A MANUAL

OF

PARTNERSHIP RELATIONS

TREATING OF THE

Nature, Formation, Operation and Dissolution
of the Partnership, with the Forms used
Therein, and a Comparative Con-
sideration of the Partnership
and the Corporation

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Gift of Allen Knight

PREFACE.

While the corporation is the approved form of modern business organization, the great majority of business enterprises are still conducted as partnerships. For this reason no apology is needed for the presentation of a compact and practical work on partnership relations.

In the present volume are considered the nature of the partnership, the method by which it is entered into, the manner of its operation and the details of its dissolution; also the relative merits of the partnership and the corporation, and the practical considerations and procedure involved in changing from one to the other.

The various forms incident to the organization, operation and dissolution of the partnership are also given. These are mainly from existing instruments and may be followed with confidence.

In the preparation of this work the fact has been constantly kept in view that difficulties may be best avoided by a clear comprehension of those particular points in connection with which they are most liable to arise. The usual incidents and possible dangers of the partnership relation, as well as the powers, duties and liabilities of the partners are therefore treated with special care.

The scope of the work does not call for exhaustive citations. Those given have been carefully selected, and indicate the principal authorities on each important point.

It is hoped that the forms, citations, arrangement and careful indexing of the present work may commend it to the busy practitioner as a convenient and reliable manual of reference.

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PARTNERSHIP RELATIONS.

PART I.—NATURE OF PARTNERSHIP RELATIONS.

CHAPTER I.

INTRODUCTORY.

§ 1. Definition.

Partnership is the result of a contract between two or more competent parties to combine their money, property, skill or labor for the transaction of some lawful business for profit. [1] The contract may be express or implied. The business must be lawful, otherwise the law would not recognize the combination as a partnership. The subject matter must be some undertaking for gain, for if profit were not the object, the association would not be a partnership. (See §§ 2, 4.)

§ 2. Necessary Elements.

Relations which will subject the parties to the liabilities of partners are easily formed. The mere representation that they are partners, or their passive acquiescence in such repre-

[1] For further definitions see 1 Lindley on Partnership, p. 1, et seq.; 1 Bates on Partnership, § 1; 3 Kent's Commentaries, 23; also N. Y. Laws of 1897, Ch. 420, § 2, for a statutory definition.

sentations by others, will, as to third parties, suffice to establish partnership liabilities. To form a partnership as between the parties themselves is less simple, requiring the following essential elements:

1. A contract.
2. Parties competent to contract.
3. Partnership capital or property.
4. A community of control.
5. A lawful business.
6. Profit sharing as a motive.

Each of these elements must ordinarily be present to establish a partnership. They are considered briefly in the following paragraphs.

(1) The contract may be written or verbal, express or implied. It may have been entered into for the purpose of establishing partnership relations, or with the expressed intention of avoiding them. The intent of the contract is gathered from the facts, and where it is clear that the contract involves the requisite legal essentials the courts will hold the association formed thereunder as a partnership, even though the contract expressly stipulates that no partnership is to be formed. [2]

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

[2] Parsons on Partnership, § 54; People v. Wiman, 85 Hun. 320 (1895); Central City Savings Bank v. Walker, 66 N. Y. 425 (1876); Salter v. Ham, 31 N. Y. 321 (1865); Kayser v. Maugham, 8 Colo. 236 (1885); McFarlane v. McFarlane, 82 Hun. (N. Y.) 238 (1894); Heye v. Tilford, 2 App. Div. (N. Y.) 346 (1896); Chapman v. Hughes, 154 Cal. 302 (1894); Manhattan, etc., Co. v. Sears, 45 N. Y. 497 (1871); Jacobs v. Shorey, 48 N. H. 100 (1868); Cleveland Co. v. Toy Co., 46 Conn. 136 (1878).

partnership it is one; and if not, not, independent of the language of the parties.

"The intention of the parties will be determined from the effect of the whole contract, regardless of special expressions. And if the actual relation which the parties have assumed towards each other, and the rights and obligations which have been created by them, are those of partners, the actual intention of the parties or their declared purpose can not suspend the consequences. And so if the parties have used the word partnership in their contract and called themselves partners, this will not make them such if the contract is not consistent with such relation." 1 Bates on P., § 17. (See also § 19.)

(2) The subject of the competency of parties is considered elsewhere in its application to minors, insane persons, married women, aliens and corporations. (See Chap. VII, Parties.)

(3) The partnership capital may consist of credit, of property, real or personal, or merely of the time, labor and skill of the respective partners. (See Chap. IX, The Partnership Property.)

(4) Unless expressly stipulated otherwise, as in the case of dormant and special partners, each member of a partnership has an equal right to assist in the management of the partnership business and property, and has equal power to contract regarding it.[3] (See Chaps. IX, X.) This right, however, may be restricted by agreement among the partners.

(5) The business or undertaking must be lawful, otherwise the law would refuse to recognize the association and it could not therefore come under the rules that regulate partnership. A joint agreement to conduct a lottery, to smuggle goods or to infringe patents would be outside the pale of the law, and the courts, if appealed to by the parties to such an agreement, would leave them in whatever condition it found

[3] Conklin v. Barton, 43 Barb. (N. Y.) 435 (1864).

them.[4] If the agreement were partly for legal and partly for illegal objects, and it were possible to separate the contract, the courts would recognize and enforce its terms as far as they applied to legal purposes.[5]

(6) A partnership is an association for sharing profits. If any association has not this object, it is not a partnership. The majority of clubs, societies, associations and organizations are, on this account, excepted from the operation of the rules governing partnerships. (See § 11.)

§ 3. Distinctive Features.

In addition to the essential elements or features already enumerated, or as a consequence of them, the partnership relation is characterized by certain distinctive features.

(1) Each partner is an agent for the others in the transaction of anything within the scope of the partnership purposes. Hence, any contract relating to the proper business of the firm entered into on its account by any one of the partners is binding on the firm. (See §§ 35, 37, 38; also Chap. XI, Relations to Third Persons.)

(2) Each partner shares either equally or in agreed proportion in the net profits of the business and usually in the losses also. (See Chap. XII, Division of Profits.)

(3) In case of insolvency each partner is personally liable for all of the firm's obligations. This is the most onerous feature of the partnership relation. (See §§ 61, 95.)

(4) The property, the business, firm name, good-will and any trade-marks or other intangible possessions are firm property and form part of the common fund. (See Chap. IX, The Partnership Property.)

[4] Watson v. Murray, 23 N. J. Eq. 257 (1872); Tenny v. Foote, 95 Ill. 99 (1880); Hunter v. Pfeiffer, 108 Ind. 197 (1886); Todd v. Rafferty, 30 N. J. Eq. 254 (1878).

[5] Dunham v. Presby, 120 Mass. 285 (1876); Anderson v. Powell, 44 Iowa 20 (1876); Read v. Smith, 60 Tex. 379 (1883); Woodworth v. Burnett, 43 N. Y. 273 (1871).

(5) The partnership relation is a purely personal one and is terminated by the assignment of an interest, or the death or retirement of a partner. A new member can not be introduced into a firm unless by agreement of all the partners, and then the resulting association, though under the old name, is a new partnership. Joint stock companies and mining partnerships are excepted from this rule. (See §§ 8, 10, 73, 75, 85.)

(6) A partner is entitled to good faith and fair dealing from his associates, and on dissolution may have an accounting to ascertain his interests in the business. (See §§ 72-84.

(7) Unlike a corporation the partnership has no entity distinct from its membership. It can not sue or be sued in the firm name. It can not contract with or bring suit against its members, nor can they bring suit against it. (See § 4, par. 4.)

§ 4. Associations that are Not Partnerships.

(1) Associations not formed for profit are not partnerships. The numerous incorporated clubs, churches, societies, associations and fraternal organizations are not partnerships and do not involve mutual agency nor partnership liability. They are governed, moreover, by entirely different rules from those regulating partnerships. (See § 11.)

(2) In some states, business organizations designated as partnership associations are authorized. These are neither partnerships nor corporations, though they partake of the characteristics of both. (See § 12.)

(3) Statutory joint stock companies have many of the features of the partnership. They have, however, transferable stock, so that the death of a member or the sale of his interest does not affect the organization; also they are authorized to sue and be sued in a single collective name, or in

the name of one or more of the officers, and if a board of managers exists, the individual members can not contract for the company. These peculiarities differentiate such companies from partnerships. (See § 13.)

(4) Corporations differ in most of their fundamental features from partnerships. A stockholder in a corporation has no authority to contract; is not in most states liable for anything more than the due payment for his shares; the relation is not personal, and neither his death, his insolvency nor the assignment of his interest affects the corporation. Also the corporation itself has an entity apart from its stockholders, and sues and is sued in its corporate name. More than this, it can sue its members and they can bring suit against it, without interfering with their membership relations. (See § 14.)

(5) The law does not imply a partnership from common ownership of either chattels or land. Co-ownership, or tenancy in common, does not therefore involve any partnership between the co-owners. One co-owner could readily sell his interest, his death would not interfere with the relation, nor would he have authority to bind the others by a contract relating to the common property. (See § 15.)

Joint tenancy, in the few cases where it exists, is also entirely different from partnership, involving but few of the features of this latter relation. The right of survivorship which marks joint tenancy has no place in the law of partnership.

(6) Contracts are very frequently made for a share of profits as compensation for services, for the use of property, or for the loan of money. This does not necessarily form a partnership. In some cases of this kind, however, it is difficult to draw the line, and determine the status of the parties. (See Chapter IV, Profit Sharing.)

CHAPTER II.

CLASSIFICATION.

§ 5. Classification.

Partnerships may be roughly divided into two classes, general and special. While this classification covers the majority of cases, there are a few forms involving peculiarities of partnership law, such as mining partnerships, limited partnerships and joint stock companies that require separate discussion. (See §§ 8-10.)

§ 6. General Partnerships.

A general partnership is the usual partnership formed for the continued prosecution of some general line of business.[1] It is the commonest form of partnership. General partnerships may be either trading or non-trading.

Trading partnerships include all those formed for the purpose of buying, selling and manufacturing.

Non-trading partnerships do not buy, sell or manufacture as a principal feature of their business.

"The test of the character of the partnership is buying and selling. If it buys and sells it is commercial or trading."[2] The importance of this distinction lies in the power that the individual partners of trading firms have to borrow money and to issue negotiable paper on behalf of the firm. In busi-

[1] 1 Lindley on Partnership, p. 49; 1 Bates on Partnership, § 12; George on P. § 28.

[2] Lee v. Bank, 45 Kan. 8 (1890), 11 L. R. A. 238.

nesses which require continuous buying and selling, it is necessary that the partners should have this power. In non-trading partnerships it would not be necessary, and hence, the power is not allowed. There is, however, no hard and fast line of demarcation between trading and non-trading partnerships and some courts have shown a disposition to let each case stand on its own merits, holding that if the scope of the particular business required borrowing, the partners would have power to so act for the firm.

Partnerships of the following kinds have been held to be non-trading partnerships:

All professional partnerships. [3]
Firms of brokers, real estate and insurance agents. [4]
Mining partnerships. [5] (See § 8.)
Farming and planting partnerships. [6]
Special partnerships. [7]
Generally those partnerships wherein there would seem no reason for the existence of the power to borrow money and give notes. [8]

§ 7. Special Partnerships.

A special partnership is formed for the transaction of some single piece of business, [9] or for the conduct of some

[3] Smith v. Sloan, 37 Wis. 285 (1875); Freind v. Duryee, 17 Fla. 111 (1879); Crossthwait v. Ross, 1 Humph. (Tenn.) 23 (1839).

[4] Lee v. Bank, supra; 11 L. R. A. 238, note.

[5] Dickinson v. Valpy, 10 Barn. & Co. 128 (1829).

[6] Kimbro v. Bullitt, 63 N. Y. 256 (1860); Prince v. Crawford, 50 Miss. 344 (1874); Woodruff v. Scaife, 83 Ala. 152 (1887).

[7] Livingston v. Roosevelt, 4 Johns. (N. Y.) 251 (1809).

[8] See 11 L. R. A. 238, note; Mechem on P., § 174, and cases cited.

[9] 1 Lindley on P., p. 49; Kayser v. Maugham, 8 Colo. 236 (1885); Mumford v. Nicholl, 20 Johns. (N. Y.) 611 (1882); Hubbell v. Buhler, 43 Hun. (N. Y.) 82 (1887).

one line of business.[10] It is sometimes termed a particular partnership. A partnership to buy and sell some definite piece of land, to ship a cargo to some particular place, to buy and operate a threshing machine, to deal in specified stocks, or to finance and sell a particular patent are all examples of special partnerships. A common form in the present day is the syndicate organized for the promotion or financing of some large corporate enterprise.

The special partnership is distinguished from the general partnership solely by its more limited purpose. The authority of the partners in a special partnership is confined to its specific undertaking, and third persons dealing with it are expected to exercise more care in ascertaining the identity of the partners and the limits of their authority than when dealing with a general partnership. Beyond this, the distinction between general and special partnerships is of little importance, as the same rules govern both.[11] In a recent case it was said:

> "Whether it became a technical partnership as a matter of law or whether it constituted a mere joint venture is not of consequence. The respective interests were settled. Such interests were placed in a common pool, to be used and disposed of for the benefit of all, and the legal rules applying to such an agreement are precisely the same as are those which apply to a partnership in technical sense, and rights are to be enforced upon the same principles." Spier v. Hyde, 92 App. Div. 467, N. Y. (1904).

The partnerships discussed in the remainder of this chapter may be either general or special, according to the circumstances in each case. Ordinarily they are general.

[10] 1 Lindley on P., p. 49; Hesion v. Julian, 82 Ind. 576 (1882); Sage v. Sherman, 2 N. Y. 417 (1849); Marston v. Gould, 69 N. Y. 220 (1877); Manhattan, etc., Co. v. Sears, 45 N. Y. 797 (1871); Newell v. Cochran, 41 Minn. 374 (1889); Burgess v. Badger, 124 Ill. 288 (1888).

[11] King v. Barnes, 109 N. Y. 267 (1888); Marston v. Gould, supra.

§ 8. Mining Partnerships.

These form a class to themselves. The United States Supreme Court said: "Mining partnerships, as distinct associations with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all mining communities." [12] Under a mining partnership the co-owners of a mine may work it together as partners in the profits only, the mine or mines being owned in common, but not held to be partnership property.[13] This allows any owner to sell his share and introduce a new member without dissolving the partnership. Neither does the death or the insolvency of a partner affect the partnership. As any member may at any time transfer his share and bring in a new associate, there is no relation of trust and confidence between them, and the partners have no right to bind their fellows by contract.

The actual mining under a partnership of this kind is usually conducted by a superintendent or managing partner appointed by the mining partners or associates. But even though a managing partner be in charge, his power to bind the partnership by contract is very limited. He can only make valid contracts for such supplies and labor as are actually necessary to the transaction of the business, and he can not give a note binding the partnership unless authority to do so has by usage or express grant been given him.[14]

An ordinary general partnership may be formed for working a mine,[15] but as a rule they are operated under mining partnerships.

[12] Kahn v. Central Smelting Co., 102 U. S. 641 (1880).

[13] Lindley on P., p. 55; Reed v. Meagher, 14 Colo. 335 (1890), 9 L. R. A. 455; Kahn v. Central Smelting Co., supra; Bissell v. Foss, 114 U. S. 252 (1885); Harris v. Lloyd, 11 Mont. 390 (1891); Kimberly v. Arms, 129 U. S. 512 (1888).

[14] Charles v. Eshleman, 23 Cal. 199 (1863); Settemore v. Putnam, 30 Cal. 490 (1866); Jones v. Clark, 42 Cal. 180 (1871); Taylor v. Castle, 42 Cal. 367 (1871); Shaw v. McGregory, 105 Mass. 102 (1870).

[15] Decker v. Howell, 42 Cal. 636 (1872).

§ 9. Limited Partnerships.

A limited partnership may only be formed under special statutes. It differs from the ordinary partnership in that certain of its partners are silent, or inactive, and the liability of these partners is limited to the amount actually invested by them. (See § 36, Special Partners.) The partners whose liability is thus limited are called special partners in contradistinction to the other general partners. (See § 35, General Partners.) If a partner whose liability is thus limited takes active part in the conduct of the partnership business, his status changes and he becomes liable as a general partner.

The restricted liability enjoyed by the special partner can be secured only by strict compliance with the statutory directions. The usual requisites are that prescribed notice shall be given to the public of the formation and nature of the partnership, and that a certificate and affidavit of the limitations of the partnership be filed in some office of public registry. The certificate must give the names and addresses of the partners, specifying the special partners and the amount invested by them, with the other essential details of the proposed partnership. In all cases the local statutes should be examined, and their directions followed in detail.[16] Any variation or change, then or thereafter, may make the partnership general.[17] The New York statutes are excellent examples of the usual statutory provisions.[18]

[16] Van Ingen v. Whitman, 62 N. Y. 513 (1875); Durant v. Abendroth, 69 N. Y. 148 (1877); Abendroth v. Van Dolsen, 131 U. S. 66 (1889); White v. Eiseman, 134 N. Y. 101 (1892); Haddock v. Grinnell Mfg. Co., 109 Pa. St. 372 (1885); Briar Hill Co. v. Atlas Works, 146 Pa. St. 290 (1892); Blumenthal v. Whitaker, 170 Pa. St. 309 (1895); Smith v. Argall, 6 Hill (N. Y.) 479 (1844); Manhattan Co. v. Laimbeer, 108 N. Y. 578 (1888); Vanhorne v. Corcoran, 127 Pa. St. 255 (1889), 4 L. R. A. 386.

[17] Riper v. Popenhauser, 43 N. Y. 68 (1870); Bank v. Gould, 5 Hill (N. Y.) 1309 (1843).

[18] See N. Y. Laws of 1897, Ch. 420, Act III, Vol. 1, p. 562. See generally Bates on Limited Partnership.

§ 10. Joint Stock Companies.

A distinction is to be made between the ordinary joint stock company and the statutory joint stock company. (See § 13, Statutory Joint Stock Companies.) The ordinary joint stock company, not organized under any statute, though usually adopting a corporate name and having some of the features of a corporation, is merely a co-partnership, and the shareholders are responsible for the debts of the company as in an ordinary partnership.[19] In an early Massachusetts case, the court said:

> "The originators of this scheme have endeavored to avail themselves of the advantages of incorporation, under an association of partners. As between retiring members and creditors of the company, the attempt is unsuccessful; such members remain liable for all existing debts, and they may be liable for subsequent debts to creditors who had knowledge of their partnership, but had not had a notice of their withdrawal." Tyrell v. Washburn, 6 Allen 466.

An important difference between such an organization and an ordinary partnership is that its members, under the terms of the general agreement, may transfer their interests without dissolution of the firm. In this respect joint stock companies resemble mining partnerships. Also, if there are many members, affairs are usually managed by a board of trustees or managers, and the individual members have no authority to act in the company affairs. Such managers, within the scope of their authority, have all the power to bind the company that partners have to bind the firm.[20] The sub-

[19] Taft v. Warde, 106 Mass. 518 (1871); Railway v. Pearson, 128 Mass. 445 (1880); Hodgson v. Baldwin, 65 Ill. 532 (1872); Holt v. Blake, 47 Me. 62 (1859); Frost v. Walker, 60 Me. 468 (1872); Kramer v. Arthur, 7 Pa. St. 165 (1847).

[20] Van Aernam v. Bleistem, 102 N. Y. 355 (1886).

ject of joint stock companies is of little present importance, as such companies are now rarely organized, their objects being more simply, safely and better attained by the corporation. (See Part V, Incorporation.)

CHAPTER III.

CONTRASTED FORMS OF ASSOCIATION.

§ 11. Associations Not for Profit.

The sharing of profits is one of the necessary elements of partnership. Justice Lindley writes, "Nothing, perhaps, can be said to be absolutely essential to the existence of a partnership except a community of interest in profits resulting from an agreement to share them." Hence, any association that has not the sharing of profits for its object is not a partnership.[1] Clubs, lodges, committees, societies and associations of many kinds exist and may have a common fund and own property, but so long as they do not share profits they are not partnerships, and their members are not subject to the onerous liability of partners.[2] To quote from Justice Lindley again, "No partnership or *quasi* partnership subsists between persons who do not share either profit or loss, and who do not hold themselves out as partners. Societies and clubs, the object of which is not to share profits, are not partnerships, nor are their members as such liable for each others' acts."

This distinction is clearly shown in the cases of co-operative societies which buy goods and distribute them among their members. If the purpose of such an association does not involve making a profit, it is not a partnership. If, how-

[1] Lindley on P., pp. 7, 50; 3 Kent's Comm., 23; Niblack on Voluntary Societies, §§ 80, 81, 82.

[2] Ostrom v. Greene, 161 N. Y. 353 (1900); LaFond v. Deems, 81 N. Y. 507 (1880); Austin v. Thompson, 45 N. H. 113 (1863); In re St. James Club, 13 Eng. L. & Eq. 589 (1852).

ever, in addition to supplying its members at cost, it sells goods to non-members at an advance over cost, thus making a profit, it thereby becomes a partnership, and all its members are subject to the usual partnership liability for its obligations.[3]

In such unincorporated associations, the rights of the members in the common fund are analogous to the rights of partners. In a case where such an association was involved, the Court of Appeals of New York said:

> "While it was neither a corporation nor co-partnership, in order to pass upon its rights and powers as well as those of its members, both the law of corporations and the law of co-partnerships are to be resorted to in the absence of statutory regulations, the choice being determined by the nature of the feature under consideration."[4]

Such associations have the right to make their own rules which must be observed.[5] Beyond these the common parliamentary rules as generally used by deliberative bodies would govern their proceedings.

Their members and officers can only be held for such contracts and obligations as they have voted for, assented to, or authorized. For these they are personally responsible.[6]

§ 12. Partnership Associations.

Under the laws of Pennsylvania and Michigan, certain anomalous associations for business purposes may be organized under the name of partnership associations.[7] They

[3] Hodgson v. Baldwin, 66 Ill. 532 (1872); Tenney v. Union, 37 Vt. 64 (1864); Farmuns v. Patch, 60 N. H. 294 (1880); see also Magovern v. Robertson, 116 N. Y. 61 (1889).

[4] Ostrom v. Greene, 161 N. Y. 361 (1900).

[5] LaFond v. Deems, 81 N. Y. 507 (1880); Carter v. Producers' Oil Co., 182 Pa. St. 551 (1897).

[6] Ray v. Powers, 134 Mass. 22 (1883); Heath v. Goslin, 80 Mo. 310 (1883); Ash v. Guie, 97 Pa. St. 493 (1881).

[7] Act of June 2, 1874, P. L. 271; 2 Compiled Laws of Michigan, Ch. 160.

may be formed for any of the purposes for which ordinary business corporations may be organized and the formalities of organization are much the same.

Stock may be issued, by-laws passed, a seal may be adopted and in the home state they may sue and be sued under the association name. The word "limited" must be appended to the association name. In Pennsylvania, a transferee of stock must be elected by his associates before he becomes entitled to participate in the management.[8]

In Michigan the courts hold that these organizations are to be considered corporations rather than limited partnerships.[9]

In Pennsylvania the courts variously say that a partnership association is a "*quasi* corporation," that it is "*sui generis*," that it is inaccurately called a "joint stock company," and "that while assimilated in some respects to a corporation, it is nevertheless essentially a partnership." [10]

In Massachusetts these organizations are held to be merely common law joint stock companies and are treated as partnerships.[11] The Supreme Court of the United States held that they were not corporations for purposes of federal jurisdiction,[12] though the circuit court of appeals had previously held the contrary view.[13]

It is only certain that in event of litigation, the status of these associations outside of the state that created them is very dubious.

[8] Laflin & Rand v. Steytler, 146 Pa. St. 434 (1892).

[9] Staver, etc., Co. v. Blake, 111 Mich. 282 (1896); Rouse, Hazard & Co. v. Detroit Cycle Co., 111 Mich. 251 (1896).

[10] Carter v. Producers' Oil Co., 182 Pa. St. 551 (1897); Id. 200 Pa. St. 579 (1901).

[11] Edwards v. Linoline Works, 168 Mass. 564 (1897).

[12] Great Southern, etc., Co. v. Jones, 177 U. S. 449 (1900).

[13] Andrews Bros. Co. v. Youngstown Coke Co., Limited, 86 Fed. Rep. 585 (1898).

§ 13. Statutory Joint Stock Companies.

The common law joint stock company has already been considered. (§ 10.) The statutory joint stock company is a different organization created by special enactment and like the partnership association is really a *quasi* corporation. New York is responsible for most of these organizations and several of the largest express companies of the country are organized as joint stock companies under her enactments. These joint stock companies have in the home state virtually all the characteristics of corporations with the exception that their members are subject to full partnership liability.[14]

The Supreme Court of the United States declined to recognize such an association as anything more, outside of its own membership, than a mere partnership.

> "But the express company can not be a *citizen* of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was *organized* under the laws of New York is not an allegation that it is a corporation. In fact the allegation is, that the company is *not* a corporation, but a joint stock company—that is, a mere partnership. And, although it may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact can not give the company power, by that name, to sue in a federal court." [15] Chapman v. Barney, 129 U. S. 677 (1889.)

In Massachusetts the same general doctrine prevails.[16] The Massachusetts Courts, however, held otherwise in regard to an English joint stock company on the question of taxing it as a corporation.[17] In New York it is denied that they are

[14] People v. Coleman, 133 N. Y. 279 (1892).

[15] Gregg v. Sanford, 65 Fed. Rep. 151 (1895).

[16] Taft v. Ward, 106 Mass. 518 (1871); Lott v. Dinsmore, 111 Mass. 45 (1872); Boston v. Albany, 128 Mass. 445 (1880).

[17] Oliver v. Ins. Co., 100 Mass. 531 (1868); Liverpool Ins. Co. v. Mass., 10 Wall. 566 (1870).

corporations for taxing purposes,[18] but for other purposes they are held to have the privileges of corporations.[19] Some other states have accorded these organizations certain corporate rights.[20] The form is at best anomalous, is recognized in but few states, and has little to recommend it.

§ 14. Corporations.

For all practical business purposes there are but two generally recognized forms of association, the common law partnership and the modern business corporation. The corporation differs from the partnership in the following essentials:[21]

1. It is created only by legislative authority. The foundation is its charter granted by the state.[22]

Partnership is simply a contract between the members.

2. The liability of the members of a corporation is limited to their investments.[23]

Each partner is liable for all partnership obligations.

3. The capital of a corporation is divided into shares represented by stock certificates, transferable by endorsement.[24]

In a partnership each partner's interest is so merged that it can be divided or transferred only by dissolution of the firm.

[18] People v. Wemple, 117 N. Y. 136 (1889); People v. Coleman, 133 N. Y. 279 (1892).

[19] Westcott v. Fargo, 61 N. Y. 542 (1875).

[20] Adams Ex. Co. v. State, 55 Ohio St. 69 (1896); Edgeworth v. Wood, 58 N. J. L. 463 (1896).

[21] Clark & Marshall on Corp., § 20; 10 Cyc. 146, 148.

[22] Cook on Corp., § 1; Clark & Marshall on Corp., § 37.

[23] Cook on Corp., §§ 241, 242; Clark & Marshall on Corp., § 16; 10 Cyc. 146.

[24] Cook on Corp., §§ 11, 12; Clark & Marshall on Corp., §§ 15, 557 et seq.; 10 Cyc. 146.

4. In a corporation, the stockholders vote in proportion to their holdings, for directors, who alone have authority over the corporate property and business. These directors appoint officers and agents to transact the business. The stockholders as individuals have no authority or power in the corporate affairs.[25]

In a partnership, each partner has full authority to do all things necessary in the scope of the partnership business and his contracts and obligations are binding on his associates. Each partner is held to be the agent of all the others in the firm business.

5. The change, death, insanity or insolvency of its members does not affect the permanence and continuity of the corporate organization.[26]

The change, death, insanity or insolvency of a partner causes the dissolution or re-organization of a firm.

6. The corporation has an entity separate and apart from its members. It can sue and be sued in the corporate name. It can sue its members and be sued by them.[27]

The partnership has no separate entity, but all the partners must sue and be sued by name; neither can it be sued by its members nor bring suit against one or more of them.

As a consequence of these differences, it follows that an entire stranger might safely invest in the stock of a corporation, when he would not dream of entering a partnership formed to carry on a similar enterprise. Also, those engaged in a corporate undertaking can safely receive capital from persons whom they would not dream of receiving as partners, with all that the relation implies. As a rule a partnership can rarely secure investments except from those whom they are prepared to receive as active and responsible associates.

[25] Cook on Corp., § 11; Clark & Marshall on Corp., § 652 et seq.

[26] Cook on Corp., § 11; Clark & Marshall on Corp., § 20; 10 Cyc. 146.

[27] Cook on Corp., §§ 1, 11; Clark & Marshall on Corp., §§ 17, 20; 10 Cyc. 149.

As has been seen (see §§ 12, 13), some hybrid forms of partnership adopt certain of the corporate characteristics, but the usual business partnership does not. If the corporate advantages are desired or if any variation is to be made in the partnership form it would seem better to incorporate, rather than to experiment with such doubtful variations on the partnership form as the joint stock company (see § 13), the partnership association (see §§ 10, 12), and the limited partnership (see § 37). The very important considerations involved in a decision between the partnership and the corporate form are treated more at length in Part V of the present work.

§ 15. Co-Ownership and Joint Tenancy.

Neither co-ownership nor joint tenancy necessarily involves partnership. Partnership is a contract relation, and the mere fact that persons are mutually interested in or are part owners of the same property does not make them partners unless they have so determined.[28] If they use the property together for profit they may readily make themselves partners,[29] and cases arise where it is difficult to decide whether this has been done and those concerned have become partners, subject to partnership rules and liabilities, or whether they are still merely co-owners or joint tenants.[30]

As a general rule, however, the distinction is clear. Co-ownership need not arise from a contract; a partnership always does. One co-owner can always sell his interest to a stranger without interference with his relations to other owners. One co-owner is not the agent for the others and

[28] Story on P., §§ 2, 3, 32; Porter v. McClure, 15 Wend. (N. Y.) 187 (1833); Hawley v. Keeler, 53 N. Y. 114 (1873); Heye v. Tilford, 2 App. Div. (N. Y.) 346, aff. 154 N. Y. 787 (1897); Bank v. Osborne, 159 Pa. St. 10 (1893); Millet v. Holt, 60 Me. 169 (1872).

[29] McFarlane v. McFarlane, 82 Hun. (N. Y.) 238 (1894).

[30] Goell v. Morse, 126 Mass. 480 (1879).

can not bind them by his contracts in relation to the common property. A co-owner or a tenant in common can at any time have partition as a matter of right, and in the case of personal property severable in its nature, one co-owner may simply take his share. In a partnership, proceedings in dissolution would be necessary. There are some other technical differences in regard to the legal relations existing between co-owners and partners.[31]

Co-owners can share gross returns without becoming partners.[32] If, though, the returns are brought into a common fund, from which expenses are paid and the net profits divided, it will be held to create a partnership.[33]

The case of tenants in common of a mine and the resulting mining partnership with its peculiar relationship has been considered. (See § 8.) Other special cases will be considered under other heads.

[31] See 1 Lindley, p. 51 et seq.; Goell v. Morse, supra.

[32] Quackenbosh v. Langer, 54 Cal. 439 (1880).

[33] 1 Lindley on P., p. 53 et seq.

CHAPTER IV.

PROFIT SHARING.

§ 16. Profits as Compensation for Services.

It is common to give a share of the profits of a business or enterprise as compensation for the services of those who assist in its promotion or operation. A clerk may be employed with an agreement that, in addition to his salary, he is to receive a percentage of the net profits. Or a broker or a lawyer or another business man may be induced to assist in an enterprise or some special undertaking for a share of its profits. Ordinarily those who share the profits of a business are liable as partners, but in such cases where there is no community of interest in the partnership funds, where the party sought to be charged has not exercised a partner's control, and where the share of profits is given merely as compensation for services, the person receiving it is not a partner and is not subject to a partner's liability.[1] In regard to cases of this kind, Justice Clifford said:

> "Every man who has a share of the profits of a trade or business ought also to bear his share of the loss, for the reason, that in taking a part of the profits, he takes a part of the fund of the trade on which the creditor relies for payment. (Grace v. Smith, 2 W. Bl. 998;

[1] 1 Bates on P., § 43 and cases cited; Burkle v. Eckart, 1 Denio (N. Y.) 341 (1845); Lewis v. Grieder, 51 N. Y. 231 (1872); Sodiker v. Applegate, 24 W. Va. 411 (1884); Berthold v. Goldsmith, supra; Brown v. Hicks, 24 Fed. Rep. 811 (1885); Ambler v. Bradley, 6 Vt. 119 (1834); see, though, Bromley v. Elliot, 38 N. H. 287 (1859); Bancroft v. Hambley, 94 Fed. Rep. 975 (1899); Sangston v. Hack, 52 Mo. 173 (1879).

Waugh v. Carver, 2 H. Bl. 235.) Actual partnership, as between a creditor and the dormant partner, is considered by law to subsist where there has been a participation in the profits, although the participant may have expressly stipulated with his associates against all the usual incidents to that relation. (Bond v. Pittard, 3 Mees. & W. 357.) That rule, however, has no relation whatever to a case of service or special agency, where the employee has no power as partner and no interest in the profits, as property, but is simply employed as a servant or special agent, and is to receive a given sum out of the profits, or a proportion of the same, as a compensation for his services.

"Merchants are obliged to have clerks, and oftentimes find it necessary to employ brokers or special agents to effect sales, and it is no more detrimental to their creditors that such employees should be paid out of the profits of their trade than from any other source of income within their disposal." Berthold v. Goldsmith, 65 U. S. 536 (1860).

(In connection with this subject see § 19 and Form 51.)

§ 17. Profits as Compensation for Use of Property.

It is not uncommon to arrange to give a proportion of the profits of a business in lieu of rent or as compensation for the use of property employed in the business.[2] Such an arrangement when *bona fide* and not really intended as a cover for a partnership will not involve the owner of the property in a partner's liability. It has been held that a railroad may lease a hotel owned by it, for half the net profits made by the lessee without thereby becoming a partner.[3] A building may

[2] 1 Bates on P., § 45 and cases cited; Wilson Co. v. Bowker, 27 Abb. N. C. (N. Y.) 153 (1891); McDonnell v. Battle House Co., 67 Ala. 90 (1880); see, though, Webster v. Clark, 34 Fla. 637 (1894), 27 L. R. A. 126; Leavitt v. Windsor Co., 54 Fed. Rep. 439 (1893).

[3] Holmes v. Old Colony Ry., 5 Gray 58 (1855); Beecher v. Bush, 45 Mich. 188 (1881); May v. Trust Co., 92 Fed. Rep. 445 (1899); Newell v. Cochran, 41 Minn. 374 (1889).

soft drink.

be rented for ~~saloon~~ purposes for a share in the profits without making the lessor a partner in the business.[4] A mill may be let on shares without making the owner a partner in its operation.[5] In all such cases, the ownership of the property is retained, and while there is a community of interest in the profits, there is no community of interest in the business nor in the property, and the owner of the property would have no control or management of the business.[6]

If in any particular case, the owner of property has participated in the business, or has so turned the property in that there is a community of interest in the property as well as in the profits, the resulting relation would be a partnership and the parties concerned would be liable for its obligations. (See Form 51.)

§ 18. Profits as Compensation for Loan.

It happens occasionally that a loan is made for the purpose of conducting a business and the lender is given a share of the profits of the business in which the money is being used. Here the conditions closely approximate those of a partnership, and under the old rule which prevailed both in this country and in England and which still prevails to some extent in New York and Pennsylvania, such an arrangement would have been held to constitute a partnership, and any one sharing profits on such a basis would also have been held liable for losses.[7] In nearly every state of the Union, however, such an arrangement made in good faith and not intended to conceal a partnership is now held to be entirely legitimate, neither

[4] Thayer v. Augustine, 55 Mich. 187 (1884); Oppenheimer v. Clemmons, 18 Fed. Rep. 886 (1883).

[5] Ambler v. Bradley, 6 Vt. 119 (1834).

[6] Webster v. Clark, supra; Wood v. Beath, 23 Wis. 254 (1868); Berthold v. Goldsmith, 65 U. S. 536 (1860); Dame v. Kempster, 146 Mass. 454 (1888).

[7] Grace v. Smith, 2 W. Bl. 997 (1775); Waugh v. Carver, 2 H. Bl. 235 (1793); Leggett v. Hyde, 58 N. Y. 272 (1874); Hackett v. Stanley, 115 N. Y. 625 (1889).

constituting a partnership nor involving the lender in partnership liability.[8]

It was said by Justice Gray in Meehan v. Valentine, cited below:

> "In whatever form the rule is expressed, it is universally held that an agent or servant, whose compensation is measured by a certain proportion of the profits of the partnership business, is not thereby made a partner, in any sense. So an agreement that the lessor of a hotel shall receive a certain portion of the profits thereof by way of rent does not make him a partner with the lessee. * * *. And it is now equally well settled that the receiving of part of the profits of a commercial partnership, in lieu of or in addition to interest, by way of compensation for a loan of money, has of itself no greater effect."

As has been stated, the old rule still prevails to some extent in Pennsylvania and New York.[9] In Pennsylvania it has been modified by statute, so that *under a written agreement* money may be loaned for a share of the profits of a business without making the lender a partner, providing the lender does not hold himself out as a partner.[10] In New York the courts would seem to have practically abrogated the rule in all those cases where the loan was made in good faith and not with partnership intent.[11]

It may be said that in order to loan money for use in a business and receive compensation in the shape of a share of

[8] Cox v. Hickman, 8 H. L. C. 268 (1860); Meehan v. Valentine, 145 U. S. 611 (1891), 36 L. Ed. and note; Cassidy v. Hall, 97 N. Y. 159 (1884); Richardson v. Hughitt, 76 N. Y. 55 (1881); Smith v. Knight, 71 Ill. 148 (1873); Jones v. Walker, 103 U. S. 444 (1881); Boston C. S. Co. v. Smith, 13 R. I. 27 (1882); Salter v. Ham, 31 N. Y. 321 (1865); Curry v. Fowler, 87 N. Y. 33 (1881).

