* Webb, 30 Ind. 167.

[4] Nat'l Bk. *v.* Bank of Commerce, 94 Ill. 271.

[5] De Jarnette *v.* McQueen, 31 Ala. 230; Kendrick *v.* Tarbell, 27 Vt. 512; Small *v.* Riddle, 31 Up. Can. C. P. 373; Couilliard *v.* Eaton, 139 Mass. 105.

judgment on it he can neither enforce contribution at law nor hold the judgment over the others.[1]

In Buell *v.* Cole, 54 Barb. 353, on dissolution one partner took the assets and agreed to apply them to the debts, and the other three partners each made a note payable to him for one-fourth the amount of the debts. There being a deficiency after exhausting the assets, it was held that the payee could not enforce the notes; they were mere accommodation paper. In McHale *v.* Oertel, 15 Mo. App. 582, the notes were distinctly accommodation notes and not enforcible by the other partner, though the maker believed and stated that a large balance would be coming to the payee.

A note by one partner to another in advance of an accounting has been held to be a *nudum pactum* and without consideration.[2]

In Jones *v.* Shaw, 67 Mo. 667, parol evidence was held not to be admissible to show that the note was given as a mere memorandum to the payee of the amount he had contributed to the firm, and was not to be enforced unless the business was successful.[3]

Evidence of a subsequent partnership into which the note was contributed is not, of course, varying the note, but is in the nature of satisfying the debt.[4] A partnership between debtor and creditor does not merge the debt.[5]

§ 882. Note by firm to partner.— A note or other written contract made by the firm itself to one of the partners stands on a different basis from a note made by one partner

[1] Booth *v.* Farmers' & Mech. Bank, 74 N. Y. 228 (aff. 11 Hun, 258).

[2] Martin *v.* Stubbings, 29 Ill. App. 381; Chadsey *v.* Harrison, 11 Ill. 151; Sewell *v.* Cooper, 21 La. Ann. 583. *Contra*, Rockwell *v.* Wilder, 4 Met. (Mass.) 556.

[3] And see Gridley *v.* Dole, 4 N. Y. 486; Perkins *v.* Young, 16 Gray, 389; McSheery *v.* Brooks, 46 Md. 103; Elwood *v.* Western Un. Tel. Co. 45 N. Y. 545. Yet the contrary seemed to have been held in Hodges *v.* Black, 8 Mo. App. 389, which was affirmed without opinion in 76 Mo. 537. See Mitchell *v.* Wells, 54 Mich. 127, where the question seemed to have been left to the jury to say whether the note was to be paid out of credits. And see Peck *v.* Wakely, 1 McCord, Ch. 43. In Stultzman *v.* Yeagley, 32 Up. Can. Q. B. 630, a similar objection was raised, but the agreement was found not to be express.

[4] Foulks *v.* Rhodes, 12 Nev. 225.

[5] Cunningham *v.* Ihmsen, 63 Pa. St. 351; Mitchell *v.* Dobson, 7 Ired. Eq. (N. Ca.) 34; Gulick *v.* Gulick, 16 N. J. L. 186; Haskell *v.* Moore, 29 Cal. 437. See § 530. See Whitaker *v.* Bledsoe, 34 Tex. 401.

to the other, and is subject to the insuperable objection that in an action upon it by the payee he must appear both as plaintiff and defendant, and receive a judgment in his own favor against himself. Such a note and all similar promises, whether by indorsement, acceptance, bond or otherwise, cannot be enforced by the partner.[1]

And the same rule applies if a note of the firm is made to a third person and afterwards is assigned by him to one of the partners of the maker firm.[2]

Hence it was held in Decreet *v.* Burt, 7 Cush. 551, that if a firm payee of a note indorses it over to a third person and he indorses it afterwards to one of the firm, such holder cannot sue his immediate indorser, for, as a member of the firm, he is a prior indorsee to the last indorser.

And as held in Buchanan *v.* Meisser, 105 Ill. 638, a firm being creditor of a corporation cannot enforce the individual liability of one of the partners as stockholder.[3]

In Thompson *v.* Stb't Julius D. Morton, 2 Oh. St. 26 (59 Am. Dec. 658), R. & T., a firm, furnished a steamboat, owned by R., with supplies. R. having died, T. attempted to sue the boat in her name, under the watercraft law. It was held that the supplies

[1] Neale *v.* Turton, 4 Bing. 149; Teague *v.* Hubbard, 8 B. & C. 345; 2 M. & Ry. 369; Smyth *v.* Strader, 4 How. 404; s. c. 9 Porter (Ala.), 446; Hazlehurst *v.* Pope, 2 Stew. & Por. 259; Nevins *v.* Townsend, 6 Conn. 5; Miller *v.* Andres, 13 Ga. 366; Gammon *v.* Huse, 9 Ill. App. 557 (affd. on other points in 100 Ill. 234); Simrall *v.* O'Bannons, 7 B. Mon. 608; Portland Bank *v.* Gershom, 11 Me. 196; Pitcher *v.* Barrows, 17 Pick. 361 (28 Am. Dec. 304); Fulton *v.* Williams, 11 Cush. 108; Temple *v.* Seaver, 11 Cush. 314; Thayer *v.* Buffum, 11 Met. 398; Davis *v.* Merrill, 51 Mich. 480; Hill *v.* McPherson, 15 Mo. 204; Smith *v.* Lasher, 5 Cow. 688; Blake *v.* Wheaton, 2 Hayw. (N. Ca.) 109; s. c. Tayl. 70; Wescott *v.* Price, Wright (O.), 220; McFadden *v.* Hunt, 5 W. & S. 468; Crow *v.* Green, 111 Pa. St. 637; Waterman *v.* Hunt, 2 R. I. 298; Glenn *v.* Caldwell, 4 Rich. (S. Ca.) Eq. 168; Walker *v.* Wait, 50 Vt. 668; *In re* Chaffy, 30 Up. Can. Q. B. 64.

[2] Lindell *v.* Lee, 34 Mo. 103; Wescott *v.* Price, Wright (O.), 220; and see Hardy *v.* Norfolk Mfg. Co. 80 Va. 404. *Contra*, Morrison *v.* Stockwell, 9 Dana, 172, holding a firm note void as to the payee, but binding on the partner who signed the firm name to it, and as the law cannot apportion the debt, the payee can recover the whole.

[3] And see Bailey *v.* Bancker, 3 Hill, 188.

were merely advances by the firm to one partner, and the action would not lie.

In Crow *v.* Green, 111 Pa. St. 637, and Glenn *v.* Caldwell, 4 Rich. (S. Ca.) Eq. 168, the firm had agreed to buy real estate of one partner. As he would be liable to contribute, being both promisor and promisee, he cannot recover at law.

§ 883. **Note by partner to firm.**— And the same principle governs a note made by one partner to his firm. The note is valid;[1] but the firm cannot sue upon it because the defendant must also be one of the plaintiffs.[2]

In Burley *v.* Harris, 8 N. H. 233 (29 Am. Dec. 650), B. & H. dissolved; all demands due to the firm were assigned to B. to collect and pay debts and divide profits. B. began a suit in the name of B. & H. against H. to collect a demand due from him to the firm. The court said, page 237, the suit was *felo de se*, because a partner cannot be both plaintiff and defendant; the assignment is a mere power of attorney to collect and is valid against H., but this demand can only be enforced on an accounting.

§ 884. **—— indorsee can sue.**— But the paper is not void, and the difficulty is one attending the remedy rather than the right, and vanishes on indorsement to a third person for value; he therefore can sue upon it.[3]

Such note being valid from the beginning as between the

[1] Baring *v.* Lyman, 1 Story, 396.

[2] Mainwaring *v.* Newman, 2 B. & P. 120, holding also that the indorsee could not sue; but see next section; DeTastet *v.* Shaw, 1 B. & Ald. 664; Richardson *v.* Bank of England, 4 M. & Cr. 165, 172; Burley *v.* Harris, 8 N. H. 233 (29 Am. Dec. 650).

[3] Smyth *v.* Strader, 4 How. 404; Baring *v.* Lyman, 1 Story, 396; Hazlehurst *v.* Pope, 2 Stew. & Por. 259; Smyth *v.* Strader, 9 Porter (Ala.), 446; Brown *v.* Torver, Minor (Ala.), 370; Nevins *v.* Townsend, 6 Conn. 5; Roberts *v.* Ripley, 14 id. 543; Reid *v.* Godwin, 43 Ga. 527; Gammon *v.* Huse, 9 Ill. App. 557 (aff'd on other points, 100 Ill. 234); Parsons *v.* Tillman, 95 Ind. 452; Davis *v.* Briggs, 39 Me. 304; Pitcher *v.* Barrows, 17 Pick. 361 (28 Am. Dec. 306); Thayer *v.* Buffum, 11 Met. 398; Fulton *v.* Williams, 11 Cush. 108; Temple *v.* Seaver, 11 Cush. 314; Richards *v.* Fisher, 2 Allen, 527; Millers' River Nat'l B'k *v.* Jefferson, 138 Mass. 111; Smith *v.* Lusher, 5 Cow. 688; Blake *v.* Wheaton, 2 Hayw. (N. Ca.) 109; s. c. Tayl. 70; Waterman *v.* Hunt, 2 R. I. 298; Walker *v.* Wait, 50 Vt. 668; *In re* Chaffy, 30 Up. Can. Q. B. 64.

firm and the partner, excepting only as to the remedy, and not merely so from the time of indorsement, it follows that an indorsement of it by the payee after dissolution of the firm is not making a contract or creating an obligation after the power to do so is extinguished, but is merely giving a remedy, and the indorsee may sue upon it the same as if indorsed before dissolution.[1]

And so though indorsed after maturity, for the technical objection is removed, and the note is presumed to be for money loaned, and so expressing on its face, and not as money put into the firm to remain there until final adjustment.[2]

But if the assignment to a third person is colorable only, to enable him to sue on it for the benefit of the partner, this was held to be a defense;[3] and if the firm is in insolvency, one who is not a *bona fide* holder for value, or the assignee for the benefit of the creditors of the payee partner, cannot prove it against the estate of the partnership in competition with partnership creditors.[4]

In Russell *v.* Minnesota Outfit, 1 Minn. 162, some of the partners in the earnings of a steamboat having employed her, and thereby become indebted to the firm, it was held that one partner could assign this claim as well as any other, and the assignee could sue the debtor partner at law, and they could not demand an accounting in the case to make a set-off.[5]

But in Vilas *v.* Farwell, 9 Wis. 460, where F., among others, subscribed to shares to form an association to build a hotel, but died before he paid, and the surviving partners sold out all the property and all claims and demands, it was held that the claim

[1] Temple *v.* Seaver, 11 Cush. 314.

[2] Nevins *v.* Townsend, 6 Conn. 5. And see Thompson *v.* Hale, 6 Pick. 259. An assignee of the note without indorsement may sue upon it, Smyth *v.* Strader, 9 Porter, 446. *Contra*, that the assignee takes subject to same infirmities as the payee and cannot enforce it, Simrall *v.* O'Bannons, 7 B. Mon. 608; Lanier *v.* McCabe, 2 Fla. 32 (48 Am. Dec. 173); Hill *v.* McPherson, 15 Mo. 204 (a non-negotiable note assigned in writing).

[3] Davis *v.* Merrill, 51 Mich. 480; Tipton *v.* Vance, 4 Ala. 194.

[4] Portland Bank *v.* Gershom, 11 Me. 196.

[5] See, also, Kious *v.* Day, 94 Ind. 500.

against his estate was not one which could be transferred to sustain an action independent of an accounting.

§ 885. **Promise of compensation.**— So if one partner personally promises to pay the other extra compensation, that is out of his share of income, of a fixed amount, not depending upon the partnership accounts as to profit and loss, an action lies for its recovery;[1] or promises to declare and pay over dividends as they accrue.[2] Such promise is, however, generally a promise by the firm and not by the copartner, and hence not actionable.[3]

§ 886. **Contract to make settlement.**— So if the partners enter into a contract to make a settlement at a subsequent day, on certain terms, and one fails to fulfill his contract, an action lies in favor of the others against him for the breach. The very object of the agreement may be to get rid of a suit in chancery;[4] but a mere undertaking to wind up, involving discretion, is not such contract at law.[5]

§ 887. **Promises as to items omitted from settlement.**— Yet omitted or incorrect items in a settlement between partners may be made cognizable at law, it seems, by the parties having agreed on a final balance and the debtor partner promising to pay it or giving a note for it, subject to rebate for certain anticipated errors or possible deficiencies in collections, correctible without going over the rest of the account; for the copartner has, in effect, acquired a separate interest in such items.

[1] Paine *v.* Thacher, 25 Wend. 450; Emery *v.* Wilson, 79 N. Y. 78; Alexander *v.* Alexander, 12 La. Ann. 588.

[2] Wadley *v.* Jones, 55 Ga. 329.

[3] See § 779.

[4] Owston *v.* Ogle, 13 East, 538; Holyoke *v.* Mayo, 50 Me. 385; Wilby *v.* Phinney, 15 Mass. 116, by a surviving partner against the administrator of a deceased insolvent partner on promise to account; for as the estate is being distributed he can have no future remedy, and estimated balance may fairly be considered as final. But if the estate is solvent, intermediate fluctuating balances cannot be recovered. See Snyder *v.* Baber, 74 Ind. 47.

[5] Lyon *v.* Haynes, 5 M. & G. 504; Paul *v.* Edwards, 1 Mo. [30], that a covenant between partners to divide the goods, and on final settlement either in debt to the other should pay, implies a covenant to make a final settlement.

In Bethel *v.* Franklin, 57 Mo. 466, where F. bought out his partner, B., giving him a note for the face value of the notes and accounts due, subject to rebate for loss in collections of them, the deficiencies may be set up in defense to an action on the note.

In Frink *v.* Ryan, 4 Ill. 322, and McSherry *v.* Brooks, 46 Md. 103, a note given by a debtor partner for final balance, with a stipulation that errors and omissions in the settlement could be deducted as payments, it was held that a court of law had jurisdiction to allow such deductions in an action on the note.

In Adams *v.* Funk, 53 Ill. 219, F. & A., partners, settled their accounts, one item of which was credited to A. on his false representation that he had paid out a certain sum for F. and would pay it again to F. if the third person did not do so. A., not having in fact paid the amount, F.'s action against him at law on the promise was sustained.[1]

In Gauger *v.* Pautz, 45 Wis. 449, G. was sued for a debt which, in fact, was owing by the firm of G. & P.; pending the suit the partners settled all their matters excepting the suit, and divided their land, the title to which was in G.'s name, G. objecting to conveying the half of land to P. until the suit was settled, but was induced to do so by P.'s assurance that he was good for it. After judgment against G., paid by him, he was allowed to recover contribution from P. at law, the court inferring a promise from what had passed.

Similar to these are cases where, on settlement between partners, notes or accounts are turned over to one partner on which the copartner has already secretly received and appropriated part or all of the amount. This may be recovered from him at law.[2]

So, as in Metcalf *v.* Fouts, 27 Ill. 110, if everything is settled except a debt due the firm, which it is agreed that one partner shall collect for both, the share of the collection due the other is recoverable at law, and if collected in instalments part of each instalment belongs to the other, and the collecting partner can neither hold all until full collection nor pay his own share out of the first proceeds.[3]

[1] So Russell *v.* Grimes, 46 Mo. 410, where a partner withheld items from the settlement without his copartner's knowledge.

[2] Russell *v.* Grimes, 46 Mo. 410; Wicks *v.* Lippman, 13 Nev. 499.

[3] And Dakin *v.* Graves, 48 N. H. 45, where the agreement was general to divide any assets or pay any debts that turned up after the settlement proportionately.

In Kellogg *v.* Moore, 97 Ill. 282, everything was settled on the retirement of a partner, but certain credits were retained as a "guarantee account" to cover bad debts, and he promised to pay his share of any deficit in realizing on the guarantee account, the deficit is recoverable at law.

In Edwards *v.* Remington, 51 Wis. 336, a firm dissolved after apportioning the indebtedness, which amounted to $20,000, each partner agreeing with the others to pay his share out of his separate funds, R., the defendant, agreeing to pay $6,000 of them. The plaintiffs having been compelled to pay all the debts, it was held could sue R. on this promise, although there may be undivided property of the firm, for it may not be advantageous to sell this now. The plaintiffs, however, must have first paid the entire debt, and not merely R.'s share, for payments beyond their own shares are not more for R.'s benefit than for that of other delinquent partners.

§ 888. **Erroneous carrying out of adjustments.**— If, after a settlement is arrived at, there is a mistake in carrying it out, this can be corrected at law, unlike a mistake in the accounting itself, for the latter involves a re-accounting. Hence, after adjustment, an overpayment by mistake can be recovered at law.[1] But if there is fraud or mistake in the settlement itself, to rectify it is to re-open the account, which can only be obtained in equity.[2]

Even if the mistake be in the omission of a single item, for no action lies on one item, unless it is separated, adjusted and promised to be paid; if an omitted item is to be considered, concessions on the other side should also be re-opened.[3] But the partners who have received more than their share are not jointly bound, but the amount due from each is several.[4]

§ 889. **Violation of articles.**— There may be other stipulations in the articles, the damages resulting from which belong exclusively to the other partner and can be assessed

[1] Bond *v.* Hays, 12 Mass. 34; Chase *v.* Garvin, 19 Me. 211.

[2] Chase *v.* Garvin, *supra;* Hanks *v.* Baber, 53 Ill. 292; Johnson *v.* Wilson, 54 Ill. 419; Holyoke *v.* Mayo, 50 Me. 385.

[3] Holyoke *v.* Mayo, 50 Me. 385, 391.

[4] See Rhiner *v.* Sweet, 2 Lans. 386.

without an accounting; in such cases also the injured partner can sue the guilty one for such damages.[1]

Thus, for example, in Stone *v.* Wendover,[2] it was agreed that neither should indorse the firm name in accommodation. W.'s intestate did so, and S. had to pay a judgment on it. S. can maintain an action at law for the amount, for the claim is not founded on his interest in the partnership, but arises out of violation of an independent stipulation in the articles.

On the other hand[3] a breach of agreement in not giving his entire time and attention to the business, and being negligent and careless, and failing to keep books, is not ground of an action at law.[4]

§ 890. Examples of independent stipulations in articles.— In Aldrich *v.* Lewis, 60 Miss. 229, L. built a mill on A.'s land, each paying one-half on an agreement to operate it in partnership for nine years, at the end of that term A. to repay L.'s original advance with interest. The partnership having been carried on and the profits divided yearly for the nine years, L.'s claim for return of his advance is at law and not in equity. It is outside the partnership, for the partnership was in the business and not in the mill.

So if by the articles a continuing partner is, on dissolution, to pay the retiring partner a specified sum, the latter may recover it at law, even though on adjustment of the accounts he would be debtor to the firm.[5]

In Ridgway *v.* Grant, 17 Ill. 117, R. put $1,000 into G.'s business for one year as partner, the business to be done by and in the sole name of G. At the end of the year, each was to take out $1,000, and the balance to be divided as profits. This is a method of dividing and not a promise, and the court said that R. could not sue

[1] Dana *v.* Gill, 5 J. J. Mar. 242 (20 Am. Dec. 255); Stone *v.* Wendover, 2 Mo. App. 247; Wills *v.* Simmonds, 8 Hun, 189 (aff'g 51 How. Pr. 48), refusal to pay for raw material; Moritz *v.* Peebles, 4 E. D. Smith, 135; Taylor *v.* Holman, 1 Mill (S. Ca.), 172; Kinloch *v.* Hamlin, 2 Hill (S. Ca.), Ch. 19 (27 Am. Dec. 441); Hunt *v.* Reilly, 50 Tex. 99; Dunham *v.* Gillis, 8 Mass. 462; Collamer *v.* Foster, 26 Vt. 754; Hill *v.* Palmer, 56 Wis. 123, 130 (43 Am. Rep. 703).

[2] *Supra.*

[3] As in Capen *v.* Barrows, 1 Gray, 376.

[4] See, also, Bracken *v.* Kennedy, 4 Ill. 558.

[5] Read *v.* Nevitt, 41 Wis. 348, 352.

G. at the end of the year for the $1,000. Otherwise G. might also sue R. for $1,000, and there must be a settlement.

In Radenhurst *v.* Bates, 3 Bing. 463, each partner was to supply horses for parts of a stage route, and in case of default by any one of them, to sue the defaulter for a penalty of £200, to be divided among the rest, and it was held that the designated partner could sue alone.

Yet, in Stone *v.* Fouse, 3 Cal. 292, where, by articles for the formation of a water company, plaintiffs were to make the ditch and defendants to convey the water into it, and on breach by either they were to pay the others $1,500, as liquidated damages, it was held that this could not be obtained without seeking an accounting and dissolution.

On the doctrine that a covenant going to only part of the consideration, a breach of which may be paid for in damages, is an independent covenant, on which action lies without an averment of performance by the plaintiff. If one partner has among other things agreed to put in £2,000, and the other £5,000, an action for the £5,000 lies without averment by the plaintiff that he had brought in the £2,000 or otherwise performed.[1]

§ 891. **Transactions taken out of partnership.**— So there may be special bargains between the partners, by which particular transactions are insulated and separated from the winding up, and a single partner be substituted as the debtor in place of the firm. Such is the common case of a partner retiring and selling out his interest to the continuing partners who assume the debts. The retiring partner can sue them at law for the purchase price of his interest, which they had agreed to give, or for the amount of any debt he has had to pay.[2]

So if one partner pays over to the other his share towards the debts, and has to pay the amount over again to the creditors, he can recover it from the copartner.[3]

§ 892. So if one partner purchases some or all of the property and agrees to pay the other a definite price for it at a specified time, or gives his note, or if the effects are specific-

[1] Kemble *v.* Mills, 9 Dowl. 446.
[2] §§ 636, 879.
[3] Warring *v.* Hill, 89 Ind. 497.

ally divided on dissolution, and one sells part of his allotment to the other, the promise is enforceable independent of a settlement. The seller has sold for himself and not for the firm, and the promise of the buyer is express.[1]

For example, in Wells *v.* Carpenter, *supra*, two partners, W. & C., had a grain and a grocery business; W. took the grocery and assumed all its debts, and C. took the grain business on the same terms, and afterwards W. sold the grocery to C., who agreed to pay for it the amount of W.'s original capital. An action at law for the price was sustained.

In Davies *v.* Skinner, 58 Wis. 638; 46 Am. Rep. 65, a firm of three owned a threshing machine, one-third each, and it was agreed that one of them might use it at usual rates, less one-third for his interest, payable in a note. The latter having refused to pay or give the note after using the machine, an action at law was sustained. The court held that the partners had severed their interest in the property for the purposes of the contract, and that one could sue another on an express agreement to do any act not involving the partnership accounts.[2]

§ 893. Separating ownership of debts.—So if, on dissolution, notes payable or debts due to the firm are divided between the partners or all assigned to one partner, and another partner collects or receives payment on a claim allotted to his copartner, an action at law lies against him for the amount, and so if he has already secretly collected it.[3]

So where the partners divide the debts due by the firm, each assuming the payment of certain debts. Here, if one

[1] Jackson *v.* Stopherd, 2 Cr. & M. 361; Wells *v.* Wells, 1 Ventr. 40; Caswell *v.* Cooper, 18 Ill. 532; Wells *v.* Carpenter, 65 id. 447; Purvines *v.* Champion, 67 Ill. 459; Hunt *v.* Morris, 44 Miss. 314; Bethel *v.* Franklin, 57 Mo. 466; Dakin *v.* Graves, 48 N. H. 45; Koningsburg *v.* Launitz, 1 E. D. Smith, 215; Neil *v.* Greenleaf, 26 Oh. St. 567; Collamer *v.* Foster, 26 Vt. 754; Linderman *v.* Disbrow, 31 Wis. 465, 472.

[2] See Russell *v.* Minnesota Outfit, 1 Minn. 162.

[3] Rowland *v.* Boozer, 10 Ala. 690; Roberts *v.* Ripley, 14 Conn. 543; Russell *v.* Grimes, 46 Mo. 410; Leonard *v.* Robbins, 13 Allen, 217, a note made by one of the partners; Wicks *v.* Lippman, 13 Nev. 499; Ross *v.* West, 2 Bosw. 360; Crosby *v.* Nichols, 3 id. 450. See, also, Adams *v.* Funk, 53 Ill. 219.

partner has to pay one of the debts assumed by the other, he can sue the latter at law.[1]

But the conversion of the property into the separate property of one partner, and the promise of the defendant to pay, must be clearly to the plaintiff individually, and not to the firm.

Thus in Ivy *v.* Walker, 58 Miss. 253, I. & W. were partners, and I. desiring to trade the partnership stock for land, and W. being unwilling, I. offered to take the stock at ten per cent. less than the invoice price and W. assented. I. then traded it for the land, paying the difference out of his private means, and charging himself on the books for the stock at the invoice price, less ten per cent. The firm was in debt and also owed I. W. never claimed that the purchase was from him individually, but several years afterwards sued I. for one-half the price of the goods, without a settlement of the partnership having been had, and it was held that the suit should have been in equity for a settlement; that there was no express promise by I. to pay, and the implied promise is to the owner of the stock, which is the firm and not W. alone; that the firm being in debt, I. has a lien on the property for the payment of debts, and to convert the claim into separate property requires a distinct agreement.

But a promise on buying out a partner to pay him one-half the invoice price is not a promise to account for it on settlement, but to pay.[2]

§ 894. **Attachment.**—As under some of the codes an attachment is allowed in all civil actions, and a suit for an accounting is a civil action founded on contract, the complainant in such suit can have an attachment, where the grounds for it exist, for a specific sum which he claims will be found due him.[3]

[1] Martin *v.* Good, 14 Md. 398; Coleman *v.* Coleman, 12 Rich. (S. Ca.) L. 183.

[2] Edens *v.* Williams, 36 Ill. 252.

[3] Goble *v.* Howard, 12 Oh. St. 165; Humphreys *v.* Matthews, 11 Ill. 471; Curry *v.* Allen, 55 Iowa, 318; Stone *v.* Boone, 24 Kan. 337, 340 (denying Treadway *v.* Ryan, 3 Kan. 437). And see Pierce *v.* Thompson, 6 Pick. 193; Commonwealth *v.* Sumner, 5 Pick. 360. But see Smith *v.* Small, 54 Barb. 223. *Contra*, Brinegar *v.* Griffin, 2 La. Ann. 154; Johnson *v.* Short, 2 id. 277; Ketchum *v.* Ketchum, 1 Abb. Pr. (N. S.) 157 (*dictum*). Of

In a suit in equity for an accounting, a garnishment of a third person who sued the defendant partner, obtained on the ground of non-residence and insolvency, was sustained.[1]

A partner cannot arrest a copartner on an allegation of the fraudulent removal of partnership property.[2]

§ 895. **Loss caused by one partner's wrong.**— If a partner, by an act outside of his authority, creates against his copartners a liability which he could not have called them to share had he alone been compelled to pay, they may recover from him the amount they have paid.

Thus if a partner makes a note in the firm name for his private purposes and the firm is compelled to pay it, the innocent partners can recover from him.[3]

So if by the fraud of one partner partnership property is condemned, or the firm is rendered liable to a third person for a loss to him, the rest can recover against the guilty partner.[4]

§ 896. In this class of cases it is held that if the payment is out of a joint fund, or the money is borrowed upon a joint note, the action should be a joint one, and if from their private means each must recover separately.[5]

Where there is collusion between a third person and a partner to injure the firm, the injured partners may jointly sue either or both of the wrong-doers.[6]

course where no action at law lies no attachment at law will lie, Wheeler *v.* Farmer, 38 Cal. 203.

[1] Ramsey *v.* Barbaro, 12 Sm. & Mar. (20 Miss.) 661. But the jurisdiction was denied to exist in Kennard *v.* Adams, 11 B. Mon. 102.

[2] Cary *v.* Williams, 1 Duer, 667; Soule *v.* Hayward, 1 Cal. 345. For actions between partners arising out of the right of possession and exclusion therefrom, such as replevin, detinue, trover, see §§ 274–278.

[3] Osborne *v.* Harper, 5 East, 225; Graham *v.* Robertson, 2 T. R. 282; Cross *v.* Cheshire, 7 Ex. 43; Fuller *v.* Percival, 126 Mass. 381; Calkins *v.* Smith, 48 N. Y. 614. If the note is in hands of a *bona fide* holder, the innocent partner can pay at once and begin suit at law; or if the note is in the hands of a participant in the fraud, he can maintain a suit for its cancellation, Fuller *v.* Percival, *supra.*

[4] Hadfield *v.* Jameson, 2 Munf. (Va.) 53. Questions of contribution for loss by misuse of powers, wrongful application of assets, and the like, more frequently arise in suits for accounting, §§ 761–765.

[5] Osborne *v.* Harper, 5 East, 225; Graham *v.* Robertson, 2 T. R. 282.

[6] Longman *v.* Pole, Moo. & Mal.

Yet in Calkins *v.* Smith, 48 N. Y. 614, 618, EARL, C., delivering the majority opinion, held that the remedy at law against a partner who indorsed the firm's name to pay his private debt was not in favor of the non-consenting partners jointly, but was a separate fraud on each, for which the actions must be separate, although the note was paid out of partnership assets by a receiver.

§ 897. **Deceit in formation of firm.**— Where a person lures another into a contract of partnership with him by false representations or other deceit the injured person may maintain an action at law against him.[1]

The action may be in tort for deceit, in which case the damage is not the difference between the actual value and the price paid, but between the actual and represented values;[2] and there may be a right to rescission or dissolution with indemnity and return of premium. even where the misrepresentations are not sufficient to sustain an action for deceit.[3]

Where a person, by fraud, induces another to sign partnership articles and advance money as part of the agreed capital, with the intent to appropriate it to his own use and not for partnership purposes, he can be sued at law for a recovery of the money, for here was no real partnership, but a pretense and a sham, and the money was not used or intended for joint benefit.[4]

If the suit is in equity for rescission or dissolution, the chancellor, finding the contract void in its inception, may compel the guilty partner to repay to the complainant his capital and a reasonable compensation for the time he has acted and indemnify him against debts.[5]

If the plaintiff, on being informed of the facts, did not repudiate, but ratified the partnership, it was held that he could neither rescind nor sue for damages.[6]

Only the guilty partners are to be made defendants if the action is at law for tort or for money had and received.[7]

223: Emery *v.* Parrott, 107 Mass. 95; Sweet *v.* Morrison, 103 N. Y. 235.

[1] Rice *v.* Culver, 32 N. J. Eq. 601, that the action must be at law, no partnership having launched.

[2] Morse *v.* Hutchins, 102 Mass. 439; Greenewald *v.* Rathfon, 81 Ind. 517.

[3] Newbigging *v.* Adam, 34 Ch. D. 582.

[4] Hale *v.* Wilson, 112 Mass. 441.

[5] Richards *v.* Todd, 127 Mass. 167; Davidson *v.* Thirkell, 3 Grant's Ch. (Up. Can.) 330.

[6] St. John *v.* Hendrickson, 81 Ind. 350.

[7] Perry *v.* Hale, 143 Mass. 540; Stainbank *v.* Fernley, 9 Sim. 556.

A silent partner who did not know or assume to know the truth of the misrepresentations to one who bought an interest in the firm is not liable for damages on account of them.[1]

In More *v.* Rand, 60 N. Y. 208, R. and others, defendants, agreed to buy the assets of the firm of M. & H., with a right to elect within two months to take in M. as a partner. After they had paid H., they discovered that M. had induced them to make the purchase by fraudulent representations. Nevertheless, they elected to take him in as a partner and did so. In an action by M. for dissolution and accounting of this partnership, it was held that the defendants could, under the code, seek damages against M. for the deceit by counter-claim. It was also held: 1st. That they did not have to sue both M. and H., but had a cause of action against M. alone. 2d. The partnership, though beginning two months after the sale, was founded upon it, and therefore the deceit was part of the transaction. 3d. Taking in M. as partner was not a waiver, for they had a right to hold him on his contract, for rescinding would not have restored to them their money paid to H.; and 4th. Defendants' claim against M. is joint.

Where defendant, having an established business, took in the plaintiff and another as partners, the plaintiff paying a large sum for admittance into the firm, and then the defendant absconded, an action for damages for breach of contract and injury to the business may be brought by each, and they need not sue for rescission and recovery of the consideration.[2]

§ 898. **Torts against copartner.**— One partner can sue another at law for injuring property used in the firm belonging exclusively to him;[3] or for malicious attachment.[4]

One partner can have his copartner put under bonds to keep the peace in case of violent expulsion and threats.[5]

In Boughner *v.* Black, 83 Ky. 521, B., H. & C. were partners as tobacco warehousemen. B. and H. sold to one Black an interest in the business for $5,531.73 and in the good will for $2,500, and

[1] Chamberlin *v.* Prior, 2 Keyes, 539; 1 Abb. App. Dec. 338.

[2] Child *v.* Swain, 69 Ind. 230.

[3] Haller *v.* Willamowicz, 23 Ark. 566.

[4] Pierce *v.* Thompson, 6 Pick. 193.

[5] The Queen *v.* Mallinson, 16 Q. B. 367. Where the tort is in relation to the joint property and does not amount to a destruction of it no action lies, because one partner has as much right as the other, see § 277.

also for all Black's profits for one year as a member of the firm over $2,500. Black gave his notes for these amounts, and B. assigned his interest in them to his brother, the plaintiff, who now sues Black to recover judgment for such interest, making the other partners also defendants. By fraud on the part of B. after Black had become a member of the firm, by changing brands on hogsheads of tobacco sent to the firm for sale, and by buying at the firm's sales in fictitious names, all of which was unknown to the other partners, who were upright men, the business was destroyed and the good will wholly lost, the trade compelling the concern to close its doors. It was held that Black could set up damages thus caused by the conduct of B. as a counter-claim.

ACTION OF ACCOUNT AT COMMON LAW.

§ 899. There was once an action at law for the settlement of accounts between partners, confined perhaps to partnerships consisting of two members only, called the action of account; but owing to the superior advantages of the suit in equity, and the incomplete and unsatisfactory character of the action of account, it has become obsolete, and the forms and methods of procedure under it are fallen into nearly hopeless obscurity. Nevertheless traces of it are to be found in this country.[1]

A somewhat similar action is or was in vogue in certain parts of New England, where it was indigenous, having arisen in Connecticut.[2]

[1] Spear *v.* Newell, 2 Paine, C. C. 267; Travers *v.* Dyer, 16 Blatchf. 178; Bracken *v.* Kennedy, 4 Ill. 558, 563; Lee *v.* Abrams, 12 id. 111; Stewart *v.* Kerr, 1 Morr. (Iowa) 240; Neel *v.* Keel, 4 T. B. Mon. 162; Wilhelm *v.* Caylor, 32 Md. 151, it is recognized by statute in Maryland; Hunt *v.* Gorden, 52 Miss. 194; Jessup *v.* Cook, 6 N. J. L. 434, 436; Rickey *v.* Bowne, 18 Johns. 131; Appleby *v.* Brown, 24 N. Y. 143; James *v.* Browne, 1 Dall. 339; Griffith *v.* Willing, 3 Bin. 317, where there were three partners.

[2] Day *v.* Lockwood, 24 Conn. 185; Sawyer *v.* Proctor, 2 Vt. 580; Loomis *v.* Barrett, 4 id. 450; Wood *v.* Johnson, 13 id. 191; Wood *v.* Merrow, 25 id. 340; Green *v.* Chapman, 27 id. 236; Porter *v.* Wheeler, 37 id. 281; Hydeville Co. *v.* Barnes, 37 id. 588.

CHAPTER II.

CLAIMS BETWEEN FIRMS WITH PARTNER IN COMMON.

§ 900. Cannot sue at law.— One firm cannot at common law sue another firm having a partner common to both firms. The reason for this rule is that the same party must be both plaintiff and defendant, and the judgment must be for all the plaintiffs against all the defendants jointly liable. When we consider that the creditors of each firm have a priority in the distribution of the assets of the firm over the claim of any partner against his copartners, and hence the assets of the two firms should be treated as the assets of two distinct persons, it would appear that the above rule is not founded upon the necessities of the complications between the partners, but though no doubt very logical is based purely upon the artificial reason above stated without any other reasonable foundation whatever. Nevertheless the rule is well settled.[1]

And the fact that the claim is not for a general balance, but is on a written promise, as where it is against indorsers, makes no difference;[2] or on a note or bill,[3] or for rent,[4] or on an account stated.[5]

[1] Bosanquet *v.* Wray, 6 Taunt. 597; Perring *v.* Hone, 4 Bing. 28; 2 C. & P. 401; Mainwaring *v.* Newman, 2 B. & P. 120; Foster *v.* Ward, 1 Cababé & Ellis, 168; Tindal *v.* Bright, Minor (Ala.), 103; Haven *v.* Wakefield, 39 Ill. 509; Portland *v.* Gershon, 11 Me. 196; Denny *v.* Metcalf, 28 id. 389; Blaisdell *v.* Pray, 68 id. 269; Calvit *v.* Markham, 3 How. (Miss.) 343; Morris *v.* Hillery, 7 id. 61; Calhoun *v.* Albin, 48 Mo. 304; Englis *v.* Furniss, 4 E. D. Smith. 587; 2 Abb. Pr. 333; Rogers *v.* Rogers, 5 Ired. Eq. 31; Beacannon *v.* Liebe, 11 Oregon, 443 (19 Reporter, 183); Tassey *v.* Church, 6 Watts & S. 465 (40 Am. Dec. 575); Griffith *v.* Chew, 8 S. & R. 17, 30–31; Banks *v.* Mitchell, 8 Yerg. 111, 113; Green *v.* Chapman, 27 Vt. 236. See article on the subject of this chapter, in 5 Am. Law Rep. 47.

[2] Foster *v.* Ward, 1 Cababé & Ellis, 168.

[3] Tindal *v.* Bright, 1 Minor (Ala.). 103; Calhoun *v.* Albin, 48 Mo. 304.

[4] Haven *v.* Wakefield, 39 Ill. 509.

[5] Calvit *v.* Markham, 3 How. (Miss.

§ 901. The principle does not apply to a note or promise made by one firm to a person who is a partner in another firm having a common member with the debtor firm, but such promise is enforcible by the payee.[1]

Where E., R. & Co. held notes as collateral, and, being requested by their debtor to sell them, sold to E. & L., another firm, E. being a member in both. A person claiming to be owner of the notes, and to have left them with the debtor for sale, objected that to allow E., R. & Co. to sell to E. & L. was to allow an agent to sell to become the buyer, but it was held that the debtor alone could make the objection.[2]

§ 902. Where a statute makes all notes joint and several the creditor firm may sue the partners of the debtor firm on the note, provided the common partner is not made a defendant, but not on contracts not made joint and several.[3]

In Lacy *v.* Le Bruce, 6 Ala. 904, it was held that the death of the common partner removes the impediment, and the surviving partners can sue on a note at law. The court say the case is one of first impression. But in Bosanquet *v.* Wray, 6 Taunt. 597, an action at law for a balance was brought after the death of the common partner, and the principle was said to go to the root of the matter, and the contract to be available only in equity. This case, however, goes too far in saying that no legal contract could subsist between the partners, for if enforceable in equity there must be a contract.

In Blaisdell *v.* Pray, 68 Me. 269, it was doubted whether the principle would apply to a partition suit relating to property owned by the two partnerships as tenants in common, since partition is not necessarily adversary, and it was held that the objection was in the nature of a plea to capacity, and to be made, therefore, by plea in abatement, and after plea to the merits it was too late.

§ 903. Pennsylvania has a statute providing that firms with a

843; but see Cole *v.* Reynolds, 18 N. Y. 74, where the action was on an account stated, but was sustained because under the code it could be treated as an equity suit.

[1] Moore *v.* Gano, 12 Oh. 300; and see Mahan *v.* Sherman, 7 Blackf. 378; and Herriott *v.* Kersey, 69 Iowa, 111.

[2] Howry *v.* Eppinger, 34 Mich. 29.

[3] Morris *v.* Hillery, 7 How. (Miss.) 61.

common member can act as though they were distinct, and under this one firm can sue the other at law.[1]

And probably in England, under the judiciary acts, and in states where a partnership can sue in the firm name, it may be that the objection to such actions does not exist. § 905.

§ 904. —— assignment of the claim.— If, however, the creditor firm assigns the balance due to it, no general accounting between the firms being necessary to ascertain the amount, the assignee, it seems, can maintain the action, although an assignee may get only his assignor's rights; for the objection is technical, and is one of disability and not of right.[2]

And the assignee can sue where the common partner has the transfer to him entered on the books of the debtor firm, although the copartners objected as soon as they learned the facts; for this transfer is not using the funds of the firm to pay his own debt, since the debt was not due to him personally;[3] and where, in winding up the creditor firm, the claim was allotted to one of the partners not a member of the debtor firm, he was held entitled to recover;[4] but in an action against the firm of M. & W., a garnishment of C., M. & L., another firm owing M. & W., M. being the same person in both, was dismissed, because one firm has no legal claim to recover of the other.[5]

If the creditor firm transfer the note to a third person and afterwards re-acquire it, they do not stand in their assignor's shoes, but are under the same disability as before.[6]

[1] Grubb *v.* Cottrell, 62 Pa. St. 23; Allen *v.* Erie City Bank, 57 Pa. St. 129; Freck *v.* Blackiston, 83 id. 474. But this statute has not been extended to allowing a partner to sue his firm at law instead of for an account, Miller *v.* Knauff, 2 Pa. L. J. Rep. 11.

[2] Beacannon *v.* Liebe, 11 Oregon, 443; Pitcher *v.* Barrows, 17 Pick. 361. This on the principle stated in § 884.

[3] Russell *v.* Leland, 12 Allen, 349. The query was made in this case, p. 353, whether, if the common partner owed the debtor firm anything, they could set it off against the debt due the other firm; and a similar query was made in Cole *v.* Reynolds, 18 N. Y. 74, with a preference expressed for letting the debtor firm pay and adjust individual equities afterwards.

[4] Scott *v.* Green, 89 N. Ca. 278.

[5] Denny *v.* Metcalf, 28 Me. 389.

[6] Calhoun *v.* Albin, 48 Mo. 304.

§ 905. **Can sue in equity.**— In equity, however, and under the codes, where equitable remedies will be granted in the courts in all actions, the firms can be parties to such suits much as if they constituted distinct legal bodies, although there is a partner common to each; and hence, under the code, which administers equitable legal remedies without distinction, the suit can be sustained.[1]

§ 906. **And prove in bankruptcy.**— In bankruptcy or insolvency of a firm indebted to another firm having a member in common with it, the solvent partners of the creditor firm engaged in winding it up may prove the debt just as they can recover it in chancery, for the objection is technical and exists only at law.[2]

[1] Haven *v.* Wakefield, 39 Ill. 509; Cole *v.* Reynolds, 18 N. Y. 74; Englis *v.* Furniss, 2 Abb. Pr. 333; 4 E. D. Smith, 587; Kingsland *v.* Braisted, 2 Lans. 17; Douglass *v.* Brown. 37 Tex. 528; Gibson *v.* Ohio Farina Co. 2 Disney, 499; Frye *v.* Sanders, 21 Kan. 26, 29; Calvit *v.* Markham, 3 How. (Miss.) 343; and it was said that equity would give a remedy in Scott *v.* Green, 89 N. Ca. 278; Green *v.* Chapman, 27 Vt. 236; Bosanquet *v.* Wray, 6 Taunt. 597; *Re* Buckhouse, 2 Lowell, 331, 332; 10 Bankr. Reg. 206. *Contra*, that the accounting between the partners as well as between the firms is necessary, and a recovery had only of what is due, deducting what the common partner owes the creditor firm if the debtor firm is insolvent, and, if solvent, the creditor firm must charge such partner on its books with the amount due, Rogers *v.* Rogers, 5 Ired. Eq. 31. The article in 5 Am. Law Rev. 47, takes this side also. But in Phillips *v.* Blatchford, 137 Mass. 510, it was said that charging the debt on the books against the common partner so as to give him a claim against his copartner of the debtor firm is not a payment.

[2] *Ex parte* Thompson, 3 Deac. & Ch. 612; *Ex parte* Brenchley, 2 Gl. & J. 127; *Re* Richardson, 5 L. J. Ch. 129; *Re* Buckhouse, 2 Lowell, 331; McCauly *v.* McFarlane, 2 Dessaus. 239; also the limited partnership cases of Hayes *v.* Bement, 3 Sandf. 394; Hayes *v.* Heyer, 35 N. Y. 326; McArthur *v.* Chase, 13 Gratt. 683, where the special partner was a general partner in the creditor firm.

CHAPTER III.

SUIT FOR ACCOUNTING.

§ 907. Equity jurisdiction.— The jurisdiction of courts of equity in matters of accounting is of the most comprehensive character and extends to all matters necessary to winding up, including the sale of real estate. Though the statute is silent as to the right to appoint a receiver in an accounting, it has this power as an incidental, independent of statute.[1] Though the old action for an account may still exist, or that courts of law in certain states may settle a partnership consisting of two partners only, yet if equity powers are necessary to a complete relief, equity has jurisdiction.[2]

And though a surviving partner admits the correctness of an account presented by the administrator of the deceased partner, this does not take away the equity jurisdiction by giving a remedy at law.[3]

And the jurisdiction is not local, even though the assets consist of real property; hence part of the property may be in another county,[4] or in another state,[5] or some of the partners are non-residents.[6]

§ 908. Probate and admiralty jurisdiction.— And though a probate court may have jurisdiction, in case of death, to

[1] Gridley *v.* Conner, 2 La. Ann. 87; Cox *v.* Volkert, 86 Mo. 505.

[2] Bennett *v.* Woolfolk, 15 Ga. 213; Gillett *v.* Hall, 13 Conn. 426; Niles *v.* Williams, 24 id. 279.

[3] Personette *v.* Pryme, 34 N. J. Eq. 26, 29.

[4] Jones *v.* Fletcher, 42 Ark. 422; Godfrey *v.* White, 43 Mich. 171.

[5] Lyman *v.* Lyman, 2 Paine, C. C. 11, 41; Griggs *v.* Clark, 23 Cal. 427.

[6] Harris *v.* Fleming, 13 Ch. D. 208; Towle *v.* Pierce, 12 Met. 329 (46 Am. Dec. 679); Wells *v.* Collins, 11 Lea, 213; Henry *v.* Jackson, 37 Vt. 431; Wright *v.* Ward, 65 Cal. 525. And see Santa Clara Min. Ass'n *v.* Quicksilver Min. Co. 17 Fed. Rep. 657; 8 Sawyer, 330, holding that the partners being tenants in common of the mines, the receiver's sale was held not to affect the title of the non-residents.

settle partnership affairs, this does not oust equity courts of their powers to wind up.[1] But, as a general rule, probate courts have no such jurisdiction.[2] Nor has an admiralty court any jurisdiction over matters of account between partners or part owners, though the business of the parties be that of carriers on tide-water or in maritime adventures, or though the contract of partnership be called a charter-party.[3]

§ 909. **Refused if unnecessary, but not if merely difficult.**— The court will not, as a matter of course, undertake the winding up of a dissolved partnership. The complainant must have a real cause of complaint and some good or necessary purpose must be subserved.[4]

Thus on an application by an administrator of a deceased partner for an accounting of several firms composed in part of the same individuals, the court denied part of the prayer, and as to the rest, where the party was entitled to an accounting, but the survivors had never refused and were not refusing, and the complainant had free access to the books, and there was no complication, and there was no need of a recourse to the court, the case was dismissed at his costs.[5] A suit by the surviving partner against the administrator for an accounting will not be entertained because the survivor has possession in order to wind up, and it is not neeessary for him to go into court.[6] The surviving partner's ignorance of book-

[1] Griggs *v.* Clark, 23 Cal. 427.

[2] Vincent *v.* Martin, 79 Ala. 540; Roulston *v.* Washington, 79 id. 529; Tiner *v.* Christian, 27 Ark. 306; Culley *v.* Edwards, 44 id. 423; Theller *v.* Such, 57 Cal. 447; Anderson *v.* Beebe, 22 Kan. 768; Blake *v.* Ward, 137 Mass. 94; Booth *v.* Todd, 8 Tex. 137. *Contra*, Ensworth *v.* Curd, 68 Mo. 282. Even though the surviving partner is administrator, and must, therefore, settle the individual estate in that court, the court is not given jurisdiction by appointing the survivor, Vincent *v.* Martin, *supra;* Roulston *v.* Washington, *supra.*

[3] Stbt. Orleans *v.* Phœbus, 11 Pet. 175; Verderwater *v.* Mills, 19 How. 82 (aff'g McAll. 9); Grant *v.* Poillon, 20 id. 162; Ward *v.* Thompson, 22 id. 330 (aff'g Newb. 95); Schooner Ocean Belle, 6 Ben. 253; The Brothers, 7 Fed. Rep. 878; 5 Hughes, 282. A contract of consortship between two wrecking vessels to share salvage was held to be a maritime contract, enforcible in admiralty. Andrews *v.* Wall, 3 How. 568.

[4] McKaig *v.* Hebb, 42 Md. 227; Adams *v.* Gaubert, 69 Ill. 585, and cases in next two notes.

[5] Demarest *v.* Rutan, 40 N. J. Eq. 356; Harvey *v.* Pennypacker, 4 Del. Ch. 445, 485.

[6] McKay *v.* Joy, 70 Cal. 581.

keeping is no reason for interference by the court, for he can employ an expert. And if the assistance of the court is necessary in some particulars, it will be granted to that extent only; as where the only obstacle to a settlement is a controversy as to whether certain real estate was partnership property or not, the court will settle this question and leave the surviving partner to finish the winding up.[1]

The fact that there will be great difficulties or even an impossibility in making an accurate statement of accounts between partners is no reason for denying it. The law will not refuse redress because absolute certainty is not attainable. If the accounts are complicated, approximate correctness is often only practicable.[2]

On the other hand, if all the partners have been so negligent as to lose all evidence of the partnership concerns, or have kept their accounts in so confused a way that the court cannot see what decree to make, the bill will be dismissed.[3]

PARTIAL ACCOUNTING.

§ 910. Must seek dissolution and winding up.— The general rule — subject to the modifications hereinafter stated — is that a bill for an accounting which does not also seek a dissolution will not be entertained. For if a continuance of the partnership is contemplated, or if an accounting of only part of the partnership concern is allowed, no complete justice can be done between the partners, and the fluctuations of a continuing business will render the accounting which is correct to-day, incorrect to-morrow, and to entertain such bills on behalf of a partner would involve the court in incessant litigations, foment disputes, and needlessly drag partners not in fault before the public tribunals.[4]

At an earlier stage of the law these considerations were supposed to make the rule invariable that no accounting without a prayer

[1] Harvey *v.* Pennypacker, *supra.*
[2] Evans *v.* Montgomery, 50 Iowa, 325; Bevans *v.* Sullivan, 4 Gill, 383.
[3] Rick *v.* Neitzy, 1 Mackey (D. C.), 21; Hall *v.* Clagett, 48 Md. 223, 243.
[4] Clark *v.* Gridley, 41 Cal. 119; Nisbet *v.* Nash, 52 id. 540; Davis *v.* Davis, 60 Miss. 615; McMahan *v.* Thornton, 4 Montana, 46; Baird *v.* Baird, 1 Dev. & Bat. Eq. 524; McRae *v.* McKenzie, 2 id. 232; Coville *v.* Gilman, 13 W. Va. 314. And see Glynn *v.* Phetteplace, 26 Mich. 383; Phillips *v.* Blatchford, 137 Mass. 510.

for dissolution could be had, and a bill was demurrable if framed on any other theory.[1] But it was afterwards said that the rule was never of universal application.[2] And an accounting will be granted for a good reason, though a final winding up and dissolution are not sought.[3]

Where a court sets aside a conveyance of property by a firm as fraudulent, at the suit of creditors, it can order sale and distribution without dissolving or settling accounts, of course, because the creditors are not interested in helping to settle them after a fraudulent obstruction to the collection of debts.[4]

If the pleading is based on the theory that a dissolution has been had, the want of a specific prayer for it is immaterial.[5] And a general prayer for relief may be interpreted as a prayer for dissolution.[6]

If the right to a partial accounting did not exist when the bill was filed, a decree awarding profits since then is erroneous.[7]

§ 911. **When granted.**— The more common cases, where a partial accounting or an accounting without dissolution may be had, can be divided into five classes:

1st. Cases of clandestine profits.

2d. Of expulsion or exclusion.

3d. Where the partners are too numerous to be made parties to a suit for general accounting and justice can be done without it.

4th. Executions against one partner's interest.

5th. Agreements for settlements periodically, or of distinct transactions.

§ 912. 1st. Where a partner has engaged in transactions without the knowledge of the copartners and in violation of their rights, in which he has made profits which should be

[1] Forman *v.* Homfray, 2 Ves. & Bea. 329; Knebell *v.* White, 2 Y. & C. Ex. 15; Loscombe *v.* Russell, 4 Sim. 8.

[2] In Harrison *v.* Armitage, 4 Mad. 143, and Richards *v.* Davies, 2 Russ. & M. 317, Sir John Leach denied the rule altogether.

[3] Hudson *v.* Barrett, 1 Pars. (Pa.) Sel. Cas. 414; Pirtle *v.* Penn, 3 Dana, 247 (28 Am. Dec. 70). See article by Tracy Gould, Esq., in Alb. L. J., Feb. 28, 1880.

[4] Bank *v.* Smith, 26 W. Va. 541.

[5] Ambler *v.* Whipple, 20 Wall. 546.

[6] Loscombe *v.* Russell, 4 Sim. 8; Coville *v.* Gilman, 13 W. Va. 314, 325; Werner *v.* Leisen, 31 Wis. 169.

[7] Wadley *v.* Jones, 55 Ga. 329.

paid to the firm, an accounting can be compelled of such clandestine transactions without winding up the firm.[1]

§ 913. 2d. Where a partner or copartners in a firm for a still unexpired term of years seek to expel or exclude a copartner, an accounting will be granted without dissolution, and, in fact, to prevent dissolution.[2]

On this principle, if a firm obtains land but one partner wrongfully takes the title in his own name, the copartner can maintain a bill to establish the character of the property as being joint assets, and compel a conveyance of an undivided half without resorting to a suit to dissolve and account.[3]

The fact that the guilty partners may be compelled to submit to repeated bills for an accounting in case of continued exclusion will not be regarded as a defense in their behalf.[4]

The excluded partner will not be compelled to submit to the alternative of dissolution or continued violation of the partnership contract.[5]

Where the existence of the partnership is denied, a suit to establish it is maintainable, and an accounting of past transactions will be granted if the fact of partnership is proved.[6]

§ 914. 3d. If the partners are too numerous to be made parties, and hence a suit for a dissolution and a general accounting is highly inconvenient or impossible, and the partnership enterprise is a failure, if a partial accounting will do justice it will be granted. Thus, a bill to have the assets within reach collected and applied to the debts will lie;[7]

[1] Sir N. Lindley cites the following cases upon this proposition: Hitchens *v.* Congreve, 1 R. & M. 150; Fawcett *v.* Whitehouse, id. 132; Beck *v.* Kantorowicz, 3 K. & J. 230; Society of Practical Knowledge *v.* Abbott, 2 Beav. 559. See, also, § 790.

[2] Harrison *v.* Armitage, 4 Mad. 143; Richards *v.* Davies, 2 R. & M. 347; Blisset *v.* Daniel, 10 Hare, 493.

[3] Traphagen *v.* Burt, 67 N. Y. 30; Davis *v.* Davis, 60 Miss. 615.

[4] Richards *v.* Davies, 2 R. & M. 347; Fairthorne *v.* Weston, 3 Hare, 387, 391.

[5] Fairthorne *v.* Weston, 3 Hare, 387, 391.

[6] Knowles *v.* Haughton, 11 Ves. 168, and more fully reported in Coll. Part. 198.

[7] Wallworth *v.* Holt, 4 M. & C. 619; Richardson *v.* Hastings, 7 Beav. 323; 11 id. 17; Deeks *v.* Stanhope, 14 Sim. 57; Boisgerard *v.* Wall, Sm. & Mar. Ch. 404; Coville *v.* Gilman, 13 W. Va. 314, 325.

and for a division of profits and assets among the members;[1] and a receiver and injunction will be granted if necessary.[2]

§ 915. 4th. Where an attachment and execution has been levied upon the interest of a partner in favor of his separate creditor, and an injunction has been allowed on behalf of the other partners to determine if any and what is his interest, an accounting without dissolution has been granted; for otherwise anv creditor of a partner could force a dissolution.[3]

§ 916. Settlements periodically or of distinct transactions.— 5th. If the contract of partnership provide for settlement of distinct transactions.

In Patterson *v.* Ware, 10 Ala. 444, in a partnership to buy and sell lands, it was agreed that a division of the proceeds of each sale should be made. Partners can be compelled to divide proceeds of a sale without ordering the sale of other lands.

In Denver *v.* Roane, 99 U. S. 355, by agreement of dissolution of a firm of lawyers, fees were to be divided in certain proportions and the partnership was to continue as to old business. The business was being wound up by a surviving partner, and it was held that the personal representative was not required to wait until the entire business was closed, but could compel a division of fees as far as collected.

If the amount or dividend sued for was not due when the suit was begun, but has accrued since, it cannot be recovered.[4]

Whether on an agreement for a partial division of capital a partner can be compelled to take his own debt due to the firm in payment of his share was said to depend on whether it was then demandable, and if so, such payment could be insisted on, but not otherwise.[5]

[1] Sheppard *v.* Oxenford, 1 K. & J. 491; Apperly *v.* Page, 1 Phil. 779; Clements *v.* Bowes, 17 Sim. 167; Coope *v.* Webb, 15 id. 454; Wilson *v.* Stanhope, 2 Coll. 629.

[2] Wallworth *v.* Holt, 4 M. & Cr. 619; Sheppard *v.* Oxenford, 1 K. & J. 491.

[3] Cropper *v.* Coburn, 2 Curt. C. C. 465.

[4] Wadley *v.* Jones, 55 Ga. 329.

[5] Att'y-Genl. *v.* State Bank, 1 Dev. & Bat. Eq. 545.

INDIVIDUAL MATTERS.

§ 917. Not included in an accounting.— Personal accounts, demands or other matters between the partners will not be considered by the court in taking an account,[1] although there are only two partners.[2]

We have elsewhere seen[3] that in insolvency and bankruptcy cases the debt of one partner to the other on private account is not included in the equitable lien of a partner for his balance;[4] hence the debtor may claim an exemption in his balance in partnership accounting against the creditor partner on an individual debt.[5]

§ 918. Illustrations.— Thus, a charge for boarding the co-partner will not be considered;[6] nor the amount of indebtedness between two of the partners as constituting another firm.[7] And where a sum is due the partners jointly for services independent of the partnership, and the active partner claimed the other had appropriated the amount, it is a private controversy with which the accounting is not concerned.[8]

A firm of three persons engaged in selling articles manufactured under a patent right which they had the exclusive use of in certain states conveyed a half interest to persons in one state for the purpose of forming a corporation, the assignees of the one-half interest to have half the capital stock, and the partners to have one-sixth each. An assessment on the stock was made, and one of the partners paid in full, another paid part, and the third nothing. On

[1] Turnipseed *v.* Goodwin, 9 Ala. 372; Jones *v.* Jones, 23 Ark. 212; Nims *v.* Nims (Fla. 1887), 1 So. Rep. 527; Hanks *v.* Baber, 53 Ill. 292; Rosenstiel *v.* Gray, 112 id. 282; Fletcher *v.* Reed, 131 Mass. 312, 314; Gordon *v.* Gordon, 49 Mich. 501; Wells *v.* Babcock, 56 id. 276; Brown *v.* Haynes, 6 Jones, Eq. 49; Evans *v.* Bryan, 95 N. Ca. 174; Looney *v.* Gillenwaters, 11 Heisk. 133; O'Lone *v.* O'Lone, 2 Grant's Ch. (Up. Can.) 125. And see Gandolfo *v.* Appleton, 40 N. Y. 533.

[2] Rosenstiel *v.* Gray, 112 Ill. 282; Evans *v.* Bryan, 95 N. Ca. 174; Looney *v.* Gillenwaters, 11 Heisk. 133; O'Lone *v.* O'Lone, 2 Grant's Ch. 125; but it was done in Adams *v.* Kable, 6 B. Mon. 384 (44 Am. Dec. 772).

[3] § 823.

[4] Nichol *v.* Stewart, 36 Ark. 612; Pierce *v.* Tiernan, 10 Gill & J. 253; Hill *v.* Beach, 12 N. J. Eq. 31; Mumford *v.* Nicoll, 4 Johns. Ch. 522 (reversed in part, 20 Johns. 611); Moffatt *v.* Thomson, 5 Rich. Eq. 155; 57 Am. Dec. 737.

[5] Evans *v.* Bryan, 95 N. Ca. 174.

[6] O'Lone *v.* O'Lone, 2 Grant's Ch. 125.

[7] Dimond *v.* Henderson, 47 Wis. 172.

[8] Brown *v.* Haynes, 6 Jones, Eq. 49.

dissolution of the firm, in adjusting the accounts, held such payments were by the partners on their individual account, and not on account of or for the benefit of the firm, and are therefore to be disallowed.[1]

And if a partnership creditor takes in payment the notes of one partner indorsed by the other, the maker partner is entitled to credit for them as a payment in accounting, and the indorsement of the other is as an individual and not as a partner, for he is surety and not principal, and if he has to pay, he becomes creditor of the maker, and if no one pays, the maker is gainer.[2]

So the expense of clearing and improving lands owned by partners in common and farmed in partnership, if incurred by one partner, must be obtained by him in partition or otherwise, and not in the accounting.[3]

So where partners have treated their real estate as if owned in common, by selling their moieties separately and by making separate arrangements for paying claims "on account of the property," no claims of creditors interfering, a balance due from them on their original purchase money is not a partnership debt to be settled in the account.[4]

In a contract of sale by one partner to a third person of all his interest in the partnership assets, the buyer to assume the seller's share of debts, was a clause that the buyer should acquire no right of the seller against former partners, nor assume any liability for any debt due by the seller to such partners. This was held not to affect accounts due to or by the firm, by or to the seller, but such individual accounts of the partners would be left to be settled between themselves.[5]

In a suit for an accounting the court has no jurisdiction of the private property of any of the partners.[6]

§ 919. **Sometimes considered.**— Personal matters closely connected with the partnership, and forming part of the transactions relating to its business, have been considered.

Thus dealings preliminary to the commencement of the partnership are not to be excluded from the accounts, nor are those subse-

[1] Fletcher *v.* Reed, 131 Mass. 312, 314.
[2] Gandolfo *v.* Appleton, 40 N. Y. 533.
[3] Jones *v.* Jones, 23 Ark. 212.
[4] Smith *v.* Wood, 1 N. J. Eq. 74.
[5] Rosenstiel *v.* Gray, 112 Ill. 282.
[6] Gorham *v.* Farson (Ill.), 10 N. E. Rep. 1.

quent to its dissolution in winding it up;[1] and in Monroe *v.* Hamilton, 47 Ala. 217, one of two partners in a farming partnership gave the other a mortgage on his share of the crop to secure an individual debt, and the bill of the latter for an accounting and to foreclose the mortgage, making several purchasers of parts of the crop from the mortgagor parties, for an account of its value, was held not multifarious.

And in Gleason *v.* Van Aernam, 9 Oregon, 343, 345, the complainant had sold one-half his mill to the defendant, to be paid for out of the profits, and then went into partnership with him, and it was held proper in an accounting to consider the claim for half the mill and the vendor's lien, because connected with the accounting.

In Royster *v.* Johnson, 73 N. Ca. 474, a surviving partner was charged with a note due to the testator individually, because it grew out of the business.

§ 920. —— **set-off against balance.**— But a personal demand by one partner against the other may be allowed as a set-off against the balance found due from the former to the latter, without judgment upon the set-off for balance over.[2]

But in case of insolvent estates, this is governed by the law of the state as to set-off; and if, for example, the estate of a deceased partner is insolvent, and owes the surviving partner a personal debt, and the survivor owes the estate on partnership account, the latter debt may not be allowed if the law of the state requires a sharing *pro rata*, for otherwise he might absorb the entire separate estate to the exclusion of other separate creditors.[3]

WHO CAN ENFORCE AN ACCOUNTING.

§ 921. **Partners.**— Any partner after dissolution, or if there has been no dissolution, but he has grounds to seek it, can maintain a bill for an accounting, although he is a

[1] Cruikshank *v.* McVicar, 8 Beav. 106, 116. But see Wells *v.* Babcock, 56 Mich. 276.

[2] Jones *v.* Jones, 23 Ark. 212; Sarchet *v.* Sarchet, 2 Oh. 320. And see Mack *v.* Woodruff, 87 Ill. 570.

[3] Berry *v.* Masters, 18 Ill. 98; Moffatt *v.* Thomson, 5 Rich. (S. Ca.) Eq. 155 (57 Am. Dec. 737); Mack *v.* Woodruff, 87 Ill. 570, holding that such dividend as the survivor would receive individually may be set off.

debtor partner, and no balance will be coming to him, for he has a right to have the assets applied to the debts, to ascertain and reduce his ultimate liability.[1] And though the losses have been caused by his violation of agreement, to the extent of requiring them to fall upon himself.[2] A member of a firm, which is itself a partner in a larger firm, can maintain a bill for an accounting against the members of the latter.[3]

A partner who retires, selling his interest to his copartners or to a third person, cannot have an accounting, unless he has in some way preserved his equitable lien;[4] and if he is compelled to pay debts is a mere creditor at large in respect thereto.[5] But if he sold at a price to be ascertained, and it is not ascertained, he can maintain a bill for an accounting.[6]

A dormant partner may maintain a suit for an accounting, although his connection with the firm had been concealed in order to evade his creditors.[7]

§ 922. Employee on share of profits.—In addition to the right of a partner to apply to equity for an accounting, an employee paid by a share of profits, in lieu of or addition to a salary, is entitled also to file a bill for an accounting and discovery.[8] But an employee cannot require a sale of the property.[9]

[1] Sharp *v.* Hibbins, 42 N. J. Eq. 543.

[2] Clarke *v.* Gridley, 41 Cal. 119; and in case of levy of attachment or execution on the interest of one partner, the other in many jurisdictions can ask injunction and accounting, § 1109.

[3] Simonton *v.* McLain, 37 Ala. 663. But a sub-partner cannot require an accounting of the concerns of the principal firm, § 167.

[4] § 550.

[5] § 635.

[6] Quinlivan *v.* English, 42 Mo. 362; 44 id. 46.

[7] Harvey *v.* Varney, 98 Mass. 118.

[8] Rishton *v.* Grissell, L. R. 5 Eq. 326; Harrington *v.* Churchward, 29 L. J. Ch. 521; 6 Jur. N. S. 576; 8 Weekly Rep. 302; Turney *v.* Bayley, 4 DeG. J. & Sm. 332; Hallett *v.* Cumston, 110 Mass. 32; Hargrave *v.* Conroy, 19 N. J. Eq. 281; Osbrey *v.* Reimer, 51 N. Y. 630 (affg. 49 Barb. 265); Bentley *v.* Harris, 10 R. I. 434; 14 Am. Rep. 695; Channon *v.* Stewart, 103 Ill. 541. See Killock *v.* Greg, 4 Russ. 285. But see Mulholland *v.* Rapp, 50 Mo. 42, where, however, the plaintiff alleged that he was a partner. As to the mode of ascertaining profits in such case, see Rishton *v.* Grissell, L. R. 5 Eq. 326; 10 id. 393; Geddes *v.* Wallace, 2 Bli. 270; Osbrey *v.* Reimer, 51 N. Y. 630 (aff. 49 Barb. 265); Fuller *v.* Miller, 105 Mass. 103.

[9] Rishton *v.* Grissell, L. R. 5 Eq. 326.

§ 923. **Representatives.**— Any one who represents the share of a partner can sustain a bill for an accounting; as the administrator or executor of a deceased partner.[1]

But if the sole surviving partner and a third person are the administrators, a bill by the former against the latter for settlement has been held demurrable, because the plaintiff represents both sides, and should ask a revocation of the letters so that the estate of the deceased partner may have a fair showing.[2]

On the death of the administrator, the right to enforce a settlement is in his representative, who has been held to be the administrator *de bonis non*.[3] And in another case to be the executor of the deceased administrator.[4]

§ 924. **Widow and heirs generally cannot.**— As a general rule the representatives of the deceased partner are the only persons who can maintain a bill for an accounting against the surviving partners. The widow, legatees, distributees or creditors of the general estate of the decedent cannot sustain such suit, they not being charged with the duty of administering and being under no bond; and their remedy being to compel the representative to account as if he had collected from the surviving partners, or to have him removed.[5]

§ 925. This doctrine is, however, subject to certain limitations:

1. Where the legatee, distributee or creditor of the indi-

[1] Heyne *v.* Middlemore, 1 Rep. in Ch. 138; Hockwell *v.* Eustman, Cro. Jac. 410; Wickliffe *v.* Eve, 17 How. 468; Denver *v.* Roane, 99 U. S. 355; *Re* Clap, 2 Low. 168; McLaughlin *v.* Simpson, 3 Stew. & Port. (Ala.) 85; Castly *v.* Towles, 46 Ala. 600; Tate *v.* Tate, 35 Ark. 289; Miller *v.* Jones, 39 Ill. 54; Freeman *v.* Freeman, 136 Mass. 260; Cheeseman *v.* Wiggins, 1 Thomp. & C. 595; Grim's Appeal, 105 Pa. St. 375, 382; Tillinghast *v.* Champlin, 4 R. I. 173; Watkins *v.* Fakes, 5 Heisk. 185; Jennings *v.* Chandler, 10 Wis. 21.

[2] Griffith *v.* Vanheythuysen, 9 Hare, 85; Smith *v.* Bryson, Phil. (N. Ca.) Eq. 267.

[3] In Worthy *v.* Brower, 93 N. Ca. 344; Hutton *v.* Laws, 55 Iowa, 710.

[4] Newell *v.* Humphrey, 37 Vt. 265.

[5] Davies *v.* Davies, 2 Keen, 539; Tate *v.* Tate, 35 Ark. 289; Hutton *v.* Laws, 55 Iowa, 710; Rosenzweig *v.* Thompson, 66 Md. 593; Hyer *v.* Burdett, 1 Edw. Ch. 325; Ludlow *v.* Cooper, 4 Oh. St. 1, 15; Vienne *v.* McCarty, 1 Dall. 154; Harrison *v.* Righter, 11 N. J. Eq. 389; Stainton *v.* Carron Co. 18 Beav. 146.

vidual estate of the decedent is seeking to compel the executor to come to an account of the separate estate, an inquiry into the account between it and the partnership estate can be entered into, not because a debtor to the private estate can be made a party,[1] but in order that the account of the separate estate may be final and entire, without rendering any judgment subjecting the partnership estate.[2]

The widow of a deceased partner whose husband, holding separate estate as trustee for her, mingled it with the partnership funds, can require an accounting from the surviving partners.[3]

2. Where an executor is also a surviving partner, a legatee or other person entitled to an accounting of the private estate can sue him in both capacities for an accounting in case of mismanagement or misappropriation of assets, whether it be to secure the balance or relieve the separate estate from liability for partnership debts.[4]

3. Where there is fraud or collusion between the executor and the surviving partner, a person entitled to an accounting of the separate estate can follow the assets; that is, he can make a debtor of the estate a party, and hence can join the surviving partners and compel them to account.[5]

§ 926. Fraud and collusion are, however, not the only grounds; there may be special circumstances in all cases which would induce a court of equity to grant an accounting. As stated by the vice-chancellor,[6] such an order "may

[1] The general rule, independent of partnership law, being that a debtor of the estate cannot be made party in a suit against the administrator. See Williams on Executors, 2021.

