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THE LAW OF PARTNERSHIP.

A TREATISE

ON THE

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Fifth Edition.

WITH

A SUPPLEMENT

CONSISTING OF

THE PARTNERSHIP ACT, 1890,

WITH NOTES.

BY

THE RIGHT HONOURABLE

SIR NATHANIEL LINDLEY, KNT., LL.D. ED.,

ONE OF THE LORDS JUSTICES OF HER MAJESTY'S COURT OF APPEAL.

ASSISTED BY

SIR W. CAMERON GULL, BART., M.A.,

OF LINCOLN'S INN, BARRISTER-AT-LAW,

VINERIAN SCHOLAR IN THE UNIVERSITY OF OXFORD, 1883.

AND

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WITH

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BY

J. CAMPBELL LORIMER, LL.B.,

ESQ., ADVOCATE.

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PREFACE.

The present volume is the Fifth Edition of a portion of the author's former "Treatise on the Law of Partnership, including its application to Companies." When that Treatise was first published, viz., in 1860, the Law of Companies was being developed by legislative enactment and judicial decision out of the Law of Partnership; and it appeared to the author desirable to trace that development, and to endeavour in one treatise to investigate the Law of Partnership and to determine the extent to which its principles were applicable to Companies. But in the course of the last quarter of a century Company Law has been developed to such an extent as to justify, if not to require, separate treatment; and with a view to convenience and expense, advantage has been taken of the opportunity afforded by the demand for a Fifth Edition, to divide the former treatise into two parts, each of which shall be complete without the other, viz., the Law of Partnership proper, and the Law of Companies, in so far as it has any connection with the former. This volume is devoted to the first of these parts, viz., the Law of Partnership proper. The

volume relating to Companies is in course of preparation and will be published shortly.

In arrangement, the order of treatment previously adopted has been retained with the exceptions, that the causes of dissolution, the right to retire, and the right to expel, have been transferred to the Chapter on Dissolution in Book IV. This modification will, it is hoped, be considered an improvement.

Great pains have been taken to render this edition deserving of the favourable reception accorded to those which have preceded it. Several very important cases, and especially *Kendall* v. *Hamilton*, *Scarf* v. *Jardine*, and *The Yorkshire Banking Company* v. *Beatson*, have been decided since the publication of the last edition. There has also appeared the Digest of the Law of Partnership by Mr. Frederick Pollock, which is full of observations of the greatest value; and the third edition of which the author has constantly consulted. In the Appendix to it will be found the draft of a bill to consolidate and amend the Law of Partnership. It is much to be regretted that this branch of the law should not be put into shape and codified by legislative authority. Mr. Pollock's remarks on this subject in the Preface to the 3rd and 4th editions of the Digest deserve the serious attention of the Legislature. But this is not the place to enlarge on the many advantages which would accrue to this country if its laws were gradually revised on the model of the Indian codes.

The whole of the present treatise has once more been carefully revised throughout; whatever is obsolete has been omitted, or if retained as being still useful, has been printed in small type. The author's increased experience has suggested additions and alterations; and many portions have been re-written and adapted to the most recent decisions.

Notwithstanding, however, the labour bestowed upon the work, and the anxiety of the author to render it a trustworthy guide to the subject to which it relates, the multiplicity and difficulty of the questions with which he has had to deal are such, that he dare not venture to hope that he has always avoided error, or that his work is free from serious faults; and although it has engaged his unremitting attention for more than thirty years, he is painfully aware that it is even now but an imperfect production.

The author's thanks are due to Mr. W. C. Gull and Mr. W. B. Lindley, for their assistance in revising the sheets, and to the former gentleman also for his aid in preparing materials, in examining American and Irish reports and authorities on doubtful points, and for the preparation of the indexes.

ROYAL COURTS OF JUSTICE,
1*st March*, 1888.

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ADDITIONS AND CORRECTIONS.

Page 17, note (*m*) — See below, p. 38, note (*d*).

,, 34, line 4 — See below, p. 38, note (*d*).

,, 36, note (*t*) } See below, p. 38, note (*d*).
,, 37, note (*a*) }

,, 38, note (*d*) — *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536, was reversed on appeal (9th Feb. 1888) W. N. 1888, p. 30, so far as the Court below decided that the lender was liable for the debts of the borrower. The advances were made to enable the borrower, a railway contractor, to perform a contract to make a railway; the advances were to be employed for this purpose; the benefit of the contract and the borrower's plant, &c., were assigned to the lender as a security for the loan; and the lender was empowered to take possession of the plant, &c., and himself to complete the contract if necessary. The borrower agreed to repay the advances with interest at the end of six months after they were made, and there was a proviso for redemption on such repayment. The borrower also agreed to pay the lender a share of the profits arising from the contract with the railway company when that contract should be completed, and it was stipulated that in ascertaining those profits the borrower should be allowed certain sums for himself. There was a mass of correspondence relied upon for the purpose of showing that the borrower and lender were really partners, and Mr. Justice Stirling decided that the correspondence showed that this really was the case. The Court of Appeal differed from him on this point, and held that the correspondence was consistent with the formal security, and that the contract between the parties was really what it purported to be, viz. a contract of loan upon security. The Court of Appeal decided that, although the case was not within § 1 of Bovill's Act, it came within the principles laid down in *Cox* v. *Hickman* and *Mollwo March & Co.* v. *Court of Wards*. The statement in the text on p. 34, lines 1 to 7, may, it is apprehended, be now safely relied upon. The Court of Appeal confirmed the decision in *Badeley* v. *Consolidated Bank* on the construction put on § 5 of Bovill's Act: see p. 36, note (*t*), and p. 37, note (*a*).

Compare the last case with *Frowde* v. *Williams*, 56 L. J., Q. B. 62, in which a would-be lender was held to be a partner with the borrower.

,, 60, line 5 — After (*n*) add, "unless he and his co-tenants are under some duty or obligation to others to repair": see the authorities in notes (*m*) and (*n*).

,, 78, note (*h*) — Add *Ex parte Coulson*, 20 Q. B. D. 249.

,, 99, note (*p*) — For 55 Geo. 3, c. 104, *read* c. 194.

Page 126, note (*g*) } See also *Simpson's Claim*, 36 Ch. D. 532, where a company
,, 138 } was held not liable on a promissory note given by its general agent as security for a guarantee given by the promissee for payment of goods ordered by the agent for the company.

,, 141, note (*l*) *Blackburn, Low & Co.* v. *Vigors* was reversed by the House of Lords : see 12 App. Ca. 531.

,, 143, note (*t*) *Lacey* v. *Hill*, 4 Ch. D. 537, was affirmed by the House of Lords under the name of *Read* v. *Bailey*, 3 App. Ca. 94.

,, 163 See also *Sawyer* v. *Goodwin*, 36 L. J. Ch. 578, where a firm was held liable for the fraudulent act of a partner who had falsified an abstract of title for the purpose on concealing prior incumbrances.

,, 180, 185 In *Odell* v. *Cormack*, 19 Q. B. D. 223, a bill drawn on *Cormack Brothers* was accepted by Carter for *Margaret Cormack & Self*. Carter was not a partner with her, and had no authority to accept bills for her either in her own name or in the name of the firm in which she carried on business, and she was held not liable on the bill.

,, 191, note (*y*) See also *Baroness Wenlock* v. *River Dee Co.*, 36 Ch. D. 674, which is under appeal.

,, 191, note (*z*) For Book III. c. 3, § 1, *read* c. 6, § 3, p. 381 *et seq.*

,, 193, note (*k*) } *Kendall* v. *Hamilton*, 4 App. Ca. 504, decided two points,
,, 255, note (*s*) } viz., 1, that ordinary partnership debts are not joint and
,, 256, notes (*x*) } several ; 2, that a judgment by a joint creditor of a firm
and (*c*) } against one partner in an action brought against him only,
,, 264 } discharges his co-partners, although the judgment is un-
,, 281 } satisfied and although the co-partners were unknown to the creditor when he recovered judgment. This last rule, although now settled to be law, rests on technical reasoning, and if not carefully limited in its application will lead to unexpected and unjust results. In *Cambefort* v. *Chapman*, 19 Q. B. D. 229, the rule was, however, extended very considerably. In that case the facts were as follows : *Wilson & Chapman* carried on business under the name of *Wilson & Co.*, and became indebted to the plaintiff for goods sold and delivered. The plaintiff only knew *Wilson: Chapman* was a dormant partner. *Wilson & Chapman* dissolved partnership, but the plaintiff was ignorant of this. After the dissolution the plaintiff drew a bill on *Wilson & Co.*, and *Wilson* accepted it in that name. The bill was given for the partnership debt, and was dishonoured. The plaintiff sued *Wilson & Co.* on the bill and obtained judgment against *Wilson & Co.*, but could not get payment from *Wilson*. The plaintiff afterwards sued *Chapman* for the goods ; but it was held that the bill having been given for the goods, and not as a collateral security only (as to which, see p. 256, note (*c*), and p. 704, notes (*d*) to (*h*)), the action on the bill was in substance an action against *Wilson* for the goods, and that the judgment against him, although unsatisfied, afforded *Chapman* a good defence to the action against him. Observe that the bill did not bind him, nor did the judgment. But *quære* whether *Kendall* v. *Hamilton* applies to such a case ?

,, 264, notes (*b*) } If one only of several joint contractors is sued he can require
and (*c*) } the others to be made defendants : *Pilley* v. *Robinson*, 20
,, 280, note (*d*) } Q. B. D. 155.

,, 267, notes (*x*) } As to contracts with partners, which although joint in form,
and (*y*) } are in point of law joint and several owing to the separate
,, 273, note (*h*) } interests of the partners, see *Palmer* v. *Mallet*, 36 Ch. D. 411, a case of a contract by an assistant not to carry on business without the consent of the partners.

Page 347, note (*a*) The decision of the Court of Appeal in *A.-G.* v. *Marquis of Ailesbury*, 16 Q. B. D. 408, was reversed by the House of Lords, 12 App. Ca. 672, which restored the judgment of the Divisional Court in 14 Q. B. D. 895. *Matson* v. *Swift*, 8 Beav. 368, must be taken as now overruled: see Lord Macnaghten's judgment, 12 App. Ca. 696.

,, 362 (7) See a suggested form of order in Seton on Decrees 1214, n. (ed. 4), referred to in *Whetham* v. *Davey*, 30 Ch. D. 579.

,, 375, note (*m*) See *Lloyd* v. *Dimmack*, 7 Ch. D. 398, where *Ranelagh* v. *Hayes* was disapproved, and the Court declined to decree specific performance of a covenant to indemnify with liberty to apply in the event of future breaches which might or might not occur. *Lloyd* v. *Dimmack* is, however, not opposed to the statements in the text nor to the cases cited in p. 375, notes (*h*), (*i*) and (*l*). See the last direction in the order, 7 Ch. D. 402.

,, 452, note (*t*) See also *Deutsche Springstoff Actien Gesellschaft* v. *Briscoe*, 20 Q. B. D. 177.

,, 599, notes (*o*) and (*r*) } See below, p. 628, note (*l*).

,, 626, note (*u*) A judgment against a married woman's separate estate is not within § 4 (*g*): see *Ex parte Coulson*, 20 Q. B. D. 249.

,, 628, note (*l*)
,, 654, notes (*i*) and (*k*)
,, 674
,, 675
,, 677 } Section 47 of the Bankruptcy Act, 1883, does not apply to the administration by the Court in Bankruptcy of the estate of a deceased insolvent under § 125 of that act: *Ex parte Official Receiver, re Gould*, 19 Q. B. D. 92. Still less does § 47 apply to ordinary administration actions in the High Court. The Judicature Act, 1875, § 10, does not render it so applicable. Similar observations apply to the group of sections 43—48 of the Bankruptcy Act, 1883. See the judgments in the same case.

,, 704, notes (*d*) to (*h*). } See above, the note on *Kendall* v. *Hamilton*, on p. 193.

,, 722, note (*e*) See also p. 738, note (*g*).

THE

LAW OF PARTNERSHIP.

INTRODUCTORY.

1. *Meaning of the word partnership.*

To frame a definition of any legal term which shall be both positively and negatively accurate, is possible only to those who having legislative authority, can adapt the law to their own definition. Other persons have to take the law as they find it; and rarely indeed is it in their power to frame any definition to which exception may not justly be taken. All that they can usefully attempt is to analyse the meanings of the words they use, and to take care not to employ the same word in different senses, where so to do can possibly lead to confusion.

Without attempting, then, to define the terms partners and partnership, it will suffice to point out as accurately as possible the leading ideas involved in those words. The terms in question are evidently derived from *to part*, in the sense of to divide amongst, or share, and this at once limits their application, although not very precisely: for persons may share almost anything imaginable, and may do so either by agreement amongst themselves or otherwise. But in order that persons may be partners in the legal acceptation of the word, it is requisite that they shall share something by virtue of an agreement to that effect, and that that which they have agreed to share shall be the profit arising from some predetermined business engaged in for their common benefit. An agreement that something shall be attempted with a view to gain, and

INTRODUCTORY. that the gain shall be shared by the parties to the agreement, is the grand characteristic of every partnership, and is the leading feature of nearly every definition of the term (*a*).

Partnership, although often called a contract, is in truth the result of a contract; the relation which subsists between persons who have agreed to share the profits of some business rather than the agreement to share such profits.

By some writers associations which have not gain for their object are occasionally termed partnerships; and even in the Companies act, 1862, partnerships having gain for their object are referred to, and the reader is thereby led to suppose that there may be partnerships of some other kind (*b*). But to use the word partnership to denote a society not formed for gain is to destroy the value of the word, and can lead only to confusion (*c*). Nor is it consistent with modern usage. Lord Hale and older writers use co-partnership in the sense of co-ownership, but this is no longer customary; and as will be shown hereafter, there are many important differences between the two (*d*).

Although for the reasons already stated the writer has not attempted to give a definition of the term partnership, he appends for the consideration of the reader the following definitions taken from works of celebrity :—

Civil Code of New York. Partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them (*e*).

Code civil. La société est un contrat, par lequel deux ou plusieurs personnes conviennent de mettre quelque chose en commun, dans la vue de partager le bénéfice qui pourra en résulter (*f*).

Dixon. A partnership is a voluntary unincorporated association of individuals standing to one another in the relation of principals for carrying out a joint operation or undertaking for the purpose of joint profit (*g*).

Domat. La société est une convention entre deux ou plusieurs personnes, par laquelle ils mettent en commun entre eux ou tous leurs biens ou une partie, ou quelque commerce, quelque ouvrage, ou quelque autre affaire, pour

(*a*) *Mollwo, March, & Co.* v. *Court of Wards*, L. R. 4 P. C. 436; *R.* v. *Robson*, 16 Q. B. D. 137.

(*b*) See sec. 4 of the act.

(*c*) See as to clubs, *infra*, chap. 1, § 5.

(*d*) See *infra*, chap. 1, § 6.

(*e*) Civil Code of the State of New York, § 1283.

(*f*) Code Civil, § 1832.

(*g*) Dixon's Law of Partnership, 1

partager tous ce qu'ils pourront avoir de gain ou souffrir de perte de ce qu'ils auront mis en société (*h*). INTRODUCTORY.

Partnership is a contract of two or more competent persons to place their money, effects, labour, and skill, or some or all of them, in lawful commerce, or business, and to divide the profit and bear the loss in certain proportions (*i*). Kent.

Partnership is the relation which subsists between persons who have agreed to combine their property, labour, or skill in some business, and to share the profits thereof between them (*k*). Indian Contract act.

Partnership is the combination by two or more persons of capital, or labour, or skill, for the purpose of business for their common benefit (*l*). Parsons.

Partnership is the relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them (*m*). Pollock.

Le contrat de société est un contrat par lequel deux ou plusieurs personnes mettent, ou s'obligent de mettre, en commun quelque chose, pour faire en commun un profit honnête, dont ils s'obligent reciproquement de se rendre compte (*n*). Pothier (1.)

Societas est contractus de conferendis bona fide rebus aut operis, animo lucri quod honestum sit ac licitum in commune faciendi (*o*). Pothier (2.)

Ein Vertrag durch welchen mehrere Personen ihr Vermögen oder Gewerbe oder auch ihr Arbeiten und Bemühungen ganz oder zum Theil zur Erlangung eines gemeinschaftlichen Endzwecks vereinigen, wird ein Gesellschaftsvertrag genannt (*p*). Prussian code.

Le contrat de société se fait lorsque deux ou plusieurs personnes mettent en commun leur argent, leurs biens, ou leur travail, à la charge de partager entr'eux le gain et de supporter les pertes qui en arriveront, chacun à proportion de ce qu'il contribue du sien (*q*). Pufendorf.

When two or more persons join money, or goods, or labour, or all of these together, and agree to give each other a common claim upon such joint stock, this is partnership (*r*). Rutherford.

Partnership, often called co-partnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labour, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them (*s*). Story.

Verbinden sich mehrere zur Erreichung eines ihnen gemeinschaftlichen Thibaut.

(*h*) Domat, les Lois Civiles, liv. i. tit. 8, § 1.

(*i*) 3 Kent's Comm. 23.

(*k*) Indian Contract act, § 239.

(*l*) Parsons' Part. chap. 2, § 1. This definition is inaccurate. The word denotes a combination of persons, not a combination of capital.

(*m*) Pollock's Digest of the law of Partnership, § 4, ed. 3.

(*n*) Pothier, Traité du Contrat de Société, § 1. There is a useful English edition of this work by O. D. Tudor, Esq.

(*o*) Pothier, Pand. lib. xvii. tit. 2, § 1, art. 1.

(*p*) Allgem. Landsrecht für die Preuss. Staat. th. i. tit. 3, § 169.

(*q*) Pufendorf, Le Droit de la Nat. et des Gens, éd. Barbeyrac, liv. v. chap. 8, § 1.

(*r*) Inst. of Nat. Law, bk. i. c. 13, § 9.

(*s*) Story on Partn. § 2.

INTRODUCTORY.

Endzwecks so wird diesz ein Gesellschaftsvertrag (*societas*, Mascopei, Magenschaft) gennant. Geschicht diese Verbindung zu eigennützigen Zwecken so nennt man sie *societas quæstuaria*, oder *negotiatoria*, sonst aber *non quæstuaria* (*t*).

Vinnius.

Societas est contractus, quo inter aliquos res aut operæ communicantur, lucri in commune faciendi gratia (*u*).

Voet.

Societas est contractus jurisgentium, bonæ fidei, consensu constans, semper re honesta, de lucri et damni communione (*x*).

Watson.

Partnership is a voluntary contract between two or more persons for joining together their money, goods, labour, and skill, or either or all of them, upon an agreement that the gain or loss shall be divided proportionably between them, and having for its object the advancement and protection of fair and open trade (*y*).

All the above definitions, however, with the exception of Mr. Dixon's, are, with reference to the law of England, too wide; for they include not only partnerships in the proper sense of the word, but also many corporations and companies which differ from partnerships in several important respects, and which it is better therefore not to denote by the same word. Mr. Dixon's definition avoids this error, but the relation of principals to which he refers is not altogether free from objection (*z*).

If partnership is defined so widely as to include incorporated and other companies partnerships must be subdivided into (1) ordinary and (2) extraordinary partnerships as in the Indian Contract act (*a*). But it is more in accordance with ordinary usage to confine the word to unincorporated societies not governed by any special statute or custom.

2. *Distinction between partnerships, corporations, and companies.*

Corporations.

A corporation is a fictitious person, created by special authority (by the law of England by the Crown or by par-

(*t*) Thibaut, System des Pandekten Rechts, § 467, edition 9. This division of partnerships into partnerships having gain for their object, and other partnerships, is noticed by most German writers on the civil law.

(*u*) Vinn. Inst. iii. 26.

(*x*) Voet. Comm. ad Pand. lib. xvii. tit. 2, Pro Socio, § 1.

(*y*) Watson, Partn. p. 1. This definition is copied by Gow in his work on partnership.

(*z*) See the observations of the Master of the Rolls on the above definitions in *Pooley* v. *Driver*, 5 Ch. D. 471 *et seq.*

(*a*) See § 266.

liament), and endowed by that authority with a capacity to acquire rights and incur obligations, as a means to the end for the attainment of which the corporation is created. A corporation, it is true, consists of a number of individuals, but the rights and obligations of these individuals are not the rights and obligations of the fictitious person composed of those individuals; nor are the rights and obligations of the body corporate exerciseable by or enforceable against the individual members thereof, either jointly or separately, but only collectively, as one fictitious whole. As the civilians neatly express it—*Si quid universitati debetur singulis non debetur, nec quod debet universitas singuli debent.*

With partnerships the case is otherwise; the members of these do not form a collective whole, distinct from the individuals composing it; nor are they collectively endowed with any capacity of acquiring rights or incurring obligations. The rights and liabilities of a partnership are the rights and liabilities of the partners, and are enforceable by and against them individually: *Si quid societati debetur singulis debetur et quod debet societas singuli debent* (*b*).

Companies.

1. Unincorporated.

The fundamental distinction between partnerships and unincorporated companies is, that a partnership consists of a few individuals known to each other, bound together by ties of friendship and mutual confidence, and who, therefore, are not at liberty without the consent of all to retire from the firm and substitute other persons in their places; whilst a company consists of a large number of individuals not necessarily nor indeed usually acquainted with each other at all, so that it is a matter of comparative indifference whether changes amongst them are effected or not (*c*). Nearly all the differences which exist between ordinary partnerships and unincorporated companies, will be found traceable to the above distinction. Indeed it may be said that the law of unincorporated companies is composed of little else than the law of partnership modified and adapted to the wants of a large and fluctuating number of members.

2. Incorporated companies.

Incorporated companies are societies consisting usually of

(*b*) See *Lloyd* v. *Loaring*, 6 Ves. 773; *Beaumont* v. *Meredith*, 3 V. & B. 180; *Ryhope Coal Co.* v. *Foyer*, 7 Q. B. D. 498.

(*c*) See *per* James, L.J., in *Smith* v. *Anderson*, 15 Ch. D. 273.

INTRODUCTORY. many persons, having transferable shares in a common fund, but incorporated by Royal Charter or by Act of Parliament. They are not pure partnerships, for their members are recognised as an aggregate body; nor are they pure corporations, for their members are more or less liable to contribute to the debts of the collective whole. Incorporated companies are intermediate between corporations known to the common law and ordinary partnerships, and partake of the nature of both; and the law relating to these companies depends as well on the principles which govern ordinary partnerships, as on those which are applicable to corporations strictly so called (*d*).

The present volume is confined to Partnerships in the ordinary sense. Incorporated companies and companies which, although unincorporated, consist of numerous members and are governed by special statutes or by special customs, *e.g.*, Cost Book Mining Companies, will be dealt with in another volume.

(*d*) See the judgments in 5 Ch. 431 and 732. As to when corporations are persons within the meaning of acts of Parliament, see *The Pharmaceutical Soc.* v. *The London and Provincial Supply Assoc.*, 5 Q. B. D. 310, aff. 5 App. Ca. 857.

BOOK I.

OF CONTRACTS OF PARTNERSHIP.

CHAPTER I.

THE NATURE OF THE CONTRACT DETERMINED.

PRELIMINARY OBSERVATIONS.

Agreement to share profits the essence of a partnership.

THE basis of all partnerships is an agreement to share the profits arising from some business or undertaking. Usually, but not necessarily, partners have a joint capital or stock, by the employment of which the profits to be shared are expected to arise; and in ordinary partnerships, but not in companies, each partner usually takes an active part in the prosecution of the partnership business. 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. But, although this is so, the usual characteristics of an ordinary partnership are a community of interest in profits and losses, a community of interest in the capital to be employed, and a community of power in the management of the business engaged in.

Profits and losses.

Gross profits. Net profits.

Profits (or net profits) are the excess of returns over advances; the excess of what is obtained over the cost of obtaining it. Losses, on the other hand, are the excess of advances over returns; the excess of the cost of obtaining over what is obtained. Profits and net profits are for all legal purposes synonymous expressions; but the returns themselves are often called gross profits; hence it becomes necessary to call profits net profits in order to avoid confusion. In the

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present treatise, however, the word profits will be used in the sense of net profits; and the expression gross profits will be avoided as much as possible.

Persons who share both advances and returns, and also persons who share the difference between them, whatever that difference may be, necessarily share both profits and losses; profits, if the returns exceed the advances; losses, if the advances exceed the returns. But persons who share profits, *i.e.*, the excess of returns over advances, do not necessarily share losses; for profits may be shared by those who make no advances; and persons may stipulate for a division of gain, if any, and yet some one or more of them may by agreement be entitled to be indemnified against losses by the others; so that whilst all share profits, some only bear losses.

Sharing gross returns.

The actual or gross returns obtained by advances obviously include profits if profits have been made. But those returns do not include losses, if losses are incurred; for losses are the excess of the advances over the returns, and come out of the advances, and not out of the returns. Hence persons who share gross returns necessarily share profits, but they do not *by sharing the returns* share losses, for these fall entirely on those making the advances. Moreover, although a division of gross returns is a division of profits, if there are any, it is so only incidentally, and because such profits are included in what is divided; it is not a division of profits as such; and under an agreement for a division of gross returns, whatever is returned must be divided, whether there be profit or not.

On the other hand, if the persons sharing gross returns also share the advances by means of which the returns are made, there is necessarily community both of profit and of loss; community of profit if the returns exceed the advances; community of loss if the advances exceed the returns.

Distinction between sharing profits and gross returns.

The above remarks have appeared necessary in order to explain the reasons for the distinction made by English lawyers between agreements to share profits (*i.e.*, net profits and profits as such) on the one hand, and agreements to share gross returns (sometimes called gross profits) on the other: and in order to account for the rule that whilst an agreement to share profits creates a partnership, an agreement to share gross

returns does not. The reasonableness however of the above distinction is very questionable, at least where there is any community of capital or common stock; and the rule itself is probably attributable less to the difference which exists between net profits and gross returns than to the doctrine which so long confused the whole law of partnership in this country, and according to which all persons who shared profits incurred liability as if they were really partners. When this doctrine was rife, the distinction between sharing net profits and gross profits (*i.e.*, returns) had considerable practical value; but, as will be seen hereafter, the doctrine in question is now wholly exploded, and the distinction alluded to is of little importance.

Quasi-partnerships.

The doctrine to which reference has been made renders it necessary to caution the reader against an ambiguity in the word partnership as used by English lawyers. Partnerships are by them divided into partnerships (properly so called), and partnerships as regards third persons, which are not in fact partnerships at all, and should never be so styled. What is called a partnership as regards third persons (*quasi*-partnership), is nothing more than a number of persons, who, in consequence of certain acts done by them, are held liable for each other's conduct, as if they had entered into a contract of partnership amongst themselves. What these acts are will be considered hereafter; but the reader is requested to bear in mind that for the present, partnerships properly so called, and not *quasi*-partnerships, are intended to be spoken of.

Having made these preliminary observations, it is proposed to consider what agreements do, and what do not, result in a partnership in the proper sense of the word.

SECTION I.—OF TRUE PARTNERSHIPS.

1.—*Partnership is the result of an agreement to share profits and losses.*

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Agreements to share profits and losses.

Whether an agreement creates a partnership or not depends on the real intention of the parties to it (*a*). If the agreement is not in writing the intention of the parties must be ascertained from their words and conduct. If the agreement is in writing, its true construction must be determined; but, as will be more fully shown in a subsequent chapter, even a written contract may be departed from and modified by a new verbal agreement between all the partners proved by conduct inconsistent with the written document (*b*).

But an agreement to share profits and losses, may be said to be the type of a partnership contract. Whatever difference of opinion there may be as to other matters, persons engaged in any trade, business, or adventure upon the terms of sharing the profits *and* losses arising therefrom, are necessarily to some extent partners in that trade, business, or adventure; nor is the writer aware of any case in which persons who have agreed to share profits and losses have been held not to be partners (*c*). But it does not follow that each of several persons who share profits and losses has all the rights which partners usually have. For example, a person may share profits and losses and yet have no right actively to interfere with the management of the business (*d*); or he may have no such right to dissolve as an ordinary partner has (*e*); or he may have no right

(*a*) *Mollwo, March, & Co.* v. *Court of Wards*, L. R. 4 P. C. 419; *Pooley* v. *Driver*, 5 Ch. D. 460; *Walker* v. *Hirsch*, 27 Ch. D. 460; *Ross* v. *Parkyns*, 20 Eq. 331, and other cases cited *infra*, p. 13, note (*r*).

(*b*) *Infra*, Book III. c. 9.

(*c*) In *Mair* v. *Glennie*, 4 M. & S. 240, the expression profit or loss seems to have been used for gross returns. And in *Geddes* v. *Wallace*, 2 Bligh, 270, the arrangement as to profit and loss did not apply to the person as to whom the question of partnership or no partnership was raised.

(*d*) As in *Walker* v. *Hirsch*, 27 Ch. D. 460.

(*e*) See as to this *Moore* v. *Davis*, 11 Ch. D. 261; *Pawsey* v. *Armstrong*, 18 Ch. D. 698, in both of which the right to dissolve was held to exist. But *qu.* whether *Pawsey* v. *Armstrong* did not go too far.

to share the goodwill of the business on a dissolution; and other instances of restricted rights may be suggested. What in any given case the rights of a particular partner are depends on the agreement into which he has entered; but unless the word partner is to be deprived of all definite meaning its proper application to persons who share profits and losses can hardly be questioned (*f*).

Accordingly in *Green* v. *Beesley* (*g*), a partnership was held to result from an agreement that the plaintiff should horse a mail cart and be paid by the defendant 9*l*. per mile per annum for so doing, and that the plaintiff and the defendant should share the expenses of repairing and replacing the carts and the moneys received for the conveyance of parcels and the losses occasioned by their loss or damage.

So in *Brett* v. *Beckwith* (*h*), a partnership was held to exist between underwriters, one of whom had agreed to take a joint share of the underwriting risks of the other, paying or receiving sums according to the result of the accounts.

These authorities are sufficient to show that an agreement to share profit and loss, is an agreement for a partnership, although the words partners or partnership do not occur in the agreement (*i*).

Partnership not intended.

Cases which present most difficulty are those in which persons agree to share profits and losses and at the same time declare that they are not to be partners. The question then arises, what do they really mean? If they have in fact stipulated for all the rights of partners, an agreement that they shall not be partners is a useless protest against the consequences of their real agreement (*k*). But a clause negativing a partnership may throw light on other clauses, and rebut inferences which might be drawn from them alone. In practical life such questions do not arise in any abstract form. Some definite dispute has to be determined, *e.g.*, liability to creditors

(*f*) See however the judgment of Cotton, L.J., in *Walker* v. *Hirsch*, 27 Ch. D. 460.

(*g*) 2 Bing. N. C. 108.

(*h*) 3 Jur. N. S. 31, in the Rolls.

(*i*) See, too, *Greenham* v. *Gray*, 4 Ir. Com. L. Rep. 501.

(*k*) See *Ex parte Delhasse*, 7 Ch. D. 511; *Moore* v. *Davis*, 11 Ch. D. 261. See also *Pooley* v. *Driver*, 5 Ch. D. 460.

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or the right of one party to the agreement to some particular thing or to some particular relief as to which the agreement itself is the true guide.

2.—*Partnership is primâ facie the result of an agreement to share profits, although nothing may be said about losses, and although there may be no common stock.*

Agreements to share profits only.

Except in cases specially provided for by statute, an agreement to share profits, nothing being said about losses, amounts *primâ facie* to an agreement to share losses also (*l*); for it is but fair that the chance of gain and of loss should be taken by the same persons; and it is natural to suppose that such was their intention if they have said nothing to the contrary (*m*). It follows from this, that where no statute interferes, an agreement to share profits is *primâ facie* an agreement for a partnership; and accordingly it has been held, that unless an intention to the contrary can be shown, persons engaged in any business or adventure and sharing the profits derived from it, are partners as regards that business or adventure (*n*).

Community of profit as a test of partnership.

Indeed, it has often been said, that community of profit is the test of partnership (*o*). This, however, is not accurate. Whether persons are really partners or not is a question of intention, to be decided by a consideration of the whole agreement into which they have entered, and ought not to be made to turn on one or two only of the clauses in it (*p*) A good instance of this is afforded by the Irish case of *Barklie* v. *Scott* (*q*). There a father paid a sum of money as his infant son's share of the capital of a partnership, and it was agreed

(*l*) *Greenham* v. *Gray*, 4 Ir. Com. Law Rep. 501; *Dry* v. *Boswell*, 1 Camp. 330; *Heyhoe* v. *Burge*, 9 C. B. 440, *per* Parke, B.

(*m*) This *primâ facie* inference was held to be excluded by the rules of the building societies which were considered in *Brownlie* v. *Russell*, 8 App. Ca. 235 and *Tosh* v. *North British Build. Soc.*, 11 App. Ca. 489.

(*n*) See *Pooley* v. *Driver*, 5 Ch. D. 458.

(*o*) *Heyhoe* v. *Burge*, 9 C. B. 446; *Fox* v. *Clifton*, 9 Bing. 115; *Ex parte Langdale*, 18 Ves. 300.

(*p*) See *ante*, p. 10 and the cases in the next note but one.

(*q*) 1 Huds. & Br. 83. Compare *Reid's case*, 24 Beav. 318, where the father who had transferred shares into his infant son's name was held a contributory.

that during the son's minority the profits should be accounted for to the father; it was held that the father was not himself a partner, that clearly not being the intention of the parties to the agreement.

Servants, &c., sharing profits.

Other illustrations of the same principle are afforded by those cases in which managers and clerks are paid salaries proportionate to the profits of the business in which they are employed. The act, 28 & 29 Vict. c. 86, which will be noticed hereafter, expressly provides for such cases as these; but independently of that act no partnership subsists between persons thus paid and those who pay them, where it appears from the whole agreement that a partnership was not intended (*r*). The observations on agreements to share profits and losses (*ante*, p. 10) are applicable to agreements to share profits only; but with this difference, viz., that in the latter case it is easier than in the former to come to the conclusion that a partnership was not intended to be formed.

If the servant sharing profits has also an interest in the partnership capital or stock, this additional circumstance goes far to show that a partnership was, in fact, intended (*s*).

Partnerships in profits only.

It is not, however, essential to the existence of a partnership, that there shall be any joint capital or stock. If several persons labour together for the sake of gain, and of dividing that gain, they will not be partners the less on account of their labouring with their own tools. Thus in *Fromont* v. *Coupland* (*t*), two persons who horsed a coach and divided the profits

Fromont *v.* Coupland.

(*r*) *Ex parte Tennant*, 6 Ch. D. 303, where a father claimed to be a partner with his son; *Ross* v. *Parkyns*, 20 Eq. 331; *Rawlinson* v. *Clarke*, 15 M. & W. 292; *Stocker* v. *Brocklebank*, 3 Mc. & G. 250; *Shaw* v. *Galt*, 16 Ir. C. L. 397; *Radcliffe* v. *Rushworth*, 33 Beav. 484, where there was a holding out and a deed executed by the alleged partners, in which they were described as carrying on business together. See also, *Geddes* v. *Wallace*, 2 Bligh, 270. In *R.* v. *Macdonald*, 7 Jur. N. S. 1127, a servant, paid by a share of profits, was convicted of embezzlement, which he could not then have been if he had been a partner. In *Withington* v. *Herring*, 3 Moo. & P. 30, an agent paid by a salary and a share in the profits was thought to be a partner, but the question was not decided.

(*s*) See *Reid* v. *Holinshead*, 4 B. & C. 867; *Ex parte Chuck*, 8 Bing. 469; *Gilpin* v. *Enderby*, 5 B. & A. 954.

(*t*) 2 Bing. 170. See, too, *Lovegrove* v. *Nelson*, 3 M. & K. 1.

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were held to be partners, although each found his own horses, and the other had no property in them.

French *v.* Styring.

So, in *French* v. *Styring* (*u*), where two co-owners of a race-horse agreed to share its winnings and the expenses of its keep, although there was some doubt as to whether they were partners or not, the Court had no hesitation in admitting that they might have been partners in the profits although not in the horse itself (*x*).

The ordinary agreement between publishers and authors, to the effect that the author shall contribute the manuscript, and the publisher shall, in the first instance, defray the expenses of publication, and repay himself out of the proceeds of the sale of the work, and that then the profits shall be divided, furnishes another instance of a partnership confined to profits only (*y*).

Again, it frequently happens that one person has property and another skill, and that they agree that the latter shall have the control of the property for the benefit of both, and that the profits shall be divided. In such cases it may be difficult to say whether a partnership is or is not created. In *Stocker* v. *Brocklebank* (*z*), it is clear that no partnership was intended and none was created; in the Irish case of *Greenham* v. *Gray* (*a*), it was thought that the whole agreement could only receive a reasonable construction by holding a partnership to exist, and a partnership was held to exist accordingly, although the

(*u*) 2 C. B. N. S. 357; noticed again *infra*, p. 18.

(*x*) See also *Steel* v. *Lester*, 3 C. P. D. 126. The dictum in *Syers* v. *Syers*, 1 App. Ca. 181, to the effect that a partnership in profits is a partnership in the assets by which they are made is by no means universally true. See *infra* note (*b*).

(*y*) See *Gardiner* v. *Childs*, 8 C. & P. 345; *Reade* v. *Bentley*, 3 K. & J. 271, and 4 ib. 656; *Wilson* v. *Whitehead*, 10 M. & W. 503; *Gale* v. *Leckie*, 2 Stark. 107; *Venables* v. *Wood*, 3 Ross L. C. on Com. Law, 529. This last case is an authority for the proposition that authors and publishers are not partners at all, and *qu.* whether this is not the correct doctrine?

(*z*) 3 Mc. & G. 250. The servant claimed a right to take an active part in the management of the business. So in *Walker* v. *Hirsch*, 27 Ch. D. 460. In *Pawsey* v. *Armstrong*, 18 Ch. D. 698, the clerk shared losses as well as profits, but *quære* whether he was entitled to all he got.

(*a*) 4 Ir. Com. L. Rep. 501. The real truth here seems to have been that the plaintiff intended to create a partnership, whilst the defendant did not.

mills, and machinery, and buildings, by means of which the business was carried on, clearly belonged to one partner only.

Other instances of partnership in profits, although there is no community of interest in the capital or stock producing them, will be noticed when the subject of partnership property is examined (*b*).

3.—*Partnership is primâ facie the result of an agreement to share profits, although community of loss is stipulated against.*

Sharing profits but not losses.

Persons who agree to share the profits of an adventure in which they engage, are *primâ facie* partners, although they stipulate that they will not be liable for losses beyond the sums they engage to subscribe (*c*).

Stipulations against community of loss.

The inference that where there is community of profit there is a partnership is so strong that, even if community of loss be expressly stipulated against, partnership may nevertheless subsist. In *Coope* v. *Eyre* (*d*), Lord Loughborough is reported to have said, "In order to constitute a partnership, communion of profits and loss is essential." But there is nothing to prevent one or more partners from agreeing to indemnify the others against loss, or to prevent full effect from being given to a contract of partnership containing such a clause of indemnity (*e*).

Contracts of loan compared with contracts of partnership without community of loss.

The true effect of such a complex agreement would, it is apprehended, be to entitle each of the partners to a share of the excess of the returns over the advances, while some of the partners would be entitled to be indemnified by the others for all losses *beyond the advances*. If this were not the result of the agreement, and if the persons indemnified were indemnified not only against losses beyond the advances, but also

(*b*) In *Meyer* v. *Sharpe*, 5 Taunt. 74, the distinction between an interest in profits and an interest in the goods by the sale of which those profits were to be produced was held to be clear and manifest. See, too, *Smith* v. *Watson*, 2 B. & C. 401.

(*c*) *Brown* v. *Tapscott*, 6 M. & W. 119.

(*d*) 1 H. Blacks. 48.

(*e*) See *Bond* v. *Pittard*, 3 M. & W. 357; *Geddes* v. *Wallace*, 2 Bligh, 270.

against the loss of the advances themselves, the contract would lose its character of a contract of partnership, and become a contract of loan (*f*).

Usurious loans confounded with partnerships.

Whilst the laws against usury were in force, a tendency was sometimes manifested to treat what was in truth a loan at usurious interest and therefore illegal, as a contract of partnership and therefore legal (*g*). This view of the transaction had the merit of apparently holding the parties to their bargain; but in truth the bargain to which they were held was very different from that which they themselves had contemplated; and by treating such transactions as partnerships and not as loans an amount of confusion was introduced into this branch of the law which even the repeal of the usury laws failed to remove. The leading cases on this subject are *Gilpin* v. *Enderby* (*h*) and *Fereday* v. *Hordern*(*i*). They decided that a loan of money on the terms that the lender should share the profits of the borrower rendered the lender liable to third persons, as if he were a partner with the borrower; and that by reason of such risk the loan was not usurious. The judgments in these cases show that the borrower and lender were regarded by the court as partners *inter se*.

These cases, however, cannot now be relied upon; for, as will be seen hereafter, the mere fact that a lender of money shares profits with the borrower will not make the lender liable as a partner; and as between the borrower and the lender the question of partnership or no partnership turns on the real agreement between them (*k*).

Dormant partners.

At the same time even now a person who is really a partner although dormant (*i.e.*, a partner taking no part in the management of the partnership) will be treated as such, although he may have endeavoured to conceal his true character under the cloak of being a mere lender of money (*l*). Whether a person

(*f*) See Pothier, Contrat de Société, §§ 21 & 22. Compare *Pooley* v. *Driver*, 5 Ch. D. 458, noticed *infra*, § 2.

(*g*) See *Bloxham* v. *Pell*, cited 2 Wm. Blacks. 999; and compare *Morse* v. *Wilson*, 4 T. R. 353, and 7 Byth. Conv. p. 163, edit. 2.

(*h*) 5 B. & A. 954.

(*i*) Jac. 144; see also *Ex parte Briggs* and *Ex parte Notley*, 3 D. & Ch. 367.

(*k*) See the cases of servants sharing profits, *ante*, pp. 12, 13.

(*l*) See *Pooley* v. *Driver*, 5 Ch. D. 458, noticed *infra*, § 2.

advancing money and sharing profits is a creditor or a dormant partner is often a very difficult matter to determine, and can only be decided by a careful study of the whole agreement between the borrower and the lender, and especially by examining what rights are conferred on or taken from the person making the advance. The right of a lender is to be repaid his money with such interest or share of profits as he may have stipulated for; and his right to a share of profits involves a right to an account and to see the books of the borrower, unless such right is expressly excluded by agreement. If however a lender stipulates for more than this (*e.g.*, for a right to control the business or the employment of the assets, or to wind up the business) or if his advance is risked in the business, or forms part of his capital in it, he ceases to be a mere lender and becomes in effect a dormant partner. In illustration of these remarks, reference may be made to *Mollwo March & Co.* v. *Court of Wards* (*m*) on the one hand, and *Pooley* v. *Driver* (*n*) on the other (*o*). In both there was an advance of money and a stipulation for a share of profits; and in both the lender had unusual powers; but in the former case the court came to the conclusion that a loan on security was all that was really intended; whilst in the latter the Court considered that the lender was really a dormant partner, although he had done his best to avoid the liabilities incident to that position.

Mollwo March & Co. *v.* Court of Wards.

Pooley *v.* Driver.

4.—*Partnership is not the result of an agreement to share gross returns.*

Although, as has been already pointed out, those who share gross returns share profits, if any there be, for gross returns include profits, and although at common law an agreement to share profits is *primâ facie* an agreement for a partnership, yet it has long been held that a partnership is not the result of an agreement to share gross returns (*p*).

Sharing gross returns.

If several persons make advances for a common object and agree to share the gross returns in proportion to their advances,

(*m*) L. R. 4 P. C. 419.

(*n*) 5 Ch. D. 458.

(*o*) They are referred to more at length hereafter, in § 2.

(*p*) See the preliminary remarks, *ante*, pp. 8, 9.

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this does not create such a community of interest in profit or loss as to make such persons partners. Thus, in *Gibson* v. *Lupton* (*q*), where two persons joined in the purchase of wheat with the intention of paying for it and dividing it equally, it was held that they were not partners. So, if two workmen agree to divide their wages, that, *per se*, does not make them partners (*r*). But the strongest illustrations of this doctrine are afforded by those cases in which co-owners of chattels divide the earnings of the chattel. The distinction between co-owners and co-partners will be noticed hereafter, but as an instance in which co-owners have been held not to be partners, although they agreed to divide the returns obtained by the use or employment of the thing owned, reference may be made to *French* v. *Styring* (*s*). There the plaintiff and defendant were entitled in common to a race-horse. It was agreed, that the plaintiff should keep, train, and have the management of the horse, that thirty-five shillings a week should be allowed for the expenses of his keep, that the plaintiff should pay the expenses of entering the horse and conveying him to the different races, and that one-half of the horse's keep and other expenses and his winnings should be equally divided between the plaintiff and the defendant. This agreement was held not to create a partnership. It was no more a partnership than if two tenants in common of a house had agreed that one of them should have the general management and provide funds for necessary repairs, so as to render the house fit for the habitation of a tenant, and that the net rent should be divided amongst them equally (*t*).

Gibson *v.* Lupton.

Co-owners sharing gross returns.

French *v.* Styring.

So where two persons were respectively lessee and manager of a theatre, and they shared the gross receipts equally, the manager paying the expenses out of his share, it was held that no partnership subsisted between them (*u*).

Again, in whaling voyages the sailors are usually paid a

Wages payable by a share of produce.

(*q*) 9 Bing. 297. See further, as to joint purchasers, *Coope* v. *Eyre*, 1 H. Blacks. 37 ; and *Hoare* v. *Dawes*, 1 Doug. 371, and *post*, § 6.

(*r*) See *Finckle* v. *Stacey*, Select Ca. in Ch. 9.

(*s*) 2 C. B. N. S. 357.

(*t*) See the judgment of Willes, J., 2 C. B. N. S. 366.

(*u*) *Lyon* v. *Knowles*, 3 B. & S. 556.

certain proportion of the produce of the oil obtained, but even before the act of 28 & 29 Vict. c. 86, they were not therefore partners, either with each other or with their employers (*x*). In such cases as this partnership was clearly not intended; and even when persons who shared profits were held to incur liabilities as if they were partners, it was held that persons who merely divided gross returns, did not incur any such liabilities (*y*). *A fortiori* it was impossible to regard them as partners *inter se*. The act of 28 & 29 Vict. c. 86, which will be noticed hereafter, renders this even clearer than before.

5.—*Partnership is not the result of an agreement which is not concluded.*

Unconcluded agreements.

In order that partnership may result from any agreement, it is necessary that the parties to the agreement shall have mutually assented to the same propositions; otherwise there is no contract at all, but merely a treaty from which each party is at liberty to retire. If, therefore, A. proposes to B. that a partnership shall be formed between them on certain terms, and B. either does not accept the proposal or accepts it on other terms than those offered, A. and B. are not yet agreed and no partnership subsists between them. Nor is B. bound by his qualified acceptance; for that is merely a counter offer on his part which he is at liberty to retract until A. has assented to all its terms without qualification.

There are many decisions illustrating these principles, but they relate more particularly to agreements to take shares in companies, and it is unnecessary to consider them here (*z*).

(*x*) *Mair* v. *Glennie*, 4 M. & S. 240; *Wilkinson* v. *Frazier*, 4 Esp. 182; and see *Perrott* v. *Bryant*, 2 Y. & C. Ex. 61. See also *Stavers* v. *Curling*, 3 Bing. N. C. 355, where the captain was to be paid a sum equal to 12 per cent. on the net proceeds, after deducting certain expenses. He brought an action for what was due to him, and recovered, but no question of partnership arose. Some of the customs established amongst whalers will be found in *Fennings* v. *Grenville*, 1 Taunt. 241, where it was held that one of two tenants in common of a whale could not maintain trover against his co-tenant for half of the blubber, &c., yielded by the whale.

(*y*) *Post*, § 2.

(*z*) See the next page. In *McClean* v. *Kennard*, 9 Ch. 336,

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Cases in which there is no contract, because there has never been a mutual assent to the same terms, must not be confounded with cases in which a valid contract has been entered into, but which, being conditional, and not having been performed on the one part, is not binding on the other. These will be considered hereafter.

6.—*Partnership is not the result of an agreement to share profits so long as anything remains to be done before the right to share them accrues.*

Contemplated partnerships.

It is important to distinguish between actual and contemplated partnerships. Persons who are only contemplating a future partnership, or who have only entered into an agreement that they will at some future time become partners, cannot be considered as partners before the arrival of the time agreed upon (*a*). It is not always easy to determine whether an agreement amounts to a contract of partnership or only to an agreement for a future partnership. The test, however, is to ascertain from the terms of the agreement itself whether any time has to elapse or any act remains to be done before the right to share profits accrues; for if there is, the parties will not be partners until such time has elapsed or act has been performed (*b*).

The general principle that so long as an agreement to form a partnership is executory, no partnership is formed, applies as well to ordinary partnerships as to projected companies, and it will be useful to consider it with reference to each in turn.

(*a*) *Application of the principle to ordinary partnerships.*

Option to become a partner.