[9] See New York cases cited in note 8; Herrall v. Dobbins, 169 Pa. St. 480 (1895); Wessels v. Weis, 166 Pa. St. 490 (1895).

[10] Act of April 6, 1870, P. L. 56.

[11] See New York cases cited in note 7; also see Waverly Bank v. Hall, 150 Pa. St. 466 (1892), for a discussion of the New York decisions.

the profits without thereby becoming a member of the firm, the loan must be made in good faith, the lender must not participate in the management and must not hold himself out as a partner. The repayment of the loan must be absolute and not contingent on profits.[12] The agreement should always be in writing and be explicit in its terms. (See Form ~~53.)~~ 50

§ 19. Contracts for Sharing Profits.

The general rule that it is wise to have all contracts reduced to writing becomes doubly imperative in the case of contracts for sharing profits, either as compensation for services, for use of property, or for money loaned. The arrangement verges so nearly on a partnership that it is unsafe to trust to a verbal agreement, which may be too easily misunderstood by one party or the other.

In any agreement of this kind the contract must be drawn with great care, as otherwise it may happen that the resulting arrangement will be found to constitute a partnership, in spite of the fact that the contracting parties may have neither wished nor intended to form such a relation.[13] The law on this point is explicit. As Judge Cooley has expressed it:

> "It is nevertheless possible for parties to intend no partnership and yet form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements and names go for nothing when the substance of the arrangement shows them to be inapplicable." Beecher v. Bush, 45 Mich. 188 (1881).

[12] Richardson v. Hughitt, 76 N. Y. 55 (1897); Eager v. Crawford, 76 N. Y. 97 (1879); Leggett v. Hyde, 58 N. Y. 272 (1874).

[13] Beecher v. Bush, supra; Leavitt v. Windsor Co., 54 Fed. Rep. 439 (1893); Couch v. Woodruff, 63 Ala. 466 (1879).

In all cases where profits are taken without partnership intent, it is prudent to specify in the contract that the party shall receive as compensation "an amount equal to" the proposed share of profits. This phraseology indicates that the person does not take a share of the profits as profits, but only takes a compensation contingent on the profits. Also, it is prudent to specify that the party is not to be a partner, nor exercise a partner's control, nor to have any interest in the partnership property, nor to be liable for any losses. (See Forms 51, 52, 53.) If money is loaned provision should be made for the return of the capital without reference to profits. If the use of property is given, the title of the property should be carefully reserved to the owner.

In dealing with this question it is to be emphasized that as to third parties it is the *legal* intention of the parties rather than their *expressed* or declared intention which controls.[14] As between the parties to the agreement, however, the true rule is that "the agreement and intention of the parties themselves should govern in all cases." [15]

If in any of the cases of profit sharing discussed, the agreement is made for a share of the "gross returns," this wording shows conclusively that the arrangement is not a partnership. The usual arrangement for renting land for a share in kind of the crops raised is an example of this form of contract, and neither as between the parties themselves nor as to third persons would the relation be one of partnership.[16]

[14] Mechem on P., §§ 43, 44; Leggett v. Hyde, 58 N. Y. 272 (1874); Manhattan Brass Co. v. Sears, 45 N. Y. 797 (1871).

[15] Story on P., §§ 1, 38, 39; Stevens v. McKibbin, 68 Fed. Rep. 406 (1895); also New York cases cited in note 14.

[16] George on P., § 18; 1 Bates on P., § 61; Donnell v. Harshe, 67 Mo. 170 (1877).

CHAPTER V.

GENERAL CONSIDERATIONS.

§ 20. Partnership a Personal Relation.

While a knowledge of the law relating to the rights, duties and liabilities of partners is of great importance, it must be remembered that partnership is a personal relation, and that a knowledge of the character, reputation and general responsibility of proposed associates is even more important. It is a singular fact that not infrequently business partnerships are formed with less scrutiny and caution than a guaranty company observes in bonding a messenger boy.

The basic features of the partnership, the mutual agency and the unlimited liability of partners, render the relation susceptible of grave abuses. A partner may easily withdraw or misapply partnership funds. Without consulting his associates he may commit the partnership to contracts and undertakings. In the event of death, the winding up of a partnership business is in the hands of the survivors. In short, the relation is one of such trust that partnership should be entered into only with men worthy of the confidence which must unavoidably be reposed in them.

§ 21. Personal Qualifications.

The character and reputation of a proposed associate have a double bearing upon his fitness as a partner. He is not only to be trusted with the assets and business of the firm, but also his character will, if good, be in itself a firm asset, while if bad it will be a hindrance to success. The progress of a new firm is handicapped from the start if one or more of the partners have already become unfavorably known. On the other hand, and more particularly in professional partnerships, the reputation of its partners is not infrequently the most valuable asset of a prosperous firm.

Reasonably accurate information as to the character of a proposed partner may be obtained from the commercial agencies, and from his previous associates and history. Such information may be more or less biassed, and even if favorable may not be sufficient in itself to justify the confidential relations of the partnership. If unfavorable, however, it should unquestionably condemn the proposed association.

Such skill and experience as one partner may possess above the others form as legitimate an investment as any other kind of capital. In many cases these are taken as the full equivalent of the property investments of other members of the firm. In others, they are regarded as a partial equivalent, and in still others are recognized by a special salary or percentage of profits. It must, however, be remembered that the partnership losses must fall upon the tangible assets of the firm, and that the partner whose investment consists of skill and experience alone may emerge with his skill unimpaired and his experience enlarged from a disaster which has swept away the fortunes of his moneyed companions. This comparative immunity from loss is peculiar to the man who makes no cash contribution to the capital, and in arranging for the division of profits, it may fairly be counted as a deduction from the value of his investment.

§ 22. Financial Responsibility and Investment.

The financial responsibility of a partner is frequently as important an asset of a business as the money or other tangible property actually invested. A wealthy member may put into a firm only a strictly limited amount of capital, but since, owing to the unrestricted liability of the partnership relations, he is responsible for all its debts, it is evident that the extent of his responsibility has an important bearing on the credit of the new firm. Practically his entire property is behind the partnership undertakings, regardless of the amount of his actual investment. On the other hand, if a partner's financial responsibility is not equal to that of his associates, it is obvious that from a credit standpoint he is not so valuable a member of the firm, even though his cash investment may be the same. Also, it is quite possible that such a partner, having less at stake, might be willing to take risks with the partnership business and property from which his associates would shrink. For both these reasons, other things being equal, the desirability of a prospective partner varies directly as his financial responsibility, regardless of the amount of his contemplated investment.

The financial standing of a proposed associate is readily ascertainable from the commercial agencies and from the local banks. Where the difference in financial responsibility is material, limited partnership may be advisable, or the party of lesser means may be restricted in his power to bind the firm.

In this connection it is to be noted that the parties making the larger investment, or possessing the greater means, are usually on vantage ground when an agreement of partnership is being made, but that thereafter the other parties occupy the better position. Having less at stake these latter may, unless restrained, cheerfully involve the firm in risks that their wealthier associates will be very unwilling to incur. For this reason the wealthier parties may very properly and wisely utilize their preliminary advantage of position to insist upon such provisions and restrictions in the partnership agreement as will ensure a safe administration of the partnership affairs.

PART II.—ORGANIZATION.

CHAPTER VI.

FORMATION OF PARTNERSHIP.

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§ 23. By Written Contract.

The customary and the only proper method of forming a partnership is by written articles of partnership signed by all the parties. These articles may be a very simple memorandum of agreement, or they may be expanded into elaborate articles of association, providing for the numerous details and possible exigencies of an extended commercial enterprise.

If each partner is to put in the same amount of capital, to give his entire time and services, and the losses and gains are to be shared equally, a brief and informal memorandum is sufficient. If, however, the partners are to put in varying amounts; if profits are to be divided unequally; if salaries are to be given or interest paid on excess investments, or if options of purchase or withdrawal are to be given, it is desirable that full and explicit articles of copartnership be entered into by the parties.

The variations which may be made on the usual simple partnership contract are innumerable, and a statement and careful definition of these at the beginning will often save serious trouble later on. The general subject will be found treated at length in Part VI, Forms and Precedents.

§ 24. By Verbal Contract.

In spite of the dangers of such a course, partnerships are frequently formed by verbal agreement.[1] Sometimes this is meant to be permanent. More frequently it is intended to be merely temporary, the parties both proposing at some more convenient season to draw up a written contract in due form. The same objection obtains in either case—the objection which holds against all verbal arrangements—that the parties rarely have the same understanding of what has been said, or that one or both may forget details, and the way is thus left open for future disagreements.

Under the Statute of Frauds, a verbal contract of partnership to last more than a year is not valid. If, however, immediately upon making the contract, the parties thereto enter upon its performance, a partnership at will is thereby formed, which is legal and is governed as to its terms by the contract, but which may be terminated at any time by either party, regardless of the original contract.[2] It must be borne in mind, however, that the Statute of Frauds does not apply to verbal contracts made for any period under a year. Such contracts are binding for the specified length of time, and can not be dissolved at will without incurring a liability for damages.

As the Statute of Frauds also provides that no contract creating an estate or interest in real property shall be valid unless in writing, it has been thought that partnerships to deal in real estate can not be formed by verbal contract. The courts, however, have held otherwise, and when such con-

[1] 1 Lindley on P., p. 86; 1 Bates on P., § 281; Rumsey v. Briggs, 139 N. Y. 323 (1893); Bank v. Gallaudet, 120 N. Y. 298 (1890); Chester v. Dickerson, 54 N. Y. 1 (1863); see also post § 59 and cases cited; Levi v. Kanick, 13 Ia. 344 (1862).

[2] Sanger v. French, 157 N. Y. 213 (1898); Wahl v. Barnum, 116 N. Y. 87 (1889).

tracts are for a period less than a year, they will be sustained.[3] The New York Court of Appeals in a leading case said:

> "But suppose two persons, by parol agreement, enter into a partnership to speculate in lands, how do they come in conflict with the statute of frauds? No estate or interest in land has been granted, assigned or declared. * * * The contract is a valid one, and in pursuit of this agreement they go on and buy, improve and sell lands. While they are doing this, do they not act as partners and bear a partnership relation to each other? Within the meaning of the statute in such case neither conveys or assigns any land to the other, and hence there is no conflict with the statute. * * * This is not a controversy about the title to any of the lands taken or owned by the partners, but it simply relates to the conduct of the defendants while they were acting as partners; and in such a case the statute of frauds certainly can present no obstacle to relief." Chester v. Dickerson, 54 N. Y. 9 (1873).

§ 25. By Implied Contract.

In many cases of partnership there is neither a written nor verbal contract which can be proved, but the parties concerned, either intentionally or unintentionally, have acted as partners, have had a common fund in which they exercised a community of interest, and have shared profits and losses. Under such circumstances they will be held to be partners, both as between themselves and as to third persons.[4] An example of an implied partnership is found in the case of McFarlane v. McFarlane, cited below. In this case the Court said:

[3] Flower v. Barnskoff, 20 Oregon 127 (1890), 11 L. R. A. 149; Meagher v. Read, 14 Colo. 335 (1890), 9 L. R. A. 455; Chester v. Dickerson, supra; Essex v. Essex, 20 Beav. 442 (1855); Dale v. Hamilton, 5 Hare 369 (1846).

[4] 1 Lindley on P., p. 84; McFarlane v. McFarlane, 82 Hun. 238 (1894); Jacobs v. Shorey, 48 N. H. 100 (1868); Emerson v. Durand, 64 Wis. 111 (1885).

> "Although it does not appear from the case that there was any specific agreement, either oral or written, entered into between them, it seems to me that from the manner that they received the real estate in question, with the apparatus, machinery and appliances thereon, the evident intention of the testator, as evidenced by the sixth clause of his will, that they should continue the business as carried on by him; and the fact that they thereafter carried on said business together, dividing the profits thereof equally between them, constitutes in fact and law a copartnership as completely as if written articles of copartnership between them had been signed."

Another application of the same principle is to the case of parties who assume to be incorporated when they are not.[5] It does not apply to those who have attempted to incorporate legally, but have failed in some point of procedure. If there are existing laws under which a lawful incorporation could be had, a mere technical non-compliance would not make them liable as partners.[6] They would be a *de facto* corporation and as such capable of doing business. If, however, there were no existing laws under which they could have legally incorporated, the going through the form of incorporation would not prevent their being held liable as partners. Even in this last case, however, anyone who had dealt with them as a corporation would probably be held estopped to deny the corporate existence.[7]

§ 26. Laws Regulating Formation of Partnerships.

Most partnerships are formed under common law rules that are the same in every part of the Union. In certain of

[5] Eaton v. Walker, 76 Mich. 579 (1889), 6 L. R. A. 102; Central City Bank v. Walker, 66 N. Y. 424 (1876); 1 Cook on Corp., § 236 and cases cited in notes.

[6] 1 Cook on Corp., § 234 and cases cited; Bank v. Landon, 45 N. Y. 410 (1871).

[7] 2 Morawetz on Private Corp., § 750; Swartout v. Railroad Co., 24 Mich. 389 (1872); Bank v. Stone, 38 Mich. 779 (1878); M. E. Ch. v. Pickett, 19 N. Y. 482 (1859); Aspinwall v. Sachi, 57 N. Y. 331 (1874); Fuller v. Rowe, 57 N. Y. 23 (1874).

the Western States, however, codes of partnership law have been enacted intended to regulate general partnerships. These codes are practically recitals of the common law rules relating to partnerships. The definitions, the rules as to partnership property, the apportionment of losses and gains, the rules as to liabilities and dissolution are almost exactly a restatement of the common law rules given in this work.

Entirely apart from these general partnership codes, nearly all the states have provided for the organization of partnerships with special, silent partners. The object of these laws is to give opportunity for those who desire to invest capital in a partnership without taking an active part in the business, to invest and at the same time limit their liability to the amount so invested.

Such partnerships are designated "limited partnerships" in contradistinction to the ordinary partnership in which the liability of the partners is unlimited. The procedure to secure the advantages of these laws must be closely followed. The subject is treated more at length in Section 36, Special Partners.

§ 27. The Firm Name.

The firm title is a matter of considerable importance.[8] Its form is a matter of agreement among the parties and is usually prescribed in the articles. The usual practice where there are two partners is to use both names, the name of the leading partner naturally coming first. If there are more than two partners, all the names may appear, though this is unusual in mercantile partnerships. Usually but one or two names appear, the other names being represented by the addition, "& Co." Professional partnerships on occasion use three and even more names in the firm title.

[8] 1 Lindley on P., p. 112 et seq.; George on P., § 36; 1 Bates on P., §§ 191 to 206.

In the absence of statutory restriction any title that is preferred may be used as a partnership designation, even though it contain no partner's name. A corporate name as "The Ansonia Furniture Company" may be used in most states without penalty.[9] In New York a firm using any name other than the names of the partners or some of them, must register such "trade name" together with the real names of the partners in the County Clerk's office, under penalty. It is also illegal in New York to use the suffix, "& Co.", unless it represents an existing or former partner.[10] Partners may change the firm name without dissolution or any special formality, or may have more than one name for the firm.

The firm name under which a particular business has been done for years becomes a valuable asset, which the courts will protect from infringement. No one has the right to use the name of any existing firm or corporation or a name resembling an existing name, for the purpose of working a fraud upon the public or of securing the advantage of a trade name and repute belonging to others. This is known in law by the technical name of "unfair competition" and a man is not allowed to use even his own name, where it is obvious that it is being done for the purpose of misleading the public and of obtaining trade or patronage rightfully belonging to others.[11] When a partnership is dissolved, the question frequently comes up as to the right of a surviving partner to use the trade name. (See § 93.)

All business of the firm should be done under the firm name, although a partnership may exist without any specific

[9] Holbrook v. Insurance Co., 25 Minn. 229 (1878); Crawford v. Collins, 45 Barb. (N. Y.) 269 (1866).

[10] Sinnott v. Bank, 164 N. Y. 386 (1900); Gay v. Seibold, 97 N. Y. 472 (1884); Sparrow v. Kohn, 109 Pa. St. 359 (1885).

[11] Higgins Co. v. Higgins Soap Co., 144 N. Y. 462 (1895); Cement Co. v. Le Page, 147 Mass. 206 (1888); McLean v. Fleming, 96 U. S. 245 (1878); Steinfeld v. Nat., etc., Co., 99 App. Div. (N. Y.) 286 (1904); Kidd v. Johnson, 100 U. S. 617 (1880).

firm name and a firm may be bound by using the separate names of the partners.[12] Usage may establish a firm name, but it is usual and better that it should be designated in the articles.[13] An exception to the general rule in regard to using the firm name occurs where there are dealings in real estate, conveyances of which can not be made under the title of the firm. (See § 44.)

The firm signature is simply the name of the firm, as "Herrick, Simpson & Co.," written by one of the partners or by any authorized agent of the firm.[14] It is not necessary that a member of a partnership should add his own name or indicate that he signed it, though there would be no objection to his so doing. If written by an agent, who was not a member of the firm, it would be proper for him to add his name and the character in which he signed.

If the firm name is signed and the individual members sign also, each one thus adding his name without qualification, assumes full personal responsibility for the instrument he has signed. At the option of the other party to the obligation, either the firm or any one of the individual partners whose names are attached may be held primarily liable for the due performance of the doubly signed agreement.[15]

[12] 1 Bates on P., §§ 200, 452, 453; Berkshire Co. v. Juillard, 75 N. Y. 535 (1879); Staats v. Howlett, 4 Denio (N. Y.) 559 (1847).

[13] Bank v. Gallaudet, 120 N. Y. 298 (1890).

[14] Staats v. Howlett, 4 Denio 559 (1847).

[15] 1 Bates on P., § 453 a.

CHAPTER VII.

PARTIES.

§ 28. Competency.

As partnership is strictly a contract relation, it is essential that the parties to it be competent to contract. Anyone who is competent to bind himself by agreement is competent to enter into the partnership relation.[1] The capacity of different classes of persons to contract is discussed in the succeeding sections.

§ 29. Minors.

The general rule as to the contracts of a minor is that they are voidable, not absolutely void, and may be affirmed or disaffirmed at his discretion upon his arrival at majority. Also, previous to that time, he may disaffirm them at will. This general rule applies to the contract of partnership as to any other contract.[2]

Generally the minor is the only one who can take advantage of his disability. His incapacity is a personal disqualification, of which he alone is entitled to take advantage.[3]

[1] 1 Lindley on P., p. 71; Parsons on P., § 14; 1 Bates on P., §§ 130 to 150; 22 Am. & Eng. Ency. of Law, p. 68.

[2] 1 Lindley on P., p. 74; Sparrman v. Keim, 83 N. Y. 245 (1880); Dunton v. Brown, 31 Mich. 182 (1875); Adams v. Beall, 67 Md. 53 (1887); Osburn v. Farr, 42 Mich. 134 (1879); Kerr v. Bell, 44 Mo. 120 (1867).

[3] Beardsley v. Hotchkiss, 96 N. Y. 201 (1884); Brown v. Ins. Co., 117 Mass. 479 (1875); Bank v. Strauss, 137 N. Y. 148 (1893); Yates v. Lyon, 61 N. Y. 344 (1874).

In Continental National Bank v. Strauss, cited below, it is said:

> "There can be no question but that an infant may become interested in business as a general partner. Nothing forbade it at common law and nothing in the statutory law now forbids it. His infancy was a factor in the situation, which enabled him to disaffirm his obligations and agreements and, in that respect, the privilege was a personal one to himself. Infancy does not disable one from entering into contracts and so long as the infant does not avail himself of the privilege to set up his infancy in bar of, or to avoid, an obligation, his position and his acts are as those of any responsible person. Any other view of his situation would lead to holding all his acts and engagements void; whereas they are voidable merely at his election."

If, however, a minor falsely represents that he is of age, the adult who, relying on the truth of his statement, has formed a partnership with him, may, on discovering the truth, dissolve the partnership without incurring liability.[4]

While a minor is acting as a partner, he has all the rights and powers of a partner and can bind the firm by whatever he does, within the scope of the partnership business. The instability of his personal contracts does not enter, because while contracting for the firm he is acting solely as an agent, not in his own behalf. Like any other partner he is an agent for the firm, and obligations incurred by him on its account are fully binding upon the partnership.[5]

Should the firm become insolvent, a minor acting as a partner may take advantage of his infancy, refuse the partnership liability, and leave his associates to bear the entire burden of the partnership obligations, including those which

[4] Bush v. Linthicum, 59 Md. 344 (1882).

[5] Bush v. Linthicum, supra.

he himself created.[6] It is not probable that under these circumstances he would be allowed to withdraw his partnership investment, but beyond this he could not be held liable or forced to participate in any way in the losses. He might have claimed his proportion of the profits had the firm been successful, but he can not be drawn into its losses against his will. The admission of minors into a partnership is not uncommon, usually because of relationship, but the wisdom of the course is doubtful.

If a minor who has acted as a partner before coming of age continues to so act upon attaining majority, he thereby ratifies the partnership contract, whether or not he makes any express declaration to that effect. He then assumes his full share of the partnership liability, and is responsible, precisely as are the other members of the firm, for all obligations contracted after the date of his maturity. Whether, by merely continuing to act without other ratification of any sort, he also renders himself liable for debts and obligations contracted by the firm before his coming of age, is a question which has not yet been fully settled.

§ 30. Married Women.

At common law a married woman was not competent to contract, and hence could not enter into partnership. Now, however, the disabilities of married women have been generally removed by legislation, and a married woman may contract and enter into a partnership at her discretion.[7] One exception to the general statement still exists in most of the states, in that a married woman can not make a valid contract of partnership with her husband. It is legally supposed

[6] Gay v. Johnson, 32 N. H. 167 (1855); Whittemore v. Elliott, 7 Hun. (N. Y.) 518 (1876).

[7] 1 Lindley on P., p. 77, Am. Note by Wentworth; Parsons on P., §§ 19, 20; Vail v. Winterstein, 94 Mich. 230 (1892), 18 L. R. A. 515; Abbott v. Jackson, 43 Ark. 216 (1884); Plumer v. Lord, 5 Allen, 460 (1862).

that the husband and wife are one, and this theory precludes the idea of a business partnership existing between them.[8] In New York and a few other states, however, under the wording of special statutes, decisions have been made abrogating this rule, and holding that women can become liable under partnership and other joint contracts with their husbands.[9] Under the common law the marriage of a woman dissolved, at once, any partnership of which she was a member. It is not likely that under modern statutes it would have this effect.[10]

§ 31. Aliens.

There is no restriction upon the right of a citizen to contract, and, therefore, to enter into partnership, with an alien in time of peace between the two countries.[11] In time of war such a partnership could not be legally formed, and the breaking out of a war between the countries would of itself terminate partnership relations between individuals of the two nations.[12]

§ 32. Insane Persons.

The partnership agreement of an insane person, like that of a minor, is not void but voidable. It is not, however, voidable at the option of either party to the contract, but

[8] Seattle, etc. v. Hayden, 4 Wash. 263 (1892), 16 L. R. A. 530; Fuller v. McHenry, 83 Wis. 573 (1892), 18 L. R. A. 512; Bowker v. Bradford, 140 Mass. 521 (1885); Payne v. Thompson, 44 O. St. 192 (1886); Bassett v. Shepardson, 52 Mich. 3 (1883).

[9] Suau v. Caffee, 122 N. Y. 308 (1890), 9 L. R. A. 593; Le Grand v. Bank, 81 Ala. 123 (1886); Schlapback v. Long, 90 Ala. 525 (1889); Schofield v. Jones, 85 Ga. 816 (1890).

[10] 2 Lindley on P., p. 584; Parsons on P., § 302; Bassett v. Shepardson, supra; Brown v. Chancellor, 61 Tex. 437 (1884).

[11] 1 Bates on P., §§ 110, 131; 1 Lindley on P., p. 72; Story on P., § 297.

[12] Griswold v. Waddington, 16 Johns. (N. Y.) 438 (1819); Bank of N. O. v. Matthews, 49 N. Y. 12 (1872); Matthews v. McStea, 91 U. S. 7 (1875); see also Cohen v. Insurance Co., 50 N. Y. 610 (1872), and Kershaw v. Kelsey, 100 Miss. 561 (1868).

only by legal adjudication. If a person became insane after entering a partnership this would not of itself terminate the relation, even upon his being judicially declared insane, if it were a partnership for a term of years. In such case application would have to be made to the courts for a decree of dissolution, and until it had been secured the partnership would continue. In Raymond v. Vaughan, cited below, the court said:

> "The rule supported by the decided weight of authority, and announcing the correct doctrine is that the insanity of a partner does not *per se* work a dissolution of the partnership, but may constitute sufficient grounds to justify a court of equity in decreeing its dissolution." * * *
>
> "At any time after the insanity of Vaughan, the continuing partner had, if he saw proper to exercise it, the right to apply for a dissolution of the partnership, or, as it was a partnership at will, might have dissolved it of his own volition."

If, however, the sane partner continues the business, without taking steps to dissolve the partnership, it is held to endure, and he must account for the share of profits to which, under the partnership agreement, his partner is entitled.[13]

§ 33. Other Firms.

A partnership may be entered into between already existing firms, or between a firm and an individual, as readily as may any other contract.[14] Under such an arrangement the profits and, in case of dissolution, the assets are divided among the component firms or parties, and then subdivided

[13] 1 Lindley on P., p. 74; 2 Bates on P., §§ 132, 581; Rowland v. Evans, 30 Beav. 302 (1861); Davis v. Lane, 10 N. H. 156 (1839); Raymond v. Vaughan, 128 Ill. 256 (1889), 4 L. R. A. 440.

[14] In re Hamilton, 1 Fed. Rep. 800 (1880); Raymond v. Putnam, 44 N. H. 160 (1862); Bullock v. Hubbard, 23 Cal. 496 (1863).

by the firms among their individual members. As to liability to third persons, the arrangement is simply a partnership of all the individuals.[15]

A partner may agree with an outside party to share his interest in the profits and property of the firm. Such an arrangement is termed a sub-partnership. It may be entered into without the consent of the firm, and without affecting in any way its existence or operations. The sub-partner is not a member of the original firm, is not liable to its creditors, and, under ordinary circumstances, has no right of accounting against it.[16]

§ 34. Corporations.

It is but seldom that the question of a partnership with a corporation or between corporations arises. It has been maintained that as they can only fulfill their corporate purposes, and as those purposes do not embrace partnership relations, corporations can not become partners.[17]

On this point the New York Court of Appeals in The People v. North River Sugar Refining Co., cited below, said:

> "We are enabled to decide that in this State there can be no partnerships of separate and independent corporations, whether directly, or indirectly, through the medium of a trust; no substantial consolidations which avoid and disregard the statutory permissions and restraints, but that manufacturing corporations must be and remain several as they were created, or one under the statute."

It has been held, however, to the contrary, that when its

[15] Meyer v. Krohn, 114 Ill. 574 (1885).

[16] Lindley on P., p. 48; Burnett v. Snyder, 81 N. Y. 550 (1880); Nirdlinger v. Bernheimer, 133 N. Y. 45 (1892); Meyer v. Krohn, supra; Setzer v. Beale, 19 W. Va. 274 (1882); Rockafellow v. Miller, 107 N. Y. 507 (1887).

[17] People v. N. R. Sugar Ref. Co., 121 N. Y. 582 (1890); Morris Co. v. Barclay Co., 68 Pa. St. 173 (1871); Hackett v. Railroad Co., 12 Or. 124 (1885); Whittenton Mills v. Upton, 10 Gray 587 (1858).

charter expressly permits a corporation to enter into such a relation, it may form a legal partnership.[18] It is also possible for a corporation to make itself liable as a partner to third persons.[19]

The charters of modern corporations in the more liberal states, and more particularly in New Jersey, are usually drawn with such free provisions that the corporation is authorized to enter into any kind of business relation, including partnerships of every description.[20]

[18] Butler v. Toy Co., 46 Conn. 136 (1878).

[19] Cleveland Co. v. Courier Co., 67 Mich. 152 (1887).

[20] The following are instances of the charter powers that may be given corporations under the laws of Delaware, New Jersey and other states that have similar laws:

(i) To enter into, make, perform and carry out contracts of every sort and kind, with any person, firm, association, corporation, private, public or municipal, or body politic, and with the government of the United States, or any state, territory or colony thereof, or with any foreign government.

(k) To do any or all of the things set forth in this certificate as objects, purposes, powers or otherwise, to the same extent and as fully as natural persons might or could do, and in any part of the world, as principals, agents, contractors, trustees or otherwise.

—*Charter of the Jersey Paving Corporation,* § 3.

"To become a member of any partnership or a party to any lawful agreement for sharing profits, or to any union of interests, agreement for reciprocal concessions, joint adventure, or co-operation or mutual trade arrangement with any person or firm or company that is carrying on or engaged in, or about to carry on or engage in, any business which this corporation is authorized to carry on, or is engaged in, or that is conducting any business or transaction capable of being conducted so as directly or indirectly to benefit this corporation."

—*Charter of American & Foreign Line, Dill on N. J. Corp., p. 324.*

CHAPTER VIII.

RELATION OF PARTNERS TO FIRM.

§ 35. General Partners.

A general or active partner is one who takes part in the management of the business, and who is liable for the firm's obligations without limitation as to amount. The term is used to distinguish between the general and the special partner, the latter being one whose liability is limited to some specific amount. (See § 36.) Unless by the observance of some statutory procedure a partner has limited his liability, he will, as to third persons, be held in every case to be a general partner. The law of partnership as given in this work applies to general partners, and whenever the word "partner" is used, a general or active partner is understood. It is to be noted that the terms general and special partner have no connection with, and are used in an entirely different sense from the terms "general partnership" and "special partnership." (See §§ 5, 6.)

The distinction between general and special partners is clearly set forth in the New York statute which follows, and which gives a concise and correct statement of the law, applicable everywhere.

> **Limited partnership.** A limited partnership consists of one or more persons called general partners, and also one or more persons called special partners. Laws of 1897 (N. Y.), Ch. 420, § 4.

Authority of general [partner. Every general partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner. Id., § 5.

Liability of general partner. Every general partner is liable to third persons for all the obligations of the partnership, jointly and severally with his general copartners. Id., § 6.

Liability of special partner. A special partner, except as declared in this chapter, is liable for the obligations of the limited partnership only to the amount of the capital invested by him therein. Id., § 7.

§ 36. Special Partners.

A special partner is one who does not participate to the full in partnership liability. The partnerships in which special partners have place are termed limited partnerships. A limited partnership must have one or more general partners, and one or more special partners, the latter taking no active part in the business. They may be formed only in states where they are specifically authorized by law (see § 9), and only for those purposes specified in the statute, which are usually mercantile, mechanical or manufacturing. The object of these laws is to allow persons to invest capital in a partnership and share in its profits without taking any active part in the business, and without incurring liability beyond their actual investment. The theory on whch the arrangement is based is that the publicity enjoined notifies those having dealings with the firm that the special partners have but limited liability; hence, if any give credit, they do so knowingly, and are not wronged by the limitation of liability.

A special partner must not participate or interfere in the direct management of the business. If he does he thereby forfeits his exemption from liability and at once becomes a general partner.

The procedure necessary to form a limited partnership is almost as formal as the incorporation of a stock company, usually involving the execution and acknowledgment of a certificate of the facts relating to the partnership, the filing and recording of the same, and publication both of the certificate and of an affidavit that the investment of the special partner has actually been paid in cash. Generally the certificate must also state the name of the firm, where its business is to be done, its purposes, the names and residences of the general and special partners, the investments of the special partners, and when the partnership is to begin and terminate. In each state it is necessary to consult the statutes and to follow accurately the procedure there outlined.[1] Failure to observe the required formalities may result in making the special partners liable to creditors as general partners.[2]

§ 37. Dormant Partners.

A dormant partner is one who has invested as a partner but whose connection with the firm is secret and who has no part in the management of the business.[3] He has no legal status, exemptions or privileges beyond those of a general partner, except as the direct result of the secrecy of his connection. If this connection is discovered he is liable in exactly the same way and to the same extent as any general or active partner.[4] Unless precluded by the terms of the partnership contract, he may at any time assert himself as a gen-

[1] See N. Y. Laws of 1897, Ch. 420, for New York Statutes.

[2] See ante, Section 9, and authorities there cited.

[3] 1 Lindley on P., pp. 178, 245; 1 Bates on P., § 10; George on P., § 33; Metcalf v. Officer, 2 Fed. Rep. 640 (1880); North v. Bloss, 30 N. Y. 374 (1864).

[4] Oppenheimer v. Clemmons, 18 Fed. Rep. 886 (1883); Winship v. Bank of U. S., 5 Peters 529 (1831); Berthold v. Goldsmith, 24 Howard 536 (1861); Elmira, etc., Co. v. Harris, 124 N. Y. 280 (1891); Bromley v. Elliot, 38 N. H. 287 (1859).

eral partner and participate in the management of the firm business.

An active partner wishing to withdraw from the firm in such a way as to cut off subsequent liability, must give notice to all those with whom the firm is doing business. A dormant partner, on the contrary, may withdraw without notifying those who do business with the firm and after such withdrawal he can not be held for any subsequent liability of the firm, even though his previous connection with it should become known.[5] His withdrawal, however, does not free him from liability for anything done by the firm during his connection therewith.

The term "silent partner" is often used with much the same meaning as "dormant partner." There is, though, this difference, that a dormant partner must be both "secret" and "silent," while a silent partner need not be secret. A silent partner has no voice in the management of the firm business, but may be publicly known as a partner. He is liable for firm obligations just as is any other partner, and if he withdraws he must give notice to escape subsequent liability. In a firm where there are silent or dormant partners, the partners who actually manage the business would be known as active partners.

The relation of a dormant partner is always unsafe and of doubtful utility. At any time it may be discovered and the dormant partner be held as any other partner. Where it is desired to invest in a business and avoid liability, a limited partnership or a corporation should be formed.

§ 38. Nominal Partners.

A nominal partner is one who, while not really a partner, in that he has no interest in the business or profits, allows his name to be used or to appear as that of a partner. The

[5] 1 Lindley on P., pp. 178, 212, 245; see Elmira, etc., Co. v. Harris, supra.

effect of such holding out is that the nominal partner has practically all the liabilities of a partner and none of the advantages.

Occasionally a person allows himself to be used as a nominal partner for the purpose of assisting a firm, much as he might endorse its note, or guarantee its credit in other ways. He can, however, only become a nominal partner by his own act or neglect; he can not be forced into any such relation.

If a person allows himself to be held out as a partner he is fairly held liable to those who give credit to the firm on faith or with knowledge of his being a member, even though he has no beneficial interest in the firm.[6] He is not, however, liable to a creditor who had no knowledge of such holding out.[7]

Members of an incorporated partnership business have been held liable as partners for the debts of the corporation, because they neglected to notify those with whom they were dealing, that the business had been incorporated.[8]

[6] Poole v. Fisher, 62 Ill. 181 (1871); Bissell v. Warde, 129 Mo. 439 (1895); Lancaster, etc., Bank v. Boffenmyer, 162 Pa. St. 559 (1894); Poillon v. Secor, 61 N. Y. 456 (1875).

[7] Seabury v. Crowell, 52 N. J. L. 413, 11 L. R. A. 136 (1890); Thompson v. Nat. Bank, 111 U. S. 529 (1884); Webster v. Clark, 34 Fla. 637, 27 L. R. A. 126 (1894).

[8] McGowan v. Tan-Bark Co., 121 U. S. 575 (1887); Wechselberg v. Bank, 64 Fed. Rep. 90 (1894), 26 L. R. A. 470; see also Central Bank v. Walker, 66 N. Y. 424 (1876).

PART III.—CONDUCT OF BUSINESS.

CHAPTER IX.

THE PARTNERSHIP PROPERTY.

§ 39. The Partnership Investment.

The partnership investment is the money or property, tangible or intangible, contributed by the partners for the purposes of the business. It may be contributed in equal or unequal proportion, or one partner may furnish the entire amount. It may be paid in at the inception of the partnership, or thereafter as needed, or as the partners may be able. In case of dissolution, unless otherwise expressly agreed, the full amount of each partner's investment is returned to him if still intact.[1]

The partnership investment does not itself in any way control or determine the partners' interests in the results of the business. If profits are made they may, by agreement, be apportioned on the basis of investments or in any other way the partners may desire, but in the absence of such agreement they will be divided equally among the partners without regard to their comparative investments.[2] So, also, if losses occur they will be apportioned equally among the partners

[1] Whitcomb v. Converse, 119 Mass. 38 (1875); Livingston v. Blanchard, 130 Mass. 341 (1881); Jackson v. Crap, 32 Ind. 422 (1869); Schutte v. Anderson, 13 G. & S. (N. Y. Super.) 489 (1879); Dean v. Dean, 54 Wis. 23 (1882).

[2] Moley v. Brine, 120 Mass. 324 (1876); Jones v. Butler, 87 N. Y. 613 (1882).

unless otherwise expressly agreed.[3] That is, there is no necessary relation between the partner's investment and his participation in the profits or losses of the firm.

Unless otherwise agreed, on dissolution of a firm with sufficient assets, the amount of each partner's investment is returned to him in full. Any remainder, as profits of the business, is then divided among the partners in equal proportion. If losses have been incurred, the distribution of assets is somewhat more involved. The losses must first be apportioned equally among the partners, and the amount to be paid each on his investment account must be diminished by this amount.