[2] Newland *v.* Champion, 1 Ves. Sr. 105; Harrison *v.* Righter, 11 N. J. Eq. 389, 392; Hamersley *v.* Lambert, 2 Johns. Ch. 508.

[3] Dent *v.* Slough, 40 Ala. 518.

[4] Pointon *v.* Pointon, L. R. 12 Eq. 547; Cropper *v.* Knapman, 2 Y. & C. Ex. 338; s. c. 6 L. J. N. S. Ex. Eq. 9; Stewart *v.* Burkhalter, 28 Miss. 376; Boyle *v.* Boyle, 4 B. Mon. 570; Fiske *v.* Hills, 11 Biss. 294; Hyer *v.* Burdett, 1 Edw. Ch. 325, but this case requires some collusion or necessity to exist even where the administrator is a survivor. And see Sanderson *v.* Sanderson, 17 Fla. 820, and Forward *v.* Forward, 6 Allen, 494.

[5] Newland *v.* Champion, 1 Ves. Sr. 105; Seeley *v.* Boehm, 2 Madd. 176, 180.

[6] Travis *v.* Milne, 9 Hare, 141, 150, where the executors became partners with the survivors, and an accounting was required of the partnership estate.

be supported in all cases where the relation between the executors and surviving partners is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners."[1] So where, though no collusion, there was wilful negligence in permitting the business to be continued with the assets of the estate.[2]

But it seems that mere refusal of the executor to sue the surviving partners is not sufficient to give the legatee or private creditor a right to do so, without special circumstances from which the court may deem it necessary for the protection of the claimant.[3]

§ 927. Assignee, purchaser or mortgagee of share of one partner.— An assignee or purchaser of the interest of a partner can have a bill for an accounting against the remaining partners if they refuse to render an account.[4]

[1] Stainton *v.* Carron Co. 18 Beav. 146; and see Law *v.* Law, 2 Coll. 41; Gedge *v.* Traill, 1 Russ. & My. 281; Forward *v.* Forward, 6 Allen, 494; Rosenzweig *v.* Thompson, 66 Md. 593.

[2] Bowsher *v.* Kirby, 1 Russ. & M. 277. It was said in Davies *v.* Davies, 2 Keen, 534, that Bowsher *v.* Watkins does not say that fraud and collusion are not necessary. The decision in Davies *v.* Davies was that a charge of unfair valuation of the partnership stock was not sufficient, for *non constat* but that the final account may have been fair.

[3] Yeatman *v.* Yeatman, 7 Ch. D. 210, denying a statement of the vice-chancellor found in Hilliard *v.* Eiffe, L. R. 7 H. L. 39, 44. *Contra*, that neglect or refusal by the administrator entitles the distributee to sue, Ravenscraft *v.* Pratt, 22 Kan. 20; and the question was raised, but not decided, in Dampf's Appeal, 106 Pa. St. 72.

[4] Fawcett *v.* Whitehouse, 1 R. & M. 132; Redmayne *v.* Forster, L. R. 2 Eq. 467; Claggett *v.* Kilbourne, 1 Black, 346; Mathewson *v.* Clarke, 6 How. 122; Bank *v.* Railroad Co. 11 Wall. 624; Farley *v.* Moog, 79 Ala. 148; Nichol *v.* Stewart, 36 Ark. 612; Miller *v.* Brigham, 50 Cal. 615; Strong *v.* Clawson, 10 Ill. 346; Gyger's Appeal, 62 Pa. St. 73 (1 Am. Rep. 382); Stiness *v.* Pierce, 12 R. I. 452; Driggs *v.* Morely, 2 Pin. (Wis.) 403; 2 Chand. 59. And see Donaldson *v.* Bank of Cape Fear, 1 Dev. Eq. 103 (18 Am. Dec. 577); Fellows *v.* Greenleaf, 43 N. H. 421. Sir N. Lindley, Partnership, p. 698, says there is no doubt as to this right, and that the analogy furnished by subpartnerships leads to the inference that the assignee must be satisfied with the share of profits given to the assignor. The analogy, however, is very imperfect, for a subpartnership is confessedly an assignment of the surplus when ascertained, while an assignment of a share purports to be a conveyance of the surplus prior to its ascertain-

A mortgagee of the interest of one partner may, in his action to foreclose, also ask an accounting to determine his mortgagor's interest in the firm, instead of foreclosing first and instituting another suit for an accounting,[1] though he be an assignee holding the interest as security only.[2] So of the assignee of an assignee.[3] That the assignor cannot also be a party has been held.[4]

§ 928. **Sale of share on execution.**— The purchaser on execution of the interest of one partner can maintain such bill to ascertain what that interest is.[5] And the debtor partner whose interest was sold also has a right to an accounting, for he may still have an interest, inasmuch as the sheriff cannot sell book debts.[6]

Or a judgment creditor of one partner on execution against his interest before sale has been allowed to sustain a bill in the nature of a bill to marshal liens and sell.[7]

ment, Glyn *v.* Hood, 1 Giff. 328; 1 De G. F. & J. 334; Kelly *v.* Hutton, L. R. 3 Ch. App. 703.

[1] Bentley *v.* Bates, 4 Y. & C. Ex. 182; Churchill *v.* Proctor, 31 Minn. 129; Smith *v.* Evans, 37 Ind. 523; Huston *v.* Neil, 41 id. 504; Receivers of Mechanics' Bank *v.* Godwin, 5 N. J. Eq. 334. And the court may withhold sale under foreclosure until the interest of the mortgagor is ascertained, Receivers of Mechanics' Bank *v.* Godwin, 5 N. J. Eq. 334.

[2] Buford *v.* Neely, 2 Dev. (N. Ca.) Eq. 481; Wallace's Appeal, 104 Pa. St. 559. But as such an assignment is not a dissolution (§ 586), it would seem that the assignor would also have a right to an accounting. See Du Pont *v.* McLaran, 61 Mo. 502.

[3] Pendleton *v.* Wambersie, 4 Cranch, 73.

[4] Dayton *v.* Wilkes, 5 Bosw. 655. But in two cases where he had begun the suit before the assignment he was allowed to remain as co-plaintiff with the assignee, Nichol *v* Stewart, 36 Ark. 612; Gyger's Appeal, 62 Pa. St. 73 (1 Am. Rep. 382).

[5] Chapman *v.* Koops, 3 B. & P. 289, 290; Dutton *v.* Morrison, 17 Ves. 193, 205; Clagett *v.* Kilbourne, 1 Black, 346; Farley *v.* Moog, 79 Ala. 148; Commercial Bank *v.* Mitchell, 58 Cal. 42; Witter *v.* Richards, 10 Conn. 37; Newhall *v.* Buckingham, 14 Ill. 405; Hubbard *v.* Curtis, 8 Iowa, 1; Barrett *v.* McKenzie, 24 Minn. 20; Treadwell *v.* Brown, 41 N. H. 12; Clement *v.* Foster, 3 Ired. (N. Ca.) Eq. 213; Nixon *v.* Nash, 12 Oh. St. 647; Knerr *v.* Hoffman, 65 Pa. St. 126; Duborrow's Appeal, 84 id. 404; Bank *v.* Gray, 12 Lea (Tenn.), 459.

[6] Habershon *v.* Blurton, 1 De G. & Sm. 121.

[7] Wilson *v.* Strobach, 59 Ala. 488, 493; Commercial Bank *v.* Mitchell, 58 Cal. 42; Witter *v.* Richards, 10 Conn. 37; Treadwell *v.* Brown, 41 N. H. 12; Clement *v.* Foster, 3 Ired. Eq. 213; Nixon *v.* Nash, 12 Oh. St. 647.

And the solvent partner also, in case of such levy, can in many jurisdictions stay the sale and have an accounting.[1]

A subpartner cannot maintain a bill for an accounting against the principal firm.[2]

§ 929. Creditor at large.— Although the general rule is that a general creditor of the firm, that is, a creditor who has no lien, like the creditor of an individual who has no judgment, cannot subject the property of the firm, nor ask an accounting, injunction or receiver, yet certain courts have, in case of the death of a partner, regarded the surviving partners as trustees, as giving the creditor the right of a lienholder to file a bill to compel a winding up of the partnership affairs, and for injunction and receiver, and have pursued the same reasoning to the same conclusion in cases of insolvency.[3]

The general rule is, however, decidedly the other way.[4] And a general creditor was expressly held to have no such right.[5]

[1] § 1109.

[2] § 163.

[3] Fitzpatrick *v.* Flannagan, 106 U. S. 648, 656; *Re* Clap, 2 Lowell, 68; Fiske *v.* Gould, 12 Fed. Rep. 372; s. c. as Fiske *v.* Hills, 11 Biss. 294; Johnston *v.* Straus, 26 Fed. Rep. 57; s. c. as Johnson *v.* Straus, 4 Hughes, 621, under the Virginia statute; Fink *v.* Patterson, 21 Fed. Rep. 602; Pearson *v.* Keedy, 6 B. Mon. 128 (43 Am. Dec. 160); Jones *v.* Lusk, 2 Met. (Ky.) 356; Caldwell *v.* Bloomington Mfg. Co. 17 Neb. 489; Washburn *v.* Bank of Bellows Falls, 19 Vt. 278; Bardwell *v.* Perry, 19 Vt. 292, 302-3 (47 Am. Dec. 687); and the same rule was applied to a partner who bought out the copartners, agreeing to pay the debts, in Conroy *v.* Woods, 13 Cal. 626. See § 551. In Davis *v.* Grove, 2 Robt. (N. Y.) 134, 635; 27 How. Pr. 70, the assignee in insolvency of one member of a firm was proceeding to apply partnership funds to pay individual debts, and the general creditors obtained an injunction and receiver. S. P. Sanderson *v.* Stockdale, 11 Md. 563, granting injunction against a fraudulent conveyance. A mere allegation of insolvency and inability or unwillingness to pay, or apprehension of misuse of assets, is not sufficient, Jones *v.* Lusk, 2 Met. (Ky.) 356; Guyton *v.* Flack, 7 Md. 398.

[4] See § 560.

[5] In Reese *v.* Bradford, 13 Ala. 837; Freeman *v.* Stewart, 41 Miss. 138; Young *v.* Frier, 9 N. J. Eq. 465; Mittnight *v.* Smith, 17 id. 259; Greenwood *v.* Brodhead, 8 Barb. 593; Clement *v.* Foster, 3 Ired. Eq. 213.

DEFENDANTS.

§ 930. All partners are actors and necessary.— In a suit for an accounting, all the partners or their representatives must be made parties plaintiff or defendant, whether dormant or ostensible, for all are actors and each may have claims, whether solvent or insolvent, and each has a lien to have the debts paid. Relief is not granted to the complainant alone, but the entire affairs of the partnership are to be settled. Moreover a decree without the presence of all would not bind those not made parties.[1]

As all the partners are actors, or in effect all plaintiffs, the decree will be in favor of the defendant if the account so stands.[2]

And the complainant cannot dismiss the suit, although the defendant has not in his answer averred that a balance would be found due him or filed a counter-claim;[3] or is in default.[4]

§ 931. Successors in interest.— Hence the representatives of a deceased partner must be made parties,[5] but not heirs

[1] Hills *v.* Nash, 1 Ph. 594; Bank *v.* Railroad Company, 11 Wall. 624; Gray *v.* Larrimore, 2 Abb. (U. S.) 512; Settembre *v.* Putnam, 30 Cal. 490; Young *v.* Allen, 52 id. 466; Wells *v.* Strange, 5 Ga. 22; Johnston *v.* Preer, 51 id. 313; Derby *v.* Gage, 38 Ill. 27; Stevenson *v.* Mathers, 67 id. 123; Westphal *v.* Henney, 49 Iowa, 542; Dozier *v.* Edwards, 3 Litt. (Ky.) 67; Pratt *v.* McHatton, 11 La. Ann. 260; Francis *v.* Lavine, 21 La. Ann. 265; Fuller *v.* Benjamin, 23 Me. 255; Grove *v.* Fresh, 9 Gill & J. 280; McKaig *v.* Hebb, 42 Md. 227; Jenness *v.* Smith, 58 Mich. 280; Wickham *v.* Davis, 24 Minn. 167, 168; Raymond *v.* Putnam, 44 N. H. 160, 171; s. c. as Raymond *v.* Came, 45 id. 201; Cummings *v.* Morris, 25 N. Y. 625; Arnold *v.* Arnold, 90 id. 580; Allison *v.* Davidson, 2 Dev. (N. Ca.) Eq. 79; Waggoner *v.* Gray, 2 Hen. & M. (Va.) 603; and see § 938.

[2] Saunders *v.* Wood, 15 Ark. 24; Felder *v.* Wall, 26 Miss. 595; Scott *v.* Pinkerton, 3 Edw. Ch. 70, and cases under § 938.

[3] Hutchinson *v.* Paige, 67 Wis. 206.

[4] Fisher *v.* Stovall (Tenn.), 2 S. W. Rep. 567. The plaintiff seems to have been allowed to dismiss, in Dale *v.* Kent, 58 Ind. 584. And has the right to do so, unless manifestly prejudical to the defendant, where the referee's report shows that a full settlement has been had, as by arbitration or otherwise, Worthington *v.* White, 42 Mo. 462.

[5] Burchard *v.* Boyce, 21 Ga. 6; Frederick *v.* Cooper, 3 Iowa, 171; Fuller *v.* Benjamin, 23 Me. 255; Jenness *v.* Smith, 58 Mich. 280; Whitney *v.* Cotten, 53 Miss. 689; Walken-

or distributees;[1] and if a partner becomes bankrupt, his assignees must be made defendants as representing his share.[2]

If a partner has assigned his interest he is a necessary party nevertheless, for he may be found indebted to the firm, and a discovery from him may be desired whether the suit be by his assignee or by one of the others against the assignee.[3] But if a retired partner has not retained his lien to have assets applied to debts he is not a necessary though he may be a proper party.[4]

The purchaser or assignee of a partner's interest is also a necessary party to protect his own rights.[5]

But when a person was admitted as partner in a branch of the business, and all the others afterwards bought him out, he is not a necessary party to a subsequent accounting between the latter, as he is not interested either as debtor or creditor.[6]

And in an action between the purchaser of a share and the partner who sold it, in regard to the sale, the other partners are not proper parties, for they have no concern in the controversy.[7]

And so if the controversy be between the several partners who have contracted to sell their shares for a distribution of the purchase money, the other partners not affected by the result are not proper parties.[8]

§ 932. If the suit for dissolution is on the ground of a fraudulent sale by one partner to a third person, the fraudulent vendee may be made a party to compel the just appropriation of the assets and avoid circuity of action, and so of any person who has confederated with the defendant to

shaw *v.* Perzel, 4 Robt. 426; 32 How. Pr. 233.

[1] Moore *v.* Huntington, 17 Wall. 417.

[2] Fuller *v.* Benjamin, 23 Me. 255.

[3] Bank *v.* Railroad Co. 11 Wall. 624; Settembre *v.* Putnam, 30 Cal. 490; Wright *v.* Ward, 65 id. 525; Bracken *v.* Kennedy, 4 Ill. 558, 563; Ogden *v.* Arnot, 29 Hun, 146; Raiguel's Appeal, 80 Pa. St. 234, 250; Bartlett *v.* Parks, 1 Cush. 82.

[4] Jones *v.* Clark, 42 Cal. 180; Howell *v.* Harvey, 5 Ark. 270 (39 Am. Dec. 376).

[5] Settembre *v.* Putnam, 30 Cal. 490; Rosenstiel *v.* Gray, 112 Ill. 282; White *v.* White, 4 Md. Ch. 418; Glynn *v.* Phetteplace, 26 Mich. 383. See Hayes *v.* Heyer, 4 Sand. Ch. 485; Buford *v.* Neely, 2 Dev. (N. Ca.) Eq. 481.

[6] Warren *v.* Warren, 56 Me. 360.

[7] See § 595.

[8] Butterfield *v.* Beardsley, 28 Mich. 412.

defraud the other partners or those to whom the defendant has conveyed partnership property.[1] But otherwise creditors of the firm are not either necessary or proper parties.[2]

Hence if one firm is indebted to another, having a common partner with it, a suit for an accounting and settlement of the former firm need not make the other partners of the latter defendants.[3]

Though the title to the property of the partnership be in a single partner the rest are necessary parties.[4]

Even an incoming partner may be a proper defendant.[5]

So if the suit be by a creditor to subject his debtor's interest in the firm, the other partners are necessary parties.[6]

In Rhodes *v.* Williams, 12 Nev. 20, where in an accounting the question was whether certain real estate was partnership property or was the homestead of one partner, the latter's wife was held a necessary party.

§ 933. A purchaser of part of the interest of a partner seeking merely an ascertainment and conveyance of the share sold need only make his vendor party.[7] And a partner induced to sell his interest by fraudulent representations, seeking to set aside the sale and for an accounting, need only make those persons parties who participated in the fraud and are possessed of the property equitably belonging to him; the others are not interested or affected.[8]

Third persons, who have guarantied the fulfillment by one partner of his obligations to the firm, cannot be compelled to submit to the suit for an accounting or be charged therein, their rights being that of sureties and not principals.[9]

Where the partners are too numerous to be brought on the record it has been held that a decree could nevertheless be made, for

[1] Pennyman *v.* Jones, 58 N. H. 647; Wade *v.* Rusher, 4 Bosw. 537; Webb *v.* Helion, 3 Robt. (N. Y.) 625; Palmer *v.* Tyler, 15 Minn. 106. And see Bartlett *v.* Parks, 1 Cush. 82; Chalk *v.* Bank, 87 N. Ca. 200. And see § 545.

[2] Hoxie *v.* Carr, 1 Sumn. 173; Gridley *v.* Conner, 2 La. Ann. 87.

[3] Howell *v.* Harvey, 5 Ark. 270 (39 Am. Dec. 376). See Corner *v.* Gilman, 53 Md. 364.

[4] Wells *v.* Strange, 5 Ga. 22; Stevenson *v.* Mathers, 67 Ill. 123.

[5] Gates *v.* Fraser, 6 Ill. App. 229; Near *v.* Lowe, 49 Mich. 482.

[6] Westphal *v.* Henney, 49 Iowa, 542.

[7] Settembre *v.* Putnam, 30 Cal. 490.

[8] Berkey *v.* Judd, 22 Minn. 287; Hirsch *v.* Adler, 21 Ark. 338.

[9] Bissell *v.* Ames, 17 Conn. 121.

as the rule requiring all partners to be parties was made by the courts and not by statute, it is a matter of policy and convenience and not of jurisdiction.[1]

A partner who is out of the state is a necessary party although his whereabouts is unknown;[2] but where the non-resident has received his share, the residents can be sued alone without joining the others.[3]

The presence of supernumerary parties, however, will not render the bill demurrable. For those who are not found to be partners can be dismissed and relief be granted against the others.[4]

If the partnership itself has assigned in insolvency, as it is no part of the assignee's duty to settle equities between the partners, this ought not to interfere with the granting of an account between the partners.[5]

§ 934. Multifariousness.— Whether the court will entertain a bill to settle the accounts of more than one firm is not solely a question of convenience. Such a bill has been held multifarious, where the partners were not the same in each firm, because the court will not burden or delay the defendant with the disadvantage and expense of taking the accounts of a partnership with which he has nothing to do, even though the firms were successors of each other.[6]

On the other hand it has been suggested that the concerns of two co-existing firms, in both of which the parties to the suit were members, may be so blended that the accounts of both should be taken at once;[7] and the managing partner of two successive firms,

[1] Stimson *v.* Lewis, 36 Vt. 91.

[2] Wright *v.* Ward, 65 Cal. 525. It was hinted, however, in Fuller *v.* Benjamin, 23 Me. 255, 258, that if some of the partners were out of the state there was no remedy.

[3] Towle *v.* Pierce, 12 Met. 329 (46 Am. Dec. 679).

[4] Bass *v.* Taylor, 34 Miss. 342; Hoard *v.* Clum, 31 Minn. 186.

[5] Nevertheless, in Kuehnemundt *v.* Haar, 58 How. Pr. 464, it seems to have been held that the suit would not lie because the assignee has all the assets.

[6] White *v.* White, 5 Gill, 359, dismissing the bill *in toto* and not allowing election; Sanborn *v.* Dwinell, 135 Mass. 256, where in a partnership between plaintiff and several successive firms each of the latter defrauded the principal firm by selling to it adulterated goods; Crooks *v.* Smith, 1 Grant's Ch. (Up. Can.) 356; Corner *v.* Gilman, 53 Md. 364; Brewer *v.* Norcross, 17 N. J. Eq. 219; Rheam *v.* Smith, 2 Ph. 726.

[7] Brewer *v.* Norcross, 17 N. J. Eq. 219.

whose assets had been mingled, was compelled to account for the profits of both;[1] and three or four partnerships between two persons were settled on bill by the administrator of one against the other partner.[2]

§ 935. Creditors' rights.—Under a bill for an accounting and to wind up a partnership, the partners have the right to have creditors paid; hence actions at law by the creditors are not necessary, but their claims may be filed with the receiver;[3] or the creditors may be allowed to come into court to establish their claims, the court taking jurisdiction in order to settle all matters, although the creditors could not have gone into equity in the first instance.[4]

The creditors may intervene to reach and share the proceeds of a fraudulent sale and conversion of partnership property by the partners.[5] And it has been held that they have an interest in the proceeding, so far that the plaintiff and defendant cannot dismiss it without their consent, or, if this is done, that creditors, though not parties to it, may have the dismissal set aside.[6] And the court may refuse to allow the partners to settle part of the controversy by a contract for a give or take offer for part of the property, if it be deemed more expedient to keep the property unchanged until settlement.[7]

But a personal judgment in favor of creditors has been held to be foreign to the purposes of the suit, and, therefore, cannot be had, and a finding by the referee of the amounts due them is not a personal judgment upon which an action of debt will lie;[8] yet in Updike *v.* Doyle, 7 R. I. 446, it was said that creditors would be enjoined from proceeding at law to collect their debts after bill to wind up has been filed.

After the court has taken jurisdiction by the appointment of a receiver, creditors cannot, by pursuing their remedy at law, acquire

[1] In Warthen *v.* Brantley, 5 Ga. 571.

[2] In Adams *v.* Kable, 6 B. Mon. 384 (44 Am. Dec. 772). And see Burchard *v.* Boyce, 21 Ga. 6; Jefferys *v.* Smith, 3 Russ. 158; Chaffin *v.* Chaffin, 2 Dev. & Bat. Eq. 255.

[3] Holloway *v.* Turner, 61 Md. 217.

[4] Washburn *v.* Goodman, 17 Pick. 519; Grossini *v.* Perazzo, 66 Cal. 545; Updike *v.* Doyle, 7 R. I. 446.

[5] Grossini *v.* Perazzo, 66 Cal. 545.

[6] Updike *v.* Doyle, 7 R. I. 446.

[7] Buckingham *v.* Ludlum, 29 N. J. Eq. 345, 360.

[8] Seligman *v.* Kalkman, 17 Cal. 152; Wallace *v.* Milligan, 110 Ind. 498.

a priority on distribution.[1] But in jurisdictions where the partners can unite to dismiss the case and discharge the receiver, it has been held that creditors could sue at law and acquire a priority up to the time of decree.[2]

PLEADING.

§ 936. Without entering upon the subject of equity pleading, it may be well to state one or two principles and preserve here a few decisions under the simplified American practice on the subject of bills for accounting. The salient facts to be alleged are: a partnership and transaction of business as partners; its dissolution, or facts entitling the complainant to a dissolution; unsettled accounts, and ask for a dissolution, if none has been had, and an accounting. These facts appearing, the bill is not demurrable, even though it be not stated how long the partnership was to continue, or its terms.[3]

Allegations that the defendant has all the books and papers in his possession will relieve the complainant of the degree of certainty and particularity that would be required if he had access to them.[4]

That the amount of capital, method of carrying on the business, and the leading facts and conditions entitling plaintiff to recover, should appear.[5] And transactions of one partner outside the scope of the business must be averred either to be in fraud of the firm or mutually agreed upon, in order to found a decree in favor of the other partner for an accounting in regard to them.[6]

That the partnership contract should be set out in order that the court may see whether there was a partnership and whether land was partnership property.[7]

[1] Rhodes *v.* Amsinck, 38 Md. 345; Holmes *v.* McDowell, 15 Hun, 585 (aff'd 76 N. Y. 596); Singerly *v.* Fox, 75 Pa. St. 112; Watkins *v.* Fakes, 5 Heisk. 185.

[2] Adams *v.* Woods, 8 Cal. 152; Naglee *v.* Minturn, 8 id. 540; Adams *v.* Hackett, 7 id. 187; Ross *v.* Titsworth, 37 N. J. Eq. 333.

[3] Young *v.* Pearson, 1 Cal. 448; Ludington *v.* Taft, 10 Barb. 447; Bracken *v.* Kennedy, 4 Ill. 558; Holladay *v.* Elliott, 3 Oregon, 340, 346; Dehority *v.* Nelson, 56 Ind. 414. And see Nims *v.* Nims (Fla.), 1 So. Rep. 527.

[4] Towle *v.* Pierce, 12 Met. 329 (46 Am. Dec. 679).

[5] Cooper *v.* Frederick, 4 G. Greene (Iowa), 403; s. c. as Frederick *v.* Cooper, 3 Iowa, 171.

[6] Drew *v.* Beard, 107 Mass. 64.

[7] Little *v.* Snedecor, 52 Ala. 167. And see Groves *v.* Tallman, 8 Nev. 178.

§ 937. It has been held that the complainant should state that an amount would be found due him, or at least a probable indebtedness.[1] But, obviously, no such limitation on the right to an accounting exists. A partner has the right to have the concern settled up, the assets applied to the debts, and his own debt and liability to contribute to pay, if he is a debtor, adjusted. It is not necessary that any balance be due him.[2] And for the same reason it is not necessary to aver that the defendant has possession of any assets or has any accounts to render, for the complainant is entitled to an accounting and to charge him with a share of any deficit.[3]

As relief will extend to a full accounting of the entire concern, the omission of items in the bill or answer is immaterial,[4] nor is proof that complainants are partners in a different proportion from that alleged material.[5]

§ 938. Nor is a cross-bill necessary to a decree to enable the defendants to have an account, nor to recover a balance if due them, or either of them;[6] yet, to compel a partner to account for a fraudulent use of assets, or failure of duty or unauthorized acts, allegations in the bill were held necessary.[7] An averment of willingness on the part of the plaintiff to do equity, or account for the assets received by him, is not necessary, for it is presumed;[8] and a cross-bill can, and undoubtedly should, be filed, in order that the defendant may obtain relief for breaches of contract or duty, which would not ordinarily appear as part of the account, nor be expected to exist.[9]

[1] Hunt *v.* Gorden, 52 Miss. 194; Kimble *v.* Seal, 92 Ind. 276.

[2] Sharp *v.* Hibbins, 42 N. J. Eq. 543; Cheeseman *v.* Wiggins, 1 Thomp. & C. 595.

[3] Carlin *v.* Donegan, 15 Kan. 495.

[4] Copeland *v.* Crane, 9 Pick. 73; Tyng *v.* Thayer, 8 Allen, 391.

[5] Knott *v.* Knott, 6 Oregon, 142, 151.

[6] Scott *v.* Pinkerton, 3 Edw. Ch. 70; Boyd *v.* Foot, 5 Bosw. 110; Johnson *v.* Buttler, 31 N. J. Eq. 35; Atkinson *v.* Cash, 79 Ill. 53; Craig *v.* Chandler, 6 Colorado, 543; Saunders *v.* Wood, 15 Ark. 24; Felder *v.* Wall. 26 Miss. 595, and cases under § 930.

[7] Levi *v.* Karrick, 13 Iowa, 344; Maher *v.* Bull, 44 Ill. 97.

[8] Columbian Government *v.* Rothschild, 1 Sim. 94, 103; Craig *v.* Chandler, 6 Colorado, 543; Smith *v.* Hazleton, 34 Ind. 481.

[9] See § 780.

The defendants must be averred to be members of the partnership; merely averring they have an interest in the assets is not sufficient.[1]

§ 939. **Prayer.**— The prayer ought to ask an accounting unless an account is averred.[2] It is sufficient to pray in substance that defendant be held to account.[3] But praying that defendant pay over half the net profits is equivalent to such a prayer, since an accounting is necessary to ascertain profits;[4] and a prayer for dissolution was held sufficient, since an accounting follows as a matter of course.[5]

The absence of a prayer for dissolution is immaterial, if both parties treat the partnership as at an end,[6] or if ground for dissolution is averred, and an accounting or general relief is prayed.[7] A prayer for an account of moneys and effects received by defendant, and of all other matters relating to the concern, is equivalent to a prayer for general relief,[8] and a sale will be ordered as part of the accounting, without a specific prayer for it.[9]

Where complainant alleged that, on dissolution, the debts and assets were apportioned among the partners, but that he had since paid more than his share, and that the debts exceeded the estimate, and one of the defendants denied the settlement, the court said that had it been shown that there was no settlement, the complainant must have failed, for neither he nor this defendant asked a general accounting, but only an accounting to carry out the settlement and supplementary to it.[10]

§ 940. A bill to administer partnership lands, the title to which is in the name of a deceased partner, it was held, should be framed on the theory of a settlement of accounts, so that creditors can present claims and proper distribution be had.[11] But no reasons

[1] Ruffner *v.* Hewitt, 14 W. Va. 737.
[2] Pope *v.* Salsman, 35 Mo. 362.
[3] Miller *v.* Lord, 13 Pick. 11, 27.
[4] Bennett *v.* Woolfolk, 15 Ga. 213; Burleigh *v.* White, 70 Me. 130.
[5] Cottle *v.* Leitch, 35 Cal. 434.
[6] Fairchild *v.* Valentine, 7 Robt. (N. Y.) 564.
[7] Hall *v.* Lonkey, 57 Cal. 80; Werner *v.* Leisen, 31 Wis. 169; Medwin *v.* Ditcham, 47 L. T. N. S. 250; Fairthorne *v.* Weston, 3 Hare, 387.
[8] Miller *v.* Lord, 11 Pick. 11.
[9] Lyman *v.* Lyman, 2 Paine, C. C. 11, 41.
[10] Edwards *v.* Remington, 60 Wis. 33, 38.
[11] Whitney *v.* Cotten, 53 Miss. 689.

for this are given in the case; and while partition would be refused perhaps if there are creditors, yet the surviving partner's right is to administer and convert assets into cash without interference, unless there is danger of waste.

After a bill for an accounting to a certain date at which the complainant sold his interest to another, an amended bill asking accounting to the present time, and averring the sale to be merely as security and not absolute, was held not inconsistent, but merely enlarging the measure of relief asked.[1]

In Emerson *v.* Durand, 64 Wis. 111, the complainant sued his copartner as executor, averring that his capital was held in the capacity of executor and in fact belonged to his daughters. This the defendant and his daughters denied and disproved. The court wound up the partnership without requiring any amendment.

A bill by an administrator, asking an accounting, and averring fraud in the omission of items in an account rendered by the defendant, was held not to be multifarious in asking an accounting and surcharging an account, but merely to show reasons why an accounting was asked.[2]

§ 941. **Answer.**[3]—The defendant may set out additional reasons for desiring a dissolution in addition to those charged in the bill.[4]

An answer admitting the partnership and averring additional terms in it, as that defendant was to receive a stated weekly salary, etc., is not to be treated as averring an independent fact not responsive, but as part of the facts set out in the bill.[5]

Where the petition avers a partnership in two railroad contracts and debts amounting to $2,000, an answer not denying the debts, but denying plaintiff to be a partner in the second contract, is not an admission of the debt; for the assertion of debt is dependent on the extent of the interest claimed, and the apparent admission is overthrown by denying plaintiff's position.[6]

DEFENSES — STATUTE OF LIMITATIONS.

§ 942. There being no statute of limitations in equity cases, and a suit for an accounting being an equity suit,

[1] Ingraham *v.* Foster, 31 Ala. 123.
[2] Harrison *v.* Farrington, 36 N. J. Eq. 107 (affd. 37 id. 316).
[3] See § 964.
[4] Griswold *v.* Hill, 1 Paine, C. C.
[5] Cresson's Appeal, 91 Pa. St. 168.
[6] Williams *v.* Hayes, 20 N. Y. 58.

courts have not been quite unanimous in determining under what principles lapse of time shall be a defense to a claim for an accounting.

The possession of partnership property by one partner, if a lawful possession, that is, if not obtained in fraud of the copartner's rights or by illegal conversion, is not a trust. A liquidating or surviving partner is very often called a trustee; and no doubt his relation to the firm, that is, to the creditors first and to his copartners for their balances, is a fiduciary one, in that he is not absolute owner of the assets and can be compelled to perform the duties affixed by law to his position; but as his copartner has no title in any specific articles, but merely a right to a share of surplus with a right to have that share ascertained, he is not a trustee for his copartner except in a metaphorical sense.

Courts of equity nevertheless adopt the principles of the statute of limitations in cases which are analogous to common law cases. Thus, as the common law action of account was subject to the statute, so equity, which in taking an account is applying a similar though more expensive remedy, will adopt or act in analogy to the statute, not only in cases where the action of account would have applied, and will not allow the statute to be avoided by the change of forum; but also to similar cases where it would not have applied, as to cases where there were several partners, or cases between a surviving partner and an executor. Other equity courts explain their adoption of the time limited in the statute by holding that the equity principle that the laches or lapse of time which will bar relief in equity will be measured by the analogous time under the statute in similar cases at law;[1] hence the equity doctrine, that the statute of limitations does not apply to express trusts, is out of the field of inquiry.

Hence it is held that the time prescribed in the statute of limitations for an action of account will bar the right to an

[1] See Lord Westbury's opinion in case); Pierce *v.* McClellan, 93 Ill. 245; Knox *v.* Gye, L. R. 5 H. L. 656 (but Johnson *v.* Ames, 11 Pick. 173. see Lord Hatherley's dissent in same

accounting in equity.[1] In such of the decisions in the foregoing note as are under codes where the statute applies to all civil actions, legal or equitable, the statute applies directly, and not by analogy.[2]

§ 943. Merchants' accounts.— The exception in the English statute and in those of several of our states, fixing a limit upon the time for bringing an action of account, except such accounts as concern trade or merchandise between merchant and merchant,[3] has no application to a suit between copartners for settlement and payment of balances.[4]

§ 944. Contrary cases.— On the other hand it has been held that no statute of limitations fixes a time, and that the only bar to an accounting was lapse of time, and this only

[1] Barber *v.* Barber, 18 Ves. 286; Knox *v.* Gye, L. R. 5 H. L. 656; Taylor *v.* Taylor, 28 L. T. 189; Noyes *v.* Crawley, 10 Ch. D. 31; Godden *v.* Kimmell, 99 U. S. 201; Bradford *v.* Spyker, 32 Ala. 134; Strange *v.* Graham, 56 id. 614; Brewer *v.* Browne, 68 id. 210; McGuire *v.* Ramsey, 9 Ark. 518 (*dictum*); Crane *v.* Barry, 60 Ga. 362 (*dictum*); Pierce *v.* McClellan, 93 Ill. 245; Quagle *v.* Guild, 91 id. 378; Bonney *v.* Stoughton, 18 Ill. App. 562; McCament *v.* Gray, 6 Blackf. 233; Taylor *v.* Morrison, 7 Dana, 241; King *v.* Wartelle, 14 La. Ann. 740; Succession of Parker, 17 id. 28; Wilhelm *v.* Caylor, 32 Md. 151; McKaig *v.* Hebb, 42 id. 227; Johnson *v.* Ames, 11 Pick. 173; Jenny *v.* Perkins, 17 Mich. 28; McClung *v.* Capehart, 24 Minn. 17; Prewett *v.* Buckingham, 28 Miss. 92; Coudrey *v.* Gilliam, 60 Mo. 86; Cowart *v.* Perrine, 18 N. J. Eq. 454; Todd *v.* Rafferty, 39 id. 251; Arnett *v.* Finney, 41 id. 147; Weisman *v.* Smith, 6 Jones (N. Ca.), Eq. 124; Blackwell *v.* Claywell, 75 N. Ca. 213; McKelvy's Appeal, 72 Pa. St. 409; Manchester *v.* Mathewson, 3 R. I. 237; Allen *v.* Woonsocket Co. 11 id. 288; Leavitt *v.* Gooch, 12 Tex. 95; Lockhart *v.* Lytle, 47 Tex. 452; Coalter *v.* Coalter, 1 Rob. (Va.) 79; McFadgen *v.* Stewart, 11 Grant's Ch. (Up. Can.) 272.

[2] See, for example, McClung *v.* Capehart, 24 Minn. 17.

[3] English: 21 Jac. I. c. 16, § 3; Ky.: ch. 71, art. III; N. J.: R. S. 594, § 1; Pa.: 2 Purdon, 926, § 18; R. I.: Stat. ch. 205, § 3.

[4] Codman *v.* Rogers, 10 Pick. 112; Wilhelm *v.* Caylor, 32 Md. 151; Leavitt *v.* Gooch, 12 Tex. 95; Spring *v.* Gray, 6 Pet. 151; Coster *v.* Murray, 5 Johns. Ch. 522. See McKelvy's Appeal, 72 Pa. St. 409, 412, also, Coalter *v.* Coalter, 1 Rob. (Va.) 79, where the court seems to have misunderstood the question, and supposed it to be not whether the statute was excluded from applying to partnership accounts, but whether a new item in the account kept the right to an accounting alive; the former and not the latter is the disputed point.

when loss of papers or witnesses, or failure of memory, prevented a just settlement.[1]

Thus it is held that no statute of limitations applies, and lapse of time bars only in analogy to the statute, by force of a presumption of settlement, which is rebutted where the plaintiff had sued at law and failed because of seeking the wrong remedy, and therefore such time would be deducted.[2]

In Chouteau *v.* Barlow, 110 U. S. 238, a firm formed in 1842 dissolved in 1852, and a bill for an accounting filed in 1876 was held under the circumstances of the case not to be barred, either by laches or any statute of limitations.

In Eakin *v.* Knox, 6 S. Ca. 14, a firm dissolved in 1861, and partial settlements were made; in 1863 plaintiff paid a debt of the firm, but never mentioned it to the defendant, and in 1870 began this suit for contribution. The statute of limitations had been suspended during the war, until December, 1866, or January, 1867, as to debts made during the war, but it was held that the statute was not applicable, and the plaintiff not being chargeable with laches tending to prejudice the defendant the suit was sustained.

§ 945. When the statute begins to run.— From the foregoing doctrine, that partners engaged in winding up are not trustees, it would seem to follow that the statute of limitations would begin to run from dissolution. And apart from the large class of cases described in section 949, it is held that time begins immediately after the firm has been dissolved.[3]

In McKelvy's Appeal, 72 Pa. St. 409, a firm composed of M., J. B. & T. B. dissolved in 1854, by assignment of all their property for benefit of creditors. In 1867, M. sued T. B. for an accounting, much of M.'s real estate having been sold to pay partnership debts. It was held that as T. B. was not a liquidating partner, the six years' limitation barred any right to an accounting, and there is no reason, or justice, or principle, by which it should be otherwise. That T. B. by the articles was to act as the legal and financial

[1] Rencher *v.* Anderson, 95 N. Ca. 208; Bolton *v.* Dickens, 4 Lea, 569; McEwen *v.* Gillespie, 3 id. 204, 206; Miller *v.* Harris, 9 Baxter, 101.

[2] Spear *v.* Newell, 13 Vt. 288.

[3] Knox *v.* Gye, L. R. 5 H. L. 656; Pierce *v.* McClellan, 93 Ill. 245; McKaig *v.* Hebb, 42 Md. 227; McKelvy's Appeal, 72 Pa. St. 409; Allen *v.* Woonsocket Co. 11 R. I. 288. See, also, Coalter *v.* Coalter, 1 Rob. (Va.) 79.

manager does not make him such in fact after the dissolution. M.'s payments on partnership account gave him only a right to contribution for that, and does not open up the whole partnership, unless it appears that the general account was still open. Whether the general account is kept open by items of debit and credit after dissolution was held to be a question not raised on the pleadings.

The statute does not begin to operate until dissolution, for prior to that time there is no right to demand an account.[1]

It does not begin to run merely from the time the business has stopped, in the absence of dissolution or the exclusion of a partner, as where the partners are managing the concern, intending to open business again.[2] But the delay may be such as to amount to a dissolution in fact, although there was no expressed dissolution.[3]

§ 946. —— **special circumstances.**—Subsequent acknowledgments of the liability to account, or continued recognition of the other partner's right to require a settlement, will have the same effect to prevent the bar of the statute that subsequent promises would in the case of an ordinary debt.

Where the surviving partner, and the widow and administratrix of the deceased partner, several times during the six years following the death, submitted the accounts to arbitration, but the award failed for some reason not stated, the right of the administratrix to an accounting was held to be preserved from the statute, by these continued admissions of liability to account.[4] But an agreement to submit differences to arbitrators, without limit as to time, cannot keep any claim that might have been included alive for the purpose of a suit indefinitely.[5] Nor will offers of a partner to submit to arbitration and declarations of readiness to account deprive the other partner or his executor of the benefit of the statute.[6] An interlocutory order, referring matters to an auditor to take the account, not having settled any right or declared any principle on which it is to be stated, leaves the whole case open

[1] Chandler *v.* Chandler, 4 Pick. 78; Askew *v.* Springer, 111 Ill. 662. And see Harris *v.* Hillegass, 54 Cal. 463.

[2] Allen *v.* Woonsocket Co. 11 R. I. 288.

[3] Harris *v.* Hillegass, 54 Cal. 463.

[4] Shelmire's Appeal, 70 Pa. St. 281.

[5] Cowart *v.* Perrine, 18 N. J. Eq. 454.

[6] Burden *v.* McElmoyle, Bail. S. Ca. (Eq.) 375.

for the final hearing, and it may still be dismissed as barred by limitation.[1]

§ 947. The statute does not run in case of fraud or concealment not discovered.[2] Nor does it run against a partner's right to follow funds abstracted by the defendant partner, for as to these he is a trustee.[3]

So where a surviving partner did not know of the deceased partner's having received moneys on partnership account.[4]

If after dissolution by death, and a division of the stock on hand, the surviving partner agrees to collect the debts and pay over the decedent's share, the claim for such share is not founded upon the indenture of partnership, but upon the parol promise, and is barred by the statute applicable to parol promises.[5]

§ 948. So after the statute of limitations has barred a right to an accounting, subsequent receipts of money on partnership account may be reached, although prior items are closed.[6] And the right to land, bought with partnership funds by one partner in his own name, is not barred by the loss of the right to an accounting.[7] Where the surviving partner is also executor, the statute of limitations to bar an accounting does not begin to run until his administration is terminated.[8]

The surviving partner's claim against the executor of his deceased copartner for an accounting is barred in four years.[9]

If the partner's death does not occur until after dissolution his administrator has an additional time for filing a bill for an accounting.[10]

§ 949. —— **doctrine that time runs only from the last item.**—There is a further class of decisions, however, and

[1] Wilhelm *v.* Caylor, 32 Md. 151.

[2] Todd *v.* Rafferty, 30 N. J. Eq. 254.

[3] Partridge *v.* Wells, 30 N. J. Eq. 176.

[4] Sanderson *v.* Sanderson, 17 Fla. 820.

[5] Codman *v.* Rogers, 10 Pick. 112.

[6] See Knox *v.* Gye, L. R. 5 H. L. 656; Taylor *v.* Morrison, 7 Dana, 241.

[7] McFadgen *v.* Stewart, 11 Grant's Ch. (Up. Can.) 272; McGuire *v.* Ramsey, 9 Ark. 518; Baird *v.* Baird, 1 Dev. & Bat. Eq. 524; Brewer *v.* Browne, 68 Ala. 210.

[8] Whiting *v.* Leakin (Md.), 7 Atl. Rep. 688.

[9] Burdett *v.* Grew, 8 Pick. 108.

[10] Chandler *v.* Chandler, 4 Pick. 78.

that is, when does time begin to run, when upon dissolution there are debits to be paid and credits to be collected.

In England, there is a statute (19 and 20 Vic. c. 97) preventing a prolongation of time "by reason only of some other matter or claim comprised [1] in the same account, having arisen within six years next before the commencement of such action or suit."

In this country there are a number of decisions under the various statutes that the statute of limitations, to bar an accounting of partnership affairs, does not begin to run until those affairs as to the debtors and creditors of the concern are settled, or at least until a sufficient time has elapsed since dissolution to raise the presumption that such was the fact; and where assets have been collected, or an item of debit or credit by the liquidating partner has been made within the period of the statute, there is no bar, for until affairs are so closed that a partner can ask an account he is not guilty of laches for not so doing.[2]

This doctrine was held to apply to prevent time from beginning to run when there was partnership property outstanding undisposed of in the hands of a third party until a sufficient time for demand for settlement;[3] or where the plaintiff had recovered a

[1] The word "comprised" was said by Lord Westbury, in Knox *v.* Gye, L. R. 5 H. L. 673, to be equivalent to "that would have been comprehended in, that is, that would have been an item in the account demanded;" and he says "the statute was directed against the erroneous notion that an account which had been barred by the lapse of six years after the last entry in the account might be considered as opened and revived by the receipt of a subsequent sum of money more than six years after the date of the last entry."

[2] Hammond *v.* Hammond, 20 Ga. 556; Prentice *v.* Elliott, 72 id. 154; Richards *v.* Grinnell, 63 Iowa, 44 (50 Am. Rep. 727); Holloway *v.* Turner, 61 Md. 217; McClung *v.* Capehart, 24 Minn. 17; Todd *v.* Rafferty, 30 N. J. Eq. 254; Patterson *v.* Lilly, 90 N. Ca. 82, 88; Montgomery *v.* Montgomery, Rich. Eq. Cas. (S. Ca.) 64; Marsteller *v.* Weaver, 1 Gratt. 391; Foster *v.* Rison, 17 id. 321; Jordan *v.* Miller, 75 Va. 442; Sandy *v.* Randall, 20 W. Va. 244; Boggs *v.* Johnson, 26 id. 821; Storm *v.* Cumberland, 18 Grant's Ch. (Up. Can.) 245. See, also, Brewer *v.* Browne, 68 Ala. 210; Massey *v.* Tingle, 29 Mo. 437; Coudrey *v.* Gilliam, 60 id. 86.

[3] Richards *v.* Grinnell, 63 Iowa, 44 (50 Am. Rep. 727); Askew *v.* Springer, 111 Ill. 662.

judgment against a debtor of the firm within two years;[1] or where good debts due the firm were outstanding within five years;[2] or where there are valid claims of debit and credit due by or to the firm unsettled;[3] nor does mere delay constitute laches or stale demand in such case.[4]

§ 950. —— **adverse possession.**— Under this theory the liquidating or surviving partner is acting for all the partners, and his possession is not adverse until a renunciation by him, or so long as the postponement of a final settlement is consistent with a faithful discharge of his duties;[5] but a statement of accounts as being final or in full settlement terminates the agency or fiduciary relation and the adverse claim begins.[6]

§ 951. —— **demand.**— A demand for a settlement was said not to be necessary, and its omission would only affect costs, and not those if the partners are so disagreed as to render it a fruitless formality.[7]

Other cases regard a demand for a settlement as necessary to put the statute of limitations in operation;[8] but even here there must be some limitation to the right to make a demand. It must be made in a reasonable time, otherwise the claim is considered stale. What is a reasonable time is not settled by any precise rule and must depend on circumstances. If no cause for delay is shown,

[1] Prentice *v.* Elliott, 72 Ga. 154.

[2] Marsteller *v.* Weaver, 1 Gratt. 391.

[3] Jordan *v.* Miller, 75 Va. 442; Sandy *v.* Randall, 20 W. Va. 244. The statute of these two states is identical and places a limitation of five years from the cessation of partnership "dealings," which is construed to embrace any act done in winding up.

[4] Hammond *v.* Hammond, 20 Ga. 556; Askew *v.* Springer, 111 Ill. 662; Marsteller *v.* Weaver, 1 Gratt. 391.

[5] Coudrey *v.* Gilliam, 60 Mo. 86; Patterson *v.* Lilly, 90 N. Ca. 82; Carroll *v.* Evans, 27 Tex. 262; Near *v.* Lowe, 49 Mich. 482. So the possession of real estate by one is deemed to be possession by both, McGuire *v.* Ramsey, 9 Ark. 518.

[6] Montgomery *v.* Montgomery, Rich. Eq. Cas. (S. Ca.) 64; Boggs *v.* Johnson, 26 W. Va. 821; Coudrey *v.* Gilliam, 60 Mo. 86; or on partial settlement time begins to run upon the items embraced in it from the time of statement, Coudrey *v.* Gilliam, *supra;* Foster *v.* Rison, 17 Gratt. 321.

[7] Lawrence *v.* Rokes, 61 Me. 38; McClung *v.* Capehart, 24 Minn. 17.

[8] Richards *v.* Grinnell, 63 Iowa, 44 (50 Am. Rep. 727).

it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action.[1]

§ 952. —— **laches.**— Independent of the statute of limitations, the equity rule that the complainant must not be guilty of laches, and the court will not entertain stale demands, applies,[2] though mere lapse of time less than the statute is not alone sufficient.[3]

As where a firm dissolved in 1859, a partner died in 1860, and his youngest heir was of age in 1864, a bill for an accounting filed in 1876 is stale aside from any statute of limitations.[4]

Where surviving partners continued the business with the old assets, with the acquiescence of the administrator and of the parents and guardians of beneficiaries of the estate, and the beneficiaries made no objection for seven years after coming of age, it is then too late to require the administrator and the assignee for the firm's creditors to account.[5]

And where a liquidating partner became bankrupt and his assignee took the assets, and the other partner ten years after demanded, for the first time, a right to administer, as the sole solvent partner, he is too late.[6]

So a delay of over seven years was regarded as a relinquishment of any interest in a firm on the part of one whose name appeared on the books for one year as a partner.[7] And a delay of over thirteen years after dissolution to seek an account or claim a right to any profits was said to afford a presumption that a party had no claim.[8] So of fifteen years.[9] So a delay for seventeen years by an executor, until the surviving partner was dead and much of the evidence was lost, is too late unless a good excuse is shown.[10] So where the statute of limitations was not pleaded, but a delay of fourteen years and the death of two partners, and consequent impracticability of making a settlement, bars the right.[11] So of a delay of twenty years, when all the partners but one are dead; a bill for an

[1] Codman *v.* Rogers, 10 Pick. 112; Clements *v.* Lee, 8 Tex. 374.
[2] Harris *v.* Hillegass, 54 Cal. 463.
[3] Foster *v.* Rison, 17 Gratt. 321.
[4] Groenendyke *v.* Coffeen, 109 Ill. 325.
[5] Hoyt *v.* Sprague, 103 U. S. 613.
[6] Tracy *v.* Walker, 1 Flip. 41; 3 West. L. Month. 574.
[7] Gover *v.* Hall, 3 Har. & J. (Md.) 43.
[8] Hall *v.* Clagett, 48 Md. 223, 240.
[9] Arnett *v.* Finney, 41 N. J. Eq. 147.
[10] Codman *v.* Rogers, 10 Pick. 112.
[11] Taylor *v.* Morrison, 7 Dana, 241.

account by such survivor will not be sustained.[1] So where a partner, to whom his copartner had presented an account, kept it for thirteen years without objecting, equity will refuse an accounting on his application.[2] So a delay of ten years without claiming that anything was due will bar a party or his executor.[3] A delay of twenty years to file a bill to establish a partnership, settle its dealings and declare the defendant a trustee, in purchases of real estate, is fatal.[4] And in another case to establish a partnership the court required an explanation of a year and a half delay, but permitted it to be accounted for by getting legal advice and considering a proposition to submit to arbitration.[5]

The death of witnesses and loss of evidence and destruction of books are important elements in determining whether lapse of time constitutes laches.[6] So, although the statute of limitations has not yet barred an account, an accounting may be refused for laches which has caused the loss of the respondent's evidence.

As where the delay has been such that the best informed witness has died and the memory of others obscured, and complete justice cannot be done or the truth ascertained, although the time is short of that in the statute.[7]

In Sangston *v.* Hack, 52 Md. 173, a partner died in 1851. The survivors formed a new firm six months later, but failed in three years. Eighteen years afterwards the representatives of the deceased partner filed a bill for an accounting, when all the books of the firm, except the cash book and ledger, had been sold in 1865 for waste paper. Nevertheless the accounting was taken from these books.

[1] Ray *v.* Bogart, 2 Johns. Ch. 432.

[2] Atwater *v.* Fowler, 1 Edw. Ch. 417.

[3] Burden *v.* McElmoyle, Bail. (S. Ca.) Eq. 375.

[4] Philippi *v.* Philippi, 61 Ala. 41.

[5] Haggart *v.* Allan, 4 Grant's Ch. (Up. Can.) 36.

[6] Hall *v.* Clagett, 48 Md. 223, 243; Codman *v.* Rogers, 10 Pick. 112; Taylor *v.* Morrison, 7 Dana, 241; Bolton *v.* Dickens, 4 Lea, 569; Lawrence *v.* Rokes, 61 Me. 38, 42–3.

[7] Stout *v.* Seabrook, 30 N. J. Eq. 187 (aff'd without op. 32 id. 826). And for the same reason the doctrine of stale demand does not apply, except to delay after a dissolution, unless the delay is such that a dissolution in fact may be presumed so long before that the bill is stale, Harris *v.* Hillegass, 54 Cal. 463.

ACCOUNT STATED.

§ 953. If the partners have already agreed upon a settlement or struck balances the settlement is binding and constitutes a defense to a suit for an accounting.

§ 954. **What is a stated account.**— To constitute a stated account it must be in writing; but as any unequivocal acquiescence will make an account final, it follows that it need not be signed by the parties.[1]

Generally a balance should be struck to constitute a stated account;[2] but if a conclusion was reached on which to base a final settlement, though no balance was struck, and after five years' acquiescence was admitted to be substantially correct after mutual reexamination, it will not be opened five years later;[3] and if no books were kept, and it is difficult to ascertain the state of the accounts, an agreement being proved to arbitrate accounts of certain years will raise a presumption that those of prior years had been settled.[4]

A receipt showing a settlement of accounts will be presumed to include an adjustment of all matters touching the business,[5] but it may be shown that there was, in fact, no settlement in spite of such receipt.[6] And in case of a sale by one partner to another, where it is doubtful whether a settlement of accounts was included, it was held that neither the amount paid nor the amount realized on resale was evidence to settle the question; but no satisfactory reason is given.[7]

§ 955. Statements by the party who took the books sent to the other are not an account stated, so as to deprive the latter of his right to a judicial examination,[8] but

[1] Hunter *v.* Belcher, 2 DeG. J. & Sm. 194; Morris *v.* Harrison, Colles, 157; Willis *v.* Jernegan, 2 Atk. 251; Coventry *v.* Barclay, 3 DeG. J. & Sm. 320; aff'd in 33 Beav. 1. And see *Ex parte* Barber, L. R. 5 Ch. App. 687; Wood *v.* Gault, 2 Md. Ch. 433; Jessup *v.* Cook, 6 N. J. L. 434; Main *v.* Howland, Rich. Eq. Cas. 352; a verbal account and a receipt in full is not a stated account, Walker *v.* Consett, Forrest, 157.

[2] Wood *v.* Gault, 2 Md. Ch. 433.

[3] Groenendyke *v.* Coffeen, 109 Ill. 325.

[4] Hopley *v.* Wakefield, 54 Iowa, 711.

[5] Levi *v.* Karrick, 13 Iowa, 344.

[6] Denton *v.* Erwin, 6 La. Ann. 317.

[7] Warden *v.* Marcus, 45 Cal. 594.

[8] Clements *v.* Bowes, 1 Drew. 684, 692; Rehill *v.* McTague (Pa.), 7 Atl. Rep. 224; Schmidt *v.* Lebby, 11 Rich. Eq. 329; Mourain *v.* Delamre, 4 La. Ann. 78.

if even these are affirmatively acquiesced in they become final.[1]

The mere fact that new books are opened every ten years and balances against a partner were not carried over or charged into his personal account on the new books does not make an account stated, but it is still a current account.[2]

Rough estimates of condition will not support a plea of stated account;[3] and summing up of results, calculation of interest, and division of profits without surrender of vouchers, cancellation of books, release or receipts in full, are not a bar to an accounting.[4]

A settlement or account stated between partners binds their representatives after death the same as themselves.[5]

§ 956. The parties may waive the defense of account stated or by not insisting on it and consenting to taking an account, which will then be ordered.

Thus where the plaintiff sued upon a balance on account stated, the defendant denied the settlement and prayed an accounting. The plaintiff's assent to taking the account is an abandonment of his former claim, and the action becomes the ordinary equitable one for final accounting in courts having power to administer both legal and equitable relief.[6]

§ 957. **Partial settlements.**— Partial settlements between the partners, either of certain branches of the business or of the entire business up to a certain date, will also be regarded as conclusive upon all antecedent claims, and the accounting will be ordered of the unsettled parts only.[7]

[1] Irvine *v.* Young, 1 Sim. & Stu. 333.

[2] Buckingham *v.* Ludlum, 29 N. J. Eq. 345, 354.

[3] Burden *v.* McElmoyle, Bail. (S. Ca.) Eq. 375; Roach *v.* Ivey, 7 S. Ca. 434.

[4] Lynch *v.* Bitting, 6 Jones (N. Ca.), Eq. 238.

[5] Groenendyke *v.* Coffeen, 109 Ill. 325; Dial *v.* Rogers, 4 Desaus. (S. Ca.) 175.

[6] Auld *v.* Butcher, 2 Kan. 135; Neil *v.* Greenleaf, 26 Oh. St. 567.

[7] Newen *v.* Wetten, 31 Beav. 315; Milford *v.* Milford, McCl. & Y. 150; Clark *v.* Gridley, 41 Cal. 119; Stretch *v.* Talmadge, 65 Cal. 510, of a partnership in two kilns of brick sold separately, one of which had been settled for between the partners and a note given on which an action at law is pending, the accounting will be taken of the second kiln; Parkhurst *v.* Muir, 7 N. J. Eq. 555, a settlement to a certain date, the master must state the account from that date; if the complainant desires to

§ 958. **No disability to bargain with each other.**—In settling with each other partners are not to be considered as under the disabilities of trustees; and in the absence of deception the mere fact that one has the best of the bargain is not a ground for setting aside the settlement, though made with the administrators of a partner.[1] A managing partner may, however, be treated as a trustee, at least as to the degree of fidelity and fairness required.[2] And wherever there is a relation of trust and confidence, greater latitude will be allowed than in other cases.[3]

Trivial causes are not sufficient ground to avoid a settlement. The reasons must be cogent, and the more so in proportion to the deliberation and opportunity to investigate in reaching the settlement and the lapse of time since.[4] And the general rule is that settlements will not be set aside or reopened in the absence of fraud, collusion or mistake.[5] The intentional though improper omission of an item, or improper treatment of it, is not sufficient.[6]

But if the private accounts of partners are set down as profits, and a settlement is made and paid on that basis, with knowledge of the fact, no relief will be granted.[7]

If a partner agrees to sell out to the others on the basis of bal-

impeach the settlement he must lay the grounds in the bill, so that defendant can answer them; Moore *v.* Wheeler, 10 W. Va. 35, accounting begins with the last stated account; Foster *v.* Rison, 17 Gratt. 321. And see Holyoke *v.* Mayo, 50 Me. 385, and Eakin *v.* Knox, 6 S. Ca. 14. The omission of some doubtful items will not prevent an account being final, Sim *v.* Sim, 11 Irish Ch. 310.

[1] Farnam *v.* Brooks, 9 Pick. 212, 225.

[2] Pomeroy *v.* Benton, 57 Mo. 531.

[3] Brownell *v.* Brownell, 2 Bro. C. C. 62; Matthews *v.* Wallwyn, 4 Ves. 118.

[4] Murray *v.* Elston, 24 N. J. Eq. 310; aff'd, id. 589; Gage *v.* Parmalee, 87 Ill. 329.

[5] Taylor *v.* Shaw, 2 Sm. & Stu. 12; Endo *v.* Caleham, You. 306; Main *v.* Howland, Rich. Eq. Cas. 352; Nickels *v.* Mooring, 16 Fla. 76; Wells *v.* Erstein, 24 La. Ann. 317; Riggs *v.* Hawley, 116 Mass. 596; Stettheimer *v.* Killip, 75 N. Y. 282; and cases cited through this chapter. A settlement by account stated between two partners is not binding as to the parties, and a balance stated to be due to A. from B. may be shown to be due to A. & C. or to A. & C. and A. & S. Barger *v.* Collins, 7 Har. & J. 213.

[6] Maund *v.* Allies, 5 Jur. 860; Laing *v.* Campbell, 36 Beav. 3.

[7] Stettheimer *v.* Killip, 75 N. Y. 282.

ancing the books, omitting doubtful debts, the selling partner supposing there would be a balance in his favor, the fact that the buyers, before execution of the agreement, ascertained that the balance would be against the seller, the suspended debts being larger than was anticipated, and did not disclose this to him, does not entitle him to be reinstated in the firm.[1]

A settlement of accounts by a majority has been held binding on a minority.[2]

§ 959. **Mistakes.**— A settlement may be opened for a mistake,[3] and even though a note was given, for this creates no estoppel.[4]

Thus where one partner took all the assets and assumed all the debts, and upon the books was a credit to one E. for deposits and a debt due by him, leaving a balance due E. of $700, which all regarded as the real amount due E. But E.'s deposit was of trust funds, and judgment was recovered against all the partners for the full amount of it. M. then sued his copartners for the balance, E. being insolvent, and it was held that M. was liable for the $700 and all the partners jointly for the balance.[5]

To rescind for mistake in a sale to complainant, he must offer to put the selling partner *in statu quo* by restoration of the purchase money and paying damages for his quitting the business.[6] And if both had equal facilities for investigation, relief will not be lightly

[1] Nicholson *v.* Janeway, 16 N. J. Eq. 285.

[2] Robinson *v.* Thompson, 1 Vern. 465; Stupart *v.* Arrowsmith, 3 Sm. & G. 176; Kent *v.* Jackson, 2 De G. M. & G. 46. The authority of a partner to settle for himself and the others with a manufacturing partner may be implied from previous dealings and relations, Foster *v.* Rison, 17 Gratt. 321. Where a selling partner received in payment the buying partner's note and transferred it to a person without consideration, who sued upon it and allowed the maker a set-off which he claimed against the payee, and settled for the balance, this allowance of set-off was held not to bind the payee, although the maker did not know that the plaintiff was not owner of the note, for the maker having given no value was not prejudiced, Klase *v.* Bright, 71 Pa. St. 186.

[3] Gething *v.* Keighley, 9 Ch. D. 547; Herty *v.* Clark, 46 Ga. 649; Johnston *v.* Preer, 51 id. 313; Steadwell *v.* Morris, 61 id. 97; Waggoner *v.* Minter, 7 J. J. Mar. 173; Peteel *v.* Crawford, 51 Miss. 43; Rehill *v.* McTague (Pa.), 7 Atl. Rep. 224; Roach *v.* Ivey, 7 S. Ca. 434; McLucas *v.* Durham, 20 S. Ca. 302; Burdine *v.* Shelton, 10 Yer. 41, 47.

[4] Herty *v.* Clark, 46 Ga. 649; Steadwell *v.* Morris, 61 id. 97.

[5] McLucas *v.* Durham, 20 S. Ca. 302.

[6] Steadwell *v.* Morris, 61 Ga. 97.

granted, if at all, for mistakes arising from negligence.[1] And where the buying partner was allowed as a cost price more than he had actually paid, but the complainant knew the actual cost and the overcharge, the unfairness will not be relieved on account of the laches.[2] And even if the parties had agreed that the accounts should not be opened for error, yet for an important error, not being a mere mistake, they may be opened even after a long time or after death.[3]

Errors in calculation, as in addition and subtraction, will be corrected;[4] but values fixed upon each contribution of property at the formation of the partnership, which were acted upon in settling, will not be readjusted where there is no fraud, even as to part of the property not yet settled.[5] Or even items omitted by mutual mistake.[6]

§ 960. An error of judgment will not be relieved against; as where a partner gave a note to another for the purchase of his interest on a lumping valuation, he cannot show the share to have been worth less than was expected, or to have no value;[7] or that, on a contingency not contemplated, one partner had to pay more than was expected.[8]

If the settlement is in the belief that certain assets are good unless the partner take them assuming the risk,[9] or that a person for whom the firm is security or otherwise liable is solvent, and one partner is compelled to pay on his account,[10] relief will be granted in equity.

In correcting the account, errors of law will be rectified as well as of fact.[11]

In Evans *v.* Clapp, 123 Mass. 165, on agreement for dissolution, A. buying out B. & C., and the accounts being settled by arbitration, in which the arbitrator found that a large stock of goods did not belong to the firm, but were held on consignment; and a settlement was made on that basis, and afterwards a referee between

[1] Steadwell *v.* Morris, 61 Ga. 97.
[2] Quinlan *v.* Keiser, 66 Mo. 603.
[3] Peteel *v.* Crawford, 51 Miss. 43.
[4] Donahue *v.* McCosh, 70 Iowa, 733, sustaining an action at law for the correct amount.
[5] Mayo *v.* Bosson, 6 Oh. 525.
[6] Pritt *v.* Clay, 6 Beav. 503.
[7] Peck *v.* Boggess, 2 Ill. 281.
[8] Bispham *v.* Price, 15 How. 162.
[9] Bankhead *v.* Alloway, 6 Cold. 56; and see Sayre *v.* Peck, 1 Barb. 464.
[10] Clouch *v.* Moyer, 23 Kan. 404; Eakin *v.* Knox, 6 S. Ca. 14.
[11] Roberts *v.* Cuffin, 2 Atk. 112.

the supposed owner of the goods and the partners found the goods belonged to the firm, A. was compelled to account to B. & C. for their shares in the goods, on the ground that the question of their ownership was not submitted to the arbitrator, nor was the agreement to arbitrate pleaded as a defense, and the referee's finding is admissible in evidence.

§ 961. Fraud.— Where a partner's sale or settlement has been effected or affected by false appearances, and his copartners are to blame for them or for his non-discovery of them, equity will grant him relief.

A common example of misrepresentation is where one partner sells out his interest to another, and either the buyer or seller is misled by false representations as to the value of the interest sold, or false schedules of the assets or liabilities, or omissions of items from the books; in all these cases relief will be granted if the omission or misrepresentation was by or in the guilty knowledge of one partner and not of the other.[1]

But where the perpetrator of the fraud is a managing partner with the peculiarly intimate knowledge of the firm's affairs incident to that position, and the smaller opportunities for investigation on the part of the other partner, and with the degree of confidence reposed in a manager, a settlement induced by him, or a sale to him induced by fraud, will be reopened more readily, and more latitude will be allowed than in other cases, and want of vigilance on the part of the selling partner will be no defense.[2]

So if a partner is induced by the artifice of his copartner to forego an examination of information at command, and

[1] Roberts *v.* Totten, 13 Ark. 609; Reed *v.* King, 23 Iowa, 500; Levin *v.* Vannevar, 137 Mass. 532; McGunn *v.* Hanlin, 29 Mich. 476; Welland *v.* Huber, 8 Nev. 203; Holmes *v.* Hubbard, 60 N. Y. 183; Case *v.* Cushman, 3 Watts & S. 544 (39 Am. Dec. 47); Rehill *v.* McTague (Pa.), 7 Atl. Rep. 224; Kintrea *v.* Charles, 12 Grant's Ch. (Up. Can.) 123.

[2] Pomeroy *v.* Benton, 57 Mo. 531; s. c. 14 Am. Law Reg. (N. S.) 306; s. c. 77 Mo. 64, the fraud consisted in speculating on the credit of the firm for private benefit and concealing the fact by false accounts; Merriwether *v.* Hardeman, 51 Tex. 436.

thus to sell his interest at less than its real value, the settlement will be opened.[1]

Though misrepresentations are innocently made, errors arising from them will be corrected.[2] If the representations are based wholly on what the clerk stated as to values, and the other partner knew this, rescission will be refused if he correctly reported the clerk.[3]

But misrepresentations or omissions of a person representing and acting for the partner are his misrepresentations.[4]

§ 962. **Burden of proof.**— The proof, whether of accident, fraud or mistake, must be clear and specific. A general averment, where there was full opportunity for the parties to inform themselves, is insufficient to induce the chancellor to overhaul the entire account, but specific acts of fraud and particular mistakes must be shown, and the proof must be clear and satisfactory, especially after considerable lapse of time.[5] Stating facts showing fraud is, however, sufficient without a direct averment of fraud.[6]

Where a sum is agreed upon as due to one partner on his retirement or upon settlement, and it is by agreement subject to reduction for sums received by him and not accounted for, and to increase for sums omitted by the other partners, the burden is upon them to prove amounts received and not accounted for, and upon him to prove additions.[7]

[1] Berkey *v.* Judd, 22 Minn. 287; and in such case he can testify that he relied on the false schedules; for motive, belief and intent can be testified to directly, though a question for the jury.

[2] Stephens *v.* Orman, 10 Fla. 9.

[3] Hunt *v.* Hardwick, 68 Ga. 100.

[4] McGunn *v.* Hanlin, 29 Mich. 476, where a partner's brother, representing him, collected from debtors of the firm but did not credit the amount on the books, and consequently, in settlement, they were taken by the copartner as unpaid.

[5] Taylor *v.* Haylin, 2 Bro. C. C. 310; Dawson *v.* Dawson, 1 Atk. 1; Kinsman *v.* Barker, 14 Ves. 579; Parkinson *v.* Hanbury, L. R. 2 H. L. 1; Honore *v.* Colmesnil, 1 J. J. Mar. 506; Winter *v.* Wheeler, 7 B. Mon. 25; Loesser *v.* Loesser, 81 Ky. 139; Bry *v.* Cook, 15 La. Ann. 493; Harrison *v.* Dewey, 46 Mich. 173; Thornton *v.* McNeill, 23 Miss. 369; Wilde *v.* Jenkins, 4 Paige, 481; Chubruck *v.* Vernam, 42 N. Y. 432; Augsbury *v.* Flower, 68 id. 619; Mahnke *v.* Neale, 23 W. Va. 57; Birkett *v.* Hird, 55 Wis. 650.

[6] Farnam *v.* Brooks, 9 Pick. 212.

[7] Lambert *v.* Griffith, 44 Mich. 65. See Johnson *v.* Curtis, 2 Bro. C. C. 311, note.

§ 963. Laches.— Whether partners are guilty of laches depends on the relative standing, situation and intelligence of the parties; their prior business relations and intercourse as affecting the decree of mutual confidence; their familiarity with books and skill as accountants, and knowledge of the real intentions of their copartners.

A settlement made in fairness between partners to be opened must be repudiated within a reasonable time;[1] and will not be disturbed after a long time and after death of a party;[2] though the mistake was not discovered, but the claimant had the books, and was therefore not vigilant;[3] yet a mistake in a judgment against a firm in including a debt of one partner, though not opened fourteen years after, is an equity to be considered in a partnership settlement.[4]

§ 964. Whether corrected or wholly opened.— If the account is opened for one partner or as to one item, it may, if justice seem to require it, be opened as to all the partners, and also opened so as to restore the parties to all their original rights, to have a full accounting instead of a mere correction of the items shown to be fraudulent or erroneous.[5]

Thus, if a partner sells at a certain price, he may not have been willing to do so except to save the trouble of an accounting; and so if the copartner assumed all the debts, but failed to pay them, the other may rescind for the non-performance of such condition and have a full accounting;[6] or if a lump settlement or sale is procurred by deceit and false schedules.[7]

[1] Steadwell *v.* Morris, 61 Ga. 97; McGunn *v.* Hanlin, 29 Mich. 476. It was opened a year afterwards in Roach *v.* Ivey, 7 S. Ca. 434.