It is not unusual for a person who contemplates joining another in business to agree that such business shall be carried on upon certain terms not themselves creating a partnership,

an agreement to become partners with executors was held to create a partnership with those only who proved.

(*a*) *Per* Parke, J., in *Dickinson* v. *Valpy*, 10 B. & C. 141, 2.

(*b*) See in addition to the cases cited below *Drennen* v. *London Ass. Co.*, 6 Davis Sup. Ct. Rep. 25; *Osborne* v. *Jullion*, 3 Drew, 596, where the partnership (?) depended on the result of experiments.

and to stipulate for an option to become a partner either at a specified time, or at any time the person having the option may choose. Such agreements, if *bonâ fide*, and not mere colourable schemes for creating a partnership, and at the same time concealing it (*c*), do not create a partnership until the person having the option has exercised it, and elected to become a partner.

A strong illustration of this is afforded by *Ex parte Davis* (*d*), where a creditor had a right to nominate himself as a partner with his debtor but had not exercised the right.

Again, in *Gabriel* v. *Evill* (*e*), it was agreed between the defendant and two others that the defendant should enter into partnership with them, and bring in 1000*l.* in cash, and 1000*l.* in goods, and that the partnership should date retrospectively from the 1st of January: but the defendant reserved to himself the option of determining at any time within twelve months from that day whether he would become a partner or not. The defendant advanced the 2000*l.*, and several other acts were done in execution of the agreement; but within the twelve months the defendant declared his option not to become a partner, and it was held that he never did in fact become one, and that he had not incurred any liability as if he had (*f*). Gabriel *v.* Evill.

In *Price* v. *Groom* (*g*), a debtor's business was carried on by him under an inspectorship deed, which authorised the trustees to carry on the business themselves, and to take the profits, if they chose. Their interest in the profits, however, did not commence until the debtor's interest determined; and it was held that whilst he carried on the business there was no part- Price *v.* Groom.

(*c*) See *Courtenay* v. *Wagstaff*, 16 C. B. N. S. 110.

(*d*) 4 De G. J. & Sm. 523. The agreement was in the form of a bond, and was, as Lord Westbury remarked, "an ingenious piece of mechanism." Such an agreement, however, cannot be relied upon as affording protection against third parties.

(*e*) 9 M. & W. 297, and Car. & Marsh. 358. See, too, *Ex parte Turquand*, 2 M. D. & D. 339, which turned on the same agreement. See, also, *Re Hall*, 15 Ir. Ch. 287, a similar case.

(*f*) Compare this case with *Jefferys* v. *Smith*, 3 Russ. 158. There A. agreed to purchase B.'s share in a firm; A. acted and was treated as a partner by the other members, but afterwards rescinded the contract with B.: it was held that a partnership nevertheless subsisted between A. and B.'s co-partners.

(*g*) 2 Ex. 542.

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nership between him and them, they and he not being entitled to the profits at the same time.

Share not yet taken.

In *Howell* v. *Brodie* (*h*), the defendant, intending to become a partner in a scheme for making and letting out a market-place, advanced considerable sums of money, and ultimately, on the completion of the market, took one-seventh share in it. It was sought to make him liable for the expense of erecting the market, on the ground that he was a partner with those by whom the plaintiff had been employed; but the Court held that there was no partnership between them and the defendant until the share was taken by him.

Share of profits expected in lieu of salary.

In *Burnell* v. *Hunt* (*i*), an agreement was come to between A. and B. that A. should take premises and purchase machinery and materials to carry on the business of a silk lace-maker, and that B. should manage the business and receive half the profits as soon as any accrued, and should, in the meantime, be paid 2*l*. a week. It was held that so long as the 2*l*. per week continued payable, there was no partnership (*k*).

Partnership articles to be drawn up.

Persons who agree to become partners may be partners although they contemplate signing a formal partnership deed and never sign it (*l*). But if they are not to be partners until they sign formal articles of partnership, and if they do not so act as to waive the performance of such condition, they will not be partners until it has been performed. Where, however, two persons agreed to become partners from a subsequent day, upon certain terms to be embodied in a deed to be executed on that day: it was held that the partnership began on the day mentioned, although the deed was not executed until afterwards, and although alterations were made in it immediately before its execution (*m*). In this case, however, the

(*h*) 6 Bing. N. C. 44.

(*i*) 5 Jur. 650, Q. B. The real point here was whether B. had any interest in the *goods*, which he clearly had not, and would not have had even if there had been profits to divide.

(*k*) See, too, *Ex parte Hickin*, 3 De G. & S. 662.

(*l*) As in *Syers* v. *Syers*, 1 App. Ca. 174.

(*m*) *Battley* v. *Lewis*, 1 Man. & Gr. 155; and see *Wilson* v. *Lewis*, 2 ib. 197. Compare *Ellis* v. *Ward*, 21 W. R. 100, where the intended partners quarrelled before they signed the deed.

parties did in fact commence business as partners on the day named, and it was wholly immaterial (as regarded the question before the Court) what the terms of the partnership were.

(b) Application of the principle to Promoters of companies.

Promoters of companies not partners.

Promoters of companies are not partners; they are, it is true, engaged in a common object, and that object is ultimately to share profits; but their immediate object is the formation of a company, and they are only in the position of persons who intend to become partners after the company is formed. It was indeed said, in *Holmes* v. *Higgins* (*n*), that the projectors of a railway were partners, they being associated for the purpose of procuring the act of Parliament necessary to form the company and subscribing money for that purpose; and, in *Lucas* v. *Beach* (*o*), the Court held that persons associated for the purpose of passing a turnpike act, and who had subscribed for shares in the proposed road, were partners. But in each of these cases the real question was, whether the plaintiff was entitled to recover from the defendants by virtue of any *implied* contract, any remuneration for services rendered by him for the joint benefit of himself and them. It was held that he was not; and if the Court had likened the case to one of partnership, instead of saying that the plaintiff and the defendants were partners, there would be no room for criticism. As it is, however, the cases are apt to be considered, and are sometimes cited, as authorities for the proposition that persons engaged in passing through Parliament, bills to authorise the establishment of a company, are partners. In *Lucas* v. *Beach* it was asked in argument, "What is there to prevent a number of individuals from entering into a partnership with the limited object, in the first instance, of procuring an act of Parliament, and with an ulterior object in view when the act has passed?" (*p*) The answer is, that to call persons so associated partners is to ignore the difference between a contract of partnership and an agreement to enter into such a contract, to confound an agreement with its result, and to hold persons to be partners

Observations on Holmes *v.* Higgins; and Lucas *v.* Beach, *contra*.

(*n*) 1 B. & C. 74.

(*o*) 1 Man. & Gr. 417. *Barnett* v. *Lambert*, 15 M. & W. 489, was a similar case.

(*p*) See, too, *per* Lord Brougham in *Hutton* v. *Upfill*, 2 H. L. C. 691.

although they have not yet acquired any right to share profits. It cannot be contended that the right to share profits would, under such an agreement as is supposed, accrue before the passing of the act, and if not, how can the parties to such an agreement be *partners* at an earlier period?

For these reasons it is conceived that *Holmes* v. *Higgins* and *Lucas* v. *Beach* cannot be relied upon as authorities on the question of partnership or no partnership (*q*). Nor are they on this point reconcilable with later decisions. In *Reynell* v. *Lewis* (*r*), and *Wyld* v. *Hopkins* (*r*), in which the question was much discussed, it was held that no partnership subsisted between persons who had subscribed for the purposes of forming a railway company and of procuring the necessary act of Parliament; and this, which is the correct doctrine, was also distinctly stated by Lord Cranworth, in *Capper's case* (*s*), and has been recognised on many other occasions (*t*).

Later authorities.

It is a necessary result of the principles established above that persons associated for the purpose of forming a joint-stock company are not partners (*u*). They clearly are not partners in the company to be formed; and for reasons already given they cannot be considered as members of a partnership formed to start the company.

Subscribers to inchoate companies not partners.

It also follows from the same principles, that if persons enter into an agreement to take shares in a company formed for certain purposes and upon certain conditions, those persons are not bound to take shares in a company formed for different purposes or upon other conditions; and are not partners in such a company, unless they have accepted shares therein and

Conditional contract.

(*q*) They are authorities for the point actually decided, viz., that a person doing work for the joint benefit of himself and others, cannot recover compensation from them by virtue of any *implied* promise to pay him.

(*r*) 15 M. & W. 517.

(*s*) 1 Sim. N. S. 178.

(*t*) e. g. *Batard* v. *Hawes*, and *Batard* v. *Douglas*, 2 E. & B. 287; *Wadstab* v. *Spottiswoode*, 15 M. & W. 501; *Forrester* v. *Bell*, 10 Ir. Law R. 555; *Hutton* v. *Thompson*, 3 H. L. C. 161; *Bright* v. *Hutton*, 3 H. L. C. 368; *Hamilton* v. *Smith*, 5 Jur. N. S. 32; *Norris* v. *Cottle*, 2 H. L. C. 647; *Besley's case*, 3 Mac. & G. 287; *Tanner's case*, 5 De G. & S. 182.

(*u*) *Wood* v. *Argyll*, 6 Man. & Gr. 928; *Hamilton* v. *Smith*, 5 Jur. N. S. 32; *Hutton* v. *Thompson*, 3 H. L. C. 161; *Bright* v. *Hutton*, ib. 368.

precluded themselves from objecting to the variation of their agreement. A leading case on this subject is *Fox* v. *Clifton* (*x*), which, with other cases of the same class, will be found in the volume relating to companies and contributories.

SECTION II.—OF QUASI-PARTNERSHIPS.

Having now examined the nature of those agreements which are, properly speaking, contracts of partnership, it is necessary to advert to the doctrines by virtue of which persons who are not partners at all, are nevertheless made subject to liabilities as if they were partners. In other words, it is necessary to explain what it is that creates a *quasi*-partnership, or, as it is usually called, a partnership as regards third persons. This will involve an examination of the liability which a person incurs:

Quasi-partnerships.

1. By sharing profits.
2. By holding himself out as a partner.

1. *By sharing profits.*

In the year 1775, De Grey, C.J., laid down the proposition in *Grace* v. *Smith* (*y*), that "every man who has a share of the profits of a trade, ought also to bear his share of the loss." Eighteen years afterwards, viz., in 1793, this doctrine was discussed and approved in the celebrated case of *Waugh* v. *Carver* (*z*); and ever since that time until 1860 it was considered as clearly established, that by the law of England, all persons who shared the profits of a business incurred the liabilities of partners therein, although no partnership between themselves might have been contemplated. Subtle distinctions were drawn between sharing net profits and gross returns; and between sharing net profits and payments varying with them; but it was taken for granted, both by judges and text-

(*x*) 6 Bing. 776.
(*y*) 2 Wm. Blacks. 998.
(*z*) 2 H. Blacks. 235.

writers, that where there was no statutory enactment to the contrary, if net profits were shared, it necessarily followed that liabilities were incurred. Moreover, there were many persons of ability who maintained that this rule was based upon principles which were satisfactory and morally just. Other persons, however, took a different view of the propriety of the rule (*a*), and were unable to understand why a person lending money at a fixed rate of interest should be treated as a creditor, and be exposed to no risk beyond the loss of his advance; whilst a person lending money at a rate of interest fluctuating with, and payable out of, the profits of the borrower should be treated as a partner, and be exposed, not only to the loss of his money, but also to the loss of whatever else he might have in the world. In the first edition of this work the writer expressed a hope that the rule in question would ere long cease to exist; and he ventured to characterise it as arbitrary, unjust, and as productive of the greatest confusion. Since those words were written the whole subject has been thoroughly discussed, both in the highest court of appeal (*b*), and in Parliament; and the result has been that the rule, so far as it affords a conclusive test of liability (*c*), has ceased to exist; for the House of Lords, and subsequently other courts, have repudiated it, and Parliament has excluded its application from many cases in which it has been found by experience to produce inconvenience and injustice. Some notice, however, of the old law is necessary in order to understand the modifications thus introduced.

1. *State of the law anterior to Cox* v. *Hickman.*

Origin of the rule that those who share profits are liable to losses.

As already stated, the rule that persons who share profits incur liabilities as if they were partners, was laid down for the first time in *Grace* v. *Smith* (*d*). The question there was whether the defendant was liable to a creditor of a firm; and the material facts were that the defendant (who had

(*a*) See the report on the Law of Partnership, printed by order of the House of Commons, in 1851, and particularly the evidence of the late Commissioner Fane.

(*b*) *Cox* v. *Hickman*, 8 H. L. C. 268.

(*c*) That participation in profits is still a *primâ facie* test of partnership has been seen already, *ante*, p. 12, *et seq.*

(*d*) 2 Wm. Blacks. 998.

been a partner, but who had notoriously retired before the creditor's demand arose) had advanced to the firm 4000*l.* upon the terms of being repaid the principal and of receiving, so long as it remained unpaid, interest at 5*l.* per cent. and an annuity of 300*l.* a-year. The verdict was for the *defendant*, and the Court refused a new trial. De Grey, C. J., gave his judgment as follows :—

Judgment in Grace *v.* Smith.

"The only question is, what constitutes a secret partner? Every man who has a share of the profits of a trade, ought also to bear his share of the loss. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits ; he relies on them for repayment. And there is no difference whether that money be lent *de novo*, or left behind in trade by one of the partners who retires ; and whether the terms of that loan be kind or harsh, makes also no manner of difference. I think the true criterion is to inquire whether Smith (the defendant) agreed to share the profits of the trade with Robinson (the continuing partner), or whether he only relied on those profits as a fund of payment, a distinction not more nice than usually occurs in questions of trade or usury. The jury have said this is not payable out of the profits, and I think there is no foundation for granting a new trial."

Bloxham *v.* Pell.

This judgment and not the *decision* in the case, has always been regarded as the great authority for the proposition, that a person who shares profits is liable to third parties as if he were in fact a partner. The judgment itself appears to have been based upon a prior case of *Bloxham* v. *Pell* (*e*), before Lord Mansfield, and in substance undistinguishable from *Grace* v. *Smith*. In *Bloxham* v. *Pell*, an outgoing partner became entitled to be paid by the continuing partner a certain sum of money with interest at 5 per cent., and also an annuity of 200*l.* a-year for six years, in lieu of the profits of the trade. The plaintiff sued him for a debt contracted after the dissolution, and Lord Mansfield held the defendant liable, on the ground that the agreement was a device to make more than legal interest of money, and if it was not a partnership it was a crime ; and it should not lie in the defendant Pell's mouth to say it was usury and not a partnership. Lord Mansfield did not say a word in favour of the doctrine laid down in *Grace* v. *Smith ;* but seeing a contract which on the ground of usury was invalid as a contract of loan, he nevertheless upheld it as a contract of partnership, which it plainly was not, but which was the only alternative if the agreement was to be upheld at all (*f*).

Waugh *v.* Carver.

Such was the origin of the rule in question, which was approved and applied in the well-known case of *Waugh* v. *Carver*, the leading old authority on this subject. In *Waugh* v. *Carver* (*g*), two ship-agents, carrying on business at different ports, agreed to allow each other certain portions of each other's commissions and profits, but it was expressly agreed that neither of them should be prejudiced or affected by the losses of the other,

(*e*) Cited in 2 Wm. Blacks. 999.

(*f*) See *Jestons* v. *Brooke*, Cowp. 793, and *ante*, p. 16.

(*g*) 2 H. Blacks. 235, and 1 Smith's Lead. Ca.

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or be answerable for the acts of the other, but that each should be answerable and accountable for his own losses and acts. It was admitted by the Court that this agreement created no partnership as between the parties to it; but it was nevertheless held, on the principle enunciated in *Grace* v. *Smith*, that both parties to the agreement were answerable for the business debts of each, and a creditor who sued both for goods supplied to one, obtained judgment against both accordingly.

Application of the foregoing doctrines.

Other cases, in which the same principle was applied, need only be shortly referred to. It was held that a *quasi*-partnership subsisted between merchants who divided the commissions received by each other on the sale of goods recommended or "influenced" by the one to the other (*h*); so between persons who agreed to share the profits of a single isolated adventure (*i*); and between persons, one of whom was in the position of a servant to the others, but was paid a share of the profits instead of a salary (*k*); and between persons, one of whom was paid an annuity out of the profits made by the others (*l*); or an annuity in lieu of any share in those profits (*m*). So between the vendor and purchaser of a business, if the former guaranteed a clear profit of so much a year and was to have all profits beyond the amount guaranteed (*n*).

Moreover, the character in which a portion of the profits was received did not affect the result. For a person who as executor or trustee merely employed money in trade or business, and shared the profits arising from it, incurred all the liabilities of a partner, although he in fact had personally no interest whatever in the matter (*o*). On the other hand, the *cestuis que trustent* were also liable; the creditors having an option against which of the two they would proceed (*p*).

Again, persons who shared profits were *quasi*-partners, although their community of interest was confined to the profits. In *Smith* v. *Watson* (*q*), a broker, who was paid by a share of the profits arising from the sales made by him, and who was therefore a *quasi*-partner with the person employing him, was nevertheless held to have no interest in the goods sold.

Distinction between sharing

But notwithstanding the extent to which the doctrine laid down in *Grace*

(*h*) *Cheap* v. *Cramond*, 4 B. & A. 663.

(*i*) *Heyhoe* v. *Burge*, 9 C. B. 431; *Ex parte Gellar*, 1 Rose, 297; *Hesketh* v. *Blanchard*, 4 East, 144.

(*k*) *Ex parte Digby*, 1 Deac. 341; *Ex parte Rowlandson*, 1 Rose, 92; and see *Withington* v. *Herring*, 3 Moo. & P. 30.

(*l*) *Re Colbeck*, Buck. 48; *Ex parte Hamper*, 17 Ves. 412; *Ex parte Chuck*, 8 Bing. 469.

(*m*) *Bloxham* v. *Pell*, 2 Wm. Blacks. 999, *ante*, p. 27.

(*n*) *Barry* v. *Nesham*, 3 C. B. 641. Compare *Pott* v. *Eyton*, ib. 32, *infra*, p. 30.

(*o*) *Wightman* v. *Townroe*, 1 M. & S. 412; *Ex parte Garland*, 10 Ves. 119; *Labouchere* v. *Tupper*, 11 Moore, P. C. 198.

(*p*) See *Goddard* v. *Hodges*, 1 Cr. & M. 33. In this case the court held that the cestui que trust was liable to creditors, and that *therefore* he could not sue the co-partners of his own trustee. But surely this was wrong. There was no partnership between the plaintiff and defendants, no contract between them.

(*q*) 2 B. & C. 401; and see *Burnell* v. *Hunt*, 5 Jur. 650, Q. B., and *Cheap* v. *Cramond*, 4 B. & A. 663.

profits and gross returns.

v. *Smith* was carried, it was long ago established that persons who shared only gross returns, were not *quasi*-partners; and subtle distinctions were taken between a payment out of profits, and a payment varying with them, and between an agreement to share profits as such and an agreement to share profits not as profits, but as something else. These subtleties were attributable on the one hand to the establishment of the rule that persons who shared profits should be answerable for losses, and on the other to a disinclination to apply that principle to cases in which it was clear that those who shared the profits never intended to become partners *inter se*.

Benjamin *v.* Porteus.

First, as to gross returns. In *Benjamin* v. *Porteus* (*r*), an agreement was made between the plaintiff and a broker, by which the broker, instead of a commission on the sales effected by him for the plaintiff, was to have the whole proceeds of the sales less 2*s.* 6*d.* per lb., which was to be paid to the plaintiff. This was held not to give the broker such an interest in the goods sold by him as to render him an incompetent witness for the plaintiff, his principal, in an action for their price. This decision seems to have paved the way to others which went far beyond it. In *Dry* v. *Boswell* (*s*), Lord Ellenborough held that no *quasi*-partnership subsisted between the owner of a barge and the man who worked it, and who received for his wages half the gross earnings; and in *Mair* v. *Glennie* (*t*), where the captain of a ship was to be paid one-fifth of the profit or loss on an intended voyage, it was held that he and the owners of the ship were not *quasi*-partners. It had previously been decided in *Wilkinson* v. *Frazier* (*u*), that the crew of a whaling-ship who were to be paid by the owners a certain share of the oil brought home, were not partners with them.

Dry *v.* Boswell.

Mair *v.* Glennie.

Wilkinson *v.* Frazier.

The distinction between gross returns and profits (or, as they are sometimes called, gross profits and net profits), was acted upon by Mr. Baron Parke in *Heyhoe* v. *Burge* (*x*), when he told the jury "a person who shares gross profits is not a partner; but a person who shares net profits is *primâ facie* to be considered as a partner" (*x*).

Heyhoe *v.* Burge.

Distinction between sharing profits, and payments varying with them.

Next, as to the distinction between payments out of profits as such, and payments not out of them as such. The great enforcer of the distinction in question was Lord Eldon, who seems to have been led to make it by the impossibility of otherwise reconciling *Grace* v. *Smith* and *Bloxham* v. *Pell*. In *Ex parte Hamper* (*y*) his Lordship is reported to have said:—

Ex parte Hamper.

"It is clearly settled, though I regret it, that if a man stipulates that as the reward of his labour he shall not have a specific interest in the business, but a given sum of money even in proportion to a given quantum of the profits, that will not make him a partner; but if he agrees for a part of the profits as such, giving him a right to an account, though having no property in the capital, he is as to third persons a partner, and in a question with third persons no stipulation can protect him from loss."

(*r*) 2 H. Blacks. 590. See, too, *Dixon* v. *Cooper*, 3 Wils. 40.

(*s*) 1 Camp. 330; and see *Wish* v. *Small*, in the note there.

(*t*) 4 M. & S. 240. The expression profit or loss, in this case, must have been held equivalent to gross returns.

(*u*) 4 Esp. 182. See *ante*, p. 19, note (*x*).

(*x*) *Heyhoe* v. *Burge*, 9 C. B. 431; see ib. 440, 444.

(*y*) 17 Ves. 412.

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Other cases decided by his Lordship contain dicta to the same effect (*a*), and the distinction must be considered as settled in point of law. The latest case upon this subject is *Pott* v. *Eyton* (*b*). The defendant Eyton was concerned in a colliery, and the defendant Jones kept a shop for supplying the workmen at the colliery. Eyton built the shop; licenses to sell tea, &c., were taken in his name, and he paid for the goods supplied to the shop. Jones managed the shop business. Eyton received first seven and afterwards five per cent. on the amount of all sales to the workmen, and Jones had all the rest of the profits of the shop from whatever source derived. The question was whether Eyton and Jones were partners or *quasi*-partners. The jury found that there was no agreement to share profit and loss, and the Court of Common Pleas acted on the distinction taken in *Ex parte Hamper*, and on the distinction between profits and gross returns, and held that no partnership or *quasi*-partnership existed.

Pott *v.* Eyton.

Loans.

A loan of money to be repaid with interest, however exorbitant, did not constitute a *quasi*-partnership between the borrower and the lender (*c*) unless profits were expressly pointed at as the fund for payment (*d*).

2. *Modifications introduced by the House of Lords in Cox* v. *Hickman.*

Such was the state of the law when the case of *Cox* v. *Hickman* came before the House of Lords; and that tribunal, in effect, decided that persons who share the profits of a business do not incur the liabilities of partners unless that business is carried on by themselves personally or by others as their real or ostensible agents (*e*).

Cox *v.* Hickman.

The question in *Cox* v. *Hickman* (*f*) was substantially whether the scheduled creditors to a deed of arrangement, who were to be paid their debts out of the profits of their debtors' business, were liable to debts contracted by the trus-

(*a*) See *Ex parte Rowlandson*, 1 Rose, 89; *Ex parte Langdale*, 18 Ves. 300; *Ex parte Watson*, 19 ib. 461.

(*b*) 3 C. B. 32. See further as to this case, *infra*, § 2 (2).

(*c*) *Grace* v. *Smith*, 2 Wm. Blacks. 998.

(*d*) *Gilpin* v. *Enderby*, 5 B. & A. 954; *Fereday* v. *Hordern*, Jac. 144; *Bloxam* v. *Pell*, *ante*, p. 27. See as to the two first cases, *ante*, p. 16.

(*e*) *Cox* v. *Hickman*, 8 H. L. C. 268.

(*f*) *Hickman* v. *Cox*, 18 C. B. 617, and 3 C. B. N. S. 523; *Cox* v. *Hickman*, 8 H. L. C. 268. See, also, *The Stanton Iron Co.*, 21 Beav. 164; *Price* v. *Groom*, 2 Ex. 542, and *ante*, p. 21. *Owen* v. *Body*, 5 A. & E. 28; and *Janes* v. *Whitbread*, 11 C. B. 406, may also be referred to on the subject of partnership created by creditors' deeds; and as to the non-liability of inspectors for debts not contracted by them as principals, see *Redpath* v. *Wigg*, L. R. 1 Ex. 335; *Easterbrook* v. *Barker*, L. R. 6 C. P. 1.

tees in carrying on that business pursuant to the deed (*g*); and it was ultimately decided that they were not.

The Lords were unanimous in treating the matter before them as a mere question of agency, and in holding that the circumstances that the profits of the business were to be shared by the scheduled creditors was by no means sufficient to show that the trustees were their agents and authorised to act as such on their behalf (*h*).

Observations on the decision of the House of Lords.

In *Cox* v. *Hickman*, the persons whose liability was in question were only entitled to share profits to the amount of their respective debts, and this circumstance was greatly relied upon as distinguishing the case from *Waugh* v. *Carver*, and others of that class, in which the profits were shared to an indefinite extent. But it is plainly not consistent with the reasoning in *Cox* v. *Hickman* to hold that the mere fact that profits are shared indefinitely, raises an irrebuttable presumption that those who share them are the principals of those who make them. The circumstance that one person shares all the profits made by another, is no doubt an important element to be considered in determining the true relation in which those persons stand to each other; but it no more conclusively shows such relation to be one of agency, than it conclusively shows that the persons in question are truly partners *inter se*. In fact, although the House of Lords in deciding *Cox* v. *Hickman*, professed to overrule no previous authority, the effect of that decision has unquestionably been to put a great branch of partnership law on a substantially new footing. The following more recent decisions conclusively show this.

More recent decisions. Kilshaw *v.* Jukes.

In *Kilshaw* v. *Jukes* (*i*) it was held that a person who advanced money and supplied goods to two others on the terms of being repaid the advances and price of the goods out of the profits of a building speculation, if such profits should be sufficient for the purpose, was not liable to debts contracted by them for the purposes of the speculation.

(*g*) The defendants actually sued were two trustees, who were also scheduled creditors; one of them never acted as trustee, and the other had retired from the trusteeship before the debts in question were contracted. But all the judges agreed that there was no difference between the liability of the defendants and that of the other scheduled creditors.

(*h*) Baron Bramwell had taken the same ground. See 3 C. B. N. S. 552.

(*i*) 3 Best & Sm. 847.

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English, &c., Insurance Society.

In *The English and Irish Church and University Insurance Society* (*k*) it was held that the holders of policies of insurance who were entitled to be paid out of the funds of an insurance society not only the sums originally insured but also such bonuses as by the rules of the society might be added thereto out of the profits of the society, were not liable as partners with the members of the society either to the holders of other policies issued by it, or to its other creditors.

Bullen *v.* Sharp.

In *Bullen* v. *Sharp* (*l*), the whole profits of a son's business were assigned over to his father and another person upon trust, first to pay the father 500*l.* a year, to be increased to a sum equal to one-fourth of the profits when one-fourth thereof amounted to more than 500*l.* a year; secondly, to pay an annuity to the son; thirdly, to form a reserve fund for the benefit of the son; and fourthly, to pay the residue of the profits to the son. The Court of Common Pleas held the father liable for the engagements of the son upon the ground that the profits having been assigned to him, he had a direct interest in the business. On appeal, however, this decision was reversed, on the ground that the business was really the son's, and that the father's interest in it was not such as to render the son his agent for carrying it on.

Shaw *v.* Galt.

In *Shaw* v. *Galt* (*m*), it was held that a clerk, entitled to a fixed salary, and in addition thereto to one-third of the net profits of the business of his employers, was not liable to their creditors. The salary and share of profits were only intended as a remuneration for his services, and the profits were to be ascertained from balance-sheets prepared by the employers upon the principle theretofore adopted by them.

Holme *v.* Hammond.

In *Holme* v. *Hammond* (*n*), five persons agreed to become partners for seven years, and to share profits and losses equally, and they further agreed that if any partner died within the seven years, the survivors should continue the business and pay to the executors of the deceased partner the same share of profits which he would have had if living. One of the partners died; he had no capital in the firm, but on his

(*k*) 1 Hem. & M. 85. Compare *Re Albion Life Assur. Soc.*, 16 Ch. D. 83.

(*l*) L. R. 1 C. P. 86, reversing 18 C. B. N. S. 614.

(*m*) 16 Ir. Com. Law Rep. 357.

(*n*) L. R. 7 Ex. 218.

death the firm was indebted to him in respect of undrawn profits and other matters. After his death the business was carried on by the survivors; his executors took no part in the management of the business, but they claimed one-fifth of the profits made since his death, and they were furnished with accounts in which they were credited with such profits. The plaintiff sued the executors in respect of a contract made by the surviving partners after the death of the deceased partner, but it was held that the executors were not liable; for the surviving partners were not their agents, and although the case did not fall within the provisions of 28 & 29 Vict. c. 86, it was governed by the principles laid down in *Cox* v. *Hickman*.

Mollwo, March, & Co. v. Court of Wards.

Again, in *Mollwo, March, & Co.* v. *Court of Wards* (*o*), a person advanced large sums of money to merchants, and took as a security a charge on their business, with extensive powers of control, and stipulated for a large commission on their profits whilst anything remained due to him and for payment of his principal and twelve per cent. interest. The lender had not, in fact, taken any profits, and the above arrangement was afterwards varied by his taking a mortgage for his principal and interest. He was held not liable for debts contracted by them whilst the above agreement was in force. The Court held that the transaction was really a loan. It was urged in vain that even if there was no partnership the debtors were the agents of the creditor to earn the principal, interest, and commission to which he was entitled. But this contention very properly failed; there being no more reason for inferring agency than partnership from an agreement to share profits.

Observations on these cases.

There can be no doubt that in all these cases the decisions would have been the other way had they occurred before *Cox* v. *Hickman*; and they are particularly valuable as showing that the principles on which that case was decided by the House of Lords may now be safely relied upon, in opposition to the old rule which, before that important decision, was considered too firmly settled to be questioned. In fact, the strong tendency of the above decisions is to establish the doctrine that no

(*o*) L. R. 4 P. C. 419. Compare *Pooley* v. *Driver*, 5 Ch. Div. 458, noticed *infra*, p. 38.

person who does not hold himself out as a partner is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se*, or unless they are his agents (*p*); and, in the author's opinion, this is now the law (*q*). At the same time, persons may find that they are partners for all purposes, although they only intended to be so for purposes beneficial to themselves (*r*).

For the guidance, however, of those who may think that the writer has gone too far in representing the old law as completely superseded, the following more limited propositions are submitted as at least conclusively established, and as applicable even in cases not within 28 & 29 Vict. c. 86.

Effect of Cox *v.* Hickman.

1. That persons who share the profits of a business are, like other persons, only liable for the acts of themselves and of their real or ostensible agents.

2. That whether in any particular case the relation of principal and agent does or does not exist between one person who carries on a business and another person who shares its profits, depends not upon the mere fact that the business is carried on, more or less, for the benefit of the latter, but upon all the circumstances of the case.

3. That the relation of principal and agent is not constituted merely by an agreement which entitles one person to share the gross returns of a business or adventure conducted by another.

4. That the relation of principal and agent is not constituted merely by an agreement which entitles one person to be paid definite sums out of the profits made by another.

5. That the relation of principal and agent is not constituted merely by an agreement which entitles one person to be paid sums varying with the profits made by another.

6. That the relation of principal and agent is not constituted merely by the existence of a trust, entitling one person to profits made by another.

(*p*) As in *Steel* v. *Lester*, 3 C. P. D. 121.

(*q*) See Baron Bramwell's judgment in *Bullen* v. *Sharp*, L. R. 1 C. P. 86; *Holme* v. *Hammond*, L. R. 7 Ex. 218; *Mollwo, March, & Co.* v. *Court of Wards*, L. R. 4 P. C. 419. See also *Ex parte Tennant*, 6 Ch. D. 303.

(*r*) See *Pooley* v. *Driver*, 5 Ch. D. 458, noticed *infra*, p. 38.

7. That *primâ facie* the relation of principal and agent is constituted by an agreement entitling one person to share the profits made by another to an indefinite extent: but that this inference is displaced if it appears from the whole agreement that no partnership or agency was really intended.

8. That in these as in all other cases the courts will be astute to defeat fraud, and to hold partnerships to be created if they are intended, although the intention may be carefully concealed.

The 1st, 2nd, 4th, and 6th of these rules appear to be warranted by *Cox* v. *Hickman* and *Mollwo, March, & Co.* v. *Court of Wards;* the 3rd and 5th by older authorities, not touched by those decisions; the 7th is probably the most correct mode of expressing the effect of *Cox* v. *Hickman* and *Mollwo, March, & Co.* v. *Court of Wards* on *Waugh* v. *Carver*, and other cases of that class; the 8th speaks for itself, and is illustrated by *Pooley* v. *Driver* and *Ex parte Delhasse*, which will be noticed presently.

3. *The act of* 28 & 29 *Vict. c.* 86.

In order to amend the law by which persons sharing profits were held liable to losses, the act of 28 & 29 Vict. c. 86 was passed. This act (commonly called Bovill's act) is entitled "An Act to amend the law of Partnership." It received the Royal assent on the 5th of July, 1865, and enacts as follows:—

1. The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, *of itself*, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such.

2. No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall, *of itself*, render such servant or agent responsible as a partner therein, nor give him the rights of a partner (*s*).

(*s*) Quære if this deprives him of a right to an account? See *Harrington* v. *Churchward*, 6 Jur. N. S. 576. The object of the act was not to deprive the servant of his rights against his master, but to protect each from liability to third parties by reason of the acts of the other.

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28 & 29 Vict. c. 86.

3. No person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, *by reason only of such receipt*, be deemed to be a partner of or to be subject to any liabilities incurred by such trader.

4. No person receiving by way of annuity or otherwise a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall, *by reason only of such receipt*, be deemed to be a partner of or be subject to the liabilities of the person carrying on such business.

5. In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied (*t*).

Interpretation of "person."

6. In the construction of this act the word "person" shall include a partnership firm, a joint-stock company, and a corporation.

Upon the foregoing enactment it is to be observed—

Effect of the statute.

1. That it applies to an extremely limited number of cases, and leaves wholly untouched a large number of agreements of common occurrence, *e.g.*, all such as had to be dealt with in *Waugh* v. *Carver*, *Smith* v. *Watson*, *Cheap* v. *Cramond*, and *Cox* v. *Hickman*. All such cases, however, must now be dealt with on the principles laid down by the House of Lords in the last-named case (*u*).

2. That it in no way modifies the doctrine by which persons who hold themselves out as partners incur the liabilities of partners.

3. That to entitle a person lending money to the benefit of the act, there must be a contract in writing; and it seems that such contract must be signed (*x*).

4. That in the case of servants, agents, widows, and children,

(*t*) See *Ex parte Mills*, 8 Ch. 569; and *Re Stone*, 33 Ch. D. 541. But a secured creditor can sell or foreclose, as the case may be, even to the prejudice of other creditors. *Baddeley* v. *Consolidated Bank*, 34 Ch. D. 536.

(*u*) See *Holme* v. *Hammond*, L. R. 7 Ex. 218; *Mollwo, March, & Co.* v. *Court of Wards*, L. R. 4 P. C. 419.

(*x*) *Pooley* v. *Driver*, 5 Ch. D. 458, where, however, there was only a draft contract.

and of persons selling a goodwill, there is no necessity for any contract in writing.

5. That unless a retiring partner is brought within the 1st, 2nd, or 3rd section, he is in no better position than other persons.

6. That the persons within the 2nd and 3rd sections are not within the 5th.

7. That persons who lend money or sell a goodwill in consideration of a share of profits cannot, in respect of such loan or profits, compete with any other creditors upon a distribution of their debtors' assets (*y*).

8. That the 3rd section only applies to widows and children of deceased partners of traders : *i.e.*, it is presumed, of persons formerly liable to be adjudicated bankrupt as traders.

9. That the 5th section does not deprive the lender of his right to retain any security he may take for his money (*z*) : nor to foreclose such security (*a*).

10. That the act may be made an instrument of fraud, if a person is allowed to lend to the same person a small sum in consideration of a large share of profits, and a large sum in consideration of fixed interest. In such a case if a fraud were intended it would probably be defeated by holding the lender liable as a partner, or at least by holding him to be within the 5th section as to both loans. But where there is no fraud, a person who has advanced money under the act, and has also *bonâ fide* made other advances not under it, can on the bankruptcy of the borrower prove for the latter advances, although not for the former (*b*). A person, however, who lends money on the terms of sharing profits and then agrees to take a fixed rate of interest instead of them, is within the 5th section of the act and cannot prove in competition with other creditors (*c*).

11. That it is apparent from the words "*of itself*" and "*by reason only*" in the first four sections of the statute that it was not intended to relieve persons who are really partners (although dormant) from the liabilities incident to that position.

(*y*) *Ex parte Taylor*, 12 Ch. D. 366 ; *Ex parte Corbridge*, 4 Ch. D. 246.

(*z*) *Ex parte Sheil*, 4 Ch. D. 789.

(*a*) *Baddeley* v. *Consolidated Bank*, 34 Ch. D. 536.

(*b*) See *Ex parte Mills*, 8 Ch. 569.

(*c*) *Re Stone*, 33 Ch. D. 541.

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Cases not within the act.

Agreements intended to secure the benefit of the act to lenders of money are constantly framed with all sorts of clauses which expose them to the risks they are so anxious to avoid.

In *Baddeley* v. *Consolidated Bank* (*d*), a lender of money to a railway contractor on the security of his plant, and on the terms of receiving interest and a share of his profits, was held to be liable to his debts; the formal contract between the parties being in truth a device to conceal the fact that they were really partners.

In *Ex parte Delhasse* (*e*) it was held that a loan to a firm on the security of the business of the borrowers and to be repaid out of it, coupled with a power to dissolve their partnership, was not within the act.

In *Syers* v. *Syers* (*f*) the plaintiff lent the defendants money on the terms that they should execute a deed of partnership giving the plaintiff a share of the profits in the business of the defendants to be drawn up under the statute in question; and it was held that this agreement constituted the parties to it partners in the business.

Pooley v. Driver.

In *Pooley* v. *Driver* (*g*) a carefully drawn agreement intended to secure to the lender the benefit of the statute signally failed to do so. In that case A. and B. entered into partnership for fourteen years with a capital of 30,000*l.*, of which 10,000*l.* was to be raised by way of loan under the above act. The capital was to be divided into 60 shares of 500*l.* each, of which 20 were to belong to the persons advancing the 10,000*l.* in proportion to their advances. The net profits were to be also divided into 60 shares, of which 20 were to belong to the same persons in the same proportion. At the end of the partnership an account was to be taken in the usual way: the moneys advanced were to be returned; but if it appeared that the persons advancing the 10,000*l.* had received more than their shares of profits, the excess was to be refunded, but not

(*d*) 34 Ch. D. 536. The correspondence was relied upon to show the real truth.

(*e*) 7 Ch. D. 511.

(*f*) 1 App. Ca. 174.

(*g*) 5 Ch. D. 458. Compare this with *Mollwo, March, & Co.* v. *Court of Wards*, L. R. 4 P. C. 419, noticed *ante*, p. 33, and with *Ex parte Tennant*, 6 Ch. D. 303, where a father claimed to be a partner with his son contrary to the true meaning of an agreement framed to avoid a partnership.

to an amount exceeding their advances. C. advanced 2,500*l.* to A. and B. on the terms of an agreement, which incorporated the agreement between A. and B.; which provided for the employment of the capital (including C.'s advances) in the business, gave C. liberty to inspect and take copies of the partnership books, entitled him to five-sixtieths of the estimated annual profits of the business; and provided for a final account and repayment at the end of the partnership of the 2,500*l.*, unless it should appear that he had received more than his share of profits, in which case he was to refund the excess, not exceeding his 2,500*l.*

There was also a clause empowering A. and B. to pay out the 2,500*l.* in the event of C.'s bankruptcy, or of any dispute between the parties, and an arbitration clause. This agreement with C. was drawn up in writing, but remained in draft, and was never signed. But D. also advanced money on the same terms, embodied in a written agreement duly signed by him and A. and B. It was held by Jessel, M.R.: 1. That the unsigned draft agreement with C. was not a sufficient writing to bring the case within the statute; 2. That the signed agreement with D. did not entitle him to the protection of the statute; and 3, that, notwithstanding *Cox* v. *Hickman*, and that class of cases (*ante*, p. 30), both C. and D. were dormant partners, and liable as such for the debts of A. and B. The judgment in this case is very important, and well deserves attentive study. It proceeded upon the ground that partnership is *primâ facie* the result of participation in profits; and that the true result of the whole arrangement was that the advances were not real loans, but were in truth contributions of capital under colour of loans.

Observations on Pooley *v.* Driver.

One of the most remarkable features of this case was that, when the time arrived for the repayment of the advances it might be found that not only was there nothing to repay, but that the so-called lenders might have to refund part of what they had already received, even to the extent of their so-called loans (*h*). This practically amounted to a possible loss of their advances, and distinguished the case at once from a true

(*h*) See the clauses, 5 Ch. D. 463, 466, and the comment on them at p. 492.

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contract of loan; for in such a contract the money lent is to be repaid intact, and the only risk run is the insolvency of the borrower (*i*).

2. *By holding oneself out as a partner.*

Persons who hold themselves out as partners, incur the liabilities of partners.

The other mode in which a person not a partner becomes liable as if he were one, is by so conducting himself as to lead other people to suppose that he is willing to be regarded by them as if he were a partner in point of fact. The principle of this is obvious and satisfactory, and is well laid down by C. J. Eyre, in the great case of *Waugh* v. *Carver* (*k*). His Lordship there said:—

> "Now a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners, that A. is to contribute neither labour nor money, and, to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes as against all the rest of the world a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when, in fact, they lent it only to two of them, to whom without the others they would have lent nothing."

The doctrine that a person holding himself out as a partner and thereby inducing others to act on the faith of his representations, is liable to them as if he were in fact a partner, is nothing more than an illustration of the general principle of estoppel by conduct (*l*). It is therefore wholly immaterial whether the person holding himself out as a partner, does or does not share the profits or losses (*m*). Nay more, even if it

Effect of knowledge that a

(*i*) See *ante*, p. 16.

(*k*) *Waugh* v. *Carver*, 2 H. Blacks. 235. See *Scarf* v. *Jardine*, 7 App. Ca. 345, now the leading case on this subject. The principle will be found stated to the same effect in *Ex parte Watson*, 19 Ves. 461; *Ex parte Matthews*, 3 V. & B. 125; *De Berkom* v. *Smith*, 1 Esp. 29.

(*l*) As to which, see *Pickard* v. *Sears*, 6 A. & E. 469; *Freeman* v. *Cooke*, 2 Ex. 654; *Carr* v. *L. & N. W. Rail. Co.*, L. R. 10 C. P. 316.

(*m*) *Ex parte Watson*, 19 Ves. 461.

person who holds himself out as a partner is not a partner.

be known that he does not share either, still he may be liable. For although a person who lends his name may stipulate for an indemnity from those who use it, it by no means follows that he ought not to be liable to third parties merely because they are aware of such stipulation. His name does not induce credit the less on account of his right to be indemnified by others against any loss falling in the first instance on himself; and although, in the case supposed, he cannot be believed to be a *partner*, the lending of his name does justify the belief that he is willing to be responsible to those who may be induced to trust to him for payment (*n*).

Alderson v. Pope.

However, in *Alderson* v. *Pope* (*o*), Lord Ellenborough held, "that where there was a stipulation between A., B., and C., who appeared to the world as co-partners, that C. should not participate in the profit and loss, and should not be liable as a partner, C. was not liable as such to those who had notice of this stipulation, and that notice to one member of a firm was notice to the whole partnership." The report of this case states no more than what is here extracted, and the reader is left in doubt as to the meaning of the words "should not be liable as a partner." If these words meant that C. was to be indemnified by A. and B., the observations already made show, it is conceived, that the decision was erroneous. But if they meant that C. would not be liable at all to third parties for the acts of A. and B., then the question would arise whether this was not altogether inconsistent with C.'s conduct, and whether the maxim *protestatio facto contraria non valet* would not apply. In any point of view, the reported note of the case is unsatisfactory.

Effect of fraud

Moreover, if a person has been induced by promises of irresponsibility or by fraud to hold himself out as a partner with others, this circumstance does not relieve him from liability to third parties who have been induced by his conduct to trust

See, also, *Kirkwood* v. *Cheetham*, 2 Fos. & Fin. 798, where A. was B.'s agent, and A. held himself out as B.'s partner; both A. and B. were decided to be liable for goods supplied to A. for B. Compare *Hardman* v. *Booth*, 1 Hurls. & Colt. 803.

(*n*) See acc. *Brown* v. *Leonard*, 2 Chitty, 120.

(*o*) 1 Camp. 404, note.

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him as well as them, and who have had nothing to do with the promises or fraud practised upon him (*p*).

Observations on the phrase holding out.

The expression in *Waugh* v. *Carver*, "if he will lend his name as a partner he becomes as against all the rest of the world a partner," requires qualification; for the real ground on which liability is incurred by holding oneself out as a partner is, that credit has been thereby obtained. This was put with great clearness by Lord Wensleydale in *Dickinson* v. *Valpy* (*q*), in which he said,—"If it could have been proved that the defendant had held himself out to be a partner, not to the world, for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged, and gave credit to the defendant, upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff arising from his conduct as much as if he had stated to him directly and in express terms that he was a partner and the plaintiff had acted upon that statement" (*r*).

Dickinson *v.* Valpy.

What constitutes a holding out.

Further, a person may hold himself out or permit himself to be held out as a partner, and yet conceal his name. He may be referred to as a person who does not wish to have his name disclosed; and if he is so referred to by his authority he will incur liability as a *quasi*-partner (*s*). But it follows, from the principles above explained, that a person cannot be liable on a contract, on the ground that he held himself out as a partner, unless he did so before the contract was entered

(*p*) See *Collingwood* v. *Berkeley*, 15 C. B. N. S. 145; *Maddick* v. *Marshall*, 16 C. B. N. S. 387, and 17 ib. 829; *Ellis* v. *Schmæck*, 5 Bing. 521; *Ex parte Broome*, 1 Rose, 69. It will be seen in the volume relating to Companies that persons induced to join companies, by the false and fraudulent statements of directors, cannot on that ground escape from liability to creditors.

(*q*) 10 B. & C. 140. See, also, *Ford* v. *Whitmarsh*, Hurls. & Walmesley N. P. Reports, 53. Lord Blackburn, in *Scarf* v. *Jardine*, 7 App. Ca. 357, expressed the same idea in different words.

(*r*) See, too, *Vice* v. *Anson*, 7 B. & C. 409, where the defendant held herself out as a partner, but not to the plaintiff.

(*s*) *Martyn* v. *Gray*, 14 C. B. N. S. 824. See, also, *Maddick* v. *Marshall*, 16 ib. 387, and 17 ib. 829.

into (*t*). It also follows that no person can be fixed with liability on the ground that he has been held out as a partner, unless two things concur, viz., first, the alleged act of holding out must have been done either by him or by his consent (*u*), and secondly, it must have been known to the person seeking to avail himself of it (*x*). In the absence of the first of these requisites, whatever may have been done cannot be imputed to the person sought to be made liable; and in the absence of the second, the person seeking to make him liable has not in any way been misled (*y*).

Newsome *v.* Coles.

An instructive case on this head is *Newsome* v. *Coles* (*z*). There a firm of four partners carried on business under the name of Thomas Coles and Sons. Thomas Coles died, but the three sons carried on business in the old name for a few years; they then dissolved partnership, two of them establishing a new business and the other continuing the old business alone, but in the old name. The dissolution was advertised in the *Gazette*. The plaintiff, who did not know of the dissolution, but had had no dealings with the firm before its dissolution, sought to make all three brothers liable on a bill accepted after the dissolution by the one brother, who continued to trade under the old name, and had accepted the bill in that name. The two other brothers, however, had never held themselves out to the plaintiff that they were partners in any firm of the name of Thomas Coles and Sons: they had done nothing to authorise the use of that name after the dissolution; at the same time they knew that the old name was still used, and they had taken no steps to prevent such use. This, however, it was held they were not bound to do, and the plaintiff failed. The case would have been decided differently if the plaintiff had been a customer of the firm before its dissolution, for in that

Continued use of old name after retirement of partner.

(*t*) *Baird* v. *Planque*, 1 Fos. & Fin. 344.

(*u*) In *Fox* v. *Clifton*, 6 Bing. 776; *Edmundson* v. *Thompson*, 2 Fos. & Fin. 564, and 8 Jur. N. S. 235, the actions failed on this ground. See, also, *Cornelius* v. *Harrison*, 2 Fos. & Fin. 758.