For instance, A and B may form a partnership, A putting in $5,000 and B, $10,000, without express provision for apportionment of profits and losses. If, on dissolution, it is found that the original partnership investment has been increased by $12,000, A will receive his $5,000 from the assets of the firm, B will receive his $10,000, and each will receive $6,000 as his share of the profits. If, however, it should be found that the firm had lost $12,000, half of this loss, or $6,000, must be borne by either partner. A then not only loses his entire investment of $5,000, but is liable for $1,000 more. B with his $10,000 investment has $4,000 due him, but as the entire partnership assets are only $3,000, he must look to A for $1,000 of this amount. If such results seem inequitable to intending partners, they may be avoided by arranging in the partnership agreement for any desired apportionment of profits and losses.

A partner has no claim to interest on his investment, or even on money put in over and above his agreed investment, unless it has been expressly so agreed. If a partner advances or loans money to his firm it is proper that he should receive interest on it, but in the absence of any agreement, under-

[3] 2 Bates on P., § 813; Flagg v. Stowe, 85 Ill. 164 (1877); Jones v. Butler, 87 N. Y. 613 (1882).

standing or usage concerning the matter, he will not be able to enforce such claim. (See § 65.) It should be said, however, that this rule seldom obtains if any reason can be found for mitigation of its harshness.[4]

§ 40. Partnership Property.

The original property of a partnership is derived from the contributions of the partners. When profits are made, they may be drawn out, or they may be allowed to accumulate and meanwhile may be used in the prosecution of the firm business. If retained in the business they are practically merged in the original capital, the two together constituting the partnership property.[5] This, while the merger continues, is used for the purposes of the partnership without distinction as to its origin. In the event of dissolution, however, a distinction is made, the original investment being returned to the partners in the exact amounts which each put in, while the accumulated profits are divided among them, either equally or in any proportion which may have been specified in the articles of association. (See § 39.)

Any property purchased with partnership funds becomes *prima facie* partnership property.[6] If such property were taken in the name of a single partner, he would hold as trustee for the firm.[7]

So long as the firm is solvent the partners may by unani-

[4] Rogers v. Clement, 162 N. Y. 422 (1900); Collender v. Phelan, 79 N. Y. 366 (1880); Morriss v. Allen, 14 N. J. Eq. 44 (1861); Gilhooley v. Hart, 8 Daly (N. Y.) 176 (1878); Sweeney v. Neely, 53 Mich. 421 (1884); Hartman v. Woehr, 18 N. J. Eq. 383 (1867); Winchester v. Glazier, 152 Mass. 316 (1890).

[5] Procter v. Procter, 1 Ohio Dec. 652 (1894); contra, Dean v. Dean, 54 Wis. 23 (1882).

[6] Somerby v. Buntin, 118 Mass. 279 (1865); Collins v. Butler, 14 Cal. 223 (1859); Hill v. Miller, 78 Cal. 149 (1889); Bank v. Miller, 153 Ill. 244 (1894).

[7] Traphagen v. Burt, 67 N. Y. 30 (1876); Davis v. Davis, 60 Miss. 615 (1882); Partridge v. Wells, 30 N. J. Eq. 176 (1878).

mous consent change partnership property into individual property and may reverse the process at will.[8]

The dissolution of a firm does not destroy the joint interest of the partners in the partnership property, or make them tenants in common; the property continues to be partnership property until disposed of in some manner.[9]

§ 41. Firm Name, Good-will, Trade-marks.

The firm name, the good-will of the business and any trade-marks used in the business are the property of the partnership, in which each partner has his interest. These intangible possessions are often of great value, and in any final settlement of the affairs of a partnership should be disposed of for the benefit of all the partners.[10] (See § 93.)

The firm name is at times a very desirable property. In case of the death of a partner the right to use the firm name does not pass to the survivors.[11] Such right may be acquired in the re-organization of the firm, but the interest of the deceased partner in the name must be recognized, and in the settlement it must be treated as an asset of the firm.

In a late case, Slater v. Slater, cited in the notes, the New York Court of Appeals said:

> "1st. On the facts of this case the right to continue the use of the firm name is a firm asset and does not inure to the benefit of the surviving partner. 2nd. The purchaser at the sale provided for in the decree,

[8] Case v. Beauregard, 99 U. S. 119 (1878); Stanton v. Westover, 101 N. Y. 265 (1886); Jones v. Tusk, 2 Metc. (Ky.) 356 (1859).

[9] Roby v. A. C. Ins. Co., 120 N. Y. 510 (1890); King v. Leighton, 100 N. Y. 385 (1885); Sangston v. Hack, 52 Md. 173 (1879).

[10] Parsons on P. (4th Ed.), § 181 and note; Williams v. Farrand, 88 Mich. 473 (1891), 14 L. R. A. 161.

[11] Slater v. Slater, 175 N. Y. 143 (1903); Caswell v. Hazard, 121 N. Y. 259 (1893); Hazard v. Caswell, 93 N. Y. 250 (1890); Banks v. Gibson, 34 Beav. 566 (1865).

whether surviving partner or otherwise, will acquire the right to continue the business under the firm name."

If a firm were dissolved and no disposition or agreement were made as to the firm name, each of the partners would have an equal right to its use, and might engage in business thereunder. Usually the right to use the firm name would, on dissolution, be sold for the benefit of all interested.

The good-will of an established business, resulting from its repute, its advertising and its permanent patronage, is often included with the firm name as inhering in it. It also attaches usually to the location of the business. In professional partnerships it attaches to the persons of the partners. Though purely intangible it is partnership property, often of much value, and the interest of a deceased partner in the good-will he has helped to develop must be recognized.[12] As it is difficult for a court to estimate the value of good-will, the articles should, where it is feasible, provide for its valuation in case of dissolution. Too frequently, it is dissipated without advantage to anyone.

If the business were sold as a whole, the good-will would pass with the firm name and the tangible assets. The retiring partners could not thereafter engage in the same business, even under their own names, in any way that might lead the public to believe that they were continuing the old business.[13]

Any trade-marks used by the firm are its property in like

[12] Lobeck v. Lea-Clark Co., 37 Neb. 158 (1893); 23 L. R. A. 795; Hutchinson v. Nay, 187 Mass. 262 (1905), 68 L. R. A. 186; Snyder v. Snyder Mfg. Co., 54 Ohio St. 86 (1896), 31 L. R. A. 657; Hoxie v. Chaney, 143 Mass. 592 (1887).

[13] 2 Lindley on P., p. 445; Hazard v. Caswell, 121 N. Y. 484 (1893); Slater v. Slater, supra; Snyder v. Snyder Mfg. Co., supra; Lane v. Smythe, 46 N. J. Eq. 443 (1890); Rogers v. Taintor, 97 Mass. 291 (1867); Banks v. Gibson, 34 Beav. 566 (1865); Merry v. Hoopes, 111 N. Y. 413 (1888); Burkhardt v. Burkhardt, 36 O. St. 261 (1880); Lamb Co. v. Lamb Co., 120 Mich. 159 (1899), 44 L. R. A. 841. See, though, Williams v. Farrand, 88 Mich. 473 (1891), 14 L. R. A. 161, which gives a full discussion of the subject; Cottrell v. Babcock, 54 Conn. 122 (1886); Meneely v. Meneely, 62 N. Y. 431 (1875); Bingham School v. Gray, 122 N. C. 699 (1898), 41 L. R. A. 243; Bagby, etc., Co. v. Rivers, 87 Md. 400 (1898), 40 L. R. A. 632.

manner with the firm name.[14] In Caswell v. Hazard, cited below, it was said:

> "The right to a trade mark is derived from its appropriation and continual user, and becomes the property of those who first employ it and give it a name and reputation. (Devlin v. Devlin, 69 N. Y. 212; Colman v. Crump, 70 id. 578.) It becomes part of the assets of the firm by which it was used and established, and can be owned, transferred and sold like other species of property. Upon the dissolution of a firm which has acquired its proprietorship, it must be sold and its proceeds distributed like other firm assets and, if not so disposed of, it remains the property of the individual members of the dissolved firm, and may lawfully thereafter be used by any or either of such members desiring to continue the prosecution of the business in which it has theretofore been used."

§ 42. Nature of Partners' Interests.

It is always possible for a partner to advance money or to let the firm have the use of property of which he retains the right to possession, and such money or property remains his individual property.[15] Money or property, however, put into a partnership as an investment becomes the actual property of the partnership, and the partner who invested it has no more right in it or control over it than has any other partner. No partner has any separate interest in any portion of the partnership property.[16] A surviving partner or partners have a right of possession for the purpose of settling up the affairs of the partnership, but this being done the right of possession ceases, and each has only the right to his proportion

[14] Huwer v. Dannenhofer, 82 N. Y. 499 (1880); Hazard v. Caswell, 93 N. Y. 259 (1883); Hoxie v. Chaney, 143 Mass. 592 (1887); Merry v. Hoopes, 111 N. Y. 415 (1888); Hall v. Barrows, 4 De G. J. & S. 150 (1863).

[15] George on P., §§ 43 to 47.

[16] Taft v. Schwamb, 80 Ill. 300 (1875); Kuhn v. Newman, 49 Ia. 424 (1878).

of the partnership assets when converted into cash. In any case of dissolution the assets must be sold, and out of the proceeds each partner must receive his due proportion. He can not demand a partition of the property nor a specific share,[17] except with the consent of all the interested parties.

If a partner sells his interest or if it is sold on execution the purchaser takes nothing but that partner's proportionate share in the cash assets after the partnership has been wound up.[18] He can neither force his way into the partnership, nor demand a partition of its property.

§ 43. Partners' Power Over the Common Property.

Each partner's power over the property of the firm is the same. Each is agent for all the others in all that pertains to the care, sale and management of the partnership property. Any partner may sell any part of the personal property that is for sale, and his power to purchase for the firm is equally broad.

A partner can not, however, sell all the firm assets, for that would be to put the firm out of business;[19] nor can he sell property needed for the operations of the firm in its business.[20] Any such sales would be outside of the ordinary scope of the business, and hence outside of a partner's authority as agent for the firm. To make such a sale effectual all of the partners should either authorize one of the firm thereto or else join directly in the sale.[21]

For a legitimate purpose a partner has also the right to

[17] Staats v. Bristow, 73 N. Y. 264 (1878); Menagh v. Whitwell, 52 N. Y. 146 (1873); Hiscock v. Phelps, 49 N. Y. 97 (1872); Sindelaire v. Walker, 137 Ill. 43 (1891); Davis v. Davis, 60 Miss. 615 (1882).

[18] Staats v. Bristow, supra; Deane v. Hutchinson, 40 N. J. Eq. 83 (1885).

[19] 1 Bates on P., § 401 et seq.; Lowman v. Sheets, 124 Ill. 416 (1890).

[20] Cayton v. Hardy, 27 Mo. 536 (1858).

[21] Drake v. Thyng, 37 Ark. 228 (1881); Wilcox v. Jackson, 7 Col. 521 (1884); Hanchett v. Gardner, 138 Ill. 571 (1891).

pledge or mortgage the property of the firm.[22] He has, however, no power to sell property of the firm or to borrow money upon it for his own purposes or to pay his own debts, and anyone lending him money, or buying property from him under such circumstances with knowledge takes no title to the property in question.[23] It would be otherwise in the case of a purchaser who acted in good faith, and without knowledge that the transaction was not for the benefit of the firm.[24] (See Chap. X, Relations of Partners.)

§ 44. Real Estate.

A firm as such can not hold real estate. The law does not recognize it as a legal entity capable of holding real property. Hence, land must be deeded to the members of a firm to hold as tenants in common,[25] or to some individual, who is usually a member of the firm, to hold as trustee for its benefit.[26] A partnership may be formed, even by verbal contract,[27] for the purpose of buying and selling land, but any real property such partnership acquires must be held for it by a trustee. (See § 59, and cases cited.)

A conveyance of real estate to a firm by name, in cases where the firm name contained the name or names of existing members, would pass a legal title to the members named, who would hold in trust for the whole firm.[28] If no member

[22] Phillips v. Trowbridge, 86 Ga. 699 (1890); Hage v. Campbell, 78 Wis. 572 (1891); McCarthy v. Beisler, 130 Ind. 63 (1891).

[23] Chase v. Iron Works, 55 Mich. 139 (1884); Bank v. Underhill, 102 N. Y. 336 (1886); Hinds v. Backus, 45 Minn. 170 (1891).

[24] Locke v. Lewis, 124 Mass. 1 (1878).

[25] See generally on this subject 28 L. R. A. 86 et seq.; note gives full discussion; also Tidd v. Rines, 26 Minn. 201 (1879).

[26] Riddle v. Whitehill, 135 U. S. 621 (1889).

[27] Rumsey v. Briggs, 139 N. Y. 323 (1893); Chester v. Dickerson, 54 N. Y. 1 (1873).

[28] Sherry v. Gilmore, 58 Wis. 324 (1883); Menaget v. Burke, 43 Minn. 211 (1890).

were named in the firm title, no title would pass to anyone, but the grantor could later be compelled to deed to the individual members of the firm.[29] Likewise a conveyance from the firm in the firm name, while it would not pass title, would give the assignee such an equitable right as would enable him to compel a valid transfer by the individual members of the firm.[30]

Real estate held, as indicated, for the benefit of the firm is for all partnership purposes treated as personal property. It is thus treated in adjusting equities between the partners, or in settling partnership affairs for the benefit of creditors.[31] The wife of a partner has no right of dower in it until all partnership obligations, either to creditors or to other partners, have been satisfied.[32] The heir of a deceased partner takes it subject to the obligations of the firm.[33] As soon as the firm obligations are settled it resumes its character of realty for all purposes.

§ 45. Attachment and Execution.

A partner's interest can be reached by attachment or by execution. This interest, however, is merely a right to a certain proportion of the surplus after debts are paid and the affairs of the partnership are adjusted, and this is all that can be reached by legal process. The debtor partner has no right to any specific portion of the firm assets, and his creditors can have no better right than he has. The effect of the sale of a partner's interest under execution would be to give the purchaser the right to merely the same interest in value that the

[29] Tidd v. Rines, supra; Blanchard v. Floyd, 93 Ala. 53 (1890).

[30] Rovelsky v. Brown, 92 Ala. 522 (1890).

[31] Rovelsky v. Brown, supra; Bank v. Miller, 153 Ill. 244 (1894); Paige v. Paige, 71 Ia. 318 (1887).

[32] Paige v. Paige, supra; Woodward v. Nudd, 58 Minn. 236 (1894).

[33] Harris v. Harris, 153 Mass. 439 (1890).

debtor partner had.[34] Such a sale would, of necessity, dissolve the partnership, and make necessary an immediate settlement of its affairs.[35] All partnership debts would have to be settled before anything was set aside for a purchaser under execution.

An attachment will not be granted against a partnership unless all of the partners have given occasion for its issuance.[36] The fact that one or more members of the firm are non-residents, or have absconded, will not justify an attachment against the firm property, though it might against the individual interest therein of the partner at fault.[37]

Execution following judgment on a claim against the firm runs in the names of the individual partners, and can be levied on the partnership property, or on the individual property of any of the partners.[38] If it is levied on individual property, the partner to whom such property belongs has recourse against his partners for their proportions of the debt.

On execution against the partnership there can be no claim for homestead or exemption out of the joint assets.[39] This is the general law, but it does not apply to New York and a few of the other states, in which the provisions of the exemption act are held to extend to property owned by a partnership of which the debtor was a member.[40]

[34] Staats v. Bristow, 73 N. Y. 268 (1878); Talbot v. Emmons, 99 Ind. 452 (1884); Gerard v. Bates, 124 Ill. 150 (1888); Sirriere v. Briggs, 31 Mich. 443 (1875).

[35] Renton v. Chaplin, 9 N. J. Eq. 64 (1853); Wilson v. Waugh, 101 Pa. St. 233 (1882); Carter v. Roland, 53 Tex. 540 (1880).

[36] Allen v. Clayton, 11 Fed. Rep. 73 (1882).

[37] Staats v. Bristow, 72 N. Y. 268 (1878); but see Williams v. Mutterspaugh, 29 Kas. 524 (1883).

[38] Freeman on Ex. (3rd Ed.), § 125; Judd, etc., Co. v. Hubbell, 76 N. Y. 543 (1879).

[39] Freeman on Ex. (3rd Ed.), § 221; Love v. Blair, 72 Ind. 281 (1880); Green v. Taylor, 98 Ken. 330 (1895).

[40] Stewart v. Brown, 37 N. Y. 350 (1867); Howard v. Jones, 50 Ala. 67 (1875); Gilman v. Williams, 7 Wis. 287 (1859); Moyer v. Drummond, 32 S. C. 165 (1890).

CHAPTER X.

RELATIONS OF PARTNERS.

§ 46. Powers of Partners.

The powers of partners are strictly confined to those matters within the scope of the partnership business. Within this limit each partner has power to make contracts and do business. Beyond this limit no partner has authority to act or bind the firm. A partner in a dry goods house could not bind the firm by a contract to purchase land. A member of a law firm could not bind his associates by giving the firm note for mining stocks. The rule is that whatever is usually done in the conduct of any particular business may be done by any member of a partnership engaged in that business. As partner he is an agent for the firm with authority to do anything properly pertaining to its business.[1]

In a trading partnership the powers of the partners are most extensive and extend to all things usually done in the conduct of the particular business. A partner in a trading partnership may buy and sell goods and property used in its business,[2] make any ordinary contract,[3] borrow money and

[1] 1 Lindley on P., pp. 126, 127; 22 Am. & Eng. Ency. 144 et seq.; Cox v. Hickman, 8 H. L. Cas. 268 (1860); Rumsey v. Briggs, 139 N. Y. 323 (1893), and cases cited; Smith v. Sloan, 37 Wis. 285 (1875); Haskinson v. Eliot, 62 Pa. St. 393 (1869); Kitner v. Whitlock, 88 Ill. 513 (1878); Union Nat. Bank v. Underhill, 102 N. Y. 336 (1886); Davis v. Dodson, 29 L. R. A. 496 (1895).

[2] Irwin v. Williar, 110 U. S. 499 (1884); Boswell v. Green, 25 N. J. L. 390 (1856); Kenney v. Altwater, 77 Pa. St. 34 (1874); Crites v. Wilkinson, 65 Cal. 559 (1884).

[3] Stillman v. Harvey, 47 Conn. 26 (1879); Rovelsky v. Brown, 92 Ala. 522 (1890).

give security for the same by pledging firm property,[4] give the firm note or accept a firm draft,[5] (see § 57), appoint agents or employ assistants.[6]

He can not, however, enter an appearance or confess judgment in the firm name,[7] or sell or mortgage real estate.[8] He can not bind the firm for his private debt [9] nor execute any firm agreement under seal.[10] He can not sell firm property to himself.[11] He can not bind the firm in any matters not within the scope of the partnership business.[12]

A partner in a professional partnership has no powers save in regard to matters strictly within the line of the firm's professional business. A note or other obligation executed by a member of such a partnership would not bind the firm.[13] (See §§ 54, 55.)

§ 47. Majority Rule.

The majority rule in a partnership, each partner being entitled to an equal voice in the management of its affairs

[4] Morris v. Maddox, 97 Ga. 575 (1895); Gano v. Samuel, 14 Ohio 592 (1846); Smith v. Collins, 115 Mass. 388 (1874); Palmer v. Scott, 68 Ala. 380 (1880); Union Bank v. K. C. Bank, 136 U. S. 223 (1890); Long v. Slade, 121 Ala. 267 (1898); Settle v. Hargadin, 66 Fed. Rep. 850 (1894).

[5] Blodgett v. Weed, 119 Mass. 215 (1875); Sedgewick v. Lewis, 70 Pa. St. 217 (1871); Bank v. Alberger, 101 N. Y. 202 (1886); Rumsey v. Briggs, 139 N. Y. 323 (1895).

[6] Bennett v. Stickney, 17 Vt. 531 (1845).

[7] Hall v. Lanning, 91 U. S. 160 (1875); see, though, Kuhn v. Weil, 73 Mo. 213 (1880).

[8] Brunson v. Morgan, 76 Ala. 593 (1884); see, though, Chester v. Dickerson, 54 N. Y. 1 (1873); Rovelsky v. Brown, 92 Ala. 522 (1890), and Long v. Slade, supra.

[9] Union Nat. Bank v. Underhill, 102 N. Y. 336 (1886).

[10] George on P., § 95; Mackay v. Bloodgood, 9 Johns. (N. Y.) 285 (1812); see, though, Smith v. Kerr, 3 N. Y. 144 (1849).

[11] Comstock v. Buchanan, 57 Barb. (N. Y.) 127 (1864).

[12] Union Nat. Bank v. Underhill, 102 N. Y. 336 (1886).

[13] Lee v. Nat. Bank, 45 Kan. 8 (1890), 11 L. R. A. 238, note; Smith v. Sloan, 37 Wis. 285 (1875); Deardorf v. Thacher, 78 Mo. 128 (1883); Davis v. Dodson, 95 Ga. 718 (1895).

without regard to the amount of his investment.[14] The rule in stock corporations that votes are cast according to the relative interests of the shareholders (see §§ 100, 103, 105) has no place in the administration of partnership affairs, in which the majority is one of numbers, not of interest.

The majority may decide all matters of business policy and all questions relating to the general conduct of the business, and when and to what extent profits are to be divided, so far as these matters are not prescribed in the articles of copartnership. The majority must, however, in all cases rule fairly, must consult with the minority in regard to any proposed action and must allow the minority to be heard in discussion of the same.[15] They can not apply the capital to new undertakings outside the scope of the partnership business nor can they seek their own interest as against the common interest.[16]

Where the partners are evenly divided concerning any proposed action a deadlock results and those who would do something out of the routine are at a disadvantage as compared with those who are satisfied with existing conditions. In a partnership of two no change can be made and no new action undertaken unless both can agree.

Where articles exist no change can be made in any part save by unanimous consent of all the members of the partnership.[17]

§ 48. Mutual Agency.

This is perhaps the most important feature of the partner-

[14] 1 Lindley on P., p. 313 et seq.; Story on P., § 123; 1 Bates on P., §§ 431, 432, 433; George on P., §§ 62, 63, 64; Kirk v. Hodgson, 3 Johns. Ch. (N. Y.) 400 (1818); Zabriskie v. Railroad, 18 N. J. Eq. 178 (1867); Johnson v. Dalton, 27 Ala. 245 (1855); Peacock v. Cummongs, 46 Pa. St. 434 (1864).

[15] 1 Lindley on P., p. 315.

[16] Moore v. Knott, 12 Oregon 260 (1885).

[17] 1 Lindley on P., p. 315 et seq.; 1 Bates on P., § 434; Gansvoort v. Kennedy, 30 Barb. (N. Y.) 279 (1859); Abbott v. Johnson, 32 N. H. 9 (1855); Zabriskie v. Railroad, 18 N. J. Eq. 178 (1867).

ship relation. The mere fact of partnership makes each partner agent for the firm with full power to bind it by any contract properly within the scope of the partnership business. (This subject is treated at length in Chapter XI, Relations to Third Persons.)

§ 49. Contract Limitations.

It is always possible to restrict the powers of any one or of all the partners by limitations in the articles. Such restrictions do not, however, affect third persons, unless they have had notice of the same. In the absence of such express notice third persons may deal with partners on the assumption that they have all the powers usually incident to the relation, and any contracts so made will be as binding upon the partnership as if the restrictions did not exist.[18] If there is danger of a partner's making contracts in violation of the partnership articles, it is expedient to notify those with whom he is likely to deal of the restriction, and that the firm will not be bound by any obligations made in violation of it.

As between the partners, limitations on their powers are simply contracts, and if any partner violates them, his associates may dissolve the partnership, and the offending partner will be held personally liable for any damages arising from his breach of contract.[19] For example, a trading partnership might stipulate that no partner should sign the firm note for more than one hundred dollars, unless with the consent of his co-partners. One of the partners in some dealing, within the legitimate scope of the firm business, might give its note for one thousand dollars to some person who was ignorant of the restriction. In such case, the partnership would be bound

[18] Hoskinson v. Eliot, 62 Pa. St. 393 (1869); Magovern v. Robertson, 116 N. Y. 61 (1889); Ontario Bank v. Hennessey, 48 N. Y. 545 (1872).

[19] 2 Bates on P., §§ 761, 780; Dart v. Laimbeer, 107 N. Y. 664 (1887); Bagley v. Smith, 10 N. Y. 489 (1853).

by the note, but the offending partner would be personally liable to his associates for any damage resulting and such breach of the articles would be sufficient cause for a dissolution of the firm. (See § 56.)

§ 50. Arbitration of Differences.

It is not unusual in partnership articles to provide a clause to the effect that in the event of any difference in regard to the application of the articles or in managing the affairs of the partnership or in winding up on dissolution, the matter shall be settled by arbitration. (See Form 31.)

The difficulty with such arrangements is that men willing to agree to arbitration to settle their difficulties are generally able to arrive at some compromise without arbitration, and when they can not do this they usually do not feel like submitting to anything save the compulsion of a court. Nevertheless, it is always expedient to insert this provision, as it may on occasion save a lawsuit and it affords a ready method to settle some differences. The word, also, at the present time, often has a moral effect in preventing and quieting difficulties out of proportion to its actual workings. Even when it is omitted from the articles, the proposal to settle difficulties by arbitration may always be made and will sometimes prevent an open rupture. It is to be noted that courts generally sustain the awards made by arbitrators, unless bad faith or corruption can be shown.[20]

§ 51. The Duty of Good Faith.

Partnership is practically a personal relation, and those who enter it are expected to act honestly and fairly toward their associates. Anything that is done must be done for the common good. No partner may seek his own advantage at

[20] Sweet v. Morrison, 116 N. Y. 19 (1889); Fudickar v. Ins. Co., 62 N. Y. 392 (1878); Perkins v. Giles, 50 N. Y. 229 (1872).

the expense of his associates, nor may he make any personal and private profit out of a transaction in the line of the partnership business.[21] All transactions must be for the common good, and in important matters a partner should consult his associates before taking action.[22]

So far as is possible the courts will enforce this duty. A partner will not be allowed to retain an unfairly made profit,[23] nor to compete with his firm. He may, unless expressly restricted by his partnership agreement, carry on an independent, non-competing business of his own, provided that it does not interfere with his duty to his firm. (See § 52.) Any profit made in a competing business or in a business that did interfere with the firm business would be held to have been made for the firm and his associates could compel him to account for the same.[24] (See § 66, and cases cited.)

§ 52. The Right to Engage in Other Business.

Although, as has just been said, a partner may not engage in any enterprise that would compete with the business of the partnership,[25] he may, in the absence of any restriction in the articles, engage in other ventures which are non-competing, and may give to them time which might have been devoted to partnership affairs.[26] A partner may also use information acquired by him in the partnership business in his

[21] 1 Lindley on P., p. 303 et seq.; see Am. notes by Wentworth; 1 Bates on P., §§ 303, 304; Mitchell v. Reed, 61 N. Y. 123 (1874); Densmore Oil Co. v. Densmore, 64 Pa. St. 43 (1870).

[22] Yorks v. Tozer, 59 Minn. 78 (1894), 28 L. R. A. 86.

[23] Mitchell v. Reed, 61 N. Y. 123 (1874); Homes v. Gilman, 138 N. Y. 369 (1893); Emory v. Parrott, 107 Mass. 95 (1871).

[24] Kimberly v. Arms, 129 U. S. 512 (1888); Todd v. Rafferty, 30 N. J. Eq. 254 (1878); Chapin v. Streeter, 124 U. S. 360 (1888); Pearce v. Ham, 113 U. S. 585 (1885).

[25] 22 Am. & Eng. Ency. 118; 1 Bates on P., § 306; Kimberly v. Arms, supra; Todd v. Rafferty, supra.

[26] Wheeler v. Sage, 1 Wall. 518 (1864); Belcher v. Whittemore, 134 Mass. 330 (1883).

private undertakings, provided these latter are not within the scope and do not compete with the business of the firm.[27]

To avoid trouble of this kind the articles should provide that each partner shall give his whole time or some specified portion of his time to the partnership affairs and should prohibit the partners from engaging in other enterprises if it is so desired, or might specify in what other undertakings they may engage. (See Form 13.)

§ 53. Retirement of Partner.

When a partner dies or becomes bankrupt or when war is declared between the countries to which the respective partners belong, the partnership is forthwith terminated, the relation of mutual agency ceases and neither a partner nor the representative of a partner can bind the partnership nor the property or estate of either partner further. Nothing can be done except to liquidate, pay debts and wind up the partnership affairs.[28] If a partner becomes insane, the partnership is not dissolved until the fact of insanity has been legally determined, when, upon due application therefor, a decree of dissolution will issue.[29] (See § 73.)

If a partner wishes to terminate his partnership relations he may do so at any time by simply giving notice to the members of his firm, to those dealing with the firm and to the public generally. If the partnership was at will, or for no specified time, this ends the relation, both as among the parties themselves and as to the general public. If, however, the partnership was for a given and unexpired term, the partner may still withdraw as he can not be compelled to remain, but if he does so without sufficient cause he may be liable in damages to his associates for his breach of the partnership contract.

[27] Latta v. Kilbourn, 150 U. S. 524 (1893).

[28] Gray v. Green, 142 N. Y. 316 (1894); Robbins v. Fuller, 24 N. Y. 570 (1862).

[29] Kent v. West, 33 App. Div. (N. Y.) 112 (1898).

After giving proper public notice of his withdrawal, the retiring partner is no longer liable for the future transactions and obligations of the firm. The firm may continue under the same name, but while he is still liable for the obligations contracted while he was a member of it, he can be held for nothing further.[30] The matter of notice is, however, important, as it is the only way in which liability for the future obligations of the firm may be escaped.

As has been said, a dormant partner may retire without giving notice, save to his associates in the firm. As his connection has been secret, credit has not been given to the partnership by reason of his association with it, and he can retire in the same unostentatious manner in which he formed the relation.[31]

[30] McElvey v. Lewis, 76 N. Y. 373 (1879).

[31] 2 Bates on P., § 608; Phillips v. Nash, 47 Ga. 218 (1872); Elmira, etc., Co. v. Harris, 124 N. Y. 280 (1891); Davis v. Allen, 3 N. Y. 168 (1849).

CHAPTER XI.

RELATIONS TO THIRD PERSONS.

§ 54. Doctrine of Mutual Agency.

In a partnership each partner has equal authority with the others and is held to be the agent of the others, and of the firm, for any transactions within the scope of the partnership business. Hence each partner within this limit is bound by the acts, the contracts and even the frauds of his associates, and is responsible for the obligations and liabilities so created as fully as if he had himself acted or contracted.[1] This peculiar feature of the partnership is perhaps the most important consequence of the relation and occasionally works great hardship to individuals. It is, however, an essential feature, which may be limited by proper provision therefor, but can not under any conditions be wholly avoided. (See §§ 55, 56.) In a leading case on this subject, Chief Justice Marshall said:

> "When then a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the company to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company, and every person with whom he trades in the way of its business has a right to consider him as the company, whoever may compose it. It is usual to buy and sell on

[1] 1 Lindley on P., p. 124; George on P., §§ 90 to 93; Winship v. Bank of U. S., supra; Cox v. Hickman, 8 H. L. Cas. 260 (1860); Meehan v. Valentine, 145 U. S. 611 (1892); Rumsey v. Briggs, 139 N. Y. 323 (1893); Chester v. Dickerson, 54 N. Y. 1 (1875); Strang v. Bradner, 114 U. S. 555 (1885).

credit; and if it be so, the partner who purchases on credit in the name of the firm must bind the firm. This is a general authority held out to the world, to which the world has a right to trust. The articles of copartnership are perhaps never published. They are rarely if ever seen, except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties as between themselves. The trading world, with whom the company is in perpetual intercourse, can not individually examine those articles, but must trust to the general powers contained in all partnerships. The acting partners are identified with the company, and have power to conduct its usual business in the usual way." Winship v. Bank of U. S., 5 Peters 529 (1831).

§ 55. Limits of Agency Powers.

In the absence of special restrictions on the agency powers of the partners, they are limited only by the scope of the partnership business and by the ordinary limitations of the powers of agents.[2] Thus, under his general powers, a partner acting alone may bind the firm in any matter properly within its business operations. Under the rule of the common law he could not, however, bind it by the independent execution of a deed, bond or other sealed instrument, though well within the scope of the partnership business, unless specially authorized thereto under seal, for the reason that an agent is not competent to execute a sealed instrument except when he, himself, is authorized thereto under seal. This doctrine has, however, been relaxed in later decisions and it is now held that a partner may be authorized by parol to execute a sealed instrument for his firm or that after execution such an instrument may be adopted or confirmed verbally by the other members of the firm.[3]

[2] Irwin v. Williar, 110 U. S. 499 (1884); Union Nat. Bank v. Underhill, 102 N. Y. 336 (1886).

[3] Smith v. Kerr, 3 N. Y. 144 (1849).

The power of a partner as an agent of the firm being restricted by the scope of the firm business, it follows that the mutual agency of partnership will vary widely according to the nature of the particular firm. In a professional partnership there would usually be no buying or selling, and promissory notes and contracts might not come within the scope of the firm business at all. In such case the powers of the partners as agents would be very restricted. In an ordinary trading partnership, on the other hand, the power will extend to many things. In such a firm the partner may buy, sell, give notes or sign contracts freely, and so long as he does not go clearly beyond the scope of the business his associates will be bound by his acts. (See § 46.)

If a partner does step beyond the proper limits of the firm business his acts are of no effect so far as the firm is concerned. If the business does not require notes or contracts, any such instrument signed by a partner with the firm name may be rejected or accepted at discretion by the firm. If rejected, it can not be enforced against the firm, though the partner signing would be liable.

§ 56. Limitation in Articles.

Any desired restrictions on the agency power of partners may be incorporated in the partnership agreement. This is often done, the restrictions varying in extent and nature. Not infrequently it is stipulated that particular partners shall have no power whatsoever in the management of the firm business. (See § 49.)

Such restrictions do not, in themselves, deprive the partner of the powers sought to be denied him, and are effective only when the outside parties with whom the firm has dealings have received notice of their existence, and that the firm will not be bound by contracts so prohibited. A partner may have signed an agreement under which he is apparently deprived of all power to act for the firm, but if, notwithstanding, he contracts with third parties who have no knowledge of the restrictions, such contract is as binding on the firm as if made by any other partner.[4] The other partners may bring suit against the offending partner for damages for breach of contract, or for a dissolution of the compact of partnership, but they can not disclaim and avoid his contract. If, however, in such case the third parties had been notified of the restrictions on the power of the contracting partner, and that the firm would not be responsible for contracts in violation of them, the contract would be void, or voidable at the option of the firm.

When the usual powers of partners are restricted by agreement, any third parties dealing with the firm should, therefore, be notified in the name of the firm of such restrictions; also that the firm will not be responsible for any contract made in violation of the notified restrictions.[5] Such notice should be in writing and be served on the parties to be notified in person or by mail.

In a limited partnership (see §§ 9, 36), the partner whose liability is limited can take no part in the management. In such case the limitations on his powers and the general nature of the partnership are notified to third parties under the provisions of the laws regulating such partnership. This is usually done by publication or by filing the partnership articles in some public office, as may be prescribed. This is then sufficient notification to third parties and they deal with the partnership thereafter subject to the published conditions.

§ 57. Partnership Notes.

Partnership notes as firm obligations come under the general rules of mutual agency. Every member of a trading

[4] Winship v. Bank of the United States, 5 Peters 529 (1831); Kimbro v. Bullitt, 63 U. S. 256 (1859); Magovern v. Robertson, 116 N. Y. 61 (1889); Ontario Bank v. Hennessey, 48 N. Y. 545 (1872); Hoskinson v. Eliot, 62 Pa. St. 393 (1869); Rice v. Jackson, 171 Pa. St. 89 (1895); Stimson v. Whitney, 130 Mass. 591 (1881).

[5] 1 Lindley on P., p. 174 et seq.; Bromley v. Elliott, 38 N. H. 287 (1859).

firm has a right to make and endorse notes, and to make, accept and endorse drafts and other commercial paper in the firm name.[6] He may use this power fraudulently, or for his own purposes, but unless the payee or owner had this knowledge brought home to him, he can hold the firm on the note. To obligate the firm by negotiable paper is within the usual scope of a trading partnership business, and the abuse of the power is one of the risks of the partnership relation.

In the case of a non-trading partnership, however, it is not customary for the partners to bind the firm by issuing negotiable paper, and unless it could be shown (1) that the partner was authorized to issue commercial paper, or (2) that in the particular business it was in accordance with usage for the partnership to bind itself in this manner, the firm would not be bound.[7] For instance, in a partnership of lawyers or physicians there would seem to be no business reason for issuing commercial paper, and therefore, generally speaking, the firm would not be held liable on such obligations signed by one partner.[8]

It is not uncommon to limit in the partnership articles this power of binding the firm, but this is not of itself sufficient to relieve the firm of its liability. If it were a commercial partnership and one of its partners issued its paper for value to an innocent holder who had no knowledge of the restriction, the firm would be bound. Not only must the power of binding the firm be restricted, but third parties must have notice that it is so restricted, and that the firm will not be bound by any action exceeding these limitations. (See §§ 49, 56.) A person having a claim against a partner could not safely take in settlement a note signed by him with the partnership name, as making such a note would be clearly

[6] 1 Bates on P., § 341; George on P., § 90.

[7] Dowling v. Nat. Exch. Bank, 145 U. S. 512 (1892); Story on P., § 102a.

[8] Smith v. Sloan, 37 Wis. 285 (1875).

beyond the ordinary authority of the partner, but such a note after it was passed on for value to an innocent holder would bind the firm.[9] An endorsement of the firm name by a partner on the note of a third party, outside of the scope of partnership business, would be void.[10]

§ 58. Purchase and Sale of Personal Property.