[2] Ross *v.* McLauchlan, 7 Gratt. 86; Atwater *v.* Fowler, 1 Edw. Ch. 417; and Gover *v.* Hall, 3 Har. & J. 43; Pond *v.* Clark, 24 Conn. 370; and see Groenendyke *v.* Coffeen, 109 Ill. 325.

[3] Hite *v.* Hite, 1 B. Mon. 177.

[4] Kent *v.* Chapman, 18 W. Va. 485. See Duncan *v.* Rawls, 16 Tex. 478.

[5] Gething *v.* Keighley, 9 Ch. D. 547; Roberts *v.* Totten, 13 Ark. 609; Black *v.* Merrill, 65 Cal. 90; Bailey *v.* Moore, 25 Ill. 347; Hunt *v.* Stuart, 53 Md. 225; Leonard *v.* Leonard, 1 W. & S. 342.

[6] Bailey *v.* Moore, 25 Ill. 347.

[7] Black *v.* Merrill, 65 Cal. 90.

If there was fraud in the settlement, this is sufficient ground to set it wholly aside and retake the entire account.[1]

On the other hand, if the rest of the settlement is fair;[2] or the loss of books makes a new full accounting difficult or impossible,[3] or mere errors are to be relieved against,[4] a mere surcharging and falsifying of the account or correction of the particular errors, or enjoining collection of a certain amount, or decreeing a refunder, may be granted instead of reopening the whole account. Or after a long time, where there was no fraud in the settlement, the court may, instead of opening the whole account, permit the complaining party to surcharge and falsify,[5] or may restrict the party to particular items.[6]

On plea of account stated, or that the party had fully accounted, certainty to a common intent is sufficient;[7] but the balance should be alleged.[8] If the bill aver an account stated, but sets up fraud against it, the plea relying on the settlement should deny the fraud.[9] The defendant need not plead specially that he had fully accounted where the bill asks an accounting in regard to matters which the parties had on settling the rest of their accounts agreed should belong to the defendant individually.[10] In Kennedy *v.* Shilton, 1 Hilt. 546; 9 Abb. Pr. 157, n., it was held not improper to order

[1] Vernon *v.* Vawdry, 2 Atk. 119, where the account had been settled for twenty-three years, and the guilty partner was dead; Matthews *v.* Wallwyn, 4 Ves. 118; Middleditch *v.* Sharland, 5 id. 87; Stainton *v.* Carron Co. 24 Beav. 346; Allfrey *v.* Allfrey, 1 Mac. & G. 87; Botifeur *v.* Wyman, 1 McCord, Ch. 161; Gray *v.* Washington, Cooke, 321. See, also, on the general principle, Wharton *v.* May, 5 Ves. 27; Beaumont *v.* Boultbee, 5 Ves. 485; s. c. 7 id. 599.

[2] Turner *v.* Otis, 30 Kan. 1.

[3] Millar *v.* Craig, 6 Beav. 433; but all relief may be refused if loss of books make any result unreliable, Hunt *v.* Stuart, 53 Md. 225.

[4] Pitt *v.* Cholmondeley, 2 Ves. Sr. 565; Vernon *v.* Vawdry, 2 Atk. 119; Chubruck *v.* Vernam, 42 N. Y. 432; Burdine *v.* Shelton, 10 Yerg. 41, 47.

[5] Millar *v.* Craig, 6 Beav. 433; Brownell *v.* Brownell, 2 Bro. C. C. 61; 1 Mac. & G. 94.

[6] Twogood *v.* Swanston, 6 Ves. 485; Maund *v.* Allies, 5 Jur. 860.

[7] Harrison *v.* Farrington, 40 N. J. Eq. 353. See Spaulding *v.* Holmes, 25 Vt. 491.

[8] Harrison *v.* Farrington, 38 N. J. Eq. 358.

[9] Harrison *v.* Farrington, 38 N. J. Eq. 1.

[10] Morgan *v.* Adams, 37 Vt. 233.

an account before determining the truth of a plea that the parties had, on a certain day, fully accounted, and had made no new contracts since.[1]

PRACTICE.

§ 965. Pendency of another suit.—The pendency of a suit for an accounting is a bar to a second suit for the same purpose,[2] although more extended relief on special averments is asked in the latter suit.[3] If two suits are filed at the same time, and an injunction was granted in one cause and a receiver in the other, and the former was granted and served the earlier, it will prevail.[4]

§ 966. Decree.—The court ought to hear and dispose of all preliminary matters in bar of an accounting before ordering an account, or referring the cause generally, as where a stated account or a release is pleaded,[5] or the statute of limitations.[6]

The finding of the fact of a partnership should precede the order for an account.[7]

But if the account is ordered before the existence of the firm is established and no exception is taken, the account will not be set aside if the court finds the fact to exist, the referee having expressly reserved the question.[8] And if the bill was filed before the term of partnership had expired, asking dissolution for misconduct, and it expired pending the suit, a dismissal of the cause will be set aside.[9]

§ 967. The decree for an accounting, where the partnership and its dissolution are admitted, may, it seems, merely be an order that an account be taken, and referring the cause for that purpose, without specifically ordering that stated accounts shall not be disturbed, for the unsettled matters only are to be adjusted.[10] In fact, it would not seem

[1] But in Smith *v.* Barringer, 74 N. Ca. 665, the contrary was held.

[2] Clarke's Appeal, 107 Pa. St. 436.

[3] Ward *v.* Gore, 37 How. Pr. 119.

[4] McCarthy *v.* Peake, 18 How. Pr. 138.

[5] Dampf's Appeal, 106 Pa. St. 72.

[6] Auld *v.* Butcher, 2 Kan. 135.

[7] Drew *v.* Drew, 2 Ves. & Bea. 159; Nims *v.* Nims, 20 Fla. 204; Askew *v.* Poyas, 2 Desaus. 145; Armstrong *v.* Crocker, 10 Gray, 269.

[8] McPeters *v.* Ray, 85 N. Ca. 462.

[9] Curyea *v.* Beveridge, 94 Ill. 424.

[10] Newen *v.* Wetten, 31 Beav. 315; Morgan *v.* Adams, 37 Vt. 233. But see Smith *v.* Barringer, 74 N. Ca. 665.

always possible, in advance of the account, to determine at what period it should begin, because the beginning may antedate the partnership and periodical settlements may appear. Nor to state at what point it should end, because there may be items in the account created since the beginning of the suit and probably would be such since the dissolution. Nor can the court determine, as a preliminary matter, what allowances will be just.

In Fordyce *v.* Shriver, 115 Ill. 530, it was held that the master could not charge one partner with losses by his wrongful act or mismanagement, unless required by the order or the issues in the case,[1] and certainly the decree can order allowances to be made, with statements of the facts upon which they are based.[2]

If the suit be for dissolution also, a decree granting this prayer may fix the date of the dissolution anterior to the decree in a proper case.[3] And if a dissolution has already taken place, a clause in the decree dissolving the firm does no harm and is not, therefore, ground for reversal.[4]

An order to a master to take an account of all the assets except the Wickford Oil Works, as the same stood on the day of dissolution, requires him to exclude personalty pertaining to the oil works at the date of dissolution, and not that which pertained to it at the time they acquired the works, but no longer.[5]

§ 968. **Master's report.**— The master should examine and report the terms of partnership, for otherwise he cannot correctly state the account,[6] and the extent of the business, and its beginning and end, although these are not made issues in the pleadings.[7]

The master should give reasonable notice of the time and place of taking the account. Notice to appear between 8 and 12 o'clock at night of the same day is not reasonable.[8] And notification of its completion is recommended that the parties may hear it read and

[1] *Contra*, 2 Lindley on Partnership, 974.

[2] Crawshay *v.* Collins, 2 Russ. 347.

[3] See § 597.

[4] Babcock *v.* Hermance, 48 N. Y. 683.

[5] Bliffins *v.* Wilson, 113 Mass. 248.

[6] Jones *v.* Jones, 1 Ired. Eq. 332.

[7] Lannan *v.* Clavin, 3 Kan. 17.

[8] Bernie *v.* Vandever, 16 Ark. 616.

have abundant opportunity to suggest corrections and make exceptions.[1]

The account of the master should show what the firm owes each partner and what each owes the firm, the capital of each, what profits have been credited to each from time to time, and with what losses each is charged.[2]

His report should also dispose of uncollected debts,[3] but it is error to divide them between the partners;[4] and a report merely directing one partner to pay a certain sum to the other, without stating the account, is not final, and must be recommitted.[5]

But the omission to find by whom the firm was dissolved, or that the defendant refuses to account, or who was the managing partner, or facts admitted by the pleadings, or who shall pay the costs, are all immaterial.[6]

§ 969. —— **issue out of chancery.**— The court may direct an issue out of chancery to try a disputed question, as to ascertain if a person was a partner,[7] or the terms of partnership;[8] and if the defendant claims the terms are different from those alleged and asks damages for their breach, the court may submit the question of terms to one jury, and then, after reference to state an account, may submit the question of damages to another jury, although the court could have tried all the issues itself or left them to a single jury.[9]

§ 970. **Review.**— A decree finding the existence of a partnership and ordering a dissolution, or finding the fact and time of dissolution, and settling the proportions of interest of the partners, and referring the cause to ascertain the

[1] Brockman *v.* Aulger, 12 Ill. 277, 280.

[2] Snyder *v.* Hall, 10 Ill. App. 235; McRae *v.* McKenzie, 2 Dev. & Bat. Eq. 232; Paine *v.* Paine, 15 Gray, 299; Philips *v.* Turner, 2 Dev. & Bat. Eq. 123; and should include the account, that the court may see that partnership and not individual matters are considered, Brockman *v.* Aulger, 12 Ill. 277.

[3] Zimmerman *v.* Huber, 29 Ala. 379, 381.

[4] McRae *v.* McKenzie, 2 Dev. & Bat. Eq. 232.

[5] Paine *v.* Paine, 15 Gray, 299.

[6] Green *v.* Castleberry, 77 N. Ca. 164.

[7] Setzer *v.* Beale, 19 W. Va. 274, 288; French *v.* Wall, 2 Tex. 288.

[8] Carlin *v.* Donegan, 15 Kan. 495.

[9] Carlin *v.* Donegan, *supra.*

specific amounts and to take the account, is a final decree for the purposes of appeal; for a party need not submit to an overhauling of his accounts wrongly.[1]

But the statute of limitations does not run upon amounts found in favor of one partner against another, until the decree upon the referee's report after sale and ascertainment of the amount. This decree only is the final decree for purposes of execution.[2]

A decree of settlement finding the amounts due to the partners respectively, and ordering a sale for the payment thereof, is certainly final, for the order for sale is merely ministerial in carrying the decree into execution.[3]

The accounting of a referee in an equity case between partners is not treated as a verdict, but is subject to review by the trial court and by the appellate court.[4] The referee's finding of no partnership is binding in a court of review, unless the facts he found necessarily created a partnership.[5]

The exceptions to the account must be specific enough to point out the error,[6] but there will be no reversal for the admission of irrelevant testimony, if there is sufficient other valid evidence;[7] nor because the objecting party has failed to offer certain proof, but in case of a reversal on other grounds he can put in his other evidence;[8] nor will a decree be disturbed for erroneous allowances against the appellant, if balanced by errors of equal magnitude in his favor.[9]

If the referee has stated the account on a wrong principle, the court, to obviate the necessity of a new trial, may restate it.[10]

§ 971. Personal judgment for balances.—No personal decree is to be rendered against individual partners until the assets have been converted into money, that is to say, the excess of receipts by a partner over his disbursements is not to be ordered paid in by him to the receiver before the

[1] Clark *v.* Dunnam, 46 Cal. 205; Candler *v.* Stange, 53 Mich. 479. But see Rhodes *v.* Williams, 12 Nev. 20; and Wiegand *v.* Copeland, 14 Fed. Rep. 118; 7 Sawy. 442. And *contra*, Gray *v.* Palmer, 9 Cal. 616, 636.

[2] White *v.* Conway, 66 Cal. 383.

[3] Evans *v.* Dunn, 26 Oh. St. 439.

[4] Holt *v.* Simmons, 16 Mo. App. 97.

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

[6] O'Reilly *v.* Brady, 28 Ala. 530; Powers *v.* Dickie, 49 id. 81.

[7] Powers *v.* Dickie, *supra*.

[8] Laswell *v.* Robbins, 39 Ill. 209.

[9] Robertson *v.* Gibb, 38 Mich. 165.

[10] Knapp *v.* Edwards, 57 Wis. 191.

assets have been exhausted, but is a mere item to be debited to him on the final balance;[1] nor where all the debts have been paid, except what is owing from one partner to the other, should this be ordered paid until the assets are collected; that is, the creditor partner is to be paid out of the proceeds of assets as far as possible.[2]

But if no objection appears, a judgment before sale will be deemed an agreement that one partner could retain the property;[3] and if a personal judgment is to be docketed, as where no part of the amount will be returned to the debtor partner, the judgment is to be in favor of the receiver and not of the creditor.[4]

The individual liability of partners is not a partnership asset, and the receivers cannot enforce it on behalf of creditors, but the creditors themselves must sue.[5]

§ 972. Yet any property, whether chattels or money, which a partner has in his hands, belonging to the partnership, can be ordered paid into court,[6] but not unless the other partners do the same;[7] and even then it seems the order may give him the right to apply the money to a partnership debt, which he is being compelled to pay;[8] and if the amount he has is admitted to be improperly in his hands, or in violation of his duty, it can be ordered paid in; as where, after agreeing upon a dissolution, one partner secretly collects debts due the firm, he will be ordered to pay the amount in, although he insists that a balance will be due him;[9] so, if he admits that he owes the firm more than it owes him.[10]

[1] Mills *v.* Hanson, 8 Ves. 68; Foster *v.* Donald, 1 Jac. & W. 252, 253; Richardson *v.* Bank of England, 4 Myl. & Cr. 165, 172; Crawshay *v.* Collins, 2 Russ. 325, 347; Rosenstiel *v.* Gray, 112 Ill. 282; Buckingham *v.* Ludlum, 29 N. J. Eq. 345, 355; Bouton *v.* Bouton, 42 How. Pr. 11; Moore *v.* Wheeler, 10 W. Va. 35; *Re* Smith, 16 Bankr. Reg. 113.

[2] Moore *v.* Wheeler, 10 W. Va. 35; Bouton *v.* Bouton, 42 How. Pr. 11; Johnson *v.* Mantz, 69 Iowa, 710; Allison *v.* Davidson, 2 Dev. Eq. 79.

[3] Johnson *v.* Mantz, 69 Iowa, 710.

[4] Geery *v.* Geery, 79 N. Y. 565.

[5] Wallace *v.* Milligan, 110 Ind. 498. Nor can a personal judgment in favor of creditors be entered, § 935.

[6] White *v.* Barton, 18 Beav. 192. See Geery *v.* Geery, 79 N. Y. 565.

[7] Foster *v.* Donald, 1 Jac. & W. 252.

[8] Toulmin *v.* Copland, 3 Young & C. 643.

[9] Foster *v.* Donald, 1 Jac. & W. 252; Jervis *v.* White, 6 Ves. 738; Birley *v.* Kennedy, 6 New Rep. 395. See, also, Costeker *v.* Horrox, 3 Young & C. Ex. 530.

[10] Toulmin *v.* Copland, 3 Young &

Thus, if two accountants are appointed to investigate the accounts in a suit between partners, one employed by plaintiff and one by defendant, and they show that defendant owes plaintiff a certain sum upon undisputed items, and that the disputed items will not reduce the amount, the plaintiff may have the amount ordered into court. This is equivalent to an admission of the defendant by his agent, that at least that amount was due.[1]

That the amount due to the firm from each partner may be collected by the appointment of a receiver for that purpose, in order to pay creditors, has been held;[2] and in Lathrop *v.* Knapp, 37 Wis. 307, 310, it was said that the receiver could sue a partner for the amount due the firm, although he may be ultimately entitled to share the proceeds of it.

If a party refuses to deliver property to the receiver the decree may be for its value instead of for a specific return of it;[3] and if the partner has sold all his interest in the assets to the other partners, leaving individual accounts for receipts and expenditures to be settled, the amount due from him can be ordered in, though generally such sales are of the interest as it appears on final balance, and hence such deduction from a sale must appear very clearly.[4] And if by the terms of partnership one partner was to receive periodical dividends and these have remained unpaid, it has been held that the court may decree payment of them by the debtor partners before final winding up, if no creditor's rights are prejudiced.[5] If, however, debts are not provided for, a court should not order the debtor partner to pay to the creditor partner the amount found due, but can only require its payment into court.[6]

§ 973. After all assets are collected that are collectible, and all property sold and debts are paid and provided for, and the state of the account of each partner ascertained, the final settlement between them is by distribution of the fund, and if that is not sufficient, then by decrees for and against each *in personam* and separately.[7] The balance due from debtor partners to a creditor partner must not be found

C. Ex. 613; White *v.* Barton, 18 Beav. 192.

[1] London Syndicate *v.* Lord, 8 Ch. D. 84.

[2] Jordan *v.* Miller, 75 Va. 442.

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

[4] Rosenstiel *v.* Gray, 112 Ill. 282.

[5] O'Conner *v.* Stark, 2 Cal. 153.

[6] Carper *v.* Hawkins, 8 W. Va. 291.

[7] Bouton *v.* Bouton, 42 How. Pr. 11; Story *v.* Moon, 3 Dana, 331; Savage *v.* Carter, 9 id. 409.

against them jointly, but the proper amount should be decreed against each.[1]

But if the debtor partners had combined to exclude the creditor partner from all participation in the business and knowledge of the books and share of the profits, and had not acted in good faith, they may be held jointly and severally liable;[2] and so, where surviving partners have divided up the assets among themselves, the executor of the deceased partner cannot be compelled to accept a several responsibility, but is entitled to a decree against them jointly; whereas, had the division been in the life-time of the decedent and with his assent, a several decree would have been proper.[3]

SALE.

§ 974. In order to distribute the assets the only available means of division is generally to convert them first into money; and it has become a general rule that each partner or his representatives, unless there is an agreement to the contrary, has the right to insist on a sale of the assets, whether they are real or personal in character, in order to ascertain their value.[4]

[1] Rhiner *v.* Sweet, 2 Lans. 386; Starr *v.* Case, 59 Iowa, 491; Bloomfield *v.* Buchanan, 14 Oregon, 181; Portsmouth *v.* Donaldson, 32 Pa. St. 202, except that, as we have elsewhere seen, losses by the insolvency of a debtor partner must be divided among the solvent partners and not be cast upon any one.

[2] Bloomfield *v.* Buchanan, 14 Oregon, 181.

[3] Bundy *v.* Youmans, 44 Mich. 376.

[4] Thornton *v.* Dixon, 3 Brown's Ch. Cas. 199; Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 309; Cook *v.* Collingridge, Jac. 607; Syers *v.* Syers, L. R. 1 App. Cas. 174; Ridgen *v.* Pierce, 6 Mad. 353; Burdon *v.* Barkus, 4 DeG. F. & J. 42; Darby *v.* Darby, 3 Drew. 495; Wild *v.* Milne, 26 Beav. 504; Olcutt *v.* Wing, 4 McLean, 15; Lyman *v.* Lyman, 2 Paine, 11; Malbec de Montjoc *v.* Sperry, 95 U. S. 401; Wiegand *v.* Copeland, 14 Fed. Rep. 118; 7 Sawy. 442; Hall *v.* Lonkey, 57 Cal. 80; Sigourney *v.* Munn, 7 Conn. 11, 324; Dickinson *v.* Dickinson, 29 id. 600, 612; Allen *v.* Hawley, 6 Fla. 142 (63 Am. Dec. 198); Jackson *v.* Deese, 35 Ga. 84; Carter *v.* Bradley, 58 Ill. 101; Pennybacker *v.* Leary, 65 Iowa, 220; Johnson *v.* Mantz, 69 Iowa, 710; Freeman *v.* Freeman, 136 Mass. 260; Godfrey *v.* White, 43 Mich. 171; Sheppard *v.* Boggs, 9 Neb. 257; Tarbell *v.* West, 86 N. Y. 280, 290; Dougherty *v.* Van Nostrand, Hoff. Ch. (N. Y.) 68; Comstock *v.* White, 31 Barb. 301; Pierce *v.* Trigg, 10 Leigh, 406; Taylor *v.* Hutchison, 25 Gratt. 536 (18 Am. Rep. 699); but see statement in

The fact that there are no debts does not make the parties tenants in common so that a partition of real estate will be ordered instead of a sale, but the whole will be disposed of if any one insist upon it.[1] The nature of the property does not alter the rule; thus a sale will be ordered of a recipe for a patent medicine,[2] or letters patent,[3] or good will,[4] or agencies for insurance companies, for this is in the nature of a good will;[5] and debts due may be ordered sold instead of being collected;[6] thus, if the trouble and expense of collecting accounts would render them less productive than an immediate sale, or if they are desperate and of little value and their collection will cause delay, they, too, may be sold instead of collected.[7] And if real estate in another county or state, the court may order it sold.[8]

In selling the good will the book debts will be sold with it, because, as this is the best way to introduce the buyer to the old customers, more will be realized for the good will.[9]

Some assets cannot be sold on account of their nature, as where the emoluments of an office held by one partner belong to the firm,[10] or a government contract not alienable is held by one.[11] In such cases the holder of the office or contract retains it on dissolution and is charged with its value.

If the business consist in carrying out an uncompleted contract, the court may let the partners complete it before taking the final account, if most beneficial.[12]

Where O. was to furnish the money to buy land in partnership with W. and the title was taken in W.'s name, and the value having depreciated O. urged a sale and thereupon W. conveyed the property to O., O. still has the right to insist upon a sale in order to ascertain whether W. is indebted to him.[13]

It is certainly not proper to find a certain amount due from one partner to the other and render judgment for it, but a sale must be

Crawshay *v.* Collins, 2 Russ. 325, 333, that there may be cases where the rule cannot be applied.

[1] Wild *v.* Milne, 26 Beav. 504.

[2] Comstock *v.* White, 31 Barb. 301.

[3] Freeman *v.* Freeman, 136 Mass. 260.

[4] § 660.

[5] Sheppard *v.* Boggs, 9 Neb. 257.

[6] Hall *v.* Lonkey, 57 Cal. 80.

[7] Pratt *v.* McHatton, 11 La. Ann. 260.

[8] See § 907.

[9] Johnson *v.* Hellely, 34 Beav. 63; 2 DeG. J. & Sim. 446.

[10] Smith *v.* Mules, 9 Hare, 556.

[11] Ambler *v.* Bolton, L. R. 14 Eq. 427.

[12] McClean *v.* Kennard, L. R. 9 Ch. App. 336.

[13] Olcutt *v.* Wing, 4 McLean, 15.

had and the assets exhausted.[1] Yet if no objection appear, it will be deemed that one partner was, by agreement, to keep the assets and the other to pay.[2]

§ 975. But as no partition can be had until the debts are paid, including balances or cross-demands *inter se*, the bill should not be for partition, but for an accounting.[3] And the settlement of equities in the land should not be separated from the rest of the partnership matters, for the court cannot ascertain whether or not it is possible to keep the land separate until the accounts are taken, and cannot settle them piecemeal.[4]

If the articles of partnership or an agreement provides for other disposition of the assets than sale, this will, if possible, be carried out; but if not, a sale will be ordered.

Thus, in Cook *v.* Collingridge, Jacob, 607, division of the stock on dissolution had been provided for, but, not being practicable, a sale was ordered.

In Leach *v.* Leach, 18 Pick. 68, it was held that one partner who was to furnish $20,000 in stock as the capital at its appraised value, and the stock was taken at its cost without appraisement, and, on dissolution, was to receive back $20,000 in value of stock, could not on dissolution insist on a sale and division in money. The presumption is that the cost was considered equivalent to the appraised value.

§ 976. **Specific division.**—If, however, other disposition than a sale is fair and equally beneficial to all the partners, and is practicable, it may be ordered, no one of the partners objecting. For example, if all the debts are paid and real estate is to be divided, it may be partitioned instead of sell-

[1] Levi *v.* Karrick, 8 Iowa, 150; Johnson *v.* Mantz, 69 id. 710; Lannan *v.* Clavin, 3 Kan. 17; Canada *v.* Barksdale, 76 Va. 899; Harper *v.* Lamping, 33 Cal. 641.

[2] Johnson *v.* Mantz, *supra*.

[3] Pennybacker *v.* Leary, 65 Iowa, 220; Jackson *v.* Deese, 35 Ga. 84, where, under a statute, the suit was converted into one to settle the partnership; Carter *v.* Bradley, 58 Ill. 101; Godfrey *v.* White, 43 Mich. 171, 178–9. *Contra*, Green *v.* Graham, 5 Oh. 264.

[4] Godfrey *v.* White, 43 Mich. 171, 199; Carter *v.* Bradley, 58 Ill. 101. Yet it has been held that a surviving partner, winding up, should not resort to the real estate until the personal property is exhausted. See § 294, note 7.

ing and dividing proceeds.[1] So if the property is in corporate stock.[2] And a specific division of assets after the debts are paid may be made by the partners or by the surviving partner and administrator;[3] but the surviving partner cannot do so unless the administrator agree.[4]

In Malbec de Montjoc *v.* Sperry, 95 U. S. 401, it appeared by the pleadings that the parties owned the Big Tree Groves of Calaveras and kept a hotel on the property in partnership, and the prayer was for dissolution, settlement of accounts, and for sale of the land and distribution of the proceeds, as on partition. A sale was ordered, because the land could not be divided without injury to the value; the trees, being curiosities of the world, would be more valuable owned by one person than split up among competitors. The court affirmed the order of sale in bulk, stating that, as the bill could be treated either as for partition or for winding up, and must treat it as one or the other, it could be treated as for partition, unless objection is made.

In Chittenden *v.* Witbeck, 50 Mich., 401, 423, where there were few debts and abundance of other assets to meet them, the court gave the surviving partner and the executrix of the deceased partner of a firm in the hotel business, twenty days to see if they could agree as to the disposition of furniture in the hotel, and if this failed, then the receiver to sell in mass or in parcels, with liberty to each party to bid.

In Colehour *v.* Coolbaugh, 81 Ill. 29, it was held not error to award a division of assets, though there were debts, where each recipient of assets was required to give security to the other for the payment of debts to the amount he receives.

[1] Lang *v.* Waring, 25 Ala. 625 (60 Am. Dec. 533); Gray *v.* Palmer, 9 Cal. 616; Hughes *v.* Devlin, 23 id. 501; Askew *v.* Springer, 111 Ill. 662; Patterson *v.* Blake, 12 Ind. 436; Aiken *v.* Ogilvie, 12 La. Ann. 354; King *v.* Wartelle, 14 id. 740; Way *v.* Stebbins, 47 Mich. 296; Buchan *v.* Sumner, 2 Barb. Ch. 165, 206; Baird *v.* Baird, 1 Dev. & Bat. Eq. 524; Pierce *v.* Covert, 39 Wis. 252. And see Strong *v.* Lord, 107 Ill. 25; Godfrey *v.* White, 43 Mich. 171.

[2] Harper *v.* Lamping, 33 Cal. 641; Danvers *v.* Dorrity, 14 Abb. Pr. 206.

[3] Kimball *v.* Lincoln, 99 Ill. 578; Roys *v.* Vilas, 18 Wis. 169; Honore *v.* Colmesnil, 7 Dana, 199, where debts due were divided.

[4] Chittenden *v.* Witbeck, 50 Mich. 401. Debts due the firm and not collected in time for the final winding up may be divided among the partners, Honore *v.* Colmesnil, 7 Dana, 199.

§ 977. Manner of sale.— The court can prescribe the time and manner of sale, though it be real estate, and if reasonable and just need not conform to the statute as to sales on execution, and there can be no right of redemption in such cases, for there is no one in whom it can rest.[1]

The court may even order sale before final hearing if necessary,[2] but will not generally do so.[3]

That there is a defect in the title of the real estate is no objection to ordering a sale of such title as the partners have.[4]

Any of the partners will be allowed to bid,[5] though leave to bid may be refused to the partner who has the conducting of the sale.[6]

Where, by agreement of dissolution, a receipt for a patent medicine was to be sold to the highest bidder of the parties, this contemplates a sale by mutual arrangement, and where the plaintiff fixed the time and place of the sale, and selected the selling agent and purchased the receipt himself, the defendant refusing to bid, the sale was set aside.[7]

That but one partner is able to buy, and hence gets the property at half its value, leaving his copartner in debt to him instead of having a surplus, is no objection.[8]

EVIDENCE IN ACCOUNTING.

The first step is to prove the partnership. The evidence upon this issue will be considered hereafter in connection with the proof of partnership in actions generally.

[1] Rhodes *v.* Williams, 12 Nev. 20. In Jones *v.* Thompson, 12 Cal. 191, a private sale, it was held, could not be ordered by the court; but in Mauck *v.* Mauck, 54 Ill. 281, it was held that such power could be conferred upon the surviving partner, though it should not be except under circumstances preceding, as probability of fraud; and so in Taylor *v.* Hutchison, 25 Gratt. 536 (18 Am. Rep. 699).

[2] Bailey *v.* Ford, 13 Sim. 495; Crawshay *v.* Maule, 1 Swanst. 506, 523.

[3] Buchanan *v.* Comstock, 57 Barb. 568.

[4] Waugh *v.* Mitchell, 1 Dev. & Bat. Eq. 510.

[5] Wild *v.* Milne, 26 Beav. 504; Rowlands *v.* Evans, 30 id. 302; Wiegand *v.* Copeland, 14 Fed. Rep. 118; 7 Sawy. 442; Godfrey *v.* White, 43 Mich. 171, 199.

[6] Wild *v.* Milne, 26 Beav. 504.

[7] Comstock *v.* White, 31 Barb. 301.

[8] Wiegand *v.* Copeland, 14 Fed. Rep. 118; 7 Sawy. 442.

§ 978. **Books.**— It is the duty of the parties to produce the books and accounts before the master, for all the effects are in the *quasi* possession of the court when it has taken charge.[1]

The partnership books and all entries therein are presumed to contain true statements and on a correct basis, not because they are an official record, like a corporation's books, kept by a designated officer and verified by his signature, for it makes no difference how many hands have made the entries, nor are the entries signed, nor because they are, like the books of an individual, sometimes admitted in evidence if the entries are contemporaneous with the transactions they chronicle, for as between the partners it makes no difference whether the entries are original or copied, or whether contemporaneous or not. But they are admissible because of the agency pervading their keeping and the assent or acquiescence of each partner; and this assent is founded on the duty of each partner to avail himself of the opportunity of inspection and right of access, and see that the books are rightly kept.

This knowledge and access, and that the partner availed himself of them, are, in the absence of evidence, presumed, and hence *prima facie* the books are deemed correct, although there is no proof that the objecting partner had knowledge of a particular entry;[2] even though badly kept

[1] Brockman *v.* Aulger, 12 Ill. 277, 280; Succession of Andrew, 16 La. Ann. 197; Kelly *v.* Eckford, 5 Paige, 548; Stebbins *v.* Harmon, 17 Hun, 445; Calloway *v.* Tate, 1 Hen. & M. (Va.) 9. *Contra*, in an action at law between the partners, Ward *v.* Apprice, 6 Mod. 264, but these were ship-owners and not partners. In Fulton *v.* Golden, 12 N. J. Eq. 37, a deposition of the defendant taken on behalf of the complainant was, on the latter's motion, suppressed, because of the defendant's evasion and refusal to answer questions or produce the books.

[2] Withers *v.* Withers, 8 Pet. 355; United States Bank *v.* Binney, 5 Mason, 176; Desha *v.* Smith, 20 Ala. 747; Kahn *v.* Boltz, 39 Ala. 66; Haller *v.* Willamowicz, 23 Ark. 566; Hale *v.* Brennan, 23 Cal. 511; Pond *v.* Clark, 24 Conn. 370; Stuart *v.* McKitchan, 74 Ill. 122; Albee *v.* Wachter, 74 Ill. 173; O'Brien *v.* Hanley, 86 Ill. 278; Kitner *v.* Whitlock, 88 id. 513; Eden *v.* Lingenfelter, 39 Ind. 19; Hunter *v.* Aldrich, 52 Iowa, 442; Cunningham *v.* Smith, 11 B. Mon. 325; Parker *v.* Jonté, 15 La. Ann. 290; Foster *v.* Fifield, 29 Me. 136; Wheatley *v.* Wheeler, 34 Md. 62;

and unreliable;[1] and if some of the books have been lost or destroyed, the accounts may be taken from those remaining.[2]

Even if one partner had expelled the rest and taken the business and books, the books are still *prima facie* evidence, unless there is proof of alteration by him.[3]

§ 979. This presumption is a mere inference of fact, and rebutted as to any partner who was, without fault on his part, ignorant of the contents of the books or of particular entries. But as this proof requires negative evidence, proof of want of opportunity to inspect, from any cause, whether from absence or exclusion by other partners, is taken as sufficient to rebut the presumption of accuracy of the entries.[4]

The rule has no application to private books of a partner; such books are not evidence against the other partner nor in his own favor.[5] Thus, where W. and D. were partners, in Baltimore, as W., D. & Co., and formed a partnership with G. W. to conduct a business at L., in the name of G. W., on bill for account the books of W., D. & Co. are not admissible to charge G. W., for they are the books of others persons, to wit, of W. & D., and not G. W.'s books.[6]

Topliff *v.* Jackson, 12 Gray, 565; Lambert *v.* Griffith, 44 Mich. 65; Tucker *v.* Peaslee, 36 N. H. 167; Dunnell *v.* Henderson, 23 N. J. Eq. 174; Heartt *v.* Corning, 3 Paige, 566; Allen *v.* Coit, 6 Hill, 318; Fairchild *v.* Fairchild, 64 N. Y. 471 (aff. 5 Hun, 407); Cheever *v.* Lamar, 19 Hun, 130; Philips *v.* Turner, 2 Dev. & Bat. Eq. 123; Boire *v.* McGinn, 8 Oregon, 466; Richardson *v.* Wyatt, 2 Desaus. 471; Myers *v.* Bennett, 3 Lea, 184; Piano Co. *v.* Bernard, 2 Lea, 358; Saunders *v.* Duval, 19 Tex. 467; Fletcher *v.* Pollard, 2 Hen. & M. 544; Brickhouse *v.* Hunter, 4 id. 363; Shackelford *v.* Shackelford, 32 Gratt. 481.

[1] Topliff *v.* Jackson, 12 Gray, 565; Foster *v.* Fifield, 29 Me. 136.

[2] Sangston *v.* Hack, 52 Md. 173.

[3] Mooe *v.* Story, 8 Dana, 226.

[4] Withers *v.* Withers, 8 Pet. 355; United States Bank *v.* Binney, 5 Mason, 176; Haller *v.* Willamowicz, 23 Ark. 566; Wheatley *v.* Wheeler, 34 Md. 62, 65; Philips *v.* Turner, 2 Dev. & Bat. Eq. 123; Piano Co. *v.* Bernard, 2 Lea, 358; Saunders *v.* Duval, 19 Tex. 467; Layton *v.* Hall, 25 Tex. 404. The other foregoing cases also admit this principle. In Taylor *v.* Herring, 10 Bosw. 447, and Saunders *v.* Duval, 19 Tex. 467, it was held that actual inspection and not mere access must appear actually or presumptively, to make the books evidence. And see Sutton *v.* Mandeville, 1 Cranch, C. C. 2.

[5] Adams *v.* Funk, 53 Ill. 219.

[6] Wheatley *v.* Wheeler, 34 Md. 62.

But the mere fact that a firm forms a partnership with an individual in a certain branch of the business, and keeps the accounts of the branch in the books of the original partnership, but not mingled with its accounts, and the individual has access to them, and does not object to their being so kept, these accounts are evidence between the parties.[1]

Even if there were opportunity of inspection, the books may be shown to be incorrect; their evidence is but *prima facie* and not conclusive, for there are no elements of estoppel in them.[2] But if the statements are in the nature of an account stated, as where there are agreed annual settlements, or charges acquiesced in for several years, the presumption of correctness is much more stringent.[3]

§ 980. **After dissolution.**— After dissolution the partner engaged in winding up the concern may be required to establish his disbursements by properly authenticated vouchers and not by entries in his own books.[4] But even these books, when the other partners had free access to them, may be evidence in settling the accounts.[5] Entries after dissolution by some of the partners of items of loss are not even *prima facie* evidence that they are properly chargeable to the firm.[6]

§ 981. **As proof or disproof of partnership.**— Entries on the partnership books are not admissible to prove that a person not shown to have knowledge of these records is a partner. Like any other declarations of a partner offered to prove who is in partnership with him, they are *res inter*

[1] Clark *v.* Gridley, 49 Cal. 105.

[2] Hunter *v.* Aldrich, 52 Iowa, 442; Topliff *v.* Jackson, 12 Gray, 565; Lambert *v.* Griffith, 44 Mich. 65; Boire *v.* McGinn, 8 Oregon, 466; Heartt *v.* Corning, 3 Paige, 566; Scott *v.* Shipherd, 3 Vt. 104.

[3] Desha *v.* Smith, 20 Ala. 747; Pond *v.* Clark, 24 Conn. 370; Kitner *v.* Whitlock, 88 Ill. 513; Richardson *v.* Wyatt, 2 Desaus. 471, here the books showed a partner's contribution to capital to be a certain sum, and he was not allowed, twenty-four years afterwards, to show by parol that it was more; Gage *v.* Parmalee, 87 Ill. 329, where the active partner's salary, originally fixed at $1,000, was changed on the books to $5,000, without new agreement, a settlement on this basis was not disturbed.

[4] Clements *v.* Mitchell, Phil. (N. Ca.) Eq. 3.

[5] Routen *v.* Bostwick, 59 Ala. 360; Cameron *v.* Watson, 10 Rich. Eq. 64.

[6] Boyd *v.* Foot, 5 Bosw. 110.

alios acta.[1] Nor do they, of course, bind third persons as proof that a defendant was not a partner.[2]

And even when a person or the owner of the books had access to them, entries can be explained or contradicted as between him and third persons, for they are private memoranda and not written contracts. Hence, if plaintiff's books showed the debt sued upon to belong to him and another as partners, he may show that the partnership was contemplated when the books were opened, but never consummated.[3]

So an old balance carried into the new books after a new partner had been taken in may be shown in an action upon it by the original partners alone to have been entered for convenience, and that the new firm was merely an agent to collect it for the old.[4]

So where a person's book-keeper, without his knowledge, entered upon the books the fact of a partnership between them. This is, under such circumstances, not competent against the owner, although he did business with "& Co." added to his name.[5]

But if the entries were made by one in the presence of two persons they are competent to prove a partnership between them.[6]

So the fact that a partner who had agreed to pay certain private bills of his own with goods of the firm had for preceding years placed similar charges upon the books. This is evidence of assent of his copartners, or of authority to make such contract.[7]

The terms of partnership,[8] and any alterations of them or constructions put upon them, may be proved by the nature of the charges and entries in the books as conclusively as by any other writing.[9]

§ 982. Books as evidence.— The books are evidence themselves without proving the items by vouchers.[10]

[1] Robins *v.* Warde, 111 Mass. 244; Abbott *v.* Pearson, 130 id. 191.

[2] Folk *v.* Wilson, 21 Md. 538; Setzer *v.* Beale, 19 W. Va. 274, 294.

[3] Langdon *v.* Hughes, 107 Mass. 272.

[4] Armsby *v.* Farnam, 16 Pick. 318.

[5] Lindsay *v.* Guy, 57 Wis. 200.

[6] Howard *v.* Patrick, 38 Mich. 795.

[7] Perry *v.* Butt, 14 Ga. 699; Grant *v.* Masterton, 55 Mich. 161.

[8] Stewart *v.* Forbes, 1 Hall & Tw. 461; 1 Macn. & G. 137.

[9] Southmayd's Appeal (Pa. 1887), 8 Atl. Rep. 72; Gage *v.* Parmalee, 87 Ill. 329; Robinson *v.* Gilfillan, 15 Hun, 267.

[10] Brickhouse *v.* Hunter, 4 Hen. & M. (Va.) 363; Fletcher *v.* Pollard, 2 id. 544; Powers *v.* Dickie, 49 Ala. 81.

The duty of each partner to keep accurate accounts, and the right of each to have him do so, has already been noticed, and it is not only important, but it is the duty of the partner having the books in charge, to keep accurate and precise accounts ready at all times for inspection;[1] and if he fail to do so, or if no partner has the specific charge of accounts, but each keeps a memorandum of his own transactions, each will be held to the strictest account for the non-performance of his duty which the proof will justify,[2] and will be chargeable for sums coming to his hands, the disposition of which he cannot account for; and his mere statement that he had used them for partnership purposes will not prevent his being charged in settlement with the difference between the items he can show and what he has received;[3] and if he mix his own goods with the partnership goods, and keeps no account, he will be charged the inventory value of the partnership goods, if an inventory had been taken;[4] and if the partner who kept the books did it so carelessly that he can give no account of profits, he may be charged at least with interest in lieu thereof,[5] and so if he wilfully refuse to produce them before the master.[6]

§ 983. Presumptions in odium spoliatoris.— So where a partner whose duty it was to keep the books claims to be entitled to credits, and to have made payments which are omitted from the books, he must lose them unless he can make the most satisfactory proof — no claim in his favor will be established on mere probabilities, but every reasonable presumption will be made against him.[7]

And if he destroy the books, or wilfully refuse to produce them before the master, everything will be presumed most

[1] Chandler *v.* Sherman, 16 Fla. 99.

[2] Pierce *v.* Scott, 37 Ark. 308.

[3] Webb *v.* Fordyce, 55 Iowa, 11; Laswell *v.* Robbins, 39 Ill. 209.

[4] Randle *v.* Richardson, 53 Miss. 176; Russell *v.* Green, 10 Conn. 269; Miller *v.* Howard, 26 N. J. Eq. 166.

[5] Pearce *v.* Pearce, 77 Ill. 284.

[6] Walmsley *v.* Walmsley, 3 Jones & Latouche, 556.

[7] Van Ness *v.* Van Ness, 32 N. J. Eq. 669; Gage *v.* Parmalee, 87 Ill. 329; McCabe *v.* Franks, 44 Iowa, 208; Leftwitch *v.* Leftwitch, 6 La. Ann. 346; Hall *v.* Clagett, 48 Md. 223; Bevans *v.* Sullivan, 4 Gill, 383, 391; Harvey *v.* Varney, 104 Mass. 436; Brown *v.* Haynes, 6 Jones (N. Ca.), Eq. 49; Mooe *v.* Story, 8 Dana, 226; Dimond *v.* Henderson, 47 Wis. 172.

unfavorably to him that is consistent with established facts,[1] and so if he falsify them.[2]

But the presumption against a partner who wilfully burnt up all the books, which would be controlling in a conflict of evidence, it has been held will not supply the entire absence of proof.[3]

A partner who was to keep the books, and had failed in his duty, may, on its appearing that no losses were sustained, be required to account for all sums his copartner had put into the business;[4] and cannot be heard to complain that he is held accountable for items on conflicting testimony.[5] And the excess of receipts over disbursements which he cannot show were used for the firm may be presumed to be in his hands.[6] And entries altered or erased, in a material point, cannot be admitted as evidence in favor of such partner without explanation.[7] And if a partner having charge of the books has fraudulently failed to make entries, or suppressed the books, he cannot hold his copartner to the usual degree of proof.[8] And if he fails to produce the books, though he had not been required to do so by order of court, it is a strong circumstance against his objections to a referee's report.[9]

§ 984. On the same principle, if one partner has got possession of notes of the firm, or has collected accounts and makes no return of them, he may be charged the face value or nominal amount without distinguishing the collectible from the doubtful or desperate.[10] And if he has merchandise and refuses to deliver it or ascertain its value, the referee may charge him with a value ascertained by appraisal instead of by sale.[11]

[1] Gray *v.* Haig, 20 Beav. 219. See Walmsley *v.* Walmsley, 3 Jo. & Lat. 556.

[2] Pomeroy *v.* Benton, 77 Mo. 64.

[3] Gage *v.* Parmalee, 87 Ill. 329.

[4] Robertson *v.* Gibb, 38 Mich. 165. And may be charged interest thereon in lieu of profits, Walmsley *v.* Walmsley, 3 Jo. & Lat. 556; Pearce *v.* Pearce, 77 Ill. 284.

[5] White *v.* Magann, 65 Wis. 86, 92.

[6] Johnson *v.* Garrett, 23 Minn. 565.

[7] Churchman *v.* Smith, 6 Whart. 146. And see Mooe *v.* Story, 8 Dana, 226.

[8] Askew *v.* Odenheimer, Bald. C. C. 380.

[9] Wallace *v.* Berger, 14 Iowa, 183.

[10] Gillett *v.* Hall, 13 Conn. 426; Evans *v.* Montgomery, 50 Iowa, 325.

[11] Gillett *v.* Hall, *supra;* Laswell *v.* Robbins, 39 Ill. 209; Webb *v.* Fordyce, 55 Iowa, 11.

The principle of drawing presumptions against a partner in fault, or the maxim *omnia presumuntur contra spoliatorem*, applies only to wrong-doers, and a partner who had failed to keep proper books from incompetency, which the copartner knew of and bore with, and thus, so to speak, condoned, will not be visited with the consequences which would have attached in case of neglect, where he has done the best he could and acted in good faith, although it is very difficult to state an account.[1]

Where no books or accounts are kept, the burden of establishing disputed items must be established by the partner who claims them;[2] though neglect to keep strict accounts, springing from confidence between partners connected by family ties, may perhaps be viewed with more leniency.[3]

§ 985. **Other evidence.**— Where the books are irregularly kept the master may resort to other evidence.[4]

Even to a calculation of profits from the amount of sales made by the firm at the rate of profit usual in that business;[5] but if the books furnish the information, this conjectural evidence cannot be resorted to,[6] nor can the opinions of those engaged in a similar business be admitted to prove that profit was made,[7] or the appraisements of a former receiver as to the value of the stock at another time;[8] but an inventory taken by the partner shortly before is evidence against him.[9] Evidence that stalks on the land showed a better crop than that of the succeeding year, and that the actual yield of the latter year was so much, is admissible to show the probable crop.[10] The admission of a creditor of the firm that he had been paid is not evidence in favor of a partner as against his copartner, nor would the creditor's receipt have been admissible. It is *res inter alios acta;*[11] and where the defendant, on dissolution, sold all the unfinished stock to his son, and the son finished and sold out at private sale, the proceeds of the latter sales, offered in

[1] Knapp *v.* Edwards, 57 Wis. 191.
[2] McCabe *v.* Franks, 44 Iowa, 208.
[3] See Wiswall *v.* Ayres, 51 Mich. 324; Theall *v.* Lacey, 5 La. Ann. 548.
[4] Honore *v.* Colmesnil, 1 J. J. Mar. 506.
[5] Boire *v.* McGuire, 8 Oreg. 466.
[6] Cunningham *v.* Smith, 11 B. Mon. 325.
[7] Boire *v.* McGuire, *supra.*
[8] Miller *v.* Howard, 26 N. J. Eq. 166.
[9] Randle *v.* Richardson, 53 Miss. 176.
[10] Maddox *v.* Stephenson, 60 Ga. 125.
[11] Gandolfo *v.* Appleton, 40 N. Y. 533.

evidence by the defendant when sued for an accounting, was held to throw no light on the value at the time of the conversion.[1]

Results of an attempt to settle before bad blood had been engendered between the parties will be relied upon more than attempts since.[2] So the accounts current rendered by partners to each other are evidence; as admissions to show what items belong or do not belong to partnership account;[3] or an account stated by a partner on dissolution, showing himself indebted to the firm, is evidence against him, though not signed.[4]

COSTS.

§ 986. In an action to dissolve and wind up a partnership, the costs are in the discretion of the court to be apportioned according to the justice of each case.[5] And where the suit was necessary or beneficial to both parties, or both are in fault, will generally be charged on the fund, or, what is the same thing, if there is a surplus, divided.[6]

§ 987. The costs may be put upon one party who has been guilty of misconduct as a punishment.[7] Thus if a partner made a resort to suit necessary, he will be charged with the costs.[8]

Or if part of the suit was made necessary by him, as where he wrongfully denied the partnership, the costs of this issue will be charged to him alone,[9] and in such case should not be charged to the

[1] Flannagan *v.* Maddin, 81 N. Y. 623.

[2] McCabe *v.* Franks, 44 Iowa, 208.

[3] Barry *v.* Barry, 3 Cranch, C. C. 120.

[4] Jessup *v.* Cook, 6 N. J. L. 434.

[5] Gilman *v.* Vaughan, 44 Wis. 646; Gyger's Appeal, 62 Pa. St. 73 (1 Am. Rep. 382); Lampton *v.* Nichols, 1 Cinti. Superior Ct. Rep. 166.

[6] Chandler *v.* Sherman, 16 Fla. 99; Jones *v.* Morehead, 3 B. Mon. 377; Pratt *v.* McHatton, 11 La. Ann. 260; Johnson *v.* Garrett, 23 Minn. 565; Campbell *v.* Coquard, 16 Mo. App. 552; Knott *v.* Knott, 6 Oregon, 142, 151; Woolans *v.* Vansickle, 17 Grant's Ch. (Up. Can.) 451. Even if one partner had expelled the other or has been the cause of the discord, but the suit would have been necessary nevertheless, Jones *v.* Morehead, *supra*. But the mere fact that one party was in fault in causing the prior dissolution will not be considered in adjusting costs, Stevens *v.* Yeatman, 19 Md. 480.

[7] Taylor *v.* Cawthorne, 2 Dev. Eq. 221; O'Lone *v.* O'Lone, 2 Grant's Ch. 125.

[8] Mooe *v.* Story, 8 Dana, 226; Knapp *v.* Edwards, 57 Wis. 191; Hamer *v.* Giles, 11 Ch. D. 942.

[9] O'Lone *v.* O'Lone, 2 Grant's Ch.

fund to the prejudice of creditors;[1] but mere delay in the liquidating partner to wind up, if not wilful, is not sufficient to charge him with costs.[2] And where the defendants never had refused and were not refusing to account, and the complainant had free access to the books, and there was no need for recourse to a court of equity, the suit was dismissed at the complainant's costs;[3] but though there was no refusal by the defendant to account, but each party made requisitions which he was not justified in making, the costs will be put on the fund and not upon the complainant.[4]

In Gyger's Appeal, 62 Pa. St. 73 (1 Am. Rep. 382), a partner appointed to wind up accounted on a basis which was set aside in a suit for an accounting and he was compelled to settle on a different basis, but there being the utmost good faith and the accounts difficult and intricate, the costs were regarded as a necessary item of profit and loss, and should not be borne by him alone, and were charged on the fund.

The fact that nothing is found due the complainant, or either party, is no reason either for dismissal or imposing costs upon him, for he has the right to have the accounts adjusted and the assets applied to the debts.[5]

No part of the funds will be appropriated to an allowance to complainant's attorney for services, at least before final judgment.[6]

Costs are to be paid out of the assets, that is, out of the balance left after paying debts, including what is due to the individual partner,[7] and are to be borne in the proportion that profits are shared.[8]

125; and see Price's Estate, 81 Pa. St. 263.

[1] Bingham *v.* Shaw, 16 Grant's Ch. 373.

[2] Lee *v.* Page, 7 Jur. N. S. 768; 30 L. J. Ch. N. S. 857.

[3] See Demarest *v.* Rutan, 40 N. J. Eq. 356.

[4] Lee *v.* Page, 7 Jur. N. S. 768; 30 L. J. N. S. Ch. 857.

[5] Knapp *v.* Edwards, 57 Wis. 191.

[6] Struthers *v.* Chrystal, 3 Daly, 327.

[7] Austin *v.* Jackson, 11 Ch. D. 942, n.; Hamer *v.* Giles, 11 id. 942; Potter *v.* Jackson, 13 id. 845.

[8] Hamer *v.* Giles, *supra.*

CHAPTER IV.

INJUNCTION AND RECEIVER.

§ 988. Injunction without dissolution.— An injunction may be resorted to by one partner against another before dissolution and without seeking dissolution, and for the express purpose of avoiding it, to restrain breaches of the partnership articles or violations of duty, and minor grievances or acts of misconduct;[1] as against misuse of the property contrary to the articles;[2] or appropriating it for his separate debts;[3] or extending the business into new fields not contemplated in the articles, or the attempt of the majority to alter fundamental provisions;[4] or engaging in business or enterprises in competition with the firm;[5] or taking away the books;[6] or using the property of one partnership for another, as where some of the proprietors of a morning newspaper used news obtained at the firm's expense, for an evening paper of the prior day.[7] So, also, negative obligations may be enforced by injunction; as where the partner agrees not to write plays for any other theatre;[8] or not to carry on business except as partner;[9] or not to compete;[10] or publishing a notice of dissolution and going into another business, when the agreed term of partnership has not expired;[11] but mere apprehension and temp-

[1] Howell *v.* Harvey, 5 Ark. 270, 279; 39 Am. Dec. 376; Kennedy *v.* Kennedy, 3 Dana, 239. See Marshall *v.* Colman, 2 Jac. & W. 266, as to using wrong name.

[2] Hall *v.* Hall, 12 Beav. 414; New *v.* Wright, 44 Miss. 202.

[3] Stockdale *v.* Ullery, 37 Pa. St. 486; Converse *v.* McKee, 14 Tex. 20, 30.

[4] Natusch *v.* Irving, 2 Cooper, temp. Cottenham, 358; Drew *v.* Beard, 107 Mass. 64.

[5] § 306.

[6] See § 314.

[7] Glassington *v.* Thwaites, 1 Sim. & Stu. 124.

[8] Morris *v.* Colman, 18 Ves. 437.

[9] Levine *v.* Michel, 35 La. Ann. 1121.

[10] § 678.

[11] England *v.* Curling, 8 Beav. 129. As to the right of a general creditor to seek an injunction, see § 929.

tation to be false is not sufficient;[1] nor disagreements which the majority have the right to settle.[2]

§ 989. **Pending action for account.**— Pending an action for dissolution, a partner may be enjoined from making contracts or doing acts which would create new liabilities; as signing the firm name to negotiable paper, except for partnership purposes;[3] or interfering with the property;[4] or contracting debts in the name or on the credit of the partnership, even when not enjoined from working in the business, the object being only to protect the plaintiff.[5]

A partner enjoined from intermeddling with the property is not in contempt by giving a confession of judgment to a *bona fide* creditor, in order to enable him to obtain a preference by levying.[6]

§ 990. **After dissolution.**— After dissolution a partner may be enjoined from injuring the property of the firm, as by advertising a discontinuance of a newspaper;[7] publishing the firm's accounts;[8] or publishing letters received from the copartner in relation to the business;[9] or holding out plaintiff as still a partner;[10] or from collecting assets, if there is danger that he will misappropriate or remove them from the jurisdiction;[11] or from selling the property in his hands, if the injury to the copartners would be irremediable.[12] And a partner who on retiring has sold the good will will be

[1] Glassington *v.* Thwaites, *supra*. And see Mitchell *v.* Colman, 2 Jac. & Walk. 266.

[2] Kennedy *v.* Kennedy, 3 Dana, 239.

[3] Williams *v.* Bingley, 2 Vern. 278; Jervis *v.* White, 7 Ves. 413; Hood *v.* Aston, 1 Russ. 412.

[4] Smith *v.* Jeyes, 4 Beav. 503; Crockford *v.* Alexander, 15 Ves. 138; Marshall *v.* Watson, 25 Beav. 501; Charlton *v.* Poulter, 19 Ves. 148, n.

[5] Fitchter *v.* Fitchter, 11 N. J. Eq. 71.

[6] McCredie *v.* Senior, 4 Paige, 378. The validity of the confession of judgment seems not to have been questioned.

[7] Bradbury *v.* Dickens, 27 Beav. 53.

[8] Marshall *v.* Watson, 25 Beav. 501.

[9] Roberts *v.* McKee, 29 Ga. 161.

[10] Routh *v.* Webster, 10 Beav. 561; McGowan Bros. Pump & Mach. Co. *v.* McGowan, 22 Oh. St. 370. See § 672.

[11] Ellis *v.* Commander, 1 Strob. Eq. (S. Ca.) 188; O'Brien *v.* Cooke, Irish L. R. 5 Eq. 51.

[12] Wilkinson *v.* Tilden, 9 Fed. Rep. 683. *Contra* if solvent, Wellman *v.* Harker, 3 Oreg. 253.

enjoined from a breach of the contract;[1] and breaches of agreements not to engage in the same business, within reasonable limits, will be restrained by injunction.[2] The administrators of a deceased partner may be enjoined from disposing of partnership property in their hands;[3] or will be enjoined from collecting or disposing of assets, if he has been guilty of breach of trust.[4]

§ 991. Exclusion of a partner.—The exclusion of a partner from his rightful share in the profits or management of the business, and from his right to inspect the books and be informed of the state of the accounts, is a prominent ground for an injunction. It is not necessary that a dissolution be asked for in such cases, but the relief is granted on the same principle that other acts of misconduct are restrained, or to establish the complainant's rights without interrupting the continuance of the firm and its enterprises.[5]

Even if dissolution is also prayed for, the injunction will not be in the form of a restraint upon the defendant's interference in and control of the business, or a prohibition on his collecting and receiving debts, for that would leave the plaintiff in possession and would cause a serious embarrassment to the defendant's business without corresponding benefit to the plaintiff; if such relief is called for in order to protect the plaintiff, it must be by the appointment of a receiver.[6]

A defendant will not be restrained from exercising his calling except in a clear case and on a pressing emergency. And where there is no charge of insolvency or danger of irreparable loss, the case is not analogous to a bill to restrain waste, and although such exclusion is a serious violation of

[1] See chapter on GOOD WILL.

[2] See § 678.

[3] Alder *v.* Fouracre, 3 Swanst. 489.

[4] See Hartz *v.* Schrader, 8 Ves. 317.

[5] Anonymous, 2 Kay & J. 441; Hall *v.* Hall, 12 Beav. 414; 20 id. 139; 3 Macn. & G. 79; Rutland Marble Co. *v.* Ripley, 10 Wall. 339; Pirtle *v.* Penn, 3 Dana, 247; 28 Am. Dec. 70; Wolbert *v.* Harris, 7 N. J. Eq. 605; Petit *v.* Chevelier, 13 id. 181; Van Keuren *v.* Trenton Locomotive, etc. Mfg. Co. 13 id. 302. Compare § 996.

[6] Van Keuren *v.* Trenton Locomotive, etc. Mfg. Co. 13 N. J. Eq. 302; Petit *v.* Chevelier, 13 id. 181.

duty, it is not sufficient to sustain an injunction before notice and without opportunity to answer.[1]

Where a partner attempts or threatens to assign or sell the entire assets of the firm in fraud of his copartners' rights, or where part of the property is not designed for sale, an injunction will be granted[2] and a receiver appointed.[3]

§ 992. **Mutuality.**— The injunction may be required to be mutual, that is, only on condition that the complainant stipulates and submits to be enjoined to the same extent.[4]

§ 993. **Receiver.**— The jurisdiction of a court of equity to appoint a receiver in settling partnership affairs is inherent in the court and independent of statute; and hence exists unless the statutes take away the power.[5]

The right to have a receiver appointed, and thus take away the control and disposition of property from its owners and submit it to the management of a stranger, does not follow as of course from the right to have a dissolution and an accounting, or from the right to a settlement after dissolution.[6]

[1] Petit *v.* Chevelier, 13 N. J. Eq. 181.

[2] Halstead *v.* Shepard, 23 Ala. 558, 573; High *v.* Lack, Phil. (N. Ca.) Eq. 175; Sloan *v.* Moore, 37 Pa. St. 217; Ormsbee *v.* Davis, 5 R. I. 442.

[3] High *v.* Lack, and Ormsbee *v.* Davis, *supra.*

[4] Weissenborn *v.* Seighortner, 21 N. J. Eq. 483; and see Charlton *v.* Poulter, cited in notes to Norway *v.* Rowe, 19 Ves. 148–9.

[5] Cox *v.* Volkert, 86 Mo. 505; Gridley *v.* Conner, 2 La. Ann. 87.

[6] Waters *v.* Taylor, 15 Ves. 10, 15; Oliver *v.* Hamilton, 2 Anstr. 453; Millbank *v.* Revett, 2 Mer. 405; Renton *v.* Chaplain, 9 N. J. Eq. 62; Fitchter *v.* Fitchter, 11 id. 71; Cox *v.* Peters, 13 N. J. Eq. 39; Quinlivan *v.* English, 44 Mo. 46, limiting s. c. 42 id. 362. See Heflebower *v.* Buck, 64 Md. 15; and cases in this chapter *passim.* Some cases seem almost to proceed upon the ground that a receiver will be granted as of course. Law *v.* Ford, 2 Paige, 310; Marten *v.* Van Schaick, 4 Paige, 479 (criticised on this ground in Fitchter *v.* Fitchter, 11 N. J. Eq. 71; but they were probably cases of disagreements, § 998); New *v.* Wright, 44 Miss. 202, where the managing partner in a saw-mill was to take the lumber from copartner's land, and having violated this agreement, and the business being a losing one and the debt increasing, a receiver and injunction were granted; Dunn *v.* McNaught, 38 Ga. 179, the articles gave either partner in a farming partnership a right to dissolve on six months' notice if the business did not pay ten per cent., and a receiver and injunction were granted.

A receivership is not only an expensive but is often a most mischievous and destructive instrumentality. It may not only destroy and ruin a prosperous concern while going, but may reduce to insolvency a dissolved firm which would otherwise pay out in full. Not only do the creditors suffer by this process, but the partner who has contributed most capital and has most at stake becomes the greatest sufferer by a reckless or unnecessary resort to this stringent measure, which is often demanded by a partner who has nothing to lose and is much at fault. Hence the courts will not grant a receiver for every alleged mismanagement, and only when the necessity is real and is demanded for the safety of the assets and protection of the parties.[1] And the court will always pause before appointing a receiver, and put it to the parties to consider whether they cannot remove the necessity of doing what is at best a ruinous proceeding. Such an intimation from the court is peculiarly wholesome.[2] A receiver will not be granted unless it satisfactorily appears that there is a right to a dissolution and winding up.[3]

§ 994. Before dissolution.— Hence before dissolution mere quarrels, insufficient as ground to dissolve, will, of course, not found a right to a receiver;[4] and if the contention be of a matter which a majority must determine, no receiver will be granted, although the disagreement may be such as to limit or threaten to stop the business.[5] Yet where the personal relations of the partners are such that a dissolution is inevitable, a disagreement as to the control and disposition of the property will be ground for a receiver.[6] And so if a partner has acted so as justly to destroy all confidence in

[1] Heflebower *v.* Buck, 64 Md. 15, 22. Failing to answer interrogatories to a bill as to the account is not sufficient ground for a receiver, Drury *v.* Roberts, 2 Md. Ch. 157.

[2] Per ELDON, Ld. Ch., Waters *v.* Taylor, 15 Ves. 10, 15.

[3] Garretson *v.* Weaver, 3 Edw. Ch. (N. Y.) 385; Sieghortner *v.* Weissenborn, 20 N. J. Eq. 172, reversed in part in Weissenborn *v.* Seighortner, 21 id. 483.

[4] McElvey *v.* Lewis, 76 N. Y. 373; Loomis *v.* McKenzie, 31 Iowa, 425; Sloan *v.* Moore, 37 Pa. St. 217.

[5] Kennedy *v.* Kennedy, 3 Dana, 239.

[6] Marten *v.* Van Schaick, 4 Paige, 479. See Naylor *v.* Sidener, 106 Ind. 179.

him,[1] and has transferred his private property, and shows an intention to break up the firm and leave the complainant to pay the losses;[2] or where the firm is insolvent, and one partner is wasting the property or threatens to apply it improperly;[3] or if an insolvent partner is thus acting;[4] especially if no injury to either partner will be done;[5] or if a partner who furnished no capital, but is to sell and pay over to the partner who furnishes the commodities to be sold, fails to pay over proceeds as agreed, and makes colorable sales in fraud of the partnership contract.[6]

§ 995. After dissolution.— Although after dissolution a less strong case is necessary than before, yet even then an urgent and pressing necessity must exist. The measure is of so stringent a character that the power is never exercised except for imperative reasons.[7] There must be a breach of duty or of contract.[8] A receiver, on dissolution by consent or at will, will not be appointed as of course, even on request of the parties, unless necessary, for it might ruin a solvent concern to put it in the hands of a stranger.[9] And no receiver will be granted at the request of the partner in sole possession, because he has full power to dispose of the assets.[10] A receiver will be appointed where a partner has sold his interest in the establishment to a person who is using it in a way to hazard its destruction by fire, and threatens to take exclusive possession.[11] Or where a partner is continuing the business on his own account with the partnership

[1] Smith *v.* Jeyes, 4 Beav. 503.

[2] Sutro *v.* Wagner, 23 N. J. Eq. 388; affd. in 24 id. 589.

[3] Evans *v.* Evans, 9 Paige, 178; Jacquin *v.* Buisson, 11 How. Pr. 385; Geortner *v.* Canajoharie, 2 Barb. 625; Williamson *v.* Wilson, 1 Bland, 418, 423; and see Higginson *v.* Air, 1 Desaus. 427, 429.

[4] Phillips *v.* Trezevant, 67 N. Ca. 370; Haight *v.* Burr, 19 Md. 130; Shannon *v.* Wright, 60 Md. 520.

[5] Saylor *v.* Mockbie, 9 Iowa, 209.

[6] Maher *v.* Bull, 44 Ill. 97.

[7] O'Bryan *v.* Gibbons, 2 Md. Ch. 9; Heflebower *v.* Buck, 64 Md. 15; Morey *v.* Grant, 48 Mich. 326.

[8] Harding *v.* Glover, 18 Ves. 281; Wilson *v.* Greenwood, 1 Swanst. 481; Fitchter *v.* Fitchter, 11 N. J. Eq. 71; Bufkin *v.* Boyce, 104 Ind. 53.

[9] Birdsall *v.* Colie, 10 N. J. Eq. 63. See Pressley *v.* Harrison, 102 Ind. 14.

[10] Smith *v.* Lowe, 1 Edw. Ch. (N. Y.) 33.

[11] Heathcot *v.* Ravenscroft, 6 N. J. Eq. 113.

effects,[1] although the complainant is indebted to him,[2] or is insolvent and using the assets to pay private debts,[3] or even on the sole ground of defendant's insolvency;[4] or if continuing partners agree to apply the assets to the debts of the old firm, and one of the new firm misappropriates them,[5] or if they have been untrue to the trust, or seem likely to be untrue;[6] but merely that the complainant has lost confidence in them is not sufficient if there is no evidence of bad faith and no insolvency.[7]

§ 996. Exclusion of a partner.— Where, however, the exclusion is wilful and a dissolution is asked on sufficient grounds, a receiver also will be appointed, if a necessity for it exists.

Thus if the exclusion of the plaintiff is accompanied by wilful fraud and application of funds to the defendant's own use, and false entries and concealment, a sufficient ground for the appointment of a receiver is shown before decree.[8] But if such facts are explained, as where the exclusion and failure to account are denied, and the defendant is selling the assets under an agreement by which he is authorized to apply the proceeds of them to a note given to him by the plaintiff, which is not yet fully paid, and his solvency is not questioned, no receiver will be granted.[9] The fact that the partner who excludes the co-plaintiff is solvent and able to respond for the assets in his hands will not be a sufficient reason for refusing a receiver, although the fact of a partnership is not denied.[10]

The weight of authority, however, seems to be that a wilful exclusion of the plaintiff in itself constitutes the necessity for a receiver, and entitles the complainant to have the assets taken so charge of for his security,[11] whether

[1] Harding *v.* Glover, 18 Ves. 281.

[2] De Tastet *v.* Bordenave, Jac. 516; Doupe *v.* Stewart, *supra.*

[3] Davis *v.* Grove, 2 Robt. (N. Y.) 134; id. 635.

[4] Randall *v.* Morrell, 17 N. J. Eq. 343; Freeland *v.* Stansfeld, 2 Sm. & G. 479; Hubbard *v.* Guild, 1 Duer, 662.

[5] Coddington *v.* Tappan, 26 N. J. Eq. 141.

[6] Id.

[7] Id.; Woodward *v.* Schatzell, 3 John. Ch. 412, 415.

[8] Barnes *v.* Jones, 91 Ind. 161.

[9] Parkhurst *v.* Muir, 7 N. J. Eq. 307.

[10] Hottenstein *v.* Conrad, 9 Kan. 435.

[11] Wilson *v.* Greenwood, 1 Swanst. 471; Blakeney *v.* Dufaur, 15 Beav. 40; Clegg *v.* Fishwick, 1 MacN. & G.

the complainant is also a wrong-doer or not.[1] And if one partner attempt to assign the entire property for benefit of creditors of the firm without consulting the other who is accessible, this is such an unauthorized exclusion, and will justify appointing a receiver and enjoining the assignee.[2]

§ 997. Same in winding up.— As except in case of death, sale of an interest, or insolvency, or agreement to the contrary, all the partners have an equal right to wind up, if one wrongfully exclude the other from participation therein, a receiver will be appointed.[3]

And an exclusion of the administrator from a right to inspect the books and be informed of proceedings was held to entitle him to injunction and receiver.[4] But if a dissatisfied partner has withdrawn, the copartner who has advanced all the capital will not be interfered with in the entire management of winding up where there is no suggestion of irresponsibility or impeachment of integrity, or proof of fraud.[5]

§ 998. Disagreement in winding up.— A common cause for the appointment of a receiver is disagreement between the partners as to the proper management, control and disposition of the assets in winding up. As each has an equal right with the other, unless he has transferred the assets to a copartner in order to settle their concerns, or unless there is a majority, such disagreements seem necessarily to result in a receiver and injunction.[6]

And if a partner has sold his interest to a third person whom all the partners had agreed might participate in the settlement, he is

294; Maynard *v.* Railey, 2 Nev. 313; Heathcot *v.* Ravenscroft, 6 N. J. Eq. 113; Wolbert *v.* Harris, 7 id. 605; Steele *v.* Grossmith, 19 Grant's Ch. (Up. Can.) 141.

[1] Wolbert *v.* Harris, *supra.*

[2] Ormsbee *v.* Davis, 5 R. I. 442; High *v.* Lack, Phil. (N. Ca.) Eq. 175.

[3] Wilson *v.* Greenwood, 1 Swanst. 471; Terrell *v.* Goddard, 18 Ga. 664; Speights *v.* Peters, 9 Gill, 472; Drury *v.* Roberts, 2 Md. Ch. 157; Doupe *v.* Stewart, 13 Grant's Ch. (Up. Can.) 637.

[4] Bilton *v.* Blakely, 6 Grant's Ch. (Up. Can.) 575.

[5] Cox *v.* Peters, 13 N. J. Eq. 39.

[6] Speights *v.* Peters, 9 Gill, 472; Whitman *v.* Robinson, 21 Md. 30; Law *v.* Ford, 2 Paige, 310; Marten *v.* Van Schaick, 4 Paige, 479; Van Rensselaer *v.* Emery, 9 How. Pr. 135; McElvey *v.* Lewis, 76 N. Y. 373, Richards *v.* Baurman, 65 N. Ca. 162; Sloan *v.* Moore, 37 Pa. St. 217; Walker *v.* House, 4 Md. Ch. 39, 43.

entitled to an injunction and receiver the same as his assignor would have been.[1] And if partners have conveyed property in trust to pay certain partnership debts, and disagree as to the application of the proceeds, a receiver may be appointed, for this is a mere change of trustee.[2]

§ 999. Against surviving or liquidating partner.— We have already seen that the representatives of a partner, whether they be his administrators in case of death or assignees in case of insolvency, can apply for an accounting and to compel a winding up.[3] In such case, if relief by injunction or receiver, or both, is necessary it will be granted. But as a surviving partner has the right at law in the nature of a vested interest to wind up, the assets will not be wrested from him to be administered by the expensive and destructive machinery of a receiver except for the most cogent reasons and for real necessity; or danger to the assets in his hands, either from grievous misconduct or clear breach of duty, amounting to fraud or gross mismanagement.[4] And the same rule applies to a solvent partner engaged in winding up,[5] or to a partner to whom the settlement of the concern was left by the copartners;[6] or to the remaining partners after one has sold his share to a third person: the

[1] Van Rensselaer *v.* Emery, 9 How. Pr. 135.