(*x*) *Pott* v. *Eyton*, 3 C. B. 32, failed on this ground.

(*y*) See, also, the American case, *Thompson* v. *First National Bank of Toledo*, 4 Davis Sup. Ct. Rep. 531.

(*z*) 2 Camp. 617.

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case he would have been justified in supposing that there had been no change in the firm (*a*).

Application of doctrine to inchoate partnerships, &c.

A person who holds himself out as willing to become a partner does not incur liability by so doing. Although a person who represents himself to be a partner, is properly held liable as a partner to persons who have acted on the faith of his being so, it would be in the highest degree unjust to confound a representation by a person that he intended to become a partner, with a representation that he was one in point of fact, and to hold him as much liable to third parties for the one representation as for the other. This distinction was recognised and acted on in *Bourne* v. *Freeth* (*b*), where the defendant who had signed a prospectus containing the terms on which it was proposed to form a company, was held not to have held himself out as a shareholder therein.

Holding out, a question of fact.

Whether a defendant has or has not held himself out to the plaintiff is in every case a question of fact, not a question of law, and the consequence is, that there is great apparent conflict in the cases on this head. In *Wood* v. *The Duke of Argyll* (*c*), and in *Lake* v. *The Duke of Argyll* (*d*), the very same acts were relied on as a holding out, viz., being advertised as president of a society, acting as president at a meeting, and signing some resolutions then agreed upon; in the first case, this was considered not sufficient and the defendant had a verdict; whilst, in the last, it was considered to be sufficient and the plaintiff had a verdict. The jury was asked whether the defendant had held himself out as intending to pay for the work charged, and the question was answered in the affirmative in the one case, and in the negative in the other, and the Court in each case refused to disturb the verdict.

Defendant held out by others.

The most difficult cases of this class occur where the defendant has not held *himself* out, but where he has been held out by others, and he alleges that they had no authority to do so. If they had no such authority he is not liable (*e*). But express

(*a*) See the note in 2 Camp. 620. See, also, *Carter* v. *Whalley*, 1 B. & Ad. 11, *infra*, Bk. II. c. 2, § 3.

(*b*) 9 B. & C. 632. See, too, *Reynell* v. *Lewis*, 15 M. & W. 517, and *Wyld* v. *Hopkins*, ib. Compare *Martyn* v. *Gray*, 14 C. B. N. S. 824.

(*c*) 6 Man. & Gr. 928.

(*d*) 6 Q. B. 477.

(*e*) *Ante*, p. 43, note (*u*).

authority is not necessary; authority may be inferred from his conduct (*f*); and if a person has by signing prospectuses or allowing his name to be put to them (*g*), or by being party to resolutions (*h*), or by his own statements, though not intended to be repeated (*i*), or has in any other way so conducted himself as in fact to have authorised the holding out which he repudiates, he will not escape liability.

Observations on the liabilities of promoters of companies, &c.

It cannot be too carefully borne in mind in all cases of this description that a person who is neither a partner nor a *quasi*-partner, is liable on the general principles of agency, for acts done by others with his authority express or implied. If therefore, directors, members of committees, managers of clubs, or any other persons not in partnership, pass resolutions that work shall be done or goods supplied, they authorise whatever may be done in pursuance of such resolutions, and they are the persons naturally looked to, and *primâ facie* liable to pay for what may be so done (*k*). The question in these cases is simply one of agency, and the question of partnership or no partnership is immaterial, save that if a partnership can be established, the liability of one member for the acts of the others in the prosecution of their common object, follows almost as a matter of course.

Holding out by retiring partner.

In cases where partners carry on business under a name which does not disclose who the partners are, the doctrine of holding out must be applied with care. Suppose A. and B. carry on business under the name of X. & Co. Neither A. nor B. holds himself out as a member of that firm to any one who does not know their connection with it (*l*). If, therefore, A. retires from the firm, and gives no notice of his retirement, he will still be liable to old customers who knew of his connection with X. & Co., and who continue to deal with it on

(*f*) See the last two cases.

(*g*) *Collingwood* v. *Berkeley*, 15 C. B. N. S. 145.

(*h*) *Maddick* v. *Marshall*, 16 C. B. N. S. 387, and 17 ib. 829.

(*i*) *Martyn* v. *Gray*, 14 C. B. N. S. 824.

(*k*) See the cases in the last five notes, and *Chapleo* v. *Brunswick Build. Soc.*, 6 Q. B. D. 696; *Firbank's Ex.* v. *Humphreys*, 18 Q. B. D. 54; *Doubleday* v. *Muskett*, 7 Bing. 110; *Braithwaite* v. *Skafield*, 9 B. & C. 401; *Burls* v. *Smith*, 7 Bing. 705.

(*l*) See *Newsome* v. *Coles*, *ante*, p. 43.

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Scarf *v.* Jardine.

the faith that A. is still a member of it; but A. will incur no liability to new customers of X. & Co. who never heard of him (*m*). Further, if on A.'s retirement C. joins B., and B. and C. carry on business as X. & Co., even an old customer of X. & Co. who goes on dealing with it without notice of A.'s retirement or C.'s admission, cannot truly say that A. ever held himself out as partner with C., or with both B. and C.; and, consequently, even an old customer cannot maintain an action against A., B. and C. jointly, for a debt contracted by X. & Co. after A.'s retirement. The old customer can, in the case supposed, sue A. and B. on the ground that he dealt with X. & Co. on the faith of A. and B. being still the members of that firm; or he can sue B. and C. on the ground that they are his real debtors; but he must elect between A. and B. on the one hand and B. and C. on the other; he cannot (in the case supposed), sue A., B. and C. on the ground that B. and C. are in truth X. & Co., and that A. is estopped from denying that he is a member of that firm. This was decided in *Scarf* v. *Jardine* (*n*). The case would be otherwise if A. and B. carried on business in their own names, and A. retired and C. came in, and if B. and C. carried on business with A.'s consent under the name of A., B. and C. In such a case A. would hold himself out as in partnership with both B. and C., and would be estopped from denying it as against any one dealing with the new firm on the faith of A. being a member of it.

Further, if the old customer did not know of A.'s retirement, but did know that C. had become a member of X. & Co., such customer would, it is apprehended, be entitled to sue A., B. and C. jointly for a debt contracted by X. & Co. after A.'s retirement and C.'s admission (*o*).

Holding out by surviving partner.

If a partner dies, and the surviving partners continue the old business in the old name, this will not have the effect of rendering the estate of the deceased liable, even to old

(*m*) See *Newsome* v. *Coles*, *ante*, p. 43.

(*n*) 7 App. Ca. 345. This case will be referred to hereafter when considering the liability of retired partners.

(*o*) *Scarf* v. *Jardine* is not an authority against this proposition, nor are Lord Selborne's observations in 7 App. Ca. 350, as the author understands them.

customers or correspondents of the firm, for acts done by the survivors after the death of their late co-partner. The doctrine of holding out has never been applied to such a case, and the executor of the deceased incurs no liability by the continued use of the old name (*p*). Even if the executor is the surviving partner using the old name, that will not make any difference; for although as executor he can give a lien on his testator's estate, ordinary debts contracted by him do not charge it (*q*).

Torts.

Stables *v.* Eley.

The doctrine of holding out only applies in favour of persons who have dealt with a firm on the faith that the person whom they seek to make liable is a member of it (*r*). The doctrine is entirely misapplied when it is extended beyond the principle on which it rests. For example, it has no application to actions of tort arising from the negligent conduct of a firm where no trust has been put in it. In *Stables* v. *Eley* (*s*), a retired partner, whose name was on a cart, was held liable for the negligence of its driver. But although in that case there may have been evidence to go to the jury that the defendant was liable, proof by him that the driver was not his servant would have rendered him not liable.

(*p*) See *Webster* v. *Webster*, 3 Swanst. 490; *Devaynes* v. *Noble* (*Houlton's case*), 1 Mer. 616; *Vulliamy* v. *Noble*, 3 Mer. 614.

(*q*) See *Farhall* v. *Farhall*, 7 Ch. 123; *Owen* v. *Delamere*, 15 Eq. 134; but see *Vulliamy* v. *Noble*, 3 Mer. 614. See further on this subject, *infra*, Bk. IV. c. 1, § 2.

(*r*) See *Scarf* v. *Jardine*, 7 App. Ca. 357, and *ante*, p. 42.

(*s*) *Stables* v. *Eley*, 1 C. & P. 614. See Pollock on Partn. ed. 3, p. 25, where this blunder was first pointed out.

SECTION III.—OF SUB-PARTNERSHIPS.

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Sub-partnerships.

A sub-partnership is as it were a partnership within a partnership: it pre-supposes the existence of a partnership to which it is itself subordinate. An agreement to share profits only constitutes a partnership between the parties to the agreement. If, therefore, several persons are partners and one of them agrees to share the profits derived by him with a stranger, this agreement does not make the stranger a partner in the original firm. The result of such an agreement is to constitute what is called a *sub-partnership*, that is to say, it makes the parties to it partners *inter se;* but it in no way affects the other members of the principal firm. In the language of Civilians, *Socius mei socii, socius meus non est* (*t*). In *Ex parte Barrow* (*u*), Lord Eldon puts the law on this subject very clearly: "I take it," he says, "to have been long since established, that a man may become partner with A. where A. and B. are partners and yet not be a member of that partnership which existed between A. and B. In the case of Sir Chas. Raymond, a banker in the city, a Mr. Fletcher agreed with Sir Chas. Raymond that he should be interested so far as to receive a share of his profits of the business, and which share he had a right to draw out from the firm of Raymond & Co. But it was held that he was no partner in that partnership; had no demand against it; had no account in it; and that he must be satisfied with a share of the profits arising and given to Sir Chas. Raymond" (*x*).

Socius mei socii, socius meus non est.

Liability to creditors.

Since the decision of the House of Lords in *Cox* v. *Hickman* (*ante*, pp. 30—35), a sub-partner cannot be held liable to the creditors of the principal firm by reason of his participation in the profits thereof (*y*).

(*t*) See Pothier, Partn. § 91.

(*u*) 2 Rose, 252.

(*x*) See, too, *Bray* v. *Fromont*, 6 Madd. 5; *Ex parte Dodgson*, Mont. & M'Ar. 445.

(*y*) See on this subject the Scotch case of *Fairholme* v. *Marjoribanks*, 3 Ross, L. C. on Com. Law, 697.

SECTION IV.—OF GENERAL AND PARTICULAR PARTNERSHIPS.

Universal partnerships.

It is customary for writers on partnership law, to divide partnerships into universal, general, and particular (or special or limited), according to the extent of the contract entered into by the members. The classification is traceable to a passage in the Digest—"*Societates contrahuntur sive universorum bonorum, sive negotiationis alicujus, sive vectigalis, sive etiam rei unius*" (*z*)—and is not worth enlarging upon, except for the purpose of distinguishing cases in which persons are partners in some trade or business generally, from those in which they are partners in some particular transaction or adventure only.

Partnership in one particular transaction only.

If persons who are not partners agree to share the profits and loss, or the profits, of one particular transaction or adventure, they become partners as to that transaction or adventure, but not as to anything else (*a*). For example, if two solicitors, who are not partners, are jointly retained to conduct litigation in some particular case, and they agree to share the profits accruing therefrom, they become partners so far as the business connected with that particular case is concerned, but no further (*b*). So a partnership may be limited to the working of some particular patent (*c*); or to the working of it in some particular place or district (*d*). In all such cases as these, the rights and liabilities of the partners are governed by the same principles as those which apply to ordinary partnerships (*e*); but such rights and liabilities are necessarily less extensive than those of persons who have entered into less limited contracts. The extent to which persons can be considered as partners, depends entirely on the agreement into which they have entered and upon their conduct.

(*z*) Dig. xvii. tit. 2 (*pro socio*), l. 5 pr.

(*a*) See *De Berkom* v. *Smith*, 1 Esp. 29; *Heyhoe* v. *Burge*, 9 C. B. 431; *Smith* v. *Watson*, 2 B. & C. 401; see as to partnerships in profits only, *ante*, pp. 13, 14.

(*b*) *Robinson* v. *Anderson*, 20 Beav. 98, and 7 De G. Mac. & G. 239; *M'Gregor* v. *Bainbrigge*, 7 Ha. 164.

(*c*) As in *Lovell* v. *Hicks*, 2 Y. & C. Ex 481.

(*d*) As in *Ridgway* v. *Philip*, 1 Cr. M. & R. 415.

(*e*) See *Reid* v. *Hollinshead*, 4 B. & C. 867, and the cases cited in notes (*a*) and (*b*).

SECTION V.—OF CLUBS AND SOCIETIES NOT HAVING GAIN FOR THEIR OBJECT.

Societies not having gain for their object.

It follows from the propositions established in the foregoing pages, that 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 other's acts. It was held in *Caldicott* v. *Griffiths* (*f*), that the members of "The Midland Counties Guardian Society for the protection of Trade" were not partners *inter se*; and in *Flemyng* v. *Hector* (*g*) that the members of the "Westminster Reform Club" were not partners as against third persons (*h*). Such associations, although they consist of more than twenty members, need not be registered under the Companies Acts, 1862 (*i*). It is a mere mis-use of words to call such associations partnerships (*j*); and if liabilities are to be fastened on any of their members it must be by reason of the acts of those members themselves (*k*), or by reason of the acts of their agents; and the agency must be made out by the person who relies on it, for none is implied by the mere fact of association (*l*).

(*f*) 8 Ex. 898. See, too, *R.* v. *Whitmarsh*, 15 Q. B. 600; *Bear* v. *Bromley*, 18 ib. 271, as to their not requiring registration under the repealed act, 7 & 8 Vict. c. 110.

(*g*) 2 M. & W. 172.

(*h*) See, too, *Todd* v. *Emly*, 8 M. & W. 505; *The St. James's Club*, 2 De G. Mac. & G. 383.

(*i*) *Re Siddall*, 29 Ch. D. 1. They may be wound up under the act, as will be seen in the volume on that subject.

(*j*) See *ante*, p. 2. *R.* v. *Robson*, 16 Q. B. D. 137. In *Lloyd* v. *Loaring*, 6 Ves. 773, *the Caledonian Lodge of Freemasons*, and in *Silver* v. *Barnes*, 6 Bing. N. C. 180, and *Beaumont* v. *Meredith*, 3 V. & B. 180, friendly societies were called partnerships. In *Minnitt* v. *Lord Talbot*, L. R. Ir. 1 Ch. D. 143, persons who had advanced money to add to and improve a club were held to have a lien on the property for their money.

(*k*) As in *Cross* v. *Williams*, 7 H. & N. 675, where the commandant of a rifle corps was held liable for all uniforms he had ordered.

(*l*) Compare *Flemyng* v. *Hector*, 2 M. & W. 172, and *Wood* v. *Finch*, 2 Fos. & Fin. 447, where the agency was not established, with *Luckombe* v. *Ashton*, 2 Fos. & Fin. 705; *Cockerell* v. *Aucompte*, 2 C. B. N. S. 440; *Burls* v. *Smith*, 7 Bing. 705, and *Delauney* v. *Strickland*, 2 Stark. 416, where the agency was estal-

Upon the ground that there is neither community of profit nor community of loss, it has been held that no partnership subsists between the members of a mutual insurance society, in which each, in consideration of a payment made to him, underwrites a policy for a stipulated sum. A policy so underwritten is neither more nor less than a number of separate contracts, whereby each underwriter agrees, on a given event, to pay the whole or a proportionate part of the sum written against his name. In such a society there is no joint stock; the members of it enter into no joint contract: but each is alone liable for any loss which may happen to the insured, according to the terms of the contract into which each for himself has entered (*m*).

Societies in which each member acts for himself only.

With respect to industrial and provident societies, see 39 & 40 Vict. c. 45.

SECTION VI.—OF CO-OWNERSHIP.

No partnership necessarily subsists amongst persons to whom property descends, or is given jointly or in common; and even if several persons agree to buy property, to hold jointly or in common, although by the purchase they become co-owners (*n*), they do not become partners unless that also was their intention (*o*).

Co-owners not co-partners.

lished. In *Luckombe* v. *Ashton*, and *Burls* v. *Smith*, the defendant was a member of the managing committee. This was not the case in *Cockerell* v. *Aucompte*, or *Delauney* v. *Stricklund*. See, too, *Thomas* v. *Edwards*, 2 M. & W. 215.

(*m*) See *Strong* v. *Harvey*, 3 Bing. 304; *Redway* v. *Sweeting*, L. R. 2 Ex. 400; *Gray* v. *Pearson*, L. R. 5 C. P. 568; *Andrews' & Alexander's case*, 8 Eq. 176; and as to suits between the members of such societies, *Bromley* v. *Williams*, 32 Beav. 177; *Harvey* v. *Beckwith*, 4 N. R. 90 and 298; and 12 W. R. 819 and 896.

(*n*) As to whether joint purchasers become tenants in common, or joint tenants, see *Lake* v. *Gibson*, 1 Eq. Ca. Ab. 290; *Aveling* v. *Knipe*, 19 Ves. 441; *Crossfield* v. *Such*, 8 Ex. 825; *Harris* v. *Fergusson*, 16 Sim. 308; *Robinson* v. *Preston*, 4 K. & J. 505; *Bone* v. *Pollard*, 24 Beav. 283; *Harrison* v. *Barton*, 1 J. & H. 287, in which the admissibility of parol evidence on the point was much discussed. In *French* v. *Styring*, 2 C. B. N. S. 357, *ante*, p. 18, the race-horse was clearly held in common, the owners having become such at different times and by different titles.

(*o*) See *Kay* v. *Johnston*, 21 Beav. 536. Whether they intended to become partners or not may of course

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Co-ownership and co-partnership compared.

Speaking generally, and excluding all exceptional cases, the principal differences between co-ownership and partnership may be stated as follows:

1. Co-ownership is not necessarily the result of agreement. Partnership is.

2. Co-ownership does not necessarily involve community of profit or of loss. Partnership does.

3. One co-owner can, without the consent of the others, transfer his interest to a stranger, so as to put him in the same position as regards the other owners as the transferor himself was before the transfer. A partner cannot do this.

4. One co-owner is not as such the agent real or implied of the others. A partner is.

5. One co-owner has no lien on the thing owned in common for outlays or expenses, nor for what may be due from the others as their share of a common debt. A partner has.

6. One co-owner of land is entitled to have it divided between himself and co-owners, but not (except by virtue of a recent statute) to have it sold against their consent. A partner has no right to partition in specie, but is entitled, on a dissolution, to have the partnership property, whether land or not, sold, and the proceeds divided.

7. As between the real and personal representatives of a deceased co-owner of freehold land, the equitable as well as the legal interest in his share is real estate; whilst as between the real and personal representatives of a deceased partner, the equitable interest in his share of partnership freehold property is treated as personal estate, although the legal interest in it is real estate.

8. Co-ownership not necessarily existing for the sake of gain, and partnership existing for no other purpose, the remedies by way of account and otherwise which one co-owner

be doubtful, as in *Sharpe* v. *Cummings*, 2 Dowl. & L. 504, where two persons hired a field wherein to graze their cattle. This subject will be adverted to hereafter when treating of partnership property. Pothier has an appendix on the subject at the end of his essay on partnership; but the appendix is omitted from Mr. Tudor's translation of that essay. See further on this subject the last chapter in Story on Partnership.

has against the others are in many important respects different from, and less extensive than, those which one partner has against his co-partners (*p*).

Co-owners sharing profits.

When, however, co-owners of property employ it with a view to profit, and divide the profit obtained by its employment, the difference if any between them and partners becomes very obscure. The point to be determined is whether from all the circumstances of the case, an agreement for a partnership ought to be inferred; but this is often an extremely difficult question.

If each owner does nothing more than take his share of the gross returns obtained by the use of the common property, partnership is not the result. On the other hand if the owners convert those returns into money, bring that money into a common stock, defray out of it the expenses of obtaining the returns, and then divide the net profits, partnership is created in the profits if not also in the property which yields them. Many perplexing cases may be imagined intermediate between those here put as examples, but the following illustrations will, it is hoped, enable the reader to appreciate the distinction in question.

Joint purchasers of goods for re-sale.

If several persons jointly purchase goods for re-sale, with a view to divide the profits arising from the transaction, a partnership is thereby created (*q*). But persons who join in the purchase of goods, not for the purpose of selling them again and dividing the profits, but for the purpose of dividing the goods themselves, are not partners and are not liable to third parties as if they were. *Coope* v. *Eyre* (*r*) is a leading case in support of this proposition. There an agreement was come to that one person should purchase oil and then divide it amongst himself and others, they paying him their proportion of the price. The oil was bought accordingly, and the purchaser becoming bankrupt, the seller sought to make the other parties to the agreement pay for the oil. But it was held that the purchaser purchased as a principal and not as an agent, and that as there was no community of profit or loss, the persons amongst whom the oil was to be divided could not be

Coope v. Eyre.

(*p*) See *infra*, as to this.

(*q*) *Reid* v. *Hollinshead*, 4 B. & C. 867.

(*r*) 1 H. Blacks. 37.

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made liable as partners or *quasi*-partners. In *Hoare* v. *Dawes* (*s*) there was a similar agreement, and Lord Mansfield thought at first that there was a *quasi*-partnership, but he and Willes, Ashhurst, and Buller, JJ., ultimately decided that there was not, there being no agreement to share profit or loss, and there being no pretence for holding the purchasers liable for the acts of each other by reason of their holding themselves out as partners.

Hoare *v.* Dawes.

Gibson *v.* Lupton.

So in *Gibson* v. *Lupton* (*t*), two persons joined in the purchase of some wheat with the intention of dividing and paying for it equally, and it was held that as there was no joint interest in profit or loss they could not be considered partners, either as between themselves or as regarded third parties.

Part-owners sharing the produce of their property.

Moreover, part-owners who divide what is obtained by the use or employment of the thing owned, are not thereby constituted partners. For example, if two tenants in common of a house let it and divide the rent equally amongst them, they are not partners, although they may pay for repairs out of the rent before dividing it (*u*). So two persons who are tenants in common of a race-horse, and share his winnings on the one hand, and the expenses of his keep on the other, are not partners, but co-owners only (*x*). So part-owners of ships are not usually partners (*y*), although they may be partners as well as part-owners, as was the case in *Campbell* v. *Mullett* (*z*).

Co-owners of mines.

So again with respect to mines and quarries. Tenants in common or joint tenants of a mine or quarry may or may not be partners; and the mine or quarry itself may or may not be part of a common stock. But it is highly inconvenient, if not altogether impossible, for co-owners of a mine or quarry to work it themselves without becoming partners, at least in the

(*s*) 1 Doug. 371.

(*t*) 9 Bing. 297.

(*u*) See *per* Willes, J., in the case cited in the next note. See, also, *Lyon* v. *Knowles*, 3 B. & Sm. 556, where the gross receipts of a theatre were divided; and *London Financial Assoc.* v. *Kelk*, 26 Ch. D. 107.

(*x*) *French* v. *Styring*, 2 C. B. N. S. 357; *quære*, whether there was in this case a partnership in the *profits?* It would seem not; the agreement being to divide the winnings as gross returns. See *ante*, p. 18.

(*y*) *Helme* v. *Smith*, 7 Bing. 709; *Ex parte Young*, 2 V. & B. 242; *Ex parte Harrison*, 2 Rose, 76; *Green* v. *Briggs*, 6 Hare, 395.

(*z*) 2 Swanst. 551. See ib. p. 575.

profits of the mine; and persons who work a mine or quarry in common are regarded rather as partners in trade than as mere tenants in common of land (*a*).

Three cases have here to be considered:—

Co-owners partners in profits and in mine.

1. The co-owners may be partners not only in the profits but also in the mine itself. The co-owners are then partners to all intents and purposes, and their mutual rights and obligations are determined by the law of partnership as distinguished from the law of co-ownership (*b*).

Co-owners not partners at all.

2. The co-owners may not be partners at all; neither in the profits nor in the mine. Their mutual rights and obligations are then determined by the law of co-ownership as distinguished from the law of partnership. In this case each owner is entitled to an account of what the others have got from the mine more than their share (*c*); and to transfer his share in the mine without the consent of the other owners (*d*); and to have a partition made of the mine between him and them. But the writer conceives that in the case now supposed no owner is entitled to have the mine sold against the consent of the others (*e*). Whether, if the co-owners cannot agree as to the mode of working the mine, an action will lie for the appointment of a receiver and manager, is not settled. Lord Eldon in *Jefferys* v. *Smith* (*f*), is generally understood to have intimated that it will; but the case before him was not of the description now under discussion, being one in which the mines were worked in partnership; and in a recent and care-

(*a*) See *Jefferys* v. *Smith*, 1 Jac. & W. 298; *Crawshay* v. *Maule*, 1 Swanst. 495; *Fereday* v. *Wightwick*, 1 R. & M. 45.

(*b*) There is no authority for saying that in this case one of the partners can in the absence of a special agreement or custom, assign his share without the consent of the other partners. That in this case the right is to a sale, and not to a partition of the mine, see *Wild* v. *Milne*, 26 Beav. 504; *Crawshay* v. *Maule*, 1 Swanst. 495; *Lees* v. *Jones*, 3 Jur. N. S. 954.

(*c*) *Denys* v. *Shuckburgh*, 4 Y. & C. Ex. 42.

(*d*) *Bentley* v. *Bates*, 4 Y. & C. Ex. 182.

(*e*) *I.e.*, except under the Act 31 & 32 Vict. c. 40, enabling a sale to be made in lieu of partition. See *Steward* v. *Blakeway*, 4 Ch. 603, and 6 Eq. 479.

(*f*) 1 J. & W. 302. *Wynget* v. *Heathcote*, cited in 4 Y. & C. Ex. 187, supports the same view, but the circumstances of the case are not sufficiently known.

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fully considered case the contrary rule was treated as more correct (*g*).

Co-owners partners in profits only.

3. The co-owners of a mine may work it together, bring the produce into a common fund, and be partners in the profits of the mine but not in the mine itself. In this case the mutual rights and obligations of the owners are determined partly by the law of partnership and partly by the law of co-ownership, and some curious anomalies are the consequence. The most important of these are as follows :—

1. Each co-owner may transfer his interest in the mine and in the partnership working it, without the consent of the other owners (*h*).

2. Each co-owner is entitled to maintain an action for an account against the others without seeking for a dissolution of the partnership (*i*).

3. Upon a dissolution of the partnership, the mine itself, not being partnership property, must be divided between its several owners and not be sold (*k*) : unless under the statute enabling sales to be made in lieu of partition (*l*).

4. As between the real and personal representatives of a deceased partner, his share of the mine will be real and not personal estate (*m*).

5. With a view to a dissolution the court will, if necessary, appoint a receiver and manager to carry on the mine for the benefit of all parties interested (*n*).

6. The obligation of each co-owner to account to the

(*g*) *Roberts* v. *Eberhardt*, Kay, 148. Where the mine has been worked in partnership, and the partnership has been dissolved, and the mine ordered to be sold, an interim receiver and manager will, if necessary, be appointed, *Lees* v. *Jones*, 3 Jur. N. S. 954.

(*h*) *Bentley* v. *Bates*, 4 Y. & C. Ex. 182 ; *Crawshay* v. *Maule*, 1 Swanst. 517-9.

(*i*) *Bentley* v. *Bates*, 4 Y. & C. Ex. 182.

(*k*) *Steward* v. *Blakeway*, 4 Ch. 603, and 6 Eq. 479. A sale was decreed in the cases referred to, *ante*, note (*b*), but in them the mine was a partnership asset. Consider the analogous case of a ship.

(*l*) 31 & 32 Vict. c. 40.

(*m*) *Steward* v. *Blakeway*, *ubi sup.*

(*n*) *Roberts* v. *Eberhardt*, Kay, 148 ; *Lees* v. *Jones*, 3 Jur. N. S. 954 ; *Jefferys* v. *Smith*, 1 J. & W. 302 ; *Rowe* v. *Wood*, 2 ib. 553 ; *Wynget* v. *Heathcote*, cited 4 Y. & C. Ex. 187. Whether a receiver and manager will be appointed if no dissolution is sought, see the judgment in *Roberts* v. *Eberhardt*.

others, is the same as that of one partner to account to his co-partners, and much more extensive therefore than the obligation which exists in a case of mere co-ownership. The lien which each partner has on the shares of his co-partners for what is due from them to the partnership extends to cases of this 3rd class (*o*); as does also the obligation which one partner is under to account to his co-partners for benefits he may have received in respect of the common property. It has been decided that where two tenants in common of a mine construct a shaft at their own expense in land belonging to one of them exclusively, money paid by a stranger for the use of that shaft belongs to both tenants and not exclusively to him in whose land the shaft is constructed (*p*).

Note on the remedies available by one co-owner against the others.

In order still further to understand the differences between co-ownership and co-partnership it is necessary to compare the rights and remedies of co-owners against each other with the corresponding rights and remedies of partners. The rights and remedies of partners *inter se*, will be fully investigated hereafter; but as there is no compendious summary of the rights and remedies of co-owners *inter se*, the following note is here appended.

The obligation of a partner to account with his co-partner arises *ex contractu*, and this obligation is not confined to the partners themselves, but devolves, with its correlative right, upon their respective representatives. The obligation of one co-owner to account with the other for the profits which may have arisen from the common property cannot be based upon contract where no contract has been entered into; but it by no means follows, that because there is no contract, express or tacit, to share profits, each co-owner ought to be entitled to get what he can and to keep what he may get. This was seen plainly enough by the Roman lawyers, who properly held an obligation to arise *quasi ex contractu*, and who found no difficulty in declaring that every co-owner ought to account to the others for the profits received by himself, and to contribute with them to the expenses properly incurred for the common benefit (*q*). Our ancestors, however, seem to have taken a different view of the matter.

(*o*) *Fereday* v. *Wightwick*, 1 R. & M. 45; *Roberts* v. *Eberhardt*, Kay, 148; *Crawshay* v. *Maule*, 1 Swanst. 495.

(*p*) *Clegg* v. *Clegg*, 3 Giff. 322.

(*q*) See Inst. lib. 3, tit. 27, §§ 3-5; and Dig. lib. x. tit. 2, l. 25, § 16, and tit. 3, l. 4, § 3, and lib. xvii. tit. 2, l. 34.

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By the strict rule of the common law, one co-owner of land was entitled to no account from another unless the former had made the latter his bailiff, or had been actually ousted from the land (*r*) ; and one co-owner of a chattel had no remedy against another, unless he had destroyed the common property (*s*). The statute 4 Anne, c. 16, § 27, has placed co-owners of land in a somewhat better position than they were in before, by enacting that an action of account may be maintained by one co-owner against another for receiving more than his share : but nothing has been done to improve the law as to co-owners of chattels except by the introduction by Equity Judges of rules founded on the principles of the Roman law.

The inadequacy of the remedies available by one co-owner against another at common law is justified by early writers upon the ground that each tenant in common has it in his own power to enter on the common property, if it be land, and to get possession of the common property, and retain it, if it be an ordinary chattel ; and according to the writers in question, it is only when one co-owner prevents the other from entering in the first case, and, by destroying the chattel, from getting possession of it in the other, that there is any necessity for having recourse to an action (*t*). The unsatisfactory nature of this reasoning is too apparent to require comment ; for admitting its force in the case of land, it is plainly in the highest degree unjust to allow one co-owner of a valuable chattel to keep it exclusively in his own possession, and to tell the other that his only remedy is to take it peaceably when he sees his time, and having got it to be careful not to part with it. Unsatisfactory, however, as the reasoning is, it affords the only explanation of the actual state of the law upon the subject under consideration.

In order to understand accurately the remedies, which by the law of this country are available for one co-owner against another, it is necessary, in the first place, to distinguish land from chattels.

1. *With respect to land.*

Co-owners of land.

1. If land is owned by several persons, jointly or in common, each is entitled to enter upon and occupy it (*u*).

2. If any one of them is actually excluded by the others he can bring an action for the recovery of his undivided share (*x*) ; and having recovered he can sue for mesne profits (*y*) ; and in an action for them the jury are not bound to confine the damages to the value of the actual profits made by the defendant (*z*). In case of actual exclusion or destruction an action for

(*r*) See Co. Lit. 200.

(*s*) *Ibid.*

(*t*) See Lit. § 323.

(*u*) Lit. § 323. One is not entitled to a receiver as against the others if they do not exclude him, *Sandford* v. *Ballard*, 30 Beav. 109. See *infra*, note (*b*).

(*x*) Lit. §§ 322 and 323 and Coke's Com. upon them. As to evidence of actual exclusion, see *Doe* v. *Prosser*, Cowp. 217 ; *Jacobs* v. *Seward*, L. R. 5 H. L. 464.

(*y*) *Goodtitle* v. *Tombs*, 3 Wils. 118.

(*z*) *Ibid.*

damages will also lie by one co-owner against the other (*a*); and now an injunction and a receiver can be obtained, even although there is no actual exclusion (*b*).

3. Subject to the provisions of the act of 31 & 32 Vict. c. 40, one co-owner of land is entitled to have it divided between himself and the other owners, although they may not desire a partition (*c*).

4. If one co-owner makes the other his bailiff or receiver, the latter can be compelled to account, not only for what he has received, but also for what he might have received without his own wilful default (*d*).

5. And by the statute of Anne (4 Anne, c. 19, § 27) one co-owner who receives more than his share can be made to account to the other owners for what he has received more than he ought (*e*).

6. But it has been decided, since the passing of this statute, that one co-owner of land, who merely occupies the whole, is not liable to pay any rent to the other owners (*f*).

7. And it has also been decided that if one co-owner not only occupies the whole land, but expends his own industry and capital upon it, and thereby realises profit (*e.g.* by farming), he is not liable to account to his co-owners for any share of such profit (*g*).

8. But if one co-owner of land derives gain, not from the mere use of the land by himself, but by being paid for the use thereof by others, he must account to the other owners for what he receives beyond his own share (*h*).

9. *A fortiori*, if one co-owner of land derives gain by wasting the common property, he is liable to account to the other owners for their shares of the money so obtained (*i*). He can also be restrained by a co-tenant from committing destructive waste (*k*), but not from cutting timber in a

(*a*) *Cresswell* v. *Hedges*, 1 H. & C. 421, where the defendant paid money into court in respect of the damage to the plaintiff's share.

(*b*) See Jud. Act, 1873, § 25, cl. 8. *Porter* v. *Lopes*, 7 Ch. D. 358; *Sandford* v. *Ballard*, 33 Beav. 401.

(*c*) See Bac. Ab. Joint-tenants, I. 7, and *Agar* v. *Fairfax*, 17 Ves. 533, and the notes to it in 2 Wh. & Tud. L. C.

(*d*) Co. Lit. 200 *b*, and 172 *a*.

(*e*) The remedy at law was by an action of account and not by an action for money had and received, *Thomas* v. *Thomas*, 5 Ex. 28; *Jacobs* v. *Seward*, L. R. 5 H. L. 464.

(*f*) *Teasdale* v. *Sanderson*, 33 Beav. 534; *Wheeler* v. *Horne*, Willes, 208; *M'Mahon* v. *Burchell*, 2 Ph. 127. But see *Drury* v. *Drury*, 1 Rep. in Ch. 49. In *Turner* v. *Morgan*, 8 Ves. 145, there was exclusion. Where one of the co-owners is an infant, see *Pascoe* v. *Swan*, 27 Beav. 508.

(*g*) *Henderson* v. *Eason*, 17 Q. B. 701, and 2 Ph. 308; *Jacobs* v. *Seward*, L. R. 5 H. L. 464.

(*h*) *Henderson* v. *Eason*, 17 Q. B. 701. See, too, *Clegg* v. *Clegg*, 3 Giff. 322, *ante*, p. 57, note (*p*); *Carter* v. *Horne*, 1 Eq. Ca. Ab. 17, as to sharing benefits derived by one.

(*i*) Co. Lit. 200 *b*; *Martyn* v. *Knowllys*, 8 T. R. 145. See the last sentence in the judgment. See, as to injunctions to restrain waste, *Twort* v. *Twort*, 16 Ves. 128.

(*k*) *Arthur* v. *Lamb*, 2 Dr. & Sm. 428; *Wilkinson* v. *Haygarth*, 12 Q. B. 837.

proper and judicious manner; nor, it is conceived, from mining in a similar way (*l*).

10. If one of several joint tenants, or tenants in common of a house, lays out money in necessary repairs, his outlays will be taken into account upon a partition or sale (*m*); but he cannot enforce contribution by an action for damages (*n*); nor has he any lien on the house or on the interest of his co-tenants therein for their shares of the expense (*o*).

2. *With respect to chattels.*

Co-owners of Chattels.

Ships are by far the most important chattels usually owned in common. But great care is required in applying the rules which govern ships to other chattels; for, in the first place, the principles enforced in the court of admiralty differ in many important respects from those by which the ordinary courts are governed; and, in the next place, the stringent provisions of the ship registry acts have frequently rendered it impossible to apply to ships those general doctrines of equity which are applicable to other kinds of property. For the purpose, therefore, of avoiding error in pursuing the present subject of inquiry, ships must be distinguished from other chattels.

1. Ships.

A considerable portion of the law which regulates the mutual rights and obligations of part-owners of ships is based upon the assumption that it is particularly for the benefit of the public that ships should not lie idle (*p*). Hence it is that a majority of the part-owners of a ship can employ her against the will of the others, upon giving them security to the value of their shares (*q*); a course which cannot be taken by a majority of the part-owners of any other chattel. Where a ship is sent on a voyage by some of the part-owners against the will of the others, the dissentients are not entitled to share the profits of the voyage (*r*), nor are they liable to contribute to its losses (*s*). But where a ship is employed by all the part-owners, or by some of them, but not against the will of the others (*t*), they all share her gross earnings, and contribute to the expenses incurred, in obtaining them; and in such a case there is little, if any, difference between the account which is taken between the part-owners, and that which would be taken if they were actually partners.

(*l*) *Arthur* v. *Lamb*, 2 Dr. & Sm. 428; *Wilkinson* v. *Haygarth*, 12 Q. B. 837.

(*m*) See *Leigh* v. *Dickeson*, 15 Q. B. D. 60.

(*n*) *Ibid.*, where the passages in Co. Lit. 200 *a*, and F. N. B. 162, and the old writ of contribution, are explained.

(*o*) *Re Leslie*, 23 Ch. D. 552. See also *Kay* v. *Johnston*, 21 Beav. 536; *Teasdale* v. *Sanderson*, 33 Beav. 534.

(*p*) See Maclachlan on the Law of Merchant Shipping, p. 90, ed. 2.

(*q*) *Ibid.* p. 94.

(*r*) *Anon.*, 2 Ch. Ca. 36; *Davis* v. *Johnston*, 4 Sim. 539.

(*s*) *Horn* v. *Gilpin*, 1 Ambl. 255. *Davis* v. *Johnston*, 4 Sim. 539, is not opposed to this. The marginal note, however, is calculated to mislead.

(*t*) *Strelly* v. *Winson*, 1 Vern. 296, as corrected by *Horn* v. *Gilpin*, 1 Amb. 255.

Before any division of profits amongst the part-owners, the gross freight or earnings of the adventure must be applied in payment of the expenses of the voyage yielding them, including the costs of repairs and outfit for that voyage (*u*). Lord Hardwicke went further, and held that each part-owner had a lien on the ship itself, and on the proceeds of its sale for the balance due to him from the other owners on the joint account, and had a right to a sale of the ship as if it were partnership property (*x*). But Lord Eldon thought this was going too far; and he reversed Lord Hardwicke's decision; and it is now settled that there is no such lien or right (*y*). Lord Eldon's view, however, has not prevailed in America (*z*).

2. Other Chattels.

Passing from ships to other chattels, the position of a part-owner not in possession was at law most disadvantageous; for 1, he could not obtain possession otherwise than by taking the thing itself if he had the chance (*a*); 2, he could not obtain the value of his share unless the thing had been actually or virtually destroyed (*b*); and 3, these rules applied as well to the produce of the thing, as to the thing itself (*c*). Whether, if one tenant in common of a chattel sold it, the other had any remedy at law for his share of the money produced by the sale, was doubtful (*d*), unless the sale had conferred a good title to the entirety upon the purchaser, when a remedy clearly existed (*e*).

The obligation of a co-owner of a chattel to account for the gain which he might have derived from its use may therefore be said to have been hardly, if at all, recognised at law. In equity the case was otherwise, but it is surprising how little direct authority there is upon the subject of co-ownership, if the decisions relating to ships and the winding-up of partnerships are excluded from consideration. The principles, however, upon which these decisions are based, may safely be applied to other cases if the anomalies introduced by the ship registry acts, and the fact that the rights of partners and those claiming under them depend upon contract, are borne in mind.

When the profits derived by one part-owner of a chattel are not attributable to his own industry and exertions, but are simply what he receives from others in respect of it (*e.g.* dividends of stock, or shares, or money paid for hire)—or where the profits are produced in the ordinary

(*u*) *Green* v. *Briggs*, 6 Ha. 395; *Lindsay* v. *Gibbs*, 22 Beav. 522, and 26 ib. 51, and 3 De G. & J. 690; *Alexander* v. *Simms*, 18 Beav. 80, and 5 De G. M. & G. 57.

(*x*) *Doddington* v. *Hallet*, 1 Ves. S. 497, and see *A.-G.* v. *Borrodaile*, 1 Price, 148, and *per* Lord Eldon, 2 V. & B. 243.

(*y*) *Ex parte Young*, 2 V. & B. 242; *Ex parte Harrison*, 2 Rose, 76.

(*z*) See Story on Part. § 444.

(*a*) Lit. § 323, and see 2 Wms. Saund. 47 *o*.

(*b*) Co. Lit. 200; *Jacobs* v. *Seward*, L. R. 5 H. L. 464.

(*c*) See *Fennings* v. *Grenville*, 1 Taunt. 241, where a whale had been converted into blubber and oil.

(*d*) See *Heath* v. *Hubbard*, 4 East, 110; *Mayhew* v. *Herrick*, 7 C. B. 229; *Morgan* v. *Marquis*, 9 Ex. 145; *Barton* v. *Williams*, 5 B. & A. 395; and *Williams* v. *Barton*, 3 Bing. 139.

(*e*) See *Jacobs* v. *Seward*, L. R. 5 H. L. 464, and the cases in the last note, and *per* Willes, C. J., in *Wheeler* v. *Horn*, Willes, 208.

course of nature (*e.g.* by breeding)—there is no difficulty in coming to the conclusion that his co-owners are entitled to make him account to them for their shares of what their property may have produced. Further, when one co-owner of a chattel derives gain from its use, and those gains are attributable, mainly, or in part, to his own industry and exertions, justice to the other owners and to him requires, either that the gains made by him shall be shared by all, they making him a proper allowance for his trouble and reimbursing him his expenses; or that he shall be allowed to keep the whole profits, paying the other owners a proper sum for the use of their property. Of these two modes of adjusting the rights of the parties, the first seems to be most in accordance with the course usually adopted in analogous cases. Notwithstanding, therefore, the little direct authority upon the point, the writer ventures to submit that as a general rule where one owner of a chattel derives gain from its use, he is, independently of any contract, bound to account to the other owners for their respective shares, he being allowed all proper charges and expenses (*f*).

Co-owners of patents and copyrights.

Cases may, nevertheless, arise in which justice may be done by allowing each co-owner to make what he can and to keep what he may get. This may occur where the chattel is such that each co-owner can, in fact, enjoy his rights to the full extent, without the concurrence of the other owners (*e.g.* where the chattel is a patent for an invention). In the case of a patent, belonging to several persons in common, each co-owner can assign his share and sue for an infringement (*g*), and can also work the patent himself, and give licences to work it, and sue for royalties payable to him for its use (*h*); and it is now settled that he is entitled to retain for his own benefit whatever profit he may derive from the working, although it is perhaps still open to question whether he is not liable to account for what he receives in respect of the licences (*i*). The mutual rights of co-owners of a copyright, not being partners, have not been much discussed: but it has been decided that a licence to represent a dramatic entertainment granted by one only of several co-owners of the copyright in it does not bind the others; nor prevent them from recovering their shares of the penalties imposed by statute on persons who infringe the copyright (*k*).

If part-owners of an ordinary chattel cannot agree who ought to have it, or how it ought to be employed, the only remedy (if any) appears to be by an action for an injunction or a receiver and a sale (*l*).

(*f*) See the judgment of V.-C. Wigram, in *Green* v. *Briggs*, 6 Ha. 395, and *Strelley* v. *Winson*, 1 Vern. 297. See, also, 1 Story's Eq. Jur. § 466.

(*g*) See *Dunnicliff* v. *Mallett*, 7 C. B. N. S. 209, and *Walter* v. *Lavater*, 8 ib. 162. As to tenants in common of trade-marks, see *Dent* v. *Turpin*, 2 J. & H. 139.

(*h*) *Sheehan* v. *Great East. Rail. Co.*, 16 Ch. D. 59.

(*i*) *Mathers* v. *Green*, 1 Ch. 29, reversing S. C. 34 Beav. 170. The same point was discussed, but not decided in *Hancock* v. *Bewley*, Johns. 601. See, also, *Russell's Patent*, 2 De G. & J. 130; *Horsley* v. *Knighton's Patent*, 8 Eq. 475.

(*k*) *Powell* v. *Head*, 12 Ch. D. 686. See some observations on the indivisibility of copyright in 4 H. L. C. 992.

(*l*) See Jud. Act, 1873, § 25, cl. 8.

CHAPTER II.

OF THE CONSIDERATION OF A CONTRACT OF PARTNERSHIP.

Consideration for a partnership.

AGREEMENTS to share profits, like all other agreements, require to be founded on some consideration in order to be binding. Any contribution in the shape of capital or labour, or any act which may result in liability to third parties, is a sufficient consideration to support such an agreement (*a*).

A *bonâ fide* contract of partnership is not invalidated by the unequal value of the contributions of its members, for they must be their own judges of the adequacy of the consideration of the agreement into which they enter.

As observed by Vice-Chancellor Wigram, "If one man has skill and wants capital to make that skill available, and another has capital and wants skill, and the two agree that the one shall provide capital and the other skill, it is perfectly clear that there is a good consideration for the agreement on both sides, and it is impossible for the Court to measure the quantum of value. The parties must decide that for themselves" (*b*).

Profits to be shared, but losses not.

It often happens that persons agree that all profits shall be shared rateably, and, nevertheless, that all losses shall be borne by some or one of them exclusively. Such an agreement is not necessarily invalid as a *nudum pactum;* for it is nothing more than an agreement, providing, amongst other things, that some or one of the partners shall indemnify the others against losses; and the very fact that these latter become, or agree to become, partners is quite sufficient consideration to give validity to a contract that they shall be indemnified. Such agreements appear, moreover, to be reasonable, where the partners

(*a*) See *The Herkimer*, Stewart's Adm. Rep. 23; *Anderson's case*, 7 Ch. D. 75.

(*b*) *Dale* v. *Hamilton*, 5 Ha. 393.

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indemnified leave the whole management of the concern to their co-partners (*c*).

Of the return of premiums.

Premiums.

It frequently happens, when one person is admitted into partnership with another already established in business, that it is agreed that the incoming partner shall pay the other a premium, *i.e.*, a sum of money for his own private benefit. Such an agreement is valid; and if the premium is not duly paid, it may be recovered by an action, provided the plaintiff has been ready and willing to take the defendant into partnership as agreed (*d*).

The consideration for the premium is not only the creation of a partnership between the person who takes, and him who parts with, the money, but also the continuance of that partnership; and if a person on his entry into a partnership pays a premium and then the partnership is determined sooner than was expected, the question arises whether any, and if any, what part of the premium ought to be returned?

In order to determine this point, it is necessary in the first place to ascertain whether the agreement for the premium was or was not tainted with fraud.

Premiums returnable in cases of fraud.

If a person has been deluded into becoming a partner by false and fraudulent representations, and has paid a premium, he may take one of two courses; viz., either abide by the contract and claim compensation for the loss occasioned by the fraud, which he may do in taking the partnership accounts; or he may disaffirm the contract, and thereby entitle himself to a return of the whole of the money he has paid (*e*). And

(*c*) *Geddes* v. *Wallace*, 2 Bli. 270, is an instance of such an agreement. However, in *Brophy* v. *Holmes*, 2 Moll. 1, the L. C. Hart expressed an opinion that an agreement between A. and B. that A. should advance capital, that B. should be sole manager, and that they should divide the profits equally, but that all losses should fall on B. was, as regards the last stipulation, void, as being *nudum pactum*; and his Lordship thought that under such an agreement the losses should be borne equally. But see, as to such partnerships, *ante*, pp. 15, *et seq.*

(*d*) *Walker* v. *Harris*, 1 Anstr. 245, where it was held that no partnership deed need be tendered.

(*e*) See *infra*, pp. 65, *et seq.*; and as to rescinding for fraud, *infra*, book iii. c. 10.

in a case of this sort in the event of the bankruptcy of the defrauding partner, the amount of the premium paid to him is a debt provable against his estate in competition with his separate creditors (*f*).

Return of premium where the consideration for it has failed.