A partner has full power to buy and sell personal property within the scope of the partnership business, and the firm will be bound by his transactions.[11] This power does not extend to the sale of property used by the firm for carrying on the firm business as such a sale would tend to destroy the partnership business.[12] For the same reason one partner has no power to sell the entire assets of the partnership.[13] Where a sale is to be made of the stock in trade, or of the entire assets, or of fixtures or furniture, all of the firm should join in the assignment. As to power of a partner to assign for benefit of creditors, see § 60, Assignment for Benefit of Creditors.

A partner has likewise power to pledge and mortgage personal property of the firm for the legitimate purposes of the partnership, but not to such an extent as to terminate the partnership business.[14]

§ 59. Purchase and Sale of Real Property.

A partnership may be formed by either written or verbal contract for the express purpose of buying and selling real

[9] Smyth v. Straden, 4 Howard 403 (1846); Union Nat. Bank v. Underhill, 102 N. Y. 336 (1886); Bank v. Savery, 82 N. Y. 291 (1880); Atlas Bank v. Savery, 133 Mass. 75 (1879).

[10] Bank v. Alden, 129 U. S. 372 (1888).

[11] 1 Bates on P., § 401; also cases in note 2, Chapter X.

[12] 1 Bates on P., § 401; George on P., § 99.

[13] Bender v. Hemstreet, 12 Misc. (N. Y.) 620 (1895); Patterson v. Hare, 4 App. Div. (N. Y.) 319 (1896); Sloan v. Moore, 37 Pa. St. 217 (1860).

[14] Osborne v. Barge, 29 Fed. Rep. 725 (1885); also cases in note 4, Chapter X.

estate.[15] (See § 24.) In such cases the realty is treated for all partnership purposes as if it were personalty. Likewise in other cases where real property is purchased with partnership funds for partnership purposes, it is treated as personalty, is held subject to the claims of creditors and co-partners, and, until these are fully satisfied, is liable neither to the claims of heirs nor to dower rights.[16]

Since a partnership is not, like a corporation, a legal entity, land can not be held in the firm name,[17] but must be held either in the names of all the partners, or in the name of one or more who will be considered trustees for the partnership. (§ 44.) When held in the name of all the partners it is often difficult to determine whether they hold it as partnership property, or simply as tenants in common. If the latter is the case, the land is subject to the usual incidents of real property.[18]

If partners own land in common, each may sell his undivided share, and the purchaser will take as tenant in common with the others. Any one of them can at pleasure have partition by taking the necessary legal steps, and the interest of each is subject to all the usual incidents attaching to real property.[19]

If, however, the land is held as partnership property, partition can not be had, nor may individual shares be sold or separated. If a partner tries to sell his interest, the pur-

[15] Chester v. Dickerson, 54 N. Y. 1 (1873); Note in 28 L. R. A. 86; see cases cited in § 24.

[16] Greenwood v. Marvin, 111 N. Y. 423 (1888); Fairchild v. Fairchild, 64 N. Y. 471 (1876); Columb v. Read, 24 N. Y. 505 (1862); Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 164 (1847); Riddle v. Whitehill, 135 U. S. 621 (1889); Allen v. Withrow, 110 U. S. 119 (1883); Shearer v. Shearer, 98 Mass. 107 (1867); Moore v. Wood, 171 Pa. St. 365 (1895).

[17] Parsons on P., § 366; Byam v. Bickford, 140 Mass. 31 (1885); Tidd v. Rines, 26 Minn. 201 (1879).

[18] Thompson v. Bowman, 73 U. S. 316 (1867); Coles v. Coles, 15 Johns. (N. Y.) 159 (1818); Ware v. Owens, 42 Ala. 212 (1868).

[19] Gerard on Titles to Real Estate, pp. 300, 304.

chaser only takes right to the surplus remaining after winding up the business and satisfying all partnership claims.[20]

Although a partnership can not hold real property in the firm name, if land were so deeded to a partnership it would be sustained as a contract to convey or as conveying to them as tenants in common, provided the individuals composing the firm could be identified from the name given in the deed. If one member of the firm could be thus identified, he would take and hold as trustee for his associates.[21] One partner can not make a valid deed to real estate held by the firm, but he can in a proper case, that is, when such contract is within the scope of the partnership business, make a contract to convey which the courts will compel the firm to perform.[22] Likewise in a similar case, a partner can make a valid contract for the purchase of land by the firm.[23]

Where real property is to be held by a partnership it should be conveyed to the individual members, with a statement in the conveyance that the transferees are partners under a firm name and take the property conveyed as partnership property. In case of subsequent transfer all should join in like manner.

§ 60. Assignment for Benefit of Creditors.

Although a partner has full power to do anything necessary for the conduct of the firm business, he has no power to do anything which will terminate this business. Hence he has no right to make a general assignment to a trustee for the benefit of creditors.[24] This can only be done by all the

[20] 2 Bates on P., §§ 927, 1098.

[21] Sage v. Sherman, 2 N. Y. 417 (1849); Holmes v. Jarrett, 7 Heisk (Tenn.) 506 (1872); Tidd v. Rines, 26 Minn. 201 (1879); Menage v. Burke, 43 Minn. 211 (1890).

[22] Thompson v. Bowman, 73 U. S. 316 (1867).

[23] Offut v. Scott, 47 Ala. 104 (1872); Sage v. Sherman, supra.

[24] Welles v. March, 30 N. Y. 344 (1864); Fox v. Curtis, 176 Pa. St. 52 (1896); Osborne v. Barge, 39 Fed. Rep. 725 (1887); Emerson v. Senter, 118 U. S. 3 (1886).

partners acting together. If, however, one partner makes such an assignment, the others may, if they choose, ratify his action, thus making the unauthorized assignment valid.[25] In case a partner has absconded, or for any other reason can not be reached, the remaining members of the firm, acting together, can make a valid assignment.[26]

In contradiction to the general rule that one partner, acting independently, can not make a valid assignment, it has been held in New York that he may transfer the partnership effects directly to a creditor of the firm, without the knowledge or consent of his associates, and the courts will sustain his action.[27]

It must be said, however, that since the passage of the present National Bankruptcy Law, this general subject of assignment is of little practical importance, as any assignment made by a firm when insolvent would be an act of bankruptcy, and any creditor aggrieved could proceed under the National Bankruptcy Act, which defines the specific "acts of bankruptcy" as follows:

> "Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such

[25] Adee v. Cornell, 93 N. Y. 572 (1883).

[26] Sullivan v. Smith, 15 Neb. 476 (1884); Williams v. First, 27 Minn. 255 (1880).

[27] Bulger v. Rosa, 119 N. Y. 459 (1890); Mabbett v. White, 12 N. Y. 442 (1855); Graser v. Stellwagen, 25 N. Y. 315 (1862); Van Brunt v. Applegate, 44 N. Y. 544 (1871).

preference; or (4) made a general assignment for the benefit of his creditors, *or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States;* or (5) admitted in writing his inability to pay his debts, and his willingness to be adjudged a bankrupt on that ground.

"A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay or defraud his creditors, or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment." § 3, (a) and (b) National Bankruptcy Act of 1898 as amended by the Act of 1903. (See also quotations in § 74.)

§ 61. Liability to Third Persons.

Where a partnership is admitted or proved, and where a contract within the scope of the partnership business has been made by a partner, each individual partner is liable, and in case judgment is had against the firm execution may be levied on the firm property, or on the separate property of any one of the partners. That is, the creditors may take judgment against all the partners and may then proceed to collect it from firm assets or from the property of any one or more of them, leaving the partners to adjust the matter between themselves as best they may.[28]

[28] Judd, etc., Co. v. Hubbell, 76 N. Y. 543 (1879).

> "Each partner is liable *in solido* for all debts of the firm. This does not mean that one partner can be sued alone, which depends upon whether the liability is joint or several, but means that the entire fortune of each partner, not only that embarked in the business, but whatever he may own, is liable to make good the firm's debts, whether the other partners are able to contribute or not; and regardless of the amount or proportion of his interest in the firm, whether it be large or small, the consequence is the same." 1 Bates on P., § 457.

A partner is liable in damages for the torts, frauds and wrongdoing of his partner within the scope of the partnership business, but usually he will not be held criminally liable.[29]

In connection with this liability to third persons, it usually becomes necessary to prove the existence of a partnership, and the rules considered in Chapter I of this work apply.[30] This important matter was summed up by the Supreme Court of the United States as follows:

> "It may perhaps be doubted whether any more precise general rule can be laid down than that those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incident or consequence follows, that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them within the scope of the partnership business; and that even an express stipulation between them that one shall not be

[29] Williams v. Hendricks, 115 Ala. 277 (1897); see note on this case in 41 L. R. A. 650; Strang v. Bradner, 114 U. S. 555 (1885); Loomis v. Barker, 69 Ill. 360 (1873).

[30] See cases cited in notes to Chapter IV; also Bates on P., Chap. II; George on P., §§ 9 to 17 inclusive; Mechem on P., Chap. V.

so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive, but not conclusive, evidence of partnership." Meehan v. Valentine, 145 U. S. 611 (1891).

A dormant partner may be held if discovered (see § 37), and anyone who has allowed himself to be held out as a partner, though not really one, will be held to a partner's liability.[31]

In regard to those uncertain contracts by which men expose themselves to partnership liability when they have no intention of becoming partners, it should be remembered that prevention by a properly drawn contract is not difficult, and that a small expenditure in counsel fees for drafting a safe contract at the beginning may save a later disastrous liability.

[31] McGowan v. Am. Pressed Tan-Bark Co., 121 U. S. 575 (1887); Oppenheimer v. Clemmons, 18 Fed. Rep. 886 (1883); Bissell v. Ward, 129 Mo. 439 (1895); Sylvester Co. Bank v. Boffenmeyer, 162 Pa. St. 559 (1894); Lothrop v. Adams, 133 Mass. 471 (1882); Strang v. Bradner, 114 U. S. 555 (1885); U. S. v. Baxter, 46 Fed. Rep. 350 (1891); Wisc. Central R. Co. v. Ross, 142 Ill. 9 (1892).

CHAPTER XII.

DIVISION OF PROFITS.

§ 62. Usual Rule.

The sharing of profits is an essential feature and the usual object of a partnership. Ordinarily these profits are ascertained by deducting the current expenses from the current receipts, or gross profits, or, on dissolution or any general accounting, by deducting the firm indebtedness and the original partnership investment from the total partnership assets.[1]

> "In determining the profits of a business the court instructed the jury that they should first ascertain the gross receipts and the stock on hand at its cost price, less its depreciation and deduct therefrom the expenditures and the debts. This we think was right." Thayer v. Augustine, 55 Mich. 187 (1884).

As there is often room for differences of opinion as to what constitutes profits, it is well to define in the articles of association how they are to be determined. (See Form 8.) The articles should also specify the times at which profits are to be apportioned; if they fail to do so, this point must be decided by agreement, or, when there is an odd number of partners, by the majority. (See Form 9.)

As already stated (see § 39), in the absence of a special agreement otherwise, the common law rule governs the division of both profits and losses. Under this the partners must

[1] 1 Lindley on P., p. 394 et seq.; Fuller v. Miller, 105 Mass. 103 (1870); Braun's Appeal, 105 Pa. St. 414 (1884).

share equally, without any variation, or any allowance for the greater value of services rendered, the greater amount of time devoted, or the greater investment made by one or the other of the partners.[2] Some modification of this rule may occur if one partner wilfully neglects the business,[3] but otherwise unless set aside by agreement it is invariable. If it is desired to modify this rule and to make the shares of profits or loss proportionate to investment, to time given or to comparative skill, a specific stipulation to that effect must be put in the articles of agreement. Unless this is done the common law rule will hold and the partners will share equally.

§ 63. Contract Stipulations.

When a partnership is formed, any desired variation of the common law rule of profit sharing may be arranged.[4] As equality of profit sharing among partners would in many cases be obviously inequitable, such variations are common. Each partner's interest in profits is then specified and is usually determined by the amount of his investment and the general value of his services to the firm.

If one partner makes the greater investment, this should be recognized, either by interest on the excess investment or by a larger share of profits. If one partner has greater skill or experience in the particular line of business this is even more important than excess investment, and must receive due recognition. If one partner is to give his entire time and attention, while the others give but a portion of their time or

[2] 2 Lindley on P., p. 774 and notes; Parsons on P., §§ 172, 173; 2 Bates on P., §§ 770, 781; Bradford v. Kimberly, 3 Johns. Ch. 431 (1818); Evans v. Warner, 20 App. Div. (N. Y.) 230 (1897); 9 L. R. A. 424 and note; Whitcomb v. Converse, 119 Mass. 38 (1875); Robinson v. Anderson, 20 Beav. 98 (1885); Roach v. Perry, 16 Ill. 37 (1854).

[3] 1 Lindley on P., p. 381; Denver v. Roane, 99 U. S. 355 (1879); Airey v. Borham, 29 Beav. 620 (1861).

[4] Paine v. Thacher, 25 Wend. (N. Y.) 450 (1841); Bradford v. Kimberly, 3 Johns. Ch. 431 (1818); Welsh v. Canfield, 60 Md. 469 (1883).

are at liberty to engage in outside undertakings, this also would bear directly upon the division of profits. Other considerations will also frequently enter in and the division of partnership profits becomes a matter of difficult adjustment.

It is, however, even more important that the agreement should be certain than that exact justice should be secured in the apportionment of profits. Where the conditions are at all involved it is impossible to arrange any division of profits that shall be absolutely fair, but the matter should be settled specifically in some way in the partnership agreement. Uncertainty is a far greater evil than is some slight and unavoidable inequity of division of profits. (See Forms 9 and 39 for examples of unequal divisions of profits.)

§ 64. Salaries for Services.

Unless by express agreement, no partner has any claim for extra compensation for his services, no matter how onerous.[5]

Where the time devoted to the business by the several partners is not the same or where one partner has some special skill and ability above the others, these differences may be fairly adjusted either by providing in the partnership articles for a differing proportion of profits for the respective partners, or, which is perhaps a better way, by allowance of salaries proportioned to the value of the services rendered.[6]

The plan of salaries drawn from the firm business for partners has several advantages. It not only affords a ready means of adjusting the varying claims of the partners upon

[5] 1 Lindley on P., p. 380; Denver v. Roane, 99 U. S. 355 (1879); Evans v. Warner, 20 App. Div. (N. Y.) 230 (1897); Roach v. Perry, 16 Ill. 37 (1854); Drew v. Ferson, 22 Wis. 620 (1868); Burgess v. Badger, 124 Ill. 288 (1888); Major v. Todd, 84 Mich. 85 (1890); Godfrey v. White, 43 Mich. 171 (1880); Dunlop v. Watson, 124 Mass. 305 (1878); Pierce v. Pierce, 89 Mich. 233 (1891); 9 L. R. A. 424 and note; Bromley v. Elliot, 38 N. H. 287 (1859); Emerson v. Durand, 64 Wis. 111 (1885).

[6] Hagenbuchle v. Schultz, 69 Hun. (N. Y.) 183 (1893); Winchester v. Glazier, 152 Mass. 316 (1890); 9 L. R. A. 424 and note; Askew v. Springer, 111 Ill. 662 (1884); Couch v. Woodruff, 63 Ala. 466 (1879).

the earnings of the partnership, but also usually reduces the amount which each partner draws from the firm for personal use to a fixed and definite sum. Also it makes more apparent the real results of the partnership undertaking. (See Form 10.)

A partnership business can not be said to be making a profit unless it is yielding something beyond a fair compensation for the services of the partners. If, however, no salaries are paid and the partners only draw from time to time such sums as they may need, they not infrequently lose sight of the fact—when such is the case—that their business is merely giving them an opportunity to earn wages. Such a condition may be entirely satisfactory to the partners, or in new undertakings their services may have to be given for a time without compensation, but an established business is usually expected to show returns above fair salaries to the partners. In any event those arrangements are to be preferred that show most clearly the real conditions of the business.

§ 65. Interest on Investments.

As has been stated (see § 39), the general rule is that no partner has any claim for interest on his investment, or on his excess investment, or on his advances or on profits not withdrawn, unless express provision has been made to that effect in the partnership agreement.[7] The rule has not been sustained, though, in all cases, and where circumstances would imply an agreement to pay interest or where there was reason to consider that the advances were in the nature of loans, interest has been allowed.[8] In a Massachusetts case, the court said:

[7] 1 Lindley on P., p. 389; Collyer on P., § 318; 2 Bates on P., § 781 et seq.; Hallock v. Streeter, 102 Fed. Rep. 193 (1900).

[8] Rodgers v. Clement, 162 N. Y. 422 (1900), and cases therein cited; Winchester v. Glazier, 152 Mass. 316 (1890), 9 L. R. A. 424 and notes; Ligare v. Peacock, 109 Ill. 94 (1884); Morris v. Allen, 14 N. J. Eq. 44 (1861); Hartman v. Woehr, 18 N. J. Eq. 383 (1867); Collender v. Phelan, 79 N. Y. 366 (1880); Baker v. Mayo, 129 Mass. 517 (1880).

> "Now although interest might not be allowed to a partner for such advances and unwithdrawn profits in the absence of an agreement or understanding to that effect, yet slight circumstances may be sufficient to show such an understanding." Winchester v. Glazier, 152 Mass. 316 (1890).

It is, however, always prudent to arrange in the articles, or by special agreement thereafter, that interest is to be paid where such payment is intended, or where it is equitable that it should be paid. (See Forms 5, 32 and 33.)

Where there is a manifest disparity of investment, it would appear but equitable that either the profits should be divided in some unequal proportion or that interest should be allowed on the excess investment. The same is true as to advances made to the firm by partners. In any such case it may be arranged that interest shall be paid by the firm, or it may be made an individual matter, each partner bearing a proportionate part of the interest charge. Interest on excess investments is usually deemed preferable by those making the smaller investments, to compensation to the larger investors by giving them a larger proportion of profits. In a business in which material risk of capital is involved, the legal rate of interest would not be sufficient compensation for excess investments or advances, and in such cases the partner furnishing the extra capital would properly insist on a higher rate. The usury laws would not apply to such a contract.[9]

If a firm becomes insolvent its other creditors will have the preference over a partner who makes a loan to the firm with an agreement for the payment of a specified interest.[10] Upon dissolution and adjustment of accounts, the partner in

[9] 2 Bates on P., § 784; Payne v. Freer, 91 N. Y. 43 (1883); Owis v. Curtis, 157 N. Y. 657 (1899).

[10] 2 Bates on P., § 811; Wallerstein v. Ervin, 112 Fed. Rep. 124 (1901).

whose favor the balance stands is usually allowed interest thereon, but the allowance depends upon the circumstances of each case and there is no inflexible rule.[11]

§ 66. Secret Profits.

The rule of good faith requires that all profits made within the scope of the partnership business shall be turned in for the benefit of the entire firm. If any partner violates this rule and uses his position in the firm and the knowledge he has of the business to secure any secret rebates, commissions or other profits to himself, he will, if discovered, be held liable to the firm for the amount so realized.[12] (See § 51.) The Court of Appeals of New York, in Mitchell v. Reed, cited below, stated the rule as follows:

> "The relation of partners with each other is one of trust and confidence. Each is the general agent of the firm, and is bound to act in entire good faith to the other. The functions, rights and duties of partners in a great measure comprehend those both of trustees and agents, and the general rules of law applicable to such characters are applicable to them. Neither partner can, in the business and affairs of the firm, clandestinely stipulate for a private advantage to himself. Every advantage which he can obtain in the business of the firm must inure to the benefit of the firm. These principles are elementary, and are not contested. (Story, §§ 174, 175; Collyer, 181, 182.)"

In Holmes v. Gilman, the same court said:

[11] 9 L. R. A. 424, note and cases cited; Johnston v. Hartshorne, 52 N. Y. 173 (1873); Smith v. Smith, 18 R. I. 722 (1894); Dunlap v. Watson, 124 Mass. 305 (1878).

[12] Perry on Trusts, § 127; 1 Lindley on P., p. 303; Shaler v. Trowbridge, 28 N. J. Eq. 595 (1877); Mitchell v. Reed, 61 N. Y. 123 (1874); Struthers v. Pearce, 51 N. Y. 357 (1873); Riddle v. Whitehill, 135 U. S. 621 (1889); Holmes v. Gilman, 138 N. Y. 369 (1893); Williamson v. Monroe, 101 Fed. Rep. 322 (1900); and cases there cited.

> "That a partner occupies a fiduciary position with regard to his co-partners and the funds of the firm, and will not be permitted to make a personal profit out of the use of such funds, is, I think, clearly established. Although partners do not, in the strict sense of the term, occupy the position of trustees towards each other and towards the firm funds, yet the position is one of a fiduciary nature, calling for the maintenance and exercise of the greatest good faith between them. Such a relationship authorizes the same remedy on behalf of the wronged partner as would exist against a trustee, strictly so called, on behalf of a cestui que trust."

This rule is peculiarly liable to violation by promoters when organizing corporations to take over their enterprises.[13] They overlook or disregard the fact that those who go into the corporation with them are from a legal standpoint their partners, and that therefore none must make any secret profit on the promotion. All rebates, all commissions, all agreements looking to the secret profit of one or more of the promoters are illegal, and if discovered can be taken for the benefit of all concerned. In regard to promoters it is said:

> "Their relation to the persons who become corporators or subscribers to stock, and their relation to the proposed corporation, when formed, is a fiduciary relation, or a relation of trust and confidence. And for this reason it is well settled that they will not be permitted to take advantage of their position in order to make a secret profit out of their transactions in behalf of the proposed corporation or of the corporators or out of their dealings with the corporation or corporators." 1 Clark & Marshall, Private Corporations, § 110b.

If a partner uses firm funds in his private speculation he can be compelled to account for any profits. If the result

[13] Conyngton on Corporate Organization, Chapter XXXIII, Concerning Promoters; Densmore Co. v. Densmore, 64 Pa. St. 43 (1870); New Sombrero Phosphate Co. v. Erlanger, 5 Ch. D. 73 (1878).

is a loss he must bear this himself, returning the partnership funds intact.[14] (See § 52.) This rule also applies to the use for private gain of time or skill which should be applied to the firm business.

> "If a partner speculate with the firm's funds or credit he must account to his co-partners for the profits, and bear the whole losses of such unauthorized ventures himself. And if he go into competing business, depriving the firm of the skill, time or diligence or fidelity he owes to it, so he must account to the firm for the profits made in it." 1 Bates on P., § 306.

§ 67. Right to an Accounting.

Every partner is entitled to have accurate accounts kept. This is usually specified in the partnership articles (see Form 19), but the right is independent of any such specifications, existing whether or not any reference has been made to it in the terms of agreement. This makes it the duty of each partner to keep an accurate record of his own transactions concerning the firm business, and if, as is usually the case, some one partner or some particular employee is designated to keep the firm books, it is the duty of each partner to furnish such accountant full information as to his transactions.[15]

It is also the right of every partner to have access to the firm books and accounts and to make extracts therefrom.[16]

> "One partner has no right to keep the partnership books in his own exclusive custody, or to remove them from the place of business of the partnership. In the absence of an express agreement to the contrary, every partner has a right, without the permission of his co-partners, to inspect, examine and make extracts from all

[14] 1 Bates on P., § 306; Karrick v. Hannaman, 168 U. S. 336 (1897).

[15] Pomeroy v. Benton, 7 Mo. 64 (1882); Knapp v. Edwards, 57 Wis. 191 (1883).

[16] 1 Bates on P., §§ 313, 314; George on P., § 76; Mechem on P., § 116.

> the books of the firm; and no partner can deprive his copartners of this right by keeping the partnership accounts in a private book of his own, containing other matters with which they have no concern." 2 Lindley on P., p. 808.

The books of account should always be kept at the office of the firm, or if it has more than one, at the principal office. When books are properly kept and all the partners have access to them, they are presumed to know what is in them, and the books are competent evidence in any dispute between firm members.[17] If the books have been mutilated or destroyed, or if the accounts have been garbled or falsified, every presumption will be allowed against the interest of the partner at fault. If no accounts at all are kept the same presumption will hold against the one at fault. On this point Judge Lindley says:

> "If no books of account are kept, or if they are so kept as to be unintelligible, or if they are destroyed or wrongfully withheld, and an account is directed by a court, every presumption will be made against those to whose negligence or mis-conduct the non-production of proper accounts is due. If all the persons interested in the account are in *pari delicto,* this rule can not be applied; but it is the duty of continuing or surviving partners so to keep the accounts of the firm, as at any time to show the position of the firm when a change among its members has occurred." 2 Lindley on P., p. 809.

Usually when proceedings are brought for dissolution, part of the relief demanded is that an account be had of the partnership transactions. In a few cases, however, it is possible to have an accounting independent of an action for dissolution.[18] (See § 88.)

[17] 2 Bates on P., § 978; Fairchild v. Fairchild, 64 N. Y. 471 (1876); Nat. Bank v. Widener, 24 App. Div. (N. Y.) 330 (1897).

[18] Sanger v. French, 157 N. Y. 213 (1878), and cases there cited.

PART IV.—TERMINATION.

CHAPTER XIII.

DISSOLUTION BY AGREEMENT.

§ 68. Introductory.

A partnership may terminate:

(1) By agreement. Upon the expiration of its term as limited by the partnership articles the partnership will be dissolved in any particular manner prescribed by the articles, or, in the absence of such provisions, in accordance with the rules of common law. A partnership may be dissolved at any time by unanimous agreement regardless of the period fixed by the articles. Not infrequently partnerships are terminated by the incorporation of the partnership business. (See §§ 69, 70, 71.)

(2) By force of circumstances. A partner may give notice of withdrawal, may assign his interest to a stranger, die, become insane or permanently disabled, or become bankrupt, thereby necessitating a dissolution of the partnership. Or the failure of the enterprise, involving bankruptcy, usually compels a dissolution. In some cases of professional or of skilled trade partnerships, the members might continue their relations during and after bankruptcy proceedings, but this would not be possible in an ordinary trading firm. (See Chap. XIV, Enforced Dissolution.)

(3) Through disagreement of the partners. This usually requires dissolution by legal procedure with possible resort to injunction and the appointment of a receiver for the settlement of the partnership affairs. (See Chap. XV, Dissolution Upon Disagreement.)

§ 69. Expiration of Period.

The duration of a partnership is usually specifically limited by the terms of the partnership agreement. The simplest form of such limitation merely provides that the partnership shall last for some specified time or until the completion of some particular undertaking without provision for the terms or method of dissolution. (See Form 6.) This limits the continuance of the partnership, but leaves the partners to arrange the details of the dissolution when the time comes. Frequently, however, the partnership articles in addition to prescribing the period will also include specific arrangements for closing up the business and settling its affairs. This is advisable where conditions permit. It is, though, difficult to anticipate the exact condition of affairs at the end of a term of years and unforeseen events may render impossible the best-laid plans for dissolution.

Before a partnership term expires, it would rest on the members of the firm to decide whether they wish to renew the same partnership agreement for another term, to enter into some new or modified arrangement, or to dissolve and wind up the business. If the business were of any value, it would probably be continued in some shape. This might be either the renewal of the old partnership for a further term; the formation of a new partnership with some change of membership; the incorporation of the business or possibly a sale of the business to a new firm. The continuance without any further agreement would constitute a partnership at will, liable to termination at any time on demand of any partner,[1] but governed in other respects by the terms of the old agreement.[2]

> "If a partnership is continued after the expiration of the time originally contemplated, or is dissolved by the retirement or addition of a partner, the business being continued, the continued partnership is deemed to be on the same terms, as far as applicable, as before, except that it becomes a partnership at will, and all the provisions of the original articles which are consistent with continuance of the partnership at will or for a new term, if so agreed, are binding on the members." 1 Bates on Partnership, § 216.

§ 70. Agreement for Dissolution.

When the term of a partnership has expired and no provision is made in the articles for its dissolution; or if, prior thereto, one partner desires or is compelled to retire, or if disagreements among the partners make a termination of the partnership relation desirable, the terms and method of dissolution are frequently difficult to arrange. Recourse may then be had to the courts and a receivership, if the matter can be arranged in no other way, but every effort should be exhausted to effect the dissolution on agreed terms, or on some compromise, or by arbitration of disputed points, in order to avoid the expense, delay and destruction of values incident to a forced dissolution.[3] (See § 87, Receivership.)

The simplest solution of difficulties of the kind where one or more partners are harmonious or wish to continue, is for these to buy out the partners who wish to retire or who are

[1] Gould v. Homer, 12 Barb. (N. Y.) 601 (1852); Wilson v. Simpson, 89 N. Y. 619 (1882); Duffield v. Brainerd, 45 Conn. 424 (1878).

[2] Bradley v. Chamberlin, 16 Vt. 613 (1844); Sangston v. Hack, 52 Md. 173 (1879); Boardman v. Close, 44 Ia. 448 (1876); Essex v. Essex, 20 Beav. 442 (1855); Cox v. Willoughby, 13 Ch. Div. 863 (1880).

[3] 2 Bates on P., § 993.

dissatisfied. Where this can be done it simplifies matters and leaves only the price and terms of payment to be decided. Widely differing views are apt to obtain as to the value of the good-will [4] and the firm name, but this question may be left to arbitration, or the actual assets may be paid for in cash and some payment contingent on profits be provided for the good-will, or some other settlement may be effected. Incorporation often affords a simple method of closing up the partnership affairs satisfactorily.

Where it is necessary to actually wind up the business, any agreement reached between the partners should provide for a trustee to take charge of the settlement on behalf of the partners, and should direct the closing up of the business, the liquidation of its assets, the collection of outstanding debts, the settlement of its obligations, the partition of losses or the division of profits, and the withdrawal of the investments of the partners.[5] The legal rules governing such dissolutions are well known (see Chap. XVI), and if partners can settle without resort to the courts it will be to their great advantage. (See Form 44.)

§ 71. Incorporation.

In many cases the most satisfactory method of disposing of a partnership business, worth preserving, is by incorporation. This is preeminently a dissolution by agreement and has the advantage of preserving the firm name and good-will, and continuing the business as a going concern without interruption. The corporate form also offers a wide range of opportunity for adjustment of the varying claims of the different partners. Its capabilities in this direction are not commonly understood. By its use it is often possible to make a most satisfactory settlement of conflicting partnership interests. (See Part V, Incorporation.)

[4] 2 Bates on P., Chap. VI.
[5] 2 Bates on P., Chap. IV.

CHAPTER XIV.

ENFORCED DISSOLUTION.

§ 72. By Notice.

In a partnership at will any partner may terminate the relation at any time by merely giving his associates notice that he withdraws from the partnership.[1] This notice should be specific, be in writing and be delivered to each of the partners. As between themselves such notice concludes the partnership, the remaining partners have no authority to bind the retiring member further by the firm contracts and the business and affairs of the partnership must be wound up by the ordinary process of dissolution. (See Chap. XVII, Closing Up the Business.) The partner withdrawing will be liable on all obligations of the firm up to the time the notice of withdrawal is given, but at that point the mutual agency powers of the partners cease and they have no authority to obligate him further on firm account. To make this withdrawal of authority effective it must, however, as stated later, be duly notified to those with whom the firm has dealings, and to the public at large.

When the partnership is for a term or for a specified undertaking, but provision has been made that any partner may terminate the relation by giving prescribed notice, the formalities are the same, except that the notice must be given

[1] 1 Lindley on P., p. 210 et seq.; Story on P., § 275; 2 Bates on P., § 574; McElroy v. Lewis, 76 N. Y. 373 (1879); Duffield v. Brainerd, 45 Conn. 424 (1878); Fletcher v. Reed, 131 Mass. 312 (1881); Blake v. Sweeting, 121 Ill. 67 (1887); Spears v. Willis, 151 N. Y. 443 (1897).

in accordance with the requirements of the partnership articles.[2] (See Form 7.)

If the partnership is for a term of years or for the accomplishment of some particular object without provision for dissolution prior thereto, any partner may, notwithstanding, bring the relation to an abrupt conclusion by giving notice of his withdrawal. This avoids any future partnership liability so far as he is concerned, but he will be liable to his partners for any damages that may result from his breach of contract.[3] In Skinner v. Dayton, cited below, the Court said:

> "There can be no such thing as an indissoluble partnership. Every partner has an indefeasible right to dissolve the partnership, as to all future contracts, by publishing his own volition to that effect; and after such publication, the other members of the firm have no capacity to bind him by any contract. 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."

To the same effect in Karrick v. Hannaman, Justice Gray said:

> "No partnership can efficiently or beneficially carry on its business without the mutual confidence and cooperation of all the partners. Even when, by the partnership articles, they have covenanted with each other that the partnership shall continue for a certain period, the partnership may be dissolved at any time, at the will of any partner, so far as to put an end to the partnership

[2] Swift v. Ward, 80 Ia. 700 (1890), 11 L. R. A. 302.

[3] 2 Bates on P., §§ 577, 578; Bagley v. Smith, 10 N. Y. 489 (1853); Karrick v. Hannaman, 168 U. S. 328 (1897); 42 L. Ed. 484, see note; Skinner v. Dayton, 19 Johns. (N. Y.) 513 (1822); Marquand v. Mfg. Co., 17 Johns. (N. Y.) 525 (1820); Solomon v. Kirkwood, 55 Mich. 256 (1884); Bank v. Railroad Co., 78 U. S. 624 (1870).

relation and to the authority of each partner to act for all; but rendering the partner who breaks his covenant liable to an action at law for damages, as in other cases of breaches of contract. * * * A partner who assumes to dissolve the partnership, before the end of the term agreed on in the partnership articles, is liable, in an action at law against him by his co-partner for the breach of the agreement, to respond in damages for the value of the profits which the plaintiff would otherwise have received."

On the other hand it must be noted that some authorities deny the right of a partner to dissolve a partnership made for a fixed term before the expiration of that term.[4] On occasion certain courts have even granted injunctions against a dissolution of partnerships of this nature, holding that damages could not really compensate the injury wrought by such a failure to observe the terms of partnership. The cases in which this would be done are rare, but there can be no question that a wilful violation of the partnership contract is ordinarily both unwise and unjustifiable. If the conduct of other partners is such as to justify one in withdrawing before the expiration of the specified term, it is such as to afford him ample ground for an appeal to a court of equity through which a legal dissolution may be secured

To make a withdrawal effectual the notice to the partners must be followed by notice to those dealing with the firm and to the general public. If these notices are neglected, the retiring partner, while free as regards his associates, remains liable to third parties precisely as though he had made no effort to withdraw. It is held that, failing to give these notices, the retiring member of the firm still allows himself to be held out as a partner, and the general rule then applies

[4] Story on P., § 275; Van Kuren v. Trenton Co., 13 N. J. Eq. 302; Seighortner v. Weissenborn, 20 N. J. Eq. 172; Johnson v. Dutton, 27 Ala. 245 (1855); see note to Karrick v. Hannaman, supra, in 42 L. Ed. 488, for a strong presentation of this view.

that anyone allowing himself to be held out as a partner incurs a partner's liability. If he has been a partner it is incumbent on him to see that third parties know that he is one no longer. He must warn; they need not enquire.[5] (See § 61.)

The formalities of notice of withdrawal must be fully observed. An individual notice must be sent to each person who has dealt with the firm. This is commonly sent by mail, but unless it can be shown that it has been received, even this is not sufficient. Actual personal notice is necessary.[6] Proof that such notices have been duly mailed is *prima facie* evidence of their having been received, but this may be rebutted. Publication in one or more newspapers circulating in the locality is sufficient notice to all parties who have not theretofore dealt with the firm.[7]

Specific notice to those who have dealt with the firm and to the general public is not required when a partnership is dissolved by bankruptcy, by death or by war. These causes are supposed to be of themselves sufficiently public and obvious, and the partners are freed from obligation to give the usual notice of dissolution.[8]

A dormant partner need not give notice but may retire in the same unostentatious manner in which he entered.[9]

§ 73. By Sale of Partner's Interest.

If a partner sells his interest in a firm, or if it be sold under execution, it is in effect a dissolution of the partner-

[5] Austin v. Holland, 69 N. Y. 571 (1877), and cases cited under notes 6 and 7; Van Kuren v. Trenton Co., 13 N. J. Eq. 302 (1861); Seighortner v. Weissenborn, 20 N. J. Eq. 172 (1869).

[6] Austin v. Holland, supra; Nat. Bank v. Herz, 89 N. Y. 629 (1882); Meyer v. Krohn, 114 Ill. 574 (1885); Elkinton v. Booth, 143 Mass. 479 (1887).

[7] Lovejoy v. Spafford, 93 U. S. 430 (1876); 23 L. Ed. 851, see note; Central Bank v. Frye, 148 Mass. 498 (1889); Solomon v. Kirkwood, supra.

[8] Griswold v. Waddington, 15 Johns. (N. Y.) 57 (1816); Eustis v. Holles, 146 Mass. 413 (1888).

[9] Elmira Co. v. Harris, 79 N. Y. 280 (1891); Shamburg v. Ruggles, 83 Pa. St. 148 (1876).

ship.[10] A stranger can not be forced into the firm,[11] and all the assignee secures is a right to have the firm dissolved, and after all debts have been paid, all obligations discharged and its affairs settled, to receive his share of whatever surplus may remain. In a mining partnership or a joint stock company the rule is otherwise, as has been explained. (See §§ 8, 9.) In cases of assignment of a partner's interest, if the other members of the firm were willing to receive the assignee as a partner, no dissolution would be necessary, nor need there be any disturbance of the firm affairs, but nevertheless the result would be a new firm, not a continuation of the old.

Unless with the consent of the remaining partners an assignee has no right to interfere in the partnership business, to take any portion of its property, to act for it in any way, or to do anything more than to demand the winding up of the partnership affairs by the other partners, with a view to determining the amount due him from the surplus.