[2] Naylor *v.* Sidener, 106 Ind. 179.

[3] § 923.

[4] Waters *v.* Taylor, 15 Ves. 10, 19; Heflebower *v.* Buck, 64 Md. 15; Barry *v.* Briggs, 22 Mich. 201; Higginson *v.* Air, 1 Desaus. 427, 429. In Barry *v.* Briggs, 22 Mich. 201, it was said that the appointment of a receiver in a suit for an account by an administrator against a surviving partner has no analogy to the appointment in an ordinary partnership case, because in the former case, unlike the latter, there is an interference with an exclusive right and title, and divesting of a vested interest, and such a decree is therefore not interlocutory, but appealable. In Milner *v.* Cooper, 65 Iowa, 190, a landlord had a landlord's lien on a stock of goods of a firm who were his tenants, and one of the partners having died, the survivor, a man of large means, was about to sell the whole stock. The landlord enjoined; the injunction was dissolved as being unnecessary for his protection, the survivor being a trustee for all interested and could not be compelled to sell at retail only.

[5] Renton *v.* Chaplain, 9 N. J. Eq. 62; O'Bryan *v.* Gibbons, 2 Md. Ch. 9. And see Wellman *v.* Harker, 3 Oreg. 253.

[6] Drury *v.* Roberts, 2 Md. Ch. 157; Walker *v.* Trott, 4 Edw. Ch. 38.

rest can refuse to allow him to interfere;[1] or after one has absconded.[2]

Hence the mere fact that a business was unprofitable and should be discontinued is no reason for taking away the settlement of it from a partner.[3]

Where the articles gave an option to a continuing to purchase the share of the outgoing partner at a valuation, but on the retirement of a partner the copartner refused to take at the valuation, he is entitled nevertheless to the opportunity to wind up, and unless abuse is shown, although the bill may be retained for an accounting.[4]

And if the settlement is nearly at an end and a receiver would be a trouble and expense without substantial benefit, and no danger by abuse or insolvency appears, no receiver will be granted.[5]

§ 1000. —— injunction against surviving partner.— If the surviving partner is disposing of the property to his own use or continuing business, an injunction, on application of the administrator, will certainly be granted;[6] or is using real or personal property on his own account to the detriment of the estate, even though it be not consumed in the usage;[7] or being guilty of laches and bad faith.[8] The executor's consent to continue business is no estoppel, for he had no right to consent.[9]

§ 1001. —— and receiver.— And a receiver will also be granted if he is attempting to transfer to his new business the benefit of the custom and good will of the old;[10] or is

[1] McGlensey *v.* Cox, 1 Phila. 287; 5 Pa. L. J. Rep. 203; Ballard *v.* Callison, 4 W. Va. 326; § 756.

[2] Hamill *v.* Hamill, 27 Md. 679. Here the wife of the absconding person brought a divorce suit and obtained a receiver of all his property, who took possession of the business, but it being proved that there was a partner restitution to him was ordered.

[3] Moies *v.* O'Neill, 23 N. J. Eq. 207.

[4] Quinlivan *v.* English, 44 Mo. 46, limiting S. C. 42 id. 362.

[5] Heflebower *v.* Buck, 64 Md. 15.

[6] Hartz *v.* Schrader, 8 Ves. 317; Fletcher *v.* Vandusen, 52 Iowa, 418; Gable *v.* Williams, 59 Md. 46; Citizens' Mut. Ins. Co. *v.* Ligon, 59 Miss. 305, 313; Fulton *v.* Thompson, 18 Tex. 278, 286–7; Jennings *v.* Chandler, 10 Wis. 18 [21].

[7] Stanhope *v.* Suplee, 2 Brews. (Pa.) 455, of machinery.

[8] People *v.* White, 11 Ill. 341, 350.

[9] Citizens' Mut. Ins. Co. *v.* Ligon, 59 Miss. 305.

[10] Young *v.* Buckett, 51 L. J. Ch. 504.

continuing business, mixing the old and new assets, without keeping separate accounts and using the proceeds for his own benefit,[1] or otherwise appropriating them;[2] or assigns for the benefit of private and partnership creditors without distinction;[3] or if there had been abuse of the assets and there is danger of further misapplication, and he is insolvent.[4] And in case of misuse of assets the buyer of a co-partner's interest may obtain interference of court by injunction and receiver.[5]

A receiver may even be granted for unreasonable delay of the survivor to pay debts and collect credits,[6] certainly if he is also continuing business for his own benefit.[7]

§ 1002. Partnership in doubt.—If the existence of the partnership is denied and is doubtful, a preliminary injunction and, therefore, a receiver may be refused.[8] Yet where the doubt was merely whether the partnership extended to include certain property, an injunction to secure the alleged interest was not dissolved before trial.[9] A receivership will not be refused or vacated merely because the fact of partnership is denied, for that would open the door to a real victory to the wrong-doer, and *prima facie* proof is sufficient, or proof of insolvency of the defendant.[10]

In case one partner is claiming property as his own, it is not necessary that the funds be ascertained absolutely to be partnership assets; if they are probably joint a receiver will be appointed on

[1] Jennings *v.* Chandler, 10 Wis. 18.

[2] Tillinghast *v.* Champlin, 4 R. I. 173, 210.

[3] Gable *v.* Williams, 59 Md. 46, 52. But see Scott *v.* Tupper, 8 Sm. & Mar. 280.

[4] Gable *v.* Williams, 59 Md. 46, 52; Fletcher *v.* Vandusen, 52 Iowa, 448.

[5] Ballard *v.* Callison, 4 W. Va. 326.

[6] Miller *v.* Jones, 39 Ill. 54.

[7] Holden *v.* McMakin, 1 Pars. Eq. Cas. 270.

[8] See Lord Eldon in Norway *v.* Rowe, 19 Ves. 144, 155-7; Baxter *v.* Buchanan, 3 Brewst. (Pa.) 435; Guyton v. Flack, 7 Md. 398; Hobart *v.* Ballard, 31 Iowa, 521.

[9] Carroll *v.* Martin, 35 Ga. 261; Williams *v.* Moore, Phil. (N. Ca.) Eq. 211, where the firm was insolvent and the property owned in common was probably assets.

[10] Peacock *v.* Peacock, 16 Ves. 49, here a denial of partnership in the answer did not prevent injunction and receiver; Hottenstein *v.* Conrad, 9 Kan. 435. But see Fitchter *v.* Fitchter, 11 N. J. Eq. 71.

application of the excluded partner, although the funds are not in imminent peril.[1]

If effects in the hands of a receiver are shown to be the separate property of one partner, restitution will be ordered.[2]

But the court cannot generally undertake to decide what is partnership property as between the partners and third persons, and it must be determined by an action by or against the receiver.[3]

§ 1003. Partner as receiver.— One of the partners may be appointed receiver.[4] A solvent partner has been appointed receiver.[5] So may a surviving partner;[6] or the only sane partner.[7] A partner who has dissolved the firm at an inopportune time and unreasonably will not be put in charge.[8]

But a partner thus put in charge of the winding up can have no compensation for such services.[9]

Or instead of a receivership the partner in possession may, in certain cases, on giving adequate security to pay the other his share, be left in charge, as where such partner owns most of the capital and a receiver would arrest a large and flourishing business.[10] So a receiver has been refused as against a surviving partner, upon his giving security to the administrator to account, apply assets to debts and pay over the balance.[11]

[1] Speights *v.* Peters, 9 Gill, 472.

[2] Saylor *v.* Mockbie, 9 Iowa, 209.

[3] Higgins *v.* Bailey, 7 Robt. (N. Y.) 613.

[4] Honore *v.* Colmesnil, 1 J. J. Mar. 506; Doupe *v.* Stewart, 13 Grant's Ch. (Up. Can.) 637, 641.

[5] Wilson *v.* Greenwood, 1 Swanst. 471, 483; *Ex parte* Stoveld, 1 Glyn & J. 303; Hubbard *v.* Guild, 1 Duer, 662, that he will generally be appointed.

[6] Berry *v.* Jones, 11 Heisk. 206.

[7] Reynolds *v.* Austin, 4 Del. Ch. 24.

[8] McMahon *v.* McClernan, 10 W. Va. 419.

[9] *Ex parte* Stoveld, 1 Glyn & J. 303; Doupe *v.* Stewart, 13 Grant's Ch. (Up. Can.) 637, 641. *Contra*, that he is entitled to compensation, Honore *v.* Colmesnil, 1 J. J. Mar. 506.

[10] Popper *v.* Scheider, 7 Abb. Pr. (N. S.) 56; 38 How. Pr. 34. It was done in Delo *v.* Banks, 101 Pa. St. 458; Keeney *v.* Home Ins. Co. 71 N. Y. 396 (27 Am. Rep. 60); and refused in Law *v.* Ford, 2 Paige, 310. And the partner in charge of the editorial department of a political newspaper was allowed to continue to superintend it under the receiver until a sale could be had, Marten *v.* Van Schaick, 4 Paige, 479.

[11] Jennings *v.* Chandler, 10 Wis. 18; Foster *v.* Shephard, 33 Tex. 687; Higginson *v.* Air, 1 Desaus. 427, 429; Hartz *v.* Schrader, 8 Ves. 317; Burden *v.* Burden, 1 Ves. & Bea. 170.

An administrator of a deceased partner may, upon the surviving partner being superseded for bad faith, be appointed receiver on giving bond as such.[1]

Where a partner, on being permitted to wind up, gives bond to pay the complainant his share, and is afterwards displaced by a receiver appointed in the same case, his sureties are liable only for the amount actually received by him while liquidating the concern.[2]

§ **1004. Notice necessary.**— The usual rule requiring notice of an application for a receiver before a person's property is taken away from him obtains of course.[3] But this equity rule may be dispensed with in case of fraud or imminent danger and stringent necessity clearly proved, as where the bill charges the active partner with having largely overdrawn, with fraudulent motives, and excluding complainant from access to the books, failing to pay debts, appropriating the funds and threatening to sell out the entire effects, the defendant being of no pecuniary responsibility.[4]

§ **1005. Of all property.**— As the receiver's possession is merely that of the court, and he derives all his powers from the court, it would follow that he can take possession only of such assets as are within the jurisdiction.[5] Certainly where the assets in another jurisdiction consist of a branch business conducted by one of the partners in partnership with a third person, the receiver cannot be appointed to interfere with the rights of such person.[6] But the receivership should extend to all assets in the jurisdiction where the suit is for a final accounting, and not merely of those on the premises in controversy.[7]

§ **1006. Creditors' rights.**— When the property is in the hands of a receiver it is in the custody of the law and the

[1] Miller *v.* Jones, 39 Ill. 54.

[2] Delo *v.* Banks, 101 Pa. St. 458.

[3] Bostwick *v.* Isbell, 41 Conn. 305, holding that a statute to the contrary would not be constitutional; Fletcher *v.* Vandusen, 52 Iowa, 448, 454.

[4] Haight *v.* Burr, 19 Md. 130.

[5] See Booth *v.* Clark, 17 How. (U. S.) 322.

[6] Harvey *v.* Varney, 104 Mass. 436.

[7] Morey *v.* Grant, 48 Mich. 326.

remedy of the creditors becomes equitable. They cannot thereafter reach the property or acquire preferences in it by getting judgment against the partners or a surviving partner or by attempting to garnish the receiver.[1]

A receiver appointed to supersede a surviving partner was said to be a necessary party to all suits by creditors to establish their claims, for otherwise their judgments would be nullities;[2] but is not a necessary party to a bill by creditors to have judgments against the firm declared fraudulent and to have the receiver suspended.[3]

§ 1007. **Receiver continuing business.**— If a sudden stoppage of the business would cause material injury to the interests of the partners, or it is necessary in order to preserve the good will and sell out as a going concern, the court may authorize and direct the receiver to continue the business until it can be advantageously stopped or sold.[4]

But if the only resident partner procures a receiver, who continues to carry on business in the interest of such partner and not by direction of the court, such partner is liable to persons who furnished the receiver with goods.[5]

Profits earned by the receiver after dissolution belong to all the

[1] Jackson *v.* Lahee, 114 Ill. 287; Knode *v.* Baldridge, 73 Ind. 54; Buckingham *v.* Ludlum, 37 N. J. Eq. 137, 146; Kirkpatrick *v.* McElroy (N. J.), 7 Atl. Rep. 647; Waring *v.* Robinson, Hoff. Ch. 524; Holmes *v.* McDowell, 15 Hun, 585 (aff'd without op. 76 N. Y. 593); Manning *v.* Brickell, 2 Hayw. (N. Ca.) 133; Taylor *v.* Gilleau, 23 Tex. 508; and see § 935. *Contra*, that as the partners could by uniting discontinue the suit and procure the discharge of the receiver, the creditors are not deprived of their remedy until an order of distribution among them has been made, and until then can proceed to judgment and levy and thus acquire a lien, Ross *v.* Titsworth, 37 N. J. Eq. 333, approving the dissenting opinion in Holmes *v.* McDowell, 15 Hun, 585, and the California cases, and also Waring *v.* Robinson, Hoff. Ch. 524; Adams *v.* Wood, 9 Cal. 24; except that in case of insolvency *pro rata* distribution is required (and citing Waring *v.* Robinson); Marye *v.* Jones, id. 335.

[2] Kirkpatrick *v.* McElroy, 41 N. J. Eq. 539.

[3] Davis *v.* Michelbacher (Wis.), 31 N. W. Rep. 160.

[4] Levi *v.* Karrick, 8 Iowa, 150, 155; Allen *v.* Hawley, 6 Fla. 142 (63 Am. Dec. 198); Jackson *v.* DeForest, 14 How. Pr. 81; Marten *v.* Van Schaick, 4 Paige, 479. And see § 660.

[5] Curtin *v.* Munford, 53 Ga. 168.

partners,[1] unless the earnings are the proceeds of the capital of the aggrieved partner only.[2]

§ 1008. Miscellaneous.— In Terrell *v.* Ingersoll, 10 Lea, 77, it was held that where one partner enjoins another from collecting the assets, the former is bound to see that a receiver is properly appointed to secure the assets, and is liable for neglect of the receiver to do his duty although the particular person had been consented to by the defendaut, and that the partner wrongfully enjoined could recover on the injunction bond his share of assets collectible at the time of injunction, which had become insolvent or barred by limitations.

In Shulte *v.* Hoffman, 18 Tex. 678, it was held that both parties are equally bound to see that the receiver gives bond, and cannot object on appeal if he did not.

A receiver authorized to collect debts can sue in his own name.[3]

A receiver ordered to sell partnership real estate may sell a piece though omitted to be mentioned in the complaint.[4]

A receiver's sale has been held to pass only the partnership title, and does not divest a chattel mortgage of a third person;[5] but liens against the interest of one partner do not affect the title conveyed by receiver's sale.[6]

[1] McMahon *v.* McClernan, 10 W. Va. 419.

[2] Durbin *v.* Barber, 14 Oh. 311.

[3] Henning *v.* Raymond, 35 Minn. 229.

[4] Barron *v.* Mullin, 21 Minn. 374.

[5] Lorch *v.* Aultman, 75 Ind. 162.

[6] Foster *v.* Barnes, 81 Pa. St. 377, of real estate, there being a judgment against one partner. And see §§ 183–187, 291.

CHAPTER V.

SPECIFIC PERFORMANCE.

§ 1009. Generally refused, and why.— Specific performance of a contract to form a partnership as a general rule will not be enforced, but the partners will be left to their action at law for damages.[1] If the contract require a party to give his time, skill, attention or services of any kind, an enforcement of it upon an unwilling party would require the court to manage the partnership, which alone is reason for refusal to grant the relief, besides being productive of no benefit to the other party. And this refusal of specific relief is in analogy to the policy of the law to grant a dissolution for hopeless and irreconcilable dissensions.

And if the contract require a contribution of capital only, the remedy at law for damages is adequate, especially if the partnership is still wholly inchoate.[2]

§ 1010. Older leading cases.— Buxton *v.* Lister, 3 Atk. 383, seems to be the earliest case (1746), and there it was said that specific performance will in general be refused, but was granted in that case; Lord Hardwicke saying: "Suppose two partners should enter into an agreement . . . to carry on a trade together, and that it should be specified in the memorandum that articles should be drawn pursuant to it, and before they are drawn one of the parties flies off, I should be of opinion . . . that notwithstanding it is in relation to a chattel interest, yet a specific performance ought to be decreed."

In Anonymous, 2 Ves. Sr. 629 (1755), an agreement to let plaintiff into a trade was specifically enforced, but without an account of profits from the time when plaintiff should have been let in, as to which an action at law can be brought.

In the leading case of England *v.* Curling, 8 Beav. 129 (1844), a partnership as shipping agents was formed in 1831, to be for

[1] §§ 870–874. [2] § 874.

seven, ten or fourteen years, but the articles were never executed. The parties, however, began business and continued until 1843, when the defendant, Curling, gave notice that he would retire, and he retired and formed a new partnership with other persons, who were also made defendants, in a competing business, and circulated notices of dissolution of the old firm and opened their letters. A preliminary injunction was granted against Curling carrying on business with his co-defendants, or with any person other than complainants, and against them for carrying on business with him until the expiration of fourteen years from 1831, and from circulating notices of dissolution or interference with letters. On final hearing a reference was made to a master to determine the terms of partnership, to be ascertained from the conduct of the parties and their mode of carrying on business, which had effected an alteration from the original terms, and a specific performance was ordered to compel Curling to execute the deed of partnership to be prepared by the master.

The court said (p. 137) that the business had been carried on for a year since the preliminary injunction but with no benefit to the complainant, and (on p. 138) that it was impossible to make parties carry on a business jointly, and that judges always felt an anxiety to have partners come to some arrangement. It is to be observed of this case that the partnership was not inchoate and that the remedy was by restraint and not by enforcement, except merely as to signing the deed.

In Sichel *v.* Mosenthal, 30 Beav. 371 (1862), the defendant agreed with plaintiff's firm to become a partner, or to lend them £5,000 if he did not become a partner. The terms were not fully settled. Specific performance was refused, and the court doubted whether it would have been granted had the terms been settled and the alternative clause left out.

§ 1011. Partnerships at will.—If the partnership agreed upon is at will, specific performance will be refused for the reason that the partnership could be immediately dissolved, except to the extent awarded under section 1013.[1]

[1] Hercy *v.* Birch, 9 Ves. Jr. 357; reported; Syers *v.* Syers, L. R. 1 Vansandau *v.* Moore and Kinder *v.* App. Cas. 174; Morris *v.* Peckham, Taylor, *coram* LORD ELDON, cited in 51 Conn. 128; Buck *v.* Smith, 29 Gow on Partnership, 110, and not Mich. 166 (18 Am. Rep. 84).

§ **1012. —— for a term.**— And the modern decisions refuse specifically to enforce contracts of partnerships which are wholly inchoate, even if the contract provides for a fixed term. The party's remedy is at law.[1] And so of a contract to purchase shares from another,[2] or that the share or interest of a partner shall be valued and that the other shall take it at the valuation, for this is analogous to an agreement to arbitrate;[3] but if this agreement was in the original partnership articles under which the partnership has been conducted, it then becomes a case where a partner has had and enjoyed property on these conditions, and the only question is one of settling the price, and if the agreement as to the appointment of valuers cannot be carried out, the court will itself ascertain the value.[4] And so of agreements to continue in a partnership.[5]

§ **1013. Partial performance compelled, when.** — Although a contract to contribute time, skill, etc., will not be specifically enforced, yet if the execution of an instrument or of articles of partnership is necessary to confer rights upon the other party, or to determine his *status*, it will be decreed whether the partnership was at will or for a fixed term, although the party will not be compelled to act under the articles when signed.[6]

[1] Stocker *v.* Wedderburn, 3 K. & J. 393, where the complainant was to give time and services, and specific performance was refused against the defendant because the court could not compel the complainant to give time and services, and there was therefore no mutuality in the remedy. And see Buck *v.* Smith, 29 Mich. 166 (18 Am. Rep. 84), for a similar reason. Scott *v.* Rayment, L. R. 7 Eq. 112; Morris *v.* Peckham, 51 Conn. 128; Satterthwait *v.* Marshall, 4 Del. Ch. 337; Somerby *v.* Buntin, 118 Mass. 279; Meason *v.* Kaine, 63 Pa. St. 335, 341; Reed *v.* Vidal, 5 Rich. (S. Ca.) Eq. 289; Cross *v.* Hopkins, 6 W. Va. 323.

[2] Sheffield Gas, etc. Co. *v.* Harrison, 17 Beav. 294; Maxwell *v.* Port Tennant Co. 24 id. 495.

[3] Vickers *v.* Vickers, L. R. 4 Eq. 529.

[4] Dinham *v.* Bradford, L. R. 5 Ch. App. 519, where the relief was granted *against* the surviving partner; Maddock *v.* Asbury, 32 N. J. Eq. 181, where the relief was granted *to* the surviving partner.

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

[6] See Swanston's note to Crawshay *v.* Maule, 1 Swanst. 495, 513; England *v.* Curling, *supra;* Hibbert *v.* Hibbert, cited in Collyer on Partnership, § 203.

And where the defendant was to convey to the complainant property rights with which the partnership is to deal or which are necessary for it, the conveyance will be decreed after expenditure of time and money by the complainant in reliance on the agreement.

As in cases of agreements to form a partnership in manufacturing under or selling patent rights, and to convey to complainant a certain interest in defendant's patent as soon as obtained by the parties, the conveyance will be enforced, though the partnership would not be.[1]

§ 1014. So of an agreement to convey part of defendant's land on which the partnership buildings were to be put at joint expense or at the expense of services or money by the complainant.[2]

But even in these cases, if relief would be nominal only and the benefit would probably not result, the court may refuse to indulge the complainant's desire for a specific performance.

As in Sims *v.* McEwen, 27 Ala. 184, where McEwen having bought a lot on credit agreed that Sims should own the lot jointly with him and should superintend the building of a hotel upon it and become manager and have half the profits, which were to be applied to paying for the lot, and after the hotel was in operation McEwen died, and Sims filed a bill for specific performance and conveyance; but Sims being insolvent, and it being doubtful whether the profits would pay for his half, it was refused.

Where A. B. & C. bought land in partnership in the names of A. and B., who furnished the capital, and C. was to manage it and receive one-third of the net profits, and afterwards C. agreed to take part of the land for his share of the estimated profits, and A. and B. thereupon gave him a contract to convey a certain section, and C. in return gave them a receipt for a certain amount of money to bear interest at seven per cent., this section is taken out of the partnership, as much as if C. had paid cash for it, and A. and B.

[1] Satterthwait *v.* Marshall, 4 Del. Ch. 337; Somerby *v.* Buntin, 118 Mass. 279.

[2] Whitworth *v.* Harris, 40 Miss. 483; Tilman *v.* Cannon, 3 Humph. (Tenn.) 637; Birchett *v.* Bolling, 5 Munf. (Va.) 442.

look to the receipt, which is partnership property, instead of the land, and the assignees of the contract can compel A. and B. to convey to them irrespective of the state of the partnership accounts.[1]

§ 1015. **In winding up.**— Where a partner has not paid in his agreed capital, the assignee for the benefit of the creditors of the partnership can by suit in equity compel the payment of the amount.[2]

Cases also frequently occur in suits for an accounting or other controversies between partners where the partnership is denied and as a preliminary step must be proved. These are not cases of specific performance, but to establish a partnership by circumstantial evidence, and are treated elsewhere.

[1] Beckwith *v.* Manton, 12 R. I. 442.

[2] Robinson *v.* McIntosh, 3 E. D. Smith, 221.

CHAPTER VI.

ACTIONS WITH THIRD PERSONS.

PARTIES PLAINTIFF.

§ 1016. On sealed contracts.— If the contract with a partner is under seal, the common law rule was that the obligee could alone sue upon it, and that the others could not be co-plaintiffs,[1] though a person named in and assenting to it may be joined as co-plaintiff, even if he did not seal,[2] unless the covenant is expressly in favor of those whose hands and seals are set to it;[3] but generally all covenantees who may join must join.[4] And if the covenant be to a firm in its collective name, all the partners can sue upon it.[5]

Thus, a covenant with S., "and such other parties as he may associate with him under the name of S. & Co.," signed by the obligor and by S. & Co., is a covenant with all those who were partners at the time of execution, and they may sue upon it.[6] So a covenant with "John L. Brown for Brown, Brawley & Co.," and signed by him in the firm name, can be sued upon by the firm.[7] A real estate mortgage to A. DeGrieff & Co., cannot be foreclosed by A. DeGrieff alone,[8] but it has been said that even this could not be sued upon by subsequently incoming members, though intended for them.[9]

If a note is made to all the partners and a mortgage securing it is to one only, all must sue in foreclosure, for the security follows the

[1] *Ex parte* Peele, 6 Ves. 602; *Ex parte* Williams, Buck. 13; Harrison *v.* Fitzhenry, 3 Esp. 238; Cabell *v.* Vaughan, 1 Saund. 291; Anderson *v.* Martindale, 1 East, 497.

[2] Vernon *v.* Jeffrys, Str. 1146.

[3] Metcalf *v.* Rycroft, 6 M. & S. 75.

[4] Scott *v.* Goodwin, 1 B. & P. 67.

[5] Armstrong *v.* Robinson, 5 Gill & J. 412.

[6] Seymour *v.* Western R. R. Co. 106 U. S. 320.

[7] Brown *v.* Bostian, 6 Jones (N. Ca.), L. 1.

[8] DeGrieff *v.* Wilson, 30 N. J. Eq. 435. See Brown *v.* Bostian, 6 Jones, L. 1.

[9] LITTLEDALE, J., in Pease *v.* Hirst, 10 B. & C. 122, 127.

debt.[1] And where judgment is rendered in favor of two partners of a firm of four, all four can maintain a bill to set aside a conveyance by the debtor in fraud of creditors, in order to make the judgment a lien.[2]

§ 1017. On mercantile paper.— If a bill or note is made payable to a single partner, he could sue alone upon it at common law,[3] and he only, though made in pursuance of a previous contract with the firm.[4]

And if the paper is payable to a firm, and on the retirement of some of the members it is not indorsed to the continuing partners, action in the name of all the original partners was proper.[5] If the paper is indorsed in blank any holder can, of course, sue upon it.

The firm may indorse a note over to one partner to enable him to sue upon it,[6] or a partner may indorse it over to himself in the firm name and then sue upon it,[7] but cannot indorse it over in his own name. Nor can one partner indorse it over in his own name to the other, and thus enable him to sue upon it.[8] But the prevalence of codes authorizing or requiring the action to be in the name of the real party in interest has made these rules of little effect. Thus a new firm, composed of old and new members, can sue upon a note made to the old firm.[9]

§ 1018. Other simple contracts.— Other simple contracts must be sued upon by all the promisees jointly, and here all the partners must sue in their individual names and not in the company name,[10] in enforcing a partnership demand, except where statutes allowing actions to be in the firm name have been passed, which will be hereafter considered.

[1] Noyes *v.* Sawyer, 3 Vt. 160.

[2] Fuller *v.* Nelson, 35 Minn. 213.

[3] Bawden *v.* Howell, 3 Man. & G. 638; Driver *v.* Burton, 17 Q. B. 989.

[4] Mynderse *v.* Snook, 53 Barb. 234; 1 Lans. 488.

[5] Pease *v.* Hirst, 10 B. & C. 122. And see McBirney *v.* Harran, 5 Irish Law Rep. 428; Phelps *v.* Lyle, 10 A. & E. 113.

[6] Manegold *v.* Dulau, 30 Wis. 541; Russell *v.* Swan, 16 Mass. 314, and cases in next note.

[7] Burnham *v.* Whittier, 5 N. H. 334; Kirby *v.* Coggswell, 1 Cai. 505.

[8] § 194.

[9] Pease *v.* Rush, 2 Minn. 107.

[10] Moore *v.* Burns, 60 Ala. 269; Banks *v.* Bosler, 4 Bibb, 573; Armstrong *v.* Robinson, 5 Gill & J. 412; Halliday *v.* Doggett, 6 Pick. 359; Cushing *v.* Marston, 12 Cush. 431 Reed *v.* Hanover Branch R. R. 105 Mass. 303; Mexican Mill *v.* Yellow Jacket Mine, 4 Nev. 40; Seely *v.* Schenck, 2 N. J. L. 75; Choteau *v.*

Even if real estate held in the name of one partner in trust for the firm has been appropriated for a railroad, the partners may recover its value jointly. It is proper that the *cestuis que trustent* in possession join.[1]

And the same rule applies after dissolution in winding up, whether the business is continued by the old partners with incoming partners or not.[2] The firm cannot sever and sue separately, for the defendant, having contracted with them jointly, is entitled to have but one action.[3] And one partner cannot sue for his share of the debt.[4] As to whether an infant partner must be a co-plaintiff, see Infant, § 148.

§ 1019. Contract with one partner.— But the doctrine that an undisclosed principal may sue upon a contract made by an agent in his behalf applies, and the partners may all sue on a contract made with one of their number; they, as beneficiaries, may appropriate and enforce the contract; hence in all transactions by a partner, except on notes and sealed contracts, in conducting the business of the firm, in selling, working or otherwise, all the partners must bring an action, although the debtor did not know that he was dealing with a member of a firm.[5] Thus, where a guaranty was given to one partner as indemnity against or to secure the repayment of advances by the firm, but the evidence shows it was intended for the benefit of the firm, all the several partners may sue upon it.[6]

Raitt, 20 Oh. 132, 144; Smith *v.* Walker, 6 S. Ca. 109.

[1] Reed *v.* Hanover Branch R. R. 105 Mass. 303.

[2] Gannett *v.* Cunningham, 34 Me. 56; Fish *v.* Gates, 133 Mass. 441; Mudd *v.* Bast, 34 Mo. 465.

[3] Fish *v.* Gates, 133 Mass. 441.

[4] Vinal *v.* West Va. Oil, etc. Co. 110 U. S. 215.

[5] Spurr *v.* Cass, L. R. 5 Q. B. 656, 659; Skinner *v.* Stocks, 4 B. & Ald. 437; Townsend *v.* Neale, 2 Camp. 189; Arden *v.* Tucker, 4 B. & Ald. 817; Bennett *v.* Scott, 1 Cranch, C. C. 339; Wilson *v.* Wallace, 8 S. & R. 53; Chamberlain *v.* Hite, 5 Watts, 373; Speake *v.* Prewitt, 6 Tex. 252, 258; Hilliker *v.* Loop, 5 Vt. 116, 121; Badger *v.* Daenieke, 56 Wis. 678.

[6] Garrett *v.* Handley, 5 Dow. & R. 319; s. c. 4 B. & C. 664; s. c. 3 id. 462; Walton *v.* Dodson, 3 C. & P. 162; The Havana, Rantoul & Eastern R. R. *v.* Walsh, 85 Ill. 58; Barns *v.* Barrow, 61 N. Y. 39.

A conveyance of merchandise in payment of a partnership debt after dissolution to a partner engaged in winding up inures to the benefit of the firm, and all can bring an action in relation to it.[1]

A person who retains one lawyer of a firm specially is properly sued by all the partners.[2]

In an action against the firm, an attachment was got out against one partner as a non-resident and levied upon the partnership property. The attachment bond was made to such partner; he alone can sue upon it.[3] And where one partner bought goods in his own name for the firm, the seller not knowing he had partners, and the goods were afterwards attached as the seller's property, and an attachment bond, payable to the state, was given on demand of such purchaser, he, and not the firm, is the proper party to sue on the bond.[4]

So all the partners may sue a banker for refusing to pay a check drawn by a single partner, in whose name the account is kept.[5]

Where, of two co-sureties, one dies, and the other and the executor of the deceased were partners, and pay the debt out of the partnership funds, it was held that each brings his separate action for his moiety against the principal debtor, for the partners were not joint sureties, and, if they elected to pay out of partnership funds, it is no concern of the defendant, and each sue for half, because, in the absence of proof, such is the presumed proportion.[6]

If a person contracts with a partner in a matter outside the scope of the business, the fact that he procures the assistance of his copartners in carrying it out does not make the employer a debtor of the firm.[7]

Where the contract is in the name of individuals as promisees, though it describe them as partners, and is signed in the firm name,

[1] Gannett *v.* Cunningham, 34 Me. 56.

[2] Warner *v.* Griswold, 8 Wend. 665; Jackson *v.* Bohrman, 59 Wis. 422. And an attorney in whose hands a single partner put claims for collection cannot be sued by such partner alone, Wiley *v.* Logan, 95 N. Ca. 358.

[3] Faulkner *v.* Brigel, 101 Ind. 329.

[4] State *ex rel.* Peirce *v.* Merritt, 70 Mo. 275.

[5] Cooke *v.* Seeley, 2 Ex. 746. (N. B. It is far from clear that a banker is liable for not paying a check. See discussion in Morse on Banking, 2d ed. p. 519.)

[6] Gould *v.* Gould, 6 Wend. 263 (aff'g S. C. 8 Cow. 168).

[7] Conklin *v.* Cabanné, 9 Mo. App. 579; Sloan *v.* Bangs, 11 Rich. L. 97.

it is a promise to them individually, and a third partner, dormant or otherwise, need not be a co-plaintiff upon it.[1]

§ 1020. If one partner lend the firm's money or sell its property, the partners may on the maturity of the loan sustain a joint action for its repayment.[2] But the plaintiffs must show that they were in fact the lenders, whether nominally so or not.[3] Thus, if a partner make a contract with defendant expressly declaring that the subject-matter is his property alone, if the copartners wish to take advantage of the contract, they must be content to do so in the mode in which it was made, and cannot, therefore, sue jointly.[4] If the contract is under seal and void for fraud of the other party, the covenanting partner may recover back the advance in his own name;[5] and a promise to one partner to refund inures to all and all must sue upon it.[6]

So if the persons agree to make a purchase on joint account, the purchase to be by one of them in his own name only, all can join in an action against the vendor for breach of the contract made by such one, either on the doctrine that a principal can sue on a contract made in the agent's name, or as dormant partners.[7]

Where G. H. & Co., in the ice business in Massachusetts, formed a partnership with G. in Mobile, as G. & Co., G. H. & Co. to ship ice to G. & Co., and G. H. & Co. employed defendant and his vessel to carry the ice to G. & Co., and defendant broke his contract, the action against him must be brought in the names of all the partners of G. & Co. and not merely of those composing G. H. & Co.[8] Plaintiff claimed that the members of G. H. & Co. could sue, for they contracted as agents of G. & Co.; but the court[9] said: "The distinct characters of agents and partners are not to be thus blended, and though the business is done here in the name of G.

[1] Hilliker *v.* Francisco, 65 Mo. 598.

[2] Alexander *v.* Barker, 2 Cr. & J. 133; s. c. 2 Tyrw. 140; Higdon *v.* Thomas, 1 Har. & G. (Md.) 139, 153; Hilliker *v.* Loop, 5 Vt. 116.

[3] Sims *v.* Bond, 5 B. & Ad. 389; Sims *v.* Brittain, 4 id. 375. And see Robson *v.* Drummond, 2 B. & Ad. 303.

[4] Lucas *v.* De la Cour, 1 M. & S. 249.

[5] Lefevre *v.* Boyle, 3 B. & Ad. 877.

[6] Creel *v.* Bell, 2 J. J. Mar. 309.

[7] Cothay *v.* Fennell, 10 B. & C. 671.

[8] Gage *v.* Rollins, 10 Met. 348.

[9] Per Hubbard, J., p. 356.

H. & Co. for the Mobile house, it is not done by them in the capacity of agents but as partners." "The fact that the partners generally do business in the name of their general partner, and the partner in Mobile does it in the name of the firm there, cannot affect the interests of third persons, who have a legal right to treat them as partners in the transaction of such joint business." Shaw, C. J., in a dissenting opinion puts this ruling on another ground, namely, that the contract with defendant was signed by a person as agent for G. H. & Co., and such person could have sued; but G. H. & Co. cannot sue as intermediate agents, not because intermediate agents can or cannot sue, but because the person signing was in fact agent of G. & Co.

Yet it has been held that a contract for the shipment of partnership property, made in the name of one partner, could be sued upon by him alone at common law.[1]

§ 1021. If a contract is in writing and with one partner, and it does not appear therein that he is acting for the firm, he may sue alone upon it;[2] or if he represents himself as acting on his own account,[3] and though the contract or note be made in pursuance of a previous agreement with the firm,[4] or was for its benefit.[5]

§ 1022. **Dormant partners as co-plaintiffs.**— If a partner was not merely unknown to the other contracting party but was also a dormant partner, it is now well settled that he may be joined as co-plaintiff, because, in fact, one of the principals, or he may at the option of the firm be omitted. In other words he is a permissible but not an essential plaintiff.[6]

[1] Taylor *v.* Stbt. Robt. Campbell, 20 Mo. 254.

[2] Skinner *v.* Stocks, 4 B. & Ald. 437.

[3] Lucas *v.* De la Cour, 1 M. & S. 249; Phillips *v.* Pennywit, 1 Ark. 59.

[4] Mynderse *v.* Snook, 53 Barb. 234; 1 Lans. 488; Thacker *v.* Shepherd, 2 Chit. 652; Brand v. Boulcott, 2 B. & P. 235.

[5] Ajacio *v.* Forbes, 14 Moo. P. C. 160.

[6] Leveck *v.* Shafto, 2 Esp. 468; 7 T. R. 361; Cothay *v.* Fennell, 10 B. & C. 671; Desha *v.* Holland, 12 Ala. 513 (46 Am. Dec. 261); Bank of St. Mary's *v.* St. John, 25 Ala. 566; Phillips *v.* Pennywit, 1 Ark. 59; McCabe *v.* Morrison, 2 Harr. (Del.) 66; Goble *v.* Gale, 7 Blackf. 218 (41 Am. Dec. 219); Barstow *v.* Gray, 3 Me. 409; Mitchell *v.* Dall, 2 Har. & Gill, 159; Robinson *v.* Mansfield, 13 Pick. 139; Wood *v.* O'Kelley, 8 Cush. 406; Wright *v.* Herrick, 125 Mass. 154,

It has been held that the dormant partner ought not to join because it might prejudice the defendant's right of set-off against the active partner.[1] But the law is now that rights of set-off against the ostensible partner are protected, although he joins his dormant partner as co-plaintiff.[2]

The test of dormant partner as to the joinder has been said to be, was the contract sued on made with the firm or with the partner supposing him to be an individual; that is, not did the defendant know the plaintiff had a partner, but did he know the partner in the particular transaction.[3]

§ 1023. Nominal partners as co-plaintiffs. — Nominal partners, as they have no interest in the firm, need not be joined as co-plaintiffs on simple contract debts, when they are not specially named as contracting parties, whether they are parties held out as partners without ever having had an interest in the firm, or are partners who have retired leaving their names in the partnership, and the contract was made after the retirement, for as to prior contracts they were actual parties. It seems inconsistent with legal principles to join him at all, especially where his name is not in the title of the firm, for the theory of a partnership by holding out is one of liabilities and not of rights; yet it seems clear that he may be joined.[4] It is true that the contract

155; Wilkes *v.* Clark, 1 Dev. (N. Ca.) L. 178; Clarkson *v.* Carter, 3 Cow. 84; Platt *v.* Halen, 23 Wend. 456; Choteau *v.* Raitt, 20 Oh. 132, 141; Morse *v.* Chase, 4 Watts, 456; Wilson *v.* Wallace, 8 S. & R. 53, 55; Speake *v.* Prewitt, 6 Tex. 252; Jackson *v.* Alexander, 8 id. 109; Garrett *v.* Muller, 37 id. 589; Boardman *v.* Keeler, 2 Vt. 65; Hilliker *v.* Loop, 5 Vt. 116 (26 Am. Dec. 286); Lapham *v.* Green, 9 Vt. 407; Curtis *v.* Belknap, 21 Vt. 433; Maynard *v.* Briggs, 26 Vt. 94, 96; Waite *v.* Dodge, 34 Vt. 181; Bird *v.* Fake, 1 Pin. (Wis.) 290; Briggs *v.* Bower, 5 Up. Can. Q. B. (Old Ser.) 672; that he must join under the code, Secor *v.* Keller, 4 Duer, 416. *Contra*, Howe *v.* Savery, 49 Barb. 403; 51 N. Y. 631.

[1] Mawman *v.* Gillett, in note to Lloyd *v.* Archbowle, 2 Taunt. 324, 325; Wilson *v.* Wallace, 8 S. & R. 53, 55; Boardman *v.* Keeler, 2 Vt. 65.

[2] Hilliker *v.* Loop, 5 Vt. 116, 121 (26 Am. Dec. 286).

[3] Bird *v.* Fake, 1 Pin. (Wis.) 290. And see Curtis *v.* Belknap, 21 Vt. 433.

[4] Harrison *v.* Fitzhenry, 3 Esp. 238; Kell *v.* Nainby, 10 B. & C. 20; Cox *v.* Hubbard, 4 C. B. 317; Spurr *v.* Cass, L. R. 5 Q. B. 656; Phillips *v.* Pennywit, 1 Ark. 59; Enix *v.* Hayes, 48 Iowa, 86; Bishop *v.* Hall, 9 Gray, 430; Jones *v.* Howard, 53 Miss. 707;

is made with a firm which includes the nominal partner, hence the latter is a contracting party; but the real principal is the actual partner, and an undisclosed principal can sue on contracts other than those under seal or negotiable paper.

But if the contract is expressly made with the nominal partner on mercantile paper, where his name appears in the style of the firm, he must be a co-plaintiff under the common law practice,[1] but not to recover back payments on such paper.[2]

A nominal partner cannot maintain a separate action for a slander upon the firm.[3]

§ 1024. Assignments between partners.— One partner cannot by assignment clothe another partner with the power to sue alone on a contract with both, either during the continuance of the firm or by the retirement of the assignor,[4] unless by the assent or new promise of the debtor there is a novation or substitution of creditors, or unless it be negotiable paper.[5]

But if the credits be divided absolutely, each can sue separately for his own.[6] If a debtor of the firm pay certain partners their exact proportion, a remaining partner can regard this as a severance and sue alone;[7] and so if a person who contracts with the

Campbell *v.* Hood, 6 Mo. 211; Hatch *v.* Wood, 43 N. H. 633; Bendel *v.* Hettrick, 35 N. Y. Superior Ct. 405; Waite *v.* Dodge, 34 Vt. 181. And see Glossop *v.* Coleman, 1 Stark. 35. Collyer, § 662, says there is no doubt but that he may join; Lindley says he ought not. And Allen *v.* White, Minor (Ala.), 365, held that in an action by two as partners, if one disclaims all interest, the action may proceed in the name of both, giving as a reason that if the contract was with the firm the other can use its name.

[1] Guidon *v.* Robson, 2 Camp. 302; Parke, B., in Beckham *v.* Drake, 9 M. & W. 79, 96; Blackburn, J., in Spurr *v.* Cass, L. R. 5 Q. B. 656, 658.

[2] Harrison *v.* Fitzhenry, 3 Esp. 233.

[3] Davis *v.* Ruff, Cheves (S. Ca.), 17.

[4] Howell *v.* Reynolds, 12 Ala. 128; Molen *v.* Orr, 44 Ark. 486; Dougherty *v.* Smith, 4 Met. (Ky.) 279; Horback *v.* Huey, 4 Watts, 455; Mosgrove *v.* Golden, 105 Pa. St. 605; De Groot *v.* Darby, 7 Rich. L. 18; Brougham *v.* Balfour, 3 Up. Can. C. P. 72.

[5] § 1017.

[6] Evans *v.* Silverlock, 1 Peake, 31.

[7] Garret *v.* Taylor, 1 Esp. 117. See § 543.

firm afterwards treats the joint contract as several, each can sue him severally.[1]

But under the codes which require an action to be in the name of the real party in interest, a partner or partners to whom the others have assigned their interests can sue in their own names;[2] hence, a partner who takes all the assets, though by assignment in order to wind up, can use the name of the other partners for the purpose of suing.[3]

But leaving all the assets in the hands of a creditor partner to collect and pay himself is not an assignment; although he is entitled to the proceeds, he is not sole owner and cannot sue alone.[4]

But the partners cannot appoint a person to sue for them in his name.

Even to sue for contributions thereafter to be made; it is not the case of a promise to an agent, who can then sue in his own name;[5] nor can the trustee of a numerous body sue on its behalf in his own name.[6]

§ 1025. Substitution of creditors — New firm suing on contract of old.— Where T. and P., law partners, were retained in certain suits, and P. sold out to S. his interest in the firm, which then became T. & S. The client did not assent to S. being in his cases, but S. prepared and argued them, and made charges in the books with the client's knowledge and without objection from him. Here the action for fees is properly in the name of T. and S. and not of T. and P. or T. alone.[7]

So where M. was retained by the defendant as a lawyer, and afterwards formed a partnership with E., and the firm performed

[1] Blair *v.* Snover, 10 N. J. L. 153; Baker *v.* Jewell, 6 Mass. 460; Austin *v.* Walsh, 2 id. 401; Bunn *v.* Morris, 3 Caines, 54.

[2] Walker *v.* Steel, 9 Colorado, 388; Farwell *v.* Davis, 66 Barb. 73; West *v.* Citizens' Ins. Co. 27 Oh. St. 1; Viles *v.* Bangs, 36 Wis. 131. And some codes even then require the assignor to be a party on one side or other of the record. Swails *v.* Covердill, 17 Ind. 337; Dougherty *v.* Smith, 4 Met. (Ky.) 279.

[3] Molen *v.* Orr, 44 Ark. 486.

[4] White *v.* Savery, 50 Iowa, 515.

[5] Fortune *v.* Brazier, 10 Ala. 793.

[6] McConnell *v.* Gardner, Morris (Iowa), 272; Niven *v.* Spickerman, 12 Johns. 401.

[7] Thrall *v.* Seward, 37 Vt. 573.

the services, the firm can sue for them, although M. as the sole contracting party could have sued alone.[1]

For other cases of the assent of a debtor to the substitution of a new firm as his creditor, so that the new firm can sue upon the debt, see the cases in the note.[2]

While a contract with a person made before he formed a partnership should not be declared on by the firm as a contract made with it,[3] and merely talking to the new partner is not an assent to be liable to the new firm,[4] yet such assent may be proved by circumstances; as by subsequent dealings, and new credits and debits combined in a single account in the statements rendered;[5] but merely transferring the balance for convenience to the books of a new firm, without new dealings, does not make it necessary to sue in the name of the new firm, when it is merely constituted an agent to collect for the old firm.[6]

So where one partner sells out his interest to a third person, who takes his place in the firm, the assent of a debtor that his debt might be charged against him on the books of the new firm enables the latter to recover in their own names.[7] And not objecting when notified is evidence of an agreement to accept the new firm as parties to a contract made by defendant with the old, and the new firm can sue for breach.[8]

§ 1026. After bankruptcy of one partner.—If the firm is dissolved by the bankruptcy or insolvency of a partner, the action must be brought in the name of the solvent partner and the assignee of the bankrupt.[9] And the solvent partner is entitled to use the name of the assignee in bankruptcy, on giving him an indemnity against loss.[10]

[1] Maynard *v.* Briggs, 26 Vt. 94.

[2] Armsby *v.* Farnam, 16 Pick. 318; Anderson *v.* Holmes, 14 S. Ca. 162; Eaton *v.* Whitcomb, 17 Vt. 641; Whitlock *v.* McKechnie, 1 Bosw. 427.

[3] Carr *v.* Wilkins, 44 Tex. 424.

[4] Id.

[5] Armsby *v.* Farnam, 16 Pick. 318.

[6] Id.

[7] Eaton *v.* Whitcomb, 17 Vt. 641.

[8] Anderson *v.* Holmes, 14 S. Ca. 162.

[9] Eckhardt *v.* Wilson, 8 T. R. 140; Thomason *v.* Frere, 10 East, 418; Wilkins *v.* Davis, 15 Bankr. Reg. 60; Peel *v.* Ringgold, 6 Ark. 546; Sims *v.* Ross, 8 Sm. & Mar. 557; Halsey *v.* Norton, 45 Miss. 703 (7 Am. Rep. 745); Murray *v.* Murray, 5 Johns. Ch. 70; *Ex parte* Owen, 13 Q. B. D. 113. In Bird *v.* Pierpoint, 1 Johns. 118, the court were equally divided upon this point.

[10] *Ex parte* Owen, 13 Q. B. D. 113;

It has been said that foreign assignees of a foreign bankrupt could not join the assignees of the bankrupt in this country, but that the foreign bankrupt was the co-plaintiff with the assignees here. Only the home assignee will be recognized, and he must collect the debts.[1]

And as an assignment in insolvency of one of two partners does not extend to partnership assets, the maintenance of a pending action is not defeated by an individual assignment for benefit of creditors by one of the plaintiff partners.[2]

§ 1027. Non-consenting partner made defendant.— If one of the partners refuse to join as plaintiff, relief may be had in many jurisdictions under provisions for a non-consenting joint claimant made a co-defendant, the reasons therefor being stated in the pleadings. These provisions apply to partners.[3]

§ 1028. Too numerous parties.— Where the members of a club or partnership are too numerous to be brought upon the record it has been held that one could sue for all.[4] So in a suit against them to collect a debt,[5] or to enforce the rights of a member,[6] or to wind up.[7] But a trustee cannot sue in such case in his own name.[8]

Whitehead *v.* Hughes, 2 Cr. & M. 318; 4 Tyrwh. 92.

[1] Bird *v.* Caritat, 2 Johns. 342.

[2] Cunningham *v.* Munroe, 15 Gray, 471. In Wright *v.* Condict (Supr. Ct. U. S. 1881), Lawyer's Coop. Ed. Book 26, p. 562, it was held that the assignee in bankruptcy of a partner or of a firm does not represent the creditors of the partners or of a former firm so as to enforce their claims against a retired partner, whose interest the bankrupts had bought, and who owed them nothing.

[3] Hill *v.* Marsh, 46 Ind. 218; Pogson *v.* Owen, 3 Desaus. 31; Noonan *v.* Orton, 31 Wis. 265. See, also, Nightingale *v.* Scannell, 6 Cal. 506, and facts in Cole *v.* Reynolds, 18 N. Y. 74. See, also, Holkirk *v.* Holkirk, 4 Mad. 50.

[4] Lloyd *v.* Loaring, 6 Ves. 773; Pope *v.* Bateman, 1 Iowa, 369; McConnell *v.* Gardner, Morris (Iowa), 272; Goldman *v.* Page, 59 Miss. 404. *Contra*, Brainerd *v.* Bertram, 5 Abb. N. Cas. 102.

[5] Wall *v.* Boisregard, 11 Sm. & M. (19 Miss.) 574.

[6] Gorman *v.* Russell, 14 Cal. 531.

[7] Cockburn *v.* Thompson, 16 Ves. 321; Stewart *v.* Erie & Western Transp. Co. 17 Minn. 372; Warth *v.* Radde, 18 Abb. Pr. 396; Keller *v.* Tracy, 11 Iowa, 530. *Contra*, Benninger *v.* Gall, 1 C. S. C. R. 331, and McMahon *v.* Rauhr, 47 N. Y. 67.

[8] McConnell *v.* Gardner, Morris

§ **1029. Amendments.**— Where one partner brought an action to collect a debt in his individual name, an amendment adding the copartner, it was said, could be made.[1]

And where two partners brought the suit as constituting the firm, a third partner was allowed to be added without vitiating an attachment[2] or a replevin.[3]

But where several brought suit as partners, and a separate right of action in each was proved, as where, after final settlement and balance struck, creditor partners sue a debtor partner jointly, the defect was held fatal as being a different cause of action.[4]

We have already seen in treating of surviving partners that all rights of action vest in them and they sue without joining the administrator. Hence, it follows that on the death *pendente lite* of a partner plaintiff, the action does not abate but proceeds, mere suggestion of the death being sufficient.[5]

TORTS AGAINST PARTNERS.

§ **1030.** Where a tort is committed against a firm or its property, damages for the joint injury are to be jointly sued for, and the individual injury to each must be recovered in separate actions by each.

§ **1031. Joint action for libel on the firm.**— Thus, where a slander or libel is uttered and published against the firm all the partners may maintain an action for the damages to the extent that they are joint, as where the charge is that

(Iowa), 272; Niven *v.* Spickerman, 12 Johns. 401.

[1] Molen *v.* Orr, 44 Ark. 486; Lockwood *v.* Doane, 107 Ill. 235; Dixon *v.* Dixon, 19 Iowa, 512; Hodges *v.* Kimball, 49 Iowa, 577; Davis *v.* Chouteau, 32 Minn. 548; Pitkin *v.* Roby, 43 N. H. 138; Martin *v.* Young, 85 N. Ca. 156; Roberson *v.* McIlhenny, 59 Tex. 615; and see § 1065. *Contra*, Ball *v.* Strohecker, 2 Spears (S. Ca. 1844), 364.

[2] Henderson *v.* Stetter, 31 Kan. 56.

[3] Fay *v.* Duggan, 135 Mass. 242.

[4] In Masters *v.* Freeman, 17 Oh. St. 323. This ruling is much criticised in Pomeroy, Remedies, §§ 213, 215.

[5] Phœnix Ins. Co. *v.* Moog (Ala.), 1 South. Rep. 103; Atlanta *v.* Dooby, 74 Ga. 702; McCandless *v.* Hadden, 9 B. Mon. 186; Sprawles *v.* Barnes, 1 Sm. & Mar. 629; Dunman *v.* Coleman, 59 Tex. 199.

the firm is insolvent,[1] or of dishonesty, swindling, using false weights, and the like.[2]

All can sue jointly for injury by malicious attachment of the partnership property.[3]

In the action by the partners jointly, damages cannot be recovered for the private injury suffered by each partner, or the injury to feelings. But only the joint damages are recoverable, for the firm has no legal interest in the personal character of either partner.[4]

§ 1032. **Separate action for libel on firm.**— Where the language in regard to the partnership is actionable *per se*, each partner can maintain a separate action for the damages that are personal to himself alone, as being an injury to him in his means of earning a livelihood. Thus, each can recover damages for calling the firm insolvent, to the extent that this charge is a slander upon his individual credit,[5] or for charging that the partners had sold out their business to defraud creditors,[6] or were swindlers,[7] or burned their property to get the insurance.[8]

A nominal partner cannot maintain an action for slander of the firm, for he has no share in its chances of making profit.[9]

And in the individual actions of the partners no damages suffered by the firm can be recovered; and if a partner is de-

[1] Forster *v.* Lawson, 3 Bing. 453; 11 Moo. 360; Beardsley *v.* Tappan, 1 Blatchf. C. C. 588; Titus *v.* Follet, 2 Hill, 318; LeFanu *v.* Malcomson, 1 H. L. C. 637; 8 Irish L. R. 418; Davis *v.* Church, 1 E. D. Smith, 279; 8 N. Y. 452.

[2] Cook *v.* Batchellor, 3 B. & P. 150; Ward *v.* Smith, 6 Bing. 749; 4 C. & P. 302; Maitland *v.* Goldney, 2 East, 426; Duffy *v.* Gray, 52 Mo. 528; Williams *v.* Beaumont, 10 Bing. 260, that a life insurance association corruptly escaped paying a policy.

[3] Donnell *v.* Jones, 13 Ala. 490 (48 Am. Dec. 59). See § 1108.

[4] Haythorn *v.* Lawson, 3 C. & P. 196; Robinson *v.* Marchant, 7 Q. B. 918; LeFanu *v.* Malcomson, 1 H. L. C. 637; 8 Irish, L. R. 418; Duffy *v.* Gray, 52 Mo. 528; Donnell *v.* Jones, 13 Ala. 490; 48 Am. Dec. 59.

[5] Harrison *v.* Bevington, 8 C. & P. 708; Robinson *v.* Marchant, 7 Q. B. 918; Fidler *v.* Delavan, 20 Wend. 57.

[6] Odiorne *v.* Bacon, 6 Cush. 185.

[7] Duffy *v.* Gray, 52 Mo. 528; Solomons *v.* Medex, 1 Stark. 191, went off on a question of variance.

[8] Noonan *v.* Orton, 32 Wis. 106.

[9] Davis *v.* Ruff, Cheves (S. Ca.), 17.

famed as an individual, the special damages to the firm's business cannot be recovered, but all must join.[1]

In England now, under the new rules, the separate and joint claims may be pursued in a single action.[2]

§ 1033. Joint action for libel upon one partner.— A libel upon one partner may or may not constitute a cause of action in favor of the firm, according as averments may disclose or the language import an injury to the concern or an attack upon its credit.

Thus a charge that one partner was insolvent was held not actionable by the firm, because not going to the particular business but to the general mercantile character of the individual;[3] and on a charge of dishonesty against one partner, all were held entitled to recover;[4] but words imputing dishonesty to a clerk of the firm were held not to import injury to the firm without other averments.[5]

§ 1034. —— other torts.—So in cases of malicious attachments against property of a firm, only the natural and proximate injury to the joint business or special damages specially alleged, as loss of credit or customers, or injury to property by forced sale under insolvency proceedings precipitated in consequence of the tort, can be recovered in the joint action, and not injury to the feelings of the individual partners.[6]

Partners may join in an action for deceit of the vendor in the purchase of real estate for partnership purposes, for the injury is joint.[7] So for a false affirmation by one firm to another firm as to the solvency of a person about to buy goods whereby the value of the goods was lost, the action may be brought by the plaintiffs jointly against the defendants jointly.[8]

[1] Robinson *v.* Marchant, 7 Q. B. 918; Duffy *v.* Gray, 52 Mo. 528.

[2] Booth *v.* Briscoe, 2 Q. B. D. 496.

[3] Davis *v.* Ruff, 1 Cheves (S. Ca.), 17. See comments on this case in Taylor *v.* Church, 1 E. D. Smith, 279.

[4] Taylor *v.* Church, 1 E. D. Smith, 279; 8 N. Y. 452. But see Solomons *v.* Medex, 1 Stark. 191.

[5] Smith *v.* Hollister, 32 Vt. 695.

[6] Donnell *v.* Jones, 13 Ala. 490 (48 Am. Dec. 59). See, also, Alexander *v.* Jacoby, 23 Oh. St. 358, an action by two as partners on the attachment bond payable to three obligees.

[7] Medbury *v.* Watson, 6 Met. 246 (39 Am. Dec. 726).

[8] Patten *v.* Gurney, 17 Mass. 182.

The negligence of one firm will not be imputed to another firm having a common partner with it so as to defeat an action. As where one firm sues a railroad company for neglect to receive and carry its grain, the fact that the road was blockaded by the neglect to receive grain on the part of another firm with a partner in common is no defense.[1]

DISQUALIFICATION OF A PLAINTIFF.

§ 1035. We now come to a subject of a purely technical nature, as to which courts have disagreed. We have already seen that one reason why a partner cannot sue the firm is because he must, as a member of it, be one of the defendants as well as plaintiff, and a person is disqualified to sue himself.

A partner may also disqualify himself to sue third persons, as where he releases a debtor or uses partnership property wrongfully, for example, to pay his separate debt. Here, if the partners bring suit to recover the debt or the property, all the partners being necessary plaintiffs, the guilty partner is as a co-plaintiff taking a position in repudiation of his former act, and although the defendant ought not *ex æquo et bono* retain the debt or the money, the remedy at law against him has been denied.

Thus if one partner releases a debtor of the firm, it was formerly in England, and generally here, no longer possible for the firm to sue upon the claim, for one partner has disqualified himself to prosecute the action, and the promise being joint, the others cannot sue alone.[2]

§ 1036. The most numerous class of cases is where the property of the firm has been used without authority to pay the separate debt of one partner.[1] Although a partner has no right to use the firm's funds, assets or credit to pay

[1] Cobb *v.* I. C. R. R. Co. 38 Iowa, 601.

[2] Richmond *v.* Heapy, 1 Stark. 202; Johnson *v.* Peck, 3 id. 66; Sparrow *v.* Chisman, 9 B. & C. 241; Cochran *v.* Cunningham, 16 Ala. 448 (50 Am. Dec. 186); McLane *v.* Sharpe, 2 Harr. (Del.) 481; Dyer *v.* Sutherland, 75 Ill. 583; Myrick *v.* Dame, 9 Cush. 248; Morse *v.* Bellows, 7 N. H. 549 (28 Am. Dec. 372); Salmon *v.* Davis, 4 Binn. 375 (5 Am. Dec. 410).

his private debt, the question of what is the remedy of the firm has given rise to many and hopeless variations of opinion.

I. If the credit of the firm has been used, the partners are necessarily defendants in the attempt to enforce the unauthorized contract, and the attempt is defeated by simple proof of the facts, except where the plaintiff is a *bona fide* indorsee.

II. If, however, the assets or money of the firm is used, the recipient of them is defendant, and affirmative relief is sought on behalf of the firm.

A. (1) If chattels were so used, and the partners are plaintiff to recover them back, the guilty partner as co-plaintiff is seeking to repudiate his own act. Several different theories are in vogue as to the possibility of maintaining such suit.

(2) If such suit is by an innocent surviving partner, or an assignee of the firm, or in any other form wherein the guilty partner is not a co-plaintiff, other theories are in vogue.

B. If the payment was in money, it may be (1) to a person without notice, or (2) to a person with notice.

C. (1) The private debt may be incurred as an inducement to buy.

(2) The taking of the partnership goods may be for the sole purpose of getting payment.

§ 1037. Authorities sustaining the disqualification.— In Jones *v.* Yates, 9 B. & C. 532, the leading case (1829), Sykes, of Sykes & Bury, without Bury's knowledge, drew bills on debtors of the firm in favor of the firm, and indorsed them over to another firm, composed of Sykes, Yates & Young, to pay a debt owed by him to the latter firm. Sykes & Bury having become bankrupts, their assignees in bankruptcy brought trover for the bills against Yates & Young, and also brought *assumpsit* for money of Sykes & Bury paid out by Sykes on the same debt. Lord TENTERDEN, C. J., rendering the opinion, said that Sykes & Bury, had they remained solvent, could not have maintained either action; for it would be allowing a person to rescind his own act on the ground that such act was a fraud on another person. If he could do so, then if he

were surviving partner he could sue alone and allege his own misconduct to avoid his own act. "The defrauded partner may, perhaps, have a remedy in equity, by a suit in his own name, against the partner and the person with whom the fraud was committed." "It was said, in support of the argument, that the property did not pass from Sykes by his wrongful act, but remained in Sykes & Bury. This was ingeniously and plausibly put; but as against Sykes, the property did pass at law, and there was no remedy at law for Bury to recover it back again; he could not do so without making Sykes a party;" and it was held that the assignees could not maintain either action, trover or *assumpsit*, because representatives only; that the case is not analogous to the recovery by assignees of property voluntarily given or paid to a creditor in contemplation of bankruptcy, for that is a fraud on the bankrupt laws, but this case is a fraud on a particular person, the copartner. Wallace *v.* Kelsall [1] states the proposition in another form, viz.: that a person who cannot sue by himself cannot do so by joining others as co-plaintiffs with him,[2] nor can the partners even be petitioning creditors in bankruptcy.[3]

§ 1038. Authorities refusing to apply the doctrine.— In Rogers *v.* Batchelor, 12 Pet. 221, the leading case (1838), Rogers, holding the joint bond of Richards & Buckholts, on which, by the laws of the state where the action arose, he could sue either obligor separately, sued Buckholts alone. Buckholts dying *pendente lite*, his administrators were substituted as defendants. The defense claimed a judgment in their favor on a set-off. The defense set up a payment by Richards to the plaintiff of his private debt out of funds belonging to the firm, paid without Buckholts' consent, but

[1] 7 M. & W. 264.

[2] The following are the American authorities adopting the above doctrine and show in what states it is the law: Cochran *v.* Cunningham, 16 Ala. 448 (50 Am. Dec. 186); Church *v.* First Nat'l Bank, 87 Ill. 68 (yet the contrary seems to have been put in practice in Brewster *v.* Mott, 5 Ill. 378, and Casey *v.* Carver, 42 id. 225); Blodgett *v.* Sleeper, 67 Me. 499; Myrick *v.* Dame, 9 Cush. 248, of a release by one partner; Homer *v.* Wood, 11 Cush. 62 (may be called the leading American case on this side of the question); Farley *v.* Lovell, 103 Mass. 387; Greeley *v.* Wyeth, 10 N. H. 15; Fellows *v.* Wyman, 33 N. H. 351, 358; Weaver *v.* Rogers, 44 id. 112; Craig *v.* Hulschizer, 34 N. J. L. 363; Wells *v.* Mitchell, 1 Ired. (N. Ca.) L. 484; Cornells *v.* Stanhope, 14 R. I. 97, 99; Estabrook *v.* Messersmith, 18 Wis. 545, now overruled, see end of § 1038.

[3] Richmond *v.* Heapy, 1 Stark. 202.

plaintiffs had no knowledge that Richards did not have his partner's assent to such appropriation. The administrators got judgment against the plaintiff for the amount in which the set-off exceeded the plaintiff's claim. STORY, J., rendering the opinion, held that the act of a partner in paying his separate debt out of the partnership funds without authority from the copartners is manifestly a violation of his duty and of the right of his partners and an illegal conversion of the funds, and the separate creditor can have no better title to the funds than the partner himself had, and the partnership may reassert their claim to it in the hands of such creditor; that it makes no difference that the creditor had no knowledge at the time of the fund being partnership property; the title of the firm to it is not divested in his favor, whether he knew it or not.[1]

Following the doctrine of Rogers *v.* Batchelor, that the title of the property has not passed out of the firm, and hence there is no act to be rescinded, the attempted appropriation being merely null, and hence that the partners can maintain an action at law against the recipient of their property, is held in the following cases.[2]

In Viles *v.* Bangs, 36 Wis. 131, the *rationale* was stated to be that a firm in suing, not in order to declare an act by one partner void, but to enforce a valid demand, does not show as part of its case the fraudulent act of one of the plaintiffs; but the defendant has to show this to defeat the action, which will not be permitted

[1] There is no internal evidence in this case that the court considered or were aware of the case of Jones *v.* Yates (§ 1037); nevertheless Rogers *v.* Batchelor is always cited by those cases which refuse to follow Jones *v.* Yates, while those which do follow the latter case attempt to distinguish from Rogers *v.* Batchelor on the ground that the guilty partner was not a party.

[2] Burwell *v.* Springfield, 15 Ala. 273; Brewster *v.* Mott, 5 Ill. 378, of a credit of a separate debt of one partner in the account held no bar to action by all the partners, the credit being null; Daniel *v.* Daniel, 9 B. Mon. 195; Johnson *v.* Crichton, 56 Md. 108; Minor *v.* Gaw, 11 Sm. & Mar. (19 Miss.) 322; Buck *v.* Mosley, 24 Miss. 170; Stegall *v.* Coney, 49 id. 761; Ackley *v.* Staehlin, 56 Mo. 558; Forney *v.* Adams, 74 id. 138; Billings *v.* Meigs, 53 Barb. 272; Thomas *v.* Pennrick, 28 Oh. St. 55, 60, 61; Purdy *v.* Powers, 6 Pa. St. 442; Binns *v.* Waddill, 32 Gratt. 588, 594; Liberty Savings Bk. *v.* Campbell, 75 Va. 534; Viles *v.* Bangs, 36 Wis. 131; Cotzhausen *v.* Judd, 43 id. 213 (28 Am. Rep. 539); and see Leonard *v.* Winslow, 2 Grant's Cas. (Pa.) 139; and Grubb *v.* Cottrell, 63 Pa. St. 23.

if he had knowledge at the time of the misappropriation, and was therefore a *particeps criminis*.[1]

§ 1039. Defrauded partner cannot sue alone.— The defrauded partner cannot sustain an action at law *ex contractu* in his own name alone to recover the property or any share of it clandestinely used by the other to pay his separate debt.[2] But the defrauded partner can maintain a bill in equity against the guilty partner and his grantee.[3]

In Halstead *v.* Shepard, 23 Ala. 558, a firm sold its whole property, receiving in payment the buyer's notes, which one partner disposed of to pay his individual debts. A bill by the other partner making him and the several claimants of the notes parties, averring that they had combined to defraud the complainant, and that the latter did not know which of the notes the several defendants claim and asking discovery, is not multifarious.

In Gordon *v.* Tyler, 53 Mich. 629, one partner transferred a mortgage belonging to the firm to a person with notice; the other partners foreclosed, making both of them co-defendants with the mortgagors.

Where the debtor of the firm of W. & McG. paid W. partly in cash and partly by giving his note at his request to G., a private creditor of W., on bill for settlement and relief filed by McG. against W. & G., the cash payment will be held a good credit but not the note, but to protect G. any moneys collected and due to W. may be applied to pay McG. before resort to G.[4]

[1] This case denies Estabrook *v.* Messersmith, 18 Wis. 545.

[2] Piercy *v.* Fynney, L. R. 12 Eq. 69; Miller *v.* Price, 20 Wis. 117; Fenton *v.* Block, 10 Mo. App. 536; and see Hewes *v.* Bayley, 20 Pick. 96; Craig *v.* Hulschizer, 34 N. J. L. 363. That if the non-joinder is not objected to the other partner may recover, Hagar *v.* Graves, 25 Mo. App. 164. Hence, also, a partnership creditor who has taken judgment against the innocent partner alone cannot garnishee the recipient of the property, Fenton *v.* Block, *supra*.

[3] Piercy *v.* Fynney, L. R. 12 Eq. 69; Halstead *v.* Shepard, 23 Ala. 558, for discovery and relief after stoppage of business; Church *v.* First Nat'l Bk. 87 Ill. 68; Craig *v.* Hulschizer, 34 N. J. L. 363, *dictum*, that in case of insolvency the copartners or creditors have a remedy in equity where part payment to pay a separate debt had been indorsed on a note.

[4] Granger *v.* McGilvra, 24 Ill. 152. In this case McG. only claimed to be entitled to half the amount of the note, which was accordingly held good as to the other half against W.

§ **1040. Disqualification as to others than defendant.**— It has also been held that the disqualification of one partner in order to disable the partners to sue must be by an act in relation to the defendant, and that a wrongful sale by such partner of a chose in action, which shows on its face that it is partnership property, to a third person, will not prevent a suit by the partners against the debtor.[1] On the other hand, it must be remembered that the transferee from one partner of a chose in action suing the debtor is presumptively the owner.[2]

§ **1041.** Where a bailee of the firm uses its property to pay the debt of one partner an action by the firm is sustainable, for such partner is not repudiating his own act in joining as co-plaintiff. And so where he is also a member of the firm of bailees, but is dealt with as such and not as bailor, it has been held that the bailor firm can sue.

In Wright *v.* Ames, 2 Keyes, 221; 4 Abb. App. Dec. 644, W. L. was a member both of R. & L. and of J. & J. L. R. & L. were warehousemen and W. L. had wheat stored with them, as did also J. & J. L. W. L. sold his own wheat to the defendant, but surreptitiously removed and converted part of it, in consequence whereof R. & L. delivered to the defendant some of J. & J. L.'s wheat, thus using the latter firm's property to pay the private debt of W. L. J. & J. L. were held entitled to recover their wheat from the defendant.