But if the agreement by virtue of which the partnership was entered into, and the premium became payable, is not tainted by fraud, then the proper mode of dealing with the premium is not so easy to determine. In the first place, assuming the partnership to have been in fact created, it is clear that there has not been a *total* failure of consideration for the premium; and, consequently, it cannot be recovered as money paid for a consideration which has failed (*g*). In the next place, persons who enter into partnership know that it may be determined at any time by death and other events; and unless they provide against such contingencies, they may fairly be considered as content to take the chance of their happening, and the tendency of modern decisions is to act on this principle (*h*).

Apportionment of premium when partnership ceases sooner than was expected.

On the other hand, if a person receives a premium for taking another into partnership, which is to endure for a certain time, and then himself does anything which determines the partnership before that time has elapsed, he may be fairly considered as having precluded himself from insisting on his strict right to retain or be paid his whole premium. Moreover, where there has been no misconduct, a premium paid for a partnership for a term of years has been held apportionable in the event of a premature determination of the partnership by an unforeseen occurrence. The fact that the consideration for the premium has partially failed has been considered sufficient to render it inequitable to retain or obtain payment of the whole premium (*i*).

(*f*) *Ex parte Turquand*, 2 M. D. & D. 339; and see *Bury* v. *Allen*, 1 Coll. 589. The case of *Ex parte Broome*, as reported in 1 Rose, 69, is opposed to this, but see on that case the note in 1 Coll. 598, and the observations at the end of the judgment, ib. p. 607.

(*g*) See *Taylor* v. *Hare*, 1 Bos. & Pul. N. R. 260.

(*h*) *Whincup* v. *Hughes*, L. R. 6 C. P. 78; *Ferns* v. *Carr*, 28 Ch. D. 409. See, also, *Akhurst* v. *Jackson*, 1 Swanst. 85; *Bond* v. *Milbourn*, 20 W. R. 197.

(*i*) Similar views have been taken

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The principles applicable to cases of this description are not even yet well settled; nor are the decisions upon them easy to reconcile.

The following rules are, however, submitted to the reader as guides on this subject:—

1. Partnerships at will.

1. Where a partnership is entered into for no specified time, and there is no agreement for a return or an apportionment of the premium in the event of an unexpected determination of the partnership, no part of the premium is returnable on the happening of such event. A case of fraud must be dealt with on its own demerits; and a person taking another into partnership for no definite time cannot, as soon as he has received the premium, dissolve the partnership and retain what has been paid as the consideration for it (*k*). But laying aside fraud, and supposing there to be nothing except a partnership created for no specified time and determined soon after its creation, it is difficult to hold that it was in fact entered into for a longer time, and that the person who came in, paying a premium, has not got all for which he stipulated (*l*).

2. Partnerships for a time.

2. Where a partnership is entered into for a specified time, and is determined prematurely, the first matter for consideration is whether the parties have come to any agreement on the dissolution. If they have, and if they have also provided for the premium, it must be dealt with according to the agreement; but if the agreement on dissolution is silent with respect to the premium, the inference is that the parties did not intend to deal with it, nor to vary their rights to it under the original agreement for its payment (*m*).

Agreements to dissolve.

with respect to what is right in cases of a similar kind, arising on the death of a solicitor who has been paid a premium by an articled clerk. See *Hirst* v. *Tolson*, 2 Mac. & G. 134; *Ex parte Bayley*, 9 B. & C. 691. But these cases have been since disapproved. See *Whincup* v. *Hughes*, L. R. 6 C. P. 78, and *Ferns* v. *Carr*, 28 Ch. D. 409.

(*k*) *Featherstonhaugh* v. *Turner*, 25 Beav. 382. See, also, *Hamil* v. *Stokes*, Dan. 20, and *Burdon* v. *Barkus*, 4 De G. F. & J. 42, *per* L. J. Turner.

(*l*) See *per* Lord Eldon in *Tattersall* v. *Groote*, 2 Bos. & P. 134.

(*m*) See *Lee* v. *Page*, 30 L. J. Ch. 857, and 7 Jur. N. S. 768. A mere consent to dissolve may leave all questions of this sort open, as in *Astle* v. *Wright*, 23 Beav. 77; *Wilson* v. *Johnstone*, 16 Eq. 606; *Bury* v. *Allen*, 1 Coll. 589.

Where, however, no agreement is come to on the dissolution, then the cause of dissolution must be considered.

Premature termination.

(a) By death.

(*a*.) Death is a contingency which all persons entering into partnership know may unexpectedly put an end to it. If, therefore, they do not expressly guard against this risk, they may reasonably be treated as content to incur it; and if death should unexpectedly happen, no return of premium not expressly provided for can, it is apprehended, be demanded (*n*). But even in this case, if a person knows himself to be in a dangerous state of health, and conceals that fact, and induces another to enter into partnership with him, and to pay him a premium, and shortly afterwards dies, the fraud so practised will entitle the partner paying the premium to a return of part of it; and he can obtain such return in an action for a partnership account: he need not rescind the contract *in toto* (*o*).

(b) By bankruptcy.

(*b*.) Bankruptcy of the partnership as distinguished from the bankruptcy of one of the partners cannot, it is apprehended, be a ground for apportioning a premium; for it is a contingency which every one may fairly be taken as contemplating (*p*). But the bankruptcy of a partner receiving a premium is a ground for its apportionment if he was embarrassed when the partnership commenced, and this fact was not known to his co-partner (*q*); but not if it was (*r*). What the effect would be if he became embarrassed after the commencement of the partnership has not been decided. The bankruptcy of the partner paying the premium cannot entitle him or his trustee to a return of any part of it; unless he has been made bankrupt by his co-partner who has received the premium (*s*).

(c) Lunacy.

(*c*.) The lunacy of a partner causing a dissolution would perhaps be considered as a ground for apportioning the premium.

(*n*) See *Whincup* v. *Hughes*, L. R. 6 C. P. 78; *Ferns* v. *Carr*, 28 Ch. D. 409.

(*o*) *Mackenna* v. *Parkes*, 36 L. J. Ch. 366, and 15 W. R. 217.

(*p*) See *Akhurst* v. *Jackson*, 1 Swanst. 85.

(*q*) *Freeland* v. *Stansfeld*, 2 Sm. & G. 479.

(*r*) *Akhurst* v. *Jackson*, 1 Swanst. 85.

(*s*) As in *Hamil* v. *Stokes*, Dan. 20, and 4 Price, 161. In this case it is to be observed that the contract of partnership was not rescinded on the ground of fraud.

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(*d*) Disagreements.

(*d.*) Disagreements between the partners resulting in a dissolution have given rise to much difficulty. The tendency of modern decisions is to apportion the premium in these cases not only where neither partner is to blame (*t*); but *a fortiori* where the partner receiving the premium has so misconducted himself as to give the partner paying it a right to have the partnership dissolved (*u*); and it matters not that the latter may himself not be altogether free from blame (*x*); nor is the rule altered by the fact that the partners have consented to dissolve since the institution of legal proceedings (*y*).

Misconduct.

Wilson v. Johnstone.

But where a partner has paid or agreed to pay a premium, and has so misconducted himself as to induce the court to dissolve the partnership on that ground, he cannot recover any part of the premium if he has paid it, nor avoid paying it if it is due and it is still unpaid (*z*). In *Wilson* v. *Johnstone* (*a*), *V.-C. Wickens* held that the misconduct must be such as to amount to a complete repudiation of the contract of partnership; but he did not lay down any rule for determining what misconduct amounts to such a repudiation, and the statement in the text is in accordance with the latest decision on the subject (*b*).

3. Amount to be returned.

3. There is no definite rule for deciding in any particular case the amount which ought to be returned. The time for which the partnership was entered into, and the time for which it has in fact lasted, are the most important matters to be considered; but other circumstances must often be taken into

(*t*) *Atwood* v. *Maude*, 3 Ch. 369.

(*u*) *Bullock* v. *Crockett*, 3 Giff. 507. See, also, *Rooke* v. *Nisbet*, 50 L. J. Ch. 588, where the partner dissolving was in fault, and was the party to receive the premium.

(*x*) *Atwood* v. *Maude*, 3 Ch. 369, where the partner paying the premium was plaintiff; *Astle* v. *Wright*, 23 Beav. 77; *Pease* v. *Hewitt*, 31 Beav. 22. Compare *Airey* v. *Borham*, 29 Beav. 620, where nothing was returned.

(*y*) *Bury* v. *Allen*, 1 Coll. 589; *Astle* v. *Wright*, 23 Beav. 77; *Wilson* v. *Johnstone*, 16 Eq. 606. Compare *Lee* v. *Page*, 7 Jur. N. S. 768, and 30 L. J. Ch. 857.

(*z*) See *Bluck* v. *Capstick*, 12 Ch. D. 863; *Wilson* v. *Johnstone*, 16 Eq. 606; *Airey* v. *Borham*, 29 Beav. 620; *Atwood* v. *Maude*, 3 Ch. 369.

(*a*) 16 Eq. 606.

(*b*) *Bluck* v. *Capstick*, 12 Ch. D. 863.

account in order to decide what is fair between the parties (*c*). At the same time the rule generally adopted is to apportion the premium with reference to the agreed and actual duration of the partnership (*d*).

The proper time for obtaining the decision of the court upon the question whether any part of a premium is returnable or not, is the hearing of the action. An inquiry on this point will not be added afterwards except under special circumstances (*e*).

(*c*) *Lyon* v. *Tweddell*, 17 Ch. D. 529, which shows that the court has a wide discretion in this matter.

(*d*) See *Wilson* v. *Johnstone*, 16 Eq. 606; *Atwood* v. *Maude*, 3 Ch. 369; *Bury* v. *Allen*, 1 Coll. 589; *Astle* v. *Wright*, 23 Beav. 77; *Pease* v. *Hewitt*, 31 Beav. 22. Compare *Bullock* v. *Crockett*, 3 Giff. 507; *Freeland* v. *Stansfeld*, 1 Sm. & G. 479; *Hamil* v. *Stokes*, Dan. 20, where this rule was not adhered to.

(*e*) *Edmunds* v. *Robinson*, 29 Ch. D. 170.

CHAPTER III.

OF THE PERSONS CAPABLE OF ENTERING INTO PARTNERSHIP.

The parties to a contract of partnership may be considered with reference to

1. Their number.
2. Their capacity.

SECTION I.—OF THE NUMBER OF PARTNERS.

Bk. I. Chap. 3. Sect. 1.

Number of partners.

By the common law of this country there is no limit to the number of persons who may be associated together in partnership (*a*).

Statutes regulating the number of persons who may be partners.

But from time to time various statutes have been passed, declaring that certain partnerships shall be either altogether illegal, or, at all events, deprived of some important rights, or exposed to serious penalties, if their members exceed a prescribed number. Of these statutes the Companies act, 1862, is the only one of present practical importance. This act, by § 4, limits the greatest number of persons who can carry on business as partners otherwise than under its provisions to ten, if the business is that of bankers, and to twenty in other cases (*b*). But this enactment does not apply to partnerships formed before the 2nd November, 1862 (see § 2), nor to those formed in pursuance of some other act of Parliament, or of letters patent, nor to companies engaged in working mines within and subject to the jurisdiction of the Stannaries.

All the other statutes relating to this subject, except the Banking act of 7 Geo. IV. c. 46, have been repealed (*c*); and

(*a*) As to the supposed illegality of partnerships so large as to be incapable of practically suing and being sued, see the vol. on Companies.

(*b*) See on this subject the vol. on Companies.

(*c*) A list of them will be found in the 2nd edit. of this treatise, vol. i. p. 82.

although that act is still in force, no partnership or company can now be formed under it. That act limited the number of persons who could lawfully carry on business as bankers in partnership and issue notes (except under certain restrictions), to six (*d*).

SECTION II.—OF THE CAPACITY OF PARTNERS.

Persons who cannot be partners.

By the law of this country, a valid contract of partnership can be entered into between any persons who are not under the disabilities of minority or unsoundness of mind, and are not convicts within the meaning of 33 & 34 Vict. c. 23. As will be seen hereafter, when treating of illegal partnerships, there are certain trades, businesses, and professions, which cannot be lawfully carried on, either solely or in partnership, unless some statutory requisite has been complied with: but now that the disabilities under which spiritual persons formerly lay have been removed (*e*), the writer is not aware that there is any class of persons (except convicts), who, being of sound mind, and over twenty-one, are rendered incapable of becoming members of a partnership. Married women may be partners, as will appear later on.

Agreements entered into between several persons, some of whom are by law incompetent to contract, are not wholly null and void, but are only in some respects less effective than if all the parties to them were competent. Hence there is nothing to prevent a person who is not *sui juris* from being a partner. But if any such person is a partner, his or her want of capacity to contract will necessarily give rise to consequences deserving special notice. These may be considered as they affect, 1, aliens; 2, felons and outlaws; 3, infants; 4, lunatics; 5, married women; and 6, corporations and companies.

(*d*) See on this subject, *infra*, book i. c. 5, § 1.

(*e*) The law relating to the clergy is now 1 & 2 Vict. c. 106, §§ 29-31, and 4 Vict. c. 14. Although a violation of those laws is attended with the risk of suspension and deprivation, it is expressly enacted that contracts entered into contrary to them shall not be void (see *Lewis* v. *Bright*, 4 E. & B. 917). Consequently the disability under which the clergy formerly lay, and which rendered all partnerships and companies of which they were *de facto* members, illegal (*Hall* v. *Franklin*, 3 M. & W. 259), exists no longer. Clergy.

1. *Aliens.*

Alien friends.

There is nothing to prevent an alien, not an enemy, from being a partner (*f*). But a public minister of a foreign state, accredited to and received by the Queen, cannot be sued here even in respect of commercial transactions in which he may have engaged (*g*).

Alien enemies stand in a very different position from alien friends.

Effects of war on the rights of partners.

When two supreme powers are at war, all persons who, for the time being, are the subjects of either, become in contemplation of the civil tribunals of both, hostile to the subjects of the other; and so long as the war lasts the subjects for the time being of the one country are incapable of entering into any valid contract with the subjects of the other; and all remedies available for the one against the other, in respect of transactions before the war, are suspended (*h*). Consequently no partnership can subsist between the subjects of hostile powers (*i*); and if two partners are resident in two different countries, their partnership is determined by a war between those countries (*k*).

These doctrines, however, are only recognised and enforced by the belligerent powers. Neutrals do not apply them to the determination of commercial questions arising between the subjects of belligerent states.

It is to be remembered that whether a person is or is not to be considered as an enemy depends, not on whether there is war between this country and his native land, but upon whether

(*f*) Co. Lit. 129 *b*; Bac. Ab. Alien, D. See, generally, as to aliens, 33 Vict. c. 14.

(*g*) *Taylor* v. *Best*, 14 C. B. 487; *Magdalena Steam Nav. Co.* v. *Martin*, 2 E. & E. 94.

(*h*) *Albretcht* v. *Sussmann*, 2 V. & B. 323; *Willison* v. *Patteson*, 7 Taunt. 440; *Ex parte Boussmaker*, 13 Ves. 71; *Potts* v. *Bell*, 8 T. R. 548. See the note to *Clemontson* v. *Blessig*, 11 Ex. 141.

(*i*) See *Evans* v. *Richardson*, 3 Mer. 469; and *infra*, the chapter on dissolution.

(*k*) See *Griswold* v. *Waddington*, 15 John. 57, and 16 ib. 438 (Amer.). Whether peace operates retrospectively, see *New York Life Ins. Co.* v. *Statham*, 3 Otto, 24 (Amer.); and Parsons on Part. c. 3, §§ 1, 3.

there is war between this country and the country in which he is voluntarily resident. It is the place of his residence or trading, and not the place of his birth, which is of importance in these matters (*l*): and, therefore, if a foreigner comes over here, enters into partnership here, and dwells here, and then war breaks out between this country and that of which he is a native, the partnership will not, nor will his rights as a partner, be affected by the war, any more than if he were an Englishman (*m*). On the other hand, if a partnership consists wholly of Englishmen, some of whom reside here and some in another country, and war breaks out between that country and this, the partners become enemies for all purposes of trade and commerce, just as much as if those abroad were natives of the country in which they reside (*n*). The same is true, even in the absence of any fixed residence in the belligerent country, if some of the partners go over there and trade there during the war (*o*).

2. *Felons and outlaws.*

Felons and outlaws.

Formerly a felon's or outlaw's share in a partnership vested in the Crown (*p*); and although a felon or outlaw could contract, he could not sue in his own right until his disability had been removed; *i.e.*, in the case of felony until pardon or expiration of the term of punishment; and in case of outlawry, until its reversal (*q*). But no person could plead his own attainder or outlawry as a defence to an action against him (*r*). As regards outlaws, the law in these respects

(*l*) See *Albrecht* v. *Sussmann*, 2 V. & B. 323; *Willison* v. *Patteson*, 7 Taunt. 440; *Houriet* v. *Morris*, 3 Camp. 303; *Bell* v. *Reid*, 1 M. & S. 726.

(*m*) See *Wells* v. *Williams*, 1 Ld. Raymond, 282, and 1 Salk. 46, in which it was held that a plea of alien enemy was no defence to an action brought by a foreigner domiciled here, though there was war between his country and this.

(*n*) See *M'Connell* v. *Hector*, 3 Bos. & P. 113; *O'Mealey* v. *Wilson*, 1 Camp. 482, and compare *Roberts* v. *Hardy*, 3 M. & S. 533, and *Ex parte Baglehole*, 18 Ves. 525, and 1 Rose, 271.

(*o*) See *The Yonge Klassina*, 5 Ch. Rob. 303; *The Indian Chief*, 3 ib. 12; *The Portland*, ib. 41.

(*p*) Bac. Ab. Felony and Outlawry; Co. Lit. 128.

(*q*) *Ibid.*, and see *Bullock* v. *Dodds*, 2 B. & A. 258.

(*r*) Foster's Cr. L. 61.

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(*r*) Foster's Cr. L. 61.

remains unchanged; the law, however, respecting felons was materially altered by 33 & 34 Vict. c. 23. This act abolished forfeiture for felony (*s*), and empowers the Crown to commit the custody and management of the property of any convict (*i.e.* a person sentenced to death or penal servitude (*t*)) to an administrator (*u*), in whom all the convict's property, both real and personal, then becomes vested (*x*). Moreover, a convict is absolutely disabled from alienating any property or making any contracts, and from suing (*y*), except when lawfully at large under a proper license (*z*). Provision is also made for the appointment of an interim curator of a convict's property (*a*). Practically this act facilitates the dissolution and winding-up of a partnership in the event of a member being convicted of felony: but it is unnecessary to allude further to this statute in the present place.

3. *Infants.*

Infant partners.

An infant may be a partner. But, speaking generally, whilst he is an infant he incurs no liability and is not responsible for the debts of the firm: and when he comes of age, or even before, he may, if he chooses, disaffirm past transactions (*b*).

The irresponsibility of an infant for the debts of a partnership of which he is a member is an obvious consequence of his general incapacity to bind himself by contract, and does not require to be supported by any special authority (*c*). It might, perhaps, be thought that an infant who held himself out as a partner would be liable to persons trusting to his representations if they did not know him to be under age; but this is not so (*d*); and as an infant is not responsible for the torts of

(*s*) § 1.
(*t*) § 6.
(*u*) § 9.
(*x*) § 10.
(*y*) § 8.
(*z*) § 30.
(*a*) § 21, et seq.
(*b*) See *Goode* v. *Harrison*, 5 B. & A. 157-9; *Ex parte Taylor*, 8 De G. M. & G. 254.
(*c*) *Chandler* v. *Parkes*, 3 Esp. 76; *Jaffray* v. *Frebain*, 5 ib. 47; *Gibbs* v. *Merrill*, 3 Taunt. 307; and *Burgess* v. *Merrill*, 4 ib. 468, show that an infant partner ought not to be joined as a defendant in an action against the firm.
(*d*) See *Price* v. *Hewitt*, 8 Ex. 146; *Johnson* v. *Pye*, Vin. Ab. *Enfant*, H. 2, pl. 16; *Glossop* v. *Colman*, 1 Stark. 25; *Green* v. *Greenbank*, 2 Marsh. 485.

his agent, an infant partner cannot be held liable for the misconduct of his copartners. The irresponsibility of an infant as a partner, seems therefore to be complete, except in cases of fraud.

But an infant who was guilty of fraud was not so free from liability in equity as he was at law (*e*); and equitable as distinguished from legal relief, *e.g.*, rescission of contract, may be obtained against him (*f*). In accordance with these principles, although, as a rule, an infant cannot be made bankrupt (*g*); yet if he fraudulently represents himself as of age, and obtains credit by his false representations, and is made bankrupt, the adjudication against him will not be superseded, and his deceived creditors will be paid out of his estate (*h*).

Repudiation by Infant.

Moreover, notwithstanding the general irresponsibility of an infant, he cannot, as against his co-partners, insist that in taking the partnership accounts he shall be credited with profits, and not be debited with losses. The infant partner must either repudiate or abide by the agreement under which alone he is entitled to any share of the profits (*i*).

Time for avoidance of infant's contract.

An infant partner may avoid the contract into which he has entered, either before or within a reasonable time after he has come of age (*k*). If he avoids the contract, and has derived no benefit from it, he is entitled to recover back any money paid by him in part performance of it (*l*); but he cannot do this if he has already obtained advantages under the contract, and cannot restore the party contracting with him to the same position as if no contract had been entered into (*m*).

(*e*) See *Wright* v. *Snowe*, 2 De G. & S. 321.

(*f*) *Lempriere* v. *Lange*, 12 Ch. D. 675.

(*g*) *Ex parte Jones*, 18 Ch. D. 109; *Ex parte Henderson*, 4 Ves. 163; *Ex parte Lees*, 1 Deac. 705; *Belton* v. *Hodges*, 9 Bing. 365.

(*h*) See *Ex parte Watson*, 16 Ves. 265; *Ex parte Bates*, 2 M. D. & D. 337; *Ex parte Unity Banking Assoc.*, 3 De G. & J. 63.

(*i*) See *Lon. & N. W. Rail. Co.* v. *McMichael*, 5 Ex. 114, and other cases of that class, in the vol. on Companies.

(*k*) Co. Lit. 380 *b*. *Newry & Enniskillen Rail. Co.* v. *Coombe*, 3 Ex. 565; *Dublin & Wicklow Rail. Co.* v. *Black*, 8 Ex. 181.

(*l*) *Corpe* v. *Overton*, 10 Bing. 253.

(*m*) *Holmes* v. *Blogg*, 8 Taunt. 508; *Ex parte Taylor*, 8 De G. M. & G. 254. Compare *Mann's case*, 3 Ch 459, and *Curtis's case*, 6 Eq. 455, where the infant had sold some shares, but not the rest.

Position of married women with separate estate.

But a married woman who has separate estate, which she is not restrained from anticipating, is as to such estate regarded as a *feme sole*: and debts and obligations incurred by her either expressly or impliedly on the credit of that estate can be enforced against it, although not against her personally (*d*). Supposing, therefore, that a married woman partner has such separate estate, it will be liable for the debts of the partnership; and to that extent she will be a partner (*e*). But her husband will not. A married woman having separate estate may lend money to her husband, but if lent to him for purposes of trade and he becomes bankrupt she is postponed to his other creditors (*f*); but a loan by her to a partnership of which her husband is a member is payable out of its assets like any other joint debt (*g*).

A married woman having separate property and carrying on business separately from her husband is liable to the bankruptcy laws (*h*). But her position, if she carries on business in partnership with him, is not defined. There is, however, no reason why she should not do so (*i*); her liability to the extent of her separate estate for his contracts and his liability for hers would, in such a case, be governed by the principles of agency (*k*).

6. *Corporations and Companies.*

Corporations, &c., may be partners.

There is no general principle of law which prevents a corporation from being a partner with another corporation or with ordinary individuals, except the principle that a corporation cannot lawfully employ its funds for purposes not authorised by its constitution (*l*). Having regard, however, to this

(*d*) See 45 & 46 Vict. c. 75, §§ 1, 12, 19; *Re Shakespear*, 30 Ch. D. 169; *Pulliser* v. *Gurney*, 19 Q. B. D. 519.

(*e*) See *Matthewman's case*, 3 Eq. 781, where she was held a contributory. See as to a married woman's separate trade, *Ashworth* v. *Outram*, 5 Ch. D. 923.

(*f*) 45 & 46 Vict. c. 75, § 3.

(*g*) *Ex parte Nottingham*, 19 Q. B. D. 88.

(*h*) 45 & 46 Vict. c. 75, § 1 (5); *Ex parte Gilchrist*, 17 Q. B. D. 521.

(*i*) See *Butler* v. *Butler*, 16 Q. B. D. 374.

(*k*) A husband is liable for his wife's torts, *Seroka* v. *Kattenburg*, 17 Q. B. D. 177.

(*l*) See *Gill* v. *Manchester, Sheffield, &c. Rail. Co.*, L. R. 8 Q. B. 186, as to one company being the agent of another, if not its partner.

principle, it may be considered as *primâ facie ultra vires* for an incorporated company to enter into partnership with other persons (*m*).

(*m*) See the American cases, *Sharon Coal Corp.* v. *Fulton Bank*, 7 Wend. 412; *Catskill Bank* v. *Gray*, 14 Barb. 479. As to holding out, see *Holmes* v. *Old Colony R. R. Co.*, 5 Gray, 58.

CHAPTER IV.

OF THE EVIDENCE BY WHICH A PARTNERSHIP OR *QUASI*-PARTNERSHIP MAY BE PROVED.

Bk. I. Chap. 4.

Evidence by which a partnership or *quasi*-partnership may be proved.

THE contract of partnership is one of those which does not require to be entered into with any particular formalities. By the common law of this country, a partnership may be constituted without any official act, such as registry, without any instrument under seal, and even without any writing whatever; and this is the law at the present time, except so far as it has been altered by the Statute of Frauds, by the acts relating to marine insurance (*a*), and by the various statutes relating to companies. But although a partnership may be constituted without any deed or writing, still a person who has entered into a mere verbal agreement for a partnership with another, will not be able to sustain an action for its breach, unless he can prove the terms upon which the partnership was to be entered into (*b*).

Statute of Frauds.

The only statutory enactment applicable to ordinary partnerships is the Statute of Frauds, the 4th section of which enacts, amongst other things,

> "That no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

Future partnerships, &c.

This enactment applies as well to an agreement for a partnership to commence more than a year from the date of the agree-

(*a*) By 30 Vict. c. 23, § 7, agreements for marine insurance must be in writing and stamped; and a mutual marine insurance society which infringes these enactments is an illegal society. See *infra*, book i. c. 5, § 1.

(*b*) *Figes* v. *Cutler*, 3 Stark. 139.

ment (*c*), as to an agreement for a present partnership to last more than a year from its commencement (*d*). But if in either case the parties have acted on the agreement and become partners, they must be treated as such, and the statute will not be applicable (*e*).

Partnerships in land.

With respect to that part of the 4th section of the Statute of Frauds which relates to lands, it is held,—1, that a partnership constituted without writing is as valid as one constituted by writing (*f*); and 2, that if a partnership is proved to exist, then it may be shown by parol evidence that its property consists of land. This was first clearly laid down in *Forster* v. *Hale* (*g*), where a person attempted to obtain an account of the profits of a colliery on the ground that it was partnership property, and it was objected that there was no signed writing, such as the statute required. But to this the Lord Chancellor observed,

Forster *v.* Hale.

"That was not the question; it was whether there was a partnership. The subject being an agreement for land, the question then is whether there was a resulting trust for that partnership by operation of law. The question of partnership must be tried as a fact, and as if there was an issue upon it. If by facts and circumstances it is established as a fact that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purposes of that partnership are *by operation of law* held for the purposes of that partnership."

Dale *v.* Hamilton.

The principle here stated was carried to its extreme limit by the Vice-Chancellor Wigram, in *Dale* v. *Hamilton* (*h*). He held that an agreement to form a partnership for the purpose of buying and selling land might be proved by parol; that it might then be shown by parol, that certain land had been

(*c*) See *per* Holroyd, J., in *Williams* v. *Jones*, 5 B. & C. 108.

(*d*) *Ibid.*; and see *Britain* v. *Rossiter*, 11 Q. B. D. 123. But see as to this *McKay* v. *Rutherford*, 6 Moore, P. C. C. 414, and 13 Jur. 21.

(*e*) See *Baxter* v. *West*, 1 Dr. & Sm. 173, where the partners had acted on, and were held bound by, an unsigned memorandum, continuing a partnership for seven years. See, also, *Williams* v. *Williams*, 2 Ch. 294, and *per* Turner, L. J., in *Burdon* v. *Barkus*, 4 De G. F. & J. 47.

(*f*) *Essex* v. *Essex*, 20 Beav. 449.

(*g*) 5 Ves. 309.

(*h*) 5 Ha. 369. S. C., on appeal, 2 Ph. 266.

Bk. I. Chap. 4.

bought for the purposes of the partnership, and, consequently, that the plaintiff was entitled to a share of the profits obtained by its resale. The Vice-Chancellor directed an issue as to the fact of partnership, but his decision is an authority for the proposition that the Statute of Frauds does not preclude a person from establishing by parol an agreement to form a partnership for the purpose of buying and selling land at a profit (*i*).

This is certainly going a long way towards repealing the Statute of Frauds. *Dale* v. *Hamilton* was appealed from, and the plaintiff obtained a decree without any issue as to the fact of partnership.

Both in *Forster* v. *Hale* and in *Dale* v. *Hamilton*, there was a signed writing showing a trust in the plaintiff's favour; and this circumstance was relied on by Sir William Grant in the former case (*j*), and by Lord Cottenham in the latter (*k*); but, curiously enough, the signed writing was not made the foundation of the decision of Lord Rosslyn in *Forster* v. *Hale*, and was not considered sufficient by Vice-Chancellor Wigram in *Dale* v. *Hamilton*.

Caddick *v.* Skidmore.

His decision is difficult to reconcile with sound principle, or with the more recent decision of *Caddick* v. *Skidmore* (*l*). There the plaintiff alleged that it had been agreed between him and the defendant, that they should become partners in a colliery and share the profits equally. The plaintiff sought to enforce that agreement. The defendant denied the alleged agreement, and asserted that the true agreement was that the plaintiff and the defendant should share the royalties obtained from the colliery. The defendant also set up the Statute of Frauds as an answer to the plaintiff's claim. In this case no partnership in fact was proved: and there was no agreement for a partnership as distinguished from the agreement to share the profits of the colliery in question. The terms of that agreement were not in writing and were in dispute. Under these circumstances the Statute of Frauds was properly held to be a defence to the action.

(*i*) See, too, *Cowell* v. *Watts*, 2 H. & Tw. 224.

(*j*) *Forster* v. *Hale*, 3 Ves. 696.

(*k*) *Dale* v. *Hamilton*, 2 Ph. 266.

(*l*) 2 De G. & J. 52.

Part performance.

In considering cases of this description the equitable doctrines of part performance must be borne in mind. They may enable a plaintiff to prove a parol agreement for sharing the profits arising from land notwithstanding the Statute of Frauds (*m*).

Question of partnership or no partnership, a mixed question of law and fact.

The question whether a partnership does or does not subsist between any particular persons is a mixed question of law and fact, and not a mere question of fact. If it comes before a jury the question must be decided by them; they, taking their own view of the effect of the evidence before them, are bound to apply to the facts established to their satisfaction, those legal principles which the Court may lay down for their guidance (*n*).

In considering the evidence which it is necessary to adduce in order to establish the existence of a partnership, two perfectly distinct questions immediately suggest themselves, viz.:—

1. What is to be proved?
2. How is it to be proved?

What has to be proved in order to establish the existence of a partnership.

1. With reference to the first question, the distinction between partnerships and *quasi*-partnerships is all-important; for it by no means follows, that persons who are not partners are not liable as if they were; nor does it follow that persons who are liable as if they were partners are partners in reality. This has been already explained: and, in fact, the answer to the first of the above two questions will be found in that portion of the present work in which the nature of the contract of partnership was discussed (*o*).

Proof of such a state of things as is sufficient to establish a *quasi*-partnership is *primâ facie* evidence of a real partner-

(*m*) See *Cowell* v. *Watts*, 2 H. & Tw. 224, where the plaintiff succeeded on this point, although by reason of his laches he failed to obtain a decree.

(*n*) See *Fox* v. *Clifton*, 9 Bing. 117. Formerly the Court of Chancery used to direct an issue to try a disputed question of partnership, or no partnership, if there was any real difficulty about it. See *McGregor* v. *Bainbrigge*, 7 Ha. 164, note, and the cases there cited, but this is no longer the practice.

(*o*) See *ante*, p. 7, *et seq.*

ship (*p*), but evidence which is insufficient to establish a *quasi*-partnership must, *a fortiori*, fail to establish a real partnership between the same persons.

Sharing profits is only evidence of *quasi*-partnership where agency may be inferred, and where the recent act 28 & 29 Vict. c. 86 does not apply (*q*).

The distinction between existing and contemplated partnerships must not be overlooked: and it is obvious that if in attempting to establish a *quasi*-partnership, a real partnership should be shown to exist, the liability of the persons sought to be charged will only be established the more completely.

Means of proof.

2. With reference to the means of proof, it is the province of a writer on evidence to discuss the method by which facts to be established may be proved; and it is not consistent with the plan of this work to examine the principles relative to the production or admissibility of evidence. At the same time, a few observations on some points of practical importance with respect to the mode of proving the existence of a partnership are laid before the reader, in the hope that they may be found of use.

Where there is no writing.

As partnerships, even for long terms of years, very often exist in this country without any written agreement, the absence of direct documentary evidence of any agreement for a partnership is entitled to very little weight. As between the alleged partners themselves the evidence relied on, where no written agreement is forthcoming, is their conduct, the mode in which they have dealt with each other, and the mode in which each has, with the knowledge of the other, dealt with other people. This can be shown by books of account, by the testimony of clerks, agents, and other persons, by letters and admissions, and, in short, by any of the modes by which facts can be established (*r*).

(*p*) See *Peacock* v. *Peacock*, 2 Camp. 45.

(*q*) See as to this, *ante*, p. 31.

(*r*) As to the presumption arising from the joint retainer of solicitors, see *Robinson* v. *Anderson*, 20 Beav. 98, and 7 De G. Mc. & G. 239; *Webster* v. *Bray*, 7 Ha. 159; *McGregor* v. *Bainbrigge*, ib. 164. And for cases in which a partnership has been inferred from a number of circumstances, see *Nerot* v. *Burnand*, 4 Russ. 247, and 2 Bli. N. S. 215; *Jacobsen* v. *Hennekinius*, 5 Bro. P. C. 482; *Nicholls* v. *Dowding*, 1 Stark. 81; *Peacock* v. *Peacock*, 2

Informal documents.

An agreement for a partnership may be evidenced by informal documents; as, for example, an unsigned memorandum or draft agreement acted on by the partners (*s*), or a series of letters. Moreover, an agreement between A. and B. may disclose a trust for C., and be evidence for him and show him to be a partner (*t*).

A prospectus or advertisement issued by one person and assented to by another, is abundant evidence of a contract upon the terms contained in the prospectus or advertisement (*u*).

Acts of alleged co-partner.

When it is sought to make a person liable as if he were a partner, evidence must be adduced of his acts, or of what has been done by other people with his knowledge or with his consent, and the plaintiff must prove a holding out to himself (*x*). The statements and acts of the defendant's alleged co-partners are no evidence against him until he and they are shown to have been connected in some way with each other; and it is obviously reasoning in a circle to infer a partnership from acts of theirs, unless he and they can be connected by other evidence admissible against him (*y*).

Registers, &c.

Upon this principle it has been held that the registers of ships are no evidence of ownership except as against the persons upon whose affidavit the entries in the registers were made (*z*); that entries in the office in Somerset House for licensing stage-coaches, are no evidence to prove that the persons named in the licence are the owners of the coach (*a*); and that the acts, letters, and statements of one promoter of a company are no evidence against another, who cannot be shown to have authorised them (*b*).

Camp. 45. See as to obtaining evidence from the solicitors of the alleged partners, *Williams* v. *Mudie*, 1 Car. & P. 158.

(*s*) *Baxter* v. *West*, 1 Dr. & Sm. 173; *Worts* v. *Pern*, 3 Bro. P. C. 548 (vol. i. p. 270, in folio edit.); *Williams* v. *Williams*, 2 Ch. 294. See, as to mutual insurance societies, *ante*, p. 80, note (*a*).

(*t*) As in *Dale* v. *Hamilton*, 2 Ph. 266. See, also, *Murray* v. *Flavell*, 25 Ch. D. 89; *Page* v. *Cox*, 10 Ha. 163.

(*u*) *Fox* v. *Clifton*, 6 Bing. 797, 8.

(*x*) *Dickinson* v. *Valpy*, 10 B. & C. 140, *ante*, p. 42.

(*y*) See 1 Tay. Ev. § 753, edit. 8; *Edmundson* v. *Thompson*, 2 Fos. & Fin. 564, and 8 Jur. N. S. 235; *Grant* v. *Jackson*, Peake, 268.

(*z*) *Tinkler* v. *Walpole*, 14 East, 226; *Flower* v. *Young*, 3 Camp. 240; and see *McIver* v. *Humble*, 16 East, 174.

(*a*) *Strother* v. *Willan*, 4 Camp. 24; *Weaver* v. *Prentice*, 1 Esp. 369.

(*b*) See *Drouet* v. *Taylor*, 16 C. B. 671; *Burnside* v. *Dayrell*, 3 Ex. 224;

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It need scarcely be observed that the principle now under discussion does not apply to exclude the testimony of a person deposing to the existence of a partnership between himself and another. Such testimony was not excluded even before the alteration of the law relating to the competency of witnesses (*c*), and there is no pretence for excluding such testimony now. If a partnership is alleged to exist between A. and B., and A. is called to prove it, and he denies it, then, although the person calling A. as a witness cannot adduce evidence to show that his testimony is generally unworthy of credit, yet such person may adduce other evidence to show that the partnership denied by the witness does in point of fact exist (*d*).

Acts of co-partners after *primâ facie* evidence of partnership has been given.

Further it is to be observed that, notwithstanding the principle above stated, after sufficient evidence has been given to raise a presumption that several persons are partners, then the acts of each of those persons are admissible as evidence against the others for the purpose of strengthening the *primâ facie* case already established. Thus, in *Norton* v. *Seymour* (*e*), in order to prove a partnership between the defendants Seymour and Ayres, the plaintiff called a witness who deposed that Ayres had in conversation admitted the partnership, and then the plaintiff gave in evidence a circular and invoice issued by Seymour, and headed Seymour and Ayres, and stating that the business would in future be carried on in those names. Ayres objected to the admissibility of this document, there being, as she contended, no evidence to connect her with it; but the Court held it to be admissible; for, before the document was put in, evidence of a partnership had been given, and the document tended to confirm that evidence. So in *Nicholls* v. *Dowding* (*f*), *primâ facie* evidence of a partnership having been given, the declarations of one of the defendants were inquired into for the purpose of binding the others, and it was held that such evidence was admissible, a foundation for it having been previously laid (*g*).

Norton *v.* Seymour.

Nicholls *v.* Dowding.

Watson v. *Charlemont*, 12 Q. B. 856. This will be again alluded to in a subsequent chapter.

(*c*) *Hall* v. *Curzon*, 9 B. & C. 646; *Blackett* v. *Weir*, 5 ib. 385.

(*d*) *Ewer* v. *Ambrose*, 3 B. & C. 746.

(*e*) 3 C. B. 792.

(*f*) 1 Stark. 81.

(*g*) See, too, *Alderson* v. *Clay*, 1 Stark. 405.

Proof of articles, &c., not necessary.

A person may be made liable as if he were a partner without the proof of any partnership articles or deed which he may have executed (*h*). And although in order to prove an actual partnership it may be necessary by the law of some other country to show that some formality has been observed, the non-observance of that formality will not prevent persons who in fact trade as partners, from being so treated in this country in questions arising between them and third parties (*i*).

Admissions.

An admission made by any one that he is a member of a particular partnership is evidence of that fact against him (*k*); and such an admission renders it unnecessary for the purpose of fixing him with the liabilities of a partner, to show that he executed any document whereby he became a partner (*l*).

Vice *v.* Anson.

Admissions, however, are not necessarily conclusive, and little weight ought to be attached to them if it is shown that they were made under erroneous suppositions. This seems to have been the true ground of the decision in the much debated case of *Vice* v. *Anson* (*m*). There the defendant supposed herself to be a shareholder in a mine; she had in private letters and in private society, written and spoken of herself as a shareholder; she had received certificates stating that her name was registered in the act-book of the mine, and that she was entitled to share the profits of it; and lastly, she had paid deposits on her shares. But Lord Tenterden held that she had not in point of fact any interest in the mine, and that as she never represented to the plaintiff that she was a shareholder therein, she could not be made liable to him simply because of her erroneous suppositions and admissions.

(*h*) *Alderson* v. *Clay*, 1 Stark. 405, where a person was proved to be a member of a company without the production of the company's deed.

(*i*) *Shaw* v. *Harvey*, Moo. & Mal. 526; *Maudslay* v. *Le Blanc*, 2 C. & P. 409, note.

(*k*) *Sangster* v. *Mazarredo*, 1 Stark. 161; *Studdy* v. *Saunders*, 2 D. & Ry. 347; *Clay* v. *Langslow*, 1 Moo. & Mal. 45.

(*l*) *Harvey* v. *Kay*, 9 B. & C. 356; *Ralph* v. *Harvey*, 1 Q. B. 845; and see *Tredwen* v. *Bourne*, 6 M. & W. 461.

(*m*) 7 B. & C. 409, and Moo. & M. 98. See, on this case, *Owen* v. *Van Uster*, 10 C. B. 318, and *qu.* if it is law; for though the defendant had no legal interest in the mine, was she not entitled as a partner to share the profits obtained by working the mine? and what more was necessary to make her liable to the supplier?

Ridgway v. Philip.

The inconclusive nature of an admission was distinctly recognised in *Ridgway* v. *Philip* (*n*), where Parke, B., said, "It frequently happens in cases where the liability of persons as partners comes in question, that juries are induced to give too much effect to slight evidence of admissions. An admission does not estop the party who makes it; he is still at liberty, as far as regards his own interest, to contradict it by evidence." In that case, one of the defendants was allowed to explain an admission made by him to the effect that he was in partnership with the others (*o*). So where the freighters of a ship addressed a letter to the captain instructing him on his arrival at the Cape to call upon their managing partner, Mr. W. G. Anderson, it was held competent to the freighters to show that Mr. Anderson was not a partner of theirs (*p*).

Even where a person has executed a deed describing him as a partner, the admission is not necessarily conclusive against him (*q*).

An admission by one person that he and another are partners, may be open to the explanation that they are partners to some limited extent, or with respect to some particular transaction, but not to the extent or with respect to the business necessary to sustain the case made against him (*r*).

Retrospective articles, &c.

Again, persons may agree that as between themselves, the partnership between them shall be deemed to have commenced at some time before its actual commencement. Proof of such an agreement as this would not enable a stranger to make the parties to it liable to him as partners for what took place before the partnership in point of fact began. As to third parties, such an agreement is *res inter alios acta*, which does not affect them in any way (*s*); and it is obvious that an admission of

(*n*) 1 Cr. M. & R. 415.

(*o*) See, too, *Newton* v. *Belcher*, 12 Q. B. 921; *Newton* v. *Liddiard*, ib. 925, as to the admissions made by promoters of companies as to their liabilities.

(*p*) *Brockbank* v. *Anderson*, 7 Man. & Gr. 295. The real question was whether Anderson was an interested witness, which he would have been had he been a partner. See *Mant* v. *Mainwaring*, 8 Taunt. 139; *Brown* v. *Brown*, 4 ib. 752.

(*q*) See *Radcliffe* v. *Rushworth*, 33 Beav. 485; *Empson's case*, 9 Eq. 597.

(*r*) See *Ridgway* v. *Philip*, 1 Cr. M. & R. 415: and *De Berkom* v. *Smith*, 1 Esp. 29.

(*s*) *Wilsford* v. *Wood*, 1 Esp. 182;

the existence of a partnership might be explained as true only in this limited sense; in which case the admission might be worth nothing.

Usual evidence of partnership.

The following is the kind of evidence usually had recourse to for the purpose of proving the existence of an alleged partnership or *quasi*-partnership:—

Agreements in writing and deeds, showing the right to share profits. If the signature to a deed is proved, its due execution is inferred (*t*). To prove who constituted a firm of A. and Co., the attorney of B. and Co. cannot be compelled to produce an agreement made between A. and Co. and B. and Co., if he objects on the ground of professional confidence (*u*).

Admissions (*x*), as to which see *ante*, pp. 87, 88.

Advertisements, *Prospectuses*, &c., containing the names of the alleged partners (*y*), and names over doors (*z*), and on carts (*a*).

Answers in Chancery containing admissions (*b*).

Bills to customers, *Circulars*, *Invoices* } containing the names of the alleged partners (*c*).

Bills of Exchange. The mode in which these have been drawn, accepted, or endorsed, has frequently been relied on with success (*d*).

Drafts of Agreements, which have been acted upon (*e*).

Letters and Memoranda, showing an intention to give a person a share of profits, coupled with evidence that such intention was acted on (*f*).

Vere v. *Ashby*, 10 B. & C. 288. This subject will be more fully examined in book ii. ch. 2, § 3.

(*t*) *Grellier* v. *Neale*, 1 Peake, 198.

(*u*) *Harris* v. *Hill*, Dowl. & Ry. N. P. Ca. 17.

(*x*) *Sangster* v. *Mazarredo*, 1 Stark. 161; *Harvey* v. *Kay*, 9 B. & C. 356; *Ralph* v. *Harvey*, 1 Q. B. 845; *Clay* v. *Langslow*, 1 Moo. & M. 45.

(*y*) *Lake* v. *Argyll*, 6 Q. B. 477; *Bourne* v. *Freeth*, 9 B. & C. 632; *Maudslay* v. *Le Blanc*, 2 C. & P. 409, note; *Reynell* v. *Lewis*, 15 M. & W. 517; *Wood* v. *Argyll*, 6 Man. & Gr. 928. In *Ex parte Matthews*, 3 V. & B. 125, an advertisement of dissolution was relied on.

(*z*) *Williams* v. *Keats*, 2 Stark. 290. See, too, *Pott* v. *Eyton*, 3 C. B. 32, *ante*, p. 30.

(*a*) *Stables* v. *Eley*, 1 C. & P. 614, as to which, see *ante*, p. 47.

(*b*) *Studdy* v. *Saunders*, 2 D. & Ry. 347; *Grant* v. *Jackson*, 1 Peake, 268.

(*c*) *Young* v. *Axtell*, 2 H. Blacks. 242; *Norton* v. *Seymour*, 3 C. B. 792.

(*d*) *Spencer* v. *Billing*, 3 Camp. 310; *Guidon* v. *Robson*, 2 ib. 302; *Duncan* v. *Hill*, 2 Brod. & Bing. 682; *Gurney* v. *Evans*, 3 H. & N. 122.

(*e*) *Worts* v. *Pern*, 3 Bro. P. C. 558.

(*f*) *Heyhoe* v. *Burge*, 9 C. B. 431; *Baxter* v. *West*, 1 Dr. & Sm. 173, where a partnership for seven years was proved by an unsigned memorandum on which the parties had acted.

Usual evidence of partnership.

Meetings.—Attending and taking part in them (*g*); requiring them to be called (*h*).

Payment of money into court.—When in an action against two persons as partners they pay money into court, this does not amount to an admission of the partnership alleged to exist between them; but only of a joint liability to the extent of the amount paid in (*i*).

Recitals in agreements (*k*).

Registers.—These do not affect a person whose name is in them unless he can be proved to have authorised the use of his name (*l*); or unless there is some statute applicable to the case. An entry in custom house books made by one of three alleged partners, to the effect that he and the other two were jointly interested in certain goods, though conclusive as between them and the Crown, is not so as between them and other persons (*m*).

Release executed by all the alleged partners (*n*).

Verdict.—A verdict of a jury finding the existence of a partnership upon the trial of an issue directed out of Chancery, was held by Lord Kenyon conclusive evidence against the partners in a subsequent action brought against them by a creditor (*o*).

Use of property by several jointly (*p*).

Witness.—A witness may be asked not only who compose such and such a firm, but also whether named individuals do so (*q*). To prove a partnership between A. in England and B. in Spain, it has been held not enough to show that A. once dwelt in a town in Spain, and that B. resides and carries on business there under the name of A., B. and Co., and that there is no one there of the name of A. (*r*).

(*g*) *Lake* v. *Argyll*, 6 Q. B. 477, and *Wood* v. *Argyll*, 6 Man. & Gr. 928; noticed *ante*, p. 44. See, also, *Peel* v. *Thomas*, 15 C. B. 714.

(*h*) *Tredwen* v. *Bourne*, 6 M. & W. 461.

(*i*) *Charles* v. *Branker*, 12 M. & W. 743.

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

(*l*) *Fox* v. *Clifton*, 6 Bing. 776. As to joint-stock companies, see the volume on that subject.

(*m*) *Ellis* v. *Watson*, 2 Stark. 453.

(*n*) *Gibbons* v. *Wilcox*, 2 Stark. 43.