If execution is issued against a partner, nothing can be sold but the right he has in the surplus remaining after dissolution and settlement of the firm business.[12]

> "Purchasers of the share of an individual partner can only take his interest. That interest and not a share of the partnership effects is sold, and it consists merely of the share of the surplus which shall remain after the payment of the debts and settlement of the accounts of the firm." [13]

The purchaser of a partner's share has no voice nor part in the winding up, which devolves upon the remaining part-

[10] Menagh v. Whitwell, 52 N. Y. 146 (1873); Barkley v. Topp, 87 Md. 25 (1882); Ballard v. Callison, 4 W. Va. 326 (1870).

[11] Burnett v. Snyder, 76 N. Y. 344 (1879); Miller v. Brigham, 50 Cal. 615 (1875).

[12] 2 Bates on P., § 1098.

[13] 3 Kent Comm. 78, Note b.

ners, though these would not be allowed, in so doing, to abuse their trust.[14]

It has been questioned whether the sale of his interest by a partner for a term, dissolves the partnership or is only a cause for dissolution. The weight of authority seems to be that such an assignment, of itself, dissolves the partnership.[15] It is certain that the other partners can always secure a dissolution for such cause. This is their right, whether the sale was voluntary or whether the interest of the partner has been sold under execution. Also if damages can be shown, the partner selling will be liable to his former partners for his breach of contract.

§ 74. By Bankruptcy.

The bankruptcy of a firm dissolves it *ipse facto*. Mere insolvency may exist for an indefinite period without affecting the partnership relation, but an assignment by the firm for the benefit of creditors, or an adjudication of bankruptcy under the National Bankruptcy Law, terminates the partnership.

It is to be noted that under the present National Bankruptcy Act a partnership is considered an entity which may be proceeded against as a whole. The statute reads:

> "A partnership during the continuation of the partnership business or after its dissolution before final settlement may be adjudged a bankrupt." [16]

In bankruptcy proceedings against a firm, if one or more, but not all the partners are individually adjudged bankrupt, the solvent partner or partners may, if they prefer, settle the

[14] Ballard v. Callison, supra; Hamill v. Hamill, 27 Md. 679 (1867); Miller v. Brigham, supra.

[15] Bank v. Carrolton Railroad, 78 U. S. 624 (1870); Karrick v. Hannaman, 168 U. S. 328 (1897); S. C. 42 L. Ed. 484, see note; Marquand v. President, etc., 17 Johns. (N. Y.) 525 (1820); Ballard v. Callison, supra.

[16] See National Bankruptcy Act of 1898, § 5, Partners; Loveland on Bankruptcy, § 96 et seq.

partnership business themselves, and account for the interest of the bankrupt members. If, on the other hand, all the partners are insolvent, the creditors appoint a trustee, who marshals the assets and apportions the surplus according to the usual rules as to priorities. (See § 95.)

The bankruptcy of an individual member of a partnership would dissolve the firm, and the other partners would have the right to settle up its affairs, turning the interest of the bankrupt member over to the trustee in bankruptcy.

> "The partnership debts and assets are not drawn into bankruptcy to be administered, only the individual debts and assets, including the interest of the bankrupt partner or partners in the partnership as accounted for by the solvent partners, is administered in bankruptcy." [17]

In such case, if the bankrupt partner were finally discharged he would be relieved from all responsibility for partnership as well as individual liabilities. (See Form 26.)

Acts of bankruptcy by one partner acting as an agent for the firm, are cause for adjudging a firm bankrupt.

Those portions of the National Bankruptcy Law that define acts of bankruptcy have already been given. (See § 60.) The parts that refer to firm bankruptcy are as follows:

> "Section 5. *Partners.* a. A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.
>
> b. The creditors of the partnership shall appoint the trustee; in other respects, so far as possible, the estate shall be administered as herein provided for other estates.
>
> c. The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the

[17] Loveland on Bankruptcy, § 96a.

partners and of the administration of the partnership and individual property.

d. The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

e. The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

f. The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

g. The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

h. In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.." National Bankruptcy Act of 1898, as amended by the Act of 1903.

§ 75. By Death or Insanity.

The death of a partner dissolves a partnership immediately, whether it be a partnership at will or a partnership for a fixed term. The mutual agency is at once *ipse facto* revoked, and the estate of the deceased partner can be bound by no firm obligation entered into after his death.[18]

It is possible, though, for the partners to provide by the partnership agreement for the continuance of the partnership after the death of one member; in which case it would be continued by virtue of such agreement. (See Form 28.) A partner, too, may provide by his will that the partnership shall continue after his death, and if the surviving partners agree to this, it becomes obligatory. In both of these cases there might be a question as to whether the estate of the deceased partner would be liable on partnership obligations contracted after his death, for anything more than the funds already invested. This must be decided in each case by the language of the instrument under which the partnership is continued. It would require a very clear statement to hold the personal representatives of the deceased liable for more than the amount involved at the time of the partner's death.[19]

In the case of Burwell v. Cawood, cited below, the United States Supreme Court said:

> "Nothing, however, but the clearest and most unambiguous language, showing in the most positive manner an intention on the part of the testator to render his general assets liable for debts contracted after his death, will justify a court in extending the liability of his estate beyond the actual fund employed therein at the time of his death."

The insanity of a partner does not work a dissolution, but may be sufficient reason for asking a dissolution by decree.[20]

[18] Stewart v. Robinson, 115 N. Y. 328 (1889); S. C. 5 L. R. A. 410, see note; Willis v. Sharp, 113 N. Y. 586 (1889).

[19] Burnwell v. Cawood, 43 U. S. 560 (1844); Stewart v. Robinson, supra.

[20] 3 Kent Comm., 58; Parsons on P., § 465; Griswold v. Waddington, 15 Johns. (N. Y.) 57 (1818); Raywood v. Vaughan, 128 Ill. 256 (1889); 4 L. R. A. 440.

If the partnership is not formally dissolved when a partner becomes insane, the sane partner will be required to account for the profits due his insane partner until the relation is terminated in some legal manner. If the insanity is temporary the courts will not decree a dissolution.[21] (See § 32.)

§ 76. Failure or Impossibility of Enterprise.

Where a partnership has been formed for a particular enterprise or for the conduct of a business in some direction, and it becomes apparent that success is unobtainable and that only loss can result from the further prosecution of the partnership business, any partner, if his associates will not agree to a peaceable termination of the business, can obtain a judicial dissolution.[22] The same is true in any case where it is impossible that the firm or enterprise should be continued.[23] The insolvency of the firm would be sufficient ground for decreeing a dissolution.[24] If one partner were convicted of a felony it would be sufficient cause, though in such case the partnership would probably be dissolved without recourse to the courts.[25]

[21] Whitwell v. Arthur, 35 Beav. 140 (1865).

[22] 2 Lindley on P., p. 576; Rosenstein v. Burns, 41 Fed. Rep. 841 (1882); Holliday v. Elliott, 8 Oregon 85 (1879).

[23] Brown v. Hicks, 8 Fed. Rep. 155 (1881); Moies v. O'Neill, 23 N. J. Eq. 207 (1872).

[24] Seighortner v. Weissenborn, 20 N. J. Eq. 172 (1869); Jackson v. Deese, 35 Ga. 84 (1866).

[25] Essell v. Hayward, 30 Beav. 158 (1860).

CHAPTER XV.

DISSOLUTION UPON DISAGREEMENT.

§ 77. Introductory.

If the articles of partnership are properly prepared the most probable causes of disagreement will be provided for in advance. Others are determined by well settled partnership law, and if the parties understand their respective rights and duties, and have well-drawn articles, it should be entirely possible to avoid serious friction or dissolution before the expiration of the agreed term. Failing this, it should be feasible to disagree and to dissolve without resort to the courts.

Unfortunately, articles are often defective or loosely worded, partners do not understand their reciprocal rights and duties, or lack the wisdom and good feeling necessary to adjust them, and complications ensue which may lead to long and costly litigation. The present chapter deals with the usual disagreements which compel resort to the courts. It must be noted that in all these cases of disagreement the prayer for relief must come from the partner who has done his part, not from the one at fault.[1]

§ 78. Breach of Articles.

The articles of partnership form a contract and the breach of these articles by one of the contracting parties would be good ground for a dissolution of the partnership, and for

[1] Seighortner v. Weissenborn, 20 N. J. Eq. 178 (1869); Gerard v. Gateau, 84 Ill. 121 (1876).

damages to the aggrieved party if injury could be shown.[2] The breach of articles would have to be serious and in matters essential. Failure in inconsiderable matters not affecting materially the business would not afford grounds for dissolution,[3] though, if the trouble and expense were justified, such violations might be stopped by injunction.[4]

A failure on the part of one member to invest the capital he had agreed to put in would be ground for dissolution. So, also, would be violation of an agreement not to engage in other business or in speculation, or a failure to keep books and accounts, or a refusal to open them to a partner's inspection, or the making of false entries in the firm books.[5] Bad character, drunkenness or other misconduct might be good cause for dissolution (see § 82), but would not justify exclusion from the partnership business without a formal dissolution.[6]

§ 79. Abandonment by One Partner.

A partner abandoning the common enterprise thereby forfeits his right to a share in the profits made, but this penalty is not incurred unless the abandonment is so complete that neither his labor nor his investment has contributed to the making of the profits.[7] Such abandonment also entitles the other partner or partners to have the partnership dissolved,[8]

[2] Hartman v. Woehr, 18 N. J. Eq. 383 (1867); Rosenstein v. Bevins, 41 Fed. Rep. 841 (1882); Meaher v. Cox, 37 Ala. 201 (1861).

[3] Anderson v. Anderson, 25 Beav. 190 (1857); Seighortner v. Weissenborn, 20 N. J. Eq. 178 (1869); Gerard v. Gateau, 84 Ill. 121 (1876); Cash v. Earnshaw, 66 Ill. 402 (1872).

[4] 2 Bates on P., § 592.

[5] Campbell v. Clark, 101 Fed. Rep. 972 (1900); Cottle v. Leitch, 35 Cal. 434 (1868).

[6] Karrick v. Hannaman, 168 U. S. 328 (1897); Ambler v. Whipple, 20 Wall. 564 (1874); Essell v. Hayward, 30 Beav. 158 (1860).

[7] 2 Bates on P., § 589; Denver v. Roane, 99 U. S. 355 (1879); Hartman v. Woehr, 18 N. J. Eq. 383 (1867).

[8] Babcock v. Hermance, 48 N. Y. 683 (1872); Child v. Swain, 69 Ind. 230 (1879).

and where it is possible that future claims may be made, this step is best taken promptly. A temporary absence, or an absence on account of illness will not be considered abandonment,[9] nor will it be so considered if it is the result of a partner's exclusion from the business by his associates.[10]

The partner who abandons the enterprise does not, by so doing, dissolve the partnership, and his associates may continue and involve him in further liabilities.[11] It is, however, usually safer for all the partners, under any of these circumstances to dissolve by formal agreement or by the retiring partner giving notice of withdrawal. (See § 72.)

§ 80. Exclusion of a Partner.

It not infrequently happens that a partner is excluded from a business by his associates, without the usual preliminary formality of dissolving the partnership and settling its affairs. In such case he has good ground for asking a legal dissolution,[12] or he might secure an injunction, restraining his partners from so excluding him.[13] He may, however, simply bide his time, and later when profits are made he may demand an accounting, and will be given his fair share of any profits.[14] In Karrick v. Hannaman, cited below, the Court said:

> "This court, speaking by Mr. Justice Miller, held that drunkenness and dishonesty on the part of one part-

[9] Ambler v. Whipple, 20 Wall. 546 (1874).

[10] Karrick v. Hannaman, 168 U. S. 328 (1897); Ambler v. Whipple, supra.

[11] Austin v. Holland, 69 N. Y. 571 (1877).

[12] 2 Lindley on P., p. 540; Ambler v. Whipple, 20 Wall. 546 (1874); Karrick v. Hannaman, 168 U. S. 328 (1897); Einstein v. Schnebly, 89 Fed. Rep. 540 (1898); Groth v. Payment, 79 Mich. 290 (1890).

[13] 2 High on Injunctions, § 1335.

[14] 2 Bates on P., § 794; Holmes v. Gilman, 138 N. Y. 369 (1893); 20 L. R. A. 566; Freeman v. Freeman, 136 Mass. 260 (1884); Hartman v. Woehr, 18 N. J. Eq. 386 (1867); Major v. Todd, 84 Mich. 85 (1890); Bagley v. Smith, 10 N. Y. 489 (1853).

ner and his consequent exclusion from the business did not authorize his co-partner, of his own motion, to treat the partnership as ended and to take himself all the benefits of their joint labors and joint property, or exempt him from responsibility to account to the excluded partner."

Under no circumstances have the partners in an ordinary partnership the right to expel an objectionable member. The only way to get rid of such a partner is through a legal dissolution of the copartnership. A clause might be inserted in the articles giving a majority of the partners the right to expel a member for sufficient cause, but such provision though legitimate would be difficult to enforce.[15] When, without formal procedure, it is assumed that a partnership has been dissolved, but a partner or partners continue the business with the partnership property, an excluded member is entitled to his share of the profits.[16]

On the other hand a partner who allows himself to be thus excluded without a formal dissolution of the firm, or without notifying those with whom the firm has dealings of his exclusion, may, under certain circumstances, be held liable for the debts contracted by the firm after his active connection with it has ceased. Generally speaking, it is not well for either side to permit a partnership to lapse without definite dissolution. If a member finds himself barred out from the partnership activities the courts will provide relief on proper application, and much annoyance and uncertainty may be thereby avoided.

§ 81. Bad Faith.

Good faith is required on the part of each partner. Bad faith will be cause for dissolution, and recovery may be had

[15] George on P., § 173.

[16] 2 Bates on P., § 794; Karrick v. Hannaman, 168 U. S. 328 (1897); Pearce v. Ham, 113 U. S. 585 (1885).

of the fruits of misconduct.[17] Upon the petition of the innocent party the courts will decree a dissolution of the partnership for the misconduct of a partner. Any apparent fraud, such as making false entries, sequestering the firm profits, refusing to account for firm assets, or any other dishonest and fraudulent conduct toward a partner is ground for application for dissolution.[18] The use of the firm funds for private speculation would be good grounds for dissolution, and any profits made could be recovered for the benefit of the firm.[19] Petty disagreements between the partners are not ground for the interference of a court, unless carried to such an extreme as to prevent the further mutual conduct of the business.[20]

The dissolution of a partnership through the courts is a costly and troublesome proceeding, and should be resorted to only when it is found to be impossible to settle differences peaceably, or when continuance in the partnership involves greater risk and expense than does the necessary legal procedure.[21]

§ 82. Misconduct of Partner.

In a partnership for a definite term, the misconduct of a partner is ground for dissolving the relation. The degree of misconduct on which the courts will act is not always clear. A partner might be guilty of many things which were objectionable to his associates which yet would not be deemed sufficient to justify the interference of a court. He must so

[17] 1 Bates on P., §§ 303, 304; Ambler v. Whipple, 87 U. S. 546 (1874); Mitchell v. Reed, 61 N. Y. 123 (1874).

[18] Adams v. Shewalter, 139 Ind. 178 (1894); Barnes v. Jones, 91 Ind. 161 (1883); Werner v. Leisen, 31 Wis. 169 (1872); Roby v. Colehour, 135 Ill. 300 (1890); Johnson's Appeal, 115 Pa. St. 129 (1886); Caldwell v. Davis, 10 Colo. 481 (1887).

[19] Holmes v. Gilman, 138 N. Y. 369 (1893).

[20] 2 Bates on P., § 594; Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129 (1833).

[21] Cash v. Earnshaw, 66 Ill. 402 (1872); Gerard v. Gateau, 84 Ill. 121 (1876); Levi v. Karrick, 8 Ia. 150 (1859).

seriously misconduct himself as to affect the credit and success of the business, or as to make it impossible for his associates to work with him.[22] Continued drunkenness,[23] the commission of a crime,[24] assault upon his partner, any falsification of general partnership accounts or deception in regard to partnership affairs,[25] and any other positive abuse of the partnership relation [26] would furnish sufficient ground for dissolution.

The fact that sufficient ground exists for obtaining a legal dissolution would be no justification for the exclusion, without legal authority, of the offending partner from the business by his associates. In other words, ground for legal dissolution does not justify expulsion.[27]

§ 83. Fraud in the Inception of the Partnership.

In case a person has been induced to enter a partnership by false representations, he can have a dissolution or can have the whole contract rescinded and cancelled. This can be done whether or not he can show that he has suffered any actual damage through the misrepresentation.[28] He may also have an action at law against the partner who deceived him [29] if damages can be shown.

In such case the misrepresentations must have been ma-

[22] Leavitt v. Windsor Co., 54 Fed. Rep. 439 (1893); Fogg v. Johnston, 27 Ala. 432 (1855).

[23] Ambler v. Whipple, supra.

[24] Essell v. Hayward, 30 Beav. 158 (1860).

[25] Cottle v. Leitch, 35 Cal. 434 (1868).

[26] Einstein v. Schnebly, 89 Fed. Rep. 540 (1898); Campbell v. Clark, 101 Fed. Rep. 972 (1900).

[27] Ambler v. Whipple, 20 Wall. 546 (1874).

[28] 2 Bates on P., § 595; Parsons on P., p. 467; Smith v. Everett, 126 Mass. 304 (1879); Richards v. Todd, 127 Mass. 167 (1879); Harlow v. La Brum, 151 N. Y. 278 (1897); Hollister v. Simonson, 36 App. Div. (N. Y.) 63 (1879); Rosenstein v. Burns, 41 Fed. Rep. 841 (1882).

[29] More v. Rand, 60 N. Y. 208 (1875); Child v. Swain, 69 Ind. 230 (1879).

terial and not mere expressions of opinion. Where a minor represents himself as of age, his partner on discovery of the fraud may have the partnership dissolved. A false representation as to the cost of goods put into the partnership would be ground for dissolution,[30] while, on the other hand, a mere expression of opinion as to the prospective profits, no matter how mistaken, would not. In Harlow v. La Brum, cited below, Justice Gray said:

> "The question of whether a money damage has been sustained by the party who has been induced to enter into a partnership relation through fraudulent representations, has nothing to do with the decision of the case presented for the avoidance of the partnership agreement. The true principle by which the court is to be guided in such a case is, that the party deceived has a right to have the agreement wholly set aside; if it has been obtained by fraud he is entitled to say that the misrepresentations vitiate the contract. (Rawlins v. Wickham, 3 De Gex & Jones 304.) As was said by Lord Justice Turner in that case, 'we can not assume from what was done in ignorance of the misrepresentation what would have been done if the misrepresentation had been detected.' The relation of partners is one implying the highest degree of mutual confidence, as it was well observed in the opinion below, and if the contract of partnership was initiated by fraud, it is thereby avoided and annulled. The person fraudulently induced to enter into the partnership is entitled to a decree canceling the partnership agreement *ab initio,* and he can, also, have an action for the deceit."

§ 84. Dissensions.

It does not necessarily follow that because partners have dissensions and quarrels, either can secure a legal dissolution. Friction and ill temper may exist, and the partners may work at cross purposes to a considerable extent, without affording

[30] Bush v. Linthicum, 59 Md. 344 (1882).

any valid ground for the dissolution of the partnership.[31] When, however, ill feeling between the members of a firm reaches such a point that it is impossible to continue the business and there is no likelihood of reconciliation, the courts will grant dissolution.[32]

While dissensions may not in themselves furnish ground for dissolution, they are very apt to cause conditions which do furnish such ground. Thus, they may easily lead to the practical exclusion of one partner from the conduct of the business, which is a sufficient reason for a dissolution of a firm. (See § 80.) A refusal to open the partnership books to one partner, or to keep full and accurate accounts, or some breach of the articles of association, are other consequences easily arising from partnership quarrels, which would afford adequate grounds for a legal dissolution. In any case of this kind, it is to be noted that dissolution can not be had at the request of the offending partner. One member can not create intolerable conditions, and then, because of these conditions, secure a dissolution through the courts. In other words, a court of equity will not assist him to take advantage of his own wrongdoing.[33]

[31] 2 Bates on P., § 594; Gerard v. Gateau, supra; Henn v. Walsh, supra.

[32] Sutro v. Wagner, 23 N. J. Eq. 388 (1873).

[33] Gerard v. Gateau, supra; Seighortner v. Weissenborn, 20 N. J. Eq. 178 (1869).

CHAPTER XVI.

EQUITABLE REMEDIES.

§ 85. Dissolution.

A partnership, as already stated, may be terminated by agreement of the partners, by death, insanity or bankruptcy, or by a declaration of war between the respective countries to which the partners belong. Apart from these causes, a partnership may, as set forth in the preceding chapter, be terminated for certain other sufficient grounds, by proper legal proceedings. These proceedings are brought in a court of equity, and the resulting dissolution involves an injunction, the appointment of a receiver and the taking of an account in all cases where these remedies are requisite. The grounds for which recourse may be had to a court of equity are as follows:

1. Any breach of the partnership articles in essential matters. (See § 78.)
2. The abandonment of the partnership business by one of the partners. (See § 79.)
3. The exclusion of a partner from participation in the partnership business. (See § 80.)
4. Any bad faith in partnership affairs. (See § 81.)
5. The misconduct of a partner. (See § 82.)
6. Fraud in the inception of the partnership. (See § 83.)

7. Dissensions that can not be reconciled. (See § 84.)

8. The failure or impossibility of the enterprise. (See § 76.)

9. The sale of his interest by a partner. (See § 73.)

10. The insanity of a partner. (See § 75.)

In all of these cases, proceedings may be instituted to have the partnership dissolved and to secure an accounting. If it is necessary to enjoin interference by the offending partner, an injunction will be granted. (See § 86.) If a receiver is requisite to preserve property or to prevent injury to the business one will be appointed. (See § 87.)

Partnership liability can at any time be terminated immediately by notice of withdrawal given to partners, followed by like notice to those dealing with the firm, and to outsiders generally, by publication, but when this has been done it may be necessary to bring a suit in equity in order to obtain the formal dissolution, accounting and settlement that is desired.

A suit at law may be brought for damages (1) for refusal to form a partnership in pursuance of contract,[1] (2) for deceit in the formation of a partnership,[2] (3) for wrongful dissolution or withdrawal,[3] and for a few similar causes, but the remedies in equity are usually sought as they alone furnish the relief required in most cases.

§ 86. Injunction.

When making application for dissolution of partnership an injunction, if desirable, may usually be had, restraining the defendants from making new firm obligations, from interfer-

[1] 2 Bates on P., §§ 870, 871, and cases cited.

[2] 2 Bates on P., § 897; see ante § 83.

v. Kirkwood, 55 Mich. 256 (1884).

[3] 2 Bates on P., §§ 578, 573; Bagley v. Smith, 10 N. Y. 489 (1853); Solomon

ing with or disposing of firm property, or from further conduct of the firm business.[4] When dissolution is sought by a partner who is not in control, an injunction is usually asked and granted. This takes the control of the business from the hands of the offending partners, and generally makes it necessary to appoint a receiver.[5] (See § 87.) It is also usually possible to secure an injunction in cases where a dissolution is not desired, but where it is sought to restrain the defendant partner from some particular misconduct or abuse of his position. In this way the extension of the partnership business into lines other than those for which the relation was formed; the waste of partnership property; the exclusion of a partner from the business, and other breaches of partnership duty may be restrained.[6] Usually, however, when partnership relations are strained to this point, it is expedient to end them, and the injunction then issues as a part of the procedure of dissolution.

After dissolution, injunction may be had to prevent violation of particular agreements, wrongful use of trade name, and the like.[7]

§ 87. Receivership.

The appointment of a receiver is an extreme measure to be resorted to only when the interests of some member of the firm or of outside creditors are in urgent need of protection. Such appointments rest in the discretion of the courts, and these are slow to act. They do not exist for the purpose of

[4] 2 High on Injunctions, § 1342 et seq.; Wilkinson v. Tilden, 9 Fed. Rep. 683 (1881); New v. Wright, 44 Miss. 202 (1870).

[5] 2 High on Injunctions, § 1350 et seq.

[6] 2 Lindley on P., p. 539, note and cases cited; 2 Bates on P., § 988; 2 High on Injunctions, § 1330 et seq.; Rutland Marble Co. v. Whitney, 10 Wallace, 339 (1870); Leavitt v. Windsor, etc., Co., 54 Fed. Rep. 439 (1893); Miller v. O'Boyle, 89 Fed. Rep. 140 (1898).

[7] 2 Bates on P., § 990; 2 High on Injunctions, § 1345 et seq.; Bininger v. Clark, 60 Barb. (N. Y.) 113 (1870); McGowan v. McGowan, 22 O. St. 370 (1872); contra Wilson v. Fichter, 11 N. J. Eq. 71 (1855).

conducting commercial enterprises,[8] and, especially before dissolution, they must be convinced that a real necessity exists before they will take the partnership affairs out of the hands of the partners and place them in charge of a receiver. A standard text-book says:

> "A receivership is not only an expensive but it 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 who 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 the protection of the parties."[9] 2 Bates on P., § 993.

It is only when the partners are on such terms that it is impossible for them to act together, and when the firm assets and business are suffering injury from these conditions, that the court will take possession and appoint a receiver to take charge of the whole.[10] In the case of the death or insanity of a partner, such conditions should not exist, and there is no cause for the appointment of a receiver unless the remaining partner or partners fail in their duty of winding up the partnership affairs fairly and honestly.[11] Nor will a receiver

[8] High on Receivers, § 480; Martin v. Von Schaick, 4 Paige (N. Y.) 479 (1834).

[9] High on Receivers, § 472 et seq.; Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129 (1833).

[10] High on Receivers, § 472 et seq.; Einstein v. Schnebly, 89 Fed. Rep. 540 (1898); Wolbert v. Harris, 7 N. J. Eq. 605 (1849); Whitman v. Robinson, 21 Md. 30 (1863); Shannon v. Wright, 60 Md. 520 (1883); New v. Wright, 44 Miss. 202 (1870).

[11] 2 Bates on P., §§ 999, 1001.

be appointed where the partnership term has not expired, and the defendant partner is not at fault.

If a dissolution is unavoidable or if the firm is already dissolved, there may be good reasons for the appointment of a receiver to wind up the firm business and settle its affairs.[12] Even in such cases, however, if there is no bad faith, breach of articles, insolvency or exclusion of a partner, the courts will not, at the behest of a dissatisfied partner, take the firm affairs out of the hands of a capable partner or partners and place a receiver in charge.[13]

When there are three or more partners in a firm the court will not appoint a receiver unless satisfied that none of the partners are to be trusted to manage the partnership affairs. On occasion one of the partners may be appointed receiver of the partnership affairs. If the immediate winding up of the business would be destructive of values, the court may authorize its continuance in the hands of the receiver until it can be closed out with the least loss.

§ 88. Accounting.

The right to an accounting is an incident of the partnership relation, and is a necessary corollary to the right to profits. It would be of little avail to have an abstract right to profits, unless it were possible to investigate their amount, and where necessary the courts will enforce this right.

It is usual in all actions for a dissolution to ask also for an accounting, and if there are grounds for the one there are for the other, as well. If the partnership has been already dissolved, an accounting may be had. Whether or not it is specifically asked for an accounting is a necessary incident of a dissolution, unless the parties have already agreed upon a

[12] Martin v. Von Schaick, supra; McElvey v. Lewis, 76 N. Y. 373 (1879); Watson v. Bettman, 88 Fed. Rep. 825 (1898).

[13] High on Receivers, § 486; Moies v. O'Neill, 23 N. J. Eq. 207 (1872); Simon v. Schloss, 48 Mich. 233 (1882); Mason v. Dawson, 15 Misc. Rep. (N. Y.) 595 (1876); Loomis v. McKenzie, 31 Ia. 425 (1871).

settlement, which would be a bar to the right. If the partnership articles provided a method of settling the affairs on dissolution (see Forms 20 and 30), as by naming a firm of professional auditors whose examination and report should be final, this also would bar the right. Unless, however, there has been some such specific abrogation of the right, an accounting on dissolution can not be denied a partner demanding it.

In those cases where one partner has excluded the other from the business, where one partner has made secret profits, or where there is an agreement for periodical settlements, an accounting may be had without dissolution.[14] Also, if one partner's share were seized on execution or under attachment, an accounting might be had without dissolution.[15] Generally, though, an accounting will only be granted in those cases where a dissolution is decreed.[16]

When an accounting is granted, the usual procedure is to appoint a referee, or to refer the accounting to a Master in Chancery, to examine and report the terms of the partnership, the accounts that have been kept, the capital invested and withdrawn, the profits and the losses, the assets and liabilities, and the proportion in which these should be shared among the partners.[17] The court then makes its orders in accordance with this report, and the receiver, or the partner or partners in charge, close up the business pursuant to these directions.[18] (See § 62; also, Chap. XVII.)

An accounting will not be granted for a special transaction in dispute when a dissolution is not asked.[19]

[14] 2 Bates on P., § 911 et seq.; Sanger v. French, 157 N. Y. 213 (1898); Leavitt v. Windsor Co., 54 Fed. Rep. 439 (1893); Lord v. Hull, 178 N. Y. 9 (1904), (a full discussion).

[15] 2 Bates on P., § 915.

[16] Parsons on P., § 206.

[17] 2 Bates on P., §§ 968, 810.

[18] 2 Bates on P., § 811.

[19] Lord v. Hull, 178 N. Y. 9 (1904).

CHAPTER XVII.

CLOSING UP THE BUSINESS.

§ 89. Different Phases of Dissolution.

(1) If one or more partners are bought out the dissolution of a partnership is usually a simple matter. The business passes as a going concern into the hands of the remaining partners. It is conducted thereafter by the new firm but the name, location, business and, at least in part, the management is the same. The only apparent change is the withdrawal of the retiring partners. Due notice should be given of this withdrawal or the retiring partners may be held for subsequent liabilities of the firm.[1] (See § 72.)

(2) If the business is terminated by agreement, by limitation or by the death, insanity or insolvency of a partner, it will usually be wound up by the partners acting together, or by the surviving or liquidating partner or partners. These will have no authority to engage in any new business, but may fulfill existing contracts, dispose of the assets to the best advantage, pay the debts and divide whatever remains among the respective interests.[2] (See § 90.)

(3) If the partnership is dissolved by proceedings in equity or in bankruptcy, the receiver or trustee takes charge, the partners turn over the assets to him and have nothing

[1] Story on P., § 160; Pringle v. Leverish, 97 N. Y. 181 (1884).

[2] Story on P., §§ 342, 343; Hall v. Lanning, 91 U. S. 160 (1875); King v. Leighton, 100 N. Y. 386 (1885); Russell v. McCall, 141 N. Y. 437 (1894).

more to do with the business, further than to give the officer in charge such information as will facilitate his work.

(4) If the partnership is incorporated, the corporation usually succeeds to the assets, name, good-will and location of the firm, and the business is continued as a going concern with the minimum of disturbance. The partners usually become directors and officers of the corporation, and as a rule hold all the stock. (See Part V, Incorporation.)

§ 90. Surviving and Liquidating Partners.

In case of the death, insanity or insolvency of one of the partners, possession of the business and assets for the purpose of winding up the partnership affairs devolves upon the remaining partner or partners.[3] It follows as a natural corollary that they have also the right to do all things necessary to accomplish this purpose, and in doing these they are not liable to interference from the representatives of the former partner, unless it can be shown that they have in some manner misused their powers.[4]

It is the duty of surviving or liquidating partners on taking charge to notify those having dealings with the firm, of its dissolution and of the fact that they are engaged in winding up its affairs. It is also their duty to dispose of and fulfill any existing contracts, to dispose of the partnership property to the best advantage, to discharge all debts and obligations,[5] and to turn over to each of those entitled thereto their due proportions of the surplus.[6] They have no power

[3] 2 Bates on P., § 715; King v. Leighton, 100 N. Y. 386 (1885); Russell v. McCall, 141 N. Y. 437 (1894); Widderburn v. Widderburn, 22 Beav. 84 (1856); Vetterlein v. Barnes, 6 Fed. Rep. 693 (1880); Nelson v. Hayner, 68 Cal. 487 (1873).

[4] Walker v. Trott, 4 Edw. Ch. 38 (1840); Williams v. Wheedon, 109 N. Y. 338 (1888); Gable v. Williams, 59 Md. 46 (1882); Shields v. Fuller, 4 Wisc. 120 (1854).

[5] 2 Bates on P., § 726; Bank v. Vanderhorst, 32 N. Y. 553 (1865); Williams v. Wheedon, supra.

[6] Jenks v. Manson, 53 Me. 208 (1865); Heartt v. Walsh, 75 Ill. 200 (1874); Davis v. Lowell, 77 Ala. 262 (1884).

to bind the firm to new contracts, or to undertake new business,[7] and ordinarily they are not entitled to compensation for their services in settling the firm's affairs.[8]

In settling the affairs of professional firms the general rule laid down is not always equitable. In a law firm for example the settlement of its affairs sometimes involves protracted litigation extending over years. This must be carried on by the partners in charge without compensation beyond their partnership interests, the estate of the deceased partner, or the representatives of an insane or insolvent partner, participating as fully as if the time and efforts of their principals had been actively devoted to the business.

In an extreme case of the kind it is probable that the courts would grant relief,[9] but it is a wise precaution when professional partnerships are formed to provide fully and clearly in the partnership articles for the interests of liquidating partners. In Denver v. Roane, cited below, Justice Strong said:

> "There may possibly be some reason for applying a different rule to cases of winding up partnership between lawyers and other professional men, where the profits of the firm are the result solely of professional skill and labor. No adjudicated cases, however, with which we are acquainted, recognize any such distinction. And in the present case, as we have said, the parties made arrangements for the work and results of work after the death of any of their number. The agreement of August 13, 1869, provided that in case of the death of any partner, one third of the fees in cases nearly finished, and one quarter of the fees in other partnership cases, should be-

[7] 2 Bates on P., § 727 and cases cited.

[8] Sangston v. Hack, 52 Md. 173 (1879); Denver v. Roane, 99 U. S. 355 (1878); Burgess v. Badger, 82 Hun. 488 (1894); Johnson v. Hartshorne, 52 N. Y. 180 (1873); see exceptions, 2 Bates on P., §§ 773, 777, and cases cited; Bradley v. Chamberlain, 16 Vt. 613 (1844).

[9] Sterne v. Goep, 20 Hun. (N. Y.) 396 (1880); (affd. 84 N. Y. 641); see dictum in Denver v. Roane, supra; Osmeat v. McElrath, 68 Cal. 466 (1866).

long to the representatives of the decedent. Of course, it was contemplated that the surviving partners should finish the work, and that no allowance should be made to them beyond the share of the fees specified in the agreement."

§ 91. Existing Contracts.

Although surviving or liquidating partners have no authority to undertake new business or to make new contracts, they may complete and fill orders and contracts on hand at the time of dissolution. They may also conduct the business for a limited time, to give opportunity to dispose of the business to the best advantage and to prevent a sacrifice of the good-will.[10] If they should continue the business for any longer time, they would become personally liable for any losses that might occur, and if their efforts resulted in a profit would be required to account for it.[11] The former partner or partners, or their personal representatives, would not be liable under such circumstances on any contract made or for any losses incurred.[12]

When a receiver has been appointed, he can not, unless specially authorized thereto by the court, actively continue the partnership business. This authorization is rarely given except in cases where a sudden stoppage would injure the business, and damage or destroy the good-will. Such cases furnish an exception to the well established principle that courts will not appoint a receiver for the purpose of carrying on a partnership business. (See § 87.)

A trustee in bankruptcy would be held to the same general rule, and should only continue the business when necessary in order to avoid considerable sacrifice.[13]

[10] Oliver v. Forrester, 96 Ill. 315 (1880); Denver v. Roane, 99 U. S. 355 (1878); Schenkl v. Dana, 118 Mass. 236 (1875).

[11] King v. Leighton, 100 N. Y. 386 (1885); Fitzpatrick v. Flannagan, 106 U. S. 648 (1882).

[12] Bennett v. Buchan, 61 N. Y. 222 (1879); Oliver v. Forrester, supra.

[13] Bankruptcy Act, 1898, Sec. 2, Clause 5.

§ 92. Sale of Assets.

The assets of a liquidating partnership should always be sold to the best advantage, but the method of accomplishing this rests largely in the discretion of the surviving or liquidating partner. He need not force sales, thereby sacrificing the goods, nor is he compelled to sell out at retail.[14] He may even borrow money and pledge the partnership property for its payment. He may himself buy the partnership goods or property, with the consent of the representatives of the former partner,[15] or if given the option to do so in the articles.[16] Partners may agree among themselves to divide and partition the firm assets, if the firm is solvent, but in the absence of such an agreement, the property must be sold.[17]

A receiver would likewise be required to sell to the best advantage. In such case it would not be possible to settle the affairs of the partnership in any other way.

Patents, recipes, formulae, lands, accounts, good-will, and anything else that can be sold must be sold. If there were anything which could not be sold and it were possible to make some other equitable disposition of it, the court in its discretion could make a special order in regard to the matter.[18]

§ 93. Disposition of Firm Name, Good-will, Etc.

The good-will of a business is often a most valuable asset, and, when possible, the business should be so sold as to secure compensation both for the good-will and the firm name. To attain this end, it is usually necessary to sell the business

[14] Williams v. Wheedon, 109 N. Y. 333 (1888); Durant v. Pierson, 124 N. Y. 444 (1891); Emerson v. Leuter, 118 U. S. 3 (1885).

[15] Gunn v. Black, 60 Fed. Rep. 151 (1894), and cases cited on p. 156; Nelson v. Hayner, 68 Cal. 487 (1873).

[16] Hull v. Cartledge, 18 App. Div. (N. Y.) 54 (1897); Harbster's Appeal, 125 Pa. St. 1 (1889).

[17] 2 Bates on P., § 1007.