So in Allen *v.* St. Louis Bank, 120 U. S. 20, a firm of factors transferred a warehouse receipt without authority to pay their own debt; their active partner was also a member of the firm which had consigned the goods. He acted as factor and was not understood by the transferee to act in any other capacity.

[1] Nall *v.* McIntyre, 31 Ala. 532; Gordon *v.* Tyler, 53 Mich. 629, of a mortgage wilfully transferred to one with notice; but here the other partners foreclosed, making the guilty partner and his grantee co-defendants.

[2] Kull *v.* Thompson, 38 Mich. 685; Walker *v.* Kee, 16 S. Ca. 76; 14 id. 142; but there was evidence of ratification here.

§ 1042. Transaction treated as a sale.— That the transaction may be treated as a sale and the recipient sued for the price of the goods is also held.[1]

§ 1043. Doctrine not applicable to counter-claims.— The rule preventing the partners from suing at law to recover funds misappropriated by a member of the firm, on account of his disqualification, being purely technical, has been held not applicable to defenses further than is required, and hence such payment has been held available as a counter-claim or payment when such creditor is suing upon a debt due him from the firm.[2]

The creditor, it has been held, can set off such part of the amount he loaned to the guilty partner as actually went to pay partnership debts, though borrowed for his own accommodation.[3]

§ 1044. Action sustained when guilty partner not party. The innocent partner, after the death of the guilty one, sustained an action as surviving partner to recover the original debt.[4]

An assignee of the firm for the benefit of its creditors or a vendee of the claim compelled the separate creditor, to whose debt the debtor partner had applied firm funds, to pay in;[5] and the innocent partner, having bought out the guilty partner, has sustained suit against a debtor of the firm who had had credit on the books for a debt due him from the guilty partner.[6]

[1] Daniel *v.* Daniel, 9 B. Mon. 195; Ackley *v.* Staehlin, 56 Mo. 558; Dob *v.* Halsey, 16 Johns. 34; Forney *v.* Adams, 74 Mo. 138. And see Daniel *v.* Daniel, 9 B. Mon. 195.

[2] Cornells *v.* Stanhope, 14 R. I. 97; Davis *v.* Smith, 27 Minn. 390. (This case is modified in other respects by S. C. in 29 Minn. 201.) See Allen *v.* St. Louis Bank, 120 U. S. 20.

[3] Liberty Sav. B'k *v.* Campbell, 75 Va. 534.

[4] Todd *v.* Lorah, 75 Pa. St. 155; Strong *v.* Fish, 13 Vt. 277; Sims *v.* Smith, 12 Rich. (S. Ca.) L. 685.

[5] Heilbut *v.* Nevill, L. R. 4 C. P. 354; Cadwallader *v.* Kroesen, 22 Md. 200; Thomas *v.* Pennrich, 28 Oh. St. 55; Thomas *v.* Stetson, 62 Iowa, 537 (49 Am. Rep. 148); Fellows *v.* Wyman, 33 N. H. 351; Williams *v.* Barnett, 10 Kan. 455; Evernghim *v.* Ensworth, 7 Wend. 326; Cotzhausen *v.* Judd, 43 Wis. 213 (28 Am. Rep. 539). *Contra*, Jones *v.* Yates, 9 B. & C. 532, noticed under § 1037.

[6] Brewster *v.* Mott, 5 Ill. 378; Gram *v.* Cadwell, 5 Cow. 489.

F. made an accommodation note to C. to pay debts, and C. accordingly indorsed it to his creditor, A. A. sold the note to C. & C., a firm of which the payee, C., was a member. The firm cannot sue the maker on this note because of the want of consideration which disqualifies C. to sue; and Q., who purchased the note after maturity, is equally disabled.[1]

Y. & H. being deeply involved, Y., to pay his private debt, gave a bill of sale of a horse belonging to the partnership to his creditor, the plaintiff, and subsequently he gave a bill of sale of the same horse to the defendant, a partnership creditor. The defendant was held entitled to retain the horse, the former conveyance being fraudulent as to creditors.[2]

§ **1045. Creditor not disqualified.**— A creditor of the firm can pursue the fund if the recipient knew it was partnership property and that the firm was insolvent by garnishing the recipient;[3] or in case of sale, on distribution.[4] *Contra*, when it does not appear that there was any objection by the other partner.[5]

§ **1046. Creditor's innocence.**— That the creditor of the guilty partner was ignorant that partnership property was being misappropriated does not deprive the firm of its remedy.[6]

[1] Quinn *v.* Fuller, 7 Cush. 224.

[2] Yale *v.* Yale, 13 Conn. 185 (33 Am. Dec. 393); and see Shaw *v.* McDonald, 21 Ga. 395.

[3] Johnson *v.* Hersey, 70 Me. 74 (35 Am. Rep. 303; 8 Am. Law Rec. 720); s. c. 73 Me. 291; French *v.* Lovejoy, 12 N. H. 458; Caldwell *v.* Scott, 54 N. H. 414; Hartley *v.* White, 94 Pa. St. 31; Sauntry *v.* Dunlap, 12 Wis. [364].

[4] McNaughton's Appeal, 101 Pa. St. 550.

[5] Russell *v.* Convers, 7 N. H. 343; and see Huntoon *v.* Dow, 29 Vt 215; Crozier *v.* Shants, 43 id. 478; Fenton *v.* Block, 10 Mo. App. 536, where a partnership creditor, having taken judgment against the innocent partner alone, which he could do under the statute making debts joint and several, was held not entitled to sue the transferee because the defendant himself could not have done so.

[6] Kendal *v.* Wood, L. R. 4 Ex. 243 Heilbut *v.* Nevill, L. R. 4 C. P. 354; 5 id. 478; Snaith *v.* Burridge, 4 Taunt. 684; Rogers *v.* Batchelor, 12 Pet. 221; Brewster *v.* Mott, 5 Ill. 378, of an unauthorized credit; Minor *v.* Gaw, 11 Sm. & Mar. 322; Buck *v.* Mosley, 24 Miss. 170; Ackley *v.* Staehlin, 56 Mo. 558; Bank *v.* Harvey, 12 Mo. App. 588; Caldwell *v.* Scott, 54 N. H. 414 (but see Chase *v.* Bean, 58 N. H. 183); Geery *v.* Cockroft, 33 N. Y. Superior Ct. 146; Purdy *v.* Powers, 6 Pa. St. 402,

Contra, Locke *v.* Lewis, 124 Mass. 1,[1] where the cases are very carefully examined and the court believe they do not support the above proposition. In Locke *v.* Lewis one partner, the plaintiff, of a firm of carriage makers, retired, taking the note of the new firm, composed of old and new partners, in payment of his interest. Afterwards the firm paid him the note by giving him carriages, with a bill of sale signed by the same firm name as that on the note; but in fact there had been other new partners admitted, forming a limited partnership, the ostensible partners remaining the same as known to the plaintiff, who was unaware of the change, except by a vague rumor, so that the ostensible partners seemed held out as authorized to dispose of the property, and the jury were held warranted in finding the plaintiff had a good title.

In Williams *v.* Brimhall, 13 Gray, 462, 467, it was held that the creditor had the burden to show that he acted in good faith and without notice of the fraud on the firm; the mere fact of such application of the property being *prima facie* fraudulent.[2]

And he has the burden to show authority.[3]

§ 1047. Bank paying individual note with firm's money.— Where the payee of the individual note of a partner procures its discount by a bank, to whom such partner pays the note with the firm's money, the firm cannot recover of the payee, for the bank, and not he, has received the partnership funds.[4]

In Davis *v.* Smith, 29 Minn. 201, Davis, a creditor of H., drew on him through a bank in which the firm of H. & S. deposited, and by H.'s direction the bank paid the draft and charged it to the firm's account, and it was held that, whether the bank was liable to the firm or not, which was said to depend on H.'s authority, yet Davis was not liable to S. for the money because deposits in a bank are the bank's funds, and the bank therefore had paid the draft out of its own funds. At an earlier stage of the case[5] the court had ruled that where H. had paid the draft by a check on the firm's

Goode *v.* McCartney, 10 Tex. 193; Young *v.* Read, 25 Tex. Supp. 113 (*dictum*); Powell *v.* Messer, 18 Tex. 401, 406; Binns *v.* Waddill, 32 Gratt. 588, 594; Liberty Sav. Bk. *v.* Campbell, 75 Va. 534. The question was raised, but not decided, in Johnson *v.* Crichton, 56 Md. 108, 113–14.

[1] 26 Am. Rep. 631.

[2] And see Chase *v.* Bean, 58 N. H. 183.

[3] Johnson *v.* Crichton, 56 Md. 108.

[4] Moriarty *v.* Bailey, 46 Conn. 592.

[5] Davis *v.* Smith, 29 Minn. 390.

deposit, the creditor was affected by the bank's knowledge of the misappropriation, and S. could set up the amount as a counter-claim in a subsequent suit against him by Davis.

In Billings *v.* Meigs, 53 Barb. 272, a bank which transferred partnership funds to the separate account of one partner, knowing he would appropriate them, was held liable to the firm.

§ 1048. **Payment in money different from assets.**— There is probably a difference between the payment of money and delivery of assets. Money has no earmarks, and it would seem that a creditor might receive a payment in money, regardless of whether the debtor got it by abstracting funds of his firm or by robbing a till, and doubtless Rogers *v.* Batchelor should be limited in this respect.[1]

In Kendal *v.* Wood, L. R. 6 Ex. 243, 248, Cockburn, C. J., said that the separate creditor acted altogether at his peril, but Blackburn and Montague Smith, JJ., said (pp. 251, 253) that the co-partner may give reasonable ground for supposing authority and create an estoppel.

In Moriarty *v.* Bailey, 46 Conn. 592, 594, it is said that if money is thus applied to pay a private debt it is recoverable, although the creditor had no notice, but suggests the qualification that the creditor has not parted with security and can be put *in statu quo.*

In Davis *v.* Smith, 27 Minn. 390, a creditor of one partner drew upon him. A bank received the draft and the partner paid it by a check upon the firm's deposit there. Here it was held that the bank's knowledge of the misappropriation was the creditor's knowledge, and that the firm could use this as a counter-claim against the creditor on its own debt; but in the same case, in 29 Minn. 201, it was held that money deposited in bank, being the bank's money, the bank paid the draft out of its own money, and the creditor was not liable for any part of it. And in Moriarty *v.* Bailey, 46 Conn. 592, a note of one partner, payable to A., was discounted for him in bank and the partner paid it with partnership funds, but here it was held that the bank and not A. received the firm's money, and hence the firm could not recover it from A.

If the creditor knew that the money being paid him by one partner belonged to the firm, he cannot retain it against

[1] Banks *v.* Allen, 26 Ga. 568; Dob *v.* Halsey, 16 Johns. 34, 39 (8 Am. Dec. 293).

the firm, for he knows the act is outside the scope of the partner's power,[1] unless he can show the payment to have been authorized by the copartner, and the burden is upon him to show this.[2]

DEFENDANTS.

§ 1049. All must be joined.— Partnership engagements being in law joint only, if objection is made to non-joinder, all the partners who were such at the date of the contract must be joined as defendants, for partners are entitled to have the judgment go against all.[3] Even though some are non-residents, yet they must be joined.[4]

§ 1050. Non-joinder, how objected to.— The non-joinder of a partner who is not dormant, as defendant, must be taken advantage of by plea in abatement, and, unlike non-joinder of a co-plaintiff, cannot be urged under the general issue or at the trial.[5] If the declaration discloses a partner-

[1] Kendal *v.* Wood, L. R. 6 Ex. 243; Heilbut *v.* Nevill, L. R. 4 C. P. 354; 5 id. 478; Foster *v.* Fifield, 29 Me. 136.

[2] Kendal *v.* Wood, L. R. 6 Ex. 243, 253; Davis *v.* Smith, 27 Minn. 390; Corwin *v.* Suydam, 24 Oh. St. 205.

[3] Lippincott *v.* Shaw Carriage Co. 25 Fed. Rep. 577; Adams *v.* May, 27 id. 907; Harrison *v.* McCormick, 69 Cal. 616; Exchange Bank *v.* Ford, 7 Colorado. 314; Roberts *v.* Rowan, 2 Harr. (Del.) 314; Richardson *v.* Smith, 21 Fla. 336; Page *v.* Brant, 18 Ill. 37; Pettis *v.* Atkins, 60 id. 454; Armstrong *v.* Robinson, 5 Gill & J. 412; Kent *v.* Holliday, 17 Md. 387; Smith *v.* Cooke, 31 id. 174; Loney *v.* Bailey, 43 id. 10; Smith *v.* Canfield, 8 Mich. 493; Blackwell *v.* Reid, 41 Miss. 102; Revis *v.* Lamme, 2 Mo. [207] 168; Tinkum *v.* O'Neale, 5 Nev. 93; Kamm *v.* Harker, 3 Oregon, 208; Laird *v.* Umberger, 1 Phila. 518; Davis *v.* Willis, 47 Tex. 154; Pate *v.* Bacon, 6 Munf. (Va.) 219; Slutts *v.* Chafee, 48 Wis. 617, and cases cited in the next note. In Lippincott *v.* Shaw Carriage Co. 25 Fed. Rep. 577, on a foreclosure suit, a firm holding a lien on the property was made defendant to cut off the lien, but only some of the partners were made parties. This was held not to cut off the right of the firm to contest the validity of plaintiff's mortgage on winding up.

[4] Wilby *v.* Sledge, 8 Ga. 532; Boorum *v.* Ray, 72 Ind. 151; Curtis *v.* Hollingshead, 14 N. J. L. 402, 409; Cowdin *v.* Hurford, 4 Oh. 132; Simonds *v.* Speed, 6 Rich. L. 390. *Contra*, see facts in Kimbro *v.* Bullitt, 22 How. 256. That the remedy is in equity if one partner lives out of the state, Williams *v.* Donaghe, 1 Rand. (Va.) 300.

[5] Puschel *v.* Hoover, 16 Ill. 340; Page *v.* Brant, 18 Ill. 37; Kent *v.* Holliday, 17 Md. 387; Smith *v.* Cooke, 31 id. 174; Mershon *v.* Hobensack, 22 N.

ship and but one partner is sued, unless the absence of the others is accounted for, as by death, it is demurrable, for the others are presumed to be still living.[1]

§ 1051. Statute making joint and several.— But where the statute makes the partners jointly and severally liable, as it does in many states,[2] the action can be against one or more.[3]

Where one partner is under these statutes sued alone on a partnership debt, a claim against him individually can be joined.[4] A partner who signs a note in the firm name jointly and severally can of course be sued alone;[5] but his copartners are not severally bound but jointly only, unless such note was authorized by them, for he is agent of all jointly, and not of each, and has no implied power to bind them jointly and severally.[6]

§ 1052. Dormant partners.— The non-joinder of a dormant partner is not ground of defense or abatement of an action. It is perfectly proper to join him, for he is liable as an undisclosed principal and hence in fact a contracting party.[7] His non-joinder cannot be objected to, because as an undisclosed principal he was not a nominal party to the contract, and the ostensible partners who assumed the attitude of sole principals cannot embarrass the creditor by repudiating that position to his disadvantage.[8]

J. L. 372, 379; Sage *v.* Sherman, 2 N. Y. 417, 433; Coffee *v.* Eastland, Cooke (Tenn.), 158, 160; Davis *v.* Willis, 47 Tex. 154; Hardy *v.* Cheney, 42 Vt. 417; Rutter *v.* Sullivan, 25 W. Va. 427. *Contra,* Shields *v.* Oney, 5 Munf. (Va.) 550, if plaintiff knew of what the plea would inform him.

[1] Kent *v.* Holliday, 17 Md. 387. And see Pettis *v.* Atkins, 60 Ill. 454, that the judgment must be reversed if some of the partners are not parties.

[2] See § 456 for list of these states.

[3] Green *v.* Pyne, 1 Ala. 235; McCulloch *v.* Judd, 20 id. 703; Hall *v.* Cook, 69 id. 87; Hamilton *v.* Buxton, 6 Ark. 24; Burgen *v.* Dwinal, 11 id. 314; Hicks *v.* Maness, 19 id. 701; Kent *v.* Wells, 21 id. 411; Nutt *v.* Hunt, 4 Sm. & Mar. 702; Miller *v.* Northern Bank, 34 Miss. 412; Putnam *v.* Ross, 55 Mo. 116; Gates *v.* Watson, 54 id. 585, 590; Logan *v.* Wells, 76 N. Ca. 416; Gratz *v.* Stump, Cooke (Tenn.), 493, 496.

[4] Logan *v.* Wells, 76 N. Ca. 416.

[5] Snow *v.* Howard, 35 Barb. 55; Sherman *v.* Christy, 17 Iowa, 322, 324; § 346.

[6] § 346.

[7] § 157.

[8] De Mautort *v.* Saunders, 1 B. & Ad. 398; Cox *v.* Hickman, 8 H. L.

If the plaintiff contracted with the defendant or defendants, not knowing or having reason to suppose that he or they had partners, and no other name appears in the style of the firm, such partner may be treated as to the plaintiff as dormant, and his non-joinder is not ground of abatement. A partner after contracting with the plaintiff, in his own name and on his own credit, cannot turn him over to litigate with a stranger.[1]

So where a partner sells property of the firm without disclosing that it belongs to a partnership, and this fact is unknown to the plaintiff, the latter can sue him for fraud in the sale,[2] or for breach of his warranty.[3]

And so when a partner when contracting was asked by the plaintiff who composed the firm, and replied, himself and two others, naming them, these three, when sued, are estopped to plead the non-joinder of a fourth partner.[4]

It was said in North *v.* Bloss, 30 N. Y. 374, 380, that the plaintiff's discovery of the fact of partnership before suing does not make his non-joinder a defect; that the plaintiff's knowledge at the time of contracting fixes his rights. And the rule has been held to apply even if the partnership was open and notorious in the immediate neighborhood, but was not known to the plaintiff.[5]

Cas. 268; Page *v.* Brant, 18 Ill. 37; Hopkins *v.* Hull, 17 Md. 72; Sylvester *v.* Smith, 9 Mass. 119; Wright *v.* Herrick, 125 Mass. 154; Pinschower *v.* Hanks, 18 Nev. 99; Elliot *v.* Stevens, 38 N. H. 311; Chase *v.* Deming, 42 id. 274; New York Dry Dock Co. *v.* Treadwell, 19 Wend. 525; Arnold *v.* Morris, 7 Daly, 498; Cookingham *v.* Lasher, 2 Keyes, 454; 1 Abb. App. Dec. 436; 38 Barb. 656; Leslie *v.* Wiley, 47 N. Y. 648; North *v.* Bloss, 30 N. Y. 374; Scott *v.* Conway, 58 N. Y. 619; Boardman *v.* Keeler, 2 Vt. 65; Goddard *v.* Brown, 11 id. 278; Cleveland *v.* Woodward, 15 id. 302 (40 Am. Dec. 682); Hicks *v.* Cram, 17 id. 449; Blin *v.* Pierce, 20 id. 25; Hagar *v.* Stone, 20 id. 106.

[1] De Mautort *v.* Saunders, 1 B. & Ad. 398; Sylvester *v.* Smith, 9 Mass. 119; Chase *v.* Deming, 42 N. H. 274; Clark *v.* Holmes, 3 Johns. 148; New York Dry Dock Co. *v.* Treadwell, 19 Wend. 525; Hurlbut *v.* Post, 1 Bosw. 28; Brown *v.* Birdsall, 29 Barb. 549; Farwell *v.* Davis, 66 id. 73; North *v.* Bloss, 30 N. Y. 374, 380; Cookingham *v.* Lasher, 2 Keyes, 454; 1 Abb. Dec. 436; 38 Barb. 656; Goddard *v.* Brown, 11 Vt. 278; Hicks *v.* Cram, 17 id. 449; Blin *v.* Pierce, 20 id. 25.

[2] Leslie *v.* Wiley, 47 N. Y. 648.

[3] Clark *v.* Holmes, 3 Johns. 148; Cookingham *v.* Lasher, 2 Keyes, 454; 1 Abb. Dec. 436; 38 Barb. 656.

[4] Chase *v.* Deming, 42 N. H. 274.

[5] Hagar *v.* Stone, 20 Vt. 106. Here one of the partners misled the plaintiff into supposing he alone

§ 1053. —— **judgment against ostensible.**— The judgment against the ostensible partners alone binds the entire partnership interest; it is still a partnership debt and entitled to priority over separate creditors, the same as if all the partners had been sued.[1]

Thus where A. and B., each having a business in different places, agreed to carry them on in connection and divide profits, but concealing the connection, and B. confessed judgment to a creditor, who then levied on his business, and A. claimed the property as partnership property, the creditor can hold A.'s interest.[2]

So if A. attaches the partnership property, making the ostensible partner alone defendant, and then B. discovers that the defendant has a concealed partner, and attaches the same property, making both partners defendant, A.'s attachment is not postponed to B.'s on that account.[3]

When B. attaches A.'s stock, and then C. attaches it, and then D. sues A. and B. jointly, and in the latter case the jury find that B. is a dormant partner of A., C. is not entitled to a preference over B., for B. is only estopped in D.'s suit to deny the partnership, and in another suit may be able to show that there is no partnership.[4]

§ 1054. **Nominal partner.**— A nominal partner need not be joined as defendant,[5] for his liability is not by reason of actual interest as a principal, but by estoppel in favor of the plaintiff alone, who can waive the estoppel if he chooses, or can treat him as an actual partner.

If a partner retires without notice of dissolution, and a new partner takes his place, the old name being retained, a former dealer to whom the new firm becomes indebted can

was interested. *Contra*, Alexander *v.* McGinn, 3 Watts, 220, holding that if the other partners are not dormant the plaintiff's ignorance of a partnership is no reason for non-joining them, if the buyer intended the purchase for the partnership and it was within the scope of the business.

[1] Pinschower *v.* Hanks, 18 Nev. 99; Elliot *v.* Stevens, 38 N. H. 311; Wright *v.* Herrick, 125 Mass. 154; Carey *v.* Bright, 58 Pa. St. 70; Tynberg *v.* Cohen (Tex.), 2 S. W. Rep. 734. On the same principle that a judgment against adult partners on plea of infancy by a minor partner binds the assets.

[2] Van Valen *v.* Russell, 13 Barb. 590.

[3] Wright *v.* Herrick, *supra*.

[4] Lord *v.* Baldwin, 6 Pick. 348.

[5] Hatch *v.* Wood, 43 N. H. 633. Compare § 109.

hold the original partners by estoppel, or the new firm as being the actual debtors, but cannot hold both, and must elect which to pursue.[1]

§ **1055. Death pendente lite.**—The death of a defendant partner *pendente lite*, like the death of a plaintiff partner and for the same reasons, does not abate an action against the partners, for the liability survives against the survivors, who can be proceeded against alone. Hence no revivor is necessary.[2] So if one of a firm of garnishees dies the action proceeds to judgment against the survivor;[3] but the case should proceed against the survivor alone. A judgment against the firm is erroneous.[4]

This can be waived, as where on death of a partner defendant *pendente lite*, his administrator obtains leave to file a separate answer and contests on the merits; yet even here it was held that to recover against him the plaintiff must file a supplemental pleading showing the survivor to be insolvent.[5]

If a partner in an action for the distribution of proceeds of real estate in the sheriff's hands between joint and separate creditors die, his representatives should be made parties.[6]

So if one partner is adjudged a bankrupt the cause proceeds to judgment as to the rest.[7]

§ **1056. Amendments.**—If there is a defect of parties defendant they may be brought in by amendment;[8] and if

[1] Scarf *v.* Jardine, L. R. 7 App. Cas. 745.

[2] Troy Iron & Nail Factory *v.* St. John, 11 Blatchf. 513; King *v.* Bell, 13 Neb. 409; Hammond *v.* St. John, 4 Yer. 107, 111; Townes *v.* Birchett, 12 Leigh, 173.

[3] Gaines *v.* Beirne, 3 Ala. 114. That a continuance ought to be granted if a sudden death has deprived the surviving partner of the testimony of his copartner, Long *v.* McDonald, 39 Ga. 186.

[4] Bowen *v.* Troy Portable Mill Co. 31 Iowa, 460. In Ross *v.* Everett, 12 Ga. 30, under a statute providing that if service in an action against partners is on part of the defendants only the case may proceed to judgment in the same manner as if they were the sole defendants and bind the joint property and the several property of those served, it was held that upon the death of one of those served, a revivor against his administrator could be had, for that was proceeding in the same manner as if he were "sole defendant."

[5] Sherman *v.* Kreul, 42 Wis. 33.

[6] Bank *v.* Sawyer, 38 Oh. St. 339, 343.

[7] Hogendobler *v.* Lyon, 12 Kan. 276; Lomme *v.* Kintzing, 1 Montana, 290: Tinkum *v.* O'Neale, 5 Nevada, 93.

[8] Kamm *v.* Harker, 3 Oregon, 208.

non-partners are made defendants they may be struck out by amendment.[1] But where R. R. is sued as doing business under the name of R. R. & Son, the action is against R. R. only and not against the firm, and others cannot be added as copartners by amendment;[2] but the copartner's request to be let in to defend will be granted, as he is an interested party who might be affected by the result.[3] Amendments are also allowed when the action is in the company name.[4]

§ 1057. Appeal and error.— One partner may alone appeal or prosecute error, and a reversal as to him must be a reversal as to all, since they would be injuriously affected otherwise.[5] If one plaintiff in error dies, there is no objection to proceeding in the name of the survivor alone, but the court, at the survivor's request, may make the administrator a party.[6]

§ 1058. Removal to United States courts.— Where partners are sued and one only is a citizen of another state, he cannot remove the cause to the federal courts, for if liable at all the partners are jointly liable.[7]

If, however, the non-residents are the only defendants served, they have the right of removal.[8]

If the action in the state courts is in the firm name, under a statute, this is not so in the federal courts, and the application for removal must state the names and citizenship of each member.[9]

[1] Kamm *v.* Harker, 3 Oregon, 208; Cowan *v.* McIntyre, 19 Up. Can. Q. B. 607. And see Cunningham *v.* Smithson, 12 Leigh, 32. *Contra*, Mershon *v.* Hobensack, 22 N. J. L. 372, 379, that all the defendants must be proved to be partners, else nonsuit.

[2] Maritime Bk. of Bangor *v.* Rand, 24 Conn. 9.

[3] Peck *v.* Parchen, 52 Iowa, 46.

[4] See § 1065.

[5] Smith *v.* Bryan, 60 Ga. 628; Wood *v.* Cullen, 13 Minn. 394, 399; Dickson *v.* Burke, 28 Tex. 117; but if the rest are not liable a reversal and remand may be of the one liable and dismissal as to the rest, Cunningham *v.* Smithson, 12 Leigh (Va.), 32. That both must appeal, or, at most, one in the name of both, and if one the rest must be made parties, Curry *v.* Stokes, 12 R. I. 52; Tupery *v.* Lafitte, 19 La. Ann. 296; Todd *v.* Daniel, 16 Pet. 521; Dunns *v.* Jones, 4 Dev. & Bat. 154; Wilkinson *v.* Gilchrist, 5 Ired. L. 228.

[6] Gunter *v.* Jarvis, 25 Tex. 581.

[7] Stone *v.* South Carolina, 117 U. S. 430; Blum *v.* Thomas, 60 Tex. 158.

[8] Davis *v.* Cook, 9 Nev. 134.

[9] Adams *v.* May, 27 Fed. Rep. 907.

CHAPTER VII.

ACTIONS IN THE FIRM NAME.

§ 1059. We have seen that in the absence of a statute partners can neither sue nor be sued in the partnership name.[1] But in England and a number of states, recent statutes have been passed authorizing actions by and against partnerships to be brought in certain cases in the firm name. This makes the firm a distinct entity as far as remedies are concerned.

Such a statute has often been stated to recognize a firm as an entity or distinct legal person distinct from its members.[2] But it is not an entity so that a firm can in the same action unite a claim on notes, one of which was given when the firm was composed of different persons from the firm to which the other was given.[3]

Such statutes are not exclusive but alternative, and the partners can be sued in their individual names;[4] and are to be liberally construed, being remedial,[5] but the contrary is also held.[6]

[1] §§ 1018, 1049. In Wilson *v.* King, Morris (Iowa), 105, the court said that if the questions were new they would regard a partnership as a mercantile person and allow it to sue in the firm name.

[2] Newlon *v.* Heaton, 42 Iowa, 593, 597; Fitzgerald *v.* Grimmell, 64 Iowa, 261 (two judges dissenting); Leach *v.* Milburn Wagon Co. 14 Neb. 106, 108; Whitman *v.* Keith, 18 Oh. St. 134, 144. And see Wilson *v.* King, Morris (Iowa), 105; Liverpool, etc. Nav. Co. *v.* Agar, 14 Fed. Rep. 615; 4 Woods, 201, of a commercial partnership in Louisiana; also Hefferman *v.* Brenham, 1 La. Ann. 146. See § 173.

[3] Dyas *v.* Dinkgrave, 15 La. Ann. 502. See *Ex parte* Blain, 12 Ch. D. 522.

[4] Markham *v.* Buckingham, 21 Iowa, 494; Whitman *v.* Keith, 18 Oh. St. 134. But see as to a commercial partnership in Louisiana, Liverpool Nav. Co. *v.* Agar, 4 Woods, C. C. 201; 14 Fed. Rep. 615.

[5] Whitman *v.* Keith, 18 Oh. St. 134; Phelps Mfg. Co. *v.* Eng, 19 Conn. 58, where by statute the individual names were to be substituted in the first three days of the term, but the defendants refusing to tell their names until after, an amendment was allowed later.

[6] Burlington & Mo. Riv. R. R. *v.* Dick, 7 Neb. 242.

The right to sue partners under the firm name is not confined to existing partnerships, but continues after dissolution of the debtor firm.[1] But a new firm formed by part of the former in the same name is not the same firm, and cannot be sued for the debts of the old, especially if service on some of the debtors would not bind the rest.[2]

In England the right to sue a firm in its firm name applies to foreign partnerships.[3]

§ **1060. Individual using firm name.**— And if an individual is trading in a firm name he can be sued in such name,[4] but his right to sue in such name does not follow.

Thus, in Stirling *v.* Heintzman, 42 Mich. 449, under a statute allowing actions in the firm name when the individual names are unknown, and inserting them when discovered, an agent brought replevin for his principal in the name of H. & Co., averring that the names of the partners were unknown. An amendment inserting H.'s individual name, doing business as H. & Co., was disallowed because the statute applied to partnerships, and one person cannot constitute a partnership, and moreover there was a variance in averring a joint claim and proving a sole claim.

§ **1061. Practice.**— The pleading must aver the necessary facts showing a right as an artificial person to sue, or liability to be sued in the firm name, else a demurrer for want of capacity lies.[5]

But the use of a firm name was held equivalent to an averment that defendant was a partnership in that name.[6]

In Alabama the statute formerly only applied to actions against a firm and not to actions by a firm;[7] but this has been since changed.

[1] Davis *v.* Morris, 10 Q. B. D. 436. This had been doubted in *Ex parte* Young, 19 Ch. D. 124, and *Ex parte* Blain, 12 id. 522.

[2] Shorter *v.* Hightower, 48 Ala. 526.

[3] Pollexfen *v.* Sibson, 16 Q. B. D. 792.

[4] Munster *v.* Cox, 11 Q. B. D. 435; aff'd, 10 App. Cas. 680. Compare § 106.

[5] Haskins *v.* Alcott, 13 Oh. St. 210; Byington *v.* Miss. & Mo. Rev. R. R. 11 Iowa, 502; Sweet v. Ervin, 54 Iowa, 101. But an action against partners giving their individual names, adding, "doing business under the firm name of," etc., is not an action against them in the firm name. Davidson *v.* Knox, 67 Cal. 143; Smith *v.* Gregg, 9 Neb. 212.

[6] Love *v.* Blair, 72 Ind. 281.

[7] Sims *v.* Jacobson, 51 Ala. 186.

The statute applies to garnishees, and a firm may be garnished for the debt due to the principal defendant.[1]

In these actions the firm can recover whatever debt belongs to it regardless of the scope of the business.

Thus a firm in the dairy business sued the defendant for services in herding his cattle. He cannot defend on the ground that the firm was not in the business of herding, and therefore the services were not rendered by the plaintiff as a firm, since, as the land, feed, etc., belonged to the firm, the compensation would also go to it.[2]

For jurisdictional purposes such firm must be deemed to have a residence in every county where it has a place of business, though the partners all live elsewhere.[3]

§ 1062. Summons.— The summons and its service must conform to the statutory provisions when there are any. If this requires service to be at the place of business, a personal service on the individual partners separately may be set aside;[4] otherwise the service may be upon the individuals,[5] or upon part of them.[6] And the summons may run against the individuals.[7]

Where a writ issued against R. & Co. and appearance was entered by R., trading as R. & Co., and verdict and judgment had against R. trading as R. & Co., the judgment cannot be amended so as to run against R. & Co., in order that an execution may issue upon a subsequently discovered partner.[8]

§ 1063. Judgment.—The judgment must be against the firm in the firm name, and cannot be separately entered against one partner though he is in default.[9]

[1] Whitman *v.* Keith, 18 Oh. St. 134.

[2] Tiernan *v.* Doran, 19 Neb. 492.

[3] Fitzgerald *v.* Grimmell, 64 Iowa, 261.

[4] Shafer *v.* Hockheimer, 36 Oh. St. 215, 218. See Clark *v.* Evans, 64 Mo. 258; Whitman *v.* Keith, 18 Oh. St. 134.

[5] Ladiga Saw Mill Co. *v.* Smith, 78 Ala. 108; Gillett *v.* Walker, 74 Ga. 291.

[6] Ladiga Saw Mill Co. *v.* Smith, 78 Ala. 108; Pollexfen *v.* Sibson, 16 Q. B. D. 792; Hefferman *v.* Brenham, 1 La. Ann. 146. And see cases under § 1087.

[7] Gillett *v.* Walker, 74 Ga. 291; Wyman *v.* Stewart, 42 Ala. 163.

[8] Munster *v.* Cox, 10 App. Cas. 680.

[9] Jackson *v.* Litchfield, 8 Q. B. D. 474; Marsh *v.* Mead, 57 Iowa, 535; Storm *v.* Roberts, 54 id. 677; Fitzgerald *v.* Grimmell, 64 id. 261; Adkins *v.* Arthur, 33 Tex. 431.

But this is also held to be a mere irregularity, and the judgment against the partners actually served not to be void nor subject to collateral attack.[1] That the judgment may properly go against the individuals was held in Nevada.[2] Yet a dismissal of one partner who had not been served was held to be a dismissal of the case because the recovery must be against the partnership.[3]

§ 1064. Execution.—The judgment being rendered against the firm, execution cannot be levied upon the individual property of the partners. The proceeding is somewhat in the nature of a proceeding *in rem*.[4]

The contrary has been held where service of summons was had upon all the partners.[5] And whether the judgment is a lien on other than partnership property was queried.[6] Hence if one partner is a married woman, the plea of coverture is no defense.[7] Nor is the creditor a judgment creditor of an individual partner so as to attack a conveyance by him of individual property in fraud of his creditors.[8]

§ 1065. Cured by amendment or by judgment and verdict.—Where the action was brought against a firm in the firm name without the statutory averments to show a right so to sue, it is too late after judgment to raise an objection.[9] Or by a non-resident firm, such remedy being confined to residents, for it is mere want of capacity, waived if not objected to.[10]

So where there was no right to sue in the firm name, an amendment may be made after objection.[11]

[1] Marsh *v.* Mead, 57 Iowa, 535.

[2] Gillig *v.* Lake Bigler Road Co. 2 Nev. 214.

[3] Storm *v.* Roberts, 54 Iowa, 677.

[4] Wyman *v.* Stewart, 42 Ala. 163; McCoy *v.* Watson, 51 id. 466; Haralson *v.* Campbell, 63 id. 278; Yarbrough *v.* Bush, 69 id. 170; Watts *v.* Rice, 75 Ala. 289; Davis *v.* Buchanan, 12 Iowa, 575; Levally *v.* Ellis, 13 id. 544. See Clayton *v.* May, 68 Ga. 27.

[5] Stout *v.* Baker, 32 Kan. 113.

[6] Markham *v.* Buckingham, 21 Iowa, 494, and Lathrop *v.* Brown, 23 id. 40. And denied in York Bank's Appeal, 36 Pa. St. 458.

[7] Yarbrough *v.* Bush, 69 Ala. 170.

[8] McCoy *v.* Watson, 51 Ala. 466.

[9] Wendall *v.* Osborne, 63 Iowa, 99.

[10] Cady *v.* Smith, 12 Neb. 628. See Wilson *v.* King, Morris (Iowa), 105; and Abernathy *v.* Latimore, 19 Oh. 286, 289.

[11] Sims *v.* Jacobson, 51 Ala. 186; Rohrbough *v.* Reed, 57 Mo. 292; Dobell *v.* Loker, 1 Handy, 574; but the attachment falls, Marienthal *v.* Amburgh, 2 Disney, 586; Maritime Bank

And where a concern brought suit as a corporation and it was a partnership, an amendment stating it to be a partnership was allowed.[1] So where it was sued as a corporation a similar amendment was permitted.[2]

Where action was begun in the firm name after one partner had died, an amendment substituting the surviving partners was allowed and former depositions held good.[3]

After judgment it is too late to object.[4] And the judgment docketed in the firm name of the judgment creditors is a lien and notice to purchasers of the debtor's land.[5]

But where a firm sues in its partnership name without authority, it has been held that a judgment by default would be set aside, as the debtor has the right to know who his creditors are.[6]

If sued in the firm name without proper averments and summons served at the place of business, an amendment by entry on the journal of the court, substituting individual names, is not complete until personal service of summons.[7]

§ 1066. Action on the judgment.—Action on the judgment can be brought against the individual partners;[8] or to make them parties to the judgment.[9]

This remedy is not an action upon the judgment, nor an action on a right created by statute, for the right to sue the partners ex-

v. Rand, 24 Conn. 9. *Contra*, that there can be no amendment, because there is no plaintiff to amend. Mexican Mill *v.* Yellow Jacket Mine, 4 Nev. 40.

[1] Ward *v.* Pine, 50 Mo. 38.

[2] Packing Provision Co. *v.* Casing Co. 34 Kan. 340.

[3] Cragin *v.* Gardner (Mich.), 31 N. W. Rep. 206.

[4] Fowler *v.* Williams, 62 Mo. 403; Davis *v.* Kline, 76 id. 310, 312; Brownson *v.* Metcalfe, 1 Handy, 188, where a foreign firm so sued answered to the merits; Totty *v.* Donald, 4 Munf. (Va.) 430; Pate *v.* Bacon, 6 id. 219; Downer *v.* Morrison, 2 Gratt. 250. *Contra*, Burlington & Mo. Riv. R. R. *v.* Dick, 7 Neb. 242; Seely *v.* Schenck, 2 N. J. L. 75.

[5] Dearborn *v.* Patton, 3 Oregon, 420.

[6] Lanford *v.* Patton, 44 Ala. 584; Burden *v.* Cross, 33 Tex. 685; Seely *v.* Schenck, 2 N. J. L. 75.

[7] Marienthal *v.* Amburgh, 2 Disney, 586.

[8] Clark *v.* Cullen, 9 Q. B. D. 355; Cox *v.* Harris, 48 Ala. 538; Waterman *v.* Lipman, 67 Cal. 26; Ruth *v.* Lowrey, 10 Neb. 260; Leach *v.* Milburn Wagon Co. 14 id. 106; Haskins *v.* Alcott, 13 Oh. St. 210.

[9] Waterman *v.* Lipman, 67 Cal. 26; Hawkins *v.* Lasley, 40 Oh. St. 37.

isted before judgment. It is an extension of the remedy; hence the statute of limitations as to actions on judgments and on statutory rights is not applicable;[1] nor can it be the same as upon the original cause of action, for the judgment may have been on many claims of different ages.

A judgment being by a statute joint and several, a single partner can be sued upon it;[2] but it has been held that an averment is necessary that the partnership property was not sufficient to satisfy the judgment because of the priority of separate creditors in the separate estate.[3] And averring execution and *nulla bona* in one state where the partnership is doing business in two states is not a sufficiently positive statement;[4] neither the pleading nor judgment in the original action can be amended.[5]

If the action on the judgment is in the same state as the original action, the omission in the second suit to aver that the plaintiff firm is formed to do business in the state, or otherwise to show a right to sue in the firm name, is immaterial because already established in the original action.[6]

If a firm did business in two names, and judgments are got against it in each of the names, these judgments can be joined in an action upon them against individual members of the firm.[7]

[1] Hawkins *v.* Lasley, 40 Oh. St. 37. In Ash *v.* Guie, 97 Pa. St. 493, 501 (39 Am. Rep. 818; 10 Am. Law Rec. 278; 12 Reporter, 281), a judgment against an association, and execution upon its realty, not being a judgment against any person natural or artificial, was held not pleadable as a "former recovery" in an action against the members individually.

[2] Cox *v.* Harris, 48 Ala. 538.

[3] Ruth *v.* Lowrey, 10 Neb. 260.

[4] Leach *v.* Milburn Wagon Co. 14 Neb. 106.

[5] Waterman *v.* Lipman, 67 Cal. 26.

[6] Haskins *v.* Alcott, 13 Oh. St. 210.

[7] Ruth *v.* Lowrey, 10 Neb. 260.

CHAPTER VIII.

PLEADING.

§ 1067. Averment of plaintiffs' partnership. — If the plaintiffs are suing upon a note indorsed to them in blank, it is not necessary to aver or prove that they are partners.[1] But on any other contract or on a note specially indorsed to them or payable to a firm, it is necessary to aver that plaintiffs constitute the firm, or that the note was made to them in that name, for then possession of the note raises no presumption of title.[2] If the execution of a note given to plaintiffs as partners is admitted, proof of partnership is not necessary.[3]

Even a statute that persons suing as partners need not make proof of partnership will not dispense with proof of identity. Where A., B. and C. sue without averring they are partners, and prove a cause of action in A. & Co., they must show that they are A. & Co.[4]

The fact of partnership must be averred in the body of the pleading. That the caption showed they sued or were sued as partners is not sufficient.[5]

Thus in an action by a drawer against the acceptor the declaration would be that the plaintiff drew the bill by the name of A. & B.[6]

[1] Ord *v.* Portal, 3 Camp. 239; Dessaint *v.* Elling, 31 Minn. 287; Clark *v.* Kensall, Wright (O.), 480; Ege *v.* Kyle, 2 Watts, 221; Neely *v.* Morris, 2 Head, 595. And see Boswell *v.* Dunning, 5 Harr. (Del.) 231.

[2] Note to Ord *v.* Portal, 3 Camp. 239, 240, n.; Attwood *v.* Rattenbury, 6 J. B. Moore, 579; Wilcox *v.* Woods, 4 Ill. 51; Woodworth *v.* Fuller, 24 id. 109; Wright *v.* Curtis, 27 id. 514; Hughes *v.* Walker, 4 Blackf. 50; Hubbell *v.* Skiles, 16 Ind. 138; Campbell *v.* Blanks, 13 Kan. 62; McGregor *v.* Cleveland, 5 Wend. 475; Robb *v.* Bailey, 13 La. Ann. 457; Redmond *v.* Stansbury, 24 Mich. 445; Dessaint *v.* Elling, 31 Minn. 287; Clark *v.* Kensall, Wright (O.), 480; Ege *v.* Kyle, 2 Watts, 221; Bischoff *v.* Blease, 20 S. Ca. 460; Neely *v.* Morris, 2 Head, 595; Barnes *v.* Elmbinger, 1 Wis. 56; Varnum *v.* Campbell, 1 McLean, 313.

[3] Pratt *v.* Willard, 6 McLean, 27; Maret *v.* Wood, 3 Cranch, C. C. 2; Cowan *v.* Baird, 77 N. Ca. 201; Shepherd *v.* Frys, 3 Gratt. 442.

[4] Woodworth *v.* Fuller, 24 Ill. 109.

[5] Foerster *v.* Kirkpatrick, 2 Minn. 210.

[6] See Guidon *v.* Robson, 2 Camp. 302.

By statute in Illinois, it is not necessary to allege or prove, in the first instance, that those jointly suing or sued are partners; the fact must be denied. Hence, where the caption shows that plaintiffs as partners sue defendants as partners, the omission of an averment of the partnership is immaterial.[1]

Where plaintiffs alleged that they were partners and sold to defendant the goods sued for, and defendant denied that plaintiffs were partners, but admitted the purchase from plaintiffs, the issue of partnership is immaterial.[2] But *contra* if the sale by plaintiffs is not admitted, although the plaintiffs did not aver that they sold the goods as partners.[3]

§ 1068. Plaintiffs' averment of the defendants' partnership.— In suing partners the averments are not generally required to be different from those in an action against any other joint contractors; it is sufficient to show that the defendants bought the goods or made the note without averring that they are partners, or the manner of signing, or that they had a firm name.[4] Hence, if defendants' partnership is averred, its denial may raise an immaterial is-

[1] Cooper *v.* Coates, 21 Wall. 105. And see, also, Lee *v.* Hamilton, 12 Tex. 413. "Plaintiffs for several years last past have been and now are copartners, doing business under the firm name and style of A., B. & Co.," is a sufficient allegation of partnership, and if defendants desire a more specific allegation as to time, they must object by motion, Pfister *v.* Wade, 69 Cal. 133. For similar allegations, see Reese *v.* Kinkead, 18 Nev. 126 (aff'g 17 id. 447), by a surviving partner. See Hubbell *v.* Skiles, 16 Ind. 138, and Frost *v.* Schackleford, 57 Ga. 260, that a surviving partner must aver that he is such in order to show a right to sue alone.

[2] Millerd *v.* Thorn, 56 N. Y. 402.

[3] Irvine *v.* Myers, 4 Minn. 229.

[4] Swinney *v.* Burnside, 17 Ark. 38; Hunter *v.* Martin, 57 Cal. 365; Ensminger *v.* Marvin, 5 Blackf. 210; Pollock *v.* Glazier, 20 Ind. 262; Danaher *v.* Hitchcock, 34 Mich. 516; Vallett *v.* Parker, 6 Wend. 615; Gates *v.* Watson, 54 Mo. 585; Stix *v.* Mathews, 63 id. 371; Maynard *v.* Fellows, 43 N. H. 255; Ward *v.* Dow, 44 N. H. 45; Mack *v.* Spencer, 4 Wend. 411; Hawley *v.* Hurd, 56 Vt. 617. See, also, Nutt *v.* Hunt, 4 Sm. & Mar. 702. In Jones *v.* Mars, 2 Camp. 305, an averment that defendants made a bill, "their own proper *hands* being thereunto subscribed," whereas the signature was A. & Co., Lord Ellenborough said that the word hand would have been clearly sufficient, but that he doubted as to the plural number; nevertheless would not nonsuit. But, *contra*, Pease *v.* Morgan, 7 Johns. 468, where it was averred that their "own proper hands and

sue, for if the defendants contracted it makes no difference whether they were partners or not.[1]

Some other courts seem to require an allegation that the defendants were partners when the action is on a note made in their firm name.[2]

Under many of the codes the plaintiff's pleading may incorporate the note in lieu of alleging its execution or its terms; in these cases an averment of identity of the defendants as members of the firm whose name appears as makers may be properly required.[3]

But even here, if the caption is part of the petition, the description of the defendants as partners in the caption has been held sufficient without further allegation.[4] But if the caption describes them as "late partners as A. & B.," this is not sufficient as an allegation.[5]

In an action against one partner only, the declaration should not allege a partnership contract, for otherwise the judgment would be defective.[6] And where by statute a partnership contract is joint and several, it is not necessary to aver that the defendant and another who made the note sued upon were partners.[7]

§ 1069. It is not necessary to aver the capacity of a partnership to make notes, or the authority of one partner to do so. This is matter of defense to be expressly denied in the answer.[8] And so, if the plaintiff relies on a ratification of a

names being thereunto subscribed," or indorsed with their own proper handwriting, and it was indorsed by but one in the firm name, it is a variance. Fullerton *v.* Seymour, 5 Vt. 249. But that they indorsed acting under the name of A., B. & Co., is correct, though but one partner wrote the firm name, Manhattan Co. *v.* Ledyard, 1 Cai. 192.

[1] Hunter *v.* Martin, 57 Cal. 365.

[2] Petrie *v.* Newell, 13 Ill. 647; Meacham *v.* Batchelder, 3 Pin. (Wis.) 281; 3 Chand. 316. As to the sufficiency of allegations see Jemison *v.* Dearing, 41 Ala. 283; Champion *v.* Mumford, Kirby (Conn.), 170; National Ins. Co. *v.* Bowman, 60 Mo. 582; Manhattan Co. *v.* Ledyard, 1 Caines, 192.

[3] Lucas *v.* Baldwin, 97 Ind. 471.

[4] McCloskey *v.* Strickland, 7 Iowa, 259; King *v.* Bell, 13 Neb. 409.

[5] Norton *v.* Thatcher, 8 Neb. 186, 191.

[6] Barry *v.* Foyles, 1 Pet. 311, 317.

[7] Kent *v.* Wells, 21 Ark. 411; Burgen *v.* Dwinal, 11 id. 314; Hamilton *v.* Buxton, 6 id. 24.

[8] Vienne *v.* Harris, 14 La. Ann. 382; Carrier *v.* Cameron, 31 Mich. 373 (18 Am. Rep. 192).

departure from the articles instead of the implied power of a general partner, he need not allege this.[1]

§ 1070. Averment of title through a partnership.—In deriving title to a note through the indorsement of a partnership, or from a surviving partner through an act of law, it is not necessary to aver the names of those composing the firm.[2]

But plaintiff must show how he has a right to sue, whether by assignment from the firm or as surviving partner;[3] and if as survivor, it has been held, must show who composed the firm, though the promise be to the firm in its name.[4]

That a person cannot sue on the common counts and then prove a sale by a firm to the defendant, for the common counts imply a sale by the plaintiff, although he claims by assignment by the firm to himself on dissolution.[5]

§ 1071. Defense by one inuring to all.—Each partner has the undoubted right to plead separately;[6] but a defense made by one partner which goes to the whole execution or consideration of the claim will inure to all the partners.

Thus, where partners are sued for infringement of a patent, a defense by one that the patent was invalid inures to all;[7] so a denial of the execution of the note sued on by one defendant is in effect a denial by all;[8] or a defense of the illegality of a contract.[9]

But in such case, if the other partners are in default, execution

[1] Johnson *v.* Bernheim, 76 N. Ca. 139. See, also, in averring against a person held out as partner, § 109.

[2] Childress *v.* Emory, 8 Wheat. 642; Stout *v.* Hicks, 5 Blackf. 152; Cooper *v.* Drouillard, id. 152; Smith *v.* Blatchford, 2 Ind. 184; 52 Am. Dec. 504.

[3] Frost *v.* Schackleford, 57 Ga. 260.

[4] Hubbell *v.* Skiles, 16 Ind. 138.

[5] Hatzenbuhler *v.* Lewis, 51 Mich. 585. Here the defendant had paid the other partner in full. The court said he was not bound to meet the claim until pleaded.

[6] Plowman *v.* Riddle, 7 Ala. 775; Friend *v.* Duryee, 17 Fla. 111; 35 Am. Rep. 89; Wynne *v.* Millers, 61 Ga. 343; Walton *v.* Payne, 18 Tex. 60, holding them entitled to separate trials also, if the defenses are different.

[7] Smith *v.* Cropper, L. R. 10 App. Cas. 249.

[8] Fairchild *v.* Grand Gulf Bank, 5 How. (Miss.) 597; McRobert *v.* Crane, 49 Mich. 483.

[9] Pfau *v.* Lorain, 1 Cinti. Superior Ct. 73.

of the note by the answering partner is sufficient. This may be shown by proof that he is a member of the firm and that the note was made in its behalf. The partners in default can then take nothing by the plea,[1] or by proof that it is in his handwriting.[2]

A denial of the partnership by some of the defendants compels proof of partnership as to all, including those in default, in states where judgment cannot be taken against less than all the defendants.[3]

§ **1072. Denials of plaintiffs' partnership.**—The general issue or *non assumpsit* puts the plaintiff's partnership in issue when that is a material fact,[4] and the defendant can under it take advantage of the fact that partners of the plaintiff should have been made co-plaintiffs;[5] and doubtless the same rule would apply where all the partners sue on a debt due to one partner alone.[6]

Some jurisdictions, however, require the denials to be special and under oath.[7]

The denial may be of want of knowledge sufficient to form a belief.[8]

In replevin the non-joinder of a partner as co-plaintiff may be pleaded in bar and not in abatement merely, because one partner cannot replevy part of the property; but amendment can be had.[9]

§ **1073. Denial of execution of instrument.**—To deny a joint liability many states have statutes requiring the de-

[1] Stevenson *v.* Farnsworth, 7 Ill. 15.

[2] Davis *v.* Scarritt, 17 Ill. 202.

[3] Yocum *v.* Benson, 45 Ill. 435.

[4] Burk *v.* Morrison, 8 B. Mon. 131; Roberts *v.* Atwood, id. 209; Norcross *v.* Clark, 15 Me. 80; Armstrong *v.* Robinson, 5 Gill & J. 412; Dessaint *v.* Elling, 31 Minn. 287; True *v.* Congdon, 44 N. H. 48; Patten *v.* Whitehead, 13 Rich. L. 156.

[5] Jordan *v.* Wilkins, 3 Wash. C. C. 110; Sims *v.* Ross, 8 Sm. & Mar. 557; Coffee *v.* Eastland, Cooke (Tenn.), 158.

[6] See Anderson *v.* Tarpley, 6 Sm. & Mar. 507.

[7] Heintz *v.* Cahn, 29 Ill. 308; Anderson *v.* Tarpley, 6 Sm. & Mar. 507; Ardley *v.* Russell, 1 Browne (Pa. Com. Pl. 1810), 145; Gay *v.* Waltman, 89 Pa. St. 453; Lindsay *v.* Jaffray, 55 Tex. 626; Martin *v.* American Express Co. 19 Wis. 336.

[8] Wales *v.* Chamberlin, 19 Mo. 500.

[9] Fay *v.* Duggan, 135 Mass. 242, distinguishing as statutory Garvin *v.* Paul, 47 N. H. 158, where a plea in abatement was held the proper plea. The latter case also sustains amending.

fense, if the action is on a written contract, to be made by plea of *non est factum* or denial of execution of the instrument. The object of this is to give notice of the nature of the defense, which a general denial or *nil debet* would not do. Thus if the defense by one partner be that an acceptance was by another partner for private purposes or after dissolution, the plea must deny execution.[1] But the contrary is held in the absence of such statute because this defense is consistent with the fact of partnership and the formal execution of the note, and therefore may be shown, though neither the partnership nor the execution are specifically denied.[2] And so of a note made after dissolution and notice thereof, a general issue is sufficient.[3]

And so even if the instrument is under seal, as in an action for rent on a lease signed in the firm name, the plea must be *non est factum*, and not *nil debet*, to raise the question of authority.[4]

A denial that defendant was a partner does not satisfy the statute.[5] A denial that the defendant made the note or authorized any one to make it is not sufficient, for a copartner might have made it.[6]

A denial by two of three defendants, "each for himself denies that he ever executed said note," is bad, for the third partner's execution is not negatived.[7]

An answer that the firm was dissolved when the note was given is in the nature of a special traverse. The mode of dissolution need not be stated.[8] And a plea that a draft was made for private purposes of a partner without authority will sustain evidence that it was given to pay a note made in the firm name for an individual debt.[9]

A statute that on "an express or implied contract" no proof of

[1] Palmer *v.* Scott, 68 Ala. 380. See Aultman & Taylor Co. *v.* Webber, 4 Ill. App. 427; Phaup *v.* Stratton, 9 Gratt. 615; Cook *v.* Martin, 5 Sm. & Mar. 379.

[2] Whitman *v.* Wood, 6 Wis. [676] 652.

[3] Whitesides *v.* Lee, 2 Ill. 548; Kettelle *v.* Wardell, id. 592.

[4] Kendall *v.* Carland, 5 Cush. 74.

[5] Litchfield *v.* Daniels, 1 Colorado, 268; Ferguson *v.* Wood, 23 Tex. 177. *Contra*, Martien *v.* Manheim, 80 Pa. St. 478.

[6] Collier *v.* Cross, 20 Ga. 1. *Contra*, Zuel *v.* Bowen, 78 Ill. 234; Haight *v.* Arnold, 48 Mich. 512.

[7] Mills *v.* Bunce, 29 Mich. 364.

[8] Marlett *v.* Jackman, 3 Allen, 287, 291.

[9] Van Alstyne *v.* Bertrand, 15 Tex. 177.

the partnership is necessary unless a sworn plea "denying the execution of such writing" is filed, does not apply to an oral contract, and the word "implied" is inadvertent.[1]

Under a statute that a signature is admitted unless its genuineness is specifically denied, a general denial by D. in an action on a note made by D. & Co. admits the genuineness of the signature of D. & Co., and D.'s membership in the firm need not be proved.[2]

§ 1074. Denial of defendants' partnership.— Denying the execution of an instrument sued upon does not deny the existence of a partnership of the makers.[3]

In the absence of a statute the general denial puts the partnership of the defendants in issue when it is a material allegation.[4] And if the statute requires a plea to be under oath, whether the general issue or a special plea, to raise the question of the defendants' partnership, an unsworn plea admits it.[5]

§ 1075. An action for work and labor and money against a firm was allowed to be amended to ask an accounting, the plaintiff being a partner.[6]

And a bill to wind up a partnership was treated as a bill for a partition.[7]

SET-OFF.

§ 1076. Between the firm and its debtor or creditor.— In actions by or against partners on claims due to or from the firm, cross-demands due from or to the firm on the part of the defendants can be set off the same as in actions between individuals, and are governed by the principles

[1] Rogers *v.* Nuckolls, 2 Colorado, 281, 283.

[2] Haskins *v.* D'Este, 133 Mass. 356.

[3] Shufeldt *v.* Seymour, 21 Ill. 524; Geddes *v.* Adams, 11 Gray, 384; Fairchild *v.* Rushmore, 8 Bosw. 698.

[4] Fowlkes *v.* Baldwin, 2 Ala. 705; Fetz *v.* Clark, 7 Minn. 217.

[5] Warren *v.* Chambers, 12 Ill. 124; Haywood *v.* Harmon, 17 id. 477; Parry *v.* Henderson, 6 Blackf. 72; Henshaw *v.* Roat, 60 Ind. 220; Lobdell *v.* Mchts. & Man. Bk. 33 Mich. 408; Jameson *v.* Franklin, 6 How. (Miss.) 376; Bradford *v.* Taylor, 61 Tex. 508.

[6] Younglove *v.* Leibhardt, 13 Neb. 557, 558.

[7] See Malbec de Montjoc *v.* Sperry, 95 U. S. 401.

adopted in the several jurisdictions as to actions generally. I have space only to examine the doctrines of set-off which are peculiar to partnerships.[1]

§ 1077. By or against surviving partner.— Where an action is by or against a surviving partner, individual debts and debts arising out of the partnership relation can be set off. This results from the nature of the title of a surviving partner in the choses in action of the firm, the entire interest in which devolves upon him subject only to the duty to administer and account. This subject has been examined in treating of surviving partners.[2]

§ 1078. Between third persons and the partners — Analysis.— Where the firm is creditor, and one partner is debtor to the partnership creditor, the action may be by the firm against such creditor or by the latter against the partner. For example, if the causes of action are on two notes; thus, if one note is, "I promise to pay X. $100. (Signed) A.," and the other is, "I promise to pay A. & B. $100. (Signed) X.," here X. owes A. & B., and A. owes X. X. may sue A., and A. may desire to set off the claim of A. & B. against him, or A. & B. may sue X., and X. may seek to set off his demand against A. & B. In neither case is the set-off allowed. The general principle that joint demands and separate demands cannot be offset against each other applies. But there are other elements entering into this phase of the doctrine of set-off. Where A. & B. sue X., if X. were allowed to set off his claim against A., this would be permitting the use of partnership property to pay the individual debts of one partner, which cannot be done without the assent of the other partners.

On the other hand, if X. sues A., and A. seeks to set off the claim of A. & B., the same objection arises. But if both A. & B. seek to urge the set off it would not seem that X. has any meritorious right to object, since his debt is paid, and

[1] The subject of set-off in actions between partners has already been considered, § 850.

[2] § 723.

the objection to the appropriation of the joint property to pay a separate debt is removed by the assent of the copartner, and the only remaining objections are the technical ones, that joint and separate debts cannot be offset, and that rights of set-off must exist at the time the action was begun.

Now suppose the converse of the above is the case and the firm is debtor; thus, if the respective notes read as follows: "We promise to pay X. $100. (Signed) A. & B.," and "I promise to pay A. $100. (Signed) X.," here if the former note is sued upon by X. against A. & B., no injustice to any one is done by permitting the latter note to be set off, because any partner may use his separate property to pay a partnership debt, and this is what is done by such set-off, and the sole objection to it seems to be the technical one above stated, that courts will not try joint claims and separate claims in the same action. If, however, the action is upon the latter note by A. against X., X. cannot against the will of A. set off against his claim the debt due by A. & B. to X., unless he would be entitled to sue A. alone upon the debt of A. & B., as in those states where a partnership debt is joint and several.

§ 1079. **I. Where the partnership is creditor and one partner is debtor.**— If the foregoing analysis is correct it would show that reasons against set-off exist in some cases between partners and their individual creditors or debtors which do not obtain in others. The authorities, however, have not generally recognized any difference, but have, in all cases where the want of mutuality exists, rested upon that ground; or in other words, hold as the sole and sufficient reason that joint and separate debts or demands cannot be set off against each other. For convenience I will classify the authorities according as the firm is debtor or creditor. In the cases cited in this section the partnership was the creditor, and it was held that its demand and the debt of an individual partner cannot be set off against each other, whether the action be on the partnership demand or on the individual

demand.[1] That both claims are in judgment, of course makes no difference.[2]

And though the statute be that mutual debts between plaintiffs or either of them, and defendants or either of them, may be set off makes no difference. Such statute does not apply, because the debts are not mutual, and partnership creditors have the prior claim; and if there are no creditors the copartner may be a creditor partner, and as such would have a priority over separate debts.[3] And though the consideration of the note made to the firm was a former debt due to the partner alone.[4]

§ 1080. —— assent of copartners.— In Pennsylvania, where the set-offs are very liberally allowed, an express assent of the other partners may render their claim available as a set-off without an assignment of it to the defendant;[5] and if the firm is plaintiff, a credit on its books of one partner's debt to the defendant, the books having been introduced by the firm in their favor, may be used by the defendant in his favor to show that the firm had assumed the debt.[6] But the assent of the copartners to the appropriation of their demand to the defendant partner, to enable him

[1] Thomas *v.* Adams, 2 Porter, 196; Jones *v.* Blair, 57 Ala. 457; Watts *v.* Sayre, 76 Ala. 397; Gray *v.* Badgett, 5 Ark. 16; Collins *v.* Butler, 14 Cal. 223; Francis *v.* Rand, 7 Conn. 221; Meeker *v.* Thompson, 43 id. 77; Gregg *v.* James, Breese (Ill.), 107 (12 Am. Dec. 151); International Bank *v.* Jones (Ill.), 9 N. E. Rep. 885; Dawson *v.* Wilson, 55 Ind. 216; Bourne *v.* Wooldridge, 10 B. Mon. 492; Warder *v.* Newdigate, 11 B. Mon. 174; Stevens *v.* Lunt, 19 Me. 70; Emerson *v.* Bayliès, 19 Pick. 55, 59; Williams *v.* Brimhall, 13 Gray, 462; Howe *v.* Snow, 3 Allen, 111; Brackett *v.* Sears, 15 Mich. 244; Weil *v.* Jones, 70 Mo. 560; Payne *v.* O'Shea, 84 Mo. 129; Ladue *v.* Hart, 4 Wend. 583; Campbell *v.* Genet, 2 Hilt. 290; Sloan *v.* McDowell, 71 N. Ca. 356, 359-61; Wrenshall *v.* Cook, 7 Watts, 464; Powrie *v.* Fletcher, 2 Bay (S. Ca.), 146; Lovel *v.* Whitridge, 1 McCord, L. 7; Ward *v.* Newell, 37 Tex. 261; Scott *v.* Trent, 1 Wash. (Va.) 77; Pegg *v.* Plank, 3 Up. Can. C. P. 396. *Contra*, Beckham *v.* Peay, 2 Bail. (S. Ca.) 133. See §§ 410, 411.

[2] Watts *v.* Sayre, 76 Ala. 397; Francis *v.* Rand, 7 Conn. 221.

[3] Meeker *v.* Thompson, 43 Conn. 77, 81.

[4] Gregg *v.* James, Breese (Ill.), 107 (12 Am. Dec. 151).

[5] Wrenshall *v.* Cook, 7 Watts, 464; Tustin *v.* Cameron, 5 Whart. 379; Burke *v.* Maxwell, 81 Pa. St. 139; Montz *v.* Morris, 89 id. 392; Bates *v.* Halliday, 3 Ind. 159; but not against the creditor's assignee, Caldwell *v.* Hartupee, 70 Pa. St. 74.

[6] Dishon *v.* Schorr, 19 Ill. 59.

to use it as a set-off, or its assignment to him, will not make it available if made after the action was begun,[1] or if a subsequent assent is sufficient, the costs must still fall upon the debtor partner; he cannot, by obtaining an assent, throw them upon the plaintiff.[2]

Where a mortgage was given to two partners who receipted for it, agreeing to deduct "our account" with the mortgagor, this does not cover the right to set off subsequently incurred accounts against the individual members.[3] But where each partner had told defendant that what either might order from him while boarding with him "would be the same as if both ordered it," he can set off the debt of each for liquors and cigars against the claim of the partnership against him for goods sold and delivered.[4]

Both partners having assented, the agreement is not executory but executed, and satisfies the debt due to the firm *pro tanto* as an accord and satisfaction, without formal release or other act.[5]

§ 1081. II. Where the partnership is debtor and a partner is creditor.— Where the partnership is the debtor and its debtor has a demand against one of the partners individually, the two demands cannot be set off against each other for the same reason that governs where the firm is creditor, namely, the want of mutuality; that is, that joint and separate claims will not be set off, and no difference has been made between actions begun by the partner and those begun by the firm.[6] That both claims are in judgment and the debtor insolvent makes no difference.[7]

[1] Jones *v.* Blair, 57 Ala. 457; Francis *v.* Rand, 7 Conn. 221.

[2] Wrenshall *v.* Cook, 7 Watts, 464.

[3] Brackett *v.* Sears, 15 Mich. 244.

[4] Hartung *v.* Siccardi, 3 E. D. Smith, 560.

[5] Davis *v.* Spencer, 24 N. Y. 386.

[6] Beauregard *v.* Case, 91 U. S. 134; Jackson *v.* Robinson, 3 Mason, 138; Trann *v.* Gorman, 9 Porter, 456; Von Pheel *v.* Connally, 9 id. 452; Hoyt *v.* Murphy, 18 Ala. 316; Ingersoll *v.* Robinson, 35 id. 292; Houston *v.* Brown, 23 Ark. 333; West *v.* Kendrick, 46 Ga. 526; Cooley *v.* Sears, 25 Ill. 613; Turk *v.* Nicholson, 30 Iowa, 407; Jeffries *v.* Evans, 6 B. Mon. 119; Wilson *v.* Keedy, 8 Gill, 195; Reed *v.* Whitney, 7 Gray, 533; Cockrell *v.* Thompson, 85 Mo. 510; Bowne *v.* Thompson, 1 N. J. L. 2; Williams *v.* Hamilton, 4 id. 250; Cotton *v.* Evans, 1 Dev. & Bat. Eq. 284; McDowell *v.* Tyson, 14 S. & R. 300; Kenedy *v.* Cunningham, Cheves (S. Ca.), 50; Byrd *v.* Charles, 3 S. Ca. 352; Ritchie *v.* Moore, 5 Munf. (Va.) 388 (7 Am. Dec. 688); Wilson *v.* Runkel, 38 Wis. 526.

[7] Jeffries *v.* Evans, 6 B. Mon. 119. In Jackson *v.* Clymer, 43 Pa. St. 79,

The contrary rule has, however, been laid down and the set-off allowed in some cases.[1]

And where by statute the debt of a partnership is joint and several, so that its creditor could have sued a single partner, he can set off his claim against the firm against the claim of such partner.[2]

Each partner being liable *in solido*, it has been said that creditors of the firm were entitled to retain against the debt the effects or money of one partner coming into their hands, but were not obliged to do so in favor of the other partners, even after dissolution.[3]

And in another case where the partnership was sued, the claim of one partner against the plaintiff was said to be a good set-off on the ground that such partner could pay the firm's debt out of his individual property, if he so desired, but held not if the firm is garnished and the principal debtor's debt to one partner is well secured.[4]

On the other hand a statute allowing an action against one or more partners was held to give the right to sue merely, and by the suit to change a demand from joint to joint and several, and not to give the partners the right to consider the claim several;[5] but if the creditor elects to sue one partner, such partner can set off his individual demand.[6]

Some statutes make only certain classes of partnership debts several as well as joint. Thus where debts on judgment, bond, covenant or promise in writing are made joint and several, a person sued

a firm agreed to transfer certain personal property to secure creditors, and one partner, the plaintiff, also agreed to convey to them his individual real estate, they agreeing to pay the liens thereon, which were his individual debts. In an action by him against the creditors for not paying the liens, in consequence whereof the land had been sold on foreclosure, it was held that the creditors could not set off a claim arising from the refusal of the firm to deliver the personal property agreed to be transferred, though a rescission, perhaps, could have been demanded on the ground that the two agreements were but one contract.

[1] See, for example, Jones *v.* Jones, 12 Ala. 244.

[2] Allen *v.* Maddox, 40 Iowa, 124.

[3] Barker *v.* Blake, 11 Mass. 16, 23.

[4] Donnell *v.* P. & O. R. R. 76 Me. 33, 35. And so by Louisiana law in case of "ordinary" partnerships, the creditors partner can offset his claim, but he alone has the right. Beauregard *v.* Case, 91 U. S. 134.

[5] Van Pheel *v.* Connally, 9 Porter (Ala.), 452.

[6] Traun *v.* Gorman, 9 Porter, 456.

by a partner to set off his demand against the firm must aver it to be a debt by judgment, bond, covenant or promise in writing.[1]

§ 1082. Actual and not ostensible rights regarded.— The actual and not the apparent ownership of a claim will be regarded in favor of permitting a cross-demand, and if the demands are in reality mutual, though not ostensibly so, the set-off can be made available. Thus if a claim purporting to belong to the firm in fact belongs to the debtor partner, it may be offset against the claim of such partner against the same person.[2]

And so also if a demand purporting to belong to one partner in reality belongs to the firm and is a partnership asset it is subject to be offset in equity against a demand upon the firm, at least in equity, and under the codes where set-off against the equitable owner is permitted.[3] Hence where B. & H. were partners, but H. agreed to pay B. a specific sum in lieu of profits, and this firm was succeeded by B. & M., and B. & M. paid debts of B. & H., and charged the debts to B. & H. on the books, here H. is practically the debtor and not B. & H., and the debts can in equity be set off against a note of B. & M. made to H. alone. H. in this case, however, was insolvent.[4]

§ 1083. Dormant partners.— Where there are dormant partners the rights of a person dealing with the ostensible

[1] Ingersoll *v.* Robinson, 35 Ala. 292. And where under a bankrupt law creditors of the firm could prove against the estate of one partner who is in bankruptcy, the creditors of the firm were allowed to set off their claims due from the firm, when sued at law by the assignee in bankruptcy of one partner on debts due to him from them. Tucker *v.* Oxley, 5 Cranch, 34 (rev. 1 Cr. C. C. 419), not disapproved in Gray *v.* Rollo, 18 Wall. 631.