(*o*) *Whately* v. *Menheim*, 2 Esp. 608. *Qu.* if this can be supported? See Coll. Part. 532, quoting Mr. Starkie's comments on the case.

(*p*) *Weaver* v. *Prentice*, 1 Esp. 369. See as to co-owners who are not partners, *ante*, pp. 58, *et seq.*

(*q*) *Acerro* v. *Petroni*, 1 Stark. 100.

(*r*) *Burgue* v. *De Tastet*, 3 Stark. 53.

CHAPTER V.

OF ILLEGAL PARTNERSHIPS.

In order that a partnership may result from a contract, such contract must not be illegal. This gives rise to two questions which it is proposed to discuss in this chapter, viz. 1. What partnerships are illegal; and, 2. What are the consequences of their being so.

SECTION I.—WHAT PARTNERSHIPS ARE ILLEGAL.

Illegality never presumed.

Illegality is never presumed, but must always be proved by those who assert its existence; and in order to show that a partnership is illegal it is necessary to establish either that the object of the partnership is one the attainment of which is contrary to law, or that the object being legal, its attainment is sought in a manner which the law forbids. But proof that a firm has been guilty of an illegal act is not sufficient to bring the firm within the class of illegal partnerships; for if this were enough, every partnership which does not pay its debts, or which commits any tort, or is guilty of culpable negligence, would be illegal, which is obviously absurd (*a*). Neither does it by any means follow that because one or more clauses in a contract of partnership are illegal the partnership is itself illegal (*b*).

(*a*) See *Armstrong* v. *Armstrong*, 3 M. & K. 64 and 65; *Sharp* v. *Taylor*, 2 Ph. 818; *Brett* v. *Beckwith*, 3 Jur. N. S. 31, M. R.; *Longworth's Ex. case*, 1 De G. F. & J. 17. See the Judgment of Lord Campbell.

(*b*) See *R.* v. *Stainer*, L. R. 1 Cr. Ca. Res. 230; *General Co. of Land Credit*, 5 Ch. 363.

Bk. I. Chap. 5. Sect. 1.

Grounds of illegality.

1. A partnership may be illegal upon the general ground, that it is formed for a purpose forbidden by the current notions of morality, religion, or public policy. A partnership, for example, formed for the purpose of deriving profit from the sale of obscene prints, or of books reviling or ridiculing the established religion, or for the procurement of marriages, or of public offices of trust, would be undoubtedly illegal (*c*). In the time of Charles II., it seems to have been held that a contract for sharing the profits derived from the public exhibition of a human monster was illegal (*d*); but the writer is not aware of any modern case to the same effect, and the decision alluded to would not probably now be followed upon grounds of public policy.

Public policy.

War.

Whilst two countries are at war it is, by the law of each country, illegal for persons resident in either to have dealings with persons resident in the other. A partnership, therefore, formed between persons resident in this country for the purpose of trading with an enemy's country is illegal; and *a fortiori* is such a partnership illegal if one of the members of it is resident in that country, and is therefore an alien enemy (*e*). But a partnership in this country for running a blockade established by one belligerent nation in the ports of another is not illegal; for subject to the risk of capture a neutral may lawfully trade with a belligerent (*f*).

Trading under an assumed name.

In this country a person may legally carry on business under a name not his own; and when a firm has an established reputation and one of its members dies, it is not deemed wrong for the survivors to continue the business under the old name, although, perhaps, the reputation of the firm may have been due mainly, if not entirely, to the ability and integrity of

(*c*) See the title, Illegal Contracts, in Chitty's and Pollock's treatises on the Law of Contracts; and as to the sale of offices, *Sterry* v. *Clifton*, 9 C. B. 110; and as to associations for promulgating irreligious opinions, see *Pare* v. *Clegg*, 29 Beav. 589; *Thornton* v. *Howe*, 8 Jur. N. S. 663.

(*d*) See *Herring* v. *Walround*, 2 Ch. Ca. 110. The thing exhibited was a pair of female children, having "two heads, four arms, four legs, and but one belly where their two bodies were conjoined."

(*e*) See *Evans* v. *Richardson*, 3 Mer. 469.

(*f*) *Ex parte Chavasse*, 4 De G. J. & Sm. 655; *The Helen*, L. R. 1 Ad. & Ecc. 1.

the deceased partner. The legal view of such conduct is in accordance with established usage, and it has been accordingly held not to be illegal for surviving partners to continue to carry on business under the old name (*g*).

Speaking generally, and excluding cases specially provided for by statute (*h*), a partnership is not illegal simply because it carries on business under a name which does not disclose its members, *e.g.*, under such a name as "The City Investment and Advance Company" (*i*). It is indeed said that it is illegal at common law for persons not incorporated to assume to act as if they were, and that to trade under such a name as the above is assuming to act as a corporation; but even if assuming to act as a corporation is an offence at common law, which is very doubtful (*k*), the offence is not committed by trading under a name which is by usage as applicable to an unincorporated as to an incorporated body (*l*).

Profits of crime.

2. A partnership is illegal if formed for the purpose of deriving profit from a criminal offence, *e.g.*, from smuggling, robbery, theft, &c. (*m*). A curious instance of a partnership between two highwaymen is said to have come before the Courts in the last century, and to have been referred to by Lord Kenyon. As the case is not to be found in the reports, an abridged note of it is given below (*n*); but there

(*g*) See *Bunn* v. *Guy*, 4 East, 190; *Aubin* v. *Holt*, 2 K. & J. 66; *Lewis* v. *Langdon*, 7 Sim. 421; and compare *Thornbury* v. *Bevill*, 1 Y. & C. C. 554.

(*h*) See as to pawnbrokers, *infra*.

(*i*) See *Maughan* v. *Sharpe*, 17 C. B. N. S. 443; *Garrard* v. *Hardey*, 5 Man. & Gr. 471; *Ex parte Grisewood*, 4 De G. & J. 544.

(*k*) See 6 Man. & Gr. 107, and the volume on Companies.

(*l*) See the cases in the last note but one. An unincorporated society was held to have no right to be provisionally registered under 7 & 8 Vict. c. 110, under a name which necessarily denoted a corporation, *e.g.*, the Sea, Fire, &c., Insurance *Corporation*, *R.* v. *Whitmarsh*, 14 Q. B. 803.

(*m*) See *Biggs* v. *Lawrence*, 3 T. R. 454; and *Stewart* v. *Gibson*, 7 Cl. & Fin. 707, as to smuggling. The last case is instructive on account of the care taken to conceal the true nature of the illegal transactions.

(*n*) *Everet* v. *Williams* (2 Pothier on Obligations, by Evans, p. 3, note citing Europ. Mag. 1787, vol. 2, p. 360), is said to have been a suit instituted by one highwayman against another for an account of their plunder. The bill stated that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, &c.; that the de-

is some doubt whether it actually occurred. Real or fictitious, it is a good illustration of an illegal partnership of the class in question (*o*).

Partnerships illegal by special statutes.

3. A partnership is also illegal if formed for a purpose forbidden by statute, although independently of the statute, there would be no illegality. At one time a distinction was taken between *mala prohibita* and *mala in se;* but this distinction has very properly long ceased to be recognised as of any value for legal purposes. What judicial tribunals have to regard is the law they are called on to administer; and what is forbidden by that law, is illegal, whether it is also forbidden by the laws of morality and religion or not (*p*).

Observations on such acts.

Whether a partnership is illegal by virtue of any particular statute obviously depends upon the construction of the statute in question. With reference however to those statutes which prohibit unqualified persons from carrying on certain trades

fendant applied to him to become a partner; that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expenses on the roads and at inns, taverns, alehouses, markets, and fairs; that the plaintiff and the defendant proceeded jointly in the said business with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch; and afterwards the defendant told the plaintiff that Finchley, in the county of Middlesex, was a good and convenient place to deal in, and that commodities were very plenty at Finchley, and it would be almost all clear gain to them; that they went accordingly, and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things; that about a month afterwards the defendant informed the plaintiff that there was a gentleman at Blackheath, who had a good horse, saddle, bridle, watch, sword, cane, and other things to dispose of which he believed might be had for little or no money; that they accordingly went and met with the said gentleman, and after some small discourse they dealt for the said horse, &c.; that the plaintiff and the defendant continued their joint dealings together until Michaelmas, and dealt together at several places, *viz.*, at Bagshot, Salisbury, Hampstead, and elsewhere to the amount of 2000*l.*, and upwards. The rest of the bill was in the ordinary form for a partnership account. The bill is said to have been dismissed with costs to be paid by the counsel who signed it; and the solicitors for the plaintiff were attached and fined 50*l.* a-piece. The plaintiff and the defendant were, it is said, both hanged, and one of the solicitors for the plaintiff was afterwards transported. See 20 Eq. 230, note.

(*o*) The case was referred to by Jessel, M. R., in 11 Ch. D. 195.

(*p*) See *Aubert* v. *Maze*, 2 Bos. & P. 371.

or businesses, it may be observed, that such statutes are not infringed by an unqualified person who does nothing more than share the profits arising from those trades or businesses, if they are in fact carried on by persons who are duly qualified. The unqualified person is not within the mischief of the statutes in question, and the partnership of which he is a member is not therefore illegal (*q*).

Prohibitory and penal acts.

Again, although a statute may in terms apparently prohibit an act or omission, and affix a penalty in case of disobedience, it does not necessarily follow that all transactions to which the penalty attaches are illegal. They are so if the statute is really prohibitory (*r*); but they are not so if the true construction of the statute is that the penalty is, as it were, the price of a licence for doing what the statute apparently forbids (*s*). Therefore, it was held in *Brown* v. *Duncan* (*t*), that a firm of distillers was not illegal, although one of the firm carried on business as a retail dealer in spirits within two miles of the distillery (contrary to 4 Geo. 4, c. 94, §§ 132, 133), and was not registered as one of the firm in the excise books (as required by 6 Geo. 4, c. 81, § 7). It may, however, be doubted whether the statutes in question were properly construed by the Court (*u*).

Brown *v.* Duncan.

The most important instances of partnerships rendered illegal by statute are as follows (*x*):—

Attornies and Solicitors.—See *infra, Solicitors.*

Bankers.

Bankers.—By 7 & 8 Vict. c. 32, § 21 (*y*), all bankers are required on the 1st day of January, in every year, to make a return to the stamp office of their names, residences, and occupations, or in the case of a company or partnership, of the name, residence, and occupation of every member of the

(*q*) See *Raynard* v. *Chase*, 1 Burr. 2, and *infra*, under the heads of Medical Practitioners, Solicitors.

(*r*) *Melliss* v. *Shirley Local Board*, 16 Q. B. D. 446; *Cope* v. *Rowlands*, 2 M. & W. 149; *Bartlett* v. *Vinor*, Carth. 252; *Taylor* v. *The Crowland Gas & Coke Co.*, 10 Ex. 293.

(*s*) *Smith* v. *Mawhood*, 14 M. & W. 452; *Swan* v. *The Bank of Scotland*, 2 Mon. & Ayr. 661; *Johnson* v. *Hudson*, 11 East, 180.

(*t*) 10 B. & C. 93, and see *Smith* v. *Mawhood*, 14 M. & W. 452.

(*u*) See Pawnbrokers, *infra*.

(*x*) For a list of trades, &c., regulated by statute, see Pollock on Contracts, edit. 4, App. F., note.

(*y*) §§ 8 and 29 of this act and parts of §§ 9 and 23 are repealed by 37 & 38 Vict. c. 96.

company or partnership, and in default a penalty of 50*l.* is inflicted. Upon this act a question might arise as to the legality of a banking partnership, or company, composed in part of members whose names are not returned.

By two statutes, which have since been considerably modified, it was made unlawful for banking firms of more than six members, to issue in London or within sixty-five miles thereof, notes payable on demand, or within six months after date (*z*).

Upon these statutes, it was held, that a banking company of more than six persons associated for the purpose of issuing notes payable on demand, or within six months after date, was not illegal unless it was proved that the company issued such notes within sixty-five miles of London (*a*). Upon a similar statute relating to Ireland (*b*), it was held that in order to establish the illegality of a banking company upon the ground that its houses of business had been, from the time of the formation of the company until the commencement of the suit, and then were, at places in Ireland within fifty miles of Dublin, it was necessary to prove the existence of a place of business

Issue of notes.

(*z*) 39 & 40 Geo. 3, c. 28, § 15; 7 Geo. 4, c. 46. See further as to the issue of notes, 9 Geo. 4, c. 23; 3 & 4 Wm. 4, c. 83, and c. 98; 7 & 8 Vict. c. 32; *A.-G.* v. *Birkbeck*, 12 Q. B. D. 605; *Broughton* v. *Manchester & Salford Waterworks Co.*, 3 B. & A. 1; *Bank of England* v. *Anderson*, 3 Bing. N. C. 589; *Bank of England* v. *Booth*, 2 Keen, 466; and on appeal, *Booth* v. *Bank of England*, 6 Bing. N. C. 415; and 7 Cl. & Fin. 509. The joint effect of the above enactments seems to be that: (1.) The Bank of England can alone issue, in London, or within three miles of it, notes payable to bearer on demand. (2.) Beyond that limit such notes may be issued by bankers who were lawfully issuing them before May, 1844, under a licence; but by no other bankers; and not, therefore, by any banking firm of more than six persons carrying on the business of bankers within sixty-five miles of London. In other words, there are three limits: (1.) London and three miles round, in which the Bank of England has an exclusive monopoly. (2.) The district more than three, but within sixty-five miles of London, in which the monopoly is divided between the Bank of England and banking firms of less than six members, lawfully issuing notes before May, 1844. (3.) The district more than sixty-five miles from London, in which the monopoly is divided between the Bank of England and banking firms of six or more or less members, lawfully issuing notes before May, 1844.

(*a*) *Ransford* v. *Copeland*, 6 A. & E. 482.

(*b*) 6 Geo. 4, c. 42, § 10.

within that limit for the whole time alleged (*c*). The statutes in question, moreover, have been held only to affect partnerships formed for the purpose of carrying on the business of a banker, and not to interfere with the issue of notes by firms not carrying on such business.

Brokers.

Brokers.—The statutes imposing penalties upon brokers who acted as such in the city of London without being duly admitted so to do by the mayor and aldermen, have been repealed by 47 Vict. c. 3. Although unqualified brokers could not recover their commission (*d*), yet they could recover from their principals money paid for them by their directions or in conformity with the usages of the share market (*e*).

Discovery by unlicensed brokers.

Liability to penalties under the repealed statutes did not protect a broker from answering interrogatories relating to his dealings and transactions if he was sued in respect of them by his principal (*f*).

Marine insurers.

Insurers.—By a statute now repealed, it was made unlawful for any society or partnership (except the two corporations mentioned in the act) to carry on the business of maritime insurance or to lend money on bottomry (*g*). This enactment gave rise to numerous decisions which are frequently referred to as illustrating the consequences resulting from an illegal contract of partnership; and they will be noticed hereafter when those consequences are examined. In the present place, however, it is not necessary to do more than collect them in a note for facility of reference (*h*).

The Marine policy stamp act, 30 Vict. c. 23, prevents marine insurances being effected otherwise than by written policies

(*c*) *Hughes* v. *Thorpe*, 5 M. & W. 656.

(*d*) *Cope* v. *Rowlands*, 2 M. & W. 149.

(*e*) *Smith* v. *Lindo*, 4 C. B. N. S. 395, and 5 ib. 587; *Pidgeon* v. *Burslem*, 3 Ex. 465; *Jessopp* v. *Lutwyche*, 10 Ex. 614.

(*f*) *Green* v. *Weaver*, 1 Sm. 404; *Robinson* v. *Kitchin*, 8 De G. Mc. & G. 88, and 21 Beav. 365.

(*g*) 6 Geo. 1, c. 18, repealed by 5 Geo. 4, c. 114, § 1, as to insurances.

(*h*) The following are the decisions on the above enactment: *Mitchell* v. *Cockburn*, 2 H. Blacks. 379; *Booth* v. *Hodgson*, 6 T. R. 405; *Lees* v. *Smith*, 7 ib. 338; *Harrison* v. *Millar*, ib. 340, note; *Everth* v. *Blackburne*, 2 Stark. 66; *Ex parte Bell*, 1 M. & S. 751; *Aubert* v. *Maze*, 2 Bos. & P. 371; *Watts* v. *Brooks*, 3 Ves. 612; *Knowles* v. *Haughton*, 11 ib. 168.

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duly stamped (*i*). Consequently, if the members of a mutual insurance company insure each others' ships without any policies, the insured has no remedy against the insurers in case of a loss (*k*).

Medical practitioners.

Medical practitioners.—By 55 Geo. 3, c. 194, § 14, unqualified medical men are prohibited from practising; and by the Medical act, 1858 (*l*), it is enacted (§ 32) that no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under the act. By the same act (§ 40), penalties are inflicted on all persons who wilfully and falsely pretend to be, or take, or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner, or apothecary, or any name, title, addition, or description implying that he is registered under the act, or is recognised by law as a physician, &c.

Upon the above acts it has been decided that agreements contrary to 55 Geo. 3, are illegal and cannot be enforced (*m*); but that a medical practitioner may maintain an action for attendances, &c., although not registered when they took place, it being sufficient that he should be registered at the time of trial (*n*); and there is nothing illegal in one member of a firm being registered in one character and another in another; nor in their respectively attending to their appropriate branches of the profession; nor in their jointly suing in respect of the services rendered by each in his own branch (*o*). It has also

(*i*) They can now be stamped after their execution on payment of a penalty, 39 Vict. c. 6, § 2; but a written policy is still necessary.

(*k*) See *Edwards* v. *Aberayron Mutual Soc.*, 1 Q. B. D. 563; *Ex parte Hargrove*, 10 Ch. 542; *Fisher* v. *Liverpool Marine Insur. Co.*, L. R. 9 Q. B. 418; *Smith's case*, 4 Ch. 611; *Brett* v. *Beckwith*, 3 Jur. N. S. 31; *Bromley* v. *Williams*, 32 Beav. 177. With these cases compare *Martin's case*, 14 Eq. 148.

(*l*) 21 & 22 Vict. c. 90. As to chemists and druggists, see 31 & 32 Vict. c. 121, and *Pharmaceutical Soc.* v. *Lon. Supply Assoc.*, 5 App. Ca. 857.

(*m*) *Davies* v. *Makuna*, 29 Ch. D. 596.

(*n*) *Turner* v. *Reynall*, 14 C. B. N. S. 328.

(*o*) Ibid.

been intimated by high authority, that if only one member of a firm is duly registered, the requisitions of the statute are complied with (*p*); but the unregistered partner cannot lawfully act as a physician, surgeon, or apothecary (*q*).

Newspaper proprietors.

Newspaper proprietors.—By 44 & 45 Vict. c. 60, § 8, the titles of newspapers, and the names, occupations and residences of their proprietors, are required to be registered with the Registrar of Joint Stock Companies, and penalties are payable on default.

Patentees.

Patentees.—Prior to 1852 a patent for an invention contained a proviso to the effect that the patent should be void if more than twelve persons became interested in it as partners (*r*). But now there is no limit placed upon the number of persons who may be interested in a patented invention.

Pawnbrokers.

Pawnbrokers.—By 35 & 36 Vict. c. 93, § 13, every pawnbroker is required to have his name legibly printed over the door of every shop or place where he carries on his business. Under the previous act, 39 & 40 Geo. 3, c. 98, an agreement to carry on a pawnbroking business in partnership was illegal if it was part of the agreement that the names of some of the partners should be concealed, or, in other words, if it was part of the agreement that some of the partners should be dormant (*s*). Whether these decisions apply to the present act is open to some doubt (see § 51), but they probably do. It is conceived, however, that pawnbroking may be legally carried on by a registered company, if the name of the company is properly painted up.

(*p*) *Per* Erle, C. J., ib. Compare the cases in the next note. See, further, *De la Rosa* v. *Prieto*, 16 C. B. N. S. 578; and as to pretending to be a legally qualified practitioner, see *Pedgrift* v. *Chevallier*, 8 C. B. N. S. 240 and 246; *Ellis* v. *Kelly*, 6 H. & N. 222. The cases decided upon the Apothecaries acts, 55 Geo. 3, c. 104, and 6 Geo. 4, c. 133, will be found in 1 Chitty's Statutes.

(*q*) *Howarth* v. *Brearley*, 19 Q. B. D. 303; *Davies* v. *Makuna*, 29 Ch. D. 596; *Pharmaceutical Soc.* v. *Lon. Supply Assoc.*, 5 App. Ca. 857.

(*r*) Hindmarch on Patents, 66. See *Duvergier* v. *Fellowes*, 5 Bing. 248, and on appeal, 10 B. & C. 826, and 1 Cl. & Fin. 39.

(*s*) See *Lewis* v. *Armstrong*, 3 M. & K. 53; *Armstrong* v. *Lewis*, 2 Cr. & M. 274; *Gordon* v. *Howden*, 12 Cl. & Fin. 237; *Fraser* v. *Hill*, 1 M'Queen, 392. Compare *Brown* v. *Duncan*, 10 B. & C. 93, where one of a firm of distillers was not licensed as required by the excise laws.

Solicitors.

Solicitors.—By several statutes it has long been unlawful for any person, not duly qualified, to act by himself or another as a solicitor, or to suffer his name to be made use of upon the account, or for the profit of an unqualified person (*t*). Upon these statutes questions have arisen as to how far it is lawful for a qualified solicitor to share the profits of his business with a person who is not qualified; and it has been held that there is no illegality in this where the non-qualified person does not share the profits in consideration of his acting in any manner as a solicitor (*u*). For example, there is nothing illegal in an agreement that a surviving partner of a firm of solicitors shall share his profits with the widow of a late partner (*x*).

But an agreement for a partnership in the ordinary sense of the word between a person duly qualified and one who is not, is clearly illegal (*y*); and if the agreement is in writing, and is for a present partnership, parol evidence cannot be admitted to show that it was not to take effect until both parties were qualified (*z*). But an agreement between a solicitor and his articled clerk that the latter, when a solicitor, shall become a partner with the former and share his profits retrospectively, is not illegal (*a*). However, the statutes cannot be evaded by an agreement to the effect that the unqualified person shall receive a share of the profits as a salary, and that he shall not be a partner with the other (*b*). Nor can a solicitor's clerk (unless himself qualified) act as a solicitor under cover of his

(*t*) See 6 & 7 Vict. c. 73, §§ 2, 26, 32; 23 & 24 Vict. c. 127, § 26; and 37 & 38 Vict. c. 68, § 12. See as to partnerships between town clerks and other solicitors, *Hughes* v. *Statham*, 4 B. & C. 187; and as to prosecutions by partners of clerks of the peace, see 5 & 6 Will. 4, c. 76, § 102, and *R.* v. *Fox*, 1 E. & E. 729.

(*u*) *Scott* v. *Miller*, Johns. 220, is a strong case on this head.

(*x*) *Candler* v. *Candler*, Jac. 225, and 6 Madd. 141; *Sterry* v. *Clifton*, 9 C. B. 110; and see *Aubin* v. *Holt*, 2 K. & J. 66. See also *ante*, Medical Practitioners.

(*y*) *Williams* v. *Jones*, 5 B. & C. 108. See *Scott* v. *Miller*, Johns. 220.

(*z*) *Williams* v. *Jones*, 5 B. & C. 108.

(*a*) *Ex parte Joyce*, 4 Ch. D. 596.

(*b*) *Tench* v. *Roberts*, 6 Madd. 145; *Re Jackson*, 1 B. & C. 270; see, too, *Re Clark*, 3 D. & R. 260; *Hopkinson* v. *Smith*, 1 Bing. 13. Quære the effect on these cases of the act 28 & 29 Vict. c. 86, *ante*, pp. 35, *et seq.*

principal's name (*c*). It was, however, held that a person who had been duly examined, sworn, and admitted, but who had not taken out his annual certificate, was not unqualified within the meaning of the act of Geo. 2 (*d*) ; and since the act 6 & 7 Vict. c. 46, it has been held not unlawful for a qualified solicitor to act upon the usual agency terms as the solicitor of another solicitor who has not taken out his certificate (*e*).

It is illegal for two persons, one qualified and the other unqualified, to hold themselves out as partners, and to put both their names to bills of costs and other documents in which their names ought not to appear, unless they are qualified solicitors (*f*).

Theatre managers, &c.

Theatrical representations.—By several statutes now repealed (*g*) it was unlawful to act any play for gain except under certain restrictions. Partnerships therefore for sharing profits to be derived from acting plays otherwise than in accordance with these acts were illegal (*h*).

Unincorporated companies with transferable shares.

Unincorporated joint-stock companies with transferable shares.—The question whether unincorporated companies with transferable shares were illegal at common law or under the Bubble Act of 1719 (6 Geo. 1, c. 18), will be found discussed in the volume on Companies. The question has now only a historical interest.

Unregistered partnerships.

Unregistered Partnerships, &c.—By the Companies Act, 1862, § 4, all banking partnerships of more than ten members, and all other partnerships of more than twenty members, formed after the 2nd of November, 1862 (*i*), must be registered under that act unless formed in pursuance of some special act, charter, or letters patent, or for working mines in the Stannaries : and any partnership required to be registered and

(*c*) *Hopkinson* v. *Smith*, 1 Bing. 13 ; *Re Palmer*, 2 A. & E. 686.

(*d*) *Re Hodgson*, 3 A. & E. 224 ; and see *Hodgkinson* v. *Mayer*, 6 A. & E. 194.

(*e*) *Ex parte Foley*, 11 Beav. 456.

(*f*) *Edmonson* v. *Davis*, 4 Esp. 14.

(*g*) 10 Geo. 2, c. 28 ; 25 ib. c. 36 (made perpetual by 28 ib. c. 19) ; and 28 Geo. 3, c. 30 ; repealed by 6 & 7 Vict. c. 68. As to what is a theatre within this act, see *Davys* v. *Douglas*, 4 H. & N. 180.

(*h*) *Ewing* v. *Osbaldiston*, 2 M. & Cr. 53 ; *De Begnis* v. *Armistead*, 10 Bing. 107.

(*i*) See as to this *Shaw* v. *Simmons*, 12 Q. B. D. 117, and as to what associations need not be registered, *Smith* v. *Anderson*, 15 Ch. D. 247.

not registered is illegal (*k*). This subject will be found more fully examined in the volume on Companies.

SECTION II.—CONSEQUENCES OF ILLEGALITY.

Consequences of illegality.

If a partnership, when it is formed, will be illegal, any contract to form it must be illegal also. Upon this ground it was held in *Duvergier* v. *Fellowes* (*l*), that a bond for the payment of money upon the formation by the obligee of an illegal company was invalid; and in *Williams* v. *Jones* (*m*), that no action lay for the recovery of a premium agreed to be paid by the defendant, on being taken into partnership with the plaintiff, and which partnership was illegal.

Enforcing agreement.

Ewing v. Osbaldiston.

An agreement for an illegal partnership will not be enforced even if it has been partly performed. *Ewing* v. *Osbaldiston* (*n*) is a good instance of this. There the plaintiff and the defendant agreed to become partners in a theatre. The plaintiff advanced part of the money, and the defendant applied it in part payment for a lease of the theatre. The lease was afterwards assigned to him alone. The defendant did not perform his part of the agreement, and the plaintiff accordingly filed a bill against him. The bill prayed that it might be declared that the plaintiff and the defendant were partners in the theatre, and in the lease thereof, and that the agreement made between the plaintiff and the defendant might be performed, and, if necessary, that the partnership might be dissolved, and the usual accounts taken. The agreement, however, was illegal, by 10 Geo. 2, c. 28, and the bill was dismissed. It was decided, on appeal, that the agreement being illegal, it was impossible for the Court to decree its specific performance; and that if the plaintiff sought to recover back

(*k*) *Jennings* v. *Hammond*, 9 Q. B. D. 225; *Shaw* v. *Benson*, 11 ib. 563; *Ex parte Poppleton*, 14 Q. B. D. 379; *Padstow Total Loss Assoc.*, 20 Ch. D. 137; *Sykes* v. *Beadon*, 11 Ch. D. 170, although overruled by *Smith* v. *Anderson*, 15 Ch. D. 247, on the necessity of registration, would have been rightly decided if the association had required registration.

(*l*) 5 Bing. 248; 10 B. & C. 826; and 1 Cl. & Fin. 39.

(*m*) 5 B. & C. 108.

(*n*) 2 M. & Cr. 53.

the money he had paid, he could not do so in that suit, as (even if he had a lien on the property for the money, which the Court denied), the bill did not seek to enforce such lien.

Actions by an illegal partnership.

If a partnership is illegal, its members cannot maintain any action in respect of any transaction tainted with the illegality. For example, if a partnership is formed for selling smuggled goods, it cannot recover the price of any smuggled goods which it may have sold (*o*). So an illegal loan society cannot recover money it has lent (*p*). But an illegal partnership can prosecute a person stealing its property (*q*).

Actions against an illegal partnership.

The illegality of a partnership affords no reason why it should not be sued. It cannot indeed be effectually sued by any person who, being aware of all the facts, seeks to enforce a demand arising out of a transaction tainted with the illegality which affects the firm (*r*); but the illegality of the firm does not *per se* afford any answer to a demand against it, arising out of a transaction to which it is a party, and which transaction is legal in itself. Unless the person dealing with the firm is *particeps criminis*, there can be no *turpis causa* to bring him within the operation of the rule *ex turpi causâ non oritur actio*; and he, not being implicated in any illegal act himself, cannot be prejudiced by the fact that the persons with whom he has been dealing are illegally associated in partnership (*s*).

So, if a partnership or company has been established by fraud, and persons have been induced to join it by false and fraudulent representations, still the fraud so perpetrated, affords no answer to a creditor of the firm (*t*), unless that creditor has himself been party to the fraud (*u*). Moreover, where a company has been established by fraud, and where it has been engaged in illegal transactions, the innocent shareholders

(*o*) See *Biggs* v. *Lawrence*, 3 T. R. 454.

(*p*) *Shaw* v. *Benson*, 11 Q. B. D. 563; *Jennings* v. *Hammond*, 9 ib., 225.

(*q*) See *R.* v. *Frankland*, L. & C. 276; 9 Jur. N. S. 388; 32 L. J. M. C. 69.

(*r*) *Re South Wales Atlantic Steamship Co.*, 2 Ch. D. 763.

(*s*) See the judgment of Mellish, L.J., in the last case, and *Brett* v. *Beckwith*, 3 Jur. N. S. 31, M. R.

(*t*) *Henderson* v. *The Royal Brit. Bank*, 7 E. & B. 356.

(*u*) See *Batty* v. *M'Cundie*, 3 C. & P. 203.

are nevertheless liable amongst themselves to contribute if necessary to the payment of the debts of the company; for such shareholders are not so *in delicto* as to preclude any one of them from calling on the others to share the losses to which he and they are liable (*x*).

Actions for contribution, &c.

The most important consequence, however, of illegality in a contract of partnership is, that the members of the partnership have no remedy against each other for contribution or apportionment in respect of the partnership dealings and transactions. However ungracious and morally reprehensible it may be for a person who has been engaged with another in various dealings and transactions to set up their illegality as a defence to a claim by that other, for an account and payment of his share of the profits made thereby, such a defence must be allowed to prevail in a court of justice. Were it not so, those who—*ex hypothesi*—have been guilty of a breach of the law, would obtain the aid of the law in enforcing demands arising out of that very breach; and not only would all laws be infringed with impunity, but, what is worse, their very infringement would become a ground for obtaining relief from those whose business it is to enforce them. For these reasons, therefore, and not from any greater favour to one party to an illegal transaction than to his companions, if proceedings are instituted by one member of an illegal partnership against another in respect of the partnership transactions, it is competent to the defendant to resist the proceedings on the ground of illegality (*y*). There are indeed some old cases in which this defence was not allowed to prevail (*z*); but they have been long overruled (*a*). Moreover, if the illegality is brought to the notice of the Court, it will of its own accord decline to interfere between the parties, although there may be no desire on their part to urge such an objection (*b*).

Waiver of illegality.

Illegality a defence at law.

When partnerships of marine insurers were illegal, it was

(*x*) See *Longworth's Ex. case*, Johns. 465, affirmed 1 De G. F. & J. 17.

(*y*) See *Sykes* v. *Beadon*, 11 Ch. D. 170; *Holman* v. *Johnson*, 1 Cowp. 341; *Thomson* v. *Thomson*, 7 Ves. 470; *Cousins* v. *Smith*, 13 Ves. 544.

(*z*) *Dover* v. *Opey*, 2 Eq. Ca. Ab. 7; *Watts* v. *Brooks*, 3 Ves. 611.

(*a*) See the cases cited *infra*.

(*b*) *Evans* v. *Richardson*, 3 Mer. 469.

held that if one member of a firm of such insurers paid all the losses sustained by the firm, he could not recover any part of the money paid from his copartners (*c*); and that if the premiums were received by one only, the others could not obtain their shares from him (*d*). So, where there was an express covenant to pay such shares, the covenant was held to be invalid by reason of the illegality which tainted it (*e*); and even where an arbitrator had awarded what was to be paid by one partner to the other, it was held that the award could not be enforced (*f*). These cases are of undoubted authority, and are always referred to as such, although the particular ground of illegality on which they rested no longer exists. It has indeed been held, in one or two cases of illegal partnership, that if one partner has paid losses at the special request of the other, who promised to pay his share afterwards, an action for such share may be sustained (*g*); but these cases cannot be reconciled with others, and must be taken to be overruled. In *De Begnis* v. *Armistead* (*h*), the plaintiff and the defendant entered into an illegal agreement for bringing out an opera and dividing the profits arising from it. By the agreement the plaintiff was to pay the singers, and the defendant was to provide a theatre and pay the dancers. This was done; but instead of profits, there were losses, and on the whole account a balance was found due to the plaintiff. A bill for the balance was given by the defendant, and it was proved that the balance was made up of different sums paid by the plaintiff at the defendant's request. It was nevertheless held that the original agreement being illegal, the plaintiff could not recover the balance in question, either on the bill or the common money counts.

De Begnis v. Armistead.

Nor can an action for an account be sustained by one member of an illegal partnership against another, in respect of its dealings and transactions (*i*). Thus if an association is

Illegality a defence to an account.

Sykes v. Beadon.

(*c*) *Mitchell* v. *Cockburn*, 2 H. Blacks. 380.

(*d*) *Booth* v. *Hodgson*, 6 T. R. 405.

(*e*) *Lees* v. *Smith*, 7 T. R. 338.

(*f*) *Aubert* v. *Maze*, 2 Bos. & P. 371.

(*g*) See *Petrie* v. *Hannay*, 3 T. R. 418; *Faikney* v. *Reynous*, 4 Burr. 2070.

(*h*) *De Begnis* v. *Armistead*, 10 Bing. 107. See *Fisher* v. *Bridges*, 3 E. & B. 642, reversing S. C. 2 ib. 118.

(*i*) *Knowles* v. *Haughton*, 11 Ves. 168; *Armstrong* v. *Armstrong*, 3 M. & K. 45; *Harvey* v. *Collett*, 15 Sim. 332.

illegal by reason of non-registration under the Companies Act, 1862, an action cannot be sustained by its members against its trustees for the execution of their trust, nor to make them responsible for losses arising from breaches of trust (*k*).

Concealed illegality.

Moreover, if it can be shown that the purpose with which a partnership was formed was illegal, the consequences of illegality will follow, however skilfully the true purpose may have been concealed (*l*); and parol evidence may be given to show the existence of the illegality, however formally the partnership agreement may have been drawn up, and however successful the parties may have been in making that agreement legal on the face of it (*m*).

Illegality, when not a defence.

In order, however, that illegality may be a defence, it must affect the contract on which the plaintiff is compelled to rely, in order to make out his right to what he asks. It by no means follows, from the circumstance that money has been obtained in breach of some law, that therefore whoever is in possession of such money is entitled to keep it in his own pocket.

Effect of illegality on the right to recover back subscriptions.

If money is paid by A. to B. to be applied by him for some illegal purpose, it is competent for A. to require B. to hand back the money if he B. has not already parted with it (*n*), and the illegal purpose has not been carried out (*o*). Although, therefore, the subscribers to an illegal company have not a right to an account of the dealings and transactions of that company and of the profits made thereby, they have a right to have their subscriptions returned (*p*); and even though the moneys subscribed have been laid out in the purchase of land

(*k*) *Sykes* v. *Beadon*, 11 Ch. D. 170, is an authority for this proposition, although overruled on another ground, *ante*, p. 101.

(*l*) *Stewart* v. *Gibson*, 7 Cl. & Fin. 707; *Armstrong* v. *Armstrong*, 3 M. & K. 53.

(*m*) See *Collins* v. *Blantern*, 2 Wils. 341, and 1 Sm. L. Ca., and the notes there.

(*n*) See *Taylor* v. *Lendy*, 9 East, 49; *Varney* v. *Hickman*, 5 C. B. 271; *Diggle* v. *Higgs*, L. R. 2 Ex. D. 422; *Hampden* v. *Walsh*, 1 Q. B. D. 189; *Taylor* v. *Bowers*, ib. 291.

(*o*) See *Herman* v. *Jeuchner*, 15 Q. B. D. 561.

(*p*) See *Harvey* v. *Collett*, 15 Sim. 332. Compare the cases in the next note.

and other things for the purpose of the company, the subscribers are entitled to have that land and those things reconverted into money, and to have it applied as far as it will go in payment of the debts and liabilities of the concern, and then in repayment of the subscriptions. In such cases, no illegal contract is sought to be enforced; on the contrary, the continuance of what is illegal is sought to be prevented (*q*).

Tenant *v.* Elliott.

Again, *Tenant* v. *Elliott* (*r*), and other cases, decided that if A. and B. are parties to an illegal contract, and B. in pursuance thereof pays money to C. for A.'s use, A. can recover this money from C. It follows from this that if two partners, A. and B., enter into an illegal agreement with C., and in pursuance of this agreement C. pays money to D. for the use of A. and B., not only can A. and B. recover this money from D., but if he pays it over to either one of the two partners, that one must account to the other for his share of it. This must also be the case if C., instead of paying the money to D., pays it over at once to A. or B. In other words, it follows from *Tenant* v. *Elliott* and that class of cases, that if an illegal act has been performed in carrying on the business of a legal partnership, and gain has accrued to the partnership from such act, and the money representing that gain has been actually paid to one of the partners for the use of himself and co-partners, he cannot set up the illegality of the act from which the gain accrued as an answer to a demand by them for their share of what he has received. Upon this principle it was held in *Sharp* v. *Taylor* (*s*), that a partner was entitled to an account against his co-partner of monies actually come to the hands of the latter, from the employment of a ship in a manner not permitted by the navigation laws; and in *Sheppard* v. *Oxenford* (*t*) that the directors of an illegal company were liable to account

Sharp *v.* Taylor

Sheppard *v.* Oxenford.

(*q*) *Sheppard* v. *Oxenford*, 1 K. & J. 491; *Butt* v. *Monteaux*, ib. 98. See also *Symes* v. *Hughes*, 9 Eq. 475; *Taylor* v. *Bowers*, 1 Q. B. D. 291.

(*r*) *Tenant* v. *Elliott*, 1 Bos. & P. 3; *Farmer* v. *Russell*, ib. 296; *Bousfield* v. *Wilson*, 16 M. & W. 185; *Nicholson* v. *Gooch*, 5 E. & B. 999.

(*s*) 2 Ph. 801, recognised in *Sheppard* v. *Oxenford*, 1 K. & J. 491. Compare *Sykes* v. *Beadon*, 11 Ch. D. 170.

(*t*) 1 K. & J. 491. See, too, *Butt* v. *Monteaux*, ib. 98.

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for the money received by them on behalf of the company and for the use of its members.

Illegality set up by executors.

An executor or administrator of a deceased partner cannot protect himself from accounting for the estate of the deceased by setting up against his creditors, legatees, or next of kin, the illegality of the transactions in which the deceased may have been concerned (*u*). That has nothing to do with their claims; and the reasons upon which the maxim *ex turpi causâ non oritur actio* is founded, evidently have no application to such a case. Even if the executor was one of the deceased's co-partners, and was thus mixed up with him in the illegal transactions, still if the share of the deceased in the gains arising from them has actually been placed to his credit in the partnership books and has come or might have come to the hands of the executor as such, he must account for that share (*x*). But if there has been no account settled, it would seem that the executor may in his character of partner rely on illegality, and decline to come to any account in respect of the gains in question (*y*).

Illegal trusts.

But notwithstanding *Tenant* v. *Elliott*, *Sharp* v. *Taylor*, and other cases of that class, illegal trusts will not be enforced. *Sykes* v. *Beadon* (*z*), already referred to, is a clear

Ottley *v.* Browne.

authority for this proposition. Another authority is *Ottley* v. *Browne* (*a*). There A., who was a shareholder with B. and others in two companies, wished to become a banker; and in order to evade a statute which rendered it illegal for a banker to be a partner in commercial undertakings (*b*), A. assigned his shares to B. in trust for himself. B., who carried on a separate trade, was made bankrupt, and his assignees sold all his shares in the above companies, and also the shares held by him in trust for A. A. then filed a bill against B.'s assignees, praying that they might be declared trustees of these last shares for him, A., and that they might be ordered to pay the value

(*u*) See *Joy* v. *Campbell*, 1 Sch. & Lef. 339; *Hale* v. *Hale*, 4 Beav. 339.

(*x*) See *Joy* v. *Campbell*, 1 Sch. & Lef. 328.

(*y*) See *Ottley* v. *Browne*, 1 Ball. & Bea. 360; and compare *Sharp* v. *Taylor*, 2 Ph. 801.

(*z*) 11 Ch. D. 170, *ante*, p. 105.

(*a*) 1 Ball & Bea. 360, and see *Ex parte Mather*, 3 Ves. 373.

(*b*) 29 Geo. 2, c. 16 (Irish).

thereof to him, or that he might be at liberty to prove for such value against B.'s estate; but the bill was dismissed with costs, on the ground that it sought to enforce a secret trust, which was directly against a positive law (*c*).

Indictment.

Before quitting the subject of the consequences of the illegality of a partnership, the risk of criminal prosecution ought to be mentioned. Persons engaged in an illegal business, whether partners or not, and whether incorporated or not, are liable to be punished criminally (*d*); and even where the object of a society is not illegal, its directors and managers will do well to bear in mind, that if they wilfully violate the provisions of an act of Parliament they are guilty of a misdemeanour, and are liable to be indicted accordingly (*e*).

(*c*) The same principle is illustrated by *Thomson* v. *Thomson*, 7 Ves. 470, which, however, was not a partnership case.

(*d*) See the title Conspiracy in Russell on Crimes, and Archbold's Criminal Law.

(*e*) See Lord Campbell's observations in *Longworth's Ex. case*, 1 De G. F. & J. 31.

CHAPTER VI.

OF THE GENERAL NATURE OF A PARTNERSHIP.

SECTION I.—OF THE MERCANTILE AND THE LEGAL NOTION OF A FIRM.

Bk. I. Chap. 6. Sect. 1.

Mercantile view of a firm.

PARTNERS are called collectively a firm. Merchants and lawyers have different notions respecting the nature of a firm (*a*). Commercial men and accountants are apt to look upon a firm in the light in which lawyers look upon a corporation, *i. e.*, as a body distinct from the members composing it, and having rights and obligations distinct from those of its members. Hence, in keeping partnership accounts, the *firm* is made debtor to each partner for what he brings into the common stock, and each partner is made debtor to the *firm* for all that he takes out of that stock. In the mercantile view, partners are never indebted to each other in respect of partnership transactions; but are always either debtors to or creditors of the firm.

Owing to this impersonification of the firm, there is a tendency to regard its rights and obligations as unaffected by the introduction of a new partner, or by the death or retirement of an old one. Notwithstanding such changes among its members, the *firm* is considered as continuing the same; and the rights and obligations of the old firm are regarded as continuing in favour of or against the new firm as if no changes had

(*a*) See on this subject Cory's Treatise on Accounts (2nd ed. 1839, Pickering), a valuable work, but, it is believed, not so widely known as it should be. See, too, a paper by J. M. Ludlow, Esq., "On the mercantile notion of the firm, and the need of its legal recognition," in the 2nd Vol. of the Papers read before the Juridical Society, p. 40. To both of these the writer desires to acknowledge his obligations.

occurred. The partners are the agents and sureties of the firm: its agents for the transaction of its business; its sureties for the liquidation of its liabilities so far as the assets of the firm are insufficient to meet them. The liabilities of the firm are regarded as the liabilities of the partners only in case they cannot be met by the firm and discharged out of its assets.

Legal view of a firm.

But this is not the legal notion of a firm. The firm is not recognised by lawyers as distinct from the members composing it (*b*). In taking partnership accounts and in administering partnership assets, Courts have to some extent adopted the mercantile view, and actions may now be brought by or against partners in the name of their firms (*c*); but speaking generally, the firm as such has no legal recognition. The law, ignoring the firm, looks to the partners composing it; any change amongst them destroys the identity of the firm; what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities. In point of law, a partner may be the debtor or the creditor of his co-partners, but he cannot be either debtor or creditor of the firm of which he is himself a member (*d*).

A member of an ordinary partnership fills a double character; he is both a principal and an agent. As a principal he is bound by what he does himself and by what his co-partners do on behalf of the firm, provided they keep within the limits of their authority; as an agent he binds them by what he does for the firm, provided he keeps within the limits of his authority. But a partner is not the surety of the firm. Every member of an ordinary partnership, however numerous the partners may be, is liable as a principal to have his private property seized for a partnership debt, whether the firm has assets to pay it or not; and not only so, but the property of the firm is liable to be seized for the private debts of any of

(*b*) *Ex parte Gliddon*, 13 Q. B. D. 43; *Hoare* v. *Oriental Bank Corporation*, 2 App. Ca. 589, illustrate this; and see *per* James, L.J., in *Ex parte Corbett*, 14 Ch. D. 126.

(*c*) Rules of Sup. Ct., Ord. xvi. rule 14; Bank. Act, 1883, § 115, and Bank. Rules, 1886, r. 259.

(*d*) See Lord Cottenham's judgment in *Richardson* v. *The Bank of England*, 4 M. & Cr. 171, 172; and *De Tastet* v. *Shaw*, 1 B. & A. 664.

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the partners composing it (*e*). This non-recognition of the firm, in the mercantile sense of the word, is one of the most marked differences between partnerships and incorporated companies.

SECTION II.—CONSEQUENCES OF THE NON-RECOGNITION OF THE FIRM IN THE MERCANTILE SENSE.

1. *Generally as regards its name.*

Name of a firm.

It follows from the foregoing remarks, that the name under which a firm carries on business is in point of law a conventional name applicable only to the persons who, on each particular occasion when the name is used, are members of the firm (*f*). When a firm is spoken of by its name or style, evidence is admissible to show who in fact constituted the firm at the time in question (*g*): and if persons trade or carry on business under a name, style, or firm, whatever may be done by them under that name, is as valid as if real names had been used. This is seen every day in the case of bills of exchange and promissory notes; and even in the case of more formal instruments, there is no doubt of their validity, although some of the executing parties may be described as A. & Co. (*h*). So partners may be registered as shareholders in the name of their firm (*i*); and under the Copyright act, 5 & 6 Vict. c. 45,

(*e*) See Execution, in book ii. ch. 3, § 4.

(*f*) A firm is usually described in legal proceedings as certain persons trading or carrying on business under, and using the name, style, and firm of, &c. As to the sufficiency of this description, see *Smith* v. *Ball*, 9 Q. B. 361.

(*g*) *Carruthers* v. *Sheddon*, 6 Taunt. 15; *Bass* v. *Clive*, 4 M. & S. 13; *Stubbs* v. *Sargon*, 2 Keen, 255, and 3 M. & Cr. 507; *Latouche* v. *Waley*, Hayes & Jones (Ir. Ex.), 43.

(*h*) See *Maughan* v. *Sharpe*, 17 C. B. N. S. 443, a mortgage; *Brutton* v. *Burton*, 9 Chitty, 707, a warrant of attorney; *Evans* v. *Curtis*, 2 C. & P. 296, an agreement for a lease; *Moller* v. *Lambert*, 2 Camp. 548, a bond; *Gorrie* v. *Woodley*, 17 Ir. Com. L. Rep. 221, a guarantee; *Latouche* v. *Waley*, Hayes & Jones (Ir. Ex.) 43. How far the firm is bound by instruments on which its true name does not appear, will be seen hereafter; and see as to the parties to sue on a covenant with a firm, *Metcalf* v. *Rycroft*, 6 M. & S. 75, noticed *infra*, book ii. ch. 3.

(*i*) *Weikersheim's case*, 8 Ch. 831.

and Engravings act, 8 Geo. II. c. 13, § 1, it is sufficient to register a book in the name of the firm (*j*), or to print the name of the firm of proprietors under the engravings (*k*).

Effect of change amongst the partners.

But as the name of a firm is only a conventional mode of designating the persons composing it, any variation amongst these persons is productive of a new signification of the name.

Legacy to a firm.