[18] 2 Bates on P., § 974.

as a going concern, including good-will and the right to use the firm name and any trade-marks that may belong to the business. This is equitable, for as all of the partners are supposed to have contributed to the creation of the good-will and to the value of the firm name, such property should be disposed of only for the common benefit.[19]

It has been held that the firm name belongs only to the firm and that it can not be sold or transferred in liquidation except to a member of the firm. It has also been held that any other purchaser could secure only the right to designate himself as "successor to" the former firm. In such case, he would, however, have the right to enjoin any member of the old partnership from using the former firm name. A distinction was made between the transfer of the firm name to third parties and to surviving partners. While third parties could not secure the right to use the firm name without an explanatory prefix, a surviving partner—although the right to use the firm name would not pass to him on the death of his associate [20]—might secure this right from the latter's representative, and continue business under the old name. In the same way, upon the dissolution of a partnership, one or more members might purchase the firm name with the business.[21] (See § 27.)

In a late case, however, the New York Court of Appeals swept away the distinction between a sale of the assets and good-will to a surviving partner and a sale to a stranger, and held that either might take exactly the same rights in the use of the firm name. Justice O'Brien said:

[19] Slater v. Slater, 175 N. Y. 143 (1903); Higgins Co. v. Higgins Soap Co., 144 N. Y. 463 (1895); Freeman v. Freeman, 86 App. Div. (N. Y.) 110 (1903); Caswell v. Hazard, 121 N. Y. 484 (1890); also see note, 15 L. R. A. 462, and Brown on Trademarks, § 530.

[20] Morgan v. Schuyler, 79 N. Y. 490 (1880); Morse v. Gall, 109 Mass. 409 (1872).

[21] Merry v. Hoopes, 111 N. Y. 415 (1888); Steinfeld v. Nat. Shirt Waist Co., 99 App. Div. (N. Y.) 286 (1904); Menendez v. Holt, 128 U. S. 514 (1888); Listman Mill Co. v. William Listman M. Co., 88 Wis. 334 (1894).

"The judgment should be modified on the plaintiff's appeal so as to direct the sale of the good-will with other assets, including the right to use the firm name, without conditons, restriction or limitations upon the purchaser." Slater v. Slater, 175 N. Y. 143 (1903).

Trade-marks are frequently sold with the good-will and the right to use the firm name. As with all other firm property, such sale must be for the benefit of all the partners. If trade marks, formulae, etc., are not disposed of during dissolution any member of the former firm has a right to use them thereafter.[22]

§ 94. Paying Debts.

The debts of a partnership must be paid from the assets as these latter are converted into cash, and it is the duty of the surviving or liquidating partner so to discharge them.[23] Such surviving or liquidating partner can not, however, adjust disputed accounts or acknowledge indebtedness in such way as to diminish or further bind the share of other partners.[24] Neither would an acknowledgment on his part take a debt which had been barred, out of the statute of limitation, nor extend the time which it yet had to run, so far as former partners were concerned.[25] Neither would a part payment in such case affect the debt, save as to the partner making it.[26] The general principle which determines the limits of his powers is that the mutual agency of the partners has

[22] Caswell v. Hazard, supra.

[23] Preston v. Fitch, 137 N. Y. 41 (1893); Russell v. McCall, 141 N. Y. 437 (1894); Fiske v. Gould, 12 Fed. Rep. 372 (1882).

[24] Pringle v. Leverish, 97 N. Y. 181 (1884).

[25] Hackley v. Patrick, 3 Johns. (N. Y.) 536 (1808); Van Kernen v. Parmelee, 2 N. Y. 523 (1849); Bell v. Morrison, 1 Peters 351 (1829).

[26] Cronklute v. Herrin, 15 Fed. Rep. 888 (1883); Winchell v. Hicks, 18 N. Y. 558 (1859); contra Buxton v. Edwards, 134 Mass. 567 (1883); Merritt v. Day, 38 N. J. L. 32 (1875); Casebolt v. Ackerman, 46 N. J. L. 169 (1884); Wood v. Barber, 90 N. C. 76 (1884).

ceased, except for such purposes as are necessary in winding up the affairs of the firm, and consequently the acting partner can neither form new nor modify existing obligations.

When the firm is solvent, a surviving or liquidating partner may use his discretion in the payment of debts, and within reasonable limits may pay in such amounts and in such order as he chooses.[27] A receiver or trustee in bankruptcy, on the other hand, can only pay debts proportionally as he realizes on the assets, and is ordered by the court.[28] The debts of the partnership are thus paid, as far as assets go, at the same time and in equal proportions, without preference.

§ 95. Marshalling Assets.

When a firm is being wound up the proceeds of the partnership assets must be first applied to payment of firm debts. Each partner has a right to have the partnership property thus applied to the settlement of the partnership obligations before any is withdrawn or applied to individual debts of the partners. This right is awkwardly termed his partnership lien.[29] Corresponding to it is the right of the firm creditors to have their claims paid before any of the assets are applied to the satisfaction of creditors of individual members of the firm, and before anything is divided among the partners.

In cases of insolvency, the partnership creditors are first paid in full. If any assets then remain they are applied to payment of the creditors of the different members, or, if any partner has no individual obligations in evidence, he is entitled to receive his proportion of the remaining assets undiminished.

In the dissolution of solvent firms, after the partnership obligations have been settled, advances made by any partner

[27] Emerson v. Senter, 118 U. S. 3 (1885).

[28] Beach on Receivers, § 467.

[29] 2 Bates on P., § 820; Case v. Beauregard, 99 U. S. 119 (1878).

are returned, and then if the assets are sufficient, each partner receives back his capital, and any remainder is divided as profits. (See § 96.)

If a partner has property outside of his partnership investment, his individual creditors have the first right to satisfy their claims from this individual property. Then, after these claims are satisfied in full, if there are still individual assets remaining, any unsatisfied partnership creditors are entitled to them to the full extent of their claims.[30]

In other words, the firm creditors and the individual creditors form two classes. The firm creditors have the right to be paid from the firm assets before anything is applied to or taken by individual creditors, while the individual creditors have the right to be paid from the individual property, before any is taken for the firm creditors. Applying the partnership and individual property in this manner is termed "Marshalling the Assets." [31]

§ 96. Dividing the Remaining Assets.

After the assets of the firm have been turned into cash and the debts have been paid, it is the duty of the surviving or liquidating partners to apportion the remaining funds among themselves and the representatives of any former partners.[32]

The distribution of the surplus should be as follows:

Any advances above the stipulated investment of capital must first be repaid to the partners who made them. If the funds permit the capital of each partner must then be returned. Any surplus still remaining would represent the profits of the business and would be divided among the partners in such

[30] 2 Bates on P., § 825, and cases cited.

[31] Wilder v. Keeler, 3 Paige Ch. 167 (1832); Hewitt v. Northrup, 75 N. Y. 506 (1878).

[32] Whitcomb v. Converse, 119 Mass. 38 (1875).

proportion as the partnership agreement might provide, or in the absence of any provision therefor, in equal proportion.[33]

If the proceeds from the partnership assets do not suffice to return the partnership investment, it shows that the business has been conducted at a loss to the amount of the deficiency. This loss must be apportioned among the partners as may be provided in the partnership articles, or, in the absence of such provision, would be borne by them equally. In either case the loss of each partner would be deducted from the amount of his investment and the remainder, if any, paid over to him in settlement of the partnership accounts.

If gains and losses are to be shared equally the lesser investor may, as a result of losses, be in debt to his partner. If under such arrangement, A puts in $5,000 and B invests $1,000 and a loss of $3,000 is incurred, B's share of the loss would be $1,500. On dissolution this would be charged up against his investment of $1,000, cancelling it and leaving him indebted to his partner to the amount of $500.

[33] 2 Bates on P., § 811; 2 Lindley on P., pp. 402, 973.

PART V.—INCORPORATION.

CHAPTER XVIII.

PARTNERSHIP COMPARED WITH CORPORATION.

§ 97. Mutual Agency and Corporate Agency.

In a partnership every general partner is a general agent for the firm and has full authority to bind it by any contracts made in the scope of its ordinary business. In a corporation, on the other hand, this power of binding the whole body is carefully safeguarded. Membership or ownership of stock gives no right to act for the corporation, nor does this right inhere in any individual official position. The board of directors alone has power to bind the corporation by its action, and this power must be exercised by the board as a whole, not by the individuals composing it. A single director acting alone has no more ability to bind the corporation than has any other member or stockholder. Effective action is secured only by motions and resolutions which may only be passed by the board at legal meetings and by a majority of a quorum there present. The board elects officers and appoints agents to carry out its will, but these have only such definite powers as are given them by the by-laws or the resolutions of the board of directors. In practice, corporation officers exercise many powers which are not expressly given them, but these are held to have been authorized by the corporation since it has allowed their assumption. These, moreover, pertain merely to routine business, and do not in any way approach or compare with the wide discretionary powers of a partner.

§ 98. Comparative Liability Under Each System.

Under the partnership system each general partner, in case of insolvency, is liable to the entire extent of his fortune. Any partner may, through an injudicious contract, bankrupt the firm, and then each general partner, regardless of the amount of his investment, is bound to meet the obligations of the firm as far as his resources permit. This dangerous partnership liability can not be in any way avoided by a general partner, and it is this which drives so many enterprises into the corporate form.

Under the corporate system an entirely different rule prevails. Each stockholder is liable only for the amount he has subscribed. When that is paid he has no further liability of any kind. The corporation has been launched, and whoever gives it credit does so on its property and repute, and not on faith in the men composing it. So it comes about that while, under the corporate system there is no limit to the amount of profits which a stockholder may receive, his risk of loss is absolutely restricted to the amount he has invested.

Sometimes stock in a corporation is paid for in property, such as a mine, an invention, a going business or the like. (See § 112.) In most of the states of the Union such payment is good, unless there is fraud in the transaction or such excessive overvaluation as would imply fraud. If stock is paid for fraudulently, and the corporation thereafter becomes insolvent, the original holder may be held liable for the difference between the real value of the property and the face value of the stock. Ordinarily, however, the original investment is the measure of liability. This may be lost but nothing further.

§ 99. Advantage of the Stock Plan.

When a corporation is formed it is capitalized at a certain amount known as its capital stock. This capital stock represents the property and business of the corporation. It is divided into shares, usually of one hundred dollars each, known as shares of stock. Each holder of stock measures his interest in the corporation, his voting power in the corporate meetings and his proportion of the profits by the number of these shares he owns. When a purchaser has paid for his stock, he is entitled to a transferable certificate or certificates, signed by appointed officers of the corporation, certifying the number of shares he owns. These certificates are *quasi* negotiable, may be assigned in blank and then passed from hand to hand freely.

This system, owing to its convenience, its ready measure of a stockholder's interest, and the facility with which it permits this interest to be transferred or used as collateral, is especially attractive to investors, and gives the corporation great advantages over the partnership. In case a participant in an enterprise wishes to withdraw, or to divide or transfer his interest, it is easily done, without dissolution or disturbance of any kind in the corporate affairs. In case of his death, with the consequent necessity of settling his affairs, his interest is in the most convenient shape for sale or transferance to his devisees, in striking contrast to the tedious and somewhat uncertain disposition of a partnership interest in case of a partner's death.

§ 100. Management of Corporations.

The stockholders of a corporation meet once each year in annual meeting for the purpose of electing directors. The directors so elected control and manage the property and business of the corporation, limited, however, by the restrictions of the by-laws. The directors meet usually once a month in regular meeting. They express their will by means of resolutions, and elect officers and appoint agents to carry these resolutions into effect. The several functions of the stockholders, directors and officers are prescribed by law and usage, modified to suit the circumstances of each particular case. The whole makes a smooth, well-working business mechanism, equally effective for the close corporation with but a few members and the large industrial combination with its thousands of widely scattered stockholders.

Like the federal system of government, the corporate organization is based on a division of powers and the operation of mutual checks and balances. If well arranged and properly conducted its operation is effective and satisfactory. It is to be noted, though, that this ideal system is not ordinarily attained. Frequently it is lost through ignorance, negligence or lack of experience. Promoters and exploiters often deliberately set aside the checks and safeguards that should protect the stockholders. A charter and by-laws well adapted for some particular business and set of conditions are often duplicated for another corporation with different circumstances and aims. Other errors are frequently made tending to diminish the effectiveness of the system. To secure the full advantages of incorporation, skill and experience must be employed both in the organization of the corporation and in its management.

§ 101. Expenses Incident to Incorporation.

The direct expenses of incorporation are the initial tax paid the state authorities for the privilege of incorporation, counsel fees, the incidental fees for filing and acknowledgments and the cost of the special books and corporate equipment. After this the expenses are approximately the same as if the business were conducted as a partnership, save for the annual franchise tax imposed in some states, and, possibly, an increase of property taxation owing to the greater difficulty of evasion under the corporate form.

The annual franchise tax is in some states a rather onerous burden. In New Jersey, it amounts to one-tenth of one per cent. of the issued stock. In Pennsylvania it is one-third of one per cent. on the actual value of the capital stock. In most states where there is a special tax on corporations, an exemption is allowed for those engaged in manufacturing in the state. Each state has its own laws on this subject, and the matter should be investigated before incorporation.

Land taxes and local taxes are usually the same for corporations as for partnerships or individuals. In New York a partnership as such is not taxed, but the individuals composing a partnership are supposed to pay taxes on their investment in the partnership. A corporation on the contrary is taxed directly and its stockholders are exempt as far as the corporate property is concerned. As individuals often evade more or less of their local taxes in ways not available to corporations, it sometimes happens that incorporation results in increased taxation.

§ 102. Resumé.

The two systems—partnership and incorporation—may be briefly compared as follows:

1. Each partner is an agent for the firm and can bind it by his actions. A corporation may only be bound by its duly authorized officers.

2. In a partnership each partner is liable without limit for all the obligations of the firm. In a corporation each stockholder is liable only for the amount unpaid on his stock.

3. In a partnership each partner's share is indivisible and non-transferable. In a corporation the stock system permits an exact and easy subdivision of interests and their transfer by mere assignment as often as desired.

4. The management of a partnership is a matter of agreement among the partners, and, owing to the right to bind and contract possessed by every member of a firm, is liable to be indefinite and uncertain. The management of a corporation is prescribed by its charter, its by-laws and the statutes of the state in which it is incorporated, and the powers of stockholders, directors and officers are definitely outlined.

5. The necessary expenses and taxation of a partnership may be less than the expenses incident to organizing and maintaining a corporation. To determine the relative costs with exactness requires a special investigation in each specific case.

6. The rights and powers of a minority are frequently greater and more easily protected in a partnership than in a corporation. In either case it depends largely upon the preliminary arrangements and agreements and the ability of the minority to enforce the right really possessed. The matter is discussed in the following chapter.

CHAPTER XIX.

PRACTICAL CONSIDERATIONS.

§ 103. Control of Corporations.

The relations of the partnership are fundamentally different from those of the corporation.

In a partnership of two, for instance, unless expressly otherwise agreed, each has an equal voice in the management, regardless of the amount of the respective investments. In the event of a divergence of views on any important matter, a deadlock results, and either a compromise must be effected or the proposed measure be given up. If one partner is dissatisfied with the conduct of his associate, he may dissolve the partnership and withdraw his capital.

If these same partners incorporate their business the conditions are radically different. Then, unless otherwise expressly agreed and arranged, the amount of investment controls. The corporate affairs are managed by a board of directors elected by the stockholders, and the partner with the larger investment would elect the majority of this board, and through it control the business of the corporation. There could be no deadlock nor necessity for compromise no matter what the divergence of views. The dissatisfied party could only submit and it would be impossible for him to withdraw his capital and break up the organization as he might have done in the partnership. He may sell his stock if he can, but if not his capital must remain subject to the control of his former partner.

Again a dissatisfied minority partner sometimes brings pressure to bear upon his associates by threatening to dissolve the partnership, or by exercising his partnership authority to the detriment of the firm, until, as a measure of protection, they buy him out. In the corporation he has no such power. He can not withdraw his capital, and, if the majority ignore him, or displease him in other ways, his only means of relief is the sale of his stock. Under the circumstances his stock would not be an attractive investment and even this avenue of escape might be closed.

It is apparent that under the ordinary arrangements of the corporate system the majority interests are in a safer and much better position than under the partnership; also that the position of the minority interest is not so good. It is also true that because of this menace to the minority interests, many businesses are still maintained in partnerships that would be much more advantageously conducted under the corporate form, and if this risk could not be avoided the advisability of incorporation would, for minority interests, be very doubtful.

It is to be noted, however, that by proper arrangement, the minority interests may be properly and fully protected under the corporate form. Such arrangement must usually be made at the time of incorporation, but given competent attorneys at that time, they can secure any measure of representation or protection that may be necessary or desired.

§ 104. Protection of Minority Interests.

The matter of protecting minority interests is one requiring skilful professional counsel. The methods vary with the conditions. If the minority interests are in a position to demand equal voting power, the protection so secured is effective and complete. The arrangement may be carried out (1) by giving the minority interests half of the voting stock, or (2) by giving the minority stock the right to elect half the directors.

For instance, a partnership in which A had $10,000 and B $20,000 might be incorporated with a capital stock of $30,000 in order to represent and provide for the exact partnership interests. Of this total, $20,000 alone might be given the voting power, the other $10,000 being non-voting stock. The voting stock would then be divided equally between the partners, while the $10,000 of non-voting stock would go to B to cover his excess investment. This would give him an additional third of the stock and therefore of the profits but would not give him any more control of the business than was possessed by A. Each would vote $10,000 of stock and therefore have equal voice in the management. If it were desired to limit B's returns on his excess investment, his extra $10,000 might be provided for by non-voting preferred stock drawing a limited dividend, or it might be made up in bonds drawing interest. In this case B would first receive interest on his excess investment in the shape of his dividend on the preferred stock or interest on his bonds, and then both would participate equally in any remaining profits. The voting power would be equal as before.

Under the other plan the stock would be divided into two classes, $10,000 of stock in the one and $20,000 in the other, but each class would be empowered to elect exactly the same number of directors. Then, the stock being divided as before, A's $10,000 worth of stock would elect, say two directors, and B's $20,000 of stock would also elect but two directors, thus giving each interest equal representation. When the profits are divided, B would have two-thirds because of his stock preponderance.

These plans may be varied and arranged in many more or less complicated forms to meet any desired conditions and to do justice to the differing interests concerned. In some few states they would not be available on account of prohibitions in the laws against varying the voting power of stock.

§ 105. Cumulative Voting.

Another means of protection for the minority is the employment of cumulative voting. This operates to secure for the minority, representation on the board of directors. It can under no circumstances give anything more than representation. It can not give equality of power to the minority, but it can assure the election of one or more directors, who may attend board meetings and watch matters in the interests of the minority. The mere presence of a capable minority representative prevents many abuses of power that would otherwise occur. Also, if any unfair dealing is contemplated it must be brought up in the board of directors. Of this the minority, through their representatives, will be informed and may take legal action for its prevention.

The distinction between the ordinary system of voting and the cumulative system lies entirely in the manner in which the votes are cast. Under the ordinary system each share of stock entitles its holder to one vote for each director to be elected, but this vote may only be cast in the prescribed manner—one vote to a candidate up to the number of directors to be elected. In the cumulative system on the contrary, while each share, as before, entitles its holder to but one vote for each director to be elected, these votes may be cumulated on one or two of the candidates at the discretion of the voter. The number of votes to which he is entitled is determined by multiplying the number of his shares by the number of the directors to be elected and these votes may then be cast all for one candidate, or may be apportioned out among them at the will of the voter. As a result the holders of minority stock who, under the ordinary system of voting, are left absolutely without representation among the directors, may, if their holdings are at all material, unfailingly elect one or more directors and thereby secure representation on the board.

The State Constitution of Pennsylvania prescribes the system as follows:

> "In all elections for directors or managers of a corporation, each member or shareholder may cast the whole number of his votes for one candidate or distribute them upon two or more candidates as he may prefer."

In most other states the same arrangement may be had by proper provisions in the charter or the by-laws. It is always expedient to secure the system as it can not work disadvantageously and may on occasion prove of great advantage.[1]

§ 106. Voting Trusts.

The voting trust is also used at times for the protection of minority interests, as well as to insure the general stability of corporate management. Under this arrangement the stock of a corporation or a majority of its stock is placed in the hands of trustees who hold it in their own names in trust for the stockholders, voting it as directed in the voting trust agreement and drawing any dividends and distributing them among the real owners according to their interests.

The voting trust is often a satisfactory means of preserving an agreed corporate management for a term of years.[2] The objection to it is that it can usually be maintained only for a limited term. In the State of New York the statutes provide that such trusts shall not last longer than five years. In most of the other states, the status and term of the voting

[1] See § 231, Conyngton on Corp. Organization.

[2] See Chap. XXV, Conyngton on Corp. Organization.

trusts are not so clear but it is doubtful whether they would be upheld for a materially longer term.[3]

In the case of the incorporation of a partnership, if a voting trust were formed, the partners themselves would probably act as trustees. In this case they would take and hold their own stock in trust and vote it as a whole to elect a named board each year. Under this arrangement the management of the corporation is a matter of agreement among the stockholders. A satisfactory board is decided upon and then year after year is maintained as agreed. Some provision is usually made for the selection of a new member of the board in case any of the original members die or resign.

When a voting trust is formed the stock is actually assigned to the trustees, who hold the certificates while the trust lasts. This deprives the legal owners of the power to interfere or change the situation until the termination of the trust. The trustees usually issue certificates to the owners for the stock turned in and these certificates may be transferred if desired. For selling or for use as collateral they are not, however, usually as available as the stock itself.

§ 107. Provisions Against Selling Stock.

In the incorporation of a partnership it is often desirable to restrict the sale of stock, in order to prevent its coming into the hands of objectionable stockholders, or for other business reasons. Where this restriction is only desired for a limited period, the voting trust would be effective and probably the most satisfactory method to employ.

For longer periods direct agreements not to sell are sometimes entered into. Generally, however, the courts do not approve of agreements interfering with the free transfer of stock,

[3] Chapman v. Bates, 47 Atl. Rep. 638 (1900); Brightman v. Bates, 175 Mass. 105 (1900); Whitehead v. Sweet, 126 Cal. 67 (1899); Mobile, etc., Co. v. Nicholas, 98 Ala. 92 (1893).

and such arrangements are difficult to make and enforce. The usual plan is not to forbid directly the sale of stock but to provide that it shall be offered to the other associates before being sold elsewhere. If, however, the stock were sold despite any such agreement, the associates could not set the sale aside and would have no remedy save an empty suit for damages against the offending party.[4]

In New York it has been decided that parties may agree to deposit their certificates of stock with a trust company for a specified period, not to be withdrawn or sold without mutual consent.[5] This method is simple and effective. It has also been decided in New York that stockholders may form a special partnership for the holding of their stock and have the certificates issued to them jointly under the agreement that the certificates shall not be sold, exchanged or pledged for ten years except by consent of all interested.[6] This is effective but somewhat cumbrous.

Various other provisions and decisions exist in the different states as to restrictions on the sale of stock. It is not necessary to say that any such arrangements should be made by skilful counsel and only after careful consideration of the particular case and the law of the particular state.

[4] 2 Cook on Corporation, § 622c, note 2.

[5] Williams v. Montgomery, 148 N. Y. 519 (1896).

[6] Hey v. Dolphin, 92 Hun (N. Y.) 230 (1895.)

CHAPTER XX.

PROCEDURE FOR INCORPORATION.

§ 108. Preliminary Agreement.

When the business of a firm is to be incorporated the various details of the change must be agreed upon as a first step. The name, the capital stock, the proportional share of each partner in this stock, the representation of each on the board of directors, the official positions the partners will respectively occupy in the corporation, the salaries to be paid each, and the other important features should all be embodied in a preliminary agreement.

The following general points should be covered:

1. Name.
2. Purposes.
3. Duration.
4. Capitalization and value of shares.
5. Stock: Classes—common, preferred, non-voting.
   The terms and description of each.
   The distribution of the stock so as to give each partner his due representation and share of profits.
6. Directors—number and any qualifications.
7. Officers—powers of same—salaries.
   Incumbents for each office.
8. Any arrangements as to finance and property.
9. Any arrangements as to transfer of firm assets to the corporation.

§ 109. The Name.

If the partnership name is valuable and its preservation is desirable, it may usually be retained in some form as the corporate name. In some states the firm name may be adopted without change of any kind. This is, however, open to objection as there is then nothing in the name to indicate that the concern is a corporation, and parties transacting business with it might, unless informed in advance of its corporate nature, be able to hold the stockholders as partners.

Usually the firm name is retained with the addition of Company, the firm of "Rogers & Gannon" becoming on incorporation the "Rogers & Gannon Company," or perhaps the "Rogers-Gannon Company." Another method of avoiding any possibility of liability is to add the word incorporated, as "Rogers & Gannon, Incorporated," this last word being abbreviated in written or printed matter to "Inc."

In most of the states the word "The" may be made a part of the corporate name if desired. In a few states it is obligatory. It sometimes involves awkward verbal constructions, and hence, is usually avoided.

§ 110. Charter Provisions.

The charter is the instrument granted by the state by which the corporation is created and under which it exists. It corresponds to the constitution of a state.

Certain features of the corporation, as the name, purposes, capitalization, value of shares and the like must in most states be embodied in the charter. It is best to embody all of the desired special features of the incorporation in the charter that may be inserted there under the laws of the particular state. Any classification of the stock should be made a charter provision wherever possible. In some states this can not be done, in which case it can usually be attained by by-law provision.[1]

The number and often the names of the first board are usually made a part of the charter. In some states as in New York and New Jersey the qualifications of the directors may be fixed by charter provision. In many states any provision for cumulative voting must be made a part of the charter, and in general, if the minority is to have any special protection or any provision is to be made for equality of representation as between the partners, it must usually be done in the charter. Here is where the aid of a skilful lawyer is most valuable.

§ 111. By-Law Provisions.

The by-laws are the working rules of the corporation. Any important feature not provided for in the charter and all the routine details of procedure must appear in the by-laws.

This will include the date of the annual meeting, which should be put at such time as will best begin the business year, and the times for the directors' meetings, which should likewise be put at such time and at such intervals as will best serve the interest of the business.

The by-laws will also usually prescribe the powers and duties of the officers. This feature requires the most careful attention. The rights and duties of each should be clearly defined with some consideration of the capacities and abilities of the proposed incumbents. If any limitations on salaries are intended, they may be added to the respective by-laws which prescribe the powers and duties of each officer.

The powers of the directors may be restrained by suitable by-laws, as, for instance, that they shall not pay salaries or contract obligations beyond a certain amount, or such limitations might be imposed with the provision that they shall

[1] Kent v. Quicksilver Co., 78 N. Y. 150 (1879).

not be exceeded unless the directors are authorized thereto by a majority, or two-thirds vote of all the stock.

The by-laws may also regulate the paying of dividends and the reservation of working capital. The bank or trust company to have the accounts of the corporation may be named in the by-laws or they may provide that the directors shall designate a depositary.

Any other provision suitable to the particular circumstances of the business may be inserted. If preferred or special stock is desired and the charter has not authorized its issuance, it is usually possible to attain this end by proper provision in the by-laws.

§ 112. Organization Meetings.

After the charter has been secured, it is usual to hold organization meetings; first of the stockholders, and then of the directors. The meeting of the stockholders is for the purpose of formally adopting the set of by-laws agreed upon, and in those states where directors have not been named in the charter, to elect the first board of directors. Also if it is proposed to exchange the existing partnership business or other property for stock, it is usual to bring the matter before the stockholders, who approve the proposal and refer it to the subsequent meeting of the directors for action.

The meeting of the directors is for the purpose of electing the officers provided for in the by-laws, and for authorizing such action as may be necessary to secure funds and begin the business operations of the new corporation. If a proposal has been made to exchange property for stock, the directors must accept it and authorize the issue of the stock. At this meeting the directors also usually designate a bank as the corporation depositary, authorize the lease of office or warerooms and do anything else that requires to be done before beginning business.

The proceedings of both of these first meetings are carefully recorded in the minute book, the charter and by-laws are also entered, and this complete record, showing the charter, the by-laws and the minutes of the first meetings, takes the place of the articles of co-partnership in a firm.

§ 113. Transfer of Firm Property.

The transfer of the business is accomplished by the presentation of a written proposal from the old firm, in which all the members join, offering to the corporation the entire business, assets, trade name, and good-will of the firm as a going concern, in exchange for all or a definite portion of the stock of the corporation to be issued as directed in the proposal. This proposal is presented to the stockholders at their first meeting and is by them approved and referred to the directors for action.

At the directors' meeting the proposal with its endorsement by the stockholders is received, entered on the minutes and accepted. The resolution of acceptance usually directs the officers of the corporation to receive due assignment of the property and to issue the stock to those entitled to it. After the passage of this resolution, a formal assignment of the business and assets is usually executed and delivered to the officers of the corporation, although the acceptance of the written proposal followed by the taking possession and issuance of stock in exchange would pass the title.[2]

§ 114. Issuance of Stock Certificates.

The issuance of certificates of stock is not necessary to give the former partners all the rights of stockholders. The acceptance of the partnership business and property under the written proposal entitles the members of the partnership to the stock specified and to all the privileges of stockholders.[3]

[2] Central Ohio Co. v. Capital City Dairy Co., 60 O. St. 96 (1899); 64 L. R. A. 395.

[3] 1 Cook on Corp., § 192.

The stock certificates are, however, the convenient and usual evidence of stock ownership and as soon as the officers are elected, the seal adopted and certificates of stock printed, it is usual to make out certificates for the number of shares belonging to each partner. Each partner has then in lieu of his former interest in the partnership, a certificate for a proportionate amount of stock in the new corporation. The partnership is virtually dissolved by the transfer of all its property to the corporation. It is well, however, to formally dissolve it and to notify those who have dealt with the firm that the corporation has succeeded to its business.[4]

If the incorporation has been duly carried through, and if due notification has been made of the dissolution and incorporation of the business, no further partnership liability can be incurred.[5]

§ 115. Conduct of Business.

Thereafter the business will be conducted by the corporation, which usually takes it over as a going concern, assuming all outstanding debts not otherwise provided for. The former patrons and all who have dealt with the firm are notified of the change, the letter heading is changed, the corporate signature is used and the bank accounts are transferred to the new name.

"Close" corporations with but few stockholders and those all actively engaged in the business, are very frequently conducted with as little formality as is the partnership. Regular meetings are omitted at convenience and most matters are settled by informal conference as before. There is no objection to this lack of formality in a close corporation as long as the

[4] 2 Bates on P., § 589; Goddard v. Pratt, 16 Pick. 412 (1835); Shorb v. Beaudry, 56 Cal. 446 (1880).

[5] 1 Bates on P., § 8; 1 Cook on Corp., §§ 232 to 240; Whitney v. Wyman, 101 U. S. 392 (1879); Bank v. Smith, 26 W. Va. 541 (1885); Garnett v. Richardson, 35 Ark. 144 (1879).

company affairs move smoothly. The corporate mechanism is there ready for use when required, but need not be employed except in routine matters until called for by disagreement, death, insolvency or other emergency.

PART VI.—FORMS AND PRECEDENTS.

CHAPTER XXI.

ARTICLES OF COPARTNERSHIP.

(USUAL CLAUSES.)

The first five chapters of Part VI treat of the partnership agreement. The present chapter gives forms for the usual clauses found in almost every agreement of partnership. Chapter XXII gives clauses relating to the conduct of the partnership business, one or more of which will usually be necessary in addition to the clauses of the present chapter. Chapter XXIII relates particularly to dissolution. Chapter XXIV contains the less usual clauses which are occasionally employed, while in Chapter XXV complete partnership agreements are presented composed of forms similar to those contained in the preceding chapters.

The different forms of preamble that follow are of equal authority and all are freely employed in practice.

Form 1. Preamble—Date—Parties.

. . . .

(a) ARTICLES OF COPARTNERSHIP.

THIS AGREEMENT OF PARTNERSHIP made and entered into this tenth day of July, 1905, by and between Roy C. Vardon, J. Otis Warren and Harry C. Ayres, all of the City and State of New York, WITNESSETH: That the said parties hereby agree to become partners upon the terms and conditions hereinafter set forth;

(b) PARTNERSHIP AGREEMENT.

THESE ARTICLES OF COPARTNERSHIP entered into on this 15th day of July, 1905, by and between Herrmann Oelrichs of the City of Newark, New Jersey, and Charles W. Moore of the City and State of New York;

WITNESS: That the said parties hereby form a business partnership on the terms and conditions following:

(c) MEMORANDA OF PARTNERSHIP AGREEMENT.

BE IT REMEMBERED that Morton Granger, of Jersey City, New Jersey, and Andrew McCutcheon, of the City of New York, hereby enter into partnership for the practice of law under the firm name of Granger & McCutcheon, on the terms and conditions which follow:

. . . .

Form 2. Firm Name.

. . . .

(a) The firm name of said copartnership shall be R. C. Vardon & Co.

(b) The said copartnership shall be carried on under the firm name of

"OELRICHS & MOORE."

(c) Said business shall be carried on under the firm name of Montgomery Brothers.

(d) Said business shall be carried on under the trade name of "The Empire Publishing Company."

. . . .

(See §§ 27, 41, 93 and 109 on general subject of the firm name.)

Form 3. Place.

. . . .

(a) The offices of said firm shall be situated in the City of New York, Borough of Manhattan.

(b) The business and operations of the said copartnership shall be conducted in the premises, Nos. 161-163 Elm St., New York City, and in such other places as the partners may from time to time determine.

Form 4. Purposes.

. . . .

(a) The purpose of said copartnership shall be to conduct the business of buying, selling and generally dealing in green coffees.

(b) The object of said partnership shall be to engage generally in the business of publishing, printing, advertising, designing, engraving and the allied arts and trades and of buying, selling and generally dealing in all goods, merchandise, tools, machines and supplies incidental or appurtenant thereto.

(c) This partnership shall be formed to carry on the stationery and printing business in the city of Providence, Rhode Island, for the period of five years from date.

(d) *Special Partnership.*

This copartnership is formed for the purpose of buying, owning and operating the ocean-going steam tugboat known as the "Marmaduke," and for no other purpose.

. . . .

Form 5. Investment.

. . . .

(a) The capital of said copartnership shall be the sum of eight thousand dollars ($8,000), of which the said Roy C. Vardon shall, within ten days from the date hereof, furnish five thousand dollars ($5,000), and the said J. Otis Warren shall, within ten days from the date hereof, furnish fifteen hundred dollars ($1,500), and the said Harry C. Ayres shall, within fifteen days from the date hereof, furnish fifteen hundred dollars ($1,500). The said Roy C. Vardon shall be entitled to interest on his surplus investment of thirty-five hundred dollars ($3,500), at the rate of six per cent. per annum, to be paid him semi-annually as other debts of the firm are paid, and, in event of dissolution, he shall be entitled to withdraw said excess investment before anything is withdrawn by the other partners.

(b) The capital of said copartnership shall be twelve thousand dollars ($12,000). The said Herrmann Oelrichs shall put into the partnership as his investment the printing plant, fixtures and supplies now in the premises 161-163 Elm St., New York City, which plant shall be taken over by the copartnership as a going concern at the appraised value of six thousand dollars ($6,000), and the copartnership shall assume a certain chattel mortgage on the presses and type for twelve hundred dollars ($1,200); and the said Charles W. Moore shall, within thirty days from the date hereof, deposit in the Guardian Trust Company of New York City, in the name of the partnership, the sum of three thousand dollars ($3,000), and within six months from date the further sum of three thousand dollars ($3,000).

. . . .

(See § 2 and Chap. IX, The Partnership Property; also

Forms 32 and 33 and clauses in Partnership Articles in Chap. XXV, as to additional investments and loans from partners.)

Form 6. Period.

. . . .

(a) This partnership shall continue for the period of five years from the date hereof.

(b) Unless sooner terminated by the mutual agreement of the parties hereto, this agreement shall continue in force and effect for the period of five years from the date hereof.

(c) The partnership hereby formed shall continue for the period of two years, and unless then terminated shall continue for a like period thereafter.

(d) This partnership shall continue for the period of ten years if the parties hereto shall so long live, unless terminated sooner by mutual agreement as hereinafter provided.

. . . .

If no period is named in the agreement the partnership is at will, and any partner may dissolve it at any time without incurring liability. (See § 72.) For this reason it is not strictly necessary to state in the agreement that a partnership is at will, when such is intended to be the fact. It is, however, better to specify the exact nature of the association in this respect in order to prevent subsequent misunderstanding.

Form 7. Partnership at Will.

. . . .

(a) This partnership shall continue until terminated by the death or withdrawal of one of the parties, or by the agreement of the parties.

(b) This partnership may be dissolved by either partner's giving the other ninety (90) days notice of his desire to terminate the partnership, whereupon, at the expiration of said ninety days, the partnership shall be dissolved as hereinafter provided.

(c) Either partner may withdraw at will, but the partner withdrawing shall not withdraw his investment or any part thereof for six months after such withdrawal, but shall be entitled to interest on the amount so left in the business at the rate of six per cent. per annum until paid out.

(d) Any partner may withdraw from this partnership at will, but the remaining partners shall have the right in such case to purchase his interest for the sum of six thousand ($6,000) dollars, three thousand ($3,000) dollars to be paid by each, and thereafter to continue the business under the present firm name and style.

(e) This partnership shall continue until a member thereof shall give his associates six months notice of his desire to terminate the same, at the expiration of which period the partnership shall be dissolved and an accounting shall be had, and each partner shall receive the amount due him.

. . . .

(See §§ 12, 24, 27; also Forms 23 and 29.)

The first clause in Form 7 is of no legal effect save as a statement of a condition that still exists if the clause is omitted. The remaining clauses do, however, to some extent modify the power of dissolution at will, requiring notice before any partner may withdraw and preventing the abrupt termination of the partnership relations otherwise possible.

Form 8. Division of Profits and Losses.

. . . .