[2] Lamb *v.* Brolaski, 38 Mo. 51; Foot *v.* Ketchum, 15 Vt. 258 (40 Am. Dec. 678). In the latter case, F. being indebted to the firm of K. & S., gave them her note on the assurance that it should become the property of K., who was owing F., and it was held that she could claim as set-off her demand against K. So where a note for a debt due to a partnership was by mistake made to one partner instead of to the firm, and was sued on by a firm creditor to whom it was passed, and a set-off against the payee partner was filed, the fact of the mistake, and that the note was partnership property, is a good answer to the set-off. Bourne *v.* Wooldridge, 10 B. Mon. 492.

[3] Miller *v.* Florer, 15 Oh. St. 148.

[4] Blake *v.* Langdon, 19 Vt. 485 (47 Am. Dec. 701).

partner cannot be affected by the false colors held out by concealing the fact of a partnership or of the existence of other partners, and a set-off on behalf of such person and the ostensible partner will be allowed as if he were the only creditor or debtor, although the dormant partner be joined as a co-plaintiff.[1] So if a person purchase goods of one partner individually, or otherwise deal with him alone,[2] unless, of course, he knew the goods were the property of the partnership.[3]

In many states a promise to one person for the benefit of another can be sued upon by the latter.[4] Where this is so, if one partner, as is frequently done, assumes all the debts on dissolution, a creditor of the firm, though not a party to the agreement, may treat his claim as the separate debt of such partner and set it off against his demand.[5]

§ 1084. **Insolvency or non-residence.**— And the mere fact that the individual debtor[6] or partner[7] is insolvent is not sufficient ground on which equity will allow the set-off.

But if the plaintiffs are a non-resident firm, the defendant has been allowed to set off his claim against one or some less than all of them.[8]

[1] Stacey *v.* Decy, 2 Esp. 469, n.; s. c. as Stracey *v.* Decy, 7 T. R. 361, n. c; Lord *v.* Baldwin, 6 Pick. 348; Emerson *v.* Baylies, 19 id. 55, 59; Chandler *v.* Drew, 6 N. H. 469; Beach *v.* Hayward, 10 Oh. 455; Lapham *v.* Green, 9 Vt. 407; Bryant *v.* Clifford, 27 id. 664.

[2] Sloan *v.* McDowell, 71 N. Ca. 356; Lamb *v.* Brolaski, 38 Mo. 51, where the goods sold by one partner were furnished by the firm to him and charged against him; Otis *v.* Adams, 41 Me. 258, where the buyer made his note to the selling partner, and the latter indorsed to his copartner, the indorsee has no greater rights than the payee.

[3] Wise *v.* Copley, 36 Ga. 508; Dob *v.* Halsey, 16 Johns. 34 (8 Am. Dec. 293).

[4] § 504.

[5] Hoyt *v.* Murphy, 18 Ala. 316.

[6] Jeffries *v.* Evans, 6 B. Mon. 119.

[7] Watts *v.* Sayre, 76 Ala. 397; Collins *v.* Butler, 14 Cal. 223; Williams *v.* Brimhall, 13 Gray, 462; Howe *v.* Snow, 3 Allen, 111. *Contra*, Wrenshall *v.* Cook, 7 Watts, 464; Sloan *v.* McDowell, 71 N. Ca. 356, 359-61.

[8] Radcliffe *v.* Varner, 55 Ga. 427, 431; Wallenstein *v.* Selizman, 7 Bush, 175, in this case the defendant alleged that such partner would on settlement be creditor of his copartners to the extent of the set-off. The ruling may be a *dictum*, however, since the partner was not liable, the note sued on not having been protested.

SUMMONS ON PART.

§ 1085. Service of process upon one partner is not notice to the others, either by common law or by statute, where the firm is not sued in the firm name.[1] Where the statute is silent summons should be served upon each partner individually.

If service is required to be personal or at abode, service by leaving the writ at the store is bad, and execution will be set aside.[2] Where persons are sued as partners, as A. & Co., a return of summons as served upon A. & Co. will be held bad;[3] the writ itself may, however, be in the partnership name, if the petition or declaration contain the individual names.[4] In equity service of subpœna upon one partner may, on notice, be made to bind his partner abroad.[5]

§ 1086. **In many jurisdictions now by statute.**— In an action against the partners for a partnership debt, service upon one partner only is sufficient to sustain a judgment against the firm, under which the interest of all in property of the partnership and the separate property of the individual served may be subjected, but not the separate property of those not served.[6]

[1] Moulston *v.* Wire, 1 Dow. & L. 527; Kitchin *v.* Wilson, 4 C. B. N. S. 483; Shapard *v.* Lightfoot, 56 Ala. 506; Feder *v.* Epstein, 69 Cal. 456; Weaver *v.* Carpenter, 42 Iowa, 343; Dresser *v.* Wood, 15 Kan. 344; Rice *v.* Doniphan, 4 B. Mon. 123; Scott *v.* Bogart, 14 La. Ann. 261; Pittman *v.* Planters' B'k, 1 How. (Miss.) 527; Demoss *v.* Brewster, 4 Sm. & Mar. 661; Mitchell *v.* Greenwald, 43 Miss. 167; Maclay *v.* Freeman, 48 Mo. 234, 235. *Contra*, in ejectment, of service on the acting partner in sole possession, Doe d. Overton *v.* Roe, 9 Dowl. 1039. For summons in actions against partners in the firm name see § 1062.

[2] Smith *v.* Bryan, 60 Ga. 628.

[3] Demoss *v.* Brewster, 4 Sm. & Mar. 661; Mitchell *v.* Greenwald, 43 Miss. 167. *Contra*, that it is good, Peel *v.* Bryson, 72 Ga. 331.

[4] Andrews *v.* Ennis, 16 Tex. 45. For service where the action is against a firm in the joint name under statutes, see, also, § 1062.

[5] Carrington *v.* Cantillon, Bunb. 107; Coles *v.* Gurney, 1 Madd. 187; Leese *v.* Martin, L. R. 13 Eq. 77.

[6] Inbusch *v.* Farwell, 1 Black, 566; Fowlkes *v.* Baldwin, 2 Ala. 705; Tarlton *v.* Herbert, 4 id. 359; Printup *v.* Turner, 65 Ga. 71; Walker *v.* Clark, 8 Iowa, 474; Saunders *v.* Bentley, 8 id. 516 (but see Weaver *v.* Carpenter, 42 id. 343); Hubbardston Lumber Co. *v.* Covert, 35 Mich. 254; Whitmore *v.* Shiverick, 3 Nev. 288; Flannery *v.* Anderson, 4 id. 437.

Where by statute service upon one or less than all is sufficient, no judgment can be taken personally against those not served, or if taken does not bind them personally.[1]

Where partners are out of the jurisdiction, and an attachment of partnership property is made in an action against the partners, and service is had upon the partner within the jurisdiction, a judgment is valid to subject such property.[2]

So where a firm is made garnishee of a debtor, service upon the partner domiciled in the jurisdiction is sufficient.[3]

Judgment against the firm on service on one alone, by his collusion with the creditor, will be set aside.[4]

§ 1087. The statute authorizing service upon one alone applies, although such one be an infant.[5]

The statute has been held not to apply to a suit to foreclose a chattel mortgage, because not based on a joint contract.[6] Nor to a citation in error upon one of the partners, plaintiffs, against whom a writ of error is taken.[7]

Davis *v.* Cook, 9 id. 134, 144; Pardee *v.* Haynes, 10 Wend. 631; Kidd *v.* Brown, 2 How. Pr. 20; Stoutenburgh *v.* Vandenburgh, 7 id. 229; Leahey *v.* Kingon, 22 How. Pr. 309; s. c. as Lahey *v.* Kingon, 13 Abb. Pr. 192; Vandevoort *v.* Palmer, 4 Duer, 677, 679; Bank of U. S. *v.* Broadfoot, 4 McCord, 30; Brown *v.* Overstreet, id. 79; Alexander *v.* Stern, 41 Tex. 193; Guimond *v.* Nast, 44 id. 114; Burnett *v.* Sullivan, 58 id. 535; Hedges *v.* Armistead, 60 id. 276; Texas & St. Louis R'y Co. *v.* McCaughey, 62 id. 271; Patten *v.* Cunningham, 63 id. 666; Sanger *v.* Overmier, 64 id. 57; Fowler *v.* Bailey, 14 Wis. [125], 136. For other cases under the New York practice see note to § 380. See, also, § 1062.

[1] Hall *v.* Lanning, 91 U. S. 160; Mason *v.* Eldred, 6 Wall. 231, 239; U. S. *v.* Am. Bell Telephone Co. 29 Fed. Rep. 17; Shapard *v.* Lightfoot, 56 Ala. 506; Ladiga Saw Mill Co. *v.* Smith, 78 Ala. 108; Ingraham *v.* Gildermester, 2 Cal. 88; Davidson *v.* Knox, 67 id. 143; Hibbard *v.* Holloway, 13 Ill. App. 101; Wright *v.* Boynton, 37 N. H. 9; Grieff *v.* Kirk, 15 La. Ann. 320; Carlon *v.* Ruffner, 12 W. Va. 297. Judgment as against those served is not, however, made erroneous by improperly including those not served. Davidson *v.* Knox, 67 Cal. 143.

[2] Inbusch *v.* Farwell, 1 Black, 566; Hubbardston Lumber Co. *v.* Covert, 35 Mich. 254. And see § 1127.

[3] Parker *v.* Danforth, 16 Mass. 299, 303. And see § 1127.

[4] Griswold *v.* Griswold, 14 How. Pr. 446.

[5] Mason *v.* Denison, 11 Wend. 612.

[6] Lippincott *v.* Shaw Carriage Co. 25 Fed. Rep. 577.

[7] Clark *v.* Thompson, 42 Tex. 128.

Service upon an alleged partner of course gives no jurisdiction except upon himself, if the partnership is not established.[1]

But if a defendant not served was not a partner, and judgment is taken against him, injunction against the judgment will be granted to him.[2]

The fact that service upon one partner is sufficient to bind the firm, and that service upon an absent individual may be upon a member of his family, at his usual place of residence, is not to be construed so that a service upon the wife of an absent partner, at his house, will bind the firm.[3]

§ 1088. Entry of appearance for the firm.— Wherever service upon one partner is sufficient to bring the firm into court, it would follow that an acknowledgment of service by one partner, or a waiver of summons or appearance entered by him for the firm, and the employment of counsel to appear and contest, is within his powers and binding upon the firm as such, that is so far as common property is concerned.[4] If in the presence of the other and by his consent, it is the act of both, just as signing and sealing would have been.[5]

An acknowledgment thus: "I hereby acknowledge, etc., signed T. S. C., one of the firm of C. & L.," is not an acknowledgment of service or entry of appearance on behalf of the firm.[6] And an entry of appearance thus: "W. N., a partner of the firm of W., T. & Co.," even if the action is against the firm in the firm name, does not sustain a judgment by default against the firm.[7] Nor will an entry of appearance in the firm name, when the firm is sued in its name, dispense with service upon the partners personally after a substitution of the individual names.[8]

Lord FITZGERALD, in Munster *v.* Cox, L. R. 10 App. Cas. 680,

[1] Nixon *v.* Downey, 42 Iowa. 78.

[2] Fowlkes *v.* Baldwin, 2 Ala. 705; Purviance *v.* Edwards, 17 Fla. 140.

[3] Brydolf *v.* Wolf, 32 Iowa, 509.

[4] Harrison *v.* Jackson, 7 T. R. 207; Bowin *v.* Sutherlin, 44 Ala. 278; Mayberry *v.* Bainton, 2 Harr. (Del.) 24; Wheatley *v.* Tutt, 4 Kan. 240; Phelps *v.* Brewer, 9 Cush. 390 (57 Am. Dec. 56); Southard *v.* Steele, 3 Mon. (Ky.) 435; Sanger *v.* Overmier, 64 Tex. 57; Bennett *v.* Stickney, 17 Vt. 531.

[5] Freeman *v.* Carhart, 17 Ga. 348.

[6] Clark *v.* Stoddard, 3 Ala. 366.

[7] Adam *v.* Townend, 14 Q. B. D. 103.

[8] Marienthal *v.* Amburgh, 2 Disney, 586.

691, doubts whether a partner can enter appearance in an action against the firm for what is a crime, viz., a malicious libel, whatever he might do in respect to a contract debt or money demand.

§ 1089. Extra-territorial validity of judgment.— A judgment against all the partners upon service on one or less than all, even if authorized by the state where it is rendered, or though valid there to reach joint property within the jurisdiction, will have no extra-territorial force whatever as against those not served, nor constitute a cause of action against them.[1]

But sureties for the release of an attachment upon property where but one partner is in the jurisdiction, having been compelled to pay, can compel all the partners to reimburse them, for they were sureties for the firm, since the property would have been sold but for them.[2]

§ 1090. Appearance before dissolution to bind copartner personally.— Whether a partner can enter appearance for his copartner before dissolution seems to have been unsettled, for Gow, 163; Collyer, § 441; Pars. 174, n., have asserted that he could do so; while it was regarded as an open question by Bradley, J., in Hall *v.* Lanning, 91 U. S. 160, 166, and Whitman *v.* Keith, 18 Oh. St. 134, 147.

It would seem, however, too clear for argument that a partner has no power to enter an appearance for his copartner to bind him personally; that is, to justify a judgment reaching beyond the partnership property. All the analogies are against such a power. The denial of the right to submit to arbitration, to confess judgment, to execute a sealed instrument, to make a joint and several note, and the arguments against the existence of those powers, point with perfect clearness to the denial of a power to enter an appearance under which a judgment binding the copartner personally can be rendered. And the existence of the power has been denied except as to the property of the firm.[3]

[1] Hall *v.* Lanning, 91 U. S. 160; Conley *v.* Chapman, 74 Ga. 709; Phelps *v.* Brewer, 9 Cush. 390 (57 Am. Dec. 56); Wilson *v.* Niles, 2 Hall (N. Y.), 358; Bowler *v.* Huston, 30 Gratt. 266 (32 Am. Rep. 673).

[2] Inbusch *v.* Farwell, 1 Black, 566.

[3] Phelps *v.* Brewer, 9 Cush. 390 (57 Am. Dec. 56); Haslet *v.* Street, 2 McCord, 310 (13 Am. Dec. 724); Bright *v.* Sampson, 20 Tex. 21.

§ 1091. Service upon one after dissolution.— Even after dissolution, the statute permitting service upon one partner is held by apparent weight of authority applicable to give jurisdiction to render a judgment against the firm, which can be satisfied out of the joint property or out of the separate property of the partner served, as long as there is partnership property to reach.[1]

§ 1092. Power to enter appearance after dissolution.— After dissolution, service upon one partner or his entry of appearance for all, without special authority, will not authorize judgment against the others. They are not then partners; and entering an appearance is not part of the ordinary course of winding up the concern, but stands on the basis of admissions or promises after dissolution, which impose fresh liabilities. Such power, dangerous at all times, would be particularly so after dissolution.[2]

JUDGMENT AGAINST PART.

§ 1093. In an action against partners plaintiff may, however, when he does not seek to subject the interest of all in the partnership property, discontinue as to those not served[3]

[1] Hale *v.* Van Saun, 18 Iowa, 19; Newlon *v.* Heaton, 42 id. 593; Harferd *v.* Street, 46 id. 594; Cooper *v.* Bailey, 52 Me. 230; Alexander *v.* Stern, 41 Tex. 193; Texas & St. Louis R'y Co. *v.* McCaughey, 62 id. 271; Sanger *v.* Overmier, 64 id. 57. *Contra*, that the statute authorizing service of process upon one partner contemplates a continuing partnership, and has no application after dissolution, Duncan *v.* Tombeckbee Bank, 4 Porter (Ala.), 181; Beal *v.* Snedicor, 8 id. 523; Mitchell *v.* Rich, 1 Ala. 228; Faver *v.* Briggs, 18 id. 478; Davidson *v.* Street, 34 id. 125. (*Contra*, an early case, Click *v.* Click, Minor (Ala.), 79); and Stephens *v.* Parkhurst, 10 Iowa, 70, took the same view *obiter*. Judgment may be rendered against the partner served after dissolution on summons addressed to the firm, in which judgment against each is prayed, Montague *v.* Weil, 30 La. Ann. 50.

[2] Hall *v.* Lanning, 91 U. S. 160; Atchison Sav. Bank *v.* Templar, 26 Fed. Rep. 580; Duncan *v.* Tombeckbee Bk. 4 Port. 184; Beal *v.* Snedicor, 8 id. 523; Demott *v.* Swaim, 5 Stew. & Por. 293; Newlon *v.* Heaton, 42 Iowa, 593; Loomis *v.* Pearson, Harper (S. Ca.), L. 470; Haslet *v.* Street, 2 McCord, 311 (13 Am. Dec. 724); Bowler *v.* Huston, 30 Gratt. 266 (32 Am. Rep. 673).

[3] Earbee *v.* Ware, 9 Porter, 295; Clark *v.* Stoddard, 3 Ala. 366; Lyons

and take judgment against those served.[1] So if only part are sued and the non-joinder of the rest is not pleaded, the judgment against the defendants is not erroneous.[2]

Under these statutes the partners not served, it would seem, ought not to be dismissed from the cause, since, to bind the partnership property, the judgment should be rendered against all, for the interests of those not served are as much affected as of those served.[3]

§ **1094. Where some are not liable.**— Where several persons are sued as partners and part only proved to be liable or authorized the contract, or are found to be partners, it is now nearly everywhere the rule that in actions on contract, as well as in tort, judgment may be rendered against them and for the others.[4]

But in the common law practice it is held that if the declaration is on a joint promise, proof that one alone or less than all are liable is a variance, and the judgment cannot go

v. Jackson, 1 How. (Miss.) 474; Bull *v.* Lambson, 5 S. Ca. 288; Carlon *v.* Ruffner, 12 W. Va. 297.

[1] Shapard *v.* Lightfoot, 56 Ala. 506; Ladiga Saw Mill Co. *v.* Smith, 78 Ala. 108; Ingraham *v.* Gildermester, 2 Cal. 88; Printup *v.* Turner, 65 Ga. 71; Lyons *v.* Jackson, 1 How. (Miss.) 474; Taylor *v.* Henderson, 17 S. & R. 453; Bull *v.* Lambson, 5 S. Ca. 288; Brown *v.* Belches, 1 Wash. (Va.) 9; Barnett *v.* Watson, 1 id. 372; Carlon *v.* Ruffner, 12 W. Va. 297.

[2] § 1050.

[3] Burnett *v.* Sullivan, 58 Tex. 535.

[4] Johnson *v.* Green, 4 Porter (Ala.), 126; Brugman *v.* McGuire, 32 Ark. 733; Stoddart *v.* Van Dyke, 12 Cal. 437; Francis *v.* Dickel, 68 Ga. 255; Kirby *v.* Cannon, 9 Ind. 371; Pollock *v.* Gazier, 20 id. 262; Crenshaw *v.* Wickersham, 15 Iowa, 154; Poole *v.* Hintrager, 60 id. 180; Silvers *v.* Foster, 9 Kan. 56; Williams *v.* Rogers, 14 Bush, 776; Cutts *v.* Haynes, 41 Me. 560; Turner *v.* Bissell, 14 Pick. 192; Whiting *v.* Withington, 3 Cush. 413; Wiggin *v.* Lewis, 12 id. 486; Roberts *v.* Pepple, 55 Mich. 367 (but see, under a former statute, Anderson *v.* White, 39 id. 130); Town *v.* Washburn, 14 Minn. 268; Miles *v.* Wann, 27 id. 56 (this overrules Fetz *v.* Clark, 7 id. 217, and Whitney *v.* Reese, 11 id. 138); Finney *v.* Allen, 7 Mo. 416; Crews *v.* Lackland, 67 Mo. 619; Wells, Fargo & Co. *v.* Clarkson, 5 Montana, 336; McCann *v.* McDonald, 7 Neb. 305; Morrissey *v.* Schindler, 18 id. 672; Parker *v.* Jackson, 16 Barb. 33; Witherhead *v.* Allen, 28 id. 661; Claflin *v.* Butterly, 2 Abb. Pr. 446; Zink *v.* Attenburg, 18 How. Pr. 108; Brumskill *v.* James, 11 N. Y. 294; Ah Lep *v.* Gong Choy, 13 Oregon, 205; Bull *v.* Lambson, 5 S. Ca. 288; Tulane *v.* McKee, 10 Tex. 335; White *v.* Leavitt, 20 id. 703; Willis *v.* Morrison, 44 id. 27; Congdon *v.* Monroe, 51 id. 109; Brown *v.* Pickard (Utah, 1886), 9 Pac. R. 573; Sherman *v.* Kreul, 42 Wis. 33, 40.

against part, unless the defense of one or more is to his personal capacity or the like, as in cases of infancy, bankruptcy, etc.[1] Or must be against all who are served or none.[2]

Where the action is under a statute permitting partners to be sued in the firm name, judgment must be against the firm and cannot be against part of them personally.[3]

If the action is in tort, the partners being jointly and severally liable, there is no question but that judgment may be against those liable, or part of them, even in jurisdictions where in actions on contract all those alleged to be liable must be proved so.[4]

If some of the defendants plead infancy or discharge in bankruptcy, this is not in disproof of the plaintiff's allegation of a joint contract, but is personal matter, and hence no variance is shown and he may recover against the others.[5]

§ 1095. If all liable.— The statute permitting a judgment against part of those served only applies where some of them are not liable at all, and not against part who are liable and for part also liable.[6]

Hence if, in an action by one firm against another firm, one partner common to both is both plaintiff and defendant, a judgment against all but him is not sustainable.[7]

So in an action against three partners, and all were served, if the evidence shows that if there is a partnership all three are members, a verdict against two only is against the evidence.[8]

[1] Champlin *v.* Tilley, 3 Day, 303; Campbell *v.* Bowen, 49 Ga. 417 (changed by statute and later decisions); Kimmel *v.* Shultz, Breese (Ill.), 128; Yocum *v.* Benson, 45 Ill. 435; Tuttle *v.* Cooper, 10 Pick. 281 (changed by statute); Hammond *v.* Heward, 20 Up. Can. Q. B. 36. See, also, the overruled cases above in Minnesota and Michigan.

[2] Gribbin *v.* Thompson, 28 Ill. 61.

[3] See § 1063.

[4] Castle *v.* Bullard, 23 How. 172; Tuttle *v.* Cooper, 10 Pick. 281; Hammond *v.* Heward, 20 Up. Can. Q. B. 36.

[5] As in Woodward *v.* Newhall, 1 Pick. 500; Kirby *v.* Cannon, 9 Ind. 371; Gates *v.* Mack, 5 Cush. 613, 614.

[6] Zink *v.* Attenburg, 18 How. Pr. 108. See Harrison *v.* McCormick, 69 Cal. 616.

[7] Green *v.* Chapman, 27 Vt. 236.

[8] Bosworth *v.* West, 68 Ga. 825; Curry *v.* Roundtree, 51 Cal. 184; Nelson *v.* Lloyd, 9 Watts, 22.

§ 1096. A judgment by default against one defendant, and afterwards, after trial, against the rest, being two separate judgments instead of one, was held an immaterial error.[1] But in another case both judgments were held bad.[2] A separate judgment against one and a joint judgment against all was held erroneous as being two judgments for the same debt.[3]

And where judgment was taken against one partner by default for $225 and against the other after trial for $257, the former judgment was held to be erroneous on the grounds that both must be for the same amount, and that if the former was individually liable that liability could not be pursued in the same action with the joint liability.[4]

[1] Judd Linseed & Sperm Oil Co. v. Hubbell, 76 N. Y. 543.

[2] Curry v. Roundtree, 51 Cal. 184.

[3] Young v. Davidson, 31 Tex. 153.

[4] Lynch v. Thompson, 61 Miss. 354.

CHAPTER IX.

ATTACHMENT OR EXECUTION ON INDIVIDUAL INTEREST OF A PARTNER.

§ **1097.** The private creditors of an individual partner have a right to reach his interest in the firm by execution or attachment as they have the right to reach any of his property, whether the partnership is at will or for a term, for otherwise a debtor could baffle his creditors by taking in a partner. Yet the rights of copartners to continue the partnership and with it the use of the debtor's interest, and the rights of a creditor to subject that interest, are inconsistent, antagonistic, and the enforcement of either necessarily produces a hardship and loss on the other.

Although, as Bentham has pointed out, a person deprived of the enjoyment of a present advantage suffers a severer infliction than one from whom an expected benefit is withheld, yet a dissolution of partnership by insolvency of a partner is one of the risks of the relation, and the right of the copartner to have the use of the property against the creditor until the end of the term of partnership has never been allowed; or, in other words, the right of the creditor to realize without delay on the debtor's interest has been invariably enforced; the effort of the courts being to devise a method of withdrawing that interest with as little harm as possible to the copartner and the partnership creditors. Under any method, an attachment is a withering blight, and in more than one of the cases given below has destroyed the business and driven out the innocent partners; and although the courts are painfully alive to this, and anxious to guard the copartners and the creditors as far as possible, it must be submitted that the proceedings in vogue in a majority of the states afford a less measure of protection than is possible.

This chapter will not set out the procedure of each state *seriatim*, since the practitioner in each is or can easily become acquainted with the decisions of his own jurisdiction. Nor is a classification of practice by groupings of states possible, for similarities in one step become dissimilarities in the next, and the classes cut across each other. I shall therefore divide this chapter by the various steps that have been adopted in the proceedings, and endeavor to show the reasons and causes that have led to each.

§ **1098. What is the interest to be taken.**— The interest of each partner is a right to a share of the surplus after all debts due by the firm have been paid, including the adjustment of balances due to partners who have advanced more than the others, and it is this interest only which is to be taken. A partner has no right to any specific chattel nor to divide a proportion of the partnership property from the general fund as his share, and his creditor therefore has no such right.

§ **1099. This chapter applies to firm creditor pursuing single partner.**— It is to be noticed that a creditor of the partnership who has brought his action against a single partner or partners and not against all, or who, having brought his action or obtained a judgment against all the partners, levies his attachment or execution upon the interest of an individual partner, is governed by the same principles that apply to attachments or executions by the separate creditor of a single partner.[1]

[1] See Denny *v.* Ward, 3 Pick. 199; Staats *v.* Bristow, 73 N. Y. 264; Ross *v.* Henderson, 77 N. Ca. 170, where the judgment was against the firm, but the levy was on the interest of one partner only and was held subject to partnership debts; Scruggs *v.* Burruss, 25 W. Va. 670; Witter *v.* Richards, 10 Conn. 37. *Contra*, Martin *v.* Davis, 21 Iowa, 535, where judgment on a partnership debt was against part only of the members of the firm, and it was held that the court would look beyond the form of the judgment and to the substance of the debt, and such judgment would not yield to a later judgment against all. See, also, Stevens *v.* Bank of Central N. Y. 31 Barb. 290. The doctrine is also inapplicable to dormant partnerships, § 1053. The defendants need not be described as partners in the judgment, Trowbridge *v.* Cushman, 24 Pick. 310.

In Whittemore *v.* Elliott, 7 Hun, 518, a firm composed of adults and infants being sued for liabilities of the firm, the minors pleaded infancy in some of the actions and judgments were rendered against the adults alone. In other cases no such defense was interposed, and judgments were rendered against all the partners. Both classes of judgments are entitled to share *pro rata*, for, although the infants can repudiate personal liability, their interests in the partnership are subject to its debts.[1]

§ 1100. How to reach the interest — Earlier legal theory.— During the earlier period of the English law each partner was regarded as owning a share in the tangible property of the firm and in each item thereof in a defined proportion like a tenant in common. The most frequently cited case illustrating this view is Heydon *v.* Heydon,[2] and it was there held that the officer should levy on the entire property and sell the undivided moiety, because if he levied on the undivided moiety, the other partner would own and could claim a moiety of that moiety.[3] The practice therefore was to sell by moieties, the buyer becoming a tenant in common with the copartners. The equity doctrines of the lien of each partner to have the debts paid and for the balance due him and the equities of the creditors on distribution worked out through the partners' liens — doubtless resulting in frequent collisions between courts of law and equity — produced for a time the practice of selling the entire interest in part of the partnership property and ordering an ascertainment of the debtor's interest in that property.[4] This, however, still assumed the debtor to have an interest in each specific part of the property distinct from the whole. Mr. Justice Lindley[5] says the present English practice has reverted to the original doctrine, the intermediate theory having been found impracticable in a court of law when an account of the entire partnership was necessary to ascertain the debtor's interest in a single chattel, and that now a levy

[1] Gay *v.* Johnson, 32 N. H. 167.
[2] 1 Salk. 392.
[3] Id. and Shaver *v.* White, 6 Munf. (Va.) 110.
[4] Eddie *v.* Davidson, Dougl. 650.
[5] Partnership, p. 689.

and sale is had of the undivided share of the debtor partner in all or part of the assets, regardless of the state of the accounts.

In the United States the increasing addition of equity powers to law courts, and especially in many states the union of law and equity functions in the same tribunal, has led to great modifications and improvements in the mode of subjecting a partner's interest, by enabling the courts to apply more directly the chancery view of a partnership, as not a species of tenancy in common, and recognize the beneficial right as inhering in the legal interest.

§ 1101. Levy on specific chattels less than whole.— Hence many states, abandoning the theory of ownership by moieties even in courts of law, forbid the levy on and sale of specific chattels, and require the entire partnership property to be taken and the undivided interest in the whole to be sold, as in the following authorities.[1]

On the other hand several states still permit a levy on specific property less than the whole.[2]

In Fogg *v.* Lawry, *supra*, it was said that a levy could be on the whole of a particular part of the assets situated together, for the debt may be small and the assets large and scattered.

And the notion of legal interest in the nature of a tenancy in common as distinct from the beneficial interest still clings as a barren survival in other courts.

[1] Daniel *v.* Owens, 70 Ala. 297; Branch *v.* Wiseman, 51 Ind. 1; Stumph *v.* Bauer, 76 Ind. 157; Marston *v.* Dewberry, 21 La. Ann. 518; Levy *v.* Cowan, 27 La. Ann. 556; Sirrine *v.* Briggs, 31 Mich. 443; Sanders *v.* Young, 31 Miss. 111; Atwood *v.* Meredith, 37 id. 635; Marshall *v.* McGregor, 59 Barb. 519; Whigham's Appeal, 63 Pa. St. 194, 198; Vandike *v.* Rosskam, 67 id. 330; Rogers *v.* Nichols, 20 Tex. 719; Shaver *v.* White, 6 Munf. (Va.) 110; and see Clark *v.* Cushing, 52 Cal. 617.

[2] Harshfield *v.* Claflin, 25 Kan. 166 (37 Am. Rep. 237); Fogg *v.* Lawry, 68 Me. 78 (28 Am. Rep. 19); Wiles *v.* Maddox, 26 Mo. 77 (Richardson, J., dissenting); Carrillon *v.* Thomas, 6 Mo. App. 574; Phillips *v.* Cook, 24 Wend. 389; Uhler *v.* Semple, 20 N. J. Eq. 288, 295, holding each piece of property liable for a share of debts proportionate to its value. And see Nixon *v.* Nash, 12 Oh. St. 642, and White *v.* Woodward, 8 B. Mon. 484.

Thus, in Nixon *v.* Nash, 12 Oh. St. 647, 650, it is stated that "the levy and sale must be of an undivided part of the chattel equal to the debtor's original interest in the business, while the purchaser acquires only the present beneficial interest of the debtor."[1]

§ 1102. Title not affected.—The execution creditor, whatever the buyer may be, is not a tenant in common with the other partners, and has no legal interest in the goods; hence, if the assignees of the firm in bankruptcy, by consent of all the parties, sell the entire property of the partnership, the judgment creditor cannot sustain an action for money had and received to his use, because the interest sold was the interest of all and not of one, and his only remedy is a suit for an accounting.[2] And until by a sale the interest of the debtor becomes a share in common in the buyer, the title is unaffected and a purchaser from the firm gets title unincumbered by the levy.[3]

In view of the fact that the legal title in real estate is in the partners as tenants in common, an attachment on the interest of one partner in land will affect his legal title by moieties, but that the creditor or buyer will hold the individual share in trust, to respond to the partnership liabilities;[4] yet a buyer without notice that it was partnership real estate would hold the undivided share against the creditors.[5]

Even a judgment against one partner is not such a lien upon real estate of the firm as to continue to be an incumbrance after a sale by the firm,[6] even though the title be in the name of the debtor partner alone.[7]

[1] And the same doctrine is stated in Sanders *v.* Young, 31 Miss. 111; Reed *v.* Shepardson, 2 Vt. 120 (19 Am. Dec. 697). And in Aldrich *v.* Wallace, 8 Dana (Ky.), 287, it was said that the debtor's interest in the whole should not be sold in a lump, but in each article separately if practicable.

[2] Garbett *v.* Veale, 5 Q. B. 408; 13 L. J. Q. B. 98. And see Donellan *v.* Hardy, 57 Ind. 393.

[3] Robinson *v.* Tevis, 38 Cal. 611; Commercial Bank *v.* Wilkins, 9 Me. 28; Hill *v.* Wiggin, 31 N. H. 292; Staats *v.* Bristow, 73 N. Y. 264.

[4] Peck *v.* Fisher, 7 Cush. 386; McCauley *v.* Fulton, 44 Cal. 355. And see Jones *v.* Fisher, 42 Ark. 422.

[5] McMillan *v.* Hadley, 78 Ind. 590.

[6] Bowen *v.* Billings, 13 Neb. 439; Kramers *v.* Arthur, 7 Barr, 165; Lancaster Bank *v.* Myley, 13 Pa. St. 544; Meily *v.* Wood, 71 id. 488 (rev. 8 Phila. 517).

[7] Bowen *v.* Billings, 13 Neb. 439,

§ 1103. Garnishment of debtors of firm.— The intangible property of the firm or its choses in action stand on a different basis from the tangible as to attachment, for while tangible property sold on execution is still liable to partnership debts and equities and is not appropriated to the judgment creditor, the only judgment a court of law can render when a debt is garnished is to order it to be paid over, and thus a debt due to the firm which the debtor partner could not appropriate to pay his private debts would be withdrawn from the partnership by his creditor, who would have, therefore, a greater right than his debtor, and the proceedings being in an action at law an accounting cannot be taken, and to award the creditor a proportionate share as representing the debtor's interest, disregarding partnership equities, would not be just.[1]

holding that such a judgment is not an interest in the property, but a mere right to levy, and attaches only to the debtor's interest. See, also, Coster *v.* Bank of Georgia, 24 Ala. 37, 64.

[1] Habershon *v.* Blurton, 1 De G. & Sm. 121; Helmore *v.* Smith, 35 Ch. D. 436; Lyndon *v.* Gorham, 1 Gall. 367; Winston *v.* Ewing, 1 Ala. 129 (34 Am. Dec. 768) (and see Pearce *v.* Shorter, 50 Ala. 318); Church *v.* Knox, 2 Conn. 514; Crescent Ins. Co. *v.* Baer (Fla. 1886), 1 So. Rep. 318; Branch *v.* Adam, 51 Ga. 113, 116. (Wallace *v.* Hull, 28 id. 68, had been *contra*. A statute now governs.) Ripley *v.* People's Savings Bank, 18 Ill. App. 430; Trickett *v.* Moore, 34 Kan. 755; Smith *v.* McMicken, 3 La. Ann. 319; Thomas *v.* Lusk, 13 La. Ann. 277; People's Bank *v.* Shryock, 48 Md. 427 (30 Am. Dec. 476), (overruling Wallace *v.* Patterson, 2 H. & McH. 463); Fisk *v.* Herrick, 6 Mass. 271, as explained in Hawes *v.* Waltham, 18 Pick. 451; Upham *v.* Naylor, 9 Mass. 490; Bulfinch *v.* Winchenback, 3 Allen, 161; Foot *v.* Hunkins, 14 Allen, 15. And see Tobey *v.* McFarlin, 115 Mass. 98; Markham *v.* Gehan, 42 Mich. 74; Day *v.* McQuillan, 13 Minn. 205; Barrett *v.* McKenzie, 24 id. 20; Mobley *v.* Lonbat, 7 How. (Miss.) 318; Mitchell *v.* Greenwald, 43 Miss. 167; Williams *v.* Gage, 49 id. 777; Sheedy *v.* Second Nat'l Bank, 62 Mo. 17 (21 Am. Rep. 407); Birtwhistle *v.* Woodward, 17 Mo. App. 277; Atkins *v.* Prescott, 10 N. H. 120; Barry *v.* Fisher, 8 Abb. Pr. (N. S.) 369; 39 How. Pr. 521. See Reed *v.* McLanahan, 15 Jones & Sp. 275; Cook *v.* Arthur, 11 Ired. (N. Ca.) L. 407; Myers *v.* Smith, 29 Oh. St. 120; Sweet *v.* Read, 12 R. I. 121; Johnson *v.* King, 6 Humph. (Tenn.) 233; Towne *v.* Leach, 32 Vt. 747. In Pennsylvania it had been decided that a garnishment would lie, McCarty *v.* Emlen, 2 Dall. 277; s. c. 2 Yeates, 190; but the contrary was held in 1872, in Lewis *v.* Paine, 1 Pa. Leg. Gaz. Rep. 508.

The sheriff on execution has power to levy and sell only out of the tangible property of the firm. He does not sell the interest of the debtor in the accounts, or book debts, or good will, or anything he cannot seize, and if he has assumed to do so, the debtor can still maintain suit for an accounting against his copartner.[1]

It has been hinted that the garnishment might have been maintained had the other partner also been summoned as a garnishee.[2]

But the garnishment will not be sustained unless the plaintiff shows that after payment of the partnership debts there will be a balance.[3]

In Minnesota garnishment lies, but the creditor cannot receive the debt; the firm can still collect it, and the creditor's only comes into an interest in the collection; hence, if the garnishee has paid over the debt to the buyer at the execution sale he is still accountable for it to the partnership,[4] but the garnishment was held to be good if no other partner or any joint creditor resist,[5] or unless the debtor can show the firm to be insolvent.[6]

In Howard *v.* McLaughlin, 98 Pa. St. 440, on garnishment, the garnishee with the assent of all parties paid one-half the debt to the judgment creditor, and this was held a settlement binding on a subsequent partnership creditor who garnished the same party, and only the other half of the debt can be collected.

The interest of a partner in a surplus after sale by an officer under a mortgage held in trust for the firm was held attachable by his separate creditor in New Jersey.[7]

§ 1104. Surviving partner.—As the surviving partner has the entire legal interest in the property, it was held that his creditor could garnishee a debt due the firm, but that courts of equity would be open to creditors of the firm and

[1] Habershon *v.* Blurton, 1 De G. & Sm. 121; Helmore *v.* Smith, 35 Ch. D. 436.

[2] Lyndon *v.* Gorham, 1 Gall. 367, 370. See Fisk *v.* Herrick, 6 Mass. 271, 272.

[3] Lyndon *v.* Gorham, 1 Gall. 367; Robinson *v.* Tevis, 38 Cal. 611; Church *v.* Knox, 2 Conn. 514; Barber *v.* Hartford Bank, 9 Conn. 407; Barry *v.* Fisher, 39 How. Pr. 521, 526.

[4] Day *v.* McQuillen, 13 Minn. 205; Barrett *v.* McKenzie, 24 id. 20; and see Cook *v.* Arthur, 11 Ired. (N. Ca.) L. 407.

[5] Thompson *v.* Lewis, 34 Me. 167.

[6] Burnell *v.* Weld, 59 Me. 423; Parker *v.* Wright, 66 Me. 392; Shatzill *v.* Bolton, 2 McCord, L. 478; 3 id. 33.

[7] Hill *v.* Beach, 12 N. J. Eq. 31.

the representative of the deceased partner to insist on their prior rights,[1] or plaintiff would be required to give security.[2]

§ **1105. Levy by taking exclusive possession.**— The sheriff in making a levy takes exclusive possession as being necessary to make the levy effectual, and the only way to guard against intermediate sales, and may remove the property. This possession is not deemed adverse to the partnership rights, because the delivery after sale is to the buyer as tenant in common with the other partners, and the property in his or their hands is subject to the partnership debts and adjustments, and if they absorb it all the judgment creditor gets nothing; and in Maine and Ohio, and probably Texas, the delivery is to the buyer and the other partners. The seizure is deemed, therefore, a mere incident to the process of reaching the debtor's interest.[3]

[1] Berry *v.* Harris, 22 Md. 30; Thompson *v.* Lewis, 34 Me. 167; Smith *v.* Cahoon, 37 Me. 281; Barber *v.* Hartford Bank, 9 Conn. 407.

[2] Knox *v.* Shepler, 2 Hill (S. Ca.), 595.

[3] Moore *v.* Sample, 3 Ala. 319; Andrews *v.* Keith, 34 id. 722; Clark *v.* Cushing, 52 Cal. 617; Wright *v.* Ward, 65 Cal. 525; Stevens *v.* Stevens, 39 Conn. 474; Davis *v.* White, 1 Houst. 228; Newhall *v.* Buckingham, 14 Ill. 405; White *v.* Jones, 38 Ill. 159; Chandler *v.* Lincoln, 52 Ill. 74; Burgess *v.* Atkins, 5 Blackf. 337; Branch *v.* Wiseman, 51 Ind. 1; Hershfield *v.* Claflin, 25 Kan. 166 (37 Am. Rep. 237); White *v.* Woodward, 8 B. Mon. 484; Watson *v.* Gabby, 18 id. 658; Douglas *v.* Winslow, 20 Me. 89; Bradbury *v.* Smith, 21 id. 117; Moore *v.* Pennell, 52 Me. 162; Hacker *v.* Johnson, 66 Me. 21; Fogg *v.* Lawry, 68 Me. 78; Caldwell *v.* Auger, 4 Minn. 217; Barrett *v.* McKenzie, 24 id. 20; Sanders *v.* Young, 31 Miss. 111; Atwood *v.* Meredith, 37 id. 635; Wiles *v.* Maddox, 26 Mo. 77; Carillon *v.* Thomas, 6 Mo. App. 573; Scrugham *v.* Carter, 12 Wend. 131; Phillips *v.* Cook, 24 id. 389, 394; Goll *v.* Hinton, 8 Abb. Pr. 122; Smith *v.* Orser, 42 N. Y. 132 (aff. s. c. 43 Barb. 187); Read *v.* McLanahan, 15 Jones & Sp. 275 (Matter of Smith, 16 Johns. 102; s. c. 1 Am. Lead. Cas. 457, is overruled); Tredwell *v.* Rascoe, 3 Dev. L. 50; McPherson *v.* Pemberton, 1 Jones, L. 378; Van *v.* Hussey, 1 Jones, L. 381; Latham *v.* Simmons, 3 Jones, L. 27; Nixon *v.* Nash, 12 Oh. St. 647; Stewart *v.* Hunter, 1 Handy, 22; Randall *v.* Johnson, 13 R. I. 338; Trafford *v.* Hubbard, 15 R. I. ——; Haskins *v.* Everett, 4 Sneed, 531; Saunders *v.* Bartlett, 12 Heisk. 316; Knight *v.* Ogden, 2 Tenn. Ch. 473; Weaver *v.* Ashcroft, 50 Tex. 427 (Warren *v.* Wallis, 38 id. 225, is overruled); Lee *v.* Wilkins, 65 Tex. 295; Snell *v.* Crowe, 3 Utah, 26; Reed *v.* Shepardson, 2 Vt. 120 (19 Am. Dec. 697); Whitney *v.* Ladd, 10 Vt. 165; Russ *v.* Fay, 29 Vt. 381; Shaver *v.* White, 6 Munf. 110.

But leaving the property in the custody of the other partners is not, at least except as to third persons, an abandonment of the levy even if no receipt is taken,[1] or with a receipt;[2] and is even recommended in view of the serious effect of the sheriff's possession upon the credit of the firm.[3]

The levy and seizure being to sell the interest of one partner only, it follows that a subsequent execution against all the parties must be actually levied, for the rule that an officer once in possession is in possession as to all subsequent writs will not apply; since the seizure of the whole was only in order to sell a moiety, and is not a levying by seizure out of the other moiety. Hence if the second execution is not actually levied, it is of no avail against a subsequent *fiat* in bankruptcy issued against all the partners.[4]

§ 1106. Levy by a constructive seizure only in some states.—But in some jurisdictions the property of the firm cannot be seized, and the levy is constructive only. This is on the doctrine that the partners who are liable for the debts have a paramount title and a right to use the property; that the debtor partner is not entitled to an exclusive possession, and therefore the sheriff is not; and his interest is incapable of actual seizure, but like a levy on an equity of redemption or an immovable, it is sufficient to enter the store and declare that there is an attachment or otherwise, according to the local practice of the jurisdiction; that this is the necessary result of the doctrine that the partnership property is a fund for the partnership debts first, and that this practice is more in accordance with justice to all parties.[5]

[1] Nixon *v.* Nash, 12 Oh. St. 647, 652.

[2] Morrison *v.* Blodgett, 8 N. H. 238 (29 Am. Dec. 653); Hill *v.* Wiggin, 31 id. (11 Foster) 292; Tucker *v.* Adams, 63 id. 361; Stevens *v.* Stevens, 39 Conn. 474.

[3] United States *v.* Williams, 4 McLean, 236.

[4] Johnson *v.* Evans, 7 M. & G. 240.

[5] Burnell *v.* Hunt, 5 Jur. 650; United States *v.* Williams, 4 McLean, 236; Cropper *v.* Coburn, 2 Curt. C. C. (Mass.) 465; Richards *v.* Haines, 30 Iowa, 574 (statutory); Sanborn *v.* Royce, 132 Mass. 594 (21 Am. Law Reg. (N. S.) 799); Fay *v.* Duggan, 135 id. 242; Sirrine *v.* Briggs, 31 Mich. 443; Haynes *v.* Knowles, 36 Mich. 407; Hutchinson *v.* Dubois, 45 id. 143; Gibson *v.* Stevens, 7 N. H. 352, 357; Page *v.* Carpenter, 10 N. H. 77; Morrison *v.* Blodgett, 8 id. 238 (29 Am. Dec. 653); Dow *v.* Sayward, 14 id. 9; Newman *v.* Bean, 21 id. 93; Hill *v.* Wiggin, 31 id. 292; Treadwell *v.* Brown, 43 id. 290; Garvin *v.*

In Ovens *v.* Bull, 1 Ont. App. 62, 65-6, it was said: "But what is meant by this seizure is evidently only the taking of such possession as one partner or tenant in common has jointly with his cotenant, not an ouster of the solvent partner or any interference with his rights." . . . "The duty of the sheriff, therefore, was to do nothing which would interfere with the plaintiff's possession as a partner."

In Treadwell *v.* Brown, 43 N. H. 290, which holds that an attachment by the officer entering the store and declaring that he attaches is sufficient, adds that to preserve the attachment against third persons the officer should retain such possession as he can, or take a receipt from the partnership, or, with the attachment, summoning the other partners as garnishees or trustees. BELLOWS, J., on p. 294, says that no mode has been yet devised that is free from objections, and suggests that the legislature might order an attachment preserved by leaving a copy in the town clerk's office.[1]

Replevin against the officer, if he takes exclusive possession, was held an appropriate remedy,[2] or an action for trespass.[3]

§ 1107. The mere fact that the partnership is insolvent, or that there is no surplus for the debtor partner, does not make the levy a trespass. The officer should not be made liable because of facts subsequently developed.[4]

Paul, 47 id. 158; Tucker *v.* Adams, 63 id. 361; Jarvis *v.* Hyer, 4 Dev. (N. Ca.) L. 367; Deal *v.* Bogue, 20 Pa. St. 228; Whigham's Appeal, 63 Pa. St. 194; Knerr *v.* Hoffman, 65 id. 126; Vandike *v.* Rosskam, 67 Pa. St. 330; Ovens *v.* Bull, 1 Ont. App. 62. And see dissenting opinion of Richardson, J., in Wiles *v.* Maddox, 26 Mo. 77. The policy of Wisconsin is not settled, Brande *v.* Bond, 63 Wis. 140.

[1] In Dow *v.* Sayward, 14 N. H. 9, an injunction on behalf of the creditor restraining the other partners from any act inconsistent with his right to hold the debtor's interest was suggested.

[2] But that all the partners must be plaintiffs, Morrison *v.* Blodgett, 8 N. H. 238 (29 Am. Dec. 653); Garvin *v.* Paul, 47 id. 158; Fay *v.* Duggan, 135 Mass. 242; that the other partners may bring the replevin alone was held in Hutchinson *v.* Dubois, 45 Mich. 153; but see Haynes *v.* Knowles, 36 Mich. 407, where the action, trespass, was by both partners.

[3] Cropper *v.* Coburn, 2 Curt. C. C. 465; Sanborn *v.* Royce, 132 Mass. 594 (21 Am. Law. Reg. (N. S.) 799); Haynes *v.* Knowles, 36 Mich. 407; that a partner claiming property levied on as his individually cannot have the statutory right of trial of property because he is not a third person, Pierce *v.* Kingsbury, 63 Mo. 259.

[4] Reed *v.* Shepardson, 2 Vt. 120 (19 Am. Dec. 697); Trafford *v.* Hubbard,

But in Massachusetts it has been said that the sheriff is a trespasser if the debtor partner has no interest;[1] but even in that state when the levy is upon real estate the legal title determines its effect.[2]

§ 1108. Sale of more than debtor's interest a trespass.— Sale of the entire interest in the property or any part of it, as distinguished from a levy on the interest of the debtor partner, was held to make the officer a trespasser *ab initio*, and liable for conversion or trespass to the other partner.[3]

In Moore *v.* Pennell, 52 Me. 162, the officer was held liable to all the partners; to the non-debtors, because he had violated their rights, and to the debtor partner because the joint sale had rendered it impossible to determine the proportion of proceeds belonging to him, and how much should be indorsed on the writ, and because there might have been buyers at the sale able to buy the debtor's share and unable to buy a larger interest, and thus a less price be realized.

A levy on the entire interest instead of on the debtor's interest was held not to be a trespass or conversion, because the officer could not affect any but the separate interest.[4]

§ 1109. Relief by injunction until accounting had.— Owing to the great uncertainty of the extent of the interest levied on, and the embarrassment and injustice to both parties in the sale, until the value is known, several jurisdictions have afforded an opportunity for ascertaining the value of the beneficial interest before the sale by permitting the other partners to apply to equity for relief as by injunction, until an accounting and ascertainment of the debtor's share could be had.[5]

15 R. I. —; Hacker *v.* Johnson, 66 Me. 21, holding that the buyer was entitled to the chance of the share selling for something even if the firm is insolvent.

[1] Blanchard *v.* Coolidge, 22 Pick. 151; Cropper *v.* Coburn, 2 Curt. C. C. 465; Peck *v.* Schultze, 1 Holmes, C. C. 28.

[2] Peck *v.* Fisher, 7 Cush. 389.

[3] Mayhew *v.* Herrick, 7 C. B. 229; Daniel *v.* Owens, 70 Ala. 297; Spalding *v.* Black, 22 Kan. 55; Moore *v.* Pennell, 52 Me. 162; Walsh *v.* Adams, 3 Den. 125; Waddell *v.* Cook, 2 Hill. 47; Berry *v.* Kelly, 4 Robt. (N. Y.) 106; Atkins *v.* Saxton, 77 N. Y. 195; Randall *v.* Johnson, 13 R. I. 338; Snell *v.* Crowe, 3 Utah, 26; Ford *v.* Smith, 27 Wis. 261.

[4] Lee *v.* Wilkins, 65 Tex. 295.

[5] Bevan *v.* Lewis, 1 Sim. 376; Os-

It is also held that the sale will not be held back by the trial court to await an accounting, for this would require an indefinite delay, and in fact is equivalent to an injunction by a court at law, but the sale must be had, and an application can be made in equity for arrangement of the claims by the vendee.[1] *Contra*, that the sale may be stayed by order of the court issuing the process.[2]

It is also held that no injunction will be granted unless the bill avers that the property is needed to pay debts, and the debtor would have no interest in it after such payment.[3]

In Wilson *v.* Strobach, 59 Ala. 488, 493, it was said that the better way was for the plaintiff to file a bill for an accounting, and that it was to be regretted that the legislature had not confined the creditor to this remedy.

Also, that chancery will not compel the creditor to wait at the suit of a partner, because this would leave the funds unprotected, cause delay, and, as the share is sold subject to partnership debts, no harm is done to creditors or to the copartners, and an injunction will be refused.[4] A creditor at large of the firm cannot obtain an

born *v.* McBride, 3 Sawy. 590; 16 Bank. Reg. 22; Crane *v.* Morrison, 4 Sawy. 138; Cropper *v.* Coburn, 2 Curt. C. C. 465; Moore *v.* Sample, 3 Ala. 319; Newhall *v.* Buckingham, 14 Ill. 405 (*dictum*); Rainey *v.* Nance, 54 Ill. 29 (*dictum*); Hubbard *v.* Curtis, 8 Iowa, 1; White *v.* Woodward, 8 B. Mon. 484 (*dictum*); Watson *v.* Gabby, 18 id. 658; Williams *v.* Smith, 4 Bush, 540; Thompson *v.* Lewis, 34 Me. 167; Crooker *v.* Crooker, 46 id. 250 (9 Am. Law Reg. (O. S.) 539); Thompson *v.* Frist, 15 Md. 24; Sanders *v.* Young, 31 Miss. 111; Wiles *v.* Maddox, 26 Mo. 77, 82; Cammack *v.* Johnson, 2 N. J. Eq. 163; Phillips *v.* Cook, 24 Wend. 389; Turner *v.* Smith, 1 Abb. Pr. (N. S.) 304; Place *v.* Sweetzer, 16 Oh. 142; Sutcliffe *v.* Dohrman, 18 id. 181; Nixon *v.* Nash, 12 Oh. St. 647; Rogers *v.* Nichols, 20 Tex. 719, 724; Thompson *v.* Tinnin, 25 Tex. Sup. 56; Warren *v.* Wallis, 42 Tex. 472; Meyberg *v.* Steagall, 51 id. 351; Washburn *v.* Bank of Fellows Falls, 19 Vt. 478.

[1] Parker *v.* Pistor, 3 B. & P. 288; Holmes *v.* Menze, 4 A. & E. 127.

[2] Scrugham *v.* Carter, 12 Wend. 131; Phillips *v.* Cook, 24 id. 389; Wiles *v.* Maddox, 26 Mo. 77, 82.

[3] Peck *v.* Schultze, 1 Holmes, C. C. (Mass.) 28; Brewster *v.* Hammet, 4 Conn. 540, 543; Hubbard *v.* Curtis, 8 Iowa, 1; Mowbray *v.* Lawrence, 13 Abb. Pr. 317; 22 How. Pr. 107; Turner *v.* Smith, 1 Abb. Pr. (N. S.) 304; Grabenheimer *v.* Rindskoff, 64 Tex. 49, 52. See Moody *v.* Payne, 2 Johns. Ch. 548.

[4] Jones *v.* Thompson, 12 Cal. 191, 199; Hardy *v.* Donellan, 33 Ind. 501; Wickham *v.* Davis, 24 Minn. 167; Sitler *v.* Walker, 1 Freem. (Miss.) Ch. 77; Moody *v.* Payne, 2 Johns. Ch. 548; Brewster *v.* Hammet, 4 Conn. 540; unless security be given by the partners applying for the relief, but

injunction against the levy,[1] except perhaps in states where he can demand an accounting. § 929.

A mere injunction asked by a partner, without asking an accounting or dissolution or settlement or receiver, which requires making the other partner a party, will be denied, even if the partnership is known to be insolvent.[2]

§ **1110.** If the debtor partner has an interest in the profits alone and no property in the capital, the other partner who is the sole owner can enjoin an interference with his property other than that in which the debtor has an interest,[3] or replevy it,[4] or sue the officer as for a conversion or trespass.[5] *Contra* if he has allowed the debtor to mingle his own goods so that the officer cannot identify them.[6] But the partner contributing time, labor or skill has an interest which may be levied on.[7]

§ **1111. Purchaser's rights.**— The buyer at the execution sale cannot acquire a better title than the debtor partner had, and therefore does not acquire an absolute title to the chattels sold nor priority over partnership creditors, but his

creditors may apply in case of insolvency without giving security, Shedd *v.* Wilson, 27 Vt. 478, 481; Peck *v.* Schultze, 1 Holmes, C. C. 28.

[1] Young *v.* Frier, 9 N. J. Eq. (1 Stockt.) 465 (overruling Blackwell *v.* Rankin, 7 id. 152); Mittnight *v.* Smith, 17 id. 259. See Atwood *v.* Impson, 20 id. 150; Henderson *v.* Haddon, 12 Rich. (S. Ca.) Eq. 393. *Contra*, Hurlbut *v.* Johnson, 74 Ill. 64; Stout *v.* Fortner, 7 Iowa, 183 (*dictum*); Hubbard *v.* Curtis, 8 id. 1, 16. And so, of course, in New Hampshire, where the creditors' lien exists independent of and not through the partners' equity; and *contra* in case of insolvency, Washburn *v.* Bank of Bellows Falls, 19 Vt. 278; Shedd *v.* Wilson, 27 id. 478; Brewster *v.* Hammet, 4 Conn. 540, 543; De Caussey *v.* Baily, 57 Tex. 665.

[2] Wickham *v.* Davis, 24 Minn. 167. And see Stout *v.* Fortner, 7 Iowa, 183. In Stewart *v.* Hunter, 1 Handy, 22, a distinction is taken between attachment and execution, in that, as in attachment, a redelivery bond can be given by the copartner and possession retained, he has an adequate remedy, and injunction will not be granted, although an execution could be enjoined.

[3] Brewster *v.* Hammet, 4 Conn. 540. See Stumph *v.* Bauer, 76 Ind. 157; and State *ex rel. v.* Finn, 11 Mo. App. 546.

[4] Ford *v.* Smith, 27 Wis. 261; Gillham *v.* Kerone, 45 Mo. 487.

[5] Smith *v.* Watson, 2 B. & C. 401; Blanchard *v.* Coolidge, 22 Pick. 151; Bartlett *v.* Jones, 2 Strob. L. 471; 47 Am. Dec. 606.

[6] Chappell *v.* Cox, 18 Md. 513.

[7] Knight *v.* Ogden, 2 Tenn. Ch. 473.

title is subject to the partnership debts and equities between partners, and he cannot be a partner by reason of the *delectus personarum*. He becomes a claimant in common with the copartners for a share of the surplus. His right to an accounting has been elsewhere considered.[1]

In determining what are partnership debts to which the buyer on execution of the interest of a partner is subject, the claim of the copartners for any balance found due them is of course a debt.[2]

[1] Skipp *v.* Harwood, 2 Swanst. 586; Taylor *v.* Fields, 4 Ves. 396; Young *v.* Keighly, 15 id. 557; Clagett *v.* Kilbourne, 1 Black, 346; United States *v.* Williams, 4 McLean, 236; Gilmore *v.* North Amer. Land Co. Peters, C. C. 460, 465; Andrews *v.* Keith, 34 Ala. 722; Wilson *v.* Strobach, 59 id. 488; Daniel *v.* Owens, 70 id. 297; Farley *v.* Moog. 79 id. 148; Jones *v.* Thompson, 12 Cal. 191; Wright *v.* Ward, 65 id. 525; Newhall *v.* Buckingham, 14 Ill. 405; White *v.* Jones, 38 id. 159; Chandler *v.* Lincoln, 52 id. 74; Rainey *v.* Nance, 54 id. 29; Hubbard *v.* Curtis, 8 Iowa. 1; Cox *v.* Russell, 44 Iowa, 556; Wintersmith *v.* Pointer, 2 Met. (Ky.) 457; Savage *v.* Carter, 9 Dana, 408; White *v.* Woodward, 8 B. Mon. 484; Williams *v.* Smith, 4 Bush, 540; Hacker *v.* Johnson, 66 Me. 21; Fogg *v.* Lawry, 66 Mo. 78, 79 (28 Am. Rep. 19); People's Bank *v.* Shryock, 48 Md. 427; Schalck *v.* Harmon, 6 Minn. 265, 270; Barrett *v.* McKenzie, 24 id. 20; Williams *v.* Gage, 49 Miss. 777; Morrison *v.* Blodgett, 8 N. H. 238 (29 Am. Dec. 653); Renton *v.* Chaplain, 9 N. J. Eq. 62; Clements *v.* Jessup, 36 id. 572; Deane *v.* Hutchinson, 40 id. 83; Wilson *v.* Conine, 2 Johns. 280; Scrugham *v.* Carter, 12 Wend. 131; Phillips *v.* Cook, 24 id. 389; Menagh *v.* Whitwell, 52 N. Y. 146; Staats *v.* Bristow, 73 id. 264; Tredwell *v.* Rascoe, 3 Dev. (N. Ca.) L. 50; Ross *v.* Henderson, 77 N. Ca. 170; Latham *v.* Simmons, 3 Jones (N. Ca.), L. 27; Place *v.* Sweetzer, 16 Oh. 142; Sutcliffe *v.* Dohrman, 18 id. 181 (51 Am. Dec. 450); Nixon *v.* Nash, 12 Oh. St. 647; Loner *v.* Stauffer, 1 Pa. 198 (21 Am. Dec. 370); Deal *v.* Bogue, 20 Pa. St. 228; Reinheimer *v.* Hemingway, 35 id. 432; Lothrop *v.* Wightman, 41 id. 297; Smith *v.* Emerson, 43 id. 456; Ward's Appeal, 81½ id. 270; Duborrow's Appeal, 84 id. 404; Randall *v.* Johnson, 13 R. I. 338; Knight *v.* Ogden, 2 Tenn. Ch. 473; Boro *v.* Harris, 13 Lea, 36; Carter *v.* Roland, 53 Tex. 540; Scruggs *v.* Burruss, 25 W. Va. 670. It is also held that, the buyer having at least some right of possession, replevin will not lie against him by the copartners, nor can the debtor's interest be ascertained in such case, Newhall *v.* Buckingham, 14 Ill. 405; Chandler *v.* Lincoln, 52 id. 74; Hacker *v.* Johnson, 66 Me. 21; Wiles *v.* Maddox, 26 Mo. 77; Scrugham *v.* Carter, 12 Wend. 131; Sutcliffe *v.* Dohrman, 18 Oh. 181 (51 Am. Dec. 450); Clagett *v.* Kilbourne, 1 Black 346. That the buyer acquires no legal title or right of possession was held in Reinheimer *v.* Hemingway, 35 Pa. St. 432; Barrett *v.* McKenzie, 24 Minn. 20; Donellan *v.* Hardy, 57 Ind. 393. And see § 756.

[2] Rainey *v.* Nance, 54 Ill. 29; Donel-

§ 1112. Consequences of above doctrine.—It follows that in case the partnership is insolvent, or the debts and co-partners' equities absorb the debtor's share, the buyer of the interest gets nothing.[1] Hence the sheriff is not liable if he allow the effects to be applied to the payment of a partnership creditor;[2] nor even if he release the levy in case of insolvency; but as he does so at his own risk, it is a very unsafe practice.[3]

But in Hacker *v.* Johnson, 66 Me. 21, it was said that, although the partnership was insolvent, the interest might nevertheless sell for something, and the creditor was entitled to this chance.

As the property sold continues liable for the joint debt, the purchase money is not so incumbered, and the joint creditors cannot claim upon it.[4]

If the buyer afterwards sell or dispose of the whole property and appropriate the proceeds, it is a conversion.[5]

In Clements *v.* Jessup, 36 N. J. Eq. 572, the purchaser was post-

lan *v.* Hardy, 57 Ind. 393; Cox *v.* Russell, 44 Iowa, 556; Divine *v.* Mitchum, 4 B. Mon. 488; Bryant *v.* Hunter, 6 Bush, 75; Crooker *v.* Crooker, 52 Me. 267; Buchan *v.* Sumner, 2 Barb. Ch. 165. In Vermont, where the levy is an interest determined by moieties, if the firm was solvent at the time of the levy by the creditor of one partner, its subsequent insolvency will not defeat his priority; for the validity of the attachment will be determined by the state of affairs as of its date, and partnership debts will not be preferred by reason of an insufficiency thereafter arising. Willis *v.* Freeman, 35 Vt. 44; Railroad Co. *v.* Bixby, 55 Vt. 235 (*dictum*).

[1] Wilson *v.* Strobach, 59 Ala. 488; Wright *v.* Ward, 65 Cal. 525; Chandler *v.* Wilson, 52 Ill. 74; Hubbard *v.* Curtis, 8 Iowa, 1; Commercial Bank *v.* Wilkins, 9 Me. 28; Pierce *v.* Jackson, 6 Mass. 242; Deane *v.* Hutchinson, 40 N. J. Eq. 83; Phillips *v.* Cook, 24 Wend. 389; Staats *v.* Bristow, 73 N. Y. 264; Ross *v.* Henderson, 77 N. Ca. 170; Boro *v.* Harris, 13 Lea (Tenn.), 36.

[2] Commercial Bank *v.* Wilkins, 9 Me. 28.

[3] Wilson *v.* Strobach, 59 Ala. 488.

[4] Gilmore *v.* N. Amer. Land Co. Peters, C. C. 460, 465; Ward's Appeal, 81½ Pa. St. 270; Phillips *v.* Cook, 24 Wend. 389, 405. And see Doner *v.* Stauffer, 1 Pa. 198 (21 Am. Dec. 370).

[5] Wright *v.* Ward, 65 Cal. 525; Wilson *v.* Conine, 2 Johns. 280; Latham *v.* Simmons, 3 Jones (N. Ca.), L. 27. See Carter *v.* Roland, 53 Tex. 540; and White *v.* Woodward, 8 B. Mon. 484. That such attempted disposition is void, Duborrow's Appeal, 84 Pa. St. 404, a lease by the buyer to another.

poned to a subsequent chattel mortgage made by all the partners to secure a partnership debt.

The buyer's mere possession is not adverse, and hence the statute of limitations will not begin to run until he converts the property to his own use in some way.[1]

As to whether successive executions upon the individual interests of each partner will pass only the interest of each in the surplus, or will pass the entire partnership property, see §§ 189, 190.

§ **1113. Garnisheeing the other partners.**—A still different practice has been recommended and occasionally adopted in a few jurisdictions—that of abandoning a levy altogether and substituting for it a garnishee process upon the other partners as debtors of the debtor partner as preliminary to an accounting.[2]

But the same reasons that prevent one partner suing another in a court of law for an unsettled balance of account render a garnishment of the copartner, when the balance is unliquidated, impossible, unless a statute will authorize this process to be issued out of a chancery case, and hence it was disallowed.[3]

§ **1114. Priorities between the levy and later levies for firm debts.**—The principle that a creditor of one partner

[1] Wright *v.* Ward, 65 Cal. 525.

[2] This was suggested in Lyndon *v.* Gorham, 1 Gall. 367, 370, and Morrison *v.* Blodgett, 8 N. H. 238, and approved in Dow *v.* Sayward, 12 N. H. 271, 277, and Snell *v.* Crowe, 3 Utah, 26. See, also, Myers *v.* Smith, 29 Oh. St. 120, 124, and Cox *v.* Russell, 44 Iowa, 556; and has been adopted by statute in Georgia (Code, § 1908) and Louisiana. For the practice thereunder, see Patterson *v.* Trumbull, 40 Ga. 101; Willis *v.* Henderson, 43 id. 325; Branch *v.* Adam, 51 id. 113; Anderson *v.* Chenney, 51 id. 372; Armand *v.* Burrum, 69 id. 758; Pittman *v.* Robicheau, 14 La. Ann. 108; Marston *v.* Dewberry, 21 id. 518; Levy *v.* Cowan, 27 id. 556. A creditor's bill by a separate judgment creditor of one partner against the other partners was allowed in Eager *v.* Price, 2 Paige, 333; Tobey *v.* McFarlin, 115 Mass. 98, but the debtors of the firm cannot be made parties. And a garnishment upon the treasurer of a joint stock company will reach the dividends of a member, Kingman *v.* Spurr, 7 Pick. 235, 238.

[3] Burnham *v.* Hopkinson, 17 N. H. 259; Treadwell *v.* Brown, 41 id. 12; 43 id. 290; Birtwhistle *v.* Woodward, 17 Mo. App. 277; Campbell *v.* Pedan, 3 Up. Can. L. J. 68; Richards *v.* Haines, 30 Iowa, 574; Cox *v.* Russell, 44 id. 556; Sirrine *v.* Briggs, 31 Mich. 443; Atwood *v.* Meredith, 37 Miss 635.

can finally appropriate only his actual interest, which is a proportion of the surplus after payment of debts and settlement of copartners' claims, and the consequent priority of partnership creditors, will be enforced, even in a court of law, in distributing funds coming under its control when no accounting is necessary.

Hence where execution on a judgment against a partner is levied on partnership property, and subsequent executions on partnership liabilities are also levied on the property, or if the property is sold on execution against the firm and then an execution against one partner is issued, and after this other executions against the firm come into the officer's hands, in these and similar cases the funds will be distributed to satisfy the executions against the partnership prior to the individual claim.[1]

§ 1115. B. & L. was, as a firm, a member of another partnership, and an attachment by a creditor of the latter partnership was levied on property of B. & L. A subsequent attaching creditor of B. & L. is entitled to priority in distribution.[2]

S. sues X., and garnishes S., A. & Co., who answer, admitting that they owe X. Then Y. sues X. & Co. and also garnishes S., A. & Co. It was proved that S., A. & Co.'s debt was to X. & Co. and not to X. alone. The garnishees acted in good faith, for they had contracted with X. alone, and he had transferred the contract

[1] Burpee *v.* Bunn, 22 Cal. 194; Bullock *v.* Hubbard, 23 Cal. 495; Commercial Bank *v.* Mitchell, 58 Cal. 42; Filley *v.* Phelps, 18 Conn. 294; Clark *v.* Allee, 3 Harr. (Del.) 80; Switzer *v.* Smith, 35 Iowa, 269; Fargo *v.* Adams, 45 id. 491; Commercial Bank *v.* Wilkins, 9 Me. 28; Locke *v.* Hall, 9 Me. 133; Douglas *v.* Winslow, 29 Me. 89; Pierce *v.* Jackson, 6 Mass. 242; Denny *v.* Ward, 3 Pick. 199; Trowbridge *v.* Cushman, 24 id. 310; Dyer *v.* Clark, 5 Met. 562, 575 (39 Am. Dec. 697); Peck *v.* Fisher, 7 Cush. 386; Tappan *v.* Blaisdell, 5 N. H. 190; Tenney *v.* Johnson, 43 N. H. 144; Linford *v.* Linford, 28 N. J. L. 113; Crane *v.* French, 1 Wend. 311; Dunham *v.* Murdock, 2 Wend. 553; Fenton *v.* Folger, 21 id. 676; Eighth Nat'l Bank *v.* Fitch, 49 N. Y. 539; Ryder *v.* Gilbert, 16 Hun, 163; Roberts *v.* Oldham, 63 N. Ca. 297; Overholt's Appeal, 12 Pa. St. 222; Coover's Appeal, 29 id. 9; Bogue's Appeal, 83 id. 101; Tillinghast *v.* Champlin, 4 R. I. 173, 190; Bowden *v.* Schatzell, Bail. (S. Ca.) Eq. 360; Crawford *v.* Baum, 12 Rich. L. 75; Christian *v.* Ellis, 1 Gratt. 396; Flintoff *v.* Dickson, 10 Up. Can. Q. B. 428; Taylor *v.* Jarvis, 14 id. 128.