If, therefore, a legacy is left to a firm, the legacy is payable to those who compose the firm at the time the legacy vests (*l*); and if a legacy is left to the representatives of an old firm, it will be payable to the executors of the last survivor of the partners constituting the firm alluded to, and not to its successors in business (*m*).

Advances to a firm.

Again, if trustees are authorised to lend money to a firm, and, after the death or retirement of one of the members, the trustees lend to the remaining members, this, it seems, would be a breach of trust on the part of the trustees (*n*).

Agency.

An authority given to two partners to insure in their names does not authorise an insurance in the names of themselves and a third person afterwards taken into partnership with them (*o*). So, if there be a firm, A., B. and C., and it has an agent D., and C. retires from the firm, though D. may continue the agent of the firm, he is no longer the agent of C., but only of A. and B. (*p*). In *Tasker* v. *Shepherd*, two partners had appointed an agent for four years and a half. One of the partners having died before the expiration of that time, it was held that the surviving partner was under no obligation to continue the agent in his employ. The Court held that the appointment had reference to the existing partnership only,

(*j*) *Weldon* v. *Dicks*, 10 Ch. D. 247.

(*k*) *Rock* v. *Lazarus*, 15 Eq. 104.

(*l*) See *Stubbs* v. *Sargon*, 2 Keen, 255, and 3 M. & Cr. 507. In *Mayberry* v. *Brooking*, 7 De G. M. & G. 673, a legacy of a debt due to A. was held to pass A.'s interest in a debt due to him and his copartners. See also *Ex parte Kirk*, 5 Ch. D. 800.

(*m*) *Leak* v. *M'Dowall*, 3 N. R. 185, M. R.; *Kerrison* v. *Reddington*, 11 Ir. Eq. 451. See *Greville* v. *Greville*, 27 Beav. 594.

(*n*) See *Fowler* v. *Raynal*, 2 De G. & Sm. 749, and 3 M. & G. 590.

(*o*) *Barron* v. *Fitzgerald*, 6 Bing. N. C. 201. But of course a continuance of the authority may be inferred from the dealings of the person giving it with the changing firms. See *Pariente* v. *Lubbock*, 8 De G. Mc. & G. 5.

(*p*) See *Jones* v. *Shears*, 4 A. & E. 832.

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and that the contract was intended to be for four years and a half, provided the parties so long lived (*q*).

Offices held by a firm.

Upon the same principle—namely, that the name of the firm is only a conventional name for its members—if a firm is appointed by its mercantile name to any office, *e. g.*, the office of trustee, guardian or executor, the partners in the house at the time of its appointment to the office, are the persons who, in point of law, are considered as filling it (*r*). The firm, as such, cannot hold an office; nor can rights, personal to the members of a given firm, be exercised by new members who may be introduced into it (*s*), nor by its successors in business (*t*); unless they are clearly intended to exercise them.

Protection of name.

The name by which a firm is known is not of itself the property of the firm, and there is nothing at common law to prevent persons from carrying on business in partnership under any name they please (unless perhaps it purports to be the name of a corporation) (*u*).

But one firm is not at liberty to mislead the public by so using the name of another firm as to pass off themselves or their goods for that other, or for the goods of that other (*x*). Moreover, an established firm can prevent a company from registering itself under the name of the firm (*y*).

Name a trade mark.

The name of a firm may moreover be registered as a trade mark for particular classes of goods (46 & 47 Vict. c. 57, § 64 and 65); and if so registered, it is capable of being assigned in connection with the good will of the firm, § 70. Registration is equivalent to antecedent use, § 75. Provision is made

(*q*) *Tasker* v. *Shepherd*, 6 H. & N. 575.

(*r*) *De Mazar* v. *Pybus*, and *Knudson* v. *Pybus*, 4 Ves. 629.

(*s*) See *Barron* v. *Fitzgerald*, 6 Bing. N. C. 201; *Stevens* v. *Benning*, 1 K. & J. 168.

(*t*) *Hole* v. *Bradbury*, 12 Ch. D. 886.

(*u*) See as to this, *ante*, p. 93.

(*x*) See *Lee* v. *Haley*, 5 Ch. 155; *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748, reversing S. C., 6 Ch. D. 574; *Burgess* v. *Burgess*, 3 D. G. M. 896. See also *Singer Machine Manufactures* v. *Wilson*, 3 App. Ca. 376, and *Singer Man. Co.* v. *Loog*, 18 Ch. D. 395, and 8 App. Ca. 15; *Braham* v. *Beachim*, 7 Ch. D. 848.

(*y*) *Hendriks* v. *Montagu*, 17 Ch D. 638. The Copyright Acts have no application to mere names, see *Maxwell* v. *Hogg*, 2 Ch. 307.

to prevent the improper registration of the same trade mark by several persons, § 72.

Changes and mistakes in name of a firm.

Speaking generally, the rights and liabilities of a firm cannot be affected by a change in its name unaccompanied by a change amongst its members. Regarded as a trade mark, and in connection with goodwill, a change in name may be attended by important consequences, but in other respects it matters little; for so long as there is no change amongst the members, the different names they assume all denote the same persons. It must not, however, be concluded that one partner can bind his co-partners by using a name under which he and they do not carry on business, and the use of which they have not sanctioned; and as will be seen hereafter, he has no power so to bind them (*z*). Moreover, a mistake in the name of a firm may be important, *e.g.*, under the Copyright act, if the owners of a copyright carry on business in partnership and are not registered properly, they cannot sue for an infringement (*a*).

2. *In legal proceedings.*

Actions by and against firms.

The non-recognition of the firm, in a mercantile sense, was very apparent when it had to sue or be sued at law: for,

1. A firm could neither sue nor be sued otherwise than in the names of the partners composing it (*b*).

2. Consequently, no action could be brought by the firm against one of its partners, nor by one of its partners against it; for in any such action one person, at least, would appear both as plaintiff and as defendant, and it was considered absurd for any person to sue himself even in form (*c*).

3. For the same reason, one firm could not bring an action

(*z*) See as to this, *Kirk* v. *Blurton*, 9 M. & W. 284, and other cases of that class, noticed *infra*, book ii. Ch. 1, § 5.

(*a*) *Low* v. *Routledge*, 1 Ch. 42.

(*b*) See *infra*, book ii. c. 3. A corporation may sue in a name it has acquired by reputation. *The Dutch West India Co.* v. *Moses*, 1 Str. 612. As to actions by individuals who have assumed to act as a corporation, see *Cooch* v. *Goodman*, 2 Q. B. 580.

(*c*) *De Tastet* v. *Shaw*, 1 B. & A. 664; *Richardson* v. *The Bank of England*, 4 M. & Cr. 171, 172.

against another if there were one or more partners common to both firms (*d*).

So, if one member of a firm drew a bill on the firm, and the bill was accepted in the name of the firm, the drawer could not sue the firm on such a bill; for he, as one of the firm, was liable as an acceptor, and ought, therefore, to be a defendant to the action in which he was plaintiff (*e*).

The extent to which these rules have been modified by modern legislation will be examined hereafter (*f*). They are alluded to here in order to show the logical consequences which flow from the non-recognition of any such entity as a firm. In bankruptcy, however, the firm is often recognised, as will be seen hereafter.

Effect of change in a firm on its rights and liabilities.

Another most important consequence of the principle, that on any change amongst the persons composing a partnership there is in fact a new partnership, and not a mere continuation of the old one, is that although, upon a change in a firm, it may be agreed between the members of the old and new firms that the rights and obligations of the old shall devolve upon the new partners, this has no effect upon third parties unless they accede to it. As to them it is *res inter alios acta*, and there is no principle by virtue of which the existing rights or obligations of non-partners can be affected, either for better or for worse, by agreements to which they are strangers. This subject will be alluded to hereafter (*g*).

3. *Partnership disabilities.*

Disabilities of one partner affecting the firm.

Speaking generally, no person can do by his agent what he cannot do himself; and although each member of a firm is a principal as regards his own conduct, he is the agent of his co-partners; and he cannot therefore do for the firm what they cannot do. In other words, the disability of one of the partners affects the whole firm. Illustrations of this doctrine will

(*d*) *Bosanquet* v. *Wray*, 6 Taunt. 597; *Mainwaring* v. *Newman*, 2 Bos. & P. 120.

(*e*) See *Neale* v. *Turton*, 4 Bing. 149. Compare *Beecham* v. *Smith*, E. B. & E. 442, where the note sued upon was the several note of the defendants.

(*f*) See *infra*, book ii. ch. 3.

(*g*) See *infra*, book ii. ch. 2, § 3.

be found in Book II., Chap. III., § 1, relating to defences to actions by partners. Further illustrations are afforded by those cases which preclude a firm of solicitors or any of its members from doing work which one of the members cannot do (*h*).

Again, there are rules in bankruptcy which prevent the partners of the trustee, registrar, or official receiver from doing various acts which they might do if they were not in partnership with him (*i*).

By 50 & 51 Vict. c. 58, § 40, no inspector of a coal mine can be a partner in it, nor can a partner of any land agent, mining engineer, &c., be an inspector.

4. *As regards sureties and securities.*

Effect of change in a firm on the position of its sureties.

It is a principle of the law of suretyship, that any act on the part of the principal creditor which alters the risk of the surety without his consent, discharges him from future liability (*k*).

Sureties to a firm.

If, therefore, a person becomes surety *to* a firm, it is important to ascertain whether he clearly contemplated changes in the firm, and agreed to become surety to a fluctuating body or not. If he did, his liability is not discharged by any change amongst the members constituting the partnership at the time he became surety (*l*); but if no such intention can be shown, then a contract of suretyship entered into with a firm will be deemed to be binding so long only as the firm remains unchanged (see 19 & 20 Vict. c. 97, § 4, on the next page);

(*h*) See *Duke of Northumberland* v. *Todd*, 7 Ch. D. 777, as to swearing affidavits.

(*i*) See Bank. act, 1883, §§ 88, 116 (2); sched, 1, r. 26; Bank. R. 1886, r. 56 (2), 113, 114.

(*k*) See, as to sureties, the note to *Arlington* v. *Merrick*, 2 Wms. Saund. 414. As to the discharge of apprentices and their sureties by a change in the firm to which they are bound, see *Lloyd* v. *Blackburne*, 9 M. & W. 363; *R.* v. *St. Martin's*, 2 A. & E. 655.

(*l*) *Pease* v. *Hirst*, 10 B. & C. 122; *Metcalf* v. *Bruin*, 12 East, 400, and 2 Camp. 422; and see *Barclay* v. *Lucas*, 1 T. R. 291, note; *Kipling* v. *Turner*, 5 B. & A. 261. In *Pariente* v. *Lubbock*, 8 De G. Mc. & G. 5, an authority to a firm of consignees, to recognise the consignor's son as his agent, was held to continue, notwithstanding changes in the firm, as long as the consignor continued his business connection with the firm.

and consequently any change in it whether by the death (*m*) or the retirement (*n*) of a partner, or by the introduction of a new partner (*o*), immediately puts an end to the surety's liability so far as subsequent events are concerned. In all such cases the surety's position and risk are altered, and whether he has in fact been damnified by the change or not, he has a right to say *non in hæc fœderaveni*.

Sureties for a firm.

Similar doctrines apply to cases where a person becomes surety *for* the conduct of a firm (*p*). Moreover, a person who becomes surety for another is not necessarily surety for his conduct as a partner, and obviously not for the conduct of himself and his co-partner (*q*).

Effect of incorporation.

Again, if a person becomes surety to several people for the conduct of a servant in their employ, and those people are afterwards incorporated, the surety is discharged: for the person created by the act of incorporation is different from the persons in whose employ the servant was, and with whom the surety contracted (*r*). On precisely similar grounds it is conceived that a person who becomes surety to a corporation for the conduct of one of its servants would be discharged by the amalgamation of that corporation with another; for the two together would be a different body from either of its amalgamated members (*s*). But a mere change of name consequent on registration with limited liability has not this effect (*t*).

(*m*) *Holland* v. *Teed*, 7 Ha. 50; *Strange* v. *Lee*, 3 East, 484; *Weston* v. *Barton*, 4 Taunt. 673; *Pemberton* v. *Oakes*, 4 Russ. 154; *Simson* v. *Cooke*, 1 Bing. 452; *Chapman* v. *Beckington*, 3 Q. B. 703; *Backhouse* v. *Hall*, 6 N. R. 98, Q. B.

(*n*) *Myers* v. *Edge*, 7 T. R. 254; *Dry* v. *Davey*, 10 A. & E. 30; and see *Solvency Mutual Guarantee Co.* v. *Freeman*, 7 H. & N. 17.

(*o*) *Wright* v. *Russell*, 2 Wm. Blacks. 934.

(*p*) *Bellairs* v. *Ebsworth*, 3 Camp. 53; *University of Cambridge* v. *Baldwin*, 5 M. & W. 580; *Simson* v. *Cook*, 1 Bing. 452; 19 & 20 Vict. c. 97, § 4.

(*q*) *The London Assurance Co.* v. *Bold*, 6 Q. B. 514; *Montifiore* v. *Lloyd*, 15 C. B. N. S. 203, where the partnership was known to the surety.

(*r*) *Dance* v. *Girdler*, 1 Bos. & Pull. N. R. 34.

(*s*) In *The Eastern Union Rail. Co.* v. *Cochrane*, 9 Ex. 197, and *The London, Brighton, and South Coast Rail. Co.* v. *Goodwin*, 3 Ex. 320, the surety was not discharged; but the statute amalgamating the two companies contained an express provision on the subject.

(*t*) *Crowe's Soap Co.* v. *Cooper*, 8 C. B. N. S. 800.

The doctrines established in the foregoing cases have been expressly sanctioned by the legislature; it being enacted by the Mercantile Law Amendment Act (*u*), that:— Mercantile Law Amendment Act.

"No promise to answer for the debt, default or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm or in the person trading under the name of a firm, unless the intention of the parties that such promise shall continue to be binding notwithstanding such change shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise."

Effect of change in firm on its securities.

Questions nearly akin to those just alluded to, arise where securities have been deposited with bankers to secure future advances, and a change has occurred in the banking firm before the making of some of the advances. *Primâ facie*, the securities extend only to those advances which are made by the firm whilst its members continue the same as when the securities were deposited (*x*). And similarly, if a partner pledges his separate property for future advances to be made to his firm, and he afterwards dies, an advance made after his death to his surviving partners will not be chargeable against the property pledged (*y*). It has even been held that if a person deposits deeds as a security for advances to be made to *him*, the security does not cover advances made to him and his partners (*z*).

Equitable mortgagees.

However, it is established that an equitable mortgage by deposit of title deeds may be extended, even by parol, to cover advances made after a change in the firm with which the deeds are lodged (*a*). And although a legal mortgage to a firm

(*u*) 19 & 20 Vict. c. 97, § 4. See on this section, *Backhouse* v. *Hall*, 6 B. & Sm. 507, and 6 N. R. 98, Q. B.

(*x*) See *per* Lord Eldon in *Ex parte Kensington*, 2 V. & B. 83.

(*y*) *Bank of Scotland* v. *Christie*, 8 Cl. & Fin. 214.

(*z*) *Ex parte Mackenna*, 3 De G. F. & J. 629; *Ex parte Freen*, 2 Gl. & J. 246. See, too, *Chuck* v. *Freen*, 1 Moo. & M. 259. These cases turn on the terms of the memoranda of deposit, and on the circumstances under which the securities are given.

(*a*) *Ex parte Lloyd*, 1 Gl. & J. 389; *Ex parte Lane*, De Gex, 300; and see *Ex parte Nettleship*, 2 M. D. & De G. 124.

cannot be converted into an equitable mortgage merely by parol (*b*), it may be so converted by a written agreement, and may as an equitable mortgage become available as a security for advances made after a change in the firm to which the legal mortgage was originally given (*c*). Owing to these doctrines a security given to a firm for advances to be made by it, is, upon a change in the firm, readily made a continuing security; and a slight manifestation of intention on the part of the borrower that it should so continue, will enable the new firm to hold the securities until the advances made by itself as well as those made by the old firm, have been repaid (*d*).

Lien of solicitors.

The lien which a firm of solicitors has on the deeds, &c., of its clients, is not lost by a mere change in the firm (*e*). But a solicitor's lien only attaches where the papers on which the lien is claimed have come to the possession of the very persons to whom the client is legally indebted: whence it follows that papers which come into the possession of a firm after the introduction of a new partner (*f*) or the retirement of an old one (*g*) cannot be retained for a debt due before the change in the firm took place. The death of a partner is not, however, it is conceived, equivalent to retirement, for the survivors become the legal creditors; and there is, therefore, no reason why they should not have a lien for a debt due to them and their deceased partner on papers coming into their possession after his death.

A dissolution of a partnership between solicitors operates as a discharge by them of their client; and any lien they may have on his papers is subject to his right to have them handed over to a fresh solicitor, for the purpose of enabling him to finish business of the client pending at the time of dissolution (*h*).

(*b*) *Ex parte Hooper*, 2 Rose, 328.

(*c*) *Ex parte Parr*, 4 D. & C. 426.

(*d*) See *Ex parte Kensington*, 2 Ves. & B. 79; *Ex parte Marsh*, 2 Rose, 239; *Ex parte Loyd*, 3 Deac. 305; *Ex parte Alexander*, 1 Gl. & J. 409.

(*e*) *Pelly* v. *Wathen*, 7 Ha. 351, affirmed 1 De G. Mc. & G. 16.

(*f*) *Re Forshaw*, 16 Sim. 121; *Pelly* v. *Wathen*, 7 Ha. 351.

(*g*) *Vaughan* v. *Vanderstegen*, 2 Drew. 409.

(*h*) *Griffiths* v. *Griffiths*, 2 Ha. 587; *Rawlinson* v. *Moss*, 7 Jur. N. S. 1053, V.-C. W.

CHAPTER VII.

OF THE DURATION OF CONTRACTS OF PARTNERSHIP—OF PARTNERSHIPS AT WILL AND FOR A TERM.

Partnerships at will and for a term.

A CONTRACT of partnership is determinable at the will of any one of the persons who have entered into it, provided it has not been agreed that the contract shall endure for a specified time. In other words, the result of a contract of partnership is a partnership at will, unless some agreement to the contrary can be proved (*a*). Such an agreement may be established as well by direct evidence as by implication from the acts of the partners; and it is not possible to lay down any rule by means of which the intention of the partners on this head can be certainly ascertained, where no express agreement has been come to. One or two points, however, on the subject have been decided, and demand notice.

Primâ facie, partnerships are at will.

Effect of existence of debts.

The mere fact that a firm has incurred debts, and charged its assets for their payment, is no proof of an agreement that the firm shall continue until its debts are paid, for those debts may be paid as well after as before a dissolution (*b*).

Effect of taking a lease.

Again, the fact that the partners have, for partnership purposes, taken land on lease for a term of years, is not proof of an agreement that the partnership between them shall subsist for the same period. This has been decided on several occasions (*c*), and the reasons are thus given by Lord Eldon in *Crawshay* v. *Maule*, a leading case upon the subject.

Crawshay v. Maule.

"Without doubt, in the absence of express there may be an implied contract as to the duration of a partnership, but I must contradict all authority

(*a*) See *per* Parke, J., in *Heath* v. *Sanson*, 4 B. & Ad. 175; *Frost* v. *Moulton*, 21 Beav. 596, and the cases cited in the following notes.

(*b*) See *King* v. *The Accumulative Assurance Co.*, 3 C. B. N. S. 151.

(*c*) *Featherstonhaugh* v. *Fenwick*, 17 Ves. 307; *Jefferys* v. *Smith*, 1 Jac. & W. 301; *Alcock* v. *Taylor*, Taml. 506; *Burdon* v. *Barkus*, 3 Giff. 412, and on appeal, 4 De G. F. & J. 42.

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if I say that whenever there is a partnership, the purchase of a leasehold interest of longer or shorter duration, is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On that argument the Court, holding that a lease for seven years is proof of partnership for seven years, and a lease of fourteen of a partnership for fourteen years, must hold that if the partners purchase a fee simple, there shall be a partnership for ever. It has been repeatedly decided that interests in land purchased for the purpose of carrying on trade are no more than stock in trade" (*d*).

Partnerships continued after their terms are expired.

Further, where a partnership, originally entered into for a certain number of years, is continued after their expiration, and there is no evidence as to the additional time for which the partnership was to last, it is treated as having become a partnership at will, and not as having been renewed for another definite period (*e*).

Duration of sub-partnerships.

So, if one of several partners forms a sub-partnership with a stranger, the fact that the principal partnership has been entered into for a certain number of years is no proof that the sub-partnership was intended to last for the same number of years, or for as many of them as were unexpired when the sub-partnership was formed (*f*).

Implied terms of duration.

On the other hand, in *Wheeler* v. *Van Wart* (*g*), a company, the duration of which was not expressly fixed, was held to be intended to last at least until after a day appointed in its deed of settlement for the holding of a general meeting. And in *Reade* v. *Bentley* (*h*), it was considered that an agreement to the effect that a publisher should defray the expenses of a work written by an author, and should receive a per centage on the gross amount of sale, and that the net profits of each edition should be divided equally between both parties, amounted to an agreement for a joint adventure between the author and the publisher for so long as might be necessary to dispose of a complete edition; and that the publication of every new edition prolonged the partnership until that edition should

(*d*) *Crawshay* v. *Maule*, 1 Swanst. 509.

(*e*) *Neilson* v. *Mossend Iron Co.*, 11 App. Ca. 298; *Featherstonhaugh* v. *Fenwick*, 17 Ves. 307; *Booth* v. *Parkes*, 1 Moll. 465. See, also, *Cuffe* v. *Murtagh*, 7 Ir. L. R. 411.

(*f*) *Frost* v. *Moulton*, 21 Beav. 596.

(*g*) 9 Sim. 193, and better in 2 Jur. 252.

(*h*) 4 K. & J. 656; and 3 ib. 271.

be disposed of; but that when any edition was exhausted either party was free to discontinue the joint adventure.

Causes of dissolution.

The right to rescind a partnership contract for fraud or misrepresentation will be discussed hereafter in Book III.; and the right to dissolve a partnership or to have it dissolved, and the consequences of its dissolution will be examined in Book IV.

BOOK II.

OF THE RIGHTS AND OBLIGATIONS OF PARTNERS AS REGARDS NON-PARTNERS.

CHAPTER I.

OF THE LIABILITIES OF PARTNERS FOR THE ACTS OF EACH OTHER.

SECTION I.—GENERAL PRINCIPLES OF AGENCY AS APPLIED TO ORDINARY PARTNERSHIPS.

Bk. II. Chap. 1. Sect. 1.

Each partner the agent of the firm.

EVERY member of an ordinary partnership is its general agent for the transaction of its business in the ordinary way; and the firm is responsible for whatever is done by any of the partners when acting for the firm within the limits of the authority conferred by the nature of the business it carries on (*a*). Whatever, as between the partners themselves, may be the limits set to each other's authority, every person not acquainted with those limits is entitled to assume that each partner is empowered to do for the firm whatever is necessary for the transaction of its business, in the way in which that business is ordinarily carried on by other people (*b*). But no person is entitled to assume that any partner has a more extensive authority than that above described.

The consequences of this principle are:—

General rules.

1. That if an act is done by one partner on behalf of the

(*a*) The case is different with mere part-ownerships, *Barton* v. *Williams*, 5 B. & A. 395; *Helme* v. *Smith*, 7 Bing. 709.

(*b*) See *per* James, L. J., in *Baird's case*, 5 Ch. 733, and *per* Parke, B., in *Hawken* v. *Bourne*, 8 M. & W. 710. The fact that one partner ordinarily attends to one branch of the business does not prevent his binding the firm when acting out of his own department, *Morans* v. *Armstrong*, Arm. M'Artn. & Ogle, Ir. N. P. Rep. 25.

firm, and it was necessary for carrying on the partnership business in the ordinary way, the firm will *primâ facie* be liable, although in point of fact the act was not authorised by the other partners.

2. That if an act is done by one partner on behalf of the firm, and it was not necessary for carrying on the partnership business in the ordinary way, the firm will *primâ facie* be not liable.

In the first case the firm will be liable unless the one partner had in fact no authority to bind the firm, and the person dealing with him was aware of that want of authority; whilst in the second case the firm will not be liable unless an authority to do the act in question, or some ratification of it, can be shown to have been conferred or made by the other partners (*c*).

Secret partnerships.

The doctrine that each member of any ordinary firm is its implied agent for the transaction of its business in the ordinary way, is generally laid down without qualification. But it is questionable whether this rule applies to a case in which a person who happens to be a member of a firm, but who is not known to be such, and who has in fact no authority to act for it, takes upon himself so to do. Real authority is excluded by hypothesis; and it is difficult to see from what, in such a case, any authority can be implied. If, indeed, he was known to be a partner, whether by his own representations or otherwise, his authority to act for the firm would be properly inferred. But the case supposed excludes all knowledge of his position, and under such circumstances it is conceived there can be no apparent as distinguished from real authority (*d*).

Authority of dormant partner.

Liability of dormant partners.

Again, with respect to the liability of dormant partners: a distinction must be drawn between—first, undisclosed principals who carry on a business by partners or agents; and, secondly, persons who simply share the profits of a business carried on by others on their own account, *i.e.*, as principals only, and

(*c*) See *Dickinson* v. *Valpy*, 10 B. & C. 128, and *Orellin* v. *Brook*, 14 M. & W. 11, where there was sufficient ratification.

(*d*) See the judgment of Cockburn, C. J., in *Nicholson* v. *Ricketts*, 2 E. & E. 524, and of Cleasby, B., in *Holme* v. *Hammond*, L. R. 7 Ex. 233.

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not as agents for those who share their profits. In the first case the dormant partners are liable for whatever may be done by their partners and agents in the course of transacting the business in the ordinary way; but in the second case the so-called dormant partners are not principals at all, the persons who carry on their business do not carry it on as their agents either really or apparently, and the doctrines applicable to undisclosed principals are altogether excluded (*e*).

Necessity the limit of authority.

It will be observed, that what is necessary to carry on the partnership business in the ordinary way, is made the test of authority where no actual authority or ratification can be proved. This is conformable to the most recent and carefully considered decisions; but by adopting it the liability of a firm for the acts of its co-partners is not so extensive as non-lawyers sometimes imagine. The act of one partner to bind the firm must be *necessary* for the carrying on of its business; if all that can be said of it was that it was convenient, or that it facilitated the transaction of the business of the firm, that is not sufficient in the absence of evidence of sanction by the other partners (*f*). Nor it seems will necessity itself be sufficient if it be an extraordinary necessity. What is necessary for carrying on the business of the firm under ordinary circumstances and in the usual way is the test; and therefore, in a case where the nature of the business was one in which there was no necessity to borrow money to carry it on under ordinary circumstances and in the ordinary manner, the Court held the firm not liable for money borrowed by its agent under extraordinary circumstances, although money was absolutely requisite to save the property of the firm from ruin (*g*). This case is an authority for saying that a power to do what is usual does not include a power to do what is unusual, however urgent; and although in the case referred to, the money was not borrowed by a partner, but by a person who was only an agent of the firm, the decision would, it is apprehended, have

Extraordinary necessity.

(*e*) This distinction is rendered necessary by the decision of the House of Lords, in *Cox* v. *Hickman*. See *ante*, pp. 30, *et seq.*

(*f*) See *Brettel* v. *Williams*, 4 Ex. 630.

(*g*) See *Hawtayne* v. *Bourne*, 7 M. & W. 595; and see *Ex parte Chippendale*, 4 De G. M. & G. 19.

been the same if he had been a partner. For notwithstanding the fact that every partner is to a certain extent a principal as well as an agent, the liability of his co-partners for his acts can only be established on the ground of agency. As their agent he has no discretion except within the limits set by them to his authority, and the fact that he is himself, as one of the firm, a principal, does not warrant him in extending those limits, save on his own responsibility (*h*).

Discretion in urgent cases.

The question whether a given act can or cannot be said to be necessary to the transaction of a business in the way in which it is usually carried on, must evidently be determined by the nature of the business, and by the practice of persons engaged in it. Evidence on both of these points is therefore necessarily admissible, and, as may readily be conceived, an act which is necessary for the prosecution of one kind of business in the ordinary way may be wholly unnecessary for carrying on another. Consequently no answer of any value can be given to the abstract question—can one partner bind his firm by such and such an act? unless, having regard to what is usual in business, it can be predicated of the act in question either that it is one without which no business can be carried on, or that it is one which is not necessary for carrying on any business whatever. There are obviously very few acts of which any such assertions can be truly made. The great majority of acts, and practically all which give rise to doubt are those which are necessary in one business and not in another. Take, for example, negotiable instruments: it may be necessary for one member of a firm of bankers to draw, accept, or indorse a bill of exchange on behalf of the firm, and to require that each member should put his name to it would be ridiculous; but it by no means follows, nor is it in fact true, that there is any necessity for one of several solicitors to possess a similar power, for it is no part of the ordinary business of a solicitor to draw, accept, or indorse bills of exchange. The question, therefore, can one partner bind the firm by accepting bills in its name? admits of no general answer; the nature of the business and

Nature of the business the test of necessity.

(*h*) See *Ricketts* v. *Bennett*, 4 C. B. 686, and *Dickinson* v. *Valpy*, 10 B. & C. 128.

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the practice of those who carry it on (usage or custom of the trade) must be known before any answer can be given (*i*).

The question when the agency of a partner begins and ends will be examined hereafter, see bk. ii. c. 2, § 3.

SECTION II.—LIABILITIES OF PARTNERS IN RESPECT OF ACTS WHICH ARE NEITHER TORTS NOR FRAUDS.

Having noticed the general principles determining the extent to which one partner is the agent of the firm it is proposed to examine the power of one partner to bind his firm in particular cases where there is no question of tort or fraud. For the sake of convenience, subjects noticed will be arranged in alphabetical order.

1. Accounts.

1. *Accounts.*—An account rendered by one partner relative to a partnership transaction is equivalent to an account rendered by the firm (*k*).

The power of one partner to settle accounts, and to assent to a transfer of them, will be found noticed *infra* under the head *Debts*.

2. Admissions.

2. *Admissions.*—The admissions of one partner with reference to a partnership transaction are evidence against the firm (*l*); but are not necessarily conclusive (*m*). An admission by one person who afterwards enters into partnership with others is no evidence against them, merely because they and he are partners when the evidence is sought to be used (*n*). Moreover, in an action against partners, the answer of one of

(*i*) See *Hogarth* v. *Latham*, 3 Q. B. D. 643; *Taunton* v. *Royal Ins. Co.*, 2 Hem. & M. 135.

(*k*) *Fergusson* v. *Fyffe*, 8 Cl. & Fin. 121, where an account sent by one partner showing a balance due from the firm, and bearing interest at 9 per cent. was held to be binding on the firm. See as to false accounts, *infra*, § 3.

(*l*) *Wood* v. *Braddick*, 1 Taunt. 104; *Pritchard* v. *Draper*, 1 R. & M. 191, affirmed 2 Cl. & Fin. 379; *Nicholls* v. *Dowding*, 1 Stark. 81; *Sangster* v. *Mazarredo*, ib. 162; *Thwaites* v. *Richardson*, 1 Peake, 23; *Grant* v. *Jackson*, ib. 268; *Wright* v. *Court*, 2 Car. & P. 232; and see the last preceding note, and *ante*, p. 87. As to part-owners, see *Jaggers* v. *Binnings*, 1 Stark. 64.

(*m*) *Wickham* v. *Wickham*, 2 K. & J. 491, where the point in question was the amount of a debt.

(*n*) *Tunley* v. *Evans*, 2 Dowl. & L. 747; *Catt* v. *Howard*, 3 Stark. 3.

them to interrogatories cannot be read against the others (*o*), unless they have an opportunity of contradicting it.

See further, *infra*, under the heads *Debts* and *Representations*.

3. *Agents.*—As to the appointment of agents, see *infra* under the head *Servants*. 3. Agents.

4. *Arbitration.*—One partner cannot, without special authority, bind the firm by a submission to arbitration (*p*). The power to refer disputes, even although they relate to dealings with the firm, cannot be said to be necessary for carrying on its business in the ordinary way (*q*). Where a partnership has been dissolved, and it has been agreed that one of the partners shall get in the debts due to the firm, he has no power after bringing an action in the name of the firm for a debt due to it, to bind his co-partner by a reference of all matters in difference between the plaintiffs and the defendant (*r*). The partner actually referring the dispute is, however, himself bound by the award (*s*): and the other partners may become bound by ratification (*t*). 4. Arbitration.

5. *Banking Account.*—One partner has no implied authority to bind the firm by opening a banking account on its behalf in his own name (*u*). See *infra*, *Cheques*. 5. Banking account.

6. *Bills of Exchange and Promissory Notes.*—Every member of an ordinary trading partnership has implied power to bind the firm by drawing, accepting, or indorsing bills of exchange, or by making and indorsing promissory notes in its name and for the purposes of the firm (*x*). And if two partners unknown to each other give two bills in the name of the firm in payment 6. Bills and notes.

(*o*) *Parker* v. *Morrell*, 2 Ph. 453; *Dale* v. *Hamilton*, 5 Ha. 393.

(*p*) See *Stead* v. *Salt*, 3 Bing. 101; *Adams* v. *Bankhart*, 1 Cr. M. & R. 681; *Antram* v. *Chace*, 15 East, 209.

(*q*) *Stead* v. *Salt*, 3 Bing. 101; *Adams* v. *Bankhart*, 1 Cr. M. & R. 681; and see *Boyd* v. *Emerson*, 2 A. & E. 184.

(*r*) *Hatton* v. *Royle*, 3 H. & N. 500.

(*s*) *Stranyford* v. *Green*, 2 Mod. 228.

(*t*) As in *Thomas* v. *Atherton*, 10 Ch. D. 185.

(*u*) *The Alliance Bank Limited* v. *Kearsley*, L. R. 6 C. P. 433.

(*x*) See *Re Riches*, 4 D. G. J. & S. 581, and 5 N. R. 287; *Pinckney* v. *Hall*, 1 Salk. 126; *Dickinson* v. *Valpy*, 10 B. & C. 128; *Sutton* v. *Gregory*, 2 Peake, 150; *Smith* v. *Baily*, 11 Mod. 401; *Lewis* v. *Reilly*, 1 Q. B. 349; *Stephens* v. *Reynolds*, 5 H. & N. 513. See, also, The Bills of Ex. Act, 1882, § 23, cl. 2.

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of the same demand, the firm will be liable on both bills, if held by *bonâ fide* holders for value without notice of the mistake (*y*).

Acceptances in blank.

One partner, however, has no implied power to accept bills in blank, nor to bind his co-partners, otherwise than jointly with himself. A bill accepted in blank by one partner in the name of the firm is not binding on it except in favour of a *bonâ fide* holder for value without notice of the way in which the bill was accepted (*z*).

Joint and several notes.

A joint and several promissory note signed by one partner for himself and co-partners, does not bind them severally (*a*); but it does bind them and him jointly (*b*) and himself separately (*c*).

Powers of attorney to draw bills, &c

In consequence of the doctrine that every member of an ordinary trading partnership has authority to draw, accept, and indorse bills in its name, if a member of such a partnership goes abroad and gives his co-partner a power of attorney to manage his affairs, and draw, accept, or indorse bills in his name, this authority warrants the attorney in putting his principal's name to non-partnership bills only; his authority to put the partnership name to partnership bills being independent of, and unaffected by, the letter of attorney (*d*).

Bills, &c., of non-trading partnerships.

With respect to partnerships which are not trading partnerships, the question, whether one partner has any implied authority to bind his co-partners by putting the name of the firm to a negotiable instrument, depends upon the nature of the business of the partnership (*e*). In the absence of evidence showing necessity or usage, the power has been denied to one of several mining adventurers (*f*), quarry workers (*g*),

(*y*) *Davison* v. *Robertson*, 3 Dow. 218.

(*z*) *Hogarth* v. *Latham*, L. R. 3 Q. B. D. 643.

(*a*) See *Perring* v. *Hone*, 4 Bing. 32; 2 Car. & P. 401.

(*b*) *Maclae* v. *Sutherland*, 3 E. & B. 1.

(*c*) See *Elliot* v. *Davis*, 2 Bos. & P. 338; *Gillow* v. *Lillie*, 1 Bing. N. C. 695.

(*d*) *Attwood* v. *Munnings*, 7 B. & C. 278.

(*e*) See *Dickinson* v. *Valpy*, 10 B. & C. 128.

(*f*) *Brown* v. *Byers*, 16 M. & W. 252; *Dickinson* v. *Valpy*, 10 B. & C. 128. Compare *Brown* v. *Kidger*, 3 H. & N. 853.

(*g*) *Thicknesse* v. *Bromilow*, 2 Cr. & J. 425.

farmers (*h*), solicitors (*i*). Where two firms agreed to accept each other's drafts, and to share the profits arising from their sale, it was held that one of these firms was not liable to a person who had purchased a bill drawn on it by the other firm, but which the drawees had not accepted (*k*).

If, however, a member of a non-mercantile firm concurs in drawing, or authorises his partner to draw, a bill in the name of the firm, he impliedly authorises its indorsement in the same name for the purpose for which it was drawn (*l*).

Authority to transfer bill.

It must be borne in mind that a person who has no authority to use the name of another, so as to render him liable on a bill or note, may nevertheless have sufficient authority to transfer the property therein (*m*).

Before leaving the subject of negotiable instruments, it may be observed that it is often difficult to say whether they purport to be the paper of a firm, or only that of some one or more of the partners. Unless the paper purports to be the paper of a firm, no one whose name is not on the paper is liable to be sued on it (*n*). This subject will be adverted to hereafter.

7. Bonds.

7. *Bonds.*—See *Borrowing money and Deeds.*

8. Borrowing money. General power to borrow.

8. *Borrowing money.*—One of the most important of the implied powers of a partner is that of borrowing money on the credit of the firm. The sudden exigencies of commerce render it absolutely necessary that such power should exist in the members of a trading partnership, and accordingly in a comparatively early case this power was clearly recognised (*o*). It has been already seen that one partner can bind the firm by a bill or note, upon which money may be obtained, by the every-

(*h*) *Greenslade* v. *Dower*, 7 B. & C. 635.

(*i*) *Hedley* v. *Bainbridge*, 3 Q. B. 316; *Levy* v. *Pyne*, Car. & Marsh. 453; *Harman* v. *Johnson*, 2 E. & B. 61, and 3 Car. & Kir. 272.

(*k*) *Nicholson* v. *Ricketts*, 2 E. & E. 497.

(*l*) See *Garland* v. *Jacomb*, L. R. 8 Ex. 216; *Lewis* v. *Reilly*, 1 Q. B. 349.

(*m*) See on this subject, *Smith* v. *Johnson*, 3 H. & N. 222; *Heilbut* v. *Nevill*, L. R. 5 C. P. 478, where, however, the property was held not to pass.

(*n*) Bills of Ex. Act, 1882, § 23.

(*o*) See *Lane* v. *Williams*, 2 Vern. 277, 292; *Rothwell* v. *Humphries*, 1 Esp. 406; *Denton* v. *Rodie*, 3 Camp. 493; *Lloyd* v. *Freshfield*, 2 Car. & P. 333; *Ex parte Bonbonus*, 8 Ves. 540; see, too, *De Ribeyre* v. *Barclay*, 23 Beav. 125; *Gordon* v. *Ellis*, 7 Man. & Gr. 607; *Brown* v. *Kidger*, 3 H. & N. 853.

day process of discounting; and the power of one partner to pledge partnership goods for advances is equally well established (*p*). At the same time, the power of borrowing money, like every other implied power of a partner, only exists where it is necessary for the transaction of the partnership business in the ordinary way; and consequently if money is borrowed by one partner for the declared purpose of increasing the partnership capital (*q*), or of raising the whole or part of the capital agreed to be subscribed in order to start the firm (*r*), or if the business is such as is customarily carried on on ready money principles, *e.g.*, mining on the cost-book principle (*s*), or without borrowing, as in the case of solicitors (*t*), the firm will not be bound unless some actual authority or ratification can be proved. Still less will the firm be bound where borrowing is prohibited and the person advancing the money is aware of the prohibition (*u*).

Overdrawing banking account.

Overdrawing a banking account is borrowing money (*x*).

Increasing capital.

Connected with the subject of borrowing money, is that of increasing capital. A sole trader who borrows money for the purpose of his trade, cannot with propriety be said to increase his capital; but if two or more persons are in partnership, and each borrows money on his own *separate* credit, and the money is then thrown into the common stock, the capital of the firm, as distinguished from the separate capitals of the persons composing it, may with propriety be said to be increased. But, in this case, the firm is not the borrower, nor is it debtor to the lender for the money borrowed. If a firm borrows money so as to be itself liable for it to the lender, the capital of the firm is no more increased than is the capital of an ordinary individual increased by his getting into debt. When, therefore,

(*p*) See, *infra*, Mortgage and Pledge.

(*q*) *Fisher* v. *Taylor*, 2 Ha. 218.

(*r*) *Greenslade* v. *Dower*, 7 B. & C. 635.

(*s*) *Hawtayne* v. *Bourne*, 7 M. & W. 595; *Burmester* v. *Norris*, 6 Ex. 796; *Ricketts* v. *Bennett*, 4 C. B. 686.

(*t*) *Plumer* v. *Gregory*, 18 Eq. 624, as to the 1,700*l*.

(*u*) *Worcester Corn Exchange Co.*, 3 De G. M. & G. 180. See, also, the cases in the next note.

(*x*) *Blackburn Building Soc.* v. *Cunliffe, Brookes & Co.*, 22 Ch. D. 61, and 9 App. Ca. 827; *Waterlow* v. *Sharp*, 8 Eq. 501; and *Re Cefn Cilcen Mining Co.*, 7 Eq. 88, contra, must be considered as overruled.

it is said that one partner has no implied power to borrow on the credit of the firm for the purpose of increasing its capital, what is meant is, that one partner, as such, has no power to borrow, on the credit of himself and co-partners, money, which each was to obtain on his individual credit, and then to bring into the common stock (*y*). Unless the expression means this, it means nothing (*z*).

Difference between borrowing and obtaining goods, &c., on credit.

There is a practical difference between borrowing money and procuring works and materials on credit, which requires notice. The difference consists in this, that he who possesses power to borrow on the credit of another, has a much more extensive, and therefore more easily abused, trust reposed in him than one who is empowered only to pledge the credit of another for value received, when the pledge is given. A power, therefore, to incur debt, which is necessarily incidental to almost every partnership, by no means involves a power to borrow money; and the cases which show that adventurers in cost-book mines are liable for supplies furnished to the mine (*a*), but not for money borrowed for the purposes of the mine (*b*), show that the difference here alluded to is judicially recognised.

The effect of having had the benefit of money improperly borrowed will be noticed hereafter. See *infra*, § 6.

See further as to borrowing money, *infra*, *Mortgages and Pledges*.

9. Cheques.

9. *Cheques.*—One partner has implied power to bind the firm by cheques, not post dated (*c*), drawn on the bankers of the firm in the partnership name (*d*); and if one partner directs the bankers of the firm not to pay a cheque of the firm, the

(*y*) See *Greenslade* v. *Dower*, 7 B. & C. 635; *Fisher* v. *Taylor*, 2 Ha. 218, as to the power of one partner to do this.

(*z*) See *Bryon* v. *Metropolitan Saloon Omnibus Co.*, 3 De G. & J. 123.

(*a*) *Tredwen* v. *Bourne*, 6 M. & W. 461; *Hawken* v. *Bourne*, 8 ib. 703.

(*b*) *Hawtayne* v. *Bourne*, 7 M. & W. 595; *Burmester* v. *Norris*, 6 Ex. 796; *Ricketts* v. *Bennett*, 4 C. B. 686; *Brown* v. *Byers*, 16 M. & W. 252. See, also, *Beldon* v. *Campbell*, 6 Ex. 886.

(*c*) See *Forster* v. *Mackreth*, L. R. 2 Ex. 163; *Bull* v. *O'Sullivan*, L. R. 6 Q. B. 209.

(*d*) *Laws* v. *Rand*, 3 C. B. N. S. 442; *Backhouse* v. *Charlton*, 8 Ch. D. 444. As to cheques drawn by directors, see *Re Gloucester, Aberystwith, &c., Rail. Co.*, 18 Jur. 815, L. J.

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bankers incur no liability to the firm if they follow such directions (*e*).

10. Contracts.

10. *Contracts.*—One partner can bind his co-partners by varying a contract made with both in the ordinary course of business (*f*).

11. Debts.

Payment to one partner.

11. *Debts.*—If a debt is owing to a firm, payment by the debtor to any one partner extinguishes the claim of all, each partner being ostensibly the agent of all the rest to get in debts owing to the firm (*g*). After a dissolution, payment to any one of the partners discharges the debtor (*h*), even though a third person is appointed to collect the debts owing to the firm, and the creditor is aware of that fact (*i*). But if on a dissolution a debt due to the partnership is assigned to one of the partners, and the debtor has notice of the assignment, he can only pay the assignee (*k*). If there are two firms with one common partner, and a bill of exchange is given to one firm and is endorsed by it to the other, payment to the first firm is an answer to an action brought on the bill by the second (*l*).

Payment to one partner of debt not due to firm.

Moreover, when it is said that payment to one partner is payment to all, it is supposed that the payment is made in discharge of a debt due to the firm. If it is due, not to the firm, but to one of the partners, the rule does not hold. Therefore, if an owner of goods sells them, the purchase-money must be paid to him or his agent; and payment to a person interested with him in the profits accruing from the sale will not do: for though the two may be liable as if they were partners by reason of their community of interest in the profits, it does not there-

(*e*) Before the Jud. Acts, an action for dishonouring the cheque must have been brought in the names of all the partners, and in the case supposed such an action could not have been sustained. See *infra*, book ii. c. 3. It is conceived that the statement in the text is correct, notwithstanding the modern rules as to parties.

(*f*) *Leiden* v. *Lawrence*, 2 N. R. 283, Ex.

(*g*) *Anon.*, 12 Mod. 446.

(*h*) *Duff* v. *The East India Co.*, 15 Ves. 198; *Brasier* v. *Hudson*, 9 Sim. 1. See *Phillips* v. *Phillips*, 3 Ha. 281, as to the receipts of a surviving partner.

(*i*) *Bristow* v. *Taylor*, 2 Stark. 50; *Porter* v. *Taylor*, 6 M. & S. 156; *King* v. *Smith*, 4 Car. & P. 108.

(*k*) See *Duff* v. *East India Co.*, 15 Ves. 213.

(*l*) See *Jacaud* v. *French*, 12 East, 317.

fore follow that he who is to share the profits is entitled to receive the proceeds of the sale of the goods themselves which belong exclusively to the other (*m*). So, where a court orders payment to be made to one partner by name, the order must be strictly obeyed, and payment to the partner of the person named in the order will not suffice, though both are defendants in the action in which the order is made (*n*).

Receipts given by one partner.

As one partner can accept payment of a debt due to the firm, so he can effectually release (*o*) and give a valid receipt for such debt (*p*). It is, however, to be remembered that although one partner has implied authority to get in debts owing to the firm and to give discharges for them, still a receipt is not conclusive evidence of payment; so that if one partner gives a receipt in fraud of his co-partners, it will not preclude the firm from recovering the money (*q*). Nor will a release given by one partner bind the firm if the releasing partner acts in fraud of his co-partners and in collusion with the debtor (*r*).

Assent to creditors' deed.

If one of several partners assent to a deed executed by a debtor of the firm in favour of his creditors, the firm is bound by the deed (*s*); and the doctrine, that one partner has no implied authority to bind his co-partners by an instrument under seal, has no application to such a case (*t*).

Assent to transfer of debt.

One partner can bind the firm by assenting to a transfer of a debt due to it, as for example, to a transfer of the firm's account from their banker to his successor in business (*u*). So, where a creditor of the firm assigns the debt due to him, and

(*m*) See *Smith* v. *Watson*, 2 B. & C. 401.

(*n*) See *Shoveler* v. *Stoakes*, 2 Dowl. & L. 3. As to payments by the Paymaster-General to one of several partners, see *Supreme Court Fund Rules*, 1886, r. 63.

(*o*) See *Hawkshaw* v. *Parkins*, 2 Swanst. 539, and *post*, Release.

(*p*) *Henderson* v. *Wild*, 2 Camp. 561.

(*q*) *Farrar* v. *Hutchinson*, 9 A. & E. 641; *Henderson* v. *Wild*, 2 Camp. 561.

(*r*) *Aspinall* v. *The London & N. W. Rail. Co.*, 11 Ha. 325, and see *post*, Release.

(*s*) See *Morans* v. *Armstrong*, Arms. M'Art. & Ogle, Ir. N. P. Rep. 25; *Dudgeon* v. *O'Connell*, 12 Ir. Eq. 566.

(*t*) *Dudgeon* v. *O'Connell*, 12 Ir. Eq. 566.

(*u*) *Beale* v. *Caddick*, 2 H. & N. 326. See, also, *Buckhouse* v. *Charlton*, 8 Ch. D. 444.

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one of the partners recognises the transfer and promises to pay the transferee, the firm is bound by this promise (*x*).

Taking bill in payment.