(a) Books of account shall be kept and at the end of each calendar year an inventory shall be taken, and the books shall be balanced and a statement shall be made showing the net profits for the year. Such profits shall be divided equally, share and share alike, between the two partners, and the account of each shall be credited with one-half of the amount of profits so shown.

(b) Books of account shall be kept and at the end of each calendar year an inventory shall be taken, the books shall be balanced, and a statement made showing the amount of gain or loss for the past year. Such gain or loss so shown shall be shared by the two partners in the following proportion: 40 per cent. of the said gain or loss shall be credited or charged to the said Anderson, and 60 per cent. of the said gain or loss shall be credited or charged to the said Benton.

(c) The said partners may draw each month in anticipation of profits the sum of one hundred and fifty dollars each, and as soon after the end of the year as possible a statement shall be made, and the net profits, if any, shall be equally divided between the two partners and credited to their respective accounts; and if the gains so credited shall not equal the amounts withdrawn, the said partners shall equally contribute to make good the said deficit and keep their investments up to the original amounts.

(d) The said Andrews may draw out each month in anticipation of profits the sum of two hundred dollars, and the said Bell may each month draw out the sum of one hundred dollars, which amounts as drawn shall be debited to their respective accounts. At the expiration of each year, or as soon thereafter as it may conveniently be done, the books shall be balanced and the gains ascertained. Then, if such gains exceed the amount so withdrawn, the sum of twenty-four hundred dollars shall be credited to Andrews' account, and the sum of twelve hundred dollars shall be credited to Bell's account. The remainder shall be passed to a surplus account, which may be drawn upon if, in any year, the profits fall below the amount withdrawn. When the partnership is terminated, or at any agreed time, any surplus remaining in said account shall be divided as profits in the proportion of two-thirds to Andrews and one-third to Bell.

. . . .

(See §§ 19 and 20 on subject of partnership books and accounts.)

Form 9. Salaries.

. . . .

(a) The said partners shall devote their entire time and attention to the said business and neither shall engage in any other business or undertaking during the continuation of this partnership, and each partner shall draw for living expenses the sum of two hundred dollars per month, to be charged as part of the expenses of the business.

(b) The said Rathbone shall devote his entire time to the interests of the partnership, and shall be entitled to draw at the end of each month a salary of one hundred and fifty dollars, which shall not be deducted from nor be included in his share of the profits of the business; and the said Collins shall only be required to give such time to the business as he can spare from his other interests, and shall receive no salary.

. . . .

Form 10. Payment of Private Debts.

. . . .

(a) Each partner shall pay his private debts, and shall not, while a member of the firm, do anything or engage in any undertaking that will tend to impair his credit and solvency.

(b) During the continuance of this partnership each member shall promptly pay and discharge his individual debts and obligations, and in all ways keep good his credit and repute.

. . . .

Form 11. Engaging in Other Businesses.

. . . .

(a) During the continuance of this partnership no partner shall engage in any business or in any other enterprise that shall compete with or interfere in any way with the business of the firm.

(b) During the period for which this partnership is to continue no member of the partnership shall engage in any similar business, or any business which competes with or interferes with the business of this partnership, and if any partner shall retire before the expiration of the term, he shall not thereby be released from the obligation imposed in this paragraph.

. . . .

(See also Form 13.)

Form 12. Termination.

. . . .

(a) That at the termination from any cause of this partnership, an account shall be taken, the debts of the partnership discharged, and the remainder of the assets shall be set aside and divided in specie equally, share and share alike, between the partners or the representatives of either.

(b) That after the expiration of two years, if it shall appear to be for the interest of the copartners to continue this business, the same shall be incorporated and a company shall be organized under the laws of the State of Ohio to take over the said business, and the entire business and assets of the partnership shall be assigned to the corporation, and each partner shall receive stock in said corporation proportionate to his interest in the partnership.

(c) Upon the dissolution from any cause of this partnership, a full and general account of the business shall be taken, and unless one or more of the partners shall by agreement purchase the interest of the others, the assets and property thereof shall be sold, the liabilities of the partnership discharged, and after the investments of each partner have been repaid, the surplus, if any, shall be divided among the partners or their representatives as profits. But, if there shall not be sufficient capital remaining to repay the original investments, then such capital still remaining shall be divided among the partners in proportion to their respective original investments.

. . . .

(See Chap. XXIII, Clauses Relating to Dissolution.)

CHAPTER XXII.

ARTICLES OF COPARTNERSHIP.

(CLAUSES RELATING TO CONDUCT OF BUSINESS.)

Form 13. Time of Partners.

. . . .

(a) Neither partner shall during the continuance of this partnership be concerned in any other business unless with the written consent of the other party hereto.

(b) It is understood and agreed that each partner shall devote his whole time to the business of this partnership, and shall, during its continuance, engage in no other business, nor accept any office or trust that may interfere with his attendance at its place of business.

(c) The said Marvin shall give his entire time and attention to the said business, and shall engage in no other business, undertaking or speculation during its continuance.

(d) The said Wilson shall give to the said business such time and attention as may be necessary, but shall be at liberty to continue his present business of Fire and Marine Insurance and to give it proper attention.

. . . .

(See § 52; also Form 11.)

Form 14. Dormant and Silent Partners.

. . . .

(a) And it is agreed between the parties hereto that the said Bowen shall take no part in the management of the business, and that he shall not be held out as a partner, nor shall his connection with the said copartnership be known or announced.

(b) It is further agreed that the said Andrews shall allow the use of his name in the firm style and shall be entitled to share in the profits and shall be responsible for any losses incurred in the conduct of the firm business, but he shall take no part in the management thereof, and shall not interfere in the conduct of the firm business.

. . . .

(See § 37.)

Form 15. Managing Partner.

. . . .

(a) It is understood and agreed that the said Morton shall have the entire control and management of the partnership business, shall receive, deposit and check out all moneys of the firm, shall purchase such goods, supplies and materials as may be needed, shall employ and discharge such labor and clerical assistance as may be necessary, and shall do and direct all other things pertaining to the business of the firm without hindrance or interference from the other members of the firm.

(b) In the conduct of the firm business the said Randall Colyer shall be managing partner, shall have sole charge of the moneys, securities, goods and property of the firm, and shall make a statement of his receipts and expenditures to his partners at the end of each month.

. . . .

A managing partner is held to the strictest good faith in the discharge of his partnership duties. Kimberly v. Arms, 129 U. S. 512 (1888).

Form 16. Signature to Commercial Paper, Etc.

. . . .

(a) No note, bill, draft, check or other obligation of the firm in excess of fifty dollars shall be signed or endorsed or accepted by either partner without consultation with and consent of the other partner thereto.

(b) Neither partner alone shall bind the firm to any contract or obligation involving a liability in excess of five hundred dollars, but every such contract or obligation shall require the signature of the firm name executed by both partners.

. . . .

Form 17. Restrictions on Partners' Powers.

. . . .

Against Endorsement.

(a) During the continuance of this partnership neither partner shall become surety or endorser or otherwise make himself liable for the debt, default or miscarriage of another.

(b) During the continuance of this partnership, no partner shall sign, endorse or guarantee the payment of any commercial paper or other instrument, or make himself responsible for the debt, default or miscarriage of any other person, firm or corporation, unless with the written consent of the other parties hereto.

Against Speculation.

(c) Neither partner shall engage, outside of the firm business, in any venture, speculation or business operation of any kind involving possible gain or loss.

(d) During the continuance of this partnership, neither partner shall, either for himself or for the firm, engage in any sale, purchase or other operation, either directly or indirectly, in or concerning stock, bonds, securities or commodities other than those pertaining to the firm business herein set forth.

. . . .

As has been stated (§ 49), stipulations such as contained in Forms 16 and 17 when included in the partnership articles have no effect as to third persons unless brought to their notice. A partner violating any such stipulation would be liable to his partners for his breach of contract, but his act as to an innocent third person would be binding on the firm.

Form 18. Majority Rule.

. . . .

(a) No change from the usual routine of business or new venture or other action involving a possible liability by the firm shall be made or undertaken unless first discussed by all the members of the firm and authorized by a majority of said members.

(b) After due consultation between all the members of the firm, the decision of the majority shall prevail and without such consultation and authorization no partner shall take any action that may involve the firm in a liability exceeding five hundred dollars.

. . . .

(See § 47.)

Form 19. Books to Be Kept.

. . . .

(a) A full and correct record of the firm business shall be kept and each partner shall at all times have access to the books and records of the firm.

(b) The accounts of the firm shall be kept by double entry bookkeeping and shall be balanced at the end of each month, and the books and records shall at all times be kept in the office of the firm and shall be open to the inspection of the partners. Each partner shall furnish the bookkeeper with a full record of all his transactions on behalf of the firm.

. . . .

(See §§ 19, 20.)

Form 20. Periodical Accounting.

. . . .

(a) An accounting shall be had at the close of each month, and the profits or losses shown shall be apportioned and paid to each partner as herein elsewhere provided.

(b) At or as near as may be to the first day of January in each year an inventory shall be taken, the books shall be closed, and a balance sheet prepared, showing the assets and liabilities, and the losses and gains for the preceding year. Any gain shown shall be apportioned as herein elsewhere directed, and shall be credited to the accounts of the partners entitled thereto.

(c) On or about the 30th day of June and the 31st day of December in each year, an inventory shall be taken, 10 per cent. discount being allowed for depreciation of plant and stock and material on hand, and such amount being deducted from bills and accounts payable as shall be agreed upon by all the partners. Then the books shall be closed and a balance sheet prepared. After deducting all rents, salaries, wages, commissions and expenses of conducting the business, including salaries as elsewhere provided herein for the partners, the net surplus profits shall be equally divided among the partners, and a copy of the balance sheet, showing such closing and apportionment shall be given to each partner who shall be concluded thereby, unless he makes written objection thereto within thirty days after the receipt thereof.

. . . .

Form 21. Financial Management.

. . . .

(a) All moneys of the firm shall be deposited in some national bank of New York City subject to withdrawal only by the check of the firm signed by Melville P. Stevens, who shall have sole charge of the finances and accounts of the firm and who alone is authorized to sign and endorse commercial paper on behalf of and for the firm. A copy of this article shall be given to the bank upon opening such account as notice of the stipulation.

(b) The said Warren shall have sole authority to issue, sign and endorse commercial instruments and paper on behalf of and for the firm; he shall have sole charge of the finances and accounts of the firm and shall deposit all moneys of the firm in some bank or trust company in New York City in the firm name, subject to withdrawal by check signed in the firm name by the said Warren, and a copy of this section of the articles of copartnership endorsed by the firm shall be given to said bank or trust company.

. . . .

Form 22. Employees.

. . . .

(a) No clerk or other employee shall be engaged or discharged save by the agreement of both partners, and no salary or wages paid to any employee shall be increased save by the agreement of both partners.

(b) No person shall be employed in the firm business by any partner without consultation with and agreement thereto of all the members of the firm and no person employed by the firm shall receive any increase of wages without the agreement of all members of the firm, and no employee shall be discharged without the agreement of all members of the firm except in case of gross misconduct or insolence.

CHAPTER XXIII.

ARTICLES OF COPARTNERSHIP.

(CLAUSES RELATING TO DISSOLUTION.)

Form 23. Retirement of Partner.

. . . .

(a) This partnership shall continue for the period of two years and thereafter may be terminated by any partner, provided he shall give to the other partners a several written notice thereof not less than six months before the same shall go into effect.

(b) After the period hereinbefore provided for the continuation of this partnership has elapsed, if either partner shall desire to terminate the same he may do so by giving not less than three months' written notice thereof to his partner.

(c) If either of the partners hereto shall desire to terminate this partnership at or after the expiration of its prescribed period, he may do so, by giving to his associates written notice of such desire, two calendar months previous to such termination.

(d) This partnership shall continue till the first day of January, 1908, after which any partner may retire on giving three months' prior notice to the other partners, and at the expiration of the date of notice the partnership shall be terminated and its affairs wound up, unless the other partners elect to buy out the interest of the partner giving notice for the sum of ten thousand dollars and all undivided profits to which said partner may be entitled at the time.

. . . .

(See Forms 7 and 29.)

Form 24. Option on Partner's Interest.

. . . .

(a) The said Buell shall have the option, at any time before the expiration of this agreement, to buy the share of the said Armitage for the amount of his investment, and five thousand dollars ($5,000), bonus for goodwill, etc. In such event the said Armitage shall be entitled to his share of the profits up to the date of full payment of both his investment and the bonus.

(b) If during the continuance of this partnership or at its close either partner should desire to retire, the other partners shall have the option to purchase his interest at the valuation thereof shown by the last inventory and settlement, with an amount equal to the current year's net profits added thereto for the goodwill. Said valuation shall be paid one-half in cash, and the remainder, together with the amount paid for the goodwill, in monthly installments of not less than one hundred dollars each.

Form 25. Power of Expulsion.

. . . .

It is understood and agreed by all the parties hereto that any member of the company may be expelled by the unanimous vote of the other members, in which event the member so expelled shall be entitled to have his investment repaid within sixty days from the date of such expulsion, and to receive his due proportion of the dividends for the period of six months next succeeding.

. . . .

Form 26. Insolvency of Partner.

. . . .

(a) If any partner shall become insolvent, or shall be adjudicated a bankrupt, or shall make an assignment to or for the benefit of his creditors, the other partners may notify him that the partnership is dissolved, may advertise such dissolution, and may thereafter conduct the business on their own behalf free from all claim from such insolvent partner for goodwill or the trade name, by paying him or his trustee or assignee the value of his interest in the partnership, as shown by the last annual account.

. . . .

Form 27. Losses.

. . . .

(a) If at the close of any year it shall be shown that the business has made no profits, the partnership may be terminated by ten (10) days' notice from either partner.

(b) If at any time losses shall be incurred aggregating one-half of the capital invested, either partner may, at his option, require the partnership to be dissolved, as herein elsewhere provided.

(c) If at any time losses shall be incurred whereby the original investments of the partners shall be impaired, each partner shall within thirty days after notice of such impairment make good his proportion of such deficiency, or, in default thereof, shall be charged ten (10) per cent. per annum on the amount due, until paid.

. . . .

Form 28. Death of Partner.

. . . .

(1) *Continuation of Investment.*

(a) Should either partner die before the expiration of the period of this partnership, it is expressly understood and agreed that his investment and interest in the profits shall not be withdrawn for one year thereafter, but that the surviving partner shall continue the business, and the amount ascertained to be due such deceased partner at the time of his death shall be treated as a loan, and shall draw interest therefrom at the rate of six per cent. until paid in full.

(b) In the event of the death of any partner, the partnership between the surviving partners shall not be terminated, but they may continue the business under the present firm name, and the interest of the deceased partner in the business, including the good-will and firm name, shall be valued by appraisers appointed by the personal representatives of the deceased partner and by the surviving partners, and the amount so ascertained shall be due and payable to the estate of the deceased partner in twenty monthly payments, with interest at six per cent. per annum until paid.

(c) "Should either partner die during the term of said copartnership, the firm shall not be deemed dissolved thereupon, but the wife and children of the decedent shall immediately succeed to his interest in the business which thenceforward shall be prosecuted for the remainder of the term for the benefit of them and the surviving partner. Either partner may designate by will what interest his wife and children, as between themselves, shall have in his said copartnership interest in the event of his death as aforesaid." (Stewart v. Robinson, 115 N. Y. 328 [1889].)

This last clause was construed by the New York Court of Appeals not to make the estate liable as a partner, that only the fund already in the business was subject to the hazards of the business, and that the estate of the decedent partner could not be held for anything further even though the business became insolvent.

(2) *Life Insurance.*

(a) It is understood and agreed that there shall be taken out policies of life insurance to the amount of twenty-five thousand dollars in favor of the executors of each of said partners, and the premiums thereon shall be assumed and paid by the firm as a charge on the firm profits and assets, and in the event of the death of either partner the receipt of such life insurance by his personal representatives shall be a full payment for all interests of the deceased partner in the firm or firm assets, and the same shall belong, free of all claims from his estate, to the surviving partners.

This plan is capable of many variations. It is for the benefit of the surviving partners rather than for the deceased partner's family. The estate gets an insurance paid out of profits that should have come to it, and loses whatever the interest in the business is worth.

(3) *Option to Survivors.*

(a) In the event of the death of any partner, the surviving partners may become the owners of the said business and may continue it under the firm name by paying to the estate of the deceased, in twelve equal monthly payments, the sum of fifteen thousand dollars ($15,000), said amount being the agreed liquidated valuation of the interest of such deceased partner in the firm property, including the firm name and goodwill.

(b) In event of the death of one partner, the surviving partner shall be at liberty to purchase and take all the partnership assets, property and business, including the firm name and goodwill, upon the payment to the legal representatives of such deceased partner of the just and full amount of his share thereof, or interest therein, as fixed and determined by the last annual inventory and account.

The surviving partner must, however, within three months after the death of the partner so dying, elect to purchase and take such partnership assets, property and business, as aforesaid, and in case of his failure to so elect, then the partnership affairs are to be wound up and settled in the usual manner by the said surviving partner.

These last clauses are taken from the articles construed in Hull v. Cartledge, 18 App. Div. (N. Y.) 54 (1897). See also Harbster's Appeal, 125 Pa. St. 1.

(4) *Allowance for Good-will.*

In the event of the death of any partner before the expiration of the term, the remaining partners shall have the option of buying the interest of the deceased partner at the value shown by the last annual balance sheet, with twenty-five (25%) per cent. added in lieu of any further claim or interest in the goodwill, trade marks and firm name, and may pay the same in ten (10) semi-annual payments, the first payment to be made within ninety days after death. In consideration of such payment for the interest and goodwill the survivors or any one of them shall have the right to the use of the present firm name, free from all claim of the estate of such deceased partner.

It is very difficult to ascertain the true value of the goodwill of a business, hence a provision for making the price to be paid by a surviving partner definite may save much trouble. For another method of accomplishing this same end see Form 30(a).

Form 29. Dissolution by Notice.

....

(a) Either partner hereto may have this partnership dissolved by giving his copartner written notice of his intention ninety days before such dissolution.

(b) This copartnership shall continue until terminated by death, or by one of the copartners giving written notice to his associates of his wish to terminate the copartnership. Such notice shall be given by leaving a copy thereof, addressed to each associate, at the office of the firm. Thirty days after such notices have been given, the firm business shall be closed, an inventory taken, the books closed and each partner's account charged or credited with his proportion of the net gain or loss, shown by the books. The assets on hand shall then be sold at public sale and the net receipts divided among the copartners according to their respective rights therein as shown by the books of the firm and these articles.

(c) Any partner shall have power to have the partnership dissolved by giving written notice six months in advance to his copartners. In the event of such notice being given the other partners shall have the option of purchasing the interest of such partner at its value as shown by the last annual balance sheet, less any withdrawals in excess of profits by such partner since such balancing of accounts, and with no allowance for goodwill. If the other partners do not desire to exercise such option the business shall be wound up, and the net proceeds distributed as is usual in case of dissolution.

. . . .

(See also Forms 7 and 23.)

Form 30. Winding Up Partnership Affairs.

. . . .

(a) *Firm Name and Good-will.*

In closing up the partnership affairs, if any partner or partners shall desire to continue the business in the same location or under the firm name or as successors to the present firm, they shall be charged in settlement a sum equal to one-half the net profits for the preceding year for the goodwill, and in such event any partner or partners retiring shall not compete, and shall have no further claim for the firm name or goodwill.

(b) *Taking Goods for Share.*

Upon winding up the partnership affairs, if the partnership is solvent, any partner may take from the partnership property in specie, at the last inventory valuation, goods and assets not exceeding the amount of his interest in the firm's net worth, and any subsequent depreciation or failure to realize on the remaining assets shall not affect the transaction, nor shall he be held liable to his associates for any advantage or profit gained thereby.

(c) *Final Audit of Accounts.*

In closing the affairs of this partnership the firm of Patterson, Teale & Dennis, accountants, or their successors, shall be employed to audit and finally close the firm accounts and the results reported by them and the amounts by them found due to each of the partners shall be final and conclusive and binding upon all of the parties hereto and upon their personal representatives.

CHAPTER XXIV.

ARTICLES OF COPARTNERSHIP.

(OCCASIONAL CLAUSES.)

Form 31. Arbitration Clause.

. . . .

(a) It is hereby covenanted between the said parties that in the event of any disagreement concerning the conduct of the said partnership business, or in winding up and settling the affairs of the partnership upon dissolution thereof, the same shall be decided and determined by three arbitrators, of whom each partner or his personal representative shall appoint one, and the two so appointed shall appoint the third. The decision of these arbitrators shall be final and binding upon the parties hereto.

(b) Any disagreement arising among the parties hereto concerning the conduct of the business, or its dissolution and winding up, shall be referred to and decided by two persons in the trade, one to be chosen by each partner, or, in event of their disagreement, by a third arbitrator selected by the first two, as is usual. Said decision shall be made in writing, and shall be conclusive on the parties hereto.

. . . .

Form 32. Additional Investments.

. . . .

(a) It is agreed between the parties hereto, that either partner may make additional investments from time to time in amounts of not less than one hundred dollars and on such additional investments shall receive interest at the rate of eight per cent. per annum, and such additional investments shall not be withdrawn until the dissolution of the firm.

Form 33. Loans from Partners.

. . . .

(a) If either partner shall hereafter have additional funds which he may desire to use in the business, he may loan the same to the firm and such loans shall draw interest at the rate of eight per cent. per annum, payable as are other firm debts, and such loans shall not be withdrawn except after sixty (60) days written notice to the other partner.

. . . .

Form 34. Premium for Admission.

. . . .

(a) The said Armstrong hereby covenants and agrees to pay the sum of ten thousand dollars ($10,000) premium to the said Ehrlich and Baumgartner, to each five thousand dollars ($5,000) personally, and the said Ehrlich and Baumgartner each agrees and binds himself to invest the said sum so received, in the business as a part of his contribution to its capital.

. . . .

Form 35. Guaranty of Profits to Partner.

. . . .

(a) The said Morris P. Norton hereby guarantees that the share of profits of the said Nathan Atterbury shall in no year (during the term of the partnership) be less than the sum of three thousand dollars ($3,000), and agrees and binds himself to make good to said Atterbury any deficiency in said amount, from the share of profits coming to the said Norton.

(b) The said Alexander guarantees that the profits accruing to the said Fraser during the term of this partnership shall not be less than twenty-four hundred dollars ($2,400) per annum, and if at the end of any year the amount of net profits received by and coming to the said Fraser for the firm business for the preceding twelve months shall be less than the said sum of twenty-four hundred dollars ($2,400), the said Alexander agrees and binds himself to make good the deficiency from his own funds.

. . . .

Form 36. Amendment of Articles.

. . . .

(a) These articles may be amended or added to from time to time by the consent of all the partners.

(b) These articles may be altered, amended or added to from time to time during the term of the partnership by the agreement thereto of two of the three partners after two weeks notice to the other partner of such intention.

(c) It is hereby mutually agreed that if during the term of this partnership it shall become necessary or convenient to alter, amend or enlarge the scope of these articles, it may be done by the unanimous agreement of the parties hereto, expressed in writing upon, or attached to these articles, and such alteration, amendment or addition shall have the same effect and force as if embodied in these original articles.

CHAPTER XXV.

ARTICLES OF COPARTNERSHIP.

(COMPLETE FORM.)

Form 37. Simple Articles.

. . . .

Edward T. Craven and Milton Noble, both of the City of Rochester, New York, hereby mutually agree to become partners under the firm name of "Craven & Noble" to conduct the trade and business of sign-painting in the said City for the period of two years from date.

The said Craven invests his stock of paints, brushes and other material, estimated to be worth two hundred dollars, and the said Noble invests two hundred dollars in cash.

Both partners shall give their entire time and shall share losses and gains equally.

All amounts earned or received by either partner for work, materials or anything pertaining to the business, shall be deposited in the Guardian Trust Company of Rochester in the name of both partners, and shall be checked out as needed for expenses and supplies, by the signatures of both partners, and an equal amount shall be drawn each Monday morning for each partner for personal expenses, but a balance of two hundred dollars shall always be kept and held.

When the firm shall be dissolved the material on hand shall be divided equally and all debts shall be paid from the money in bank, after which the balance shall be divided equally between the partners.

Witness our hands and seals this 12th day of October, 1905.

EDWARD T. CRAVEN. [L. S.]
MILTON NOBLE. [L. S.]

Attest,
MARK GORHAM.

. . . .

An acknowledgment is not legally necessary to a partnership agreement though it is frequently appended.

Form 38. Articles for Mercantile Business.

. . . .

ARTICLES OF COPARTNERSHIP.

These Articles of Copartnership entered into on this 20th day of October, 1905, by and between Edgar H. Bedell, of the City of New York, and John A. Sutton, of the City of Hartford, Connecticut, WITNESS:

1. The firm name of said copartnership shall be
"E. H. BEDELL & Co."

2. The offices and place of business of said firm shall be situated in the City, County and State of New York.

3. The purpose of said firm shall be to conduct the business of buying and selling chocolate, cocoa and their products and preparations.

4. The capital of said firm shall be the sum of Twelve Thousand Dollars ($12,000), of which the said Edgar H. Bedell shall invest the sum of Four Thousand Dollars ($4,000) and the said John A. Sutton shall invest the sum of Eight Thousand Dollars ($8,000). Said investments shall be deposited in the Guardian Trust Company of New York City on or before the first day of November, 1905.

5. The said Bedell shall give his entire time and attention to the said business and shall engage in no other business, undertaking or speculation during the continuance of this agreement.

The said Sutton shall give such part of his time and attention to said business as may be necessary, but shall not be required to give up his present business interests.

6. This agreement shall bind the parties hereto until the first day of January, 1909, at which time it shall terminate unless expressly continued by written agreement for a further period.

7. Neither partner may withdraw from the business an amount in excess of one hundred and twenty-five ($125) dollars per month, and all amounts so withdrawn shall be charged against the individual account of the partner withdrawing the same.

8. All moneys of the firm shall be deposited in convenient banks in the City of New York, subject to withdrawal only by the check of the firm, signed with the firm name by the said Edgar H. Bedell, who shall have sole charge of the finances of the firm.

9. Books of account shall be kept and at the end of the year a statement shall be made showing the net profits for the year, and such profits shall be divided between the said partners as follows: 40 per cent. of said profits to the said Bedell and 60 per cent. of the said profits to the said Sutton.

10. The said Sutton guarantees that the profits accruing to the said Bedell shall not be less than $2,500 per annum and if at the end of any year the proportion of net profits coming to the said Bedell shall be less than the said sum of $2,500, the said Sutton agrees and binds himself to make good the deficiency from his own funds.

11. Upon the permanent disability or inability of either partner to participate in the firm business, or upon any disability or incapacity ex-

tending over the period of three months, the other partner may, at his option, have a dissolution of the partnership.

12. Neither partner shall, either for himself or for the firm, during the continuance of this agreement, engage in any sale, purchase or other operation, either directly or indirectly, in or concerning stocks, bonds, securities or commodities other than those pertaining to the firm business as herein set forth.

13. Neither partner shall, during the continuance of this agreement, sign, endorse or guarantee any commercial paper or other instrument or make himself responsible for the debt, default or miscarriage of any other person, firm or corporation, unless with the written consent of the other partner.

14. In the event of the death of one of the parties hereto during the continuance of this agreement, the surviving partner shall immediately take an inventory, close the books of the firm and ascertain the present worth, and shall thereupon have the option to pay the personal representatives of the deceased partner his original investment and his share of any profits shown and one thousand dollars for his share of the goodwill and continue the business in the firm name as his own, or to sell the entire assets, including the lease, firm name and goodwill, and, after paying all outstanding liabilities, to divide the remaining assets as is usual in such cases.

15. In the event of dissolution on account of death, expiration of term, or from any other cause, the parties hereto bind themselves to conduct such settlement under the directions and according to the statements made by the Lawyers' Audit Company of New York City, and if either partner refuses to be bound thereby, or resorts to the courts for settlement, all the costs and expenses of such proceeding shall be taken from his share of the net proceeds of the partnership assets.

In Witness Whereof, the parties hereto have hereunto affixed their hands and seals the day and year above mentioned.

EDGAR H. BEDELL. [L. S.]
JOHN A SUTTON. [L. S.]

Attest,
MORRIS KENWOOD.

. . . .

Form 39. Articles for Contracting Business.

. . . .

ARTICLES OF AGREEMENT made the 15th day of January, 1905, by and between Walter L. Driggs, of the City, County and State of New York, and J. W. Holmes, of the same place, as follows:

(1) The said parties have agreed to become copartners in business, and by these presents do agree to be copartners together under the firm name of "Driggs and Holmes," and as such copartnership to engage in and carry on a general contracting business in the City of New York and elsewhere, the office of the said copartnership to be located in the Borough of Manhattan, City of New York.

(2) The said copartnership is to commence on the 15th day of January, 1905, and to continue for the term of one year, unless sooner terminated as hereinafter provided.

(3) The said parties contribute to the said copartnership personal property consisting of horses, carts, wagons, harnesses and tools and also book accounts (a list of which said book accounts is annexed to this agreement; and a bill of sale of the aforesaid personal property is to be executed and delivered at the time of the execution of this agreement), the said property and accounts to be and become the property of the said copartnership hereby formed, the said Walter L. Driggs contributing two-thirds thereof, and the said James W. Holmes contributing one-third thereof, that being the proportion in which the said property and accounts are owned by the parties hereto at the time of making this agreement.

(4) The copartnership formed by this agreement assumes the debts and liabilities which are set forth in the memorandum of debts attached to this agreement, and agrees to pay the same, said debts and liabilities having been created and incurred by the parties hereto in the business heretofore carried on by them.

(5) Said Driggs subscribes the sum of Six Hundred Dollars ($600) in cash, and the said Holmes subscribes the sum of Three Hundred Dollars ($300) in cash.

(6) The said personal property, accounts and cash thus subscribed by the parties hereto are to be used and employed in common between them for the conduct of the said business to their mutual benefit and advantage.

(7) It is agreed between the parties hereto that at all times during the continuance of this copartnership they will each give their whole time and best endeavors, and will to the utmost of their skill and power exert themselves for their joint interest, profit, benefit and advantage in the business aforesaid, it being understood and agreed that the said Driggs shall have the financial management of the said business, and shall keep, or have kept under his direction all books of account used in said business. He shall sign all checks and shall pay out and receive all moneys, property and commodities of every kind and nature; such books, however, shall be at all times open to the inspection of the said Holmes.

(8) It is also understood and agreed between the parties hereto that on the last day of each and every month they shall each render and make to the other just and true accounts of all their transactions, wherein they shall state all the transactions engaged in by them for the said copartnership, as well as all payments, receipts and disbursements made by them, and all other matters pertaining to the said business of the said copartnership for the month past. From these statements, on the first day of each and every month a final and absolute account shall be made up of the business for the preceding month, upon which final monthly accounts shall be based the payments to be made to the said parties hereto in said business. After the said monthly account is made up and rendered, no payments or allowances shall be made to either party for any sums paid out by them preceding the rendition of such account, it being understood and agreed between the parties hereto that the said monthly account shall be final between them, and shall settle their accounts and business transactions as of the first day of each and every month.

(9) The said parties hereto further agree that after the payment of the subscription of Six Hundred Dollars ($600) by the said Driggs in cash, and of the subscription of Three Hundred Dollars ($300) by the said Holmes in cash, the said parties paying the said subscriptions shall, after the said monthly account has been rendered, divide the surplus profits of the said business equally between them, until the surplus profits of the business shall reach the sum of One Hundred and Twenty ($120) Dollars

per month. Whenever the said surplus profits of the said business shall exceed the sum of One Hundred and Twenty Dollars ($120) per month, then the excess over and above that amount shall be divided between the said parties in the following proportions: two-thirds thereof shall be paid to the said Driggs, and one-third thereof to the said Holmes.

(10) And it is further agreed that all losses which may be incurred in the conduct of the said business shall be borne and divided between them in the said proportion, two-thirds by the said Driggs, and one-third by the said Holmes.

(11) This agreement of copartnership shall be terminated and become null and void as follows:

1. On the death of either party thereto.

2. At any time by either party giving thirty days notice in writing to the other that he elects to terminate the same.

3. By mutual agreement.

(12) On the termination of this agreement the said parties hereto shall render, each to the other, a true, just and final account of all things relating to the said business, and in all things truly adjust the same. All the property of the said copartnership and all the gains and increase thereof, which shall appear to be remaining, whether in goods, moneys, debts or other property of every nature and description, shall be divided between them, two-thirds thereof to the said Driggs and one-third thereof to the said Holmes; all indebtedness, however, of the said firm to be first paid and deducted before a division of the property can be made. In case of the death of either party the goodwill of the said business shall belong to the survivor.

(13) It is further agreed that neither of the parties hereto, during the continuance of said copartnership, shall endorse any note or other negotiable instrument or otherwise become surety for any person or persons whomsoever, without the consent of the other of the said copartners.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

WALTER L. DRIGGS. [L. S.]
JAMES W. HOLMES. [L. S.]

Attest,
PHOEBE M. BELL.
THOMAS WENDELL.

. . . .

Form 40. Articles for Manufacturing Business.

. . . .

THESE ARTICLES OF COPARTNERSHIP made and entered into as of the eighth day of April, nineteen hundred and five, by and between Henry Gardes, of the City, County and State of New York, party of the first part, Harvey Wilson, of the same place, party of the second part, and James Haskins, of the same place, party of the third part, WITNESS:

I. The parties hereto for and in consideration of the mutual provisions and agreements hereinafter contained, and the sum of one dollar each to the other in hand paid, the receipt whereof is hereby acknowledged, have agreed to and do by these presents become copartners together in the business of manufacturing and selling disinfectants and disinfecting apparatus, and in buying, selling, renting and vending all sorts of goods, wares and merchandise to said business belonging or pertaining, and to conduct said business in the City of New York, and in such other place or places as may be expedient and beneficial.

II. The firm name and style of said business shall be the WILSON MANUFACTURING COMPANY. Said copartnership shall commence on the day of the date hereof and shall continue for ten years thereafter.

III. Each party hereto, hereby contributes to the said business all his right, title and interest in and to the assets of the former firm known as and by the same name, which was organized under Articles of Agreement bearing date the twenty-third day of November, eighteen hundred and ninety-six, by and between the parties hereto, together with one Henry Caldwell and which was this day dissolved by mutual consent, and the interest of said Caldwell assigned to the parties hereto. It being understood and agreed that the contribution of each is in the same proportion as the interest of each appears upon the books of the said dissolved firm, saving that the profits thereof shall be carried to the credit of each from the inception of such former partnership in accordance with the provisions of Paragraph V below. For the purpose of ascertaining such respective interests, an account shall be stated between the parties hereto in respect to said dissolved firm, and any amount due from Henry Caldwell, the retiring partner, as well as any amount paid to him by said firm to induce his retirement, shall be charged to the profit and loss account.

IV. The said parties of the second and third parts each hereby agrees to contribute all his business skill and experience and each shall give his whole time and attention exclusively to the affairs of said business and shall not be engaged, employed or interested in any other business whatever.

The party of the second part is to more especially attend to the manufacturing department and office work, and the party of the third part is to more especially attend to the sales department, but in general each of said parties of the second and third parts shall at all times attend to such duties as shall best serve the interests of said business.

V. The profits and losses of said business shall be borne and divided between the parties hereto as follows: the party of the second part, forty-two and ½ per cent. thereof; the party of the third part, forty-two and ½ per cent. thereof; the party of the first part, fifteen per cent thereof.

VI. Anything to the contrary hereinbefore notwithstanding, said party of the first part shall have the privilege on the first day of January, nineteen hundred and six: (1) To withdraw from said business; (2) To continue the same upon the terms hereinbefore provided; (3) To contribute the further sum of twenty-five hundred dollars to said business (for which he shall thereupon be credited on the books of said firm). Upon such additional contribution of twenty-five hundred dollars, the said party of the first part shall be allowed interest at the rate of five per cent. per annum, to be charged as an expense to the said business.

Said party of the first part shall notify in writing the parties hereto on or before the first day of December, 1905, of his choice of the above three options, and in the event of his election to contribute the further sum of twenty-five hundred dollars, he thereupon shall also contribute his skill and experience and devote all his time and attention exclusively to the said business and shall not be engaged, employed or interested in any other business whatsoever, and the branch thereof to which he shall more especially attend shall be the selling of goods, the management of said office and the financial work of the said firm.

In the event of his election to so contribute said sum of twenty-five hundred dollars upon the terms hereinbefore stated, then instead of the profits and losses being borne and divided as provided in the previous paragraph, the same shall, from and after the first day of January, 1906, be borne and divided between the parties hereto, share and share alike.

In the event of his election to withdraw from said firm, an accounting shall be had on January first, nineteen hundred and six, between the parties hereto, and he shall thereupon be paid in full the amount which shall appear due to him upon such accounting, but the copartnership shall be continued between the other parties hereto upon the same terms as in this contract provided, saving that the liability and benefit of the purchase of the interest of said party of the first part shall be divided equally between said parties of the second and third parts.

VII. Each of the parties of the second and third parts hereto shall be entitled to draw weekly during the continuance of this copartnership, as follows: party of the second part, thirty-five dollars per week; party of the third part, twenty-five dollars per week; to be charged to the personal accounts of the parties drawing the same.

In the event of the marriage of the party of the third part, he shall be entitled thereafter to draw weekly an additional sum of ten dollars, to be charged to his personal account.

The party of the first part in the event of his further contribution of the further sum of twenty-five hundred dollars upon the first day of January, nineteen hundred and six, upon the terms above specified, shall be entitled on and after that day to draw weekly during the continuance of this copartnership the sum of thirty-five dollars per week, to be charged to his personal account.

It is understood and agreed that no further sum or sums shall be drawn by either of the parties hereto without the written consent of the others having first been obtained, excepting as provided in Paragraph XI herein.