[2] Bullock *v.* Hubbard, 23 Cal. 495.

to X. & Co. And S., A. & Co. paid the amount into the sheriff's hands. The creditor of the firm of X. & Co. will be protected, and S., A. & Co.'s answer that they owed X. will not conclude the creditor.[1]

B. & C., partners, had partnership real estate held as tenants in common. B. and C. were also partners with A. in the firm of A., B. & C. A creditor of the latter firm attached the land, and afterwards a creditor of the firm of B. & C. also attached the land. The former attachment may be preferred as to the legal title, but must hold in trust for the creditors of B. & C., and takes a surplus only on distribution.[2]

In Roop *v.* Rogers, 5 Watts, 193, a sheriff with executions against a firm and also against one of the partners realized more than enough to pay the joint executions, and thereupon applied the surplus on the separate executions. An action was brought against him by a creditor of the firm to whom the partnership had assigned surplus. The court held that they would presume the en-

[1] Switzer *v.* Smith, 35 Iowa, 269.

[2] Peck *v.* Fisher, 7 Cush. 386. In Jones *v.* Fletcher, 42 Ark. 422, a creditor of one partner levied on his interest in partnership real estate. The partner then conveyed his interest to his copartner. It was held that partnership creditors had priority only while the property is joint estate, and the sale converting the property into separate estate destroyed the right of the selling partner and the right of creditors through him to claim the priority, and the other partner received the land subject to the judgment, which therefore was a valid prior lien. This reasoning proceeds on assumptions too broad for all cases, for though the creditors have no rights except through the partners, yet the buying partner does not part with his right to have the joint creditors preferred merely from the fact of buying. Hence, if the property was conveyed to him to secure the balance due him, or in consideration of his assumption of partnership liabilities, the sale would override the judgment or execution. See, also, Evans *v.* Hawley, 35 Iowa, 83; Tenney *v.* Johnson, 43 N. H. 144. In Washburn *v.* Bank of Bellows Falls, 19 Vt. 278, where the subsequently attaching joint creditors appealed to equity to wind up and distribute as against the separate creditor's prior attachment, it was held that to obtain a priority over the separate creditor they must resort to their lien, and that lien was for all alike, and that the partnership creditors must therefore share equally and not in the order of their priority. It must be noticed of this case that to speak of the joint creditors as having a lien is not accurate except in this state and New Hampshire; and this case is contrary to the general rule as shown in Pierce *v.* Jackson, 6 Mass. 242.

tire interest of the firm to have been sold in sufficient property to pay the joint executions and the separate interest of the debtor partner in the remaining property to answer for his separate debt, and that on such presumption the application of the surplus was right.

§ **1116. Dormant partnership.**— We have already seen [1] that where a person appears to be the sole owner, and is trusted as such, a dormant partner cannot arise and interfere, nor will those creditors who discover the dormant partner after contracting acquire a priority by merely making him a defendant.[2]

[1] § 104.

[2] As to nominal partners, see § 106.

CHAPTER X.

ATTACHMENTS AGAINST THE FIRM.

§ **1117. Grounds.**— An attachment will not be sustained against a partnership unless grounds for an attachment exist against all the partners. This is universal, whatever be the form of the enactment, or whether the partners are by statute jointly and severally liable, or jointly only; or whether the firm be regarded as an entity or distinct being, or not. In any case the property of an innocent partner will not be subject to attachment on a ground existing against his copartner alone. In other words, it is the firm which owes the debt, and unless ground exists against the firm as represented by all the partners; or, in other words, the firm is present by its members, and cannot therefore be present by one member and absent by another. Hence the non-residence or absconding of individual partners is no ground for attachment against the firm, as long as a single partner resides in the jurisdiction.[1]

If all the partners have absconded or are non-resident, there is no difficulty in sustaining an attachment against the firm.[2]

[1] Wiley *v.* Sledge, 8 Ga. 532; Boorum *v.* Ray, 72 Ind. 151; Williams *v.* Muthersbaugh, 29 Kan. 730; Edwards *v.* Hughes, 20 Mich. 289; Curtis *v.* Hollingshead, 14 N. J. L. 402; Faulkner *v.* Whitaker, 15 id. 438; Cowdin *v.* Hurford, 4 Oh. 132; Taylor *v.* McDonald, 4 id. 149; Leach *v.* Cook, 10 Vt. 239. See Faulkner *v.* Brigel, 101 Ind. 329; and queried in Staats *v.* Bristow, 73 N. Y. 264. *Contra*, Scruggs *v.* Blair, 44 Miss. 406; *In re* Chipman, 14 Johns. 217; 16 Johns. 102; doubted in 14 N. J. L. 402, *supra*. Where the statute permitted non-freeholders to be sued by arrest, but not freeholders, although a partnership cannot be considered a freeholder under the terms of the statute, for it cannot sit on a jury, etc., yet it is held that a freeholder does not forfeit his privilege by a partnership with a non-freeholder, but extends his exemption to both in joint suits. Faulkner *v.* Whitaker, 15 N. J. L. 438.

[2] Curtis *v.* Hollingshead, 14 N. J. L. 402; Leach *v.* Cook, 10 Vt. 239

In Starr *v.* Mayer, 60 Ga. 546, there were different and distinct grounds of attachment against each partner, one being a non-resident and the other about to remove, and the attachment against partnership assets was sustained.[1] And if the non-resident or guilty partner is a sole surviving member of the firm, attachment of the partnership property lies.[2]

§ **1118. On property of one for firm debt.**—Even if the action is properly brought against both partners, there is much doubt whether even the separate property of the absentees could be attached. It is true that after judgment execution can be levied entirely upon the individual estate of one partner, but an attachment is a purely statutory matter, and an extraordinary remedy which is not extended by construction.[3]

In Keith *v.* Armstrong, 65 Wis. 225, the fact that one partner in an insolvent firm appropriates partnership money to pay his individual debts is a fraud on the firm's creditors, and held to be ground for an attachment, but the report does not show distinctly that the attachment was sustained upon partnership property.

§ **1119.** Neither can the separate property of the absconding or non-resident partner be attached if the action is against him alone, for as a partnership debt is joint one partner cannot be sued alone.[4]

(*dictum*); Williams *v.* Muthersbaugh, 29 Kan. 730, 734.

[1] S. P. Sellew *v.* Chrisfield, 1 Handy, 86.

[2] Wiley *v.* Sledge, 8 Ga. 532; Roach *v.* Brannon, 57 Miss. 490.

[3] This construction, however, would raise difficulties in suing the firm at all, unless service upon the resident partner will bind the joint property, since constructive service upon the non-residents cannot be had, there being no attachment as against them. Attachment was held not to lie against the individual property in Taylor *v.* McDonald, 4 Oh. 149; Curtis *v.* Hollingshead, 14 N. J. L. 402. See Edwards *v.* Hughes, 20 Mich. 289. See, also, Cowdin *v.* Hurford, 4 Oh. 132. Yet the Ohio statute was that where there were joint debtors the attachment could issue against the joint or separate estates. See, also, Edwards *v.* Hughes, 20 Mich. 289, in full below, under a statute like that of Ohio. *Contra*, Van Kirk *v.* Wilds, 11 Barb. 520, and Davis *v.* Werden, 13 Gray, 305, under a statute that every kind of interest, legal or equitable, of a debtor can be reached. Stevens *v.* Perry, 113 Mass. 380.

[4] Boorum *v.* Ray, 72 Ind. 151; Curtis *v.* Hollingshead, 14 N. J. L. 402; Faulkner *v.* Whitaker, 15 id. 438; Cowdin *v.* Hurford, 4 Oh. 132.

The statutes which have been passed in a number of states making joint debts joint and several, enable a creditor to sue an individual partner, and with this right follows naturally the right of attachment against his separate property.[1]

An attachment gotten out on grounds alleged to exist against both, but proven unfounded as to one partner, will be sustained as to the other.[2]

In Edwards *v.* Hughes, 20 Mich. 289, under a statute allowing an attachment against one or more joint debtors, it was held that a joint wrong must not be alleged against all, but the facts should be stated so that an innocent partner shall not be subjected to rigorous treatment; that the innocent partner may move to dismiss the attachment; that a subsequent purchase by the innocent partner of the interest of the guilty one has nothing to do with the case, for as the attachment must be dismissed as to the former, and as he is entitled to the possession of the partnership property which must be restored to him, the *bona fides* of the sale will not be examined.

§ 1120. Acts of one partner as a ground.— The application of the statutory grounds for attachment to partnerships requires a passing notice. On the principle elsewhere mentioned, that a partner is not to be punished criminally for the act of a copartner, so attachments of the person, that is, arrests in civil actions, are of the wrong-doer alone, although all the partners may be liable for the debt. Hence if one partner obtains goods for the firm on credit by false representations or fraudulently contracts a debt, his copartners are not liable to arrest, but only he.[3]

[1] Conklin *v.* Harris, 5 Ala. 213; Pearce *v.* Shorter, 50 Ala. 318; Cannon *v.* Dunlap, 64 Ga. 680; Williams *v.* Muthersbaugh, 29 Kan. 730; Miller *v.* Bay Circuit Judge, 41 Mich. 236; Moore *v.* Otis, 20 Mo. 153, but it does not appear whether separate or joint property was taken; White *v.* Schnebly, 10 Watts, 217. And in such case his individual interest in the partnership property can of course be taken, but not the interest of his innocent copartner. Williams *v.* Muthersbaugh, *supra;* Van Kirk *v.* Wilds, 11 Barb. 520; Staats *v.* Bristow, 73 N. Y. 268, for non-residence. But his interest on a debt due the firm cannot be garnished, see § 1103.

[2] Williams *v.* Muthersbaugh, *supra;* Moore *v.* Otis, 20 Mo. 153.

[3] National Bk. of the Commonwealth *v.* Temple, 39 How. Pr. 432; McNeely *v.* Haynes, 76 N. Ca. 122.

Again, a disposition of property which would appear fraudulent in an individual capacity may be proper in a liquidating partner, whose duty it is to convert assets into money, provided there is no concealment.

Thus a surviving partner of a wholesale liquor house may find it desirable to sell the stock at retail, and for this purpose may have to procure a license in his own name, and if the proceeds of sales thus have the appearance of being converted into his individual property, a business creditor is not injured unless there are separate creditors who could thus obtain priority. And though procuring a license in his own name may have been improper, and a violation of trust, yet that is not a ground of attachment.[1]

It was held not to be a fraudulent disposition of funds under attachment laws for partners, knowing they are in difficulty, but with reasonable hope of extricating themselves, to draw reasonably small amounts for subsistence and individual obligations.[2] Nor is it fraud *per se* in a surviving partner to support the family of the deceased partner out of assets.[3]

In fact it has been doubted whether intent to defraud creditors includes injury to the mere equitable priority of joint creditors, prior to a condition of known and acknowledged insolvency.[4] And hence, a firm selling, and paying separate debts of the partners with the proceeds, has been held not to be a fraudulent conveyance authorizing injunction and attachment.[5] I have elsewhere shown, however, that this in effect is the use by one partner of his property to pay the debts of another partner, and as I believe is fraudulent.[6]

§ 1121. Bond.— Where partners bring a suit in their individual names and give bond in the firm name, reciting in it who compose the firm, the bond is valid, the statute

[1] Roach *v.* Brannon, 57 Miss. 490.

[2] McKinney *v.* Rosenland, 23 Fed. Rep. 785.

[3] Roach *v.* Brannon, 57 Miss. 490, 502. In Robinson *v.* Crowder, 1 Bail. (S. Ca.) 185, under a peculiar statute, the only resident partner advertised that he was about to leave the state and is ready to answer any suit that might be brought. The advertisement was held not to be defective because in his name only and did not specify that it related to partnership debts, for he being the only resident would practically be sued alone. Hence the partnership property could not be attached after his departure.

[4] McKinney *v.* Rosenland, 23 Fed. Rep. 785.

[5] Jones *v.* Lusk, 2 Met. (Ky.) 356.

[6] §§ 564, 565.

simply requiring that the plaintiffs give bond,[1] or it may be signed by the individuals.[2] If the action is in the firm name, a bond in the firm name will be presumed to be authorized by all the partners.[3]

If one partner for himself and as agent for his copartners sue out an attachment, a bond signed by him alone in his own name is sufficient.[4]

But if the firm is the plaintiff, a bond by one partner in his own name, reciting that he has attached, renders the attachment void.[5]

In an action against a firm and against the individual members of it, an attachment bond filed by the plaintiff running to the firm alone is valid.[6] So where the action is against a firm in the firm name.[7] And in an action against the firm in the joint name, an attachment bond payable to the individual partners has been held both ways.[8]

In an action against D. M. Osborne and others unknown, as partners, D. M. Osborne & Co. having been really the defendants, though by a wrong description, and having defended the suit, can sue on the attachment bond.[9]

Where the action is against B. & S., partners, a bond to B. alone, he being non-resident, followed by levy on partnership property, can be sued upon by him alone and not by the firm, after judgment in their favor.[10]

§ 1122. Miscellaneous.— As the interest of one partner in the firm consists merely in his share in a surplus, after payment

[1] Gray *v.* Steedman, 63 Tex. 95; Dow *v.* Smith, 8 Ga. 551; Danforth *v.* Carter, 1 Iowa, 546, but does not recommend the practice. See, also, Linn *v.* Buckingham, 2 Ill. 451, of a cost bond.

[2] Drake *v.* Brander, 8 Tex. 351.

[3] Kasson *v.* Brocker, 47 Wis. 79; and see Dow *v.* Smith, 8 Ga. 551, and Perkins *v.* Walker, 16 Vt. 240.

[4] Roden *v.* Roland, 1 Stew. (Ala.) 266; Wallis *v.* Wallace, 6 How. (Miss.) 254.

[5] Jones *v.* Anderson, 7 Leigh (Va.), 308. In fact, however, there is no reason for the plaintiffs signing at all, since they are bound in any event.

[6] Mason *v.* Rice, 66 Iowa, 174.

[7] Caussey *v.* Baily, 57 Tex. 665.

[8] That the attachment is void, Birdsong *v.* McLaren, 8 Ga. 521; but this case was denied, and the contrary held, in Gray *v.* Steedman, 63 Tex. 95.

[9] Hedrick *v.* Osborne, 99 Ind. 143.

[10] Faulkner *v.* Brigel, 101 Ind. 329, stating, also, that the clerk who issued the writ would be liable in trespass.

of debts and adjustment of balances, insolvency proceedings against one partner does not affect an attachment of partnership property by a joint creditor;[1] and for the same reason, if a partnership creditor attaches merely the interest of one partner in the partnership property, a subsequent assignment for creditors by the firm will defeat him if the interest of such partner proves to be worthless.[2]

If all the partners are non-residents and the firm's place of business is in another state, doubt was expressed whether the interest of one partner could be said to exist in this state so as to be attachable.[3]

§ 1123. Affidavit.—In an action against a firm setting out the names of the partners, an affidavit that the "said Day & Higgs conceal themselves" is sufficient, although not stating that the individuals conceal themselves.[4]

If the name and membership of only one partner in the firm are known to plaintiff, it is sufficient that the affidavit allege a debt due by the firm and these facts.[5]

§ 1124. Misnomer.—A misnomer of the name of one of the partners does not invalidate the attachment, as calling him Henry, when his name is Holowil;[6] or where the action is against Lyman George and Wm. George, trading as L. A. George & Co., whereas the firm is composed of Lyman and John George, for the name of the firm is correct.[7] Even misnaming the firm; as where Marshall Field & Co. were sued for Field, Leiter & Co., it was held not fatal.[8]

In Graham *v.* Boynton, 35 Tex. 712, it was queried whether a non-resident firm could be brought within the jurisdiction by attachment of the separate property of one partner, but such partner having died the action was dismissed as to him and continued against the surviving partner, and the dismissal was held to end the jurisdiction if acquired. Of course jurisdiction of the firm cannot be acquired by attaching the separate property of one member, nor even by personal service upon the member, or by attachment of the firm's property, further than to subject the joint interest in the property within reach.

[1] Fern *v.* Cushing, 4 Cush. 357.
[2] Staats *v.* Bristow, 73 N. Y. 264.
[3] Dow *v.* Sayward, 14 N. H. 9, 13.
[4] Guckenheimer *v.* Day, 74 Ga. 1
[5] Hines *v.* Kimball, 47 Ga. 587.
[6] Hubbardston Lumber Co. *v.* Covert, 35 Mich. 254.
[7] Rushton *v.* Rowe, 64 Pa. St. 63.
[8] Field *v.* Malone, 102 Ind. 251.

If garnishment process served upon a person indebted to a single one of the defendant partners notifies him that all credits of the firm in his possession are levied upon, no lien is created, because it does not show that the credits of one partner are taken.[1]

PARTNERS AS GARNISHEES.

§ 1125. If the plaintiff in an action against a person to whom a firm is indebted garnishes one member only of the firm, the debt due by the partnership will not be held by the process. Had the defendant himself sued a single partner only, the partner could have pleaded the non-joinder in abatement. Moreover, the process does not notify the garnishee what claim is sought to be reached.[2]

Thus where a bank sued X. and garnished A. as his debtor, plaintiff next day sued X. and garnished A. & B. The debt was in fact owing by A. & B., and A.'s answer in the bank's action so stated. It was held that plaintiff's process had priority, and that A.'s answer was equivalent to a plea of non-joinder.[3]

So where a garnishment was issued against one member of a partnership as debtor of the defendant, and he answers that the firm has paid the debt since the service of the process, he will be discharged.[4] Even if the other partners are non-residents of the jurisdiction, they should all be joined.[5] Hence, where an individual garnished answers that he is not indebted, but that the debt is

[1] Greentree *v.* Rosenstock, 61 N. Y. 583, holding, in an action by the assignee of such partner's claim, that the garnishee was therefore not justified in paying over to the sheriff.

[2] Jewett *v.* Bacon, 6 Mass. 60; Rix *v.* Elliot, 1 N. H. 184; Hudson *v.* Hunt, 5 id. 538; Ellicott *v.* Smith, 2 Cranch, C. C. 543; Reid *v.* McLeod, 20 Ala. 576; Hoskins *v.* Georgia, 24 Ga. 625; Wilson *v.* Albright, 2 G. Greene (Iowa), 125; Wetherwax *v.* Paine, 2 Mich. 555; Hirth *v.* Pfeifle, 42 id. 31; Nash *v.* Brophy, 13 Met. 476; Warren *v.* Perkins, 8 Cush. 518; Hoyt *v.* Robinson, 10 Gray, 371, 372. *Contra*, Brealsford *v.* Meade, 1 Yeates (Pa.), 488.

[3] Hoskins *v.* Georgia, 24 Ga. 625.

[4] Nash *v.* Brophy, 13 Met. 476; Pettes *v.* Spalding, 21 Vt. 66.

[5] Atkins *v.* Prescott, 10 N. H. 120; Pettes *v.* Spalding, 21 Vt. 66. Though in Parker *v.* Danforth, 16 Mass. 299, the non-residents were not made parties, yet the debt was described as owing by the firm, and the garnishment was held good and subject to such set-offs as would have been allowed had all been summoned.

owing by his firm, he must be discharged.[1] And in states where one partner can be sued alone, if an individual is garnished and answers admitting that his firm is indebted, he is bound, because the creditor can elect to proceed against him alone.[2]

But if all are garnished, an answer of one that he has no property of the defendant is untrue. For partners must be sued in their individual names, and each has power to dispose of partnership property and is responsible for all debts. The answer should have related to the firm's liability.[3]

In Reid *v.* McLeod, 20 Ala. 576, the garnishment was against "James Reid & Co.," and the individual names nowhere appearing, a judgment by default against the garnishees was set aside; the court saying that a proceeding in the firm name was too vague and uncertain to be encouraged, and that there was no need for James Reid to plead non-joinder in abatement, because his adversary, the plaintiff, by using the firm name, admitted there were defendants not joined.

And the writ is not amendable, because an amendment would relate back to the beginning of the action, and the firm may have paid the defendant since.[4]

§ 1126. And, *vice versa*, if the garnishment or trustee process be against a firm or require the persons as partners to disclose, etc., this does not reach what is held or owed by them personally.[5]

If less than all the partners, being garnished, have paid the judgment rendered in the case, they cannot be held to pay the amount over again to another creditor who joins them all as garnishees, on the ground that the prior garnishment could have been resisted by objecting to the non-joinder. Each partner has power to pay a debt.[6]

[1] Wellover *v.* Soule, 30 Mich. 481. See, also, Ellicott *v.* Smith, 2 Cranch, C. C. 543. *Contra*, in Pennsylvania, Brealsford *v.* Meade, 1 Yeates, 488.

[2] Travis *v.* Tartt, 8 Ala. 574; Speak *v.* Kinsey, 17 Tex. 301.

[3] Macomber *v.* Wright, 35 Me. 156, but no one having objected to such answer, the judgment discharging the garnishee was affirmed.

[4] Knapp *v.* Levanway, 27 Vt. 298. In Massachusetts, however, the objection that the garnishee's partners are not joined must be made at an early stage of the proceeding, because it is matter in abatement only, Parker *v.* Danforth, 16 Mass. 299; Hoyt *v.* Robinson, 10 Gray, 371; Sabin *v.* Cooper, 15 id. 532.

[5] Coverly *v.* Braynard, 28 Vt. 738; Wart *v.* Mann, 124 Mass. 586 (*dictum*).

[6] Hawley *v.* Atherton, 39 Conn. 309.

§ 1127. Service upon part only.—If all the partners as a firm are made garnishees for a debt owed by them to the defendant, service of process upon those within the jurisdiction will be sufficient to hold funds in the hands of the firm, just as a firm sued could have been served the same way if some of the partners were domiciled elsewhere.[1] The service must be upon all who are within reach of process.[2]

Or in states where service upon one of the partners is sufficient to bring the entire partnership within the jurisdiction, at least so far as to subject joint property, service upon one of the garnishees is binding.[3]

And the answer of one of a firm of garnishees, admitting the debt, is an answer for all and sufficient to charge the firm.[4]

If all the garnishees live out of the state, the property in the hands of any one is regarded as remaining at his residence and is not in legal contemplation within reach of the process, and his acknowledgment of service in another state is not connected with the partnership business and will not bind the firm.[5]

If one of two partners, both of whom were garnished and both appeared and answered, dies *pendente lite*, the proceeding can of course be prosecuted to judgment against the other as surviving partner.[6]

It is doubtful whether this rule applies where the domicile of the firm and of some of the partners is in a foreign country where the American constitutional doctrine that full faith and credit shall be given in one state to a judgment in another is not in force. In Kidder *v.* Packard, 13 Mass. 80, a firm's business house was in Havana. One partner resided in Boston and was there served with garnishment process against the firm. Goods having been delivered to the house in Havana for the principal defendant, it was held that the

[1] Parker *v.* Danforth, 16 Mass. 299; Atkins *v.* Prescott, 10 N. H. 120; Pecks *v.* Barnum, 24 Vt. 75.

[2] Warner *v.* Perkins, 8 Cush. 518. See, also, Macomber *v.* Wright, 35 Me. 156.

[3] Hinkley *v.* St. Anthony Falls Water Power Co. 9 Minn. 55; State *v.* Linaweaver, 3 Head, 51.

[4] Anderson *v.* Wanzer, 5 How. (Miss.) 587 (37 Am. Dec. 170).

[5] Clark *v.* Wilson, 15 N. H. 150.

[6] Gaines *v.* Beirne, 3 Ala. 114.

process would not hold the firm, because it would be too inconvenient for commercial men to receive property in one country and have to account for it in another. And if the foreign tribunals did not recognize the validity of the judgment here, the firm would have to pay twice. This decision was in Parker *v.* Danforth, 16 Mass. 299, 303, confined to cases where some of the partners resided outside of the United States.

§ 1128. In all cases where some of the partners are out of the jurisdiction or are not served, as those served may not know the state of the accounts or whether their non-resident partners have not paid the debt in ignorance of the process, their rights will be protected and time allowed them to ascertain the facts.[1]

In those states where an action can be brought by and against partners in the firm name,[2] they can be made garnishees in the firm name.[3]

EXECUTION ON JUDGMENT AGAINST FIRM.

§ 1129. The writ of execution follows the judgment of course, in that it runs against all the judgment debtors, and not against any part of them. In case it is levied upon partnership property and a sale is had under the levy, the sale conveys a title free and discharged of all liens made by individual partners upon their individual shares, as we have seen elsewhere. That is to say, any mortgage, assignment, judgment lien and the like upon separate interests constitute claims only upon the share or surplus ascertained after payment of debts and settlement of cross-demands *inter se*, and the sale on execution for a debt of the firm discharges such claims from the property, although they may have priorities in the debtor's share of the surplus when ascertained.[4]

[1] Parker *v.* Danforth, 16 Mass. 299; Atkins *v.* Prescott, 10 N. H. 120; Pecks *v.* Barnum, 24 Vt. 75. See, also, Robinson *v.* Hall, 3 Met. 301.

[2] § 1059 *et seq.*

[3] Whitman *v.* Keith, 18 Oh. St. 134.

[4] Thus in Jones *v.* Parsons, 25 Cal. 100, and Whitmore *v.* Shiverick, 3 Nev. 288, the execution was levied upon real estate of the firm incumbered by a mortgage by one partner upon his interest therein, and the

§ 1130. Property of each liable to execution.— Execution against the partners upon a partnership liability can be levied either upon the joint property or upon the separate property of any of them.[1]

If the action is brought against the partnership in its firm name, attachment or execution can only be upon joint property.[2]

EXEMPTION AND HOMESTEAD CLAIMS.

§ 1131. On execution against the partnership property on judgment for a partnership debt, no exemption or homestead is allowed either to the partnership as a body, or to the individual members thereof, out of the joint assets. The partnership as a body cannot claim it because the homestead and exemption statutes apply to several and not to joint claims, and the partnership is neither an entity, an individual, nor the head of a family. An individual partner cannot claim it because no partner has a proprietorship in any specific chattel, his interest being a share in the surplus after payment of debts and copartners' claims. Each asset belongs as much to the other partners as to him, and each partner has a lien upon it for its application to discharging debts and his own claim when ascertained; hence a claim of exemption, if allowed, by a partner would change the ownership. If, however, all the copartners assented, yet to make the exemption good their assent must be deemed to be an assignment to him of the property selected, in order that his selection might be made out of his own property, and thus his exemption is obtained, not by virtue of a statutory right, but by contract with the copartners. The right to exemption depends upon the power of selection, and this can only

sale was held to be free of the mortgage. See §§ 183–187, 1098–1102.

[1] Abbot *v.* Smith, 2 W. Bl. 947, 949; Haralson *v.* Campbell, 63 Ala. 278; Leinkauff *v.* Munter, 76 id. 194; Clayton *v.* May, 68 Ga. 27; Dean *v.* Phillips, 17 Ind. 406; Hardy *v.* Overman, 36 id. 549; Bray *v.* Seligman, 75 Mo. 31; Randolph *v.* Daly, 16 N. J. Eq. 313; National Bank *v.* Sprague, 20 id. 13 (reversed on other points, 21 id. 530); Saunders *v.* Reilly, 105 N. Y. 12, 21. *Contra*, that the partnership property must be first exhausted, Crowninshield *v.* Strobel, 2 Brev. (S. Ca.) 80.

[2] See §§ 1063, 1064.

be exercised in property of which the debtor is the owner. If the partners are numerous, the difficulties of ascertaining if all had consented would be sometimes insuperable. Some cases also base the inapplicability of exemption laws upon the doctrine that the partnership assets are a trust fund for the payment of the joint creditors, and in case of insolvency the partners cannot, by mutual agreement, convert the joint property into separate property, for such change is in fraud of creditors.[1]

The contrary rule prevails in Georgia, Michigan, New York, North Carolina, Texas and Wisconsin.[2]

[1] That there is no exemption or homestead in partnership property, see *Re* Hafer, 1 Bankr. Reg. 547; *Re* Price, 6 id. 400; *Re* Handlin, 12 id. 49; *Re* Tonne, 13 id. 170; *Re* Stewart, 13 id. 295; *Re* Corbett, 5 Sawy. 206; *Re* Sauthoff, 8 Biss. 35; 16 Bankr. Reg. 181 (5 Am. Law Rec. 173); *Re* Blodgett, 10 Bankr. Reg. 145; *Re* Handlin, 12 Bankr. Reg. 49; 3 Biss. 290; *Re* Hughes, 16 Bankr. Reg. 464; *Re* Croft, 17 id. 324; 8 Biss. 188; *Re* Melvin, 17 Bankr. Reg. 543; *Re* Bjornstad, 18 Bankr. Reg. 282; *Re* Boothroyd, 14 id. 223; Commercial & Sav. Bk. *v.* Corbett, 5 Sawy. 543; Short *v.* M'Gruder, 22 Fed. Rep. 46; Wooldridge *v.* Irving, 23 id. 676, 677; Giovanni *v.* First Nat'l Bk. 55 Ala. 305 (28 Am. Rep. 723) (overruling s. c. 51 id. 176; and Howard *v.* Jones, 50 id. 67); Terrell *v.* Hurst, 76 id. 588, 590; Levy *v.* Williams, 79 Ala. 171; Richardson *v.* Adler, 46 Ark. 43; Bishop *v.* Hubbard, 23 Cal. 514; Kingsley *v.* Kingsley, 39 id. 665; State *ex rel. v.* Bowden, 18 Fla. 17; Trowbridge *v.* Cross, 117 Ill. 109; Smith *v.* Harris, 76 Ind. 104; State *ex rel. v.* Emmons, 99 id. 452; *Ex parte* Hopkins, 104 id. 157; Drake *v.* Moore, 66 Iowa, 58; Hoyt *v.* Hoyt, 69 Iowa, 174; Guptil *v.* McFee, 9 Kan. 30; Succession of Stauffer, 21 La. Ann. 520, 747; Pond *v.* Kimball, 101 Mass. 105; Holmes *v.* Winchester, 138 id. 542; Baker *v.* Sheehan, 29 Minn. 235; Prosser *v.* Hartley, 35 id. 340; Robertshaw *v.* Hanway, 52 Miss. 713; State *ex rel. v.* Spencer, 64 Mo. 355 (27 Am. Rep. 244); Julian *v.* Wrightman, 73 id. 569; Lindley *v.* Davis, 6 Montana, 453; Till's Case, 3 Neb. 261; Wise *v.* Frey, 7 id. 134 (29 Am. Rep. 380); Lininger *v.* Raymond, 9 id. 40, 45; Terry *v.* Berry, 13 Nev. 514; Gaylord *v.* Imhoff, 26 Oh. St. 317 (20 Am. Rep. 762; 15 Am. Law Reg. (N. S.) 477); Bonsall *v.* Comly, 44 Pa. St. 442; Clegg *v.* Houston, 1 Phila. 352; Spiro *v.* Paxton, 3 Lea (Tenn.), 75 (31 Am. Dec. 630); Chalfant *v.* Grant, 3 id. 118; Gill *v.* Lattimore, 9 id. 381.

[2] See the overruled cases in Alabama, cited above; also Anonymous, 1 Bankr. Reg. 187; *Re* Rupp, 4 id. 25 (overruled by *Re* Tonne, 13 id. 170); *Re* Young, 3 id. 111; *Re* McKercher, 8 id. 409; *Re* Richardson, 11 id. 114; Blanchard *v.* Paschal, 68 Ga. 32; 45 Am. Rep. 474; Harris *v.* Visscher, 57 id. 229; Hunnicutt *v.* Summey, 63 id. 586; Skinner *v.* Shannon, 44 Mich. 86 (38 Am. Rep. 232); Waite *v.* Mathews, 50 id. 392; Radcliff *v.*

Certain partnership property, such as the tools and implements of mechanics, are exempt in some states by statute, but when redelivered to the partners belong to them individually and do not become partnership property if the firm is dissolved.[1]

§ 1132. Even in states where the exemption is allowed, it cannot be claimed by the firm as such or by the partners jointly,[2] nor against the copartners' claim for balance.[3]

Of course as to a private debt owed by one partner to another, the creditor partner has no lien in the absence of special contract, and is like any other individual creditor, and the balance due to the debtor on winding up can be claimed as exempt against the debt.[4]

§ 1133. But a partner may, before execution, purchase the property in good faith from his copartners, thus converting it into separate property, and an exemption may then be claimed by him in it;[5] or by acquiescence of the copartners when the firm is solvent,[6] even though the sale was to enable the buyer to claim the exemption.[7] But a mere division of property, if the firm is not solvent, other than by sale of one to the other, was held not sufficient to authorize a claim of exemption.[8]

Woods, 25 Barb. 52; Stewart *v.* Brown, 37 N. Y. 350; Burns *v.* Harris, 67 N. Ca. 140; Scott *v.* Kenan, 94 N. Ca. 296; Smith *v.* Chenault, 48 Tex. 455; Griffie *v.* Maxey, 58 id. 210; Swearingen *v.* Bassett, 65 id. 267; Russell *v.* Lennon, 39 Wis. 570 (20 Am. Rep. 60), (overruling Gilman *v.* Williams, 7 Wis. 329); O'Gorman *v.* Fink, 57 id. 649 (46 Am. Rep. 58); McNair *v.* Rewey, 62 id. 167.

[1] Wells *v.* Wells (Cal.), 9 Pac. Rep. 80.

[2] Russell *v.* Lennon, 39 Wis. 570 (20 Am. Rep. 60); McNair *v.* Rewey, 62 Wis. 167; First Natl. Bk. *v.* Hackett, 61 id. 335; Goll *v.* Hubbell, 61 id. 293.

[3] Hunnicutt *v.* Summey, 63 Ga. 586; Griffie *v.* Maxey, 58 Tex. 210, 214.

[4] Evans *v.* Bryan, 95 N. Ca. 174.

[5] Burton *v.* Baum, 33 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.

[6] Swearingen *v.* Bassett, 65 Tex. 267; Weinrich *v.* Koelling, 21 Mo. App. 133.

[7] Mortley *v.* Flanagan, 38 Oh. St. 401.

[8] Gill *v.* Lattimore, 9 Lea, 381; Chalfant *v.* Grant, 3 id. 118; *Re* Sauthoff, 16 Bankr. Reg. 181; 8 Biss. 35; 5 Am. Law Rec. 173; Bishop *v.* Hubbard, 23 Cal. 514.

And where property owned in severalty by each of the partners is used for the partnership business, but the joint interest is in the profits only and not in the property, it may be claimed as exempt from execution.[1]

[1] Root *v.* Gay, 64 Iowa, 399. And land owned in common; Radcliff *v.* see Griffie *v.* Maxey, 58 Tex. 210, and Wood, 25 Barb. 53; *Re* Corbett, 5 Smith *v.* Chenault, 48 Tex. 455, of Sawy. 206.

CHAPTER XI.

EVIDENCE OF PARTNERSHIP.

§ 1134. The determining what facts are to be proved is determining what is a partnership, and this is treated of in the beginning of the book.[1]

Determining how to prove a partnership, or what evidence is admissible, depends on between whom the question is raised. As the uses to be made of the fact of partnership require different kinds and degrees of strictness of evidence, hence I divide the subject:

1st. Proof when the question is raised between the partners, as in an action or suit between them.

2d. Proof by plaintiffs of the fact of partnership between themselves, or of defendants between themselves, when denied by the opposite side.

3d. Proof by plaintiffs that defendants are partners or that a third person is their partner, and similar proof by defendants of plaintiffs.

4th. Proof of the partnership of persons not parties to the record.

§ 1135. **Whether a question of law or fact.**— Where the facts are admitted, or the existence of the partnership depends upon the construction of a document or of an oral contract, the terms of which are before the court, the question is one for the court.[2] But otherwise the existence of a partnership must be submitted to the jury as a mixed question of law and fact.[3]

[1] §§ 15-71.

[2] Chisholm *v.* Cowles, 42 Ala. 179; Everitt *v.* Chapman, 6 Conn. 347; Doggett *v.* Jordan, 2 Fla. 541; Lintner *v.* Millikin, 47 Ill. 178, 181; Randolph *v.* Gowan, 14 Sm. & Mar. 9; Cumpston *v.* McNair, 1 Wend. 457; Jones *v.* Call, 93 N. Ca. 170; Farmers' Ins. Co. *v.* Ross, 29 Oh. St. 429; Boston, etc. Smelting Co. *v.* Smith, 13 R. I. 27, 34 (43 Am. Rep. 3); Williams *v.* Connor, 14 S. Ca. 621.

[3] Robinson *v.* Green. 5 Harr. (Del.) 115; Pardridge *v.* Ryan, 14 Ill. App.

If the court construe a writing as not constituting a partnership it is not on that account to be excluded, for it, with other facts, may show that the parties are liable as partners.[1]

And whether a particular act or transaction is in the scope of the partnership business is sometimes a question for the jury and sometimes one of law.

§ 1136. Inter se.— Where the question is whether or not plaintiff and defendant are partners of each other, as where the plaintiff seeks an accounting or where the defendant avers that plaintiff was his partner, and that the subject of the action was a partnership matter, and therefore no action at law lies between them, here, also, a partnership in fact must be proved, and therefore stricter proof is necessary than is required from third persons. Here, if the terms of partnership are material, the articles, if there are any, must be produced or their absence accounted for before oral evidence is admissible.[2]

The court will not proceed by conjecture, but strict proof is required. If there is a written contract between the parties, that is the best evidence, if in possession.[3]

In Bonaffe *v.* Fenner, 6 Sm. & Mar. 212, where defendants claimed that plaintiff was their partner and could not sue at law, it was held that the articles must be produced or their absence accounted for.[4]

If there is no written contract, other proof of the agreement is to be resorted to.

598; McMullan *v.* Mackenzie, 2 G. Greene (Ia.), 368; Chamberlain *v.* Jackson, 44 Mich. 320; Densmore *v.* Mathews, 58 id. 616; Pfeifer *v.* Chamberlain, 52 Miss. 89; Chase *v.* Stevens, 19 N. H. 465; Drake *v.* Elwyn, 1 Caines, 184 (overruled on other points, 1 N. Y. 242); Butler *v.* Finck, 21 Hun, 210; Hunter *v.* Hubbard, 26 Tex. 537, as to whether one was a dormant partner; Smith *v.* Hollister, 32 Vt. 695.

[1] Williams *v.* Soutter, 7 Iowa, 435.

[2] Chisholm *v.* Cowles, 42 Ala. 179; Field *v.* Tenney, 47 N. H. 513; Robinson *v.* Green, 5 Harr. (Del.) 115; Smith *v.* Walker, 57 Mich. 456; Kelly *v.* Devlin, 15 Jones & Sp. 555; McMullan *v.* Mackenzie, 2 G. Greene (Iowa), 368.

[3] Chisholm *v.* Cowles, 42 Ala. 179; Campbell *v.* Moore, 3 Wis. 767. See Freese *v.* Ideson, 49 Ill. 191.

[4] And see *dictum* in Cutler *v.* Thomas, 25 Vt. 73.

If there was no agreement, or no witness to it can be had, the business is presumed to belong to those by whom and on whose credit it has been carried on, and they cannot, after continuously recognizing each other as partners, successfully rely on the want of an agreement, or the non-compliance with the terms of an agreement.[1] But a mere series of transactions by which W. selects lands, and B. pays for them, and they divide profits on a resale, does not alone prove a partnership *inter se;*[2] nor is the fact that two persons kept a public house, and both made bills and purchases in their joint names in its management, sufficient proof *inter se.*[3]

The partnership books are very strong evidence as admissions of those who made the entries or were cognizant thereof.[4]

§ 1137. An oral acceptance of an offer of partnership, without change in the business, or payment, or money turned over, is not conclusive.[5]

Evidence of the lack of means of the party alleging the partnership does not tend to disprove it.[6]

That the parties put their articles of partnership in another business in writing, but not the one in question, creates no presumption against a partnership in the latter; but the failure to claim a share in the profits, when there was a prospect of realizing largely, does not tend to disprove one.[7]

Where articles of partnership were prepared, but one of the parties substituted his son's name for his own, for purposes of concealment, the father, acting and being treated as the real partner, is the real partner, and the son's suit for an accounting will be dismissed; but an accounting will be granted on cross-bill to the defendant against the father.[8]

Loose and casual remarks are not sufficient proof *inter se.*[9]

An unsigned paper, drawn up as a contract, and proved to embody the conversations between the parties, is admissible in proof of the terms of their arrangement, the testimony being conflicting

[1] Ratzer *v.* Ratzer, 28 N. J. Eq. 136; Pierce *v.* Whitley, 39 Ala. 172.

[2] Wells *v.* Babcock, 56 Mich. 276; and see § 1149.

[3] Banchor *v.* Cilley, 38 Me. 553.

[4] Hale *v.* Brennan, 23 Cal. 511; Howard *v.* Patrick, 38 Mich. 795.

[5] Hutchins *v.* Buckner, 3 Mo. App. 594.

[6] Howard *v.* Patrick, 43 Mich. 131, 126.

[7] Randel *v.* Yates, 48 Miss. 685.

[8] Watson *v.* Lovelace, 49 Iowa, 558.

[9] Walker *v.* Matthews, 58 Ill. 196.

as to whether there was a partnership;[1] but not if such paper was not a final adjustment of the terms.[2]

§ 1138. But hearsay is not admissible.

In Boulton *v.* First Nat'l Bk. 46 Iowa, 273, plaintiff claimed that certain real estate in W.'s name was owned by himself and W. as partners. Books of a third person who sold lumber for building on the lot, charging the lumber to B. and W., as if a firm, is not competent in the absence of knowledge of such charge.

Nor declarations and acts of a party in his own favor.

Thus in Gay *v.* Fretwell, 9 Wis. 186, in replevin by G.'s administrator against F., F. claimed to be in possession as surviving partner of G. F. cannot show his own acts and conduct while in charge of the business, and in whose name the business was, where G. was not about, so as to have knowledge of them, but was absent from the state.

And in Bond *v.* Nave, 62 Ind. 505, it was held that the inventory filed by a survivor of the assets of a partnership is not proof of the partnership, as against the deceased, or the separate creditors of his estate, or that the assets were joint property.

But a partnership may be inferred from acts and declarations of the parties, though the word "partnership" has not been used;[3] or from admissions by them all.[4]

Proof of a holding out is not sufficient *inter se.*[5]

BY PLAINTIFFS OR DEFENDANTS OF THEMSELVES.

§ 1139. Stricter proof is required when plaintiffs or defendants undertake to prove their own partnership than when they seek to prove or disprove a partnership among their opponents. As where plaintiffs sue as partners and the defendants deny the plaintiffs are partners, or where defendants allege that others not made parties were partners in the transaction and should have been joined. In these cases a partnership in fact must be proved and not a partnership by holding out or a mere liability as partners.

[1] Eager *v.* Crawford, 76 N. Y. 97; Denton *v.* Erwin, 6 La. Ann. 317.

[2] Tweed *v.* Lowe, 1 Ariz. 488.

[3] Clonan *v.* Thornton, 21 Minn. 380; and see § 17.

[4] Soules *v.* Burton, 36 Vt. 652.

[5] Bennett *v.* Dean, 35 Mich. 306.

It is, perhaps, not quite accurate to say that stricter proof is required, for it is not a question of degree of evidence to establish the same facts, but the facts are different. In the one case the question is, who were actually the contracting parties; in the other case it is whom have the opposite party a right to treat as the partners.[1]

§ **1140.** In such case it is not necessary to produce the articles of partnership unless the terms of partnership are material, though there are such articles. The articles are in fact but declarations by each, and are not even that, but merely an agreement to be partners in the future. (See Inchoate Partnership.)[2] The partnership may be shown by proof that the parties conducted their business publicly as partners, and the evidence of clerks, agents or persons who know they act as partners is competent.[3]

The articles of partnership are, however, admissible.[4]

§ **1141.** Where a party stands in the shoes of a partnership as to his claim or defense in an action, or claims through a firm, he may resort to the same kind of proof of the existence of the partnership as if it were the actual party.

In Price *v.* Hunt, 59 Mo. 258, the action was against the maker of a note, and his defense was that the note, which was payable to one M., was in behalf of and the property of the firm of M. & K., and that he had paid K. in full, and that the plaintiff had due notice, all of which was denied; and the contract of partnership between M. & K. being in writing, and the question being whether it constituted K. a partner or a mere employee, it was held that the writing must be produced or its absence accounted for before parol evidence of the partnership could be admitted.

[1] Chisholm *v.* Cowles, 42 Ala. 179; Holmes *v.* Porter, 39 Me. 157, 159; McGregor *v.* Cleveland, 5 Wend. 477; Robinson *v.* Green, 5 Harr. (Del.) 115; Campbell *v.* Hood, 6 Mo. 211; Wood *v.* Quarles, 10 id. 170.

[2] Field *v.* Tenney, 47 N. H. 513, 520; Gray *v.* Gibson, 6 Mich. 300.

[3] Alderson *v.* Clay, 1 Stark. 405; Gilbert *v.* Whidden, 20 Me. 367; Field *v.* Tenney, 47 N. H. 513; Rich *v.* Flanders, 39 id. 304, 336; Forbes *v.* Davison, 11 Vt. 660; Hadden *v.* Shortridge, 27 Mich. 212; McGregor *v.* Cleveland, 5 Wend. 477, 479; McCarthy *v.* Nash, 14 Minn. 127; Lockridge *v.* Wilson, 7 Mo. 560.

[4] Guice *v.* Thornton, 76 Ala. 466; Dix *v.* Otis, 5 Pick. 38.

And in McCarthy *v.* Nash, 14 Minn. 127, McCarthy, of the firm of McC. & M., had sold out his interest in the firm to Nash, who then formed a partnership with M., agreeing with McCarthy to pay all the debts of the original firm. McCarthy alleged as his cause of action that a debt was owing by the old firm to the firm of S. & S., and that he was compelled to pay it. N. denied that S. & S. were a firm, and it was held that McCarthy stood in the shoes of S. & S. and could prove the firm's existence by the same evidence that it could if plaintiff, and that evidence of their acting as partners was sufficient *prima facie* proof.

In Hake *v.* Buell, 50 Mich. 89, in an action by an assignee for the benefit of creditors, the question was whether defendant had acquired title to certain goods, and he claimed a transfer of them from a person whom he alleged was a partner of the insolvent, and it was held that such person, having signed business notes or bonds as partner, was competent.

§ 1142. By admission of opposite party.—An admission by the opposite parties that persons are partners may be sufficient evidence, or if amounting to an estoppel may relieve such persons from the necessity of proof.[1]

Thus under a statute making it unnecessary to prove that plaintiffs constituted a firm, a note made by the defendants to such firm in its firm name admits the existence of the partnership and its name.[2]

So in Ripley *v.* Colby, 23 N. H. 438, a lease by defendant to a firm in the firm name was held to estop him when sued on a covenant to deny the existence of the firm, and the occupancy of plaintiffs is evidence that they were the partners.

But an agreement made to a firm in the firm name does not prove who constitute the firm, and the promisees must therefore prove that they are the partners in order to render the agreement admissible.[3]

Merely using an abbreviated name to describe payees, as Chas. & Wm. Feickert, does not show a firm, and therefore an indorsement over should be by both payees.[4]

[1] Whiting *v.* Leakin (Md.), 7 Atl. Rep. 688; Bisel *v.* Hobbs, 6 Blackf. 479.

[2] Gordon *v.* Janney, Morris (Iowa), 182; Griener *v.* Ulerey, 20 Iowa, 266.

[3] Lee *v.* Hardgrave, 3 Mich. 77.

[4] Ryhiner *v.* Feickert, 92 Ill. 305 (34 Am. Rep. 130).

Parties, it seems, can offer their own declarations to establish their own partnership. Thus speaking of each other as partners was held admissible, on the ground that such declarations were acts and this was acting as partners.[1]

§ 1143. In disproof of alleged partnership.—Parties probably cannot prove that they were not partners by proof of each other's declarations disclaiming it. Such declarations unaccompanied by acts are no more than the declarations of third parties.[2]

Nor can a partner use the declarations of other partners to show that after the execution of the articles the partnership had been abandoned.[3]

A person cannot use his own declarations in his own favor to show he was not a partner.[4]

Nor rebut his own admissions or acts that he was a partner by proof of other acts or declarations not part of the admissions, though he may explain evidence tending to show that his acts were rather those of partner than clerk, by proof that he engaged in the business under an agreement that he might subsequently become a partner.[5]

On the other hand, the declarations and admissions of a known or admitted partner have been held competent to show that defendant was not a member of the firm, if made

[1] Gilbert *v.* Whidden, 20 Me. 367. In Lockridge *v.* Wilson, 7 Mo. 560, such declarations offered by defendants, not in the presence of the opposite party, were rejected as being in their own favor; but the subsequent case of Clark *v.* Huffaker, 26 id. 264, 267, limits this case and admits the correctness of Gilbert *v.* Whidden, *supra*, in establishing a partnership; and in Woods *v.* Quarles, 10 Mo. 170, such declarations were held admissible if made *ante litem motam*.

[2] That they are not admissible, Clark *v.* Huffaker, 26 Mo. 264; Young *v.* Smith, 25 id., 341, both cases are of the same partnership and rule that declarations of one that another was not a partner are incompetent; Phillips *v.* Purington, 15 Me. 425, declarations that the firm did not exist; Carlyle *v.* Plumer, 11 Wis. 96, that no partnership existed; Champlin *v.* Tilley, 3 Day, 303, 306, letters of one partner stating that defendant was not his partner not competent in latter's favor.

[3] Stoddart *v.* McMahan, 35 Tex. 267.

[4] Danforth *v.* Carter, 4 Iowa, 230.

[5] Hunt *v.* Roylance, 11 Cush. 117; Johnston *v.* Warden, 3 Watts, 101; Sager *v.* Tupper, 38 Mich. 258; Stoddart *v.* McMahan, 35 Tex. 267.

ante litem motam. In fact but for this the position of a clerk, it has justly been urged, would be a very dangerous one, for acts enough every day could be proved upon him to make him a partner, if he has no written contract to show; and if he has a written contract it is itself merely such a declaration.[1]

So declarations and letters of a partner to the effect that a defendant was not his partner were held admissible.[2]

After the retirement of a partner from the firm, declarations of the continuing partners that he was no longer a member, not made in plaintiff's presence, were held admissible as continuous *res gestæ* as evidence of dissolution, just as much as a publication is evidence of the fact of dissolution, although the plaintiff had not seen it.[3]

§ **1144.** In Brigham *v.* Clark, 100 Mass. 430, where A. was sued on a note signed B. & Co., but denies he was a member of it, and B. testifies that B. & Co. was the name of a partnership between himself and A., it was held that A. could, in contradiction, show that B. signed B. & Co. to notes not claimed to be of the partnership; for this tends not only to show there was no partnership, but that, if there was, B. used the same name in his private business. He may also show that, in prior insolvency proceedings against B., no property of any firm of that name was included by B. in his assets, and that notes signed B. & Co. were in his list of creditors and proved against his estate.

In Carmichael *v.* Greer, 55 Ga. 116, it being sought to bind defendant as a partner by holding out, he offered evidence that his copartner had, on other occasions, signed the firm name in outside transactions; but this evidence was rejected.

In Sager *v.* Tupper, 38 Mich. 258, to prove that E. was a partner, evidence had been given that he assumed to give directions and

[1] Danforth *v.* Carter, 4 Iowa, 230, 235.

[2] Williams *v.* Soutter, 7 Iowa, 435; Cregler *v.* Durham, 9 Ind. 375; Robinson *v.* Haas, 40 Cal. 474; Humes *v.* O'Bryan, 74 Ala. 64. But in the latter case they were made with reference to the pecuniary liability of the parties on the claims sued on and were admitted as declarations against interest, the partnership being insolvent, as doubling the declarant's liability. Had the subject of the suit been assets such declaration would have been against interest as showing a half-interest belonged to another.

[3] Cregler *v.* Durham, 9 Ind. 375.

orders about the mill, and he was allowed to rebut this by showing that others, confessedly not partners, gave like directions.

In Rabby *v.* O'Grady, 33 Ala. 255, in an action on a note made and signed in a partnership name, two of the defendants denying they were partners, offered in evidence accounts and receipted bills made out by the firm against them and against others than plaintiffs for articles purchased at the store, but the court said they could not see how this was pertinent.

Declarations of third persons are, of course, not admissible.

Thus, in McNamara *v.* Dratt, 33 Iowa, 385, a defendant, in order to show that he was not a partner of D., cannot use as evidence bills for goods made out by third persons against D. alone and found in a drawer of the business house, for the persons who made them may not have known of the partnership.

BY PLAINTIFFS OR DEFENDANTS, OF THE OPPOSITE PARTY.

§ 1145. Where plaintiffs seek to prove that the defendants are partners, or defendants seek to prove that plaintiff has a partner who should have been co-plaintiff, or in any other way, a party is required to prove a partnership of the opposite party. The proof may be by parol, though there are written articles, as by acting together or by acts and declarations of each. Such proof is like proof of an agency by evidence of recognition as such.[1]

If the opposite parties are notified to produce their original articles, acknowledged to exist, and refuse to do so, the jury are justified in assuming that a partnership would be shown by them.[2]

In Price *v.* Hunt, 59 Mo. 258, the action was on a note, and the defense was that the note, though made to one M., was then the property of M. & K., as partners, and that the maker had paid K. and that plaintiff knew this, and the question was whether K. was

[1] Bryer *v.* Weston, 16 Me. 261; Cutler *v.* Thomas, 25 Vt. 73; Widdifield *v.* Widdifield, 2 Bin. 245; Griffin *v.* Doe *ex dem.* Stoddard, 12 Ala. 783; Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15, 24; Rogers *v.* Suttle, 19 Ill. App. 163; Henshaw *v.* Root, 60 Ind. 220; Campbell *v.* Hood, 6 Mo. 211; Wolle *v.* Brown, 4 Whart. 365; Stearns *v.* Haven, 14 Vt. 540.

[2] Whitney *v.* Sterling, 14 Johns. 215. See Bogart *v.* Brown, 5 Pick. 18.

a partner or a mere employee of M. under a written contract; it was held that the writing was the best evidence.

§ 1146. Admission.— An admission of the opposite parties of their own partnership is of course sufficient proof of it against the declarant in favor of the opposite party.

Thus, in Smith *v.* Cisson, 1 Colorado, 29, an attempt by the defendants to put in a set-off in the firm name was held to admit their partnership.

In McFarland *v.* Lewis, 3 Ill. 344, a receipt for money given to defendants in their firm name and offered in order to prove payment was held an admission of partnership by them.

But not the admission of an agent,[1] unless acting within the scope of his authority: e. g., the firm's attorney receipting for proceeds of an action brought by the firm.[2]

To prove that T. was a dormant partner of B., and therefore liable for goods sold in 1836, it is competent to show that in 1835 he made offers to go into partnership with others in their names, and stated that he had done business before in the names of others because he was in debt and wanted to keep his property secure from attachment. This tends to show a purpose to do business in another's name, and also that he had property to employ in trade, although apparently insolvent. It is not like evidence of one different crime offered to prove another, but is like previous threats or intent, and so short a time before that the same motives may be presumed to continue operative.[3]

And an admission or declaration by one of the plaintiffs who sue as copartners that he was not a partner at the time of the alleged contract is admissible.[4]

§ 1147. Using a firm name.— The use of a firm name in other transactions, or on cards, bills, bills of lading or letters, is very good evidence of a partnership. When the use is proved to have been by or with the assent of the party denying his connection with the firm it is an admission. This is different from a holding out by the use of a firm name, for there a person relying on the fact holds the defendant

[1] Campbell *v.* Hastings, 29 Ark. 512.
[2] Currier *v.* Silloway, 1 Allen, 19.
[3] Butts *v.* Tiffany, 21 Pick. 95.
[4] Starke *v.* Kenan, 11 Ala. 818; Smith *v.* Hollister, 32 Vt. 695.

But admissions have been treated below by themselves, §§ 1151–1154.

by estoppel; but there are cases where the fact did not come to the plaintiff's knowledge at the time of contracting.[1]

Packages in the store of A. marked B. & Co. or A. & Son are evidence against such of the parties so named as would be likely to see them.[2]

In Trumlin *v.* Goldsmith, 40 Ga. 221, handbills signed M. & T., advertising for labor, were posted up over the town where T. lived, and on his boarding-house door, and elsewhere where he might be expected to see them, and it was held that this should have been submitted to the jury as evidence of a partnership.

But the person must be shown to have been a party to the use of the name. Hence, it is held that printed cards or circulars not traced to him are not admissible;[3] but after an admission of the party that she considered herself a partner, circulars are admissible though not distinctly brought home to her;[4]

Nor a sworn application for a revenue license by one only, setting out the names of the partners;[5]

Nor the enrollment of a vessel;[6]

Nor accounts in an agent's hands for collection, but made out by the other alleged partner alone;[7]

Nor a letter in the firm name not shown to have been known to him;[8]

Nor signatures to partnership articles not in the handwriting of the party.[9]

[1] McNeill *v.* Reynolds, 9 Ala. 313; Cook *v.* Frederick, 77 Ind. 406; Uhl *v.* Harvey, 78 id. 26; Trumlin *v.* Goldsmith, 40 Ga. 221; Burnett Line of Steamers *v.* Blackman, 53 Ga. 98; Whiting *v.* Leakin, 66 Md. 255; Crowell *v.* Western Reserve Bank, 3 Oh. St. 406, 414; Williams *v.* Rogers, 14 Bush, 776, 781; Case *v.* Baldwin, 136 Mass. 90; Priest *v.* Chouteau, 12 Mo. App. 252; Bank *v.* Smith, 26 W. Va. 541.

[2] Chaffee *v.* Rentfroe, 32 Ga. 477; Welsh *v.* Speakman, 8 Watts & S. 257; Chapman *v.* Wilson, 1 Rob. (Va.) 267; McNeill *v.* Reynolds, 9 Ala. 313 (*dictum*).

[3] Wilson *v.* Coleman, 1 Cranch, C. C. 408; Campbell *v.* Hastings, 29 Ark. 512.

[4] Norton *v.* Seymour, 3 C. B. 792.

[5] Boyd *v.* Ricketts, 60 Miss. 62.

[6] Central R. R. & Banking Co. *v.* Smith, 76 Ala. 572, 579.

[7] McNeill *v.* Reynolds, 9 Ala. 313.

[8] Hudson *v.* Simon, 6 Cal. 453; Farmers' & Mech. Bank *v.* Green, 30 N. J. L. 316; Sinclair *v.* Wood, 3 Cal. 98.

[9] Campbell *v.* Hastings, 29 Ark. 512; Yocum *v.* Benson, 45 Ill. 435.

Entries in the partnership books do not bind a person who had no knowledge or access to them to prove that he was a partner in the firm, or that someone else, whom he denies was a partner, was one.[1]

An affidavit by one of the parties in a bankruptcy proceeding that he owned the claim does not estop the firm in a subsequent suit from proving they owned it.[2]

In Beall *v.* Poole, 27 Md. 645, on the question of whether two of the defendants were members of the firm on November 1, the day the goods were sold, the articles of partnership showing that they became partners on November 17, an unsigned paper dated September 29, in the handwriting of one of them, being an agreement to become partners, is admissible against the writer, as showing an intention to become a partner at a date prior to the articles.

§ **1148.** But the use of the name must be for the purpose of indicating a partnership.

Thus in Farmers' & Mech. B'k *v.* Green, 30 N. J. L. 316, it was held that E. W. G. writing the name of E. W. G. & Co. in the books of a bank, if merely to give P. G. credit there so that he would be liable as partner to the bank, but the plaintiff did not know of or rely on this, is not proof of partnership with P. G.

So in Gilbraith *v.* Lineberger, 69 N. Ca. 145, that F. has the name of L. & Co. over a store managed by him was said to be some evidence that he was their agent, but not the slightest that they were his partners.

§ **1149. Vagueness of circumstantial evidence.**— On the question of whether circumstantial evidence is too vague or too remote to be relevant towards proving a partnership is one on which no rule can be laid down. Relevancy has never yet been explained except by examples.

Proof that two persons were very intimate may be very proper in connection with other evidence;[3] but that before the firm was formed the credit of a member was very bad has no tendency to prove that another was a partner.[4]

[1] Robins *v.* Warde, 111 Mass. 244; Abbott *v.* Pearson, 130 id. 191; Folk *v.* Wilson, 21 Md. 538; Lindsay *v.* Guy, 57 Wis. 200.

[2] Meltzer *v.* Doll, 91 N. Y. 365.

[3] McGrew *v.* Walker, 17 Ala. 824.

[4] Dutton *v.* Woodman, 9 Cush. 255; 57 Am. Dec. 46.

An assignment of all his stock by S. to his creditor E., S. still keeping in possession, and when he failed, E. taking possession and applying the proceeds to his debt, is no evidence of partnership.[1]

Testimony that one intermeddled, in general terms, and without proof of specific acts, is too vague.[2]

That a transfer of an interest in a colliery was in order to keep it from the grantor's creditors is immaterial. The intention of the parties as being fair or fraudulent does not show a partnership.[3]

That one furnished a house with goods does not show he is a dormant partner,[4] or a son furnishing his father with money, though he also tends customers.[5]

A declaration of a person asked as to the solvency of a firm, that L. did all its business and he knew nothing about it, does not tend to admit that he was a partner; it is consistent with ignorance that he was supposed to be liable.[6]

Admissions or evidence that a party has an interest in a concern or in its profits is not sufficient proof of partnership,[7] and is not even sufficient proof of it to let in the declarations of the other partner.[8]

A. had advanced money to his partner B., to invest in cattle. B. not needing it all, A. told him to "invest it in something that will pay, and not let it be idle." B. rented land in his own name and raised a crop, and his individual creditors levied. This evidence is not sufficient to show that A. was a partner in the crops and entitled to replevy them.[9]

A broker sued partners for services in buying stock; the defendants claimed that each was liable for his own share; evidence that one of the partners had an individual account with the plaintiff was held competent evidence that the claim sued on was a joint account.[10]

§ 1150. Proof that a person was often present giving orders to the plaintiff and others about the works in the

[1] Smith *v.* Edwards, 2 Har. & G. (Md.) 411.

[2] Lewis *v.* Post, 1 Ala. 65.

[3] Thomas *v.* Moore, 71 Pa. St. 193.

[4] Osborne *v.* Brennan, 2 Nott. & McC. 427 (10 Am. Dec. 614).

[5] Sculthorpe *v.* Bates, 5 Up. Can. Q. B. 318.

[6] Grafton Bank *v.* Moore, 13 N. H. 99 (38 Am. Dec. 478).

[7] Rapp *v.* Vogel, 45 Mo. 524; Scull's Appeal (Pa.), 7 Atl. Rep. 588.

[8] Campbell *v.* Dent, 54 Mo. 325.

[9] Brown *v.* O'Brien, 4 Neb. 195.

[10] Quincey *v.* Young, 5 Daly, 327 (reversed on other points in 63 N. Y. 370).

profits of which he had a share, or was frequently in the defendant's store, transacting business for him, is admissible.[1] But there being no question of estoppel by holding out, these facts can be explained by showing that payments were for other purposes, as rent, etc., and that he was an assistant only.[2]

That J. was frequently seen in plaintiff's house transacting business, and was generally believed to be a partner, is not sufficient to show that he should have been made a co-plaintiff.[3] And that one had frequently called another, who was in fact an employee on a share of the profits, his partner, does not make him such where no estoppel is involved.[4]

In Farr *v.* Wheeler, 20 N. H. 569, on the question whether a father and his sons were partners in a farming business, evidence was held competent that one of the sons had been in the habit of ordering goods and material for their common use, and that the debts were paid for by the products of the farm, and that the father had been sued for debts incurred by the sons and paid them. The statement of the father that if any of the sons made a trade he did not like he could and would disavow it was said to show that they could make trades for the common benefit.

If the acts proved are equally as consistent with a co-tenancy as with a partnership, the jury are not to be charged that the latter cannot be found, but it is a question of probability in which capacity the party acted.[5]

But jointly contracting to construct a work does not show a partnership without some agreement *inter se*, for it may be that each will do his share at his own expense, without mutual obligation or interest.[6]

Evidence that a person advertised for a partner, and that the defendant made some business arrangement with him, tends to show a partnership,[7] especially if accompanied by subsequent payment of

[1] Perry *v.* Randolph, 6 Sm. & M. (14 Miss.) 335. And see Mathews *v.* Felch, 25 Vt. 536; Carlton *v.* Ludlow Woolen Mill, 28 Vt. 504; Lindsey *v.* Edmiston, 25 Ill. 359; State *v.* Wiggin, 20 N. H. 449.

[2] Tracy *v.* McManus, 58 N. Y. 257.

[3] Bryden *v.* Taylor, 2 Har. & J. 396, 400.

[4] Nicholaus *v.* Thielges, 50 Wis. 491.

[5] Chase *v.* Stevens, 19 N. H. 465, 264.

[6] Sargent *v.* Collins, 3 Nev. 260,

[7] Wilcox *v.* Matthews, 44 Mich. 192.

notes in the firm name.[1] But subsequent acts may be consistent with an executory agreement to become a partner never carried out.[2]

§ 1151. The admission or declaration of one person that another is his partner is not competent evidence in proof of partnership to charge the other. And this is true in whatever form the declaration is made, whether a statement of their partnership, or an admission of his own or of a joint liability, or of the correctness of a claim. In any case the partnership must be proved *aliunde*.[3]

A declaration in the presence of the other is admissible against him, because his non-denial constitutes an admission by himself, but on no other ground.

Thus a receipt in writing of money by one in the firm name in the presence of the other, without proof that he saw or knew its

[1] Folk *v.* Wilson, 21 Md. 538.

[2] Beckford *v.* Hill, 124 Mass. 588.

[3] Thornton *v.* Kerr, 6 Ala. 823; Cross *v.* Langley, 50 id. 8; Clark *v.* Taylor, 68 id. 453; Humes *v.* O'Bryan, 74 id. 64; Central R. R. & Banking Co. *v.* Smith, 76 id. 572, 578; Campbell *v.* Hastings, 29 Ark. 512; Etchemende *v.* Stearns, 44 Cal. 582; Bill *v.* Porter, 9 Conn. 23, 27; Sankey *v.* Columbus Iron Works, 44 Ga. 228; Ford *v.* Kenedy, 64 Ga. 537; Flournoy *v.* Williams, 68 id. 707; Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15; Degan *v.* Singer, 41 id. 28; Hahn *v.* St. Clair Sav. & Ins. Co. 50 id. 456; Gardner *v.* Northwestern Mfg. Co. 52 id. 367; Bishop *v.* Georgeson, 60 id. 484; Smith *v.* Hulett, 65 id. 495; Beveridge *v.* Hewitt, 8 Ill. App. 467; Pierce *v.* McConnell, 7 Blackf. 170; Bond *v.* Nave, 62 Ind. 505; King *v.* Barbour, 70 Ind. 35; Evans *v.* Corriell, 1 G. Greene (Iowa), 25; Southwick *v.* McGovern, 28 Iowa, 533; Barcroft *v.* Haworth, 29 id. 462; Brown *v.* Rains, 53 id. 81; Johnston *v.* Clements, 25 Kan. 376; Bevans *v.* Sullivan, 4 Gill, 383; Robbins *v.* Willard, 6 Pick. 464; Jones *v.* Stevens, 5 Met. 373; Dutton *v.* Woodman, 9 Cush. 255; 57 Am. Dec. 46; Ruhe *v.* Burnell, 121 Mass. 450; Lea *v.* Guice, 13 Sm. & Mar. 656; Boyd *v.* Ricketts, 60 Miss. 62; Dixon *v.* Hood, 7 Mo. 414 (38 Am. Dec. 461); Crook *v.* Davis, 28 id. 94; Filley *v.* McHenry, 71 id. 417; Rimel *v.* Hayes, 83 id. 200; Converse *v.* Shambaugh, 4 Neb. 376; Grafton Bank *v.* Moore, 13 N. H. 99 (38 Am. Dec. 478); Johnson *v.* Gallivan, 52 id. 143; Faulkner *v.* Whitaker, 15 N. J. L. 438; Whitney *v.* Sterling, 15 Johns. 215; Henry *v.* Willard, 73 N. Ca. 35; Cowan *v.* Kinney, 33 Oh. St. 422; Johnston *v.* Warden, 3 Watts, 101; Nelson *v.* Lloyd, 9 id. 22; Edwards *v.* Tracy, 62 Pa. St. 374, and cases cited; McCorkle *v.* Doby, 1 Strob. (S. Ca.) L. 396 (47 Am. Dec. 560); Tripp *v.* Williams, 14 S. Ca. 502, 506; Cottrill *v.* Vanduzen, 22 Vt. 511; Noyes *v.* Cushman, 25 id. 390; Hardy *v.* Cheney, 42 id. 417; Carfrae *v.* Vanbuskirk, 1 Grant's Ch. (Up. Can.) 539; Burpee *v.* Smith, 20 New Brunswick, 408.

form or contents, is not competent evidence of partnership as against him.[1]

And so, also, where parties are partners in one business, and a new and distinct business is started up, or an enterprise outside of the scope is undertaken, the declarations of one partner that another is concerned in the new business is not admissible against the latter. Nor can a partner's declarations be given in evidence to prove the extent of his own authority, for an enlargement of the scope of business thus proved is equivalent to proving others are partners by declarations to which they are not parties.[2]

In a few cases where there was evidence *aliunde* of the existence of the firm, the declarations of one partner were admitted in corroboration.[3]

And where a partner gives the declarations of his alleged copartners in evidence to disprove the partnership, the plaintiff may show their contrary declarations.[4]

And, for the same reasons, if a partnership once existed and there is evidence of its dissolution, the declarations of a partner are not admissible, as against a copartner, to show its continued existence, notwithstanding the dissolution.[5]

§ 1152. And the same principle applies where a partner has executed a note in his own name or made a purchase on

[1] Ehrman *v.* Kramer, 30 Ind. 26.

[2] *Ex parte* Agace, 2 Cox, 312; Hahn *v.* St. Clair Sav. & Ins. Co. 50 Ill. 456; Thomas *v.* Harding, 8 Me. 417; Heffron *v.* Hanaford, 40 Mich. 305; Rimel *v.* Hayes, 83 Mo. 200; Kaiser *v.* Fendrick, 98 Pa. St. 528; and see § 332, note 4. *Contra*, of statements sent by one partner to the other, Ligare *v.* Peacock, 109 Ill. 94.

[3] Folk *v.* Wilson, 21 Md. 538. See Johnson *v.* Gallivan, 52 N. H. 143; and Dutton *v.* Woodman, 9 Cush. 255; 57 Am. Dec. 46; McCann *v.* McDonald, 7 Neb. 305; Hilton *v.* McDowell, 87 N. Ca. 364. *Contra*, Robbins *v.* Willard, 6 Pick. 464.

[4] Nelson *v.* Lloyd, 9 Watts, 22.