Again, one partner may receive a bill in payment of a debt due to the firm, and so preclude the firm from suing for the debt so long as the bill is running (*y*).

Payment to an agent of a firm of a bill drawn in his own name and payable to his own order in respect of a debt due to the firm, is not payment to the firm unless he has authority to draw in that way, or the firm gets the money (*z*).

Settling debts.

Although each partner has power to receive payment of a partnership debt, and to give a discharge for it on payment, it does not follow that he has power to compromise or settle the debt in any way he likes without payment. As a general proposition, an authority to receive payment of a debt does not include an authority to settle it in some other way (*a*); and a partner has no implied authority to discharge a separate debt of his own by agreeing that it shall be set against a debt due to his firm (*b*).

Promise by one partner to pay a debt of the firm.

A promise by one partner to pay a debt owing by the firm, undoubtedly binds the firm (*c*). How far a promise by one partner will prevent the statute of limitations from running in favour of the others will be seen hereafter (*d*).

Tender.

If a debt is owing to a firm, tender to one partner is tender to all; and if a debt is owing by a firm, tender by one partner is tender by all (*e*); and if, after tender by a firm, the creditor demands the sum tendered, a refusal to pay made by the partner on whom the demand is made, is a refusal by the firm (*f*).

12. Deeds.

12. *Deeds.*—One partner has no implied authority to bind

(*x*) *Lacy* v. *McNeile*, 4 Dow. & Ry. 7.

(*y*) See *Tomlins* v. *Lawrence*, 3 Moo. & P. 555.

(*z*) See *Hogarth* v. *Wherley*, L. R. 10 C. P. 630.

(*a*) See the last note, and *Pearson* v. *Scott*, 9 Ch. D. 198; *Young* v. *White*, 7 Beav. 506; *Underwood* v. *Nicholls*, 17 C. B. 239; Story on Agency, § 98.

(*b*) *Piercy* v. *Fynney*, 12 Eq. 69. See, also, *Kendal* v. *Wood*, L. R. 6 Ex. 243. Compare *Wallace* v. *Kelsall*, 7 M. & W. 264.

(*c*) *Anon.* v. *Layfield*, Holt, 434; *Lacy* v. *McNeile*, 4 Dow. & Ry. 7.

(*d*) A promise to one enures for the benefit of all. *White* v. *Williams*, Willm. Woll. & Hod. 52.

(*e*) *Douglas* v. *Patrick*, 3 T. R. 683.

(*f*) *Peirse* v. *Bowles*, 1 Stark. 323.

his co-partners by deed (*g*): but a release of a debt or demand stands on a peculiar ground, and will bind the firm though executed by one partner only (*h*). A deed executed by one partner in the name and in the presence of his co-partners, is deemed an execution by them (*i*); and if one partner executes a warrant of attorney in the partnership name, with the consent of his co-partner, the Court will not set it aside on the ground that the latter did not execute it (*k*).

A joint and several bond executed by one partner in the name of himself and co-partners, binds him separately, although it is invalid against them (*l*); and it has been held that a deed purporting to be made by all the partners of a firm, and to assign all their property to trustees for creditors, is operative against a partner who executes it, although his co-partners ultimately decline to execute it also (*m*).

13. Distress.

13. *Distress.*—If several partners grant a lease, any one of them may distrain, or appoint a bailiff to distrain, in the name of all; and a distress by one partner, or by the bailiff appointed by him, will be lawful, although the other partners are no parties to the distress, and do not assent thereto (*n*).

14. Extension of business.

14. *Extension of business.*—It follows from the principles investigated at the commencement of the present chapter, that one partner has no implied power to bind the firm with respect to matters not falling within the scope of the business which it ostensibly carries on, or was formed to carry on (*o*).

(*g*) *Harrison* v. *Jackson*, 7 T. R. 207; *Steiglitz* v. *Eggington*, Holt, 141. As to presuming an authority given by deed, see Holt, 141.

(*h*) See *Hawkshaw* v. *Parkins*, 2 Swanst. 539, and as to creditors' deeds, *Dudgeon* v. *O'Connell*, 12 Ir. Eq. 566. See in cases of fraud, *ante*, p. 135, note (*r*), and *infra*, Release.

(*i*) *Ball* v. *Dunsterville*, 4 T. R. 313; *Burn* v. *Burn*, 3 Ves. 578. See as to ratifying a deed executed by one person for another, *Tupper* v. *Foulkes*, 9 C. B. N. S. 797. In *Orr* v. *Chase*, 1 Mer. 729, a bond executed by one partner in the name and on behalf of the firm, was held to be the bond of the firm; and see *Palmer* v. *Justice Assurance Soc.*, 6 E. & B. 1015.

(*k*) *Bratton* v. *Burton*, 1 Chitty, 707.

(*l*) *Elliott* v. *Davis*, 2 Bos. & P. 338.

(*m*) *Bowker* v. *Burdekin*, 11 M. & W. 128; *Cumberledge* v. *Lawson*, 1 C. B. N. S. 709; and compare *Latch* v. *Wedlake*, 11 A. & E. 959, and *Lascaridi* v. *Gurney*, 9 Jur. N. S. 302, C. P.

(*n*) See *Robinson* v. *Hofman*, 4 Bing. 562, and the cases there cited.

(*o*) *Ante*, p. 124, *et seq.*

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15. Guarantees and indemnities.

15. *Guarantees, &c.*—How far one partner can bind the firm by a guarantee, obliging the firm to pay, if some other person does not, has been much disputed. The later cases, however, decide that unless it can be shown that the giving of guarantees is necessary for carrying on the business of the firm in the ordinary way, one of the members will be held to have no implied authority to bind the firm by them; for, generally speaking, it is not usual for persons in business to make themselves answerable for the conduct of other people. The subject was much considered in *Brettel* v. *Williams* (*p*). There the defendants, who were railway contractors, made a sub-contract for the performance of part of some work they had undertaken. The sub-contractor required a quantity of coal, and one of the defendants, in the name of the firm, guaranteed to the plaintiffs, who were coal-merchants, payment for coals to be supplied by them to the sub-contractors. It was held that this guarantee did not bind the partners of the contractor signing it.

Brettel *v.* Williams.

Sandilands *v.* Marsh.

In *Sandilands* v. *Marsh* (*q*) a firm was held bound by a guarantee given by one of the partners, but in that case there was evidence of adoption and ratification by the firm of the contract of which the guarantee was part. In *Ex parte Harding* (*r*), the guarantee was several as well as joint, and therefore bound those who signed it. These cases cannot therefore be considered as opposed to those in which it has been held that one partner has no implied power to bind the firm by guarantees in its name.

Statute of frauds.

With respect to the statute of frauds, a guarantee signed by one partner in the name of the firm, is sufficient to bind all the partners, if authority from them can be proved (*s*).

But no partner is liable for a false and fraudulent representation as to the solvency of another person unless such representation is in writing, and signed by himself (*t*).

(*p*) 4 Ex. 623. See, also, *Hasleham* v. *Young*, 5 Q. B. 833; *Crawford* v. *Stirling*, 4 Esp. 207; *Duncan* v. *Lowndes*, 3 Camp. 478. The dictum of Lord Mansfield in *Hope* v. *Cust*, 1 East, 53, and the decision of Lord Eldon in *Ex parte Gardom*, 15 Ves. 286, are opposed to these authorities, but cannot be relied on after the decision in *Brettel* v. *Williams*.

(*q*) 2 B. & A. 673.

(*r*) 12 Ch. D. 557.

(*s*) See *Duncan* v. *Lowndes*, 3 Camp. 478.

(*t*) 9 Geo. 4, c. 14, § 6. *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301; revers-

If one partner, in consideration that a person will accept a partnership bill, promises that the firm will put him in funds to meet the bill when due, this promise binds the firm (*u*). But this is not guaranteeing payment of the debt of another within the rule above discussed.

Promise to provide for bill.

16. *Insurances.*—One partner can bind the firm by an insurance of the partnership goods (*v*). And if one insures for all, he may give notice of an abandonment for all (*x*). 16. Insurances.

17. *Interest.*—An admission by one partner that a debt of the firm bears interest at a given rate is *primâ facie* binding on the firm (*y*). 17. Interest.

See further *ante*, under the head *Debts*.

18. *Judicial Proceedings.*—The power of one partner to act for the firm in legal proceedings will be noticed hereafter, when treating of actions (Bk. II. c. 3, § 1), and bankruptcy (Bk. IV. c. 2). 18. Judicial proceedings.

19. *Leases.* One partner, as such, has no authority to contract on behalf of the firm for a lease of a house for partnership purposes (*z*). 19. Leases.

Where a lease is made by several partners jointly, a notice to quit given by one on behalf of all is sufficient (*a*).

20. *Mortgages and Pledges.*—A legal mortgage cannot be made of partnership real estate without the concurrence of all the partners (*b*). 20. Mortgages and pledges. (*a*). By partners.

It being, however, decided that a member of an ordinary trading partnership has power to borrow money on the credit of the firm, it follows almost necessarily that he should have power to pledge partnership property as a security for advances.

ing *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244.

(*u*) *Johnson* v. *Peck*, 3 Stark. 66.

(*v*) *Hooper* v. *Lusby*, 4 Camp. 66. See *Armitage* v. *Winterbottom*, 1 Man. & Gr. 130.

(*x*) *Hunt* v. *The Royal Exchange Assurance Co.*, 5 M. & S. 47.

(*y*) See *Fergusson* v. *Fyfe*, 8 Cl. & Fin. 121.

(*z*) *Sharp* v. *Milligan*, 22 Beav. 606, where, however, specific performance was decreed against the firm, the contract having been ratified by the other partners.

(*a*) *Doe* v. *Hulme*, 2 Man. & Ry. 433; *Doe* v. *Summersett*, 1 B. & Ad. 135; *Goodtitle* v. *Woodward*, 3 B. & A. 689. See *Right* v. *Cuthell*, 5 East, 491.

(*b*) See *ante*, heading Deed. In *Juggeewundas Keeka Shah* v. *Ramdas Brijbooken Das*, 2 Moo. In. Ap. 487, a mortgage by one partner was under peculiar circumstances held to bind the firm.

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The writer is not aware of any decision in which an equitable mortgage made by one partner by a deposit of deeds relating to partnership real estate, has been upheld, or the contrary; he can therefore only venture to submit, that such a mortgage ought to be held valid in all cases in which it is made by a partner having an implied power to borrow on the credit of the firm (*c*).

Pledges of chattels.

The implied authority of a partner who has power to borrow, to pledge the personal property of the firm for money borrowed, is beyond dispute (*d*); and the power is not confined to cases in which there is a general partnership; for, if several join in a purchase of goods to be sold for their common profit, a pledge of those goods by one of the persons interested is binding on them all (*e*). The implied power to pledge, moreover, extends to pledges for antecedent debts (*f*).

Redemption.

Any partner may, on behalf of the firm, redeem a pledge of the firm; but he alone is not the proper person to bring an action to recover the thing pledged (*g*).

Factors' acts.

A question of some importance arises as to the effect, if any, of the Factors' acts (*h*) on the power of one partner to sell and

(*c*) In *Re Clough*, 31 Ch. D. 324, an equitable mortgage by a surviving partner for a partnership debt was held valid. See, further, *Ex parte National Bank*, 14 Eq. 507; *Patent File Co.*, 6 Ch. 83; *Ex parte Lloyd*, 1 Mont. & Ayr. 494. Compare 7 T. R. 210, *per* Lord Kenyon.

(*d*) See *Ex parte Bonbonus*, 8 Ves. 540; *Butchart* v. *Dresser*, 10 Ha. 453, and 4 De G. M. & G. 542; *Brownrigg* v. *Rae*, 5 Ex. 489; *Gordon* v. *Ellis*, 7 Man. & Gr. 607. See, also, *Langmead's trusts*, 20 Beav. 20, and 7 De G. Mac. & G. 353, and as to ships, *Ex parte Howden*, 2 M. D. & D. 574.

(*e*) *Reid* v. *Hollinshead*, 4 B. & C. 867; *Re Gellar*, 1 Rose, 297; *Raba* v. *Ryland*, Gow N. P. 133; *Tupper* v. *Haythorne*, ib. 135; but see *Barton* v. *Williams*, 5 B. & A. 395, p. 405, *per* Best, J., and note that there the goods pledged were not partnership property when the pledge was made. In *Ex parte Copeland*, 2 Mont. & Ayr. 177, it was questioned whether a pledge by one partner was valid if the pledgee had notice that the pledgor was not the only owner, but this it is conceived could only be material where the pledge is not made for ostensible partnership purposes.

(*f*) *Patent File Co.*, 6 Ch. 83; *Re Clough*, 31 Ch. D. 324; and see Story on Partn. § 101.

(*g*) See *Harper* v. *Godsell*, L. R. 5 Q. B. 422.

(*h*) 4 Geo. 4, c. 83; 6 Geo. 4, c. 94; 5 & 6 Vict. c. 39; 40 & 41 Vict. c. 39. See, upon them, *Navulshaw* v. *Brownrigg*, 2 De G. M. & G. 441; *Kaltenbach* v. *Lewis*, 10 App. Ca. 617.

pledge the goods of the firm. The writer is not aware of any authority upon this subject, but he conceives that those acts neither extend nor abridge the power in question. The Factors' acts do not apparently render valid any sale or pledge by one partner of partnership goods, which is not valid, independently of the acts, upon the principles of the common law.

(b.) To partners.

One partner has implied authority to accept, in the ordinary course of business, security for a debt due to his firm; and where one member of a firm of bankers accepted as security for money due to the bank, shares in a company, and caused them to be registered in the name of the bank, it was held that he had implied authority so to do, although the consequence was that he thereby rendered himself and his co-partners liable as contributories of the company (*i*).

21. Notice.

21. *Notice.*—Questions frequently arise as to whether notice to one partner is notice to all.

General rule

As a general rule, notice to a principal is notice to all his agents (*k*); and notice to an agent of matters connected with his agency is notice to his principal (*l*). Consequently, as a general rule, notice to one partner of any matter relating to the business of the firm is notice to all the other members (*m*); and if two firms have a common partner, notice which is imputable to one of the firms is imputable to the other also, if it relates to the business of that other (*n*).

(*i*) *Weikersheim's case*, 8 Ch. 831.

(*k*) See *Mayhew* v. *Eames*, 1 Car. & P. 550, and 3 B. & C. 601; *Willis* v. *The Bank of England*, 4 A. & E. 21.

(*l*) *Dresser* v. *Norwood*, 17 C. B. N. S. 466, reversing the decision below, 14 C. B. N. S. 574. *Per* Ashhurst, J., *Fitzherbert* v. *Mather*, 1 T. R. 16; *Le Neve* v. *Le Neve*, 1 Ves. S. 64; *Collinson* v. *Lister*, 7 De G. M. & G. 634, and 20 Beav. 356. See, generally, on this maxim, *Blackburn, Low & Co.* v. *Vigors*, 17 Q. B. D. 553. Whether a principal is affected by notice acquired by the agent, but not in that character, is perhaps scarcely yet settled. *Dresser* v. *Norwood*, is a strong authority that in commercial transactions he is.

(*m*) *Alderson* v. *Pope*, 1 Camp. 404; *Porthouse* v. *Parker*, ib. 82; *Bignold* v. *Waterhouse*, 1 M. & S. 259; and see *Salomons* v. *Nissen*, 2 T. R. 647.

(*n*) See *Steele* v. *Stuart*, 2 Eq. 84; *Porthouse* v. *Parker*, 1 Camp. 82; *Worcester Corn Exch. Co.*, 3 De G. M. & G. 180; *Jacaud* v. *French*, 12 East, 317; *Powles* v. *Page*, 3 C. B. 16.

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Firm affected by its agent's knowledge.

In conformity with these principles, if a firm claims the benefit of a transaction entered into by one of its members, it cannot effectually set up its own ignorance of what that member knew, so as to be in a better position than he himself would have been in had he been dealing on his own account as a principal (*o*). Thus in *Collinson* v. *Lister* (*p*), it was held that a banking company was not entitled to the benefit of a mortgage given to it by its own manager, in his character of an executor. For the mortgage was given as a security for money borrowed by the manager as executor, and advanced by himself as manager for improper purposes, and in breach of the trusts which, as executor, he had to perform; and the company, in taking the mortgage, knew that their manager was giving a security on his testator's estate for money previously taken by him from the funds of the company, and which monies he had been requested to replace, or give security for. Under these circumstances it was treated as clear that the bank could stand in no better position than the manager would have done had he advanced the money himself and taken a mortgage for it from himself.

Collinson *v.* Lister.

Meaning of phrase, notice to one is notice to all.

When it is said that notice to one partner is notice to all, what is meant is (1.), that a firm cannot, in its character of principal, set up the ignorance of some of its members against the knowledge of others of whose acts it claims the benefit, or by whose acts it is bound; and (2.) that when it is necessary to prove that a firm had notice, all that need be done is to show that notice was given to one of its members as the agent and on behalf of the firm. The expression means no more than this; and although every person has notice of what he himself does, it would be absurd to hold that a firm has notice of everything done by each of its members. Where one member is acting beyond his powers, or is committing a fraud on his co-partners, or is the person whose duty it is to give his firm notice of what he himself has done, in all such cases notice on his part is not equivalent to notice by them (*q*).

(*o*) See *ante*, p. 116, and the cases below.

(*p*) 7 De G. M. & G. 634, and 20 Beav. 356.

(*q*) See the judgment of Jessel, M. R., in *Williamson* v. *Barbour*, 9 Ch. D. 535 *et seq.*

In *Bignold* v. *Waterhouse* (*r*) one of a firm of carriers entered into an agreement to carry valuable parcels free of charge, but under such circumstances as to render the agreement not binding on the other partners. A parcel known to the partner who made the agreement to be of value, was sent, but was not entered or paid for as a valuable parcel. The other partners were held to be unaffected with the notice which their co-partner had of the nature of the parcel, and were held not to be liable for its loss. Bignold v. Waterhouse.

So, if one partner is a trustee, and he improperly employs the trust funds in the partnership business, his knowledge that he is so doing is not imputable to the firm; and therefore, to affect the other partners with a breach of trust, further evidence must be adduced (*s*). Breaches of trust.

Moreover, in cases of this kind, notice on the part of the clerks of the firm of what the fraudulent partner is doing is no more than notice to him: it is not sufficient to affect his co-partners (*t*). Notice to clerks.

These cases show what indeed is obvious of itself, viz., that if a partner exceeds his authority, and it is contended that the firm is bound by what he has done, on the ground that it has ratified his acts, evidence must be given to prove that at the time of the alleged ratification his co-partners knew of those acts. It would be absurd if, in such a case, knowledge by him was equivalent to knowledge by them (*u*). Ratification.

A retired partner is not affected with notice on the part of the continuing partners of what has occurred since the partnership, if the agency subsisting between them has been dissolved (*x*). Nor is an incoming partner affected with notice of what occurred before he joined the firm (*y*).

22. *Payments.*—See *ante*, under the head *Debts*. 22. Payments.

23. *Penalties.*—One partner may bind the firm under a 23. Penalties.

(*r*) 1 M. & S. 255.

(*s*) See *Ex parte Heaton*, Buck. 386.

(*t*) See *Lacey* v. *Hill*, 4 Ch. D. 537, and *Williamson* v. *Barbour*, 9 Ch. D. 536.

(*u*) See acc. the last note.

(*x*) *Adams* v. *Bingley*, 1 M. & W. 192.

(*y*) See *per* Jessel, M. R., in *Williamson* v. *Barbour*, 9 Ch. D. 536.

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penalty to observe a contract which he is authorised to enter into on its behalf (*z*).

24. Purchases.

24. *Purchases.*—It has been long decided that every member of an ordinary trading partnership has implied power to purchase on the credit of the firm such goods as are or may be necessary for carrying on its business in the usual way (*a*). This cannot be more strongly exemplified than by the case of

Bond v. Gibson.

Bond v. *Gibson* (*b*). There two persons carried on business as harness makers; one of them bought on the credit of the firm a number of bits to be made up into bridles; but instead of using the bits for the partnership business he pawned them for his own use. The seller of the bits was nevertheless held entitled to recover their price in an action against both partners.

Goods supplied to one partner.

The firm is liable although the goods may have been supplied to one only of the partners, and no other person may have been known to the supplier as belonging to the firm (*c*). But, as will be seen hereafter, the firm is not liable for goods ordered by and supplied to one partner, and which it was his duty to contribute to the joint stock of the firm (*d*).

Non-trading partnerships.

The power of one partner to bind the firm by a purchase of goods on its credit is not confined to trading partnerships. Thus where some printers and publishers agreed to share the profits of a work, and the publishers ordered paper for that particular work and became bankrupt, the printers were held liable for its price to the stationers who supplied it (*e*). It is of no consequence what the partnership business may be, if the goods supplied are necessary for its transaction in the ordinary way.

Return of goods.

If goods are sold to a firm on credit and are delivered to the firm, and then one partner returns them, the firm not being able to pay for them, the property will be vested in the vendor;

(*z*) *Beckham* v. *Drake*, 9 M. & W. 79.

(*a*) *Hyatt* v. *Hare*, Comb. 383.

(*b*) 1 Camp. 185.

(*c*) *Ruppell* v. *Roberts*, 4 Nev. & Man. 31; *City of London Gas Co.* v. *Nicholls*, 2 Car. & P. 365; *Gardiner* v. *Childs*, 8 ib. 345.

(*d*) See book ii. ch. 2, § 3. *Greenslade* v. *Dower*, 7 B. & C. 635, and cases of that class.

(*e*) *Gardiner* v. *Childs*, 8 Car. & P. 345; compare *Wilson* v. *Whitehead*, 10 M. & W. 503.

subject, in the event of bankruptcy, to the question of fraudulent preference (*f*).

25. Receipts.

25. *Receipts.*—See *ante*, under the head *Debts*.

26. Releases and covenants not to sue.

26. *Releases, &c.*—A covenant by one partner not to sue for a partnership debt does not amount to a release of that debt by the firm (*g*), although a covenant by all the partners not to sue would be equivalent to a release (*h*), and a release by one partner operates as a release by the firm (*i*).

Setting aside *bonâ fide* releases by one partner.

This last proposition, viz., that a release by one partner is in point of law a release by all, is strongly illustrated by those cases in which attempts have been unsuccessfully made by one partner to set aside a release given by a co-partner without his consent.

Furnival *v.* Weston.

In *Furnival* v. *Weston* (*k*) the members of a firm sued the defendant for a libel on the firm published by him. One of the partners, without the consent of the others, released the defendant, and there being no fraud in the case the Court refused to set the release aside. In *Arton* v. *Booth* (*l*), the two plaintiffs Arton and Dawson had been partners, but they had dissolved partnership, and it was agreed between them that Arton should get in the debts of the firm, and that Dawson should not interfere with him. The defendant was sued for a debt owing to the plaintiffs, and after action brought Dawson released him on receiving payment. Although the release deprived the plaintiffs of their costs, the Court would not interfere, as no case of fraud was made out. So in *Phillips* v. *Clagett* (*m*), where partners brought an action against the defendant for illegally pledging their property, the Court gave him leave to plead a release previously given by one of the partners.

Arton *v.* Booth.

Phillips *v.* Clagett.

Setting aside fraudulent releases.

However, if it can be shown that one partner has in fraud of his co-partners and in collusion with the defendant executed a release for the purpose of preventing them from enforcing a just demand, the defendant will not be allowed to plead this release as a defence to an action against him. Thus in *Barker*

(*f*) *De Tastet* v. *Carroll*, 1 Stark. 88.

(*g*) *Walmsley* v. *Cooper*, 11 A. & E. 216.

(*h*) *Deux* v. *Jefferies*, Cro. El. 352.

(*i*) 2 Ro. Ab. Release, 410 D.; *Hawkshaw* v. *Parkins*, 2 Swanst. 539.

(*k*) 7 Moore, 356.

(*l*) 4 Moore, 192. See, too, *Jones* v. *Herbert*, 7 Taunt. 421, and compare *Barker* v. *Richardson*, 1 Y. & J. 362, stated lower down.

(*m*) 11 M. & W. 84.

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Barker v. Richardson.

v. *Richardson* (*n*), the plaintiffs Barker and Owen had been partners, but they had dissolved partnership, and it was agreed that Barker should get in the debts owing to the firm, and if necessary sue for the same. The defendant was indebted to the firm and had notice of the above agreement. He was also a creditor of Owen on a private account, and Owen, against Barker's consent, gave a receipt for the partnership debt, and after the commencement of the action by Barker for the recovery of that debt, gave the defendant a formal release. The evidence showed that the release was given to defeat the action, to prevent Barker from recovering the debt due to the firm, and as part of a scheme for discharging Owen's private debt to the defendant. Under these circumstances the release was not allowed to be pleaded.

27. Representations and statements.

27. *Representations.*—The firm is bound by all representations made by a partner whilst acting within the scope of his real or implied authority, and having reference to the business of the firm (*o*); but not by statements made by him as to his authority to do that which the nature of the business of the firm does not impliedly warrant (*p*).

The liability of partnerships for false and fraudulent representations will be discussed in the next section of this chapter.

See further on this subject *ante*, under the head *Admissions*.

23. Sales.

28. *Sales.*—Any partner can dispose of any of the partnership goods (*q*); and in one case it was even held that he could make a valid sale of the partnership books (*r*).

If by any event the partners become mere tenants in common of the partnership goods and one assumes to sell them, the purchaser, although he may only become tenant in common with the other partners, will nevertheless, if he gets possession of the goods, be able to retain them as against his co-tenants; for no action lies by one tenant in common against another for the recovery of the goods belonging to both (*s*).

(*n*) 1 Y. & J. 362. See, too, *Aspinall* v. *The London and N. W. Rail. Co.*, 11 Ha. 325; *Phillips* v. *Clagett*, 11 M. & W. 84.

(*o*) *Rapp* v. *Latham*, 2 B. & A. 795; *Blair* v. *Bromley*, 2 Ph. 354; *Wickham* v. *Wickham*, 2 K. & J. 478.

(*p*) *Ex parte Agace*, 2 Cox, 312.

(*q*) *Lambert's case*, Godb. 244.

(*r*) *Dore* v. *Wilkinson*, 2 Stark. 287.

(*s*) Litt. § 323; *Fox* v. *Hanbury*, Cowp. 445; and see *Buckley* v. *Barber*, 6 Ex. 182; *ante*, p. 61.

The question whether a partner's power to sell is in any way affected by the Factors' Acts has already been noticed (*t*).

29. Servants.

29. *Servants.*—One partner has implied authority to hire servants to perform the business of the partnership (*u*); and the writer presumes that one partner has also implied authority to discharge them, although he cannot do so against the will of his co-partners (*x*).

30. Ships.

30. *Ships.*—Where necessary, one partner may bind the firm by chartering a ship on its behalf, and one partner may mortgage a ship belonging to the firm (*y*).

SECTION III.—LIABILITY OF PARTNERS IN RESPECT OF TORTS AND FRAUDS.

Liability of principals for the torts and frauds of their agents.

If it were necessary, in order that one person should be liable for the tort or fraud of another, that the former should have authorised the commission of such tort or fraud, it would be a comparatively easy matter to determine in any particular case whether a tort or fraud committed by an agent could or could not be imputed to his principal. But as a principal is bound, not only by the authorised acts of his agent, but also by such unauthorised acts as fall within the scope of the authority apparently conferred upon him, the question whether a tort or fraud committed by an agent is or is not imputable to his principal becomes one of considerable difficulty; for it is obvious that it does not follow from the circumstance that such tort or fraud was not authorised, that therefore the principal is not legally responsible for it (*z*).

(*t*) *Ante*, p. 140.

(*u*) *Beckham* v. *Drake*, 9 M. & W. 79. A servant of the firm is a servant of each of the partners, and may be described accordingly in an indictment for stealing the separate property of one of the partners. *R.* v. *Leech*, 3 Stark. 70.

(*x*) *Donaldson* v. *Williams*, 1 Cr. & M. 345. But see Dixon on Part. 139, *contra*.

(*y*) See as to chartering, *Thomas* v. *Clarke*, 2 Stark. 451, and as to mortgaging, *Ex parte Howden*, 2 M. D. & D. 574. The circumstance that a person is registered as a part-owner, does not, *per se*, render him liable for the acts of the other owners. *Myers* v. *Willis*, 17 C. B. 77, and 18 ib. 886; *Brodie* v. *Howard*, 17 C. B. 109.

(*z*) Pollock on Torts, 63 *et seq.*; Story on Agency, § 452; Paley on Agency, 294 *et seq.*

General principles.

In order that responsibility may attach to the principal, in respect of a tort or fraud, it is necessary—

1. That he shall have authorised it in the first instance; or,

2. That it shall have been done on his behalf and he shall have ratified it (*a*); or

3. That it shall have been committed for his benefit by the agent in the course and as part of his employment (*b*).

That this last is sufficient is obvious from those cases in which masters have been held liable for the negligence of their servants (*c*); litigants for irregularities committed by their solicitors in the course of the litigation to conduct which they are retained (*d*); merchants for frauds committed by their factors and brokers whilst acting on their behalf (*e*); and shopkeepers for the illegal acts of their shopmen whilst in the shop and attending to its business (*f*).

Exceptions to the rule respondeat superior.

On the other hand, a principal is not liable for the torts or frauds of his agent, except upon one or other of the three above-mentioned grounds. Thus, a principal is not liable for the wilful acts of his agent, if not done in the course of his employment and as part of his business (*g*); and this is true not only of assaults, batteries, libels, and the like, but also of frauds. The maxim *respondeat superior* does not render a principal liable for the frauds of his agent, if the agent has been dealt with as a principal (*h*), nor unless the frauds have been committed by the agent for the benefit of his principal, and in the course and as part of his own employment (*i*).

Further, a principal is not bound by a contract which is a

(*a*) Ratification can only be of an act done for the person ratifying, *Wilson* v. *Tumman*, 6 Man. & Gr. 236.

(*b*) As to the meaning of this expression, see *Burns* v. *Poulsom*, L. R. 8 C. P. 563; Pollock on Torts, 72 *et seq.*

(*c*) See the last case, and *Patten* v. *Rea*, 2 C. B. N. S. 606.

(*d*) *Collett* v. *Foster*, 2 H. & N. 356,

(*e*) *Hern* v. *Nichols*, 1 Salk. 289.

(*f*) *Grammar* v. *Nixon*, 1 Str. 653; *Amory* v. *Delamirie*, ib. 505.

(*g*) *McManus* v. *Crickett*, 1 East, 106; *Croft* v. *Alison*, 4 B. & A. 590; *A.-G.* v. *Siddon*, 1 Cr. & J. 220. Compare *Limpus* v. *Lon. Gen. Om. Co.*, 1 H. & C. 526.

(*h*) *Ex parte Eyre*, 1 Ph. 227.

(*i*) *Grant* v. *Norway*, 10 C. B. 665; *Coleman* v. *Riches*, 16 ib. 104.

fraud on him, and is known to be so by the person entering into the contract (*k*).

Having made these preliminary observations, it is proposed, in the present section, to examine the liability of partners for torts and frauds, as distinguished from contracts.

First as regards torts.

Torts of partners

It follows from the principles of agency, coupled with the doctrine that each partner is the agent of the firm, for the purpose of carrying on its business in the usual way, that an ordinary partnership is liable in damages for the negligence of any one of its members in conducting the business of the partnership. It has accordingly been held that a firm of coach proprietors is answerable for the negligent driving of a partnership coach by one of the firm, the coach being driven for the firm in the ordinary course of business (*l*); and that two partners are liable for not keeping the shaft of a mine in proper order, although one of them only actually superintended it (*m*). So, a partnership is liable for the negligence of its servants acting in the course of their employment by the firm (*n*).

Breach of revenue laws.

If one partner, in conducting the business of the firm, is guilty of a breach of the revenue laws, all the partners are jointly and severally answerable for the consequent penalties, although they may not themselves have authorised or been parties to the illegal conduct of their co-partner (*o*).

Wilful torts.

As a rule, however, the wilful tort of one partner is not imputable to the firm. For example, if one partner maliciously prosecutes a person for stealing partnership property, the firm

(*k*) *British and American Tel. Co.* v. *Albion Bank*, L. R. 7 Ex. 119; *Phosphate of Lime Co.* v. *Green*, L. R. 7 C. P. 43, and see, as to the effect of having benefited by such a contract, ib. p. 55.

(*l*) *Moreton* v. *Hardern*, 4 B. & C. 223; and see as to ships, *Steel* v. *Lester*, 3 C. P. D. 121.

(*m*) *Mellors* v. *Shaw*, 1 B. & Sm. 437; *Ashworth* v. *Stanwix*, 7 Jur. N. S. 467, and 3 E. & E. 701. See as to irregular executions of writs by one of two partners, *Duke of Brunswick* v. *Slowman*, 8 C. B. 317.

(*n*) *Stables* v. *Eley*, 1 Car. & P. 614.

(*o*) *R.* v. *Stranyforth*, Bunb. 97; *A.-G.* v. *Burges*, ib. 223; *A.-G.* v. *Weeks*, ib.; *R.* v. *Manning*, Comyn, 616. See, also, *Mullins* v. *Collins*, L. R. 9 Q. B. 292; *A.-G.* v. *Siddon*, 1 Cr. & J. 220. Compare *Newman* v. *Jones*, 17 Q. B. D. 132.

is not answerable, unless all the members are, in fact, privy to the malicious prosecution (*p*). But a wilful tort committed by a partner in the course and for the purpose of transacting the business of the firm may make the firm responsible (*q*).

Secondly as regards frauds.

Frauds of partners.

An ordinary firm is liable for frauds committed by one of its members whilst acting for the firm, and in transacting its business; and the innocent partners cannot divest themselves of responsibility on the ground that they never authorised the commission of the fraud. On the other hand, the firm is not liable for the other frauds of its members, unless it has in fact sanctioned such frauds, or the transactions of which they form part. It will be convenient to examine this subject first with reference to misapplications of money, and secondly, with reference to false representations by partners.

Liability of partnerships for misapplication of money by their members.

In order that a firm may be liable for the misapplication of money by one of its members, some obligation on the part of the firm to take care of the money must be shown. A receipt of the money by the firm *primâ facie* imposes this obligation; but where there is no receipt by the firm, there is *primâ facie* no obligation on its part with respect to the money in question. It becomes important, therefore, to determine accurately when money is to be considered as received by the firm. Upon this point the following observations suggest themselves.

1. The firm must be treated as receiving what any partner receives as its real or ostensible agent, *i.e.*, in the course of transacting the business of the firm.

2. In a case of this sort it is immaterial whether the other partners know anything about the money or not; for *ex hypothesi*, it is in the custody of one who must be regarded as their agent (*r*).

3. The firm cannot be treated as receiving what one partner receives otherwise than as its real or ostensible agent, unless

(*p*) *Arbuckle* v. *Taylor*, 3 Dow. 160.

(*q*) See *Limpus* v. *Lon. Gen. Om. Co.*, 1 H. & C. 526; Pollock on Torts, 80 *et seq.*

(*r*) See *infra*, rules 1, 2, 3.

the money actually comes into the possession or under the control of the other partners (*s*).

4. Agency being excluded in such a case as the last, the money cannot be considered as in the possession or under the control of the innocent partners, unless they know that it is so, or unless they are culpably ignorant of the fact (*t*).

These principles will be found to reconcile most, if not all, of the numerous decisions upon the important subject now under consideration, and to warrant the following rules deduced from them.

1. Liability of firm for money received by one partner in the course of business.

1. *Where one partner, acting within the scope of his authority, as evidenced by the business of the firm, obtains money and misapplies it, the firm is answerable for it.*

Willett v. Chambers.

In *Willett* v. *Chambers* (*u*) two persons carried on business as solicitors and conveyancers, in partnership. One of them received money from a client to invest on mortgage, and misapplied it. The other partner was held liable to repay it to the client. Lord Mansfield relied upon the fact that the bill for the fictitious mortgage was made out in the name of the firm, and was paid to the innocent partner. The transaction therefore was clearly a partnership transaction, and the defendant, although perfectly innocent of the fraud himself, was liable for the consequences.

Brydges v. Branfill.

In *Brydges* v. *Branfill* (*x*), one of several solicitors connived at a fraud committed by a client of the firm in obtaining money

(*s*) See rules 3 and 4.

(*t*) Compare rule 2 with rules 3, 4, and 5, and see *infra*, p. 161; and as to culpable ignorance, compare *Marsh* v. *Keating*, 2 Cl. & Fin. 289; *Sims* v. *Brutton*, 5 Ex. 802; *Ex parte Geaves*, 8 De G. M. & G. 291; *Cleather* v. *Twisden*, 28 Ch. D. 340.

(*u*) Cowp. 814. See, also, *Atkinson* v. *Mackreth*, 2 Eq. 570; *St. Aubyn* v. *Smart*, 5 Eq. 183, and 3 Ch. 646; *Dundonald* v. *Masterman*, 7 Eq. 515. Compare *Cleather* v. *Twisden*, 28 Ch. D. 340; *Viney* v. *Chaplin*, 2 De G. & J. 483, and *Bourdillon* v. *Roche*, 27 L. J. Ch. 681, and *Harman* v. *Johnson*, 2 E. & B. 61; *Plumer* v. *Gregory*, 18 Eq. 621, noticed *infra*. These cases show that whilst it is the ordinary business of a solicitor to receive money from a client for investment on a specific security, it is not part of his ordinary business to receive money for investment generally, nor to keep negotiable securities for his clients, nor, without express authority from them, to receive money for them on the payment off of a mortgage, or on a sale. See, also, *Re Bellamy & Met. Bd. of Works*, 24 Ch. D. 387.

(*x*) 12 Sim. 369. See, too, *Todd* v. *Studholme*, 3 K. & J. 324.

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out of the Court of Chancery. The money was received by the one partner under a power of attorney, and was handed over to the client. The other partners were entirely innocent, and were, in fact, ignorant of the transaction. It was nevertheless held that they were jointly and severally liable to make good the money to those to whom it really belonged (*y*).

In these cases the receipt of the money by one of the partners was the receipt by the firm; and the firm was liable, although in fact the other partners never received the money or knew of its receipt (*z*).

2. Liability of firm for money in its custody in the course of business.

2. *Where a firm in the course of its business* (*a*) *receives money belonging to other people, and one of the partners misapplies that money whilst it is in the custody of the firm, the firm must make it good.*

Clayton's case.

In *Devaynes* v. *Noble*, *Clayton's case* (*b*), some exchequer bills, deposited by their owner with a firm of bankers, were sold by one of the partners without the owner's knowledge; the money produced by the sale was applied by the firm to its own use; and it was held to be clear that the money having been received by the partnership, the amount became a partnership debt whether all the individual partners were or were not privy to the sale.

Baring's case.

In *Devaynes* v. *Noble*, *Baring's case* (*c*), the firm was held liable for stock of its customers standing in the name of one of the partners of the firm, and wrongfully sold out by him. For the stock was standing in his name alone, in accordance with the ordinary practice of the firm; the produce of the sale of the stock had been received by the firm, and had thus become a partnership debt; and the firm, in the accounts rendered by

(*y*) Although solicitors who are partners are responsible for the acts of each other, the Court will not exercise its summary jurisdiction against a solicitor to whom personally no blame is attributable. See *Re Lawrence*, 2 Sm. & G. 367; *Ex parte Gould*, 2 Mon. & A. 48; *Dixon* v. *Wilkinson*, 4 Drew. 614, and 4 De G. & J. 508; and *Re Ford*, 8 Dowl. 684. But where a firm of solicitors are the solicitors on the record, see *Norton* v. *Cooper*, 3 Sm. & G. 375.

(*z*) See *St. Aubyn* v. *Smart*, *ubi sup.*

(*a*) See *infra*, prop. 3 and 5, as to the importance of this qualification.

(*b*) 1 Mer. 575.

(*c*) 1 Mer. 611; see, too, *Wardle's case*, ib. 624, and *Vulliamy* v. *Noble*, 3 Mer. 593.

it to its customer, had falsely represented the stock as still standing in the name of the partner who had sold it, and had given credit for the dividends as if the stock had still been there.

In *Ex parte Biddulph* (*d*), trust money in the hands of a firm of bankers, was drawn out and misapplied by one of the firm, and it was held that all the partners were liable to make it good. Ex parte Biddulph.

In *Sadler* v. *Lee* (*e*), the members of a banking firm were authorised jointly and severally to sell out stock standing in the name of a customer, and one of the partners exercised the power and sold out the stock, and the firm was credited with the proceeds of the sale. These were afterwards misapplied by one of the partners, and it was held that the firm was answerable for the money. Sadler *v.* Lee

Another well-known case illustrating the same principle is *Blair* v. *Bromley* (*f*). There two persons were in partnership as solicitors. A client entrusted one of them with money to invest on mortgage, and was told by him that it had been invested; whereas, in truth, the partner who had received the money had misapplied it. For many years the client was regularly paid interest by the solicitor who attended to the matter, and the fraud was not discovered until he became bankrupt. The other partner, who knew nothing whatever of the fraud, was nevertheless held liable to make good the money. It had been placed to the partnership account at the bankers' of the firm; the representation that it had been duly invested was within the scope of the duty of one partner with reference to the transaction in question; and it was held that the innocent partner could not divest himself of his liability by showing that he had no control over the account at the bankers', and did not in fact attend to the monetary transactions of the firm. Blair *v.* Bromley.

In *De Ribeyre* v. *Barclay* (*g*), the defendants were in part- De Ribeyre *v.* Barclay.

(*d*) 3 De G. & Sm. 587.

(*e*) 6 Beav. 324.

(*f*) 5 Ha. 542, and 2 Ph. 354. See, also, *Eager* v. *Barnes*, 31 Beav. 579, a somewhat similar case.

(*g*) 23 Beav. 107; compare this case with *Ex parte Eyre*, 1 Ph. 227; *Bishop* v. *The Countess of Jersey*, 2 Drew. 143; *Coomer* v. *Bromley*, 5 De G. & Sm. 532, noticed *infra*, p. 159.

nership as stockbrokers, and were in the habit of receiving monies from the friends and connections of the firm, and of the individual partners for the purposes of investment. They also seem to have been in the habit of keeping for their customers the securities on which the investments were made. The plaintiff had some Portuguese bonds held by one of the partners for the plaintiff as a customer of the firm. The plaintiff married, and these bonds were assigned to trustees of whom that partner was one. The bonds remained in his custody as before, and were in fact deposited (and, as it seemed, with other securities belonging to other customers) with the bankers of the firm. The bonds were afterwards converted by the same partner into other bonds, which were deposited as the first had been. He acted in this matter as a stockbroker, in conformity with the usual course of business of the firm, and advised the plaintiff from time to time in the name of the firm of what had been done. The bonds were afterwards misapplied by him. It was held that they were originally clearly in the custody of the firm, and not in the custody of one only of its members, simply as trustee. It was further held that the assignment of the bonds did not take them out of the custody of the firm, and that the firm was therefore liable for the loss consequent on their unauthorised removal.

In the same case the firm was held liable for the loss of other bonds and securities bought by them for the plaintiff, and left in their custody in the usual way, and for money borrowed in the name of the firm, but from which the firm derived no benefit; and the fact that the plaintiff dealt only with one partner was held immaterial, the business transacted being the ordinary and regular business of the firm, and appearing as such in its books and accounts.

Principle of foregoing cases.

The principle of these cases is that the firm has in the ordinary course of its business obtained possession of the property of other people, and has then parted with it without their authority. Under such circumstances the firm is responsible: and the fact that the property has been improperly procured and placed in the custody of the firm by one of the partners, does not lessen the liability of the firm; for whether the firm is or is not liable for the original fraud by which the property

got into its hands, it is responsible for the subsequent misapplication thereof by one of its members.

Fauntleroy forgery cases.

This was decided in the cases arising out of the notorious Fauntleroy forgeries (*h*). Fauntleroy, who was a partner in the banking house of Marsh & Co., forged powers of attorney for the sale of stock belonging to the customers of the bank. Marsh & Co. had an account with Martin Stone & Co., and the broker who sold out the stock under the forged powers of attorney remitted the proceeds of the sale to the credit of Marsh & Co. with Martin Stone & Co. Fauntleroy then drew out these monies by a cheque signed by him in the name of his firm, and applied them to his own use. The firm of Marsh & Co. was, however, held liable for them, although none of the partners except Fauntleroy had any hand in his forgeries or frauds, or in fact knew anything of what had taken place. The liability of the firm was based upon the ground that to sell stock for its customers and to receive the proceeds of the sale fell within the scope of its business; that the sale took place and the money was received in the usual way; that the fraud of Fauntleroy in the subsequent appropriation of the money afforded no defence after the money had once been in the custody of the firm: and that if the other partners knew nothing of the receipt of the money, they might have known it, and would have ascertained the source from which it had been derived, if they had used ordinary diligence, and had not placed such implicit confidence in their co-partner (*i*).

3. Liability of firm for money received, but

3. *If a partner in the course of some transaction unconnected with the business of the firm, or not within the scope of such*

(*h*) *Stone* v. *Marsh*, 6 B. & C. 551, and Ry. & Moo. 364; *Keating* v. *Marsh*, 1 M. & A. 582; *Marsh* v. *Keating*, 1 Bing. N. C. 198, and 2 Cl. & Fin. 250; *Ex parte Bolland*, Mont. & McAr. 315, and 1 M. & A. 570; *Hume* v. *Bolland*, Ry. & Moo. 371, and 1 Cr. & M. 130. This last case is hardly consistent with *Stone* v. *Marsh*, *Marsh* v. *Keating*, or *Ex parte Bolland*.

(*i*) In *Stone* v. *Marsh* and *Ex parte Bolland*, Fauntleroy's partners did know that the stock was sold by their broker, but did not know that the powers of attorney were forged. In *Marsh* v. *Keating*, they do not seem to have known anything either of the sale of the stock or of the receipt of the proceeds of the sale. Compare as to the receipt of the money by the firm the cases cited in the next four pages.

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business, obtains money and then misapplies it, the firm is not without more (*j*) *liable to make good the loss* (*k*).

not in ordinary course of business.

Harman *v.* Johnson.

In *Harman* v. *Johnson* (*l*), one of several solicitors was entrusted with money for the purpose of investing it on mortgage when a good opportunity offered. He misapplied it, and it was held that his co-partner was not liable, inasmuch as there was no evidence to show that it was part of the business either of the firm in question or of solicitors generally to act as scriveners, *i.e.*, as depositaries of money waiting for investment. The Court intimated that if it had been shown that the money was given to the defaulting solicitor for the purpose of being invested on some specified mortgage, his co-partner would have been liable for its misapplication.

Plumer *v.* Gregory.

In *Plumer* v. *Gregory* (*m*), one of a firm of solicitors borrowed money without the knowledge of his co-partners from a client, saying that the firm wanted to lend it to another client on mortgage. The other partners were held not liable for this money, although two of them had borrowed money from the same client before.

Cleather *v.* Twisden.

In *Cleather* v. *Twisden* (*n*), bonds payable to bearer were placed for safe custody by trustees in the hands of one of a firm of solicitors and he misappropriated them. The other partners were held not liable; it being no part of their business to accept such securities for safe custody; and they not, in fact, knowing that their partner had them. The decision would have been the other way if it had been proved that the innocent partners had in fact known that the bonds were in the custody of their co-partner as representing the firm. Had such knowledge been proved, they would have been held to have had the bonds in their own custody, and would have been liable for them (*o*).

Sims *v.* Brutton.

The case of *Sims* v. *Brutton* (*p*) must be referred to this head

(*j*) As to the effect of knowledge on the part of the other partners, see *Cleather* v. *Twisden*, 28 Ch. D. 340, noticed *infra*, and prop. 5, *infra*.

(*k*) See, also, prop. 4, *infra*.

(*l*) 2 E. & B. 61.

(*m*) *Plumer* v. *Gregory*, 18 Eq. 621, as to the 1701*l*. Compare this and the last case with *Willett* v. *Chambers*, and other cases cited *ante*, p. 151, note (*u*).

(*n*) 28 Ch. D. 340.

(*o*) See *infra*, prop. 5, p. 160.

(*p*) 5 Ex. 802. See, also, *Coomer* v. *Bromley*, 5 De G. & Sm. 532, noticed *infra*, p. 159.

if its authority is to be upheld. There the defendants Brutton and Clipperton were in partnership as solicitors. Brutton received 500*l.* from a client to invest on a mortgage, and the money was duly invested. The mortgage deed remained with the defendants, and the money secured by it was ultimately repaid to Clipperton, who then gave up the deed to the mortgagor. Shortly after this Clipperton re-lent 300*l.*, part of the 500*l.*, and again received back the mortgage deed as a security, and ultimately this 300*l.* was repaid to him and the mortgage deed was again delivered up to the mortgagor. Clipperton had no authority to receive payment of the 500*l.* from the mortgagor, nor to re-lend the 300*l.*, nor to receive repayment of it, and he acted throughout the whole of these transactions without the knowledge of his co-partner, or of the mortgagee the client of the firm. The books of the firm, however, showed the receipt of the 500*l.* in the first instance; its loan and repayment; and also the loan and repayment of the 300*l.* The client was, moreover, credited from first to last with the receipt of interest on the whole 500*l.*, and was debited with the same interest, which was in fact regularly paid to his agent. Clipperton misapplied the whole 500*l.*, and the Court held that Brutton, his partner, was not liable to make it good. The defendants, it was said, discharged their duty by laying out the money as directed, and they had no authority to receive it back. Therefore the repayment to Clipperton, though treated by him as a partnership transaction, was not so in point of law, and did not create any partnership responsibility. The entries in the books were only evidence of knowledge on the part of Brutton, and the case stated for the opinion of the Court expressly found that he had no knowledge of the facts.