VIII. There shall be kept and had at the place of business of the said copartners at all times during the continuance of this copartnership true, just and accurate books of account of said firm wherein shall be entered and set down truly and correctly and properly, as well all money by said copartners or either of them received, paid, laid out and expended in and about their said business, as also all merchandise by them or either of them bought or sold by reason or on account of said business, and all other matters and things whatsoever to the said business and the management thereof in anywise belonging, which said books shall at all reasonable times be open to the use and inspection of either of said copartners, so that either of them may have free access thereto without any interruption or hindrance of the other, and none of said books nor any papers or writing whatsoever belonging to said firm, shall be removed from the place of business.

IX. The said parties hereby further mutually agree to and with each other that during the continuance of the said copartnership neither of them shall nor will make, accept nor endorse any note, bill, cheque, draft or other commercial paper in his own or in said firm name, for the accommodation or benefit of any person or persons whomsoever, or in said name or names enter into any bond, undertaking, guaranty or otherwise incur liability on his own behalf or on behalf of said firm, for the accommodation or benefit of any person or persons whomsoever, without the consent in writing of the other parties to this agreement.

X. All notes, cheques or other commercial paper shall, during the continuance of this agreement, require the signature of the party of the second part and at least one other member of said copartnership, and in case of the death of said party of the second part, then the signature of the survivors shall suffice.

XI. It is further agreed that said copartners shall on the first day of January in each year hereafter, during the continuance of this agreement, or oftener if necessary, make, yield and render each to the other a just, true and perfect inventory or account of all profits and increase by them or either of them made in their said business and of all loss by them or either of them sustained in their said copartnership business. Also all payments, receipts, disbursements and all other things by them or either of them received, made, disbursed, acted, done or suffered in their said business. Upon said annual account each of said parties shall pay and bear his just share of such rents, expenses and losses as may be made as aforesaid, and should there have been any profits in said business over and above rents, expenses and losses his just share thereof shall be ascertained and of said share he shall then be entitled to withdraw for his own use the equal one-third part and the remaining two-thirds shall be placed to his credit and shall not be subject to withdrawal until the end or sooner termination of this copartnership, unless otherwise consented to in writing by the other copartners.

XII. If at any time hereafter and before the accounts between the parties concerning the said copartnership shall be finally settled and closed, any dispute or difference shall arise between the parties hereto, concerning the true construction of anything in these presents, or any accounts to be stated or settled in pursuance hereof, or the valuation of the assets, or anything relating to the partnership, or the concerns thereof, or out of the acts or omissions of either party to this agreement, then and so often as the same shall happen, all such matters in difference shall be submitted and referred to the award and determination of five arbitrators, to be chosen one by each of the parties to this Agreement, and the fourth and fifth arbitrators shall be chosen by the three chosen by the parties hereto, and the decision and award of any three of the five arbitrators in writing shall be binding and final between the parties to this agreement, and shall be carried out and performed by them.

XIII. On the dissolution of this copartnership a final accounting shall be had concerning all things connected with the business, and after payment of all lawful debts of said firm and the repayment of the contribution of said party of the first part to said firm, all and every the assets of said firm shall be reduced to money and the proceeds divided in proportion to the interest of the parties hereto, as shown by the books of said firm.

It is expressly understood and agreed that in case such copartnership is dissolved before the expiration of the time herein fixed, then and in that event, said party of the second part upon such dissolution shall be entitled to a further credit of seven hundred and fifty dollars on the books of said firm, as an additional consideration for his contribution to the capital thereof.

XIV. In the event of the death of either of the parties hereto before the time herein fixed for the dissolution of said copartnership, such copartnership shall nevertheless be continued between the surviving parties hereto upon the same terms. And it is further agreed that the legal representative of said decedent shall succeed to all the rights and benefits of said decedent and that said copartnership shall be continued with said representative of said decedent, if he so elects, in the latter's stead, upon the same terms as hereinbefore provided, saving that said representative of said decedent shall be relieved from any contribution in lieu of the services of said decedent, and that the share of the profit and losses of such representative shall be reduced one-half, and the share of the survivors equally increased to the extent of such one-half, and further the weekly drawings of such representative of such decedent shall be reduced one-half.

It is also understood and agreed that in case of the death of either of the parties hereto, before the time herein fixed for the dissolution of said copartnership, the representative of said decedent, in the event of his election not to continue the same as in the last paragraph provided, shall nevertheless not be entitled to withdraw the share of said decedent from such copartnership, if solvent, until the expiration of six months after such death, and in that meantime, the representative of such decedent shall be entitled to and bear an amount equal to one-half of the profits and losses said decedent would have been entitled to and borne if living, and interest upon the share of said decedent from the time of his death until such payment, at the rate of five per cent. per annum. The representative of such decedent shall notify in writing the surviving partners of his election under the above provisions within sixty days after such decease—otherwise he shall be deemed to elect to withdraw the shares of such decedent.

XV. It is also expressly agreed that a waiver by either of the parties hereto of any breach of any covenant, agreement or condition of this instrument shall not bar his right to avail himself of any subsequent breach of any such covenant, agreement or condition.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals as of the day and year first above written.

HENRY GARDES.
HARVEY WILSON.
JAMES HASKINS.

Sealed and delivered
in the presence of
JASPER FREEMAN.

STATE OF NEW YORK, }
City and County of New York. } *ss.:*

On this 13th day of April, 1905, before me personally came Henry Gardes, Harvey Wilson and James Haskins, to me known and known to me to be the individuals described in and who executed the foregoing instrument and they duly and severally acknowledged to me that they executed the same.

WELLS H. HARRIS,
Notary Public in and for
New York County.

. . . .

Under the laws of New York a firm doing business under a trade name, as in the foregoing articles, is required to file a certificate in the county clerk's office setting forth the business to be conducted, the name under which they intend to do business and the full names and postoffice addresses of the partners.

Form 41. Professional Partnership.

. . . .

MEMORANDA OF AGREEMENT.

This Agreement made this 23rd day of June, 1905, by and between Edward A. Waldron, Robert Andrews Littell and Walker Orton Tilton, all of the City, County and State of New York, Witnesseth:

1. That the said parties hereby enter into certain partnership relations for the practice of the law in New York City.

2. The partnership shall be conducted under the firm name of "Waldron, Littell & Tilton," and the offices of the said firm shall be in the offices now occupied by the said Waldron in the Hanover Bank Building, until the expiration of his lease on May 1st, 1908, after which the offices shall be located as determined by the parties hereto.

3. This partnership shall commence on the first day of July, 1905, and shall continue for the period of five years unless sooner terminated by death or mutual agreement.

4. The present library and office furniture in said offices are the property of Edward A. Waldron and will be retained by him as his personal property; the said Littell and Tilton shall bring their own desks and libraries as their personal property, and all of said property shall be inventoried and all books shall be marked with the name of the individual owner. The said Waldron having the larger library and owning most of the furniture the other partners agree to pay into the funds of the partnership to be used for partnership expenses each the sum of two thousand dollars. This based on the belief that the use of the library and furniture of Mr. Waldron for the term of five years is worth two thousand dollars. Each partner shall keep up the sets of reports owned by him at his own expense.

5. Each partner shall finish and complete all legal work and cases now in hand and shall retain the receipts therefrom but all new work and new cases shall belong to the firm and shall be taken for the account of the firm. All moneys received by any partner on account of the firm shall be deposited in the name of the firm in the Hanover National Bank and shall be checked out by the cashier of the firm, each check being countersigned by a member of the firm.

6. All expenses, rents, wages, salaries and all losses and damages shall be paid from the firm bank account and if at any time there shall be a deficiency therein, the three partners shall contribute in the same proportion as they share in profits.

7. The partners shall share the profits of the business in the following proportions: Edward A. Waldron shall have four-tenths of the

profits and each of the other partners three-tenths thereof, and profits shall be apportioned at the end of each month, but a cash balance sufficient to pay the expenses of the office for at least four months shall always be retained in the bank.

8. Each partner shall during the term of this partnership devote his whole time and attention to the firm business, except for the time necessary to complete and wind up his present undertakings, and he shall not during the term of this partnership engage in any outside business, undertaking or engagement nor accept any office or trust, except with the consent of his partners and for the benefit of the firm. Any partner may, however, do gratuitous work for his immediate family and connections.

9. Upon the death or permanent disability from any cause of any partner, the partnership shall be dissolved, but the remaining partners shall complete all partnership business on hand and shall turn over to the personal representatives of the deceased or retiring partner his proportion of the profits from such business for the period of one year after the dissolution, after which all profits shall belong to the remaining partners.

10. Neither partner shall during the continuance of this partnership, engage in any sale, purchase or other operation, either directly or indirectly, in or concerning stocks, bonds, securities or commodities, or sign, endorse or guarantee any commercial paper or other obligation, become bail or surety, or make himself responsible for the debt, default or miscarriage of any other person, firm or corporation, unless with the written consent of his partners.

11. There shall be a cashier who shall have charge of the books and accounts of the firm. Each partner shall promptly inform him of all work and business done by such partner and give the proper data for charging and collecting the same. Said cashier shall keep the books and accounts in a business-like and intelligible manner and each partner shall have access to the same at all times. At the end of each month he shall make a statement showing the condition of the business, the cash on hand and the amount available for division among the partners.

12. Upon the dissolution of the partnership from any cause, each partner shall take the papers and business of those clients whose business he has usually transacted unless the client decides to make other arrangements; and in event of the death of one partner, each surviving partner shall, with the consent of the clients, take the papers and business of those clients who have usually consulted him.

13. If any partner shall die during the continuance of this partnership, the surviving partners may have the option of purchasing his books and furniture at a price to be agreed upon between them and the personal representatives, or, upon failure by them to agree, at the valuation of some disinterested person satisfactory to all concerned.

In Witness Whereof, the parties hereto have hereunto affixed their hands and seals the day and year first above written.

EDWARD A. WALDRON.	[L. S.]
ROBERT ANDREWS LITTELL.	[L. S.]
WALTER ORTON TILTON.	[L. S.]

Form 42. Married Woman's Partnership.

. . . .

THESE ARTICLES OF COPARTNERSHIP made as of this first day of December, nineteen hundred and five, between WILLIS GARDNER, of the City, County and State of New York, party of the first part, and ELLEN WARDWELL, of the same place, party of the second part, WITNESS:

That the parties hereto hereby agree with each other in manner following:

FIRST.

To become copartners in business under and by the firm name of GARDNER & WARDWELL, in the business of manufacturing, dealing in and selling at wholesale, braids, cords, moulds, &c., at the premises No. 148 East Houston Street, in the City of New York; that said copartnership is to commence on the date hereof and is to terminate on the first day of December, in the year nineteen hundred and ten.

SECOND.

To the ends and purpose of such copartnership, said Gardner shall contribute the sum of FIVE THOUSAND DOLLARS in cash; and the said Wardwell shall contribute the sum of EIGHTY-FIVE HUNDRED DOLLARS in manner following: The business now conducted under the name of GARDNER & WARDWELL, at said premises, No. 148 East Houston Street, in the City of New York, together with the goodwill of said business and all the assets of every kind belonging, being mainly the machinery (excepting one Singeing Machine, two Tipping Machines, and one Straw Working Machine), tools, fixtures and other paraphernalia appertaining to said business and contained in said premises, stock in trade, consisting of raw material, goods manufactured and in process of manufacture, good and collectible bills receivable, amounting to at least Two Thousand Dollars, moneys deposited in the Columbia Bank, in the City of New York, amounting to about Three Hundred Dollars, lease of said premises, contracts for the purchase of raw material, &c., &c., subject only to the payment of liabilities of said Gardner & Wardwell, not exceeding the sum of Three Thousand Eight Hundred Dollars.

The said party of the second part expressly represents unto the said party of the first part that she is the owner in her own right of the property contributed by her to such copartnership, and that the same is free and clear of all incumbrances and claims of every sort, and that the only liabilities against her or against said business are those stated above, to-wit, not exceeding Thirty-eight Hundred Dollars.

THIRD.

The said party of the first part shall give his full and exclusive time and his best endeavors for the profit, benefit and advantage of the said copartnership.

Said party of the second part hereby agrees to contribute the full and exclusive time and services of her Husband, Henry Wardwell, in said business; said Henry Wardwell to be engaged in such capacity in said business as may be to its best advantage and benefit.

All gains, profits and increase which shall come, grow or arise by virtue of said business shall be divided between them equally, and all losses which shall be incurred in the conduct of the said business shall be borne and paid between the parties hereto equally.

Interest at the rate of six per cent. per annum shall be allowed to the said Wardwell on the amount of the excess of her capital account standing from time to time to her credit—such interest to be adjusted and credited annually at the time of the stating of the regular accounting.

Each of the parties hereto at the time of each annual accounting shall be privileged to withdraw one-half of the profit for that current year then standing to such copartner's credit, and the other one-half of the profit shall be allowed to remain in the business for the purpose of increasing the capital stock thereof, and shall be credited to each at the time of the stating of the regular accounting. BUT, nevertheless, it is understood that until the capital account of the said Gardner shall equal that of the said Wardwell, the said Gardner shall allow all of his profits to remain in said business for the purpose of increasing his capital contribution thereto.

It is also understood that said Gardner may, from time to time, if he so desires, increase his capital contribution to said firm until it equals that of the said Wardwell.

FOURTH.

There shall be kept at all times during the continuance of said copartnership, perfect, just and true books of account wherein each of said copartners shall enter or cause to be entered all matters and things whatsoever to the said business and the management thereof in anywise belonging; which books shall be used in common between them so that either of them may have access thereto without any interruption or hindrance of the other.

And also the said copartners on the first day of December in each year shall make, yield and render each to the other a true, just and perfect inventory and account of all profits and increase by them or either of them made, and of all losses by them or either of them sustained, and a full account and balance shall be taken of all matters and things whatsoever in anywise belonging to said business in order to ascertain the exact condition thereof.

FIFTH.

Each of the parties hereto may draw from the said copartnership for his or her own separate use the sum of Thirty Dollars ($30) per week, the same to be charged as an expense of the business and neither of them shall take any further sum for his or her own separate use without the consent of the other in writing.

SIXTH.

At the end or sooner determination of the said copartnership term, the said copartners each to the other shall make a true, just and final account of all things relating to the said business and in all things truly adjust the same, and all the property and assets of the copartnership remaining after the discharge of all the liabilities shall be distributed between the parties hereto according to their respective rights and interest as they shall then exist under the terms of this Agreement.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals as of the day and year first above written.

WILLIS GARDNER.
ELLEN WARDWELL.

In presence of
JOHN CYPHER.

STATE OF NEW YORK,
City and County of New York. } ss.:

On this 10th day of December, 1905, before me personally came Willis Gardner and Ellen Wardwell, to me known and known to me to be the individuals described in and who executed the foregoing instrument and they duly and severally acknowledged to me that they executed the same.

JOHN DURHAM,
Notary Public in and for
the County of New York.

CHAPTER XXVI.

PARTNERS' AGREEMENTS.

Form 43. Agreement Taking in New Partner.

. . . .

(a) This Indenture Witnesseth, That Whereas: William Benedict and Henry H. Lathrop, both of New York City, have heretofore conducted a certain hardware business at No. 1150 Amsterdam Avenue, in said City, under the firm name of Benedict & Lathrop, and

Whereas, Frank C. Fairchild desires to become a member of said firm and to share in the profits of said business;

Now, Therefore, In consideration of the investment of eight thousand dollars ($8,000) by the said Fairchild in the said business and his agreement to devote the whole of his time and attention to the said business, to the exclusion of any other business or undertaking, it is agreed by the said parties first named and the said Fairchild, that the said Fairchild shall from the date of this instrument be a full and equal partner in the said business with the said Benedict and Lathrop, and shall share equally with them the gains and losses of the said business, to each one-third upon the terms and conditions following:

1. The firm name shall hereafter be Benedict, Lathrop & Co.

2. The term of existence of the new firm shall be five years from the date hereof.

3. The said Fairchild shall be credited with the entire sum of eight thousand dollars ($8,000) as his investment in the business.

4. The new firm shall assume and pay the outstanding liabilities of the old firm as per schedule of liabilities hereto annexed, and shall be entitled to all the credits and claims of the old firm and to all other assets and property thereof.

5. In all matters not herein expressly specified otherwise, the new firm shall be governed by the articles of copartnership executed January 1st, 1902, between the said Benedict and Lathrop, which articles are hereto annexed and made part hereof.

In Witness Whereof, the parties hereto have hereunto affixed their hands and seals this thirtieth day of October, nineteen hundred and four.

William Benedict. [L. S.]
Henry H. Lathrop. [L. S.]
Frank C. Fairchild. [L. S.]

Witness to all three signatures,
Albert Enslee.

Form 44. Agreement for Dissolution. Short Form.

. . . .

"Agreement made and entered into this 13th day of March, 1874, by and between Isaac Bernheimer, party of the first part, Jacob Goldsmith, party of the second part, and Simon Leserman, party of the third part, Witnesseth:

First. That it is hereby mutually agreed that the copartnership heretofore existing between all of the parties hereto under the name and style of the "Oleophene Oil Co." shall be and the same is hereby wholly dissolved.

Second. That the said Isaac Bernheimer only shall have the power and authority, and the same is hereby accorded and granted unto him, of taking charge of all the assets of the said copartnership, to collect and dispose of the same to the best advantage, to compromise and settle claims of the firm and to pay and meet all the obligations and debts of said copartnership out of the said assets, and is alone authorized to sign in liquidation.

In witness whereof, the parties to these presents have hereto set their hands and affixed their seals the day and the year first above written.

Isaac Bernheimer. [L. S.]
Jacob Goldsmith. [L. S.]
Simon Leserman. [L. S.]

Sealed and delivered in the
presence of
Wm. J. Trimble."

. . . .

The foregoing agreement for dissolution was brought in as an incident in the case of Leserman v. Bernheimer, 113 N. Y. 43. The sufficiency or legal effect of the agreement was not questioned. It is a good example of a brief instrument of its kind.

Form 45. Agreement for Dissolution.

. . . .

AGREEMENT, made this first day of February, 1884, between Evan T. Hoopes and John Merry, both of the City of New York, WITNESSETH:

That the copartnership known as Hoopes & Merry heretofore existing between the said parties, is hereby dissolved upon the following terms:

I. Said Hoopes shall, upon the execution of this agreement, receive of the partnership funds $4,500 in cash, of its bills receivable endorsed by the firm, $7,500 and all interest on the same, also the personal note of the said Merry, to the amount of $5,000 payable one year after date with 6% interest, and merchandise from stock to be selected by the said Hoopes to the value of $5,000 at invoice prices.

II. Said firm of Hoopes & Merry shall assign the existing lease of the premises, No. 189 Fifteenth Street, occupied by said firm to the said

Hoopes, and thereupon the said Hoopes shall lease the said premises to the said Merry for the remainder of the term, twenty-seven months from February 1st, 1905, at a monthly rental of $150, payable on the first day of each month, and the said Hoopes shall also execute a lease to the said Merry of the plant, including office fixtures, horses and wagons for the like period for the consideration of one dollar, with a proviso that in case of default in payment of said rent reserved, the said Hoopes may enter and take possession of said premises and plant.

III. Upon the expiration of the said period of twenty-seven months, and all rents and payments reserved to said Hoopes having been duly paid, the said Hoopes shall execute and deliver to the said Merry a bill of sale conveying the said plant for the sum of $1,000 which the said Merry shall pay therefor.

IV. The said Merry shall succeed to and assume all of the obligations and liabilities of the firm of Hoopes & Merry, and shall have the exclusive right to the use of the trade name, trade marks, goodwill and custom of the said firm.

V. If the said Hoopes should neglect to pay to his landlord the rent of said premises within five days after the same is due, said Merry may pay such rent so neglected to be paid and charge the same to Hoopes' account.

VI. If the premises shall be destroyed by fire, so that by terms of the lease the rent ceases, then the said Merry shall be released from his obligation to pay $150 monthly to the said Hoopes.

Witness our hands and seals the day and year first above written.

EVAN T. HOOPES. [L. S.]
JOHN MERRY. [L. S.]

. . . .

This is substantially the agreement in Merry v. Hoopes, 111 N. Y. 415, except as to the last part of Article IV. If this had appeared in the original in the form here shown, the question as to whether Merry had the exclusive right to the trade marks, etc.,—which was the point at issue in that case—could not have arisen.

Form 46. Agreement for Incorporation.

. . . .

This Agreement for Incorporation made this 12th day of October, 1905, by and between Albert Van Zandt and John K. Elridge, copartners in the manufacture and sale of paints, oils and varnishes, in the City of Brooklyn, New York, under the firm name of Van Zandt & Elridge, WITNESSETH:

1. That the business heretofore conducted by said firm shall be incorporated under the laws of the State of New York as the Van Zandt Varnish Company.

2. That the capital stock of said corporation shall be one hundred thousand dollars ($100,000), to be issued full paid in exchange for the said business as a going concern, including all of its assets, credits, trade

names, formulae and goodwill and the said incorporated Company shall assume all of the outstanding liabilities of the said firm business as existing at the time of transfer.

3. That the stock of said corporation shall be issued as follows: to the said Albert Van Zandt, $30,000 par value; to John K. Elridge, $30,000 par value; to the firm of Van Zandt & Elridge, $40,000 par value; and it is covenanted and agreed that the said $40,000 issued in the firm name shall be returned by the said firm to the corporation to be sold as treasury stock at not less than fifty cents on the dollar, to the persons, other than the parties hereto, named as its board of directors.

4. That the board of directors shall consist of five members and the first board named in its charter shall consist of Albert Van Zandt, John K. Elridge, Edgar Van Zandt, Walter P. Elridge and Marcus P. Bliss.

5. That cumulative voting shall be employed in the election of directors; that directors shall be stockholders, and that the salaries of officers shall be fixed or changed only by a four-fifths' vote of the entire board.

6. That the first officers of the corporation shall be as follows: President, Albert Van Zandt; Vice-President and Treasurer, John K. Elridge; Secretary, Edgar Van Zandt, and that the President and Treasurer shall each have an annual salary of $3,000 and that the Secretary shall have an annual salary of $1,500.

7. That after the formation of said corporation the existing firm of Van Zandt & Elridge shall be formally dissolved and its business connections and the general public shall be formally notified thereof.

In Witness Whereof the parties have hereunto affixed their hands and seals on the day and year first above written.

ALBERT VAN ZANDT. [SEAL]
JOHN K. ELRIDGE. [SEAL]

Attest,
WALTER P. ELRIDGE.

Form 47. Agreement for Continuance.

(a) This Agreement made this 10th day of October, 1905, by and between George B. Northrop and Arthur V. Bridgman, both of the City of Newark and State of New Jersey, Witnesseth:

That Whereas, The said parties have been engaged in the business of making and selling furniture in the said City of Newark under the firm name of Northrop & Co., and under the terms of certain Articles of Copartnership executed by the said parties three years heretofore for the term of three years, which said term is now about to expire;

Now Therefore, The said parties covenant and agree to continue the said partnership under the said articles for the further term of three years, unless sooner discontinued or amended by mutual agreement, and the said original articles are hereto attached and made part hereof.

Witness our hands and seals the day and year first above mentioned.

GEORGE B. NORTHROP. [L. S.]
ARTHUR V. BRIDGMAN. [L. S.]

(b) We, the parties to the foregoing Articles, hereby covenant and agree to extend the same and be bound by the same for the further period of three years from the date of expiration.

Executed in Newark, N. J., this 10th day of October, 1905.

GEORGE B. NORTHROP. [SEAL]
ARTHUR V. BRIDGMAN. [SEAL]

. . . .

Either of these forms would be legally sufficient. The second would usually be endorsed on the original articles, the first would be attached to it, or might also be drafted on the same sheets as the original agreement.

CHAPTER XVII.

PROFIT SHARING AGREEMENTS.

Form 48. Agreement to Share Profits for Services.

. . . .

This Agreement made this 10th day of October, 1905, by the firm of Wilkins, Lewis & Co., of the City and State of New York, and Theodore L. Comstock,. of Jersey City, New Jersey, Witnesseth:

1. The said Comstock is hereby employed by said firm for the term of one year from January 1, 1906, renewable thereafter on like terms at the pleasure of both parties hereto, as salesman and manager of its sales department, to which the said Comstock is to give his entire time and attention.

2. The said Comstock shall receive an annual salary of twelve hundred dollars for said services, payable in twelve equal installments, at the end of each month.

3. In addition to said annual salary the said Comstock shall receive as compensation for his services, an amount equal to ten per centum of the net profits of the said business to be due and payable ten days after each semi-annual inventory and statement of the firm.

4. The said Comstock shall have no authority in the business outside of the sales department; he shall have no interest in the firm capital and property; he shall have no interest in the profits save as a measure to his compensation; he shall have no right to an accounting and shall in no other respects than as herein set forth, have any connection with the firm or its business.

5. It is mutually agreed that if either party to this arrangement wishes to discontinue it at the expiration of its period, and not to renew it for the like period, such party shall give the other party formal written notice not less than thirty (30) days before the expiration thereof; otherwise this agreement shall be held to be renewed for a like period upon the same terms and conditions.

Witness the hands and seals of the parties the day and year first above written.

WILKINS, LEWIS & CO. [SEAL]
THEODORE L. COMSTOCK. [SEAL]

Attest both signatures,
JAMES E. HILL.

Form 49. Agreement to Share Profits for Rent.

. . . .

LEASE.

THIS INDENTURE, made the 25th day of October, 1905, by and between Silas H. Furman, of the City, County and State of New York, party of the first part, lessee, and Duffy & Brown, a partnership consisting of James V. Duffy, of Newark, N. J., and Lewis Brown, of South Orange, N. J., parties of the second part, lessors, WITNESSETH:

Whereas, the said Furman is the owner of certain premises and the buildings thereon, situated in the City of New York, Borough of the Bronx, on the North side of 156th Street, numbered 119-121 and known as the Westchester Hotel; and

Whereas, the parties of the second part desire to lease the said property for the purposes of a hotel and road house;

Now Therefore, The said party of the first part does hereby lease, let and rent to the said parties of the second part, all and singular, the said premises together with the furniture now in the buildings, as set forth in schedules hereto annexed, for the period of three years from the first day of November next, upon the following terms and conditions:

1. The said parties of the second part shall open the said premises for a hotel and public resort within thirty days from taking possession of the same, and shall keep the same open and in good order and condition for doing business during the term of this lease.

2. The said parties of the second part shall keep correct and accurate books showing the business of all kinds done in the said premises, and the profits upon the same, and within ten days from the expiration of each month shall pay to the party of the first part as rent for the said premises an amount equal to one-third of the net profits derived from any business of any kind done upon or in connection with the said premises.

3. In reckoning the said profits there shall be deducted from the gross returns all necessary expenses of the business, but no salaries for parties of the second part; there shall also be deducted from the gross returns all necessary expenditures required to keep the said premises and furniture in their present condition and repair but there shall be no deductions for amounts expended for new and additional furniture and equipment. Party of the first part shall have the right to inspect the said books of the parties of the second part at any convenient time during business hours and to employ professional accountants to examine the same from time to time for the purpose of ascertaining the amounts due party of the first part under this agreement.

4. Said party of the first part shall have no interest in the business to be conducted by lessees, and no control over the same, nor over the property hereby leased, nor in the profits save as a measure of the amount due him as rent.

5. If the amount paid as rent hereunder shall average four thousand dollars per annum, the said lessees may renew this lease on like terms at the expiration thereof, providing they give party of the first part three months written notice of such desire.

(The usual clauses in a lease of real property would be added.)

In Witness Whereof, the said parties have hereunto affixed their hands and seals upon the day and year first mentioned.

Silas H. Furman. [L. S.]
Duffy & Brown, [L. S.]
By James V. Duffy
and Lewis Brown.

Witness to both signatures,
Charles W. Roll.

. . . .

Form 50. Agreement to Share Profits for Loan.

. . . .

AGREEMENT TO SHARE PROFITS.

This Indenture made this 25th day of April, 1878, between William T. Smith, of Providence, R. I., of the first part, and Mason, Chapin & Co., of Providence, R. I., of the second part,

WITNESSETH: That in consideration of the agreements herein made, the party of the first part covenants with the said parties of the second part, that on the first day of May, 1879, he will pay to them ten per centum (10%) of the net profits of the business carried on during the year preceding the day last named, under the name and style of "Elmwood Chemical Works, William T. Smith, Treasurer," in consideration of their loan to him of $5,000 or of their endorsement for him to that amount for and during the year aforesaid, and will also pay to them two per centum (2%) of said net profits for each sum of $1,000 for which they may endorse for him during said year in addition to the said sum of $5,000; and that he will conduct said business to the best advantage and keep accurate accounts thereof upon his books which shall at all times be open for inspection by them.

And that the said parties of the second part in consideration of the foregoing agreement covenant with the said party of the first part that they will loan him $5,000 for the term of one year from the first day of May, 1878, or endorse his note for that amount, renewable from time to time during the said term, and will also during said year, if in their judgment required for the proper management of his business aforesaid, endorse his notes to an amount not exceeding $2,000 in excess of the said sum of $5,000.

In Witness Whereof, the said parties hereto set their hands and seals the day and year first above written.

William T. Smith. [SEAL]
Mason, Chapin & Co. [SEAL]

Executed in presence of
Edgar G. Robinson
Witness to both signatures.

. . . .

This contract was in question in Boston & Colorado Smelting Co. v. Smith et al., 13 R. I. 27. It was attempted to hold Messrs. Mason, Chapin & Co., liable as co-partners with Smith. In deciding that they were not co-partners the Court said:

> "We think there can be no doubt that it can only be considered a contract for the loan of money or credit in consideration of the percentage of profits in lieu of interest. It gives the lenders no voice in the management and no interest in the capital of the business. It gives them only a percentage of the profits for a single year in a continuing business. It is true that they have the right to inspect the books but only for information. The contract calls the business 'his,' i. e., the borrower's, and it remains exclusively his, as much during the continuance of the loan as before or afterwards. The contract, as between the parties to it, is, therefore, simply a contract for the loan of money or credit."

After a careful consideration of the authorities the court held that Mason, Chapin & Co. were not partners and were not liable to third persons.

CHAPTER XXVIII.

NOTICES.

Form 51. Notice of Copartnership.

. . . .

(a) NOTICE OF COPARTNERSHIP.

William F. Fisher and Charles Cavanaugh have this 21st day of July, 1905, formed a copartnership under the firm name of Fisher & Cavanaugh to conduct the feed and grain business at No. 212 Chestnut Street, Buffalo, N. Y., and will be pleased to have the patronage of all former customers and friends of either partner.

William F. Fisher,
Charles Cavanaugh.

(b) NOTICE OF COPARTNERSHIP.

The undersigned have formed a partnership under the firm name of Edwin B. Shepard & Co., for the transaction of a general business as bankers and brokers with offices at No. 59 Wall Street, New York City.

Edwin B. Shepard,
Alfred Hawkins,
Matthew B. Harris.

(c) NOTICE OF COPARTNERSHIP.

The partnership heretofore existing between Nathan Harris, Henry Dominick, Morris W. Kleybolte and Leon S. Baggot as dealers in and importers of woolens and other fabrics under the firm name of Nathan Harris & Co., has this day been dissolved by mutual consent, Mr. Nathan Harris retiring from the firm. A new copartnership has been formed, consisting of the undersigned, who will assume all liabilities of the old firm and continue the business under the firm name of Kleybolte & Co.

Morris W. Kleybolte,
Henry Dominick,
Leon S. Baggot,
Marcus Steinway.

Form 52. Admission of New Member.

. . . .

(a)

Office of H. W. Poor & Co.,
33 Wall Street,

New York, November 1, 1905.

On this day Mr. Dennie M. Hare becomes a member of this firm.

H. W. Poor & Co.

(b) COPARTNERSHIP NOTICE.

Notice is hereby given that Mr. James H. Wilkins is this day admitted as a member of the firm of Jasper & Clegg, Commission Merchants.

Jasper & Clegg.

213 Pearl St., New York,
Oct. 21, 1905.

. . . .

Form 53. Notice of Withdrawal. To Copartners.

. . . .

(a)

New York City, June 8, 1905.

Mr. Harry Edwards:

Dear Sir: I hereby notify you that I this day withdraw from the partnership of Edwards & Brown, and would suggest that we take mutual action to close the business and settle the affairs of the partnership with the least loss and delay.

Yours respectfully,

Lewis K. Brown.

(b)

To Messrs. William N. Walker and Andrew McNeish:

Gentlemen: Please take notice that I this day withdraw from the partnership heretofore existing between us. I shall be pleased to confer with either or both of you in reference to the steps to be taken to wind up the affairs of the firm.

Yours truly,

Frank B. Devlin.

New York City,
October 19th, 1905.

(c)

Mr. John D. Beals,
No. 1135 Broadway,
New York City.

Dear Sir: Please take notice that I hereby formally withdraw from the partnership heretofore existing between us, under the firm name of Arthur & Beals, and shall notify those dealing with us and the general public of such withdrawal without delay. I shall be pleased to unite in any equable procedure for winding up the affairs of the firm.

Yours respectfully,

R. M. ARTHUR.

Brooklyn, N. Y.,
March 14, 1905.

. . . .

Form 54. Notice of Withdrawal. To Firm Connections.

. . . .

(a) New York City, October 19, 1905.

MR. JOHN WILLIAMS,
182 Broadway, New York.

DEAR SIR:

Kindly take notice that I have this day withdrawn from the firm of Walker & McNeish and am not responsible for its obligations contracted after this date.

Yours very truly,

FRANK B. DEVLIN.

(b) New York City, June 10, 1905.

MESSRS. HENRY SIMONSON & CO.,
575 W. 125th St., New York.

GENTLEMEN:

Please take notice that I have this day terminated my connection with the firm of Moss, Ellsworth & Co., and am no longer a partner in its business.

Yours respectfully,

ROY C. HAYNE.

. . . .

Notifications of withdrawal to those transacting business with the firm are usually sent by mail. This procedure is not always safe. If an attempt should be made to hold the withdrawing partner for some later obligation of the firm, and the party making the attempt denied receiving the notice of withdrawal, it would be difficult or impossible to prove that the notice had been received. If there is any danger of such a contingency arising, the notice should be delivered personally or sent by registered letter.

Form 55. Notice of Withdrawal. To Public.

. . . .

WITHDRAWAL.

(a) To Whom It May Concern: I have this day withdrawn from the firm of Walker, McNeish & Co., and will not be liable for any obligations of said firm contracted after this date.

FRANK B. DEVLIN.

New York City,
October 19th, 1905.

NOTICE OF WITHDRAWAL.

(b) Notice is hereby given that I have this day withdrawn from the firm of Arthur & Beals and will not be responsible for any obligations of the same contracted after this date.

R. H. ARTHUR.

Brooklyn, N. Y.,
March 14, 1905.

. . . .

In cases where it is expedient to notify the general public, notices similar to the foregoing should be published in some paper of general circulation in the locality. Such notice would be sufficient to relieve a withdrawing partner from further responsibility to all of those who had had no previous dealings with the firm.

In ordinary cases, where the partners can agree on some formal dissolution, the usual form of advertisement stating the fact of dissolution, who withdraws and who continues, or, if the affairs are to be wound up, who is authorized to collect money and pay debts will be used as set forth in Form 56.

Form 56. Notice of Dissolution.

. . . .

(a) NOTICE OF DISSOLUTION.

The firm of Williams & Desmond, Dealers in Wooden Ware, is this day dissolved and no one is authorized to contract or do business on its behalf other than such as is necessary to wind up its affairs.

JAMES S. DESMOND.

New York City,
June 8, 1905.

(b) NOTICE OF DISSOLUTION.

The firm of Edwards & Brown, of 170 Broadway, New York City, is this day dissolved by mutual consent. Mr. Harry Edwards will continue the business and will settle all obligations of the old firm and is authorized to collect all its accounts.

HARRY EDWARDS,
LEWIS K. BROWN.

New York, June 8, 1905.

(c) RETIREMENT OF PARTNER.

Notice is hereby given that Roy C. Mayne has this day retired from the firm of Moss, Ellsworth & Co., dealers in Carpets, Rugs and Tapestries. The firm will continue to do business at its present location, No. 835 Broadway, New York City, under the same firm name.

HENRY T. MOSS,
WILLIAM ELLSWORTH,
MINOR V. ARMOUR.

June 10th, 1905.

(d) NOTICE OF DISSOLUTION OF PARTNERSHIP.

The copartnership heretofore existing between James D. Cornish and Henry McClelland under the firm name of Cornish and McClelland for the purpose of practicing medicine in the City of Newburgh, is this day dissolved by mutual consent.

Dr. James D. Cornish will continue to occupy the former offices in his residence and is authorized to collect all debts due the firm and will discharge all obligations thereof.

JAMES D. CORNISH, M. D.
HENRY MCCLELLAND, M. D.

Dated March 8, 1905.

(e) NOTICE OF DISSOLUTION OF COPARTNERSHIP.

The firm of Milward, Lynch & Co., dealers in Coffees, Spice, etc., is this day dissolved. Ernest Milward, as liquidating partner, will settle all obligations of the late firm and is authorized to collect all claims. He will be found at its office, No. 215 Beaver Street, during the month of November, and thereafter with the new firm of Parker & Milward, No. 145 Wall St., New York City.

FRANCES MILWARD,
THEODORE V. LYNCH,
THOMAS SINCLAIR.

Dated October 16th, 1905.

PARTNERSHIP NOTICE.

(f) The firm of Batten, Neumann & Co. is this day dissolved by mutual consent.

J. Z. Batten,
Chas. Neumann.

New York, November 2, 1905.

The business of the above firm will be continued by the undersigned at 374-378 Broadway, New York, under the firm name of J. Z. Batten & Co.

J. Z. Batten,
C. K. Zimmerman.

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