[5] Dowzelot *v.* Rawlings, 58 Mo. 75; Johnson *v.* Gallivant, 52 N. H. 143; Alcott *v.* Strong, 9 Cush. 323; Southwick *v.* McGovern, 28 Iowa, 533; Fick *v.* Mulholland, 48 Wis. 413, where one partner had declared that the dissolution was not to take effect until the debts were paid; Nichols *v.* White, 85 N. Y. 531, where a partner gave plaintiff a written statement on procuring his indorsement that the defendant was still a partner. They would seem to have been regarded as admissible in corroboration after a *prima facie* case of continuance or holding out after dissolution, in Gilchrist *v.* Brande, 58 Wis. 184.

his own behalf; his subsequent declarations that it was for the firm or was received by them, and the like, are not admissible, because their effect is to establish a partnership in the transaction which is the very matter in dispute, and if allowed, would enable a partner to shoulder all his private obligations upon the firm, or, as said in the Michigan case cited below, would be adding one fraud to another.[1] And so of a note in the firm name made by one partner to pay his private debt, and the plaintiff knew it, the same rule applies. The partners are not a firm as to this note, or, if they may be liable, the proof must not be by allowing the chief actor in a fraud to tell his own story.[2]

Subsequent declarations or writings by both partners are not competent against the plaintiff, if in their own favor when made. Thus on the issue of whether two persons were partners at the date of a sale to them, subsequent writings executed between them or declarations are not evidence to disprove the partnership as against the plaintiff.[3]

On the other hand, where a partner executed a note in the firm name, a writing given him by the copartner after dissolution to furnish evidence that it was authorized was held competent in favor of the payee, to enable him to rank on the joint estate as a partnership creditor.[4]

§ 1153. **Res gestæ.**— Where the note was executed or loan made or goods purchased in the firm name, or where the firm name is the same as that of the individual, and the fact of partnership is proved, or where the loan was made or goods purchased without written contract, or in no name in particular, but such act is within the scope of the partnership business, then contemporaneous declarations of the partner

[1] Scott *v.* Dansby, 12 Ala. 714; Hurd *v.* Hagerty, 24 Ill. 171; Ostrom *v.* Jacobs, 9 Met. 454; Lockwood *v.* Beckwith, 6 Mich. 168; Campbell *v.* Dent, 54 Mo. 325, 330–1; Edgell *v.* Macqueen, 8 Mo. App. 71; Uhler *v.* Browning, 28 N. J. L. 79; Thorn *v.* Smith, 21 Wend. 365; Union Nat'l Bk. *v.* Underhill, 102 N. Y. 336; White *v.* Gibson, 11 Ired. L. 283; Hardy *v.* Cheney, 42 Vt. 417.

[2] Tuttle *v.* Cooper, 5 Pick. 414; Scott *v.* Dansby, 12 Ala. 714; Union Nat'l Bk. *v.* Underhill, 102 N. Y. 336.

[3] Ruhe *v.* Burnell, 121 Mass. 450. And see Dixon *v.* Barclay, 22 Ala. 370.

[4] Anderson *v.* Norton, 15 Lea, 14.

to such creditor, showing that the transaction was avowedly for the firm and in the capacity of partner, and hence that credit was given to the firm and not to the individual, are competent, the existence of the firm being proved *aliunde*.[1] But if the declarations were statements of who constituted the firm, they cannot be received, if the partnership is in issue, to show who the partners were nor to whom the other party gave credit, for that is merely showing whom he believed were partners.[2] But declarations are admissible on behalf of the creditor to show that he believed he was dealing with a firm.[3]

Declarations of an alleged partner, explanatory of and qualifying his possession of property, have been held admissible in certain cases.[4]

§ 1154. Admission good against himself.—The admission of a person that he is a partner is competent in proof of the partnership against himself.[5]

[1] Winship *v.* Bank of U. S. 5 Pet. 529; Humes *v.* O'Bryan, 74 Ala. 64, 81, a letter ordering goods in the firm name; Dodds *v.* Rogers, 68 Ind. 110; Deitz *v.* Regnier, 27 Kan. 94; Brannon *v.* Hursell, 112 Mass. 63; Lea *v.* Guice, 13 Sm. & Mar. 656; Campbell *v.* Dent, 54 Mo. 325, 330–1; Stall *v.* Catskill Bk. 18 Wend. 466, 479–80; Thorn *v.* Smith, 21 Wend. 365, 366–7; Klock *v.* Beekman, 18 Hun, 502; Gavin *v.* Walker, 14 Lea, 643. And see Brown *v.* Atkinson, 91 N. Ca. 389. It is not necessary, in case there is but one ostensible partner, to prove that the firm had a name or that the name was the same as the individual, Lea *v.* Guice, *supra*.

[2] Winchester *v.* Whitney, 138 Mass. 549; Southwick *v.* McGovern, 28 Iowa, 533; Gardner *v.* Northwestern Mfg. Co. 52 Ill. 367.

[3] Hicks *v.* Cram, 17 Vt. 449; Southwick *v.* McGovern, 28 Iowa, 533; Austin *v.* Williams, 2 Ohio, 61; McNeish *v.* Hulless Oat Co. 57 Vt. 316, declarations of a sub-agent; Gilchrist *v.* Brande, 58 Wis. 184. And see Tozier *v.* Crafts, 123 Mass. 480.

[4] Humes *v.* O'Bryan, 74 Ala. 64; Robinson *v.* Haas, 40 Cal. 474. *Contra*, Coppage *v.* Barnett, 34 Miss. 621.

[5] Corps *v.* Robinson, 2 Wash. C. C. 388, retaining accounts sent to him as partner by alleged copartner without objection; Thomas *v.* Wolcott, 4 McLean, 365, admitting that a note was signed by his partner and offering to pay it; Lewis *v.* Post, 1 Ala. 65, his entries in the books and letters; Murphy *v.* Whitlow, 1 Ariz. 340, promising to pay; Champlin *v.* Tilley, 3 Day, 303, entries in his handwriting; Bill *v.* Porter, 9 Conn. 23, 27, to render the alleged copartner incompetent as a witness for declarant; Chaffee *v.* Rentfroe, 32 Ga. 477, admissions of being interested, and packages received with his name in the firm; Fleshman *v.* Collier, 47 id.

As the admission of a member proves the partnership as against him, the existence of the firm may be proved against all by the separate admissions of each.[1] Or it may be proved

253, admitted being a partner; Carmichael *v.* Greer, 55 id. 116, letter admitting being interested and asking that goods be sold on credit; Ford *v.* Kennedy, 64 id. 537; Gregory *v.* Martin, 78 Ill. 38, statements that he was a partner but giving no terms, held too weak to be conclusive, because consistent with a tenancy in common; King *v.* Barbour, 70 Ind. 35; Cleghorn *v.* Johnson, 11 Iowa, 292, admitting correctness of the debt, and stating that the person who made the debt had no authority to use the name. This latter is no denial, for the person may have been a partner acting beyond his authority; Barcroft *v.* Haworth, 29 id. 462, failure to contradict statement that he is partner and credit is given in reliance thereon; and Town of Manson *v.* Ware, 63 id. 345, same, and declaring he was a partner; Baring *v.* Crafts, 9 Met. 380, 393–4, failure to object to form of bill, but held entitled to little or no weight; Thurston *v.* Horton, 16 Gray, 274, statements of a tenant in common of a mill, that the engine, for the price of which the action is brought, was satisfactory, are of no weight; Sullivan *v.* Murphy, 23 Minn. 6, admitting he was partner; Dixon *v.* Hood, 7 Mo. 414 (38 Am. Dec. 461), admitting he was partner; Farmers' Bank *v.* Bayless, 35 id. 428, 440, *dictum;* McCann *v.* McDonald, 7 Neb. 305; Howell *v.* Adams, 68 N. Y. 314, certificate to the banking department; Fenn *v.* Timpson, 4 E. D. Smith, 276, admission that he was one of the proprietors of Adams' Express; Wotherspoon *v.* Wotherspoon, 49 N. Y. Superior Ct. 152; Dobson *v.* Chambers, 78 N. Ca. 334, that a loan to the copartner was for both, and both owed the debt; Clark *v.* Kensall, Wright (O.), 480, having formerly put the note sued on among his schedule of debts; Cowan *v.* Kinney, 33 Oh. St. 422, simple admission; Johnston *v.* Warden, 3 Watts, 101, simple admission; Frick *v.* Barbour, 64 Pa. St. 120, after evidence that J. was a partner, and that E. asked for the books and said he had as much interest as J., the books are admissible against E. on the issue of whether he was a partner; Shelmire's Appeal, 70 Pa. St. 281, buying the other partner's interest, worth $20,000, at sheriff's sale for $110, but always thereafter dividing profits with him, and keeping the books as before, is evidence in favor of the former's administrator in an action for an accounting; Stoddart *v.* McMahan, 35 Tex. 267, recitals in deeds by him; Levy *v.* McDowell, 45 id. 220, that he was "interested" in the business, is not sufficient when offered on behalf of the other alleged partner in an action between them; Cottrill *v.* Vanduzen, 22 Vt. 511; Noyes *v.* Cushman, 25 id. 390; Lee *v.* Macdonald, 6 Up. Can. Q. B. (old ser.) 130.

[1] Currier *v.* Silloway, 1 Allen, 19; Smith *v.* Collins, 115 Mass. 388; Bryer *v.* Weston, 16 Me. 261; Jennings *v.* Estes, 16 id. 323; Mershon *v.* Hobensack, 22 N. J. L. 372; Welsh *v.* Speakman, 8 Watts & S. 257; Haughey *v.* Strickler, 2 id. 411; Ed-

as against one by his acts and against another by his declaration, and another by his consent, etc.[1] As the declarations or admissions cannot go in all at once it follows that they must be let in one at a time, although each as it goes in is not evidence, except as against the partner who made it.[2]

An answer by defendants charged as partners, admitting that they were jointly interested, without further statement, is a sufficient admission of the partnership.[3]

Declarations or admissions of each of the partners that they are partners, admissible in favor of creditors, are not admissible against or between creditors; some of whom have attached the property as individual creditors of the partners, and others, whom the debtors are trying to favor, claim it is partnership assets. The declarations are mere hearsay as to third persons.[4]

§ 1155. Reputation.— General reputation, or the understanding of the neighborhood, or notoriety of a partnership is not competent to prove the fact of a partnership or that a particular person is a partner. Such evidence is but rumor and hearsay. An ordinary contract is not allowed to be proved by rumor, and a contract of partnership is far less capable of being understood by laymen than an ordinary contract.[5]

wards *v.* Tracy, 62 Pa. St. 374; Reed *v.* Kremer, 111 id. 482; Gordon *v.* Bankard, 37 Ill. 147; Rogers *v.* Suttle, 19 Ill. App. 163; Barcroft *v.* Haworth, 29 Iowa, 462; King *v.* Ham, 4 Mo. 275; Converse *v.* Shambaugh, 4 Neb. 376.

[1] Barcroft *v.* Haworth, 29 Iowa, 462; Welsh *v.* Speakman, 8 Watts & S. 257; Johnston *v.* Warden, 3 Watts, 101.

[2] Jennings *v.* Estes, 16 Me. 223; Welsh *v.* Speakman, 8 Watts & S. 257; Haughey *v.* Strickler, 2 id. 411; Edwards *v.* Tracy, 62 Pa. St. 374.

[3] Porter *v.* Graves, 104 U. S. 171.

[4] Clinton Lumber Co. *v.* Mitchell, 61 Iowa, 122.

[5] Wilson *v.* Colman, 1 Cranch, C. C. 408; Metcalf *v.* Officer, 2 Fed. Rep. 640; 1 McCrary, 325; Carter *v.* Douglass, 2 Ala. 499; Humes *v.* O'Bryan, 74 id. 64, 81; Central R. R. & Banking Co. *v.* Smith, 76 id. 572; Campbell *v.* Hastings, 29 Ark. 512; Sinclair *v.* Wood, 3 Cal. 98; Turner *v.* McIlhany, 8 Cal. 575; Brown *v.* Crandall, 11 Conn. 92; Gaffney *v.* Hoyt (Idaho), 10 Pac. Rep. 34; Joseph *v.* Fisher, 4 Ill. 137; Bowen *v.* Rutherford, 60 Ill. 41 (14 Am. Rep. 25); Earl *v.* Hurd, 5 Blackf. 248; Macy *v.* Combs, 15 Ind. 469; Uhl *v.* Harvey, 78 id. 26; Brown *v.* Rains, 53 Iowa, 81; Southwick *v* McGovern, 28 id. 533; Bryden *v.* Taylor, 2 Har. & J. 396, 400; Sager *v.* Tupper, 38 Mich. 258; Atwood *v.* Meredith, 37 Miss.

Hence the reports of a mercantile agency or a city directory are not admissible in proof that a person was a member of a firm, unless their authorship or adoption is brought home to the party.[1]

Representations by a person to these agencies as to his own standing, capital or condition, or that of his firm, are intended for any one who relies on them, and courts take judicial notice of such agencies.[2]

Yet general reputation of the existence of a partnership, admitted in corroboration of other evidence of the fact, has been sustained by *dicta* in the following cases.[3]

635, 639; Lockridge *v.* Wilson, 7 Mo. 560, 562; Grafton Bank *v.* Moore, 13 N. H. 99 (38 Am. Dec. 478); Taylor *v.* Webster, 39 N. J. L. 102; Smith *v.* Griffith, 3 Hill, 333; Halliday *v.* McDougall, 20 Wend. 81 (reversed on other points in 22 id. 264); McGuire *v.* O'Halloran, Hill & D. Supp. 85; Hunt *v.* Jucks, 1 Hayw. (N. Ca.) 173 (1 Am. Dec. 555); Inglebright *v.* Hammond, 19 Oh. 337 (53 Am. Dec. 430); Cook *v.* Slate Co. 36 Oh. St. 135, 159; Allen *v.* Rostain, 11 S. & R. 362; Hicks *v.* Cram, 17 Vt. 449; Carlton *v.* Ludlow Woolen Mill, 27 id. 496; Gay *v.* Fretwell, 9 Wis. 186; Benjamin *v.* Covert, 47 id. 375, 384; and see Cross *v.* National Bank, 17 Kan. 336. The leading cases are Halliday *v.* McDougall, *supra* (overruling earlier N. Y. cases), and Brown *v.* Crandall, *supra*. *Contra*, Whitney *v.* Sterling, 14 Johns. 215; Gowan *v.* Jackson, 20 id. 176 (no objection was made), and McPherson *v.* Rathbone, 11 Wend. 98 (and these cases so far are overruled by 20 Wend. 81, *supra*).

[1] Campbell *v.* Hastings, 29 Ark. 512; Southwick *v.* McGovern, 28 Iowa, 533; Cook *v.* Slate Co. 36 Oh. St. 135. See Zollar *v.* Janvrin, 47 N. H. 324, 325.

[2] Genesee Sav. B'k *v.* Mich. Barge Co. 52 Mich. 164; Eaton, Cole & Burnham Co. *v.* Avery, 83 N. Y. 31.

[3] Gulick *v.* Gulick, 14 N. J. L. 578, 583; Whitney *v.* Sterling, 14 Johns. 215 (*dictum*); Allen *v.* Rostain, 11 S. & R. 362 (a *dictum*); Turner *v.* McIlhany, 8 Cal. 575 (a *dictum*); Atwood *v.* Meredith, 37 Miss. 635, 639 (a *dictum*); Gaffney *v.* Hoyt (Idaho), 10 Pac. Rep. 34, requiring the other evidence to be sufficient to sustain the verdict. And in Inglebright *v.* Hammond, 19 Oh. 337 (53 Am. Dec. 430); and Gay *v.* Fretwell, 9 Wis. 186, the rejection of evidence of reputation is accompanied by the limiting words "when disconnected with the acts and admissions or knowledge of the party." And see Gulick *v.* Gulick, 14 N. J. L. 578, 583; but according to Taylor *v.* Webster, 39 N. J. L. 102, such reputation must be shown to exist by the authority, assent, connivance or negligence of the person sought to be charged. And in Cross *v.* National Bank, 17 Kan. 336, it was said, *arguendo*, that if the acts of a person have induced a belief in another that he is a partner, a general reputation of the fact supports the reasonableness of the party's belief, but as the point was

§ **1156.** Where a partnership has been shown to have in fact been in existence at a certain time, general reputation of its present existence has been received to support the presumption of continuance.[1] And perhaps general reputation is admissible to show knowledge of the non-existence of a partnership,[2] or to show that one partner was dormant.[3]

So, also, reputation or common report is not evidence of a dissolution.[4]

§ **1157. —— notoriety as evidence of notice.**— This principle does not impugn the doctrine that reputation may be evidence of knowledge. As where a partnership is proved as a fact *aliunde*, and plaintiff's knowledge of it may be inferred as a probability from its being generally known.[5]

So, given the fact of a dissolution, a probability of plaintiff's knowledge of it may be shown by general reputation.[6]

§ **1158. Opinion.**— The testimony of a witness as to the fact of a partnership may be nothing more than mere opinion, or it may be the short result of a recollection of facts.

A partner may testify as to who were his copartners at a given date.[7] But his knowledge of it as a positive fact, and not his opinion, must be asked for.[8] Nor if the terms of the contract,

not properly raised it was not decided; and in Rizer *v.* James, 26 id. 221, it was held that the admission of such evidence was not material error, the other evidence of partnership being very conclusive.

[1] Benjamin *v.* Covert, 47 Wis. 375; 55 id. 157; Coggswell *v.* Davis, 65 id. 191; Southwick *v.* McGovern, 28 Iowa, 533 (mercantile agency reports).

[2] Humes *v.* O'Bryan, 74 Ala. 64, 81.

[3] Metcalf *v.* Officer, 2 Fed. Rep. 640; 1 McCrary, 325.

[4] Goddard *v.* Pratt, 16 Pick. 412, 433; Halliday *v.* McDougall, 20 Wend. 81, 90.

[5] Humes *v.* O'Bryan, 74 Ala. 64 81; Wood *v.* Pennell, 51 Me. 52; Boyd *v.* Ricketts, 60 Miss. 62; Atwood *v.* Meredith, 37 Miss. 635, 639; Central R. R. & Banking Co. *v.* Smith, 76 Ala. 572; Southwick *v.* McGovern, 28 Iowa, 533.

[6] Carter *v.* Whalley, 1 B. & Ad. 11; Gaar *v.* Huggins, 12 Bush, 259, 262; Bernard *v.* Torrance, 5 Gill & J. 383; Halliday *v.* McDougall, 20 Wend. 81, 89; Humes *v.* O'Bryan, 74 Ala. 64, 81; Uhl *v.* Harvey, 78 Ind. 26. And see § 622.

[7] Gates *v.* Manny, 14 Minn. 21; Walsh *v.* Kelly, 42 Barb. 98. And see Durgin *v.* Somers, 117 Mass. 55.

[8] Atwood *v.* Meredith, 3 Miss. 635, 639.

though an oral one, are before the court, for it then becomes a question of construction.[1]

The mere statement of a witness that defendants were partners, without showing that he knew any facts, is not admissible.[2]

Testimony as to whom witness gave credit is not admissible to prove defendant a partner;[3] yet it has been held competent in order to show the state of plaintiff's mind.[4]

If a witness has had dealings with a firm and conversations with its members, the authorities seem hopelessly at variance as to whether a witness thus qualified can state in so many words that the defendants were partners, or, what is practically the same thing, that he considered them such.[5]

§ 1159. Time to which the proof may relate.— Owing to the difficulty of proving that a relation existed at an exact date, evidence of a partnership near the desired date is always admissible. A partnership shown to exist is evidence of its existence at a later date under the usual *prima facie* presumption of the continuance of a juridical relation or constancy of a condition of affairs, more or less strong according to the length of intervening time.[6] The partnership

[1] Lintner *v.* Milliken, 47 Ill. 178, 181.

[2] Williams *v.* Soutter, 7 Iowa, 435. *Contra,* Sankey *v.* Columbus Iron Works, 44 Ga. 228, and a *dictum* in Choteau *v.* Raitt, 20 Oh. 132, 143.

[3] Danforth *v.* Carter, 4 Iowa, 230.

[4] Seekell *v.* Fletcher, 53 Iowa, 330.

[5] That he can do so was held in Anderson *v.* Snow, 9 Ala. 247; Gowan *v.* Jackson, 20 Johns. 176; Parshall *v.* Fisher, 43 Mich. 529; Hadden *v.* Shortridge, 27 id. 212 (but no objection seems to have been made here); Dearing *v.* Smith, 4 Ala. 432; McGrew *v.* Walker, 17 id. 824 (explaining Anderson *v.* Snow, 9 id. 247); Central R. R. & Banking Co. *v.* Smith, 76 id. 572 (a *dictum*); Rankin *v.* Harley, 12 New Brunswick, 371, here plaintiffs proved their own partnership by the evidence of a dealer, though they themselves could have testified. And see Wattles *v.* Moss, 46 Mich. 52. *Contra,* that such testimony is too loose, and would lead to dangerous consequences, Joseph *v.* Fisher, 4 Ill. 137; Shepard *v.* Pratt, 16 Kan. 209; Turner *v.* McIlhaney, 8 Cal. 575. And see Carlton *v.* Ludlow Woolen Mill, 27 Vt. 496; and Ridenour *v.* Mayo, 40 Oh. St. 9, 14. In fact the latter opinion seems most reasonable, for a witness' opinion may be derived from rumor or from what some one else told him, and to let it in is but letting in reputation.

[6] Butler *v.* Henry, 48 Ark. 551; Bevans *v.* Sullivan, 4 Gill, 383; Anslyn *v.* Frank, 11 Mo. App. 598; Sager *v.* Tupper, 38 Mich. 258; Buck *v.*

of defendants having been proved by the plaintiff in the first instance, it becomes incumbent on the defendants to prove dissolution and notice to the plaintiff.[1] Evidence of partnership before and after the date of a note is evidence of it at that date.[2]

The admissibility, however, of evidence of a subsequent date to prove partnership at a prior date is one of relevancy; a question the solution of which, like most questions of relevancy, varies with the length of the judge's foot.

Thus in Byington *v.* Woodward, 9 Iowa, 360, an advertisement by the firm in a newspaper was held evidence of its then existence, but not of its existence four months previously, when the note sued on was made. On the other hand, in Fleshman *v.* Collier, 47 Ga. 253 (overruling Collier *v.* Cross, 20 Ga. 1), proof of a partnership at one date was held evidence of its existence three months before to go to the jury with other proof; and in Gowan *v.* Jackson, 20 Johns. 176, evidence that a partnership existed at one date was held to throw upon the other party the burden of disproving it at a date six months earlier.

So the fact of a dissolution in April is evidence tending to prove that no partnership existed in the following June, although the parties could have formed a new partnership at once.[3]

The presumption of continuance is not retrospective, and evidence that plaintiff and another made joint contracts in 1856 was held not admissible to show that they should have joined as plaintiffs in a suit on a cause of action which arose in 1854 and 1855.[4]

§ 1160. Prior judgment as evidence.— A prior judgment between the same parties, in a case where the issue was whether the defendant was a member of a certain firm, is conclusive proof of partnership at that date;[5] but a judg-

Smith, 2 Colorado, 500; Bennett *v.* Holmes, 32 Ind. 108, eight months difference; Jenkins *v.* Davis, 54 Wis. 253, but the difference in time here was only one day; Wilkins *v.* Earl, 44 N. Y. 172; Currier *v.* Silloway, 1 Allen, 19, where an affidavit eight months old was held a good admission against the partner who made it.

[1] Howe *v.* Thayer, 17 Pick. 91.

[2] Gilbert *v.* Whidden, 20 Me. 367.

[3] Floyd *v.* Miller, 61 Ind. 224, 237-8.

[4] Green *v.* Caulk, 16 Md. 556; Butler *v.* Henry, 48 Ark. 551.

[5] Lynch *v.* Swanton, 53 Me. 100.

ment on another note of the same date is not conclusive evidence but *prima facie* only.[1]

A judgment in other cases against persons as partners, obtained or suffered by default, is admissible as evidence of the partnership in favor of another plaintiff, but is not conclusive.[2]

But a decree in a proceeding between two persons, finding that they are not partners, is not evidence in favor of one of them when suing on a note, the defense being that the note belonged to the firm and not to the plaintiff alone. The decree did not settle a question of *status* out of contract.[3]

So where a person sues one partner, and judgment being rendered for the defendant sues the other on the same cause of action, the judgment in the former suit is not evidence in favor of the second defendant.[4]

WITNESSES.

§ 1161. The disqualification of a person to be a witness on account of interest has been of diminishing importance ever since Bentham's attacks upon it, and in many jurisdictions no longer remains, except where the other party to a contract is dead.

A short notice of the subject may be found of use, but in view of its increasingly local character, its application to partnership litigation will be very briefly noticed here.

[1] Dutton *v.* Woodman, 9 Cush. 255 (57 Am. Dec. 46); Coville *v.* Gilman, 13 W. Va. 314.

[2] Parks *v.* Mosher, 71 Me. 304, limiting and explaining Cragin *v.* Carleton, 21 id. 492; and see Ellis *v.* Jameson, 17 id. 235; Fogg *v.* Greene, 16 id. 282; City Bank of Brooklyn *v.* Dearborn, 20 N. Y. 244, 245; Marks *v.* Sigler, 3 Oh. St. 358; Central R. R. & Banking Co. *v.* Smith, 76 Ala. 572; Latham *v.* Kenniston, 13 N. H. 203; Wittner *v.* Schlatter, 15 S. & R. 150; Collier *v.* Cross, 20 Ga. 1, that a judgment against persons as partners is not evidence that they were partners at a subsequent date must be considered as overruled by later cases in that state. See Fleshman *v.* Collier, 47 id. 253.

[3] McDonald *v.* Matney, 82 Mo. 358. But see Coit *v.* Owen, 2 Desaus. (S. Ca.) 456.

[4] McLelland *v.* Ridgeway, 12 Ala. 482. And see Sturges *v.* Beach, 1 Conn. 507.

§ 1162. Except where statutes have removed disqualification for interest, a partner is not a competent witness on behalf of his copartners against plaintiff, who is suing on an alleged partnership debt, or against a defendant whom the firm is proceeding against, to prove a case or a defense in favor of the side on which his pecuniary interest lies.[1]

So where R. sold out to his copartner G., who assumed all the debts, and judgments having been rendered against the partners, G. applied for the benefit of the insolvent debtor's act. R. is not a competent witness in favor of the judgment creditors to charge G. with having made a false schedule, because he is interested to increase the joint fund and thus diminish his own liability, and also to convict G. and thus coerce payment of the partnership debts.[2]

Where, of two partners, one sold out his interest to a third person, who assumed the seller's share of the debts, in an action against the original partners for work done for the firm, such buyer is not a competent witness to prove payment.[3]

And where one of the defendants sold out his share in the firm to a third person, who assumed his liabilities, such ex-partner is not thereby made a competent witness for the other partners; a third person cannot release him.[4]

The fact that the proposed witness has not been made a co-defendant does not qualify him in favor of those sued, because, although there would be no judgment against him, yet the diminution of partnership effects, consequent on an unfavorable judgment, constitutes a disqualifying interest.[5]

[1] Nightingale *v.* Scannell, 6 Cal. 506; Robinson *v.* Turner, 3 G. Greene (Iowa), 540; Ellis *v.* Fisher, 10 La. Ann. 479; Porche *v.* La Blanc, 12 La. Ann. 778; Wilson *v.* Clarke, 27 Miss. 270; Dixon *v.* Hood, 7 Mo. 414 (38 Am. Dec. 461); Choteau *v.* Raitt, 20 Oh. 132; Gardiner *v.* Levaud, 2 Yeates, 185; Purviance *v.* Dryden, 3 S. & R. 402, that defendant had received assets of the firm from the other partner in payment of individual debts; Schnader *v.* Schnader, 26 Pa. St. 384; and cases in this chapter *passim*. Even on his *voir dire* as to his interest, Robinson *v.* Turner, *supra*.

[2] Yeakle *v.* George, 12 Rich. L. 153.

[3] Perry *v.* Randolph, 6 Sm. & Mar. 335.

[4] Wise *v.* Patterson, 3 G. Greene (Iowa), 471.

[5] Bill *v.* Porter, 9 Conn. 23; Carter *v.* Connell, 1 Whart. 392. And see Choteau *v.* Raitt, 20 Oh. 132

Some authorities have declined to recognize remote disqualifications where it was difficult to ascertain whether the testimony would benefit or injure his interest; as where an action was brought against surviving partners and the existence of the firm was denied, separate creditors of the deceased partner, who had died insolvent and whose estate was liable for the demand, were held competent witnesses for the plaintiff although interested in the success of his claim, as it would otherwise be a liability of such separate estate.[1] And a creditor holding assets of the alleged partnership by an assignment from the decedent as security for his debt is a competent witness and can testify for the defendant, for although the security might be affected by proving the partnership, yet the survivor might be in arrears to the decedent.[2]

§ **1163.** A partner's testimony against his own interest is competent.

Thus where the separate creditor of one partner, B., of the firm of B. & T., levied on B.'s interest in the partnership property, and T., the other partner, claimed a prior lien for advances by him to the firm, B. can testify for T. to prove the advances, for his interest is to sustain the presumption that he owns an equal share in the firm; hence his testimony is against his legal interest.[3]

So where the holder of a note signed in the firm name sues one partner alone, the other partner can testify that he himself made the note without authority from the defendant and that the plaintiff had notice thereof.[4]

§ **1164. Matters outside the firm.**—Parties are not disqualified from the mere intimacy of the relation from testifying for each other as to matters outside the business of the firm in which the testifying partner has no pecuniary interest.[5]

Thus where two persons were partners as carriers, and hence jointly interested in the freight earned, but one alone was entitled

[1] Haseltine *v.* Madden, 7 Rich. (S. Ca.) L. 16. See, also, Ward *v.* Chase, 35 Me. 515.

[2] Chamberlin *v.* Madden, 7 Rich. (S. Ca.) L. 20.

[3] Bryant *v.* Hunter, 6 Bush, 75.

[4] Robertson *v.* Mills, 2 Har. & Gill, 98.

[5] Sloan *v.* Bangs, 11 Rich. L. 97; Thompson *v.* Franks, 37 Pa. St. 327; Ward *v.* Coulter, 4 N. J. L. 208.

to commissions for selling the property carried, the other can testify on his behalf as to the commissions.[1]

So where several persons in contemplation of a partnership in real estate employ an agent to purchase the property and each gives the agent a note for his compensation and then form a partnership, but an agreement was afterwards made for the surrender of the notes, the copartners can testify for one who was sued on his note which had not been surrendered and prove the agreement.[2]

§ 1165. Removal of interest.— The disqualification of a partner as a witness on the ground of interest is terminated if his interest is removed, as it may be by releases and the like, or it may be removed so as to qualify him in favor of one party and not of the other. Hence there is some difference whether he is released by his co-parties or by the opposite side.

Thus in an action against partners on a note the partner who signed the note in the firm name, and is therefore interested on behalf of the plaintiff to prove it to be a partnership debt and thus divide his own liability, is made competent for the plaintiff by the plaintiff's releasing all demands as a partner against him.[3]

So where W. bought a chattel from the firm of A. & B., and now brings replevin for it against one F., who claims to be the owner, and B. having died and A. being interested in having W. win the action, because otherwise he would be liable to W. on an implied warranty of title, is rendered a competent witness for W. by a release of liability from W. on the implied warranty.[4]

So if one partner has by agreement with his copartners assumed all the partnership debts, he becomes thereby a competent witness in favor of a creditor of the firm in an action against all the partners, for his own liability would not be increased by the plaintiff's success, since he must indemnify his copartners.[5]

[1] Mooreman *v.* Graffenread, 2 Mill (S. Ca.), 195.

[2] Pollock *v.* McClurken, 42 Ill. 370.

[3] Whitehead *v.* Bank of Pittsburg, 2 W. & S. 172. And see Black *v.* Campbell, 6 W. Va. 51.

[4] Wright *v.* Funck, 94 Pa. St. 26. And see Churchill *v.* Bailey, 13 Me. 64.

[5] Bell *v.* Thompson, 34 Ill. 529; Brown *v.* Hurd, 41 id. 121; Miner *v.* Downer, 20 Vt. 461.

§ **1166.** If, however, the partner is sought to be called as a witness on behalf of his copartners, a release that would leave him liable for costs is not sufficient.[1]

Thus where two partners assigned all their property, joint and individual, for benefit of creditors, and the assignee brings a suit to recover a debt due to one of the partners, the other is not made competent by releasing all interest in any surplus because the costs are a charge upon the fund.[2]

So where the ostensible partner brought an action for the firm, the dormant partner is not qualified to testify for him by releasing all interest in the claim, because he would still be liable for the costs even if there were no debts, and his liability for other debts would be increased by decreasing the partnership fund, and he cannot get rid of the liability for debts.[3]

So where a surviving partner brings suit to collect a debt, the widow of the deceased partner cannot testify for him upon releasing her interest in the claim, because the estate is liable to share costs if the surviving partner does not recover.[4]

Yet where the payee of a note assigned it as collateral to a firm to which he was indebted, and the partners brought a suit upon the note against the maker, one partner was held to be a competent witness for the plaintiff on assigning to his copartners all his interest in the note in suit and in the debt, and on their releasing him from liability for costs.[5]

And a partner of the plaintiffs cannot make himself competent by releasing his interest and offering to deposit money to cover the costs. The reason assigned in the decision is that he cannot be made competent by any act of his own against the defendant's consent.[6]

A release by part of the copartners, all of whom were sued, will not qualify a partner to prove payment, because he would still be liable to contribute to the non-releasing partners, if the defense was not sustained.[7]

§ **1167.** If the partners are defendants instead of plaintiffs, and one suffers judgment by default, or confesses judg-

[1] Carter *v.* Connell, 1 Whart. 392.
[2] Cummings *v.* Fullam, 13 Vt. 441.
[3] Pickett *v.* Cloud, 1 Bailey (S. Ca.), 362.
[4] Allen *v.* Blanchard, 9 Cow. 631.
[5] Blake *v.* Buchanan, 22 Vt. 548.
[6] Loomis *v.* Loomis, 26 Vt. 198.
[7] Curtis *v.* Monteith, 1 Hill, 356.

ment (and plaintiff cannot prevent his so doing, for he has that right in order to save costs),[1] he becomes a competent witness on behalf of his co-defendants to testify that they were not his partners, because a verdict for them would not affect the judgment against him. That is, he can be a witness to exculpate them,[2] but not to inculpate them, if he is interested in so doing; and hence he does not become a competent witness on behalf of the plaintiff against his co-defendants to prove that they were his partners, because he is interested to lighten his own burthen by making them liable to contribution.[3]

A nominal partner — one who had retired but allowed his name to be continued — was held to become a competent witness for his copartners upon their giving him a bond of indemnity and release and offer to deposit sufficient money to cover his liability.[4]

So where a partner bought out the share of his copartner in the firm and gave him a bond to assume all debts, and afterwards brought an action against a debtor of the firm who pleaded a set-off, the retired partner is not a competent witness on behalf of the defendant to establish the set-off, because if it is a debt against the partners as individuals, and not a partnership debt, it is not covered by the bond, and he is liable for his share; hence he is interested in establishing the set-off as a firm debt.[5]

Where a partner has made a usurious contract without the knowledge of his copartner, who is sued alone on an agreement which merged the usurious contract, the former partner is a competent witness for defendant after the latter has released him from liability, for the witness then has no interest and is not liable to account, and in fact his interest is, if anything, on behalf of the plaintiff, because a judgment for the defendant partner on the

[1] Thomas *v.* Mohler, 25 Md. 26.

[2] Scott *v.* Jones, 5 Ala. 694; Aicardi *v.* Strang, 38 Ala. 326; Smith *v.* Knight, 71 Ill. 148; Barker *v.* Ayers, 5 Md. 202; Thomas *v.* Mohler, 25 Md. 36; James *v.* Brooke, 15 La. Ann. 541; Long *v.* Story, 13 Mo. 4; Butcher *v.* Forman, 6 Hill, 583.

[3] Brown *v.* Brown, 4 Taunt. 752; Mant *v.* Maiuwaring, 8 Taunt. 139; 2 Moore, 9; Cody *v.* Cody, 31 Ga. 619; Fairchild *v.* Amsbaugh, 22 Cal. 572; Columbian Mfg. Co. *v.* Dutch, 13 Pick. 125; Albers *v.* Wilkinson, 6 Gill & J. 358; Alexander *v.* Crosthwaite, 44 Ill. 359. *Contra*, Bacon *v.* Hutchings, 5 Bush, 595; Robinson *v.* McFaul, 19 Mo. 549, under a code.

[4] Fleming *v.* Dorn, 31 Ga. 213.

[5] Hoyt *v.* Murphy, 23 Ala. 456.

agreement would revive the witness' liability on the original demand.[1]

§ 1168. As a witness for the opposite party.— A plaintiff who is suing upon an alleged partnership debt due to him cannot call one of the partners to prove the partnership, for such partner is interested on behalf of the plaintiff to prove the others to be partners, and thus transfer part of the liability upon them.[2] Or, what amounts to the same thing, he cannot call upon one defendant whose liability is admitted to prove that the claim was a partnership transaction,[3] as to testify that money borrowed or a note signed by him individually was for and on behalf of the firm.[4]

Thus where G., a creditor of S. and his partners, sued the executor of H., claiming that H. was a partner, S., who had contracted the debt, is not a competent witness for the plaintiff to prove the partnership, for this would shift part of his responsibility.[5]

§ 1169. But the partnership of the defendants being proved or admitted, either one of the partners is a competent witness on behalf of the plaintiff to prove the rest of his case, because his pecuniary interest is to defeat the action. Or if the partners are plaintiffs, he can testify for the defendant;[6] but not in favor of the creditor who has sued

[1] Jackson *v.* Jones, 13 Ala. 121.

[2] Ripley *v.* Thompson, 12 Moore, 55; Lewis *v.* Post, 1 Ala. 65; Dickson *v.* Collins, 17 Ala. 635; Easterly *v.* Bassignano, 20 Cal. 489; Bill *v.* Porter, 9 Conn. 23; Barney *v.* Earle, 20 Ala. 405; Brown *v.* Hurd, 41 Ill. 121; McIlvaine *v.* Franklin, 2 La. Ann. 622; Spaulding *v.* Smith, 10 Me. 363; Garner *v.* Myrick, 30 Miss. 448; Latham *v.* Kenniston, 13 N. H. 203; Marquand *v.* Webb, 16 Johns. 89; Pierce *v.* Kearney, 5 Hill, 82; Miller *v.* McClanachan, 1 Yeates, 144; Hogeboom *v.* Gibbs, 88 Pa. St. 235; State *v.* Penman, 2 Desaus. (S. Ca.) 1; Vanzant *v.* Kay, 2 Humph. 106; Scott *v.* Bandy, 2 Head, 197; Philips *v.* Henry, 2 id. 133. And see preceding section. The contrary was held where the witness was not made a co-defendant, in Washing *v.* Wright, 8 Ired. L. 1.

[3] Hale *v.* Wetmore, 4 Oh. St. 600. And see Hoyt *v.* Murphy, 23 Ala. 456.

[4] Ellis *v.* Lauve, 4 La. Ann. 245; Rich *v.* Husson, 4 Sandf. 115; Foster *v.* Hall, 4 Humph. 306.

[5] Hogeboom *v.* Gibbs, 88 Pa. St. 235.

[6] Hudson *v.* Robinson, 4 M. & S. 475; Blackett *v.* Weir, 5 B. & C. 385; Hall *v.* Curzon, 9 id. 646; Cunning-

the other partner alone, to testify that the latter had assumed all the debts, nor in favor of a creditor sued by the other partner, and seeking to set off his claim against the other's individual demand.[1]

§ 1170. After death of a partner.— The statutes abolishing disqualifications on account of pecuniary interest generally preserve the incompetency where one of the parties represents the interest of a deceased person, at least where the transaction to be testified to was between the decedent and the witness.

Under some of these statutes, where one partner dies, the opposite party cannot be a witness against the surviving partner to prove conversations or a contract made by him with the deceased.[2] While under other statutes the opposite party can so testify.[3]

ham *v.* Carpenter, 10 Ala. 109; Little *v.* Hazzard, 5 Harr. (Del.) 291; Brooks *v.* McKinney, 5 Ill. 309; Crook *v.* Taylor, 12 Ill. 353; Gregory *v.* Dodge, 4 Paige, 557; Norman *v.* Norman, 2 Yeates, 154; Moddewell *v.* Keever, 8 W. & S. 63; Taylor *v.* Henderson, 17 S. & R. 453; Canon *v.* Campbell, 18 Pa. St. 164; Brewster *v.* Sterrett, 32 Pa. St. 115; Corrie *v.* Calder, 6 Rich. (S. Ca.) L. 198; Vanzant *v.* Kay, 2 Humph. 106; Young *v.* Read, 25 Tex. Supp. 113; though the witness is insolvent, Corrie *v.* Calder, *supra*. *Contra*, Latham *v.* Kenniston, 13 N. H. 203, where it is said that the point is disputed and that the English common pleas and king's bench are at variance. But in fact there is no such variance. The difference between the cases is that stated above, viz.; a person cannot prove others to be partners with him, and hence divide his liability; but if the partnership is proved so that his testimony for the plaintiff is not in his own interest, he is not disqualified.

[1] Hoyt *v.* Murphy, 18 Ala. 316. And see Hale *v.* Wetmore, 4 Oh. St. 600.

[2] Long *v.* McDonald, 29 Ga. 186; Ford *v.* Kennedy, 64 Ga. 537; McWhorter *v.* Sell, 66 Ga. 139, regards the survivor and deceased as agent and principal; Roney *v.* Buckland, 4 Nev. 45; Green *v.* Edick, 56 N. Y. 613; Sikes *v.* Parker, 95 N. Ca. 232; Hanna *v.* Wray, 77 Pa. St. 27; Standbridge *v.* Catanach, 83 Pa. St. 368, regards the survivor as an assignee of the decedent; Brady *v.* Reed, 87 id. 111.

[3] Nicklaus *v.* Dahn, 63 Ind. 87; Dodds *v.* Rogers, 68 id. 110; Ruddick *v.* Otis, 33 Iowa, 402; Brown *v.* Allen, 35 id. 306; Holmes *v.* Brooks, 68 Me. 416, of the survivor as statutory administrator; Hayward *v.* French, 12 Gray, 453; Brady *v.* Brady, 8 Allen, 101; Faler *v.* Jordan, 44 Miss. 283; McCutchen *v.* Rice, 56 id. 455; Crane *v.* Gloster, 13 Nev. 279; Tremper *v.* Conklin, 44 N. Y. 58 (aff'g 44 Barb. 456); Peacock *v.*

The reasons for these rulings vary with the language of the various statutes. Thus in some the disqualification is in cases where an administrator is a party, and hence *ex vi termini* do not apply to actions by and against the surviving partner alone.[1] In others the statute applies where a legal representative or assignee of a deceased person is a party, and a surviving partner is held to be neither of these.[2] In others because the death of a party is construed as referring to a sole party, or, if there are joint parties, to the death of all of them, thus treating the firm as an entity.[3]

If the contract was with[4] or in the presence of the surviving partner,[5] the other party is not disqualified by the death.

§ 1171. Between partners.—If the suit is between the surviving partner and executor or administrator of a deceased partner, either for an accounting or to collect a balance, or get possession of property, the disqualification obtains to prevent testifying to the existence of the partnership or transactions with the deceased.[6]

In an accounting between two partners, if the testimony of one was taken before the master, and the other subsequently died, the testimony, being legitimate when taken, and there having been sufficient opportunity to take that of the other party before his death, is not to be stricken out.[7]

Stott, 90 N. Ca. 518; Roberts *v.* Yarboro, 41 Tex. 449; Carlton *v.* Mays, 8 W. Va. 245.

[1] Nicklaus *v.* Dahn, 63 Ind. 87; Dodds *v.* Rogers, 68 id. 110; Ruddick *v.* Otis, 33 Iowa, 402; Brown *v.* Allen, 35 id. 306; Roberts *v.* Yarboro, 41 Tex. 449.

[2] Holmes *v.* Brooks, 68 Me. 416; Crane *v.* Gloster, 13 Nev. 279; Tremper *v.* Conklin, 44 N. Y. 58 (aff'g 44 Barb. 456); Carlton *v.* Mays, 8 W. Va. 245.

[3] Hayward *v.* French, 12 Gray, 453; Brady *v.* Brady, 8 Allen, 101.

[4] McCutchen *v.* Rice, 56 Miss. 455; Bennett *v.* Frary, 55 Tex. 145.

[5] Peacock *v.* Stott, 90 N. Ca. 518; Comstock *v.* Hier, 73 N. Y. 269, 280; Kale *v.* Elliott, 18 Hun, 198.

[6] Causler *v.* Wharton, 62 Ala. 358; Eppinger *v.* Canepa, 20 Fla. 262; Graham *v.* Howell, 50 Ga. 203; Bryan *v.* Tooke, 60 id. 437; Sikes *v.* Parker, 95 N. Ca. 232. In Marvin *v.* Dutcher, 26 Minn. 391, the survivor was not a party, the action being against an executor for an accounting of the estate of the decedent, and the survivor was admitted to testify that certain items belonged to the partnership. He was therefore interested, but only indirectly, and not by the direct operation of the judgment.

[7] Hay's Appeal, 91 Pa. St. 265.

In an action against a firm on a note one partner was held competent to testify that the deceased partner, who had given the note, was not authorized to do so.[1]

The statute does not apply where a firm sues the estate of a deceased debtor to it when the liability is not in question, but the dispute is between the partners as to the right of one to share in the claim.[2]

The adverse party may call the surviving partner as a witness: his place on the record, and not his presumed friendliness, settles the question of competency.[3] In that case, however, he becomes a witness for all purposes; but this does not render the plaintiff a competent witness.[4]

[1] Bryan *v.* Tooke, 60 Ga. 437.
[2] Thrall *v.* Seward, 37 Vt. 573.
[3] Packer *v.* Noble, 103 Pa. St. 188; White *v.* Tudor, 24 Tex. 639; Tudor *v.* White, 27 id. 584.
[4] Terry *v.* Ragsdale, 33 Gratt. 342.

APPENDIX.

Following are some of the common clauses of partnership articles. The forms are most of them not original, but are copies or adaptations from various standard works on conveyancing and reported cases, preceded by a list of the clauses.

A chief value of this list and the clauses is not so much to dictate forms as to suggest to the parties what contingencies must be arranged for in advance; for the solicitor will generally find their notions so vague and indefinite that he will not only have their contract to put into shape, but will also have to help them make it.

CLAUSES OF FORMATION.

1. Names.
2. Nature of the business.
3. Commencement and duration.
4. Firm name.
5. Locality.
6. Capital.
7. Profits and losses.
8. Premium.
9. Guaranty of profits and return of premium; valuation of old stock.
10. Purchase of business by incoming partners.
11. Assumption of old partners' debts.
12. Proviso for admission of son of partner.

ALLOWANCES AND CHARGES.

13. Allowances for rent.
14. Interest allowances and charges.
15. Increase of capital.
16. Office held by a partner.
17. Allowances for subsistence.
18. Salary or commissions to partner.
19. Charges for rent.
20. Allowance for treating customers.
21. Allowance of merchandise for private consumption.
22. Allowance for boarding hands.

INTERNAL RESTRICTIONS.

23. Fidelity.
24. Giving time.
25. Not to engage in other business.
26. General restrictions, as to use of assets or credit, compromising debts, going security, gambling, pledging share or property, signing paper.
27. Employment of servants.
28. Powers of majority.

ACCOUNTING CLAUSES.

29. Accounts and books.
30. Cash account.
31. Periodical accounting.

DISSOLUTION CLAUSES.

32. Right to dissolve.
33. Notice to dissolve.
34. Option to buy share at valuation.
35. Indemnity to retiring partner.
36. Death not to dissolve, and executor's powers.
37. Compensation to surviving partners.
38. Winding up.
39. Expulsion of a partner.

DISPUTES.

40. Arbitration clause.
41. Penal.

1. **Names.**— This agreement, made this —— day of ——, 18—, between A. of the city of ——, and C. of the city of ——, and D. of the city of ——, witnesseth as follows:

2. **Nature of the business.**— Said parties have mutually agreed to become partners in the business of ——.

3. **Commencement and duration.**— Said partnership shall commence on the —— day of ——, and continue for the term of —— years, subject to the provisions herein contained for prior dissolution.

4. **Firm name.**— The firm and style of said partnership shall be A., B. & Co.

5. **Locality.**— Its said business shall be carried on at ——, or in such other places as said parties shall from time to time mutually agree upon.[1]

6. **Capital.**[2]— The capital of said partnership shall consist of the sum of $——, and shall be contributed as follows, to wit: A. shall contribute $—— in cash on or before the —— day of ——, to be deposited to the credit of said firm at the Bank of ——; B. shall contribute the stock of goods now owned by him at ——, the value of which is hereby mutually agreed to be $——, and no part of the capital shall be advanced by C.

Said partners shall be interested in said capital and business in the following proportions: A. one-half; B. two-sixths, and C. one-sixth. And A. and B. shall be considered as creditors of the firm, in respect of their said contribu-

[1] In drawing articles these clauses can all be condensed; for example, the above five can be put into one, thus: Said parties have mutually agreed to become partners in the business of —— for the term of —— years, under the firm style of ——, the business to be carried on at ——.

[2] § 251.

tions, and shall be allowed interest on the same at the rate of —— per cent. per annum, payable annually out of the profits, but shall receive no interest unless profits are made.

7. **Profits and losses.**[1] — The profits of the business, after deducting interest, shall be equally divided on the —— day of —— of every year, and losses shall be borne in equal proportions [except that losses by the wilful neglect or default of any partner shall be made good by him alone],[2] [and except that in case of losses impairing the capital, C. shall not be obliged to contribute to A. and B. any part thereof except in excess of said capital].[3]

8. **Premium.**[4] — In consideration of the premium of $——, to be paid to the firm of A., B. & Co. by D., of the city of ——, said D. is admitted as a full and equal partner in said firm; the articles of partnership of said firm of A., B. & Co., remaining in force in the new firm, except that the firm name shall be —— ——, and the term of partnership shall be —— years from the date hereof, and the capital shall be $——, and the partners shall be interested therein in the following proportions, to wit: ——.

Said premium shall be paid as follows: $—— on the —— day of ——, and $—— on the —— day of ——. Said premium shall be taken to be the capital of said D., and the firm shall pay interest thereon, the same as to the other partners.

[If the premium is paid to the old partners as individuals and not contributed to the firm, it is not capital nor assets, but their individual property.][5]

9. **Guaranty of profits and return of premium.** — Said A., B. and C. [original partners] hereby jointly guaranty to said D. [incoming partner] that his share of the net profits for the first —— years of said term shall not be less than $—— per annum, and they will at the end of each of said years pay him such a sum of money as added to such share of

[1] §§ 181, 228–231.
[2] §§ 761–765.
[3] See §§ 813–816.
[4] §§ 802–809.
[5] See § 251.

profits as he may receive for that year will equal said sum of $——.[1]

[But if his share of profits in any one of said years shall exceed said sum of $——, the excess shall to that extent counterbalance the deficiency of any other of said years, so as to diminish the payments of said A., B. and C., made to repair such deficiency.]

In case of the death of said D. before the expiration of said partnership term, then said A., B. and C. shall pay to his personal representatives the sum of $—— for each of said years of the unexpired term. And in case of the dissolution of said firm before its expiration, by the death of A., B. or C., or otherwise, the surviving partners of said A., B. and C., together with the representative of such deceased partner, shall pay said sum to said D.[2]

10. **Purchase of business by new firm from old partner.**—That the lease, vessel, plant, fixtures, merchandise, credits and all the other effects of said [old partner], heretofore employed by him in the business of ——, shall be brought into said copartnership and be taken by it at the values respectively set forth in the schedule of said articles annexed, amounting altogether to $——, which sum shall be paid to said —— as follows [which sum shall be considered as the amount of capital brought in by said [old partner] into said partnership].

11. **Assumption of old partner's debts.**[3]—The debts due from said [old partner] in respect of said business and which are set forth in the second schedule hereto annexed, amounting in all to $——, shall be paid by said firm, but all other debts not comprised in said schedule shall not be taken as liabilities of the new firm, but shall be paid by said [old partner].

12. **Proviso for admission of son of partner.**—If, at any time during said term, said A. shall, by writing under his hand, desire that his son E. may for the remainder of the said

[1] § 459.
[2] § 809.
[3] § 645.

term be admitted into said partnership, and shall also give or transfer to his son any part of his share in said partnership and the capital thereof, then the said E. shall be entitled to the part of the share of the said father's estate which shall be so transferred to him in the same manner and subject to the same conditions, to all intents and purposes whatever, as his said father would himself have been entitled if he had continued possessed thereof. And thereupon the said A., B., C., D. and E. shall execute all such acts and deeds as shall become necessary to confirm and substitute the said E. in the said part or share of the said A., and to subject said E. to the same debts, demands, conditions and agreements as the said A. would have been subject to in respect thereof by reason of said partnership.

13. **Allowance for rent.**— Said business shall be carried on in the building of said A. known as No. —— in —— street, in the city of ——, and said A. shall be allowed by said firm the sum of $—— per annum, by way of rent thereof, so long as said firm shall occupy said premises, but said property shall continue as the sole property of said A., subject only to be used for the purposes of said firm.

14. **Interest, allowances and charges.**[1] —Said partners shall be deemed creditors of the firm to the amount of the respective shares of capital, and shall be allowed interest thereon at the rate of —— per cent. per annum, payable annually.

If either of said partners shall at any time or times advance to or for the use of said firm any sum or sums of money beyond the amount he ought to bring in, then such partner shall be allowed interest thereon, at the rate of —— per cent. per annum, to be paid or allowed before any interest on the capital is allowed, and before any division of profits is made. [N. B. Profits declared but not drawn are not entitled to interest unless so agreed, being merely in the nature of deposits subject to order at any time.]

If any of said partners at any time draw any moneys out of said partnership, for his own use, beyond the monthly

[1] §§ 781–788.

sums hereinafter mentioned, the partner so overdrawing shall be charged interest thereon at the rate of —— per cent. per annum, before any division of profits is made.

15. **Increase of capital.**[1] — Any partner may be allowed to increase his capital in said firm on giving to his copartners —— months' notice of his intention so to do, to an amount not exceeding $—— [not exceeding one-half his present capital], by paying the same in cash to the credit of the firm on its bank account.

16. **Office held by a partner.**[2] — When and so often as either of said partners shall hold any official situation, either of them will assist in the performance of the business thereof, and the salary and other profits to be received in respect thereof shall be considered part of the profits arising from the business of said partnership.

17. **Allowance for subsistence.**[3] — Said partners shall be at liberty to draw out of the funds of said firm each month, for their private expenses, the following sums and no more, to wit: A. $——, B. $——, C. $——, D. $——; and the sums so drawn by each shall be charged against the respective shares of the profits of said partners, and shall be brought into account at the annual rest and settlement of the firm's accounts; and if the profits of any partner in any one year shall not amount to the sums so drawn in that year, he shall repay the deficiency to the firm immediately after the same [be charged interest on the deficiency from the time the same] has been ascertained.

18. **Salary or commissions to partner.**— Said B. shall be allowed the salary of $1,200 per annum before division of profits, as extra compensation for the management and superintendence of the business, subject to deduction for absence from sickness or otherwise exceeding in all —— weeks in any one year, which salary shall be payable in equal instalments at the end of each quarter. And shall also receive a commission of —— per cent. upon all sales of merchandise effected by him on behalf of the firm.

[1] § 255.
[2] §§ 224, 269.
[3] § 235.

19. **Charges for rent.**—Said B. shall be at liberty, if he desires, to use or occupy as a residence for himself and family, the dwelling-house upon property of the partnership, situated at —— [or such part of the premises on which the business is carried on as is not wanted for the purposes of the firm], at the yearly rent of $——, to be charged to [paid by] him by said firm [*or* without paying any rent or taxes therefor].

20. **Allowance for treating customers.**[1]—Said C. shall be allowed all such sums of money, not exceeding in any one year $——, as he may expend in treating any of the customers of the firm; provided the same shall be claimed and entered upon the accounts of said firm within twenty-four hours next after the expenditure thereof, but not otherwise.

21. **Allowance of merchandise for private consumption.**—Said C. may take from the stock of goods of the firm such of the following articles as he may need for family use and consumption, not exceeding in any one year the amount of $—— on the cost price thereof.

22. **Allowance for boarding hands.**—Said B. shall board and lodge the apprentices and servants of said firm in said dwelling-house, and shall be allowed the yearly sum of $—— for each of said apprentices and servauts that shall, with the consent of [a majority of] the partners, be so by him boarded and lodged.

23. **Fidelity.**—Said partners shall be true and just to each other in all their dealings, and shall at all times during the continuance of said partnership diligently and faithfully employ themselves in the conduct and management of the concerns of the partnership.[2]

24. **Giving time.**—Said B. and C. shall diligently and faithfully employ themselves in the management and superintendence of the business, giving their entire time and attention thereto, from the hour of eight in the morning until six in the afternoon of each day, unless prevented by sickness or other reasonable cause. But said A. shall not be obliged to attend to the said business.

[1] § 237. [2] § 224.

25. **Not to engage in other business.**[1] — Said B., C. and D. shall not, during the continuance of said firm, either directly or indirectly, engage in any other trade, business, manufacture or occupation other than the business of the firm. But said A. shall be at liberty to engage in any other occupation or business.

26. **General restrictions.**— Neither of said partners shall, without the written consent of all the others, employ any of its moneys or property, or engage its credit, except upon account and for the benefit of the firm;[2] nor engage in any contract or make any purchases on behalf of the firm exceeding the amount of $-——.

Neither of said partners shall, without the consent of [a majority of] all the partners, compromise, or release, or discharge, any debt or debts due or owing to said firm, without receiving the full amount thereof;[3] nor sign any certificate of discharge of any bankrupt or insolvent, or other instrument whereby any debt or security shall be in any wise diminished or discharged.

Neither of said partners shall, during the continuance of the firm, without the consent of all the partners, sign, indorse or draw any bill of exchange, check or promissory note, or become bail or security for any person or persons, or firm or corporation; nor engage in any speculation on the market, or dealing in margin or option or time contracts for the purchase or sale of any commodity or security, or expose himself to any other risk or hazard in other gambling transaction.

Neither of said partners will assign or pledge or mortgage any of the partnership property or his share or interest in said firm, nor withdraw his share of the capital therein or any part thereof. Nor knowingly or willingly do, commit or permit any act, matter or thing whatsoever whereby, or by reason whereof, the firm's moneys or property, or his interest therein, shall be or be liable to seizure, attachment or execution, or other sequestration.

[1] §§ 224, 306.
[2] §§ 350–355.
[3] §§ 381–384.

All checks, notes or bills necessary in the regular business of the firm shall be signed in the firm name by said B., or, in case of his sickness or absence, by such other person as the majority of the partners shall substitute in his place, and neither of the other partners shall use the firm name upon any note, bill, check, bond, or other security.

27. **Employment of servants.**[1]—No apprentice, clerk, servant or other employee shall be taken or engaged in or about said business, or at the expense of the firm, by either of said partners without the consent of [a majority of] the copartners.

All premiums and apprentice fees paid or to be paid by any person received into said business shall be considered as part of the profits.

28. **Powers of majority.**[2]—In all questions, differences or disputes between the partners arising in said business and the management and regulation thereof, or any act, transaction, matter or thing relating thereto, the determination of the majority in numbers of said partners shall be final and conclusive on the others, unless the others shall be desirous of submitting the determination of the matter in controversy to arbitration pursuant to the proviso herein contained, and shall require the reference to arbitration within three days after the determination by the majority shall have been communicated to them, and in case of such arbitration the award shall be final and conclusive upon the parties.

The majority of said partners may at any time forbid the extending of credit to or dealing with any designated person on partnership account, and thereupon no partner having notice of such determination shall thereafter lend any of the moneys or extend the credit of the firm to such person or persons, or deal with him or them on partnership account. And any partner acting counter to such determination shall make good to the firm all losses sustained thereby.

[1] § 334. [2] §§ 431–435.

29. **Accounts and books.**[1]—Said partners shall keep or cause to be kept proper books and accounts in writing, and each partner shall enter, or hand in for entry, all his transactions on account of said partnership, with such circumstances of names, times and places as are usually entered in such books.

Said books and accounts, and all deeds, securities, documents and papers, shall be kept at the counting-house of the firm, and not elsewhere, and shall be at all reasonable times open to the inspection of the partners.[2]

Said books and accounts shall be duly posted and kept by said C.

30. **Cash account.**—The cash account of said business shall be settled and balanced every week.

The account of said firm shall be kept in the —— bank, or such other bank as the [majority of the] partners shall agree upon. And the balance of the cash on hand shall be daily deposited in said bank to the account of the firm.

All moneys received by any partner on account of the firm shall be forthwith paid into said bank.

31. **Periodical accounting.**—As soon as convenient after the —— day of —— [select the dull season] of each year during said partnership, a general account and rest in writing shall be taken and made of all the stock, credits and effects, debts and liabilities of said firm, and a just valuation and appraisement made of all the particulars included in said account [reducing the valuation of old stock according to the depreciation and market value of the same, and valuing uncollected debts as nearly as possible at their true value]. And the accounts of each partner shall be included therein.

After all interest charges and credits, and all just allowances for rent, salaries, commissions, advances, expenses and otherwise are deducted, the clear profits shall be divided between the partners in the proportions hereinbefore stated.

Said general account and valuation shall be entered in a

[1] §§ 313, 314. [2] § 314.

[or several] book[s], and be signed by each of said partners.[1]

After such signing each partner shall have the custody of one of such books, and shall be bound and concluded by every such account, unless within —— months after it is so signed some manifest error to the amount of $—— shall be found therein and signified to his copartners, in which case only such error shall be rectified.

32. **Right to dissolve.**— Either of said partners may retire from said firm upon giving written notice to his copartners of his intention so to do at least six months before the time named therein for dissolution.[2]

33. **Notice of dissolution.**— Upon the retirement of any partner, or other dissolution of the firm, it shall be lawful for any partner to sign the names of the firm and of the copartner to all necessary notices and publications of dissolution.

34. **Option to buy share at valuation.**[3]— If said firm is dissolved by the death, retirement, expulsion, bankruptcy or insolvency of either partner, the other partners shall have the right to purchase the interest of such partner at the valuation shown in the last annual stock-taking, together with interest thereon at the rate of —— per cent. per annum, in lieu of profits for the intervening time [*or*, with a sum in lieu of profits for the intervening time, ascertained by taking the average of profits as shown by the annual accounts of the past three years, and taking the proportion of such average which the number of months since said last accounting bears to a year].

And the continuing partners shall thereupon become the purchasers of and entitled to all the interest of said former partner in the good will, credits, effects and all other assets of the firm. And said former partner shall execute to the continuing partners all necessary deeds, assignments and assurances for vesting in them all the property and credits of the firm and enabling them to take, collect and get in the same.

[This clause can be made applicable if one of the partners

[1] § 954.
[2] § 574.
[3] §§ 244, 245.

is given the option to purchase the entire business at the expiration of the term.]

35. **Indemnity to retiring partner** [*to be inserted before last clause of preceding*].—The purchasing partners shall pay said sum in three equal instalments at the periods of six, twelve and eighteen months, with interest thereon at the rate of —— from the time of dissolution, and shall secure the payment of same by a bond.

And shall also give a bond with surety in a sufficient penalty for indemnifying the outgoing partner, or his estate, against the debts or liabilities due or owing by said firm.[1]

36. **Death not to dissolve, and executor's powers.**[2]—If said A. should die during the continuance of said partnership, such death shall not work a dissolution thereof until the expiration of said term, but the capital of said A. shall remain in said firm until the expiration of the said term, and the share of profits that would have accrued to said A. on account thereof shall be awarded and paid to his executors or administrators. [*Or*, and in such case the executors or administrators of the party so dying shall stand in his place with respect to said share and profits until the determination of said partnership, save and except with the management of the said business, which shall belong exclusively to the surviving partners; or partner for the time being.] And said executors or administrators shall have full and reasonable opportunity, after the annual accounting, to examine the books and accounts of said partnership,[3] such examination to be completed within the space of —— weeks after notification to them of the completion of said annual account; and thereupon, if no objection is found, the same shall be binding upon them the same as it would have been upon said A. had he been then living; and if objection is found in said accounting the same shall be settled as provided in the arbitration clause herein.

37. **Compensation to survivors.**[4]—Provided, however, that in case of the death of said A. the surviving partners shall

[1] §§ 634–644.
[2] §§ 598–605.
[3] § 715.
[4] § 772.

be entitled during the remainder of the partnership, as and for a compensation for the additional trouble in managing said business by reason of such death, to have out of the net gains of said partnership [or out of said decedent's share of said profits] the annual sum of —— [or can provide for arbitration of the amount]. But at the expiration of said partnership the joint stock thereof shall be disposed of and divided in the same manner and same proportions as the same would have been divided in case said A. had been then living.

38. **Wind up.**— At the expiration of the term, or, in case the surviving or continuing partners shall decline to purchase, upon the sooner dissolution, all the stock, credits and effects shall be converted into money and all the debts and liabilities of the firm discharged, including all advances and payments made by, or other allowances due to, the partners and the capital of each partner. And the surplus shall be divided between the partners or their representatives in the proportion hereinbefore provided.

All the effects that cannot be conveniently got in, sold or disposed of shall be divided between the partners or their representatives or assigns, by lot, and each of said partners, or his representatives or assigns, shall duly assign to each of the others, his representatives or assigns, all interest in the shares allotted to them and execute all necessary instruments for such purpose, to vest in them the sole right and property.[1]

After such division, neither of the partners, his representatives or assigns, shall release, discharge or interfere with any debts, claims or property allotted to the other of them.

39. **Expulsion.**[2]— If either of the partners neglect or refuse to attend to any of the business of the firm, or to keep proper and just accounts, or violate any of the provisions of these articles, then and in any of said cases [a majority of] the other partners shall be at liberty to dissolve said partnership, by giving to said offending partner notice in writing

[1] §§ 974–977. [2] §§ 241, 242.

of such intention [specifying the ground of complaint and stating a time for the hearing thereof, and if a majority of the other partners find the charges are sustained]. In such case the partnership shall be deemed dissolved from the time of [giving such notice], without prejudice to the remedies of the other partners against the offending partner for breach of any of the conditions of these articles or duties of a partner. And the offending partner shall be deemed to have quit the business for the benefit of the other partners upon payment by them, or any of them, on his own behalf, of the share of the offending partner, on the basis and in the manner provided for in case of dissolution on notice, or if neither elect to pay out said share, the affairs of the firm shall be wound up in the same manner as in case of dissolution by expiration of the term, except that the offending partner shall not participate or have any power to assist in the collection of the assets and winding up of the firm.

40. **Arbitration clause.**[1] — If any difference arises between the partners, their personal representatives or assigns, concerning the business or its management, or the settlement of the books and accounts thereof, or the settling, applying or dividing any of the property, debts or profits of the firm, or any other matter relating to or concerning the same, or anything contained in these articles [except the existence of ground of expulsion], and the partners cannot agree as to the same among themselves, in such case each partner or his personal representatives shall forthwith appoint a disinterested person as arbitrator, and said arbitrators shall determine the matter in controversy, by their award in writing under their hands. And in case such persons cannot agree upon an award within —— days after such submission, they shall select an umpire in the premises and submit the dispute to him; and he shall determine the same by writing within —— days thereafter. And the said parties, their personal representatives and assigns, respectively, shall stand to and perform the award so made, without any further suit

[1] § 233.

or trouble whatsoever, and said award shall be made a rule of court upon the application of either of the parties.

41. **Penal.**— And each of said partners doth for himself, his heirs, executors and administrators, covenant with each of the others of them, their executors and administrators, that in case he shall fail or neglect to perform or observe any or either of the covenants or stipulations foregoing, then that he, his heirs, executors or administrators, will thereupon pay to each of the others of them, their executors or administrators, the following sums for breach of article 29 above, $——, as liquidated damages, to be deemed full satisfaction of said breach and not as penalty.

[There must be a distinct compensation for breach of each covenant.][1]

AGREEMENT TO CONTINUE OR RENEW PARTNERSHIP INDORSED UPON THE ORIGINAL ARTICLES.

WHEREAS, The term of the within named partnership has this day expired, and the parties have mutually agreed to extend and prolong said partnership on the same terms for the further period of —— years:

NOW, THEREFORE, The within named A., B., C. and D. do hereby, each for himself, his heirs, executors and administrators, covenant and agree with and to the others or other of them, their heirs, executors and administrators, that they, the said A., B., C. and D., shall and will continue in the copartnership business in which they are now engaged, under the within written articles, for the term of —— years next ensuing, upon the same terms and conditions and subject to the same regulations, stipulations, provisions and agreements, in every respect, as are within expressed and declared, and in the same manner as if the said original copartnership term did not expire until the determination of the said renewed term;[2] and agree during said renewed term to observe, perform and keep the said conditions, regulations, stipula-

[1] § 250.

[2] §§ 216–218.

tions, provisions and agreements in like manner as if the same were inserted in these provisions.

In witness whereof said parties have set their hands and seals, on the —— day of ——, 18—.

RELEASE AND ASSIGNMENT FROM RETIRING TO CONTINUING PARTNER, WITH FULL COVENANTS.

[To be shortened according to taste and local practice.]

This indenture, made this —— day of ——, by and between A. B. and C. D., witnesseth:

THAT WHEREAS said parties have for several years last past carried on the business of —— in copartnership together, and said A. B. has, with the consent of said C. D., retired from said partnership; and it was agreed by and between said parties that said A. B. should take and said C. D. should give in satisfaction of his share and interest in the same the sum of —— dollars; and that said C. D. should execute to said A. B. his certain writing obligatory in the penal sum of —— dollars, payable to said A. B., conditioned to be void in case of the punctual payment of said first named sum and of the punctual discharge of all the debts and liabilities of said copartnership, which writing obligatory the said A. B. hereby acknowledges to have been made:

NOW, THEREFORE, In further performance of said agreement and in consideration of said mutual promises and agreements and of the sum of one dollar to him paid by said C. D., said A. B. doth hereby grant, release, assign, transfer and set over to said C. D. all the part or share, estate, right, title, property and interest whatsoever of him, the said A. B., of, in and to the stock in trade, debts, credits, capital, merchandise and assets, and every part thereof, of or belonging or due and owing to the said copartnership on the —— day of ——, to have and to hold the same to the said C. D., his executors, administrators and assigns, for his own absolute use and benefit, but subject, nevertheless, to

the payment and performance of all the debts, engagements and liabilities which have been entered into or incurred by or on behalf of said copartnership, and which on said last named date remained unpaid and unperformed.

And the said A. B. doth hereby nominate, constitute and appoint the said C. D. to be the true and lawful attorney of him, the said A. B., in his own name alone, or in the name jointly with said A. B., to demand, sue for, recover and receive from all and every the person or persons liable to deliver and pay the same respectively, the stock in trade, mines, debts, credits, merchandises, rents, accounts, contracts and effects belonging to or due and owing to said copartnership, and on delivery or payment thereof, or of any part thereof, respectively, to give, sign and execute all acquittances, discharges or releases for the same; and on non-delivery or non-payment thereof, or of any part, to commence and prosecute all actions, suits or other proceedings at law or in equity in that behalf as the said C. D. shall find necessary. And generally to do and perform any and all other acts, deeds, matters or things whatsoever relating to the premises, as fully and effectually to all interests and purposes whatsoever as he, the said A. B., might or could do in his own proper person in case these presents had not been executed. And said A. B. hereby covenants for himself, his heirs, executors, administrators or assigns, with the said C. D., his executors, administrators or assigns, to allow, ratify and confirm whatsoever said C. D. shall lawfully do or cause to be done in and about the premises.

And the said A. B., for himself, his heirs, executors and administrators, doth hereby covenant, declare and agree with said C. D., his executors, administrators and assigns, that he, the said A. B., hath not made, done, committed or executed, or knowingly or willingly suffered or permitted any act, deed, matter or thing whatsoever, whereby or by reason or means whereof the said part or share and premises hereby granted, released and assigned, or intended so to be, are, is, can, shall or may be in anywise impeached, charged, affected, incumbered or diminished. And further, that he, the said

A. B., his executors or administrators, shall and will from time to time and at all times hereafter, upon every reasonable request and at the costs and charges of the said C. D., his executors, administrators or assigns, make, do and execute, or procure the same to be done, all such further and other lawful and reasonable acts, deeds, matters and things for the better and more effectually granting, releasing, assigning and assuring the said part or share and premises hereby granted, released and assigned, or intended so to be, unto the said C. D., his executors, administrators and assigns, and for enabling him or them to recover and receive the same to and for his or their own use and benefit, according to the true intent and meaning of these presents, as by him or them or his or their counsel learned in the law shall be reasonably devised, advised or required.

In witness whereof, etc.

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