Upon this case it is to be observed, that if, as appears to have been the case, the 500*l.* when paid off was placed to the credit of the firm with its bankers, the decision is difficult to reconcile with *Stone* v. *Marsh* and *Marsh* v. *Keating* (*q*).

4. Liability of firm for frauds of partner acting on his own account.

4. *A fraud committed by a partner whilst acting on his own separate account is not imputable to the firm, although had he not*

(*q*) The Statute of Limitations afforded a good defence to the action in *Sims* v. *Brutton*. The propriety of the decision in that respect is untouched by the observations in the text.

been connected with the firm he might not have been in a position to commit the fraud.

This is little more than another mode of stating prop. 3; and the cases just alluded to may also be referred to under this head. In addition to them the following deserve notice.

Ex parte Eyre.

In *Ex parte Eyre* (*r*), the customer of a firm of bankers deposited with them a box containing securities belonging to himself, and he authorised one of the firm to take out some of the securities, replacing others, however, in their place. The partner so authorised, after obtaining the securities he was authorised to take and substituting others, clandestinely withdrew these last, and applied them to his own use. It was held that the firm was not liable for this act, and was not bound to make good the consequent loss; for it did not appear that the firm had any authority to open the box or to examine its contents, and the abstraction of the securities was a tortious act committed by one partner, who had been specially authorised to open the box, and who took out the securities, not for the partnership, nor for any partnership object, but in his separate character and for his own individual and separate purposes.

Bishop v. Jersey.

In *Bishop* v. *The Countess of Jersey* (*s*), one of a firm of bankers advised the plaintiff, a customer of the bank, to sell out some stock, telling her that there was an opportunity to place out 5000*l.* on a good security at 5*l.* per cent. to be given by his son. She accordingly authorised the sale, and the money produced was placed to her credit at the bank. She then drew a cheque for 5000*l.* which she gave to the partner with whom she had been in communication. No security was ever given; the money was lost; the partner in question absconded. Interest, however, on the 5000*l.* was for some time placed to the credit of the plaintiff in her account with the bank, but by whom did not appear. The other partners knew nothing of what had taken place until after the fraud had been committed, and it was held that they were not answerable. The transactions had nothing to do with the business of the partnership, and if they had not taken place at the bank there would have been no pretence for saying that the one

(*r*) 1 Ph. 227, affirming S. C. 2 M. D. & D. 66.

(*s*) 2 Drew. 143.

partner was acting otherwise than in a separate affair of his own.

Coomer v. Bromley.

A more difficult case, but one turning mainly on the same principle, is to be met with in *Coomer* v. *Bromley* (*t*). There the defendants, William and Joseph Bromley, were solicitors. The plaintiffs were their clients, and were trustees of some Navy 5*l.* per cent. annuities, in which they were themselves beneficially interested for their lives. William Bromley was associated by the plaintiffs with them as trustee of these annuities. Upon their reduction from 5*l.* to 4*l.* per cent., the annuities were sold at the request of the plaintiffs, and it was arranged that the money arising from the sale should be invested on mortgage to be taken with the plaintiffs' consent in William Bromley's name alone. The annuities were sold; the money arising from the sale found its way to the credit of the firm at its bankers, but was not invested on mortgage as intended, and was apparently used as partnership money. William Bromley pretended that he had invested the money, and he paid interest accordingly. Ultimately, and with the plaintiffs' knowledge, a mortgage, of which William Bromley was sole mortgagee, was appropriated as a security for the money in question. This mortgage was sufficient in point of value to cover the amount realised by the sale, and was for that amount less a few pounds, which the plaintiffs divided between them. The security thus appropriated was afterwards realised by William Bromley, and he misapplied the money, but it was not placed to the credit of the firm, nor did Joseph Bromley know anything of its receipt or application. Under these circumstances it was held that Joseph was not liable to the plaintiffs for the loss; for the plaintiffs dealt with William Bromley as a trustee and not as a partner; they authorised him to take a mortgage in his own name alone; they acquiesced in the appropriation to their money of a security which was of sufficient value; and Joseph's duty was then at an end. The plaintiffs could not hold him liable for the loss of the mortgage money arising subsequently from the fraud of the mortgagee.

(*t*) 5 De G. & Sm. 532. See, too, *Sims* v. *Brutton*, 5 Ex. 802, noticed *ante*, p. 156. Compare *St. Aubyn* v. *Smart*, 5 Eq. 183, and 3 Ch. 646.

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In these cases it will be observed that although the money in question had at one time been in the custody of the firm, such was not the case when the money was misapplied. This circumstance distinguishes the cases last referred to from *De Ribeyre* v. *Barclay* (*u*) and other cases of that class, the leading facts in which have been already stated (*v*).

Distinction between these cases and those noticed on pp. 152—155.

5. Liability of firm for trust monies.

5. *If a partner, being a trustee, improperly employs the money of his* cestui que trust *in the partnership business, or in payment of the partnership debts, this alone is not sufficient to entitle the* cestui que trust *to obtain repayment of his money from the firm.*

Ex parte Apsey.

In *Ex parte Apsey* (*x*), one of two assignees in bankruptcy was in partnership, and he applied part of the assets of the bankrupt in paying partnership debts. On the subsequent bankruptcy of the partnership it was held that the amount so applied was not provable against the joint estate.

Ex parte Heaton.

In *Ex parte Heaton* (*y*), a father and his sons were partners; the sons were trustees of a will, and instead of applying the trust monies according to the trust, they appropriated them to partnership purposes: but on the bankruptcy of the partnership it was held that the amount of the monies so appropriated was not provable against the joint estate, unless it could be shown that they were employed for the use of the partnership trade with the knowledge of the father, that they were trust funds; and an inquiry as to that was directed (*z*).

Distinction between these cases and Marsh *v.* Keating.

It may at first sight be thought that these cases are opposed to *Marsh* v. *Keating*, and the other authorities before referred to (*a*), in which the firm was held liable for money which came to its hands. But in those cases the money came to the hands of the firm in the ordinary course of its business (*b*); whilst in

(*u*) 23 Beav. 107.

(*v*) *Ante*, p. 153.

(*x*) 3 Bro. C. C. 265. See, also, *Ex parte White*, 6 Ch. 397.

(*y*) Buck. 386.

(*z*) *Ex parte Clowes*, 2 Bro. C. C. 595, is not opposed to the cases in the text, for there the joint and separate estates were consolidated.

(*a*) *Ante*, pp. 152—155.

(*b*) This may be thought incorrect with respect to *Marsh* v. *Keating*; but it was the business of the firm there to sell, through their broker, stock belonging to their customers, and to receive and remit the proceeds; and the money for which the firm was held answerable did arise from the sale of the stock of a customer, though it was sold under a

the cases now under consideration it is supposed to come otherwise. Liability must therefore attach to the firm, if at all, on wholly different principles, and the fact that the firm has had the benefit of the trust monies, is not sufficient to render it responsible for them. To be liable, the firm must be implicated in the breach of trust, and this it cannot be unless all the partners either knew whence the money came, or knew that it did not belong to the partner making use of it. Knowledge on the part of one partner will not affect the others, for the fact to be known has nothing to do with the business of the firm; and the case of *Ex parte Heaton*, already referred to, shows that in cases of this kind the liability as for a breach of trust does not extend to those who are ignorant of the matters before mentioned. But if knowledge of these matters can be imputed to the other partners, if they know, or ought to be treated as knowing that trust monies are being employed in the partnership business, they will be held bound to see that the trust to which the money is subject authorises the use made of it, and will be answerable for a breach of trust in case of its misapplication or loss (*c*). It is important to bear this in mind when one partner has died; for if the surviving partners deal with his property, knowing that it belongs to his estate, knowledge of the trust on which the property is held will be imputed to them, and they may be thus involved in all the consequences of a breach of trust (*d*). But this doctrine can hardly extend to the case of incoming partners, who do nothing except leave matters as they find them when they enter the firm (*e*).

Where firm knows of the breach of trust.

If partners are implicated in a breach of trust, their liability is joint and several (*f*): and a decree for costs will be made

Liability for breach of trust, joint and several.

forged power of attorney; and although Fauntleroy's partners knew nothing of the receipt of the money, their ignorance was considered culpable and of no avail.

(*c*) See *Ex parte Woodin*, 3 M. D. & D. 399; *Ex parte Poulson*, De Gex, 79; *Ex parte Watson*, 2 V. & B. 414; *Smith* v. *Jameson*, 5 T. R. 601; *Keble* v. *Thompson*, 3 Bro. C. C. 112, and compare *Ex parte Geaves*, 8 De G. M. & G. 291; *Ex parte Barnewall*, 6 De G. M. & G. 801; *Ex parte Burton*, 3 M. D. & D. 364.

(*d*) See *infra*, book iv. c. 3, § 3.

(*e*) See *Twyford* v. *Trail*, 7 Sim. 92.

(*f*) *Re Oxford Benefit Building Soc.*, 35 Ch. D. 502; *Imperial Mercantile Credit Assoc.* v. *Coleman*, L. R. 6 H. L. 189; *Deraynes* v. *Noble*, *Sleech's case*, 1 Mer. 563; *Baring's case*, ib.

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Borrowing trust money.

against them all, although they may not be all equally to blame (*g*). But persons who borrow trust money from executors or trustees are only liable to repay it with interest; and although the lenders may have no authority to lend the money, the borrowers are not liable to account for the profits which they may have realised by its employment (*h*).

Following trust money.

Although a firm is not liable to make good trust money applied to its use by one of its members in breach of the trust reposed in him, unless the firm can be implicated in the breach of trust, this doctrine will not preclude a *cestui que trust* from following his own money into the hands of the firm, and demanding it back, if he can show that the firm still has it, and the firm did not come by it by purchase for value without notice. The true owner of money traced to the possession of another has a right to have it restored, not because it is a debt, but because it is his money. His right is incidental to his ownership; and whether the money is traced to the hands of a single individual, or to the hands of a firm, is wholly immaterial (*i*).

Liability of partnerships for the false representations of their members.

In considering the liability of a firm for the false representations of one of its members, it is necessary to distinguish actions for mere damages, from actions to rescind contracts, and to recover money, or property, obtained by the firm by misrepresentation.

614; *Sadler* v. *Lee*, 6 Beav. 324; *Brydges* v. *Branfill*, 12 Sim. 369; *Blair* v. *Bromley*, 2 Ph. 359; *Wilson* v. *Moore*, 1 M. & K. 127 and 337; *Ex parte Poulson*, De Gex, 79. Compare *Ex parte Barton*, 3 M. D. & D. 364. It, however, by no means follows, that on the bankruptcy of the firm, there can be a proof against the joint as well as against the separate estate. See *Ex parte Barnewall*, 6 De G. M. & G. 801. This will be discussed in the chapter on Bankruptcy.

(*g*) *Lawrence* v. *Bowle*, 2 Ph. 140.

(*h*) *Vyse* v. *Foster*, L. R. 7 H. L. 318; *Stroud* v. *Gwyer*, 28 Beav. 130.

(*i*) See as to tracing money, Lewin on Trusts, edit. 8, ch. xxx. § 2; *Re Hallett's estate*, 13 Ch. D. 696; *Re West of England Bank*, 11 Ch. D. 773; *Brown* v. *Adams*, 4 Ch. 764; *Pennell* v. *Deffell*, 4 De G. M. & G. 372; *Frith* v. *Cartland*, 2 Hem. & M. 417; *Scott* v. *Surman*, Willes, 400; *Taylor* v. *Plumer*, 3 M. & S. 562; *Small* v. *Attwood*, Young, 507; *Pannell* v. *Hurley*, 2 Coll. 241.

Actions for deceit.

An action for damages for misrepresentation cannot as a general rule be maintained unless the misrepresentation is fraudulent, *i.e.*, false, and known so to be, to the person making it, or false and made recklessly without any reasonable ground for believing the statement to be true (*k*). There is, therefore, a difficulty in holding any person liable to such an action unless actual fraud by him can be proved. On the other hand it is difficult, if not impossible, to draw any sensible distinction between the case of fraud and any other wrong; and the weight of authority certainly is in favour of the proposition that actions for damages will lie against a principal for the fraud of his agent committed in the course of his employment, and for his principal's benefit (*l*). This doctrine obviously renders a firm liable in an action of damages for the fraud of one of its members, if committed by him in transacting the business of the firm, and for its benefit; but not otherwise (*m*).

Other actions based on fraud.

Whatever doubt there may be as to the liability of a firm to an action for deceit founded on the fraudulent statement of one of its members, there is no doubt that a firm can be compelled to restore property, or refund money, obtained by it by the misrepresentation of one of its members. Nor in such a case is it necessary to prove that the misrepresentation was fraudulent as well as false (*n*).

(*k*) See the cases in the next two notes, and Pollock on Torts, 236, &c. One exception is obscured by being referred to an implied warranty, *Lewis* v. *Nicholson*, 18 Q. B. 503; *Collen* v. *Wright*, 8 E. & B. 647, and 7 ib. 301; *Firbank's Exors.* v. *Humphreys*, 18 Q. B. D. 54.

(*l*) *Barwick* v. *English Jt. St. Bank*, L. R. 2 Ex. 259; *Weir* v. *Bell*, 3 Ex. D. 238; *Swire* v. *Francis*, 3 App. Ca. 106; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Ca. 317; *Mackay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 412; *Addie* v. *Western Bank of Scotland*, L. R. 1 Sc. & Div. App. Ca. 145, are the leading cases on this subject. As will be seen from them, opinions on the point greatly differ. See Pollock on Torts, 83, and the next note.

(*m*) See *British Mutual Bank. Co.* v. *Charnwood Forest Rail. Co.*, 18 Q. B. D. 714, where the defendants were held not liable for a fraudulent statement made by their secretary, although made in answer to enquiries which it was his apparent duty to answer. See, also, *Barnett, Hoares & Co.* v. *South Lon. Tramways Co.*, 18 Q. B. D. 815. Compare the cases in the last note.

(*n*) See *Arkwright* v. *Newbold*, 17 Ch. D. 301; *Redgrave* v. *Hurd*, 20 Ch. D. 1.

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Rapp v. Latham.

In *Rapp* v. *Latham* (*o*), the defendants (Parry and Latham) were in partnership as wine and spirit merchants, and the plaintiff employed them to purchase wine for him on commission, and to sell the same as opportunity might offer. Parry was the active partner, and he alone attended to the business of the firm. He from time to time represented that he had effected purchases and sales on the plaintiff's account, and he remitted to the plaintiff, balances alleged to be due to him on the pretended sales. The plaintiff had advanced 126,000*l.* to be laid out in the purchase of wines, and he had received, on account of pretended re-sales and profits arising therefrom, 130,000*l.* There was, however, a considerable sum advanced by the plaintiff still unaccounted for, but which the defendant Parry alleged had been invested in the purchase of wine at so much a pipe; and to recover this sum the action was brought against Parry and his co-partner. No purchase or sale had ever been made by Parry, and the whole of his representations to the plaintiff were false and fraudulent. It was contended by Latham that he was not affected by the fraud of his co-partner, inasmuch as the fictitious purchases and sales were not in the ordinary course of trade, and were not, therefore, partnership transactions. But it was held that he was bound by the acts and representations of his partner Parry, and could not be allowed to say that those transactions were fictitious which Parry had represented to be real. The plaintiff was adjudged entitled to retain the 130,000*l.* remitted to him, and to recover back the advances for the supposed purchases in respect of which there had been no remittance.

Lovell v. Hicks.

Again, where one of several partners in a patent induced the plaintiff, by false and fraudulent representations, to pay 3,000*l.* for part of the profits to be obtained by its working, all the partners were held liable to repay the money, although there was no evidence of fraud on the part of more than one (*p*).

(*o*) 2 B. & A. 795. The action was for money had and received, and a set-off was pleaded.

(*p*) *Lovell* v. *Hicks*, 2 Y. & C. Ex 46 and 481.

Blair v. Bromley.

The case of *Blair* v. *Bromley* (*q*), already alluded to, is another instance in point, and was in fact decided by the Lord Chancellor expressly upon the ground that persons who, having a duty to perform, represent to those who are interested in the performance of it that it has been performed, make themselves responsible for all the consequences of non-performance; and as one partner may bind another as to any matter within the limits of their joint business, so he may by an act which, though not constituting a contract by itself, is on equitable principles considered as having all the consequences of one.

False accounts rendered by one partner.

Whether accounts, rendered by one partner in the name of the firm and showing that money is in the hands of the firm when in truth he has misapplied it, are to be treated as representations by the firm, is a question which has given rise to much discussion and upon which the cases are not uniform. But upon the whole it is conceived that if the accounts relate to matters within the scope of the partnership business the firm is bound by them (*r*).

Statutory exceptions.

By 9 Geo. IV. c. 14, § 6, a firm is not liable for a false and fraudulent representation as to the character or solvency of any person unless such representation is in writing signed by all the partners. The signature of one partner in the name of the firm will not bind any one but himself (*s*).

Liability of firm for untrue statement as to authority.

If a partner, acting apparently beyond the limits of his authority, untruly represents that he is acting with his co-partners' consent, they are not bound by this representation, nor are they liable for what may be done on the faith of it.

Ex parte Agace.

Therefore in *Ex parte Agace* (*t*), where one partner gave partnership bills in payment of his own separate debt, and on

(*q*) 5 Ha. 542, and 2 Ph. 354, *ante*, p. 153.

(*r*) See the two last cases, and *Rapp* v. *Latham*, 2 B. & A. 795, *ante*, p. 164; *Marsh* v. *Keating*, 2 Cl. & Fin. 250; *Devaynes* v. *Noble*, *Baring's case*, 1 Mer. 611; *De Ribeyre* v. *Barclay*, 23 Beav. 107. See, on the other hand, *Hume* v. *Bolland*, 1 Cr. & M. 130; *Sims* v. *Brutton*, 5 Ex. 802.

(*s*) See *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301, reversing *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244. In this case the letter was signed by A. B., manager, but the words of the statute as construed by the Court of Appeal, warrant the statement in the text.

(*t*) 2 Cox, 312.

being asked whether his co-partner was acquainted with the transaction, untruly replied that he was, and that he consented to it; it was held that the bills were not provable against the joint estate of the firm, they not being in the hands of a *bonâ fide* holder for value, without notice of the circumstances under which they had been given. In this case, the partner who gave the bills did that which was clearly not within the scope of his authority, and the person who took them knew it. The latter was, it is true, misled by the false answer to his question, but that answer was not referable to a matter within the scope of the partnership business; and the other partner did nothing to lead to the supposition either that he was a consenting party, or that he had authorised his co-partner to say that he was (*u*).

Untrue statement as to nature of business.

A question of more difficulty arises when a partner alleges that the business of the firm is more extensive than it really is, or that it is different from what it is. But even in this case the firm would probably be held not liable for such a misrepresentation. *Ex hypothesi* the representation is not referable to anything falling within the scope of the partnership business; and it would probably be contended in vain that each partner was impliedly authorised by his co-partners to answer questions as to what business they really carried on in partnership. If the person seeking to make the firm liable knew anything of the firm and of its business as ordinarily carried on, then *Ex parte Agace* is an authority to show that he could not succeed. If he knew nothing of the firm, he would be in the position of a person dealing with an agent whose authority is wholly unknown. Now an agent whose authority is wholly unknown cannot bind his principal by misrepresenting the authority conferred (*v*); and it is difficult, therefore, to see upon what principle a partner could, in the case now supposed, bind the firm by misrepresenting his authority, or by misrepresenting the nature of the business of the firm which, as to strangers, determines that authority. A member of a banking

(*u*) See, also, *Kendal* v. *Wood*, L. R. 6 Ex. 243, and *per* Kelly, C. B., in *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H. L. 879 and 880.

(*v*) See Story on Agency, § 134, &c. The case supposes that *all* that is known about the agent's authority is what he himself says.

firm could hardly bind it by underwriting a policy in the name of the firm, and by untruly representing that he and his partners were insurers as well as bankers.

Fraud in luring a person to join the firm.

It is not necessary, in order to carry on the business of a firm in the ordinary way, that any of its partners should have power to induce other persons to join the firm. Hence if one partner induces a person by fraud, to join the firm, such fraud cannot be imputed to the firm, unless the partner in question had express authority to seek for a new partner, or unless the other members of the firm ratify the fraud when made aware of it. If, however, the incoming partner has brought in money to the firm, a retention of the money by the firm, with knowledge of the fraud, would amount to a ratification thereof, and would be equivalent to a fraud by all the partners in the first instance. Hence they cannot retain the money, as has been already seen (*x*).

SECTION IV.—LIABILITY OF PARTNERS IN RESPECT OF ACTS WHICH ARE UNAUTHORISED AND ARE KNOWN SO TO BE.

Excess of authority.

By law every member of an ordinary partnership is the agent of the firm, so far as is necessary for the transaction of its business in the ordinary way, and to this extent his authority to act for the firm may be assumed by those who know nothing of the real limits of his authority. If his co-partners have restricted his authority to narrower limits (which they are perfectly at liberty to do (*y*)), still they will be bound to all persons dealing with him *bonâ fide* without notice of the restriction, so long as he acts within the wider limits set by law, as above explained. On the other hand, if a person seeks to fasten upon the firm liability in respect of some act of one of the members which does not fall within the limits of his authority as set by law, a more extensive authority must be shown to have been actually conferred upon him by the other partners; and if no sufficient authority can be shown, the firm will not

(*x*) See *Lovell* v. *Hicks*, 2 Y. & C. Ex. 46 and 481, noticed *ante*, p. 164.

(*y*) See *infra*.

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be liable, even though the person seeking to charge it had no notice of the real authority possessed by the partner with whom he dealt.

Notice of want of authority.

The immateriality of notice of want of authority in the last case, and its materiality in the former, is a necessary consequence of the law of agency. A firm can only be made liable for what is done by one of its members on the supposition that the act in question was authorised by the other members. Now, as by law they are held *primâ facie* to authorise all acts necessary for carrying on the business of the firm in the usual way, they cannot escape liability for any act of this character unless they can show that the apparent authority to do it did not exist, and was known not to exist. But when it is sought to make the firm liable for some act not *primâ facie* authorised by it, an actual authority by it must be shown; and if this cannot be done, no case is made out against the firm, however ignorant the person seeking to charge it may have been of what was authorised and what was not. In the case now supposed the firm did not mislead him; and if he was misled by the representations of the partner with whom he dealt, his remedy is against that partner (*z*); just as when an agent untruly represents his authority, a person, dealing with him, acquires no right against the principal, but must look to the agent for indemnity (*a*).

From the above observations it follows that actual notice of excess of authority becomes important only where the firm seeks to escape liability for some act done by one of its members, with the apparent, but without the real authority of the others. So long as one partner does nothing beyond the scope of his apparent authority, as determined by the principle already explained, so long is the firm responsible for his conduct, although he may have acted beyond or in direct violation of the authority within which his co-partners may have attempted to confine him. Restrictions placed by the partners upon the powers which each shall exercise do not affect non-

(*z*) *Ante*, p. 164, *et seq.*; see, too, *Lloyd* v. *Freshfield*, 9 Dowl. & Ry. 19.

(*a*) See, as to the liability of the agent in such a case, *Collen* v. *Wright*, 7 E. & B. 301, and 8 ib. 647; and *ante*, p. 163, note (*k*).

partners, who act *bonâ fide* and without notice of the restriction (*b*). If, for example, the business of a firm requires a subdivision of labour, and it is agreed between the partners that one shall attend to one department and another to another, the firm will nevertheless be bound by the acts of one of the partners out of his department, provided they are such as, on the principles already explained, would be binding on the firm (*c*).

Cases of fraud on firm, but no notice of it.

So, if one partner acts in fraud of his co-partners, still they will be bound, if he has not exceeded his apparent authority, and if the person dealing with him had no notice of the fraud. Thus, in *Bond* v. *Gibson* (*d*), where one partner ordered goods on the credit of the firm, and immediately pawned them for his own benefit, the firm was held liable for the price of the goods. So, if one member of an ordinary trading partnership draws, accepts, or indorses a bill in the name of the firm, but for some private purpose of his own, and in fraud of his co-partners, they will be liable upon the bill at the suit of any holder for value, without notice of the fraud (*e*). So, as has been already seen, if one partner fraudulently misapplies money for which the firm is answerable, the firm is liable to make it good, although the other partners may have been grossly deceived, and may themselves have been morally blameless (*f*).

Bond *v.* Gibson.

(*b*) As regards such persons, it is of no use for one partner to tell the others he will not be bound by their acts. See *Gleadon* v. *Tinkler*, Holt, N. P. Ca. 586. It is otherwise where there is notice. See *Ex parte Holdsworth*, 1 M. D. & D. 475.

(*c*) *Morans* v. *Armstrong*, Arm. McArt. & Ogle, Ir. N. P. Rep. 25.

(*d*) 1 Camp. 185.

(*e*) *Ex parte Bushell*, 3 M. D. & D. 615; *Ex parte Meyer*, De Gex, 632 (an accommodation bill); *Lane* v. *Williams*, 2 Vern. 277; *Wintle* v. *Crowther*, 1 Cr. & J. 316; *Thicknesse* v. *Bromilow*, 2 ib. 425; *Ridley* v. *Taylor*, 13 East, 175; *Sanderson* v. *Brooksbank*, 4 Car. & P. 286; *Lewis* v. *Reilly*, 1 Q. B. 349; *Sutton* v. *Gregory*, 2 Peake, 150; *Swan* v. *Steele*, 7 East, 210. See, as to the plea of non accepit, *Jones* v. *Corbett*, 2 Q. B. 828. It is now settled that if a bill is drawn or accepted by one partner in fraud of the firm, the holder cannot recover against the firm unless he can show that he gave value for the bill. *Hogg* v. *Skene*, 18 C. B. N. S. 426, explaining *Musgrave* v. *Drake*, 5 Q. B. 185, which was supposed to be to the contrary. See, also, *Bailey* v. *Bidwell*, 13 M. & W. 73; *Smith* v. *Braine*, 15 Jur. 287, Q. B., and 16 Q. B. 244; *Harvey* v. *Towers*, 6 Ex. 656; *Berry* v. *Alderman*, 14 C. B. 95; *Heath* v. *Sansom*, 2 B. & Ad. 291.

(*f*) *Ante*, p. 151, *et seq.*

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Liability of retired partner in the absence of notice.

Upon the same principle, if a person known to be a partner retires, and does not notify his retirement, he will continue to be bound by the acts of his late partners as if his partnership with them continued (*g*).

Cases of restricted authority and notice of it

On the other hand, a person who has notice that the authority of a partner is restricted, cannot hold the firm liable if he chooses to deal with that partner in a matter beyond his authority as restricted (*h*). Therefore, where the defendant, who was in partnership, sent the plaintiff a circular telling him not to supply goods to the firm without the defendant's written order, and the plaintiff, notwithstanding, supplied goods to the defendant's partner, it was held that the defendant was not liable for the goods (*i*). So, the authority of any partner to accept bills in the partnership name may be determined by a public notice, and such notice will affect those whom it reaches, subject to the qualification that an indorsee with notice may avail himself of the ignorance of his indorser (*k*).

Galway *v.* Mathew.

In *Galway* v. *Mathew* (*l*) the defendants, Mathew and Smithson, were partners; Smithson caused an advertisement to be published warning all persons not to give credit to Mathew on his, Smithson's, account, and stating that he would not be liable for any bills or notes issued by Mathew in the name of the partnership. The plaintiff had seen this advertisement, but he was nevertheless prevailed upon by Mathew to accept a bill for the accommodation of the firm, taking in exchange a promissory note drawn by Mathew in the name of the firm. Mathew got the bill discounted, and *bonâ fide* applied almost all of the money thus procured in payment of the debts of the firm. The plaintiff paid his acceptance at maturity, and

(*g*) This subject will be alluded to hereafter, see c. 2, § 3.

(*h*) *Alderson* v. *Pope*, 1 Camp. 404, stated and observed upon hereafter.

(*i*) *Willis* v. *Dyson*, 1 Stark. 164; *Minnit* v. *Whitney*, Vin. Ab. Partn. A. pl. 12, and 5 Bro. P. C. 489. See, too, *Vice* v. *Fleming*, 1 Y. & J. 227; *Ex parte Holdsworth*, 1 M. D. & D. 475.

(*k*) *Rooth* v. *Quin*, 7 Price, 193.

(*l*) 1 Camp. 402, and 10 East, 264. See, too, *Ex parte Holdsworth*, 1 M. D. & D. 475, where the drawer of bills accepted by the firm had notice that they were accepted without authority. See, further, on this point, *infra*, p. 174.

then brought an action against the firm on the note. But it was held that, having seen the advertisement, he could not recover.

Restricted powers not inconsistent with continuance of partnership.

It will be observed that in these cases the notices were effectual though the partnership was not determined. The continuance of the partnership is not inconsistent with a notice by one partner that as to some particular matter he will not be bound by the acts of his co-partner (*m*).

Bills accepted in name of firm for private debt.

Again, a person who knows that a partner is using the name or assets of the firm for a private purpose of his own, knows that he is *primâ facie* committing a fraud on his co-partners. Therefore, notwithstanding the implied power of a member of an ordinary trading firm to accept bills or make notes, if one partner accepts a bill or makes a note in the name of the firm, and gives the bill or note in payment of a private debt of his own, the creditor who takes the bill or note, knowing the circumstances under which it has been accepted or made, will not be able to enforce it against the firm, unless it was, in fact, given with the authority of the other partners, which it is for the creditor to prove (*n*). And if a bill is drawn by one partner in the name of the firm in fraud of his co-partners, and is accepted by the drawee, and is afterwards indorsed by the drawer in the name of the firm, the acceptor may successfully deny the indorsement, although he cannot deny the drawing (*o*).

Again, although a partner may be a *bonâ fide* holder, for his own separate use, of the paper of his firm, yet if he gives such paper in payment of a separate debt of his own, this is *primâ facie* an irregular proceeding and a fraud on his co-partners. Consequently, the creditor taking the paper

(*m*) See, in addition to the cases cited in the last few notes, the judgment of L. J. Bramwell in *Bullen* v. *Sharp*, L. R. 1 C. P., pp. 125-6, and the judgment in *Vice* v. *Fleming*, 1 Y. & J. 227.

(*n*) *Leverson* v. *Lane*, 13 C. B. N. S. 278, and 3 Fos. & Fin. 221; *Re Riches*, 4 De G. J. & S. 581, and 5 N. R. 287. See, also, *Ellston* v. *Deacon*, L. R. 2 C. P. 20. Older cases to the same effect are *Wells* v. *Masterman*, 2 Esp. 731; *Green* v. *Deakin*, 2 Stark. 347; *Ex parte Thorpe*, 3 M. & A. 716; *Ex parte Austen*, 1 M. D. & D. 247; *Arden* v. *Sharpe*, 2 Esp. 524; *Ex parte Agace*, 2 Cox, 312; *Miller* v. *Douglas*, 3 Ross, L. C. 500; *Ex parte Bonbonus*, 8 Ves. 540; *Frankland* v. *M'Gusty*, 1 Knapp, 274; and see *post*, p. 173.

(*o*) *Garland* v. *Jacomb*, L. R. 8 Ex. 216.

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must rebut this *primâ facie* inference before he can compel the firm to pay (*p*). A *bonâ fide* holder for value without notice is of course in a different position (*q*).

Pledge of partnership goods for private debt.

As a partner has no implied authority to pledge the partnership name for purposes of his own, so neither has he, for similar purposes, any implied power to pledge its goods. Therefore, if two firms are jointly interested in consignments, and one of them pledges the bills of lading with its bankers as a security for advances on its separate account, the bankers cannot hold those goods against the other firm, if they knew when the goods were pledged what the real facts were respecting them (*r*). So, if one partner pays a separate debt of his own with money of the firm, and the creditor who is paid is aware of the facts, he cannot retain the money as against the firm, unless he can prove that the payment was authorised by the other partners; or unless they have estopped themselves from denying the authority (*s*).

Private bargain by one partner.

Bignold *v.* Waterhouse.

Another case, illustrating the want of authority of one partner to bind the firm by transactions enuring only to his advantage, is afforded by *Bignold* v. *Waterhouse* (*t*). There the defendants were proprietors of a coach running between London and Norwich, and they, by notice affixed in their office, stated that they would not be accountable for any parcel above the value of 5*l*., unless the same was entered and paid for accordingly. The plaintiffs were bankers at Norwich, and one of the defendants, for a consideration moving to him alone, agreed that the plaintiffs' parcels should always go free by the coach. This agreement was acted on for some time, but it did not appear that the other defendants were aware of its existence, or of the fact that the plaintiffs were treated differently from other people. A parcel of the plaintiffs' sent by the coach being lost, it was held that the contract entered into by

(*p*) See *Leverson* v. *Lane*, 13 C. B. N. S. 278, and *Re Riches*, 4 De G. J. & S. 581, and 5 N. R. 287, qualifying *Ex parte Bushell*, 3 M. D. & D. 615, and *Ridley* v. *Taylor*, 13 East, 175, in which the contrary doctrine was countenanced.

(*q*) See *ante*, p. 169.

(*r*) *Snaith* v. *Burridge*, 4 Taunt. 684.

(*s*) *Kendal* v. *Wood*, L. R. 6 Ex. 243; *Heilbut* v. *Nevill*, L. R. 4 C. P. 354, and 5 ib. 478. See further as to such cases, *ante*, pp. 165, 166.

(*t*) 1 M. & S. 255.

the one defendant was not binding on the others, and that they were not liable for the loss of the parcel, its value not having been declared as required by the notice.

Fraud on incoming partners. Shirreff *v.* Wilks.

The same principle was acted upon in the important and well-known case of *Shirreff* v. *Wilks* (*u*). There the plaintiffs sold some porter to Bishop and Wilks, who were partners; and the porter was entered in the plaintiffs' books in the names of Bishop and Wilks. Afterwards, Robson became a partner with Bishop and Wilks, and the plaintiffs, knowing this, drew a bill on all three partners for the price of the porter, and Bishop accepted the bill in the name of the three. It was held that Robson was not liable on this bill, there being no evidence to show that he knew anything of it. Lord Kenyon went so far as to say that the transaction was fraudulent on the face of it; but that is going rather far, as it is not uncommon for in-coming partners to agree to take upon themselves the existing liabilities of the firm. When such an agreement is entered into, the in-coming partner can hardly say he has been defrauded, if a bill in the name of the new firm is accepted for a debt of the old firm without any specific authority on his part. But if the creditor cannot show an authority on the part of the in-coming partner for the acceptance of a bill in his name for a debt of the old firm, the principle acted on in *Shirreff* v. *Wilks* will apply, for that case is clear law, and has often been followed as such (*x*).

Liability of retired partners after notice.

The doctrine that a person who deals with a partner, knowing that he is exceeding his authority, cannot impute the acts of that partner to the firm, is further illustrated by the decisions establishing the non-liability of a retired partner for acts done by his co-partners after notice of his retirement. These decisions will be examined at length hereafter.

Notice of private stipulations of partners.

Granting that a person, knowing the limits of a partner's authority as set by his co-partners, cannot hold them responsible for an act done by him in excess of his authority, it still remains to determine the effect of notice by non-partners of stipulations entered into between the partners themselves.

(*u*) 1 East, 48.

(*x*) See *ante*, p. 171, and *Ex parte Goulding*, 2 Gl. & Jam. 118; *Wilson* v. *Lewis*, 2 Man. & Gr. 197, and 9 Dowl. Pr. Ca. 18, *sub nomine Wilson* v. *Bailey*.

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Galway v. Mathew.

In *Galway* v. *Mathew* (*y*), Lord Ellenborough is reported to have said, "It is not essential to a partnership that one partner should have power to draw bills and notes in the partnership firm to charge the other: *They may stipulate between themselves that it shall not be done; and if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it in breach of such stipulation.*"

Alderson v. Pope.

Again, in *Alderson* v. *Pope* (*z*), the same judge held "that where there was a stipulation between A., B., and C., who appeared to the world as co-partners, that C. should not participate in profit and loss, and should not be liable as a partner, C. was not liable, as such, to those who had notice of this stipulation."

Principle examined.

These dicta appear to authorise the statement that if partners stipulate amongst themselves that certain things shall not be done, no person who is aware of the stipulation is entitled to hold the firm liable for what may be done by one of the members contrary to such stipulation. But it is submitted that this proposition is too wide. A stranger dealing with a partner is entitled to hold the firm liable for whatever that partner may do on its behalf within certain limits. To deprive the stranger of this right, he ought to have distinct notice that the firm will not be answerable for the acts of one member, even within these limits (*a*). Now notice of an agreement between the members that one of them shall not do certain things is by no means necessarily equivalent to notice that the firm will not be answerable for them if he does. For there is nothing inconsistent in an agreement between the members of a firm that certain things shall not be done by one of them, and a readiness on the part of all the members to be responsible to strangers for the acts of each other, as if no such an agreement had been entered into. It is immaterial to a stranger what stipulations partners may make amongst themselves, so long as they do not seek to restrict their responsibility as to him; and it is only when knowledge of an agreement between partners necessarily involves knowledge that they decline to be responsible for the acts of each other within the

(*y*) 10 East, 264.

(*z*) 1 Camp. 404.

(*a*) See, as to the sufficiency of such notices, *Vice* v. *Fleming*, 1 Y. & J. 227.

ordinary limits, that a stranger's rights against a firm can be prejudiced by what he may know of the private stipulations between its members.

Observations on *Galway* v. *Mathew*;

In *Galway* v. *Mathew* (*b*), the plaintiff's knowledge of want of authority was derived, not from notice of any agreement between the partners, but from an advertisement published by one of them, warning all persons that he would no longer be liable for drafts drawn by the others on the partnership account (*c*). The passage, therefore, in the judgment extracted above, was by no means necessary for the decision of the case. With respect to *Alderson* v. *Pope* (*d*), if all that was meant was that a person knowing that C. did not authorise A. or B. to act on his behalf, could not hold C. liable for their acts, the case presents no difficulty; but if anything more than this was meant, the authority of the decision becomes at least doubtful: for it has been held in another case that a person who holds himself out as a partner with others with whom he has no concern, is liable for their acts, even to persons having notice of the true state of affairs; and the decision was based upon the very ground that a person, who holds himself out as a partner with others, expresses his readiness to incur the responsibilities of a partner as regards strangers, whatever he may intend shall be the case between him and those with whom he associates his name (*e*).

and on *Alderson* v. *Pope*.

Brown v. *Leonard*.

Private stipulations restrictive of liability.

Against the general proposition in question it may be further urged, that if partners agree not to be liable beyond a certain amount, and a stranger has notice of that agreement, the notice avails nothing against him. Such an agreement, coupled with notice of it on the part of a person dealing with the firm, is by no means equivalent to a contract between him and it, that he shall not hold the members responsible beyond the amount which they may have agreed between themselves to contribute respectively (*f*).

(*b*) 1 Camp. 403, and 10 East, 264, and *ante*, p. 170.

(*c*) Distinct notice to the same effect existed in *Minnit* v. *Whitney*, 16 Vin. Ab. 244, and 5 Bro. P. C. 489; *Willis* v. *Dyson*, 1 Stark. 164.

(*d*) 1 Camp. 404.

(*e*) *Brown* v. *Leonard*, 2 Chitty, 120.

(*f*) See *Greenwood's case*, 3 De G. M. & G. 476.

Contracts on the basis of such stipulations.

The writer is not acquainted with any case in which it has been *decided* that persons who are aware of the terms upon which partners have agreed together to carry on business are deemed to contract with them upon the basis of the agreement come to amongst the partners themselves. In all cases of this description, the real question to be determined seems to be whether there was distinct notice that the firm would not be answerable to strangers for acts which, without such notice, would clearly impose liability upon it; and whenever there is any doubt upon this point, the firm ought clearly to be liable, the *onus* being on it to show sufficient reason why liability should not attach to it (*g*).

SECTION V.—OF THE LIABILITY OF PARTNERS IN RESPECT OF CONTRACTS NOT ENTERED INTO ON BEHALF OF THE FIRM, OR NOT SO IN PROPER FORM.

Observations on foregoing propositions.

The general proposition that a partnership is bound by those acts of its agents which are within the scope of their authority, in the sense explained in the foregoing pages, must be taken with the qualification that the agent whose acts are sought to be imputed to the firm, was acting in his character of agent, and not as a principal. If he did not act in his character of agent, if he acted as a private individual on his own account, his acts cannot be imputed to the firm, and he alone is liable for them, even though the firm may have benefited by them. Whether a contract is entered into by an agent as such, or by him as a principal, is often, but not always, apparent from the form of the contract.

With reference to the forms of contracts, it will be convenient to consider—

1. Contracts under seal.
2. Ordinary contracts not under seal.
3. Bills of exchange and promissory notes.

(*g*) See *Hawken* v. *Bourne*, 8 M. & W. 703, where the defendant was held liable for goods supplied to a mine, though the prospectus of the mining company stated that all goods were to be bought for cash prices and no debt was to be incurred.

1. *Contracts under seal.*

1. Covenants, &c.

A distinction is taken between deeds and other instruments with respect to the person bound by them. If a deed is executed by an agent in his own name, he and he only can sue or be sued thereon, although the deed may disclose the fact that he is acting for another (*h*). Therefore, where a partner *covenants* that anything shall be done, he and he only is liable on the covenant, and the firm is not bound thereby to the covenantee (*i*). A person who has to execute a deed as an agent, should take care that the deed and the covenants in it are expressed to be made not by him, but by the person intended to be bound. Thus, if A. is the principal and B. his agent, the deed and covenants should not be expressed to be made by B. for A., but by A.; and the execution in like manner should be expressed to be made by A. by his agent B. (*k*).

2. *Ordinary contracts not under seal.*

2. Ordinary simple contracts.

When a person enters into a contract as the agent of another, the name of that other may be either disclosed or not. If it is disclosed, the contract is treated as that of the principal and not as that of the agent (*l*); whilst if it is not disclosed, the contract is considered as that of the agent. But in this last case, the person dealing with the agent can, when he discovers the undisclosed principal, hold him liable instead of the agent (*m*).

(*h*) *Appleton* v. *Binks*, 5 East, 148; *Pickering's case*, 6 Ch. 525; and see next note.

(*i*) *Hancock* v. *Hodgson*, 4 Bing. 269; *Hall* v. *Bainbridge*, 1 Man. & Gr. 42.

(*k*) *Combe's case*, 9 Co. 76 *b*; *Wilks* v. *Back*, 2 East, 141.

(*l*) *Fairlie* v. *Fenton*, L. R. 5 Ex. 169; *Ex parte Hartop*, 12 Ves. 352; *Russell* v. *Reece*, 2 Car. & Kir. 669. But even in this case the contract may be so worded as to bind the agent. See *Paice* v. *Walker*, L. R. 5 Ex. 173; *Calder* v. *Dobell*, L. R. 6 C. P. 486.

(*m*) See *Paterson* v. *Gandasequi*, 15 East, 62; *Thompson* v. *Davenport*, 9 B. & C. 78; and the note to those cases in 2 Smith, L. C. If a man contracts for "my principal;" the principal, although undisclosed, and not the agent, is liable; unless there is some special custom rendering the agent personally liable. But if there be such a custom the agent will be liable, see *Fleet* v. *Murton*, L. R. 7 Q. B. 126.

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Firm liable though not named.

Written contracts.

If, therefore, one partner only, enters into a written contract, the question whether the contract is confined to him, or whether it extends to him and his co-partners, cannot be determined simply by the terms of the contract. For supposing a contract to be entered into by one partner in his own name only, still if in fact he was acting as the agent of the firm, his co-partners will be in the position of undisclosed principals; and they may therefore be liable to be sued on the contract, although no allusion is made to them in it. This was expressly decided in the well-known case of *Beckham* v. *Drake* (*n*). There, *Drake Knight* and *Sturgey* were in partnership as type-founders; but Drake was a secret partner. A written agreement relative to the partnership business was entered into between the plaintiff and *Knight* and *Sturgey*, and for a breach of this agreement by them the action was brought. *Drake's* name did not appear in the agreement; he did not sign it; nor when the contract was made was he known to the plaintiff to be a partner. It was nevertheless held that all three partners were liable jointly for a breach of the agreement, inasmuch as the agreement itself was clearly entered into by the firm, and Drake, like any other undisclosed principal, was liable to be sued as soon as his position was discovered.

Beckham *v.* Drake.

Parol contracts.

In conformity with the same principle, if one partner acting in fact for the firm, orders goods and they are supplied to him, the firm will be liable to pay for them, although no mention was made of his co-partners (*o*), and they were unknown to the seller of the goods (*p*). So, if A. in his own name only underwrites a policy of insurance, but the profit or loss arising from the transaction is to be divided between him and B., both A. and B. will be liable to the insured (*q*).

Liability of dormant partners.

These cases establish the important proposition, that dormant partners are liable for the debts of the firm, notwith-

(*n*) 9 M. & W. 79, and 11 M. & W. 315, overruling *Beckham* v. *Knight*, 4 Bing. N. C. 243.

(*o*) *City of Lond. Gas Lt. and Coke Co.* v. *Nicholls*, 2 Car. & P. 365; *Whitwell* v. *Perrin*, 4 C. B. N. S. 412.

(*p*) *Ruppell* v. *Roberts*, 4 Nev. & Man. 31; *Robinson* v. *Wilkinson*, 3 Price, 538; *Bottomley* v. *Nuttall*, 5 C. B. N. S. 122.

(*q*) *Brett* v. *Beckwith*, 3 Jur. N. S. 31, M. R.

standing their connection with the firm was unknown to its creditors when the debts were contracted.

One partner only liable, he only being dealt with.

On the other hand, if one partner only is dealt with, and the circumstances are such as to show that he was acting and was dealt with on his own account, *i.e.*, as a principal, and not as the agent of the firm, he alone is responsible (*r*).

Examples.

Thus, where persons work a coach in partnership, each having his own horses, and one of them orders fodder on his own account, he alone is liable for it (*s*). So, in the ordinary case of an agreement between an author and a publisher, to the effect that the publisher shall pay for the paper, printing, and other expenses of publication, and that after reimbursing himself and deducting a commission, the profits shall be divided equally, the author is not liable for the paper or printing which may have been supplied and executed for the publisher (*t*).

Form of written contracts.

With respect to contracts in writing it is to be observed that a contract or other instrument required by statute to be in writing and signed by the party to be charged, only binds those partners who actually sign it (*u*); but if signature by the party to be charged, or his agent, is sufficient, the signature of one partner, in the name or on behalf of the firm, will bind all the partners (*v*).

It is often a matter of difficulty to determine whether a particular contract is entered into by the firm through one of the partners or by that one partner only. There is nothing to prevent one person from entering into a contract *as a principal*, and yet for and on behalf of another (*x*); and when A. enters

(*r*) See, in addition to the cases cited below, *Ex parte Eyre*, 1 Ph. 227.

(*s*) *Barton* v. *Hanson*, 2 Taunt. 49. Mr. Collyer treats this as an exception depending on particular custom, but this view is not correct. The law is the same in Scotland; see *Jardine* v. *M'Farlane*, 3 Ross. L. C. on Com. Law, 575.

(*t*) See the Scotch case of *Venables* v. *Wood*, 3 Ross. L. C. on Com. Law, 529; *Wilson* v. *Whitehead*, 10 M. & W. 503; but see *Gardiner* v. *Childs*, 8 C. & P. 345, where the paper was supplied for the specific book.

(*u*) *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301, reversing *Swift* v. *Winterbotham*, 8 Q. B. 244.

(*v*) See *Duncan* v. *Lowndes*, 3 Camp. 478. In *Ex parte Harding*, 12 Ch. D. 557, a letter of guarantee was so framed as to bind the firm and also those who signed it separately.

(*x*) See, in addition to the cases cited hereafter, *Gadd* v. *Houghton*,

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into a contract for B., it may not be easy to say whether it is B. who contracts, or whether it is A. for B.'s benefit. And yet the true answer to this question determines whether B. is or is not liable on the contract. The cases on this subject relate principally to bills of exchange and promissory notes, to which it is now proposed to pass.

3. *Bills of exchange and promissory notes.*

3. Bills and notes.

Although an ordinary contract not under seal, entered into by an agent for an undisclosed principal, is binding on that principal when discovered, and he can be sued upon it, the same rule does not apply to bills of exchange and promissory notes. For, subject to the qualification that the name of a firm is equivalent to the name of all the persons liable as partners in it (*y*), no person whose name is not on a bill or note is liable to be sued upon it (*z*). In order, therefore, that a bill or note may be binding on a firm, the name of the firm or the names of all its members must be upon it; and if the names of one or more of the partners only are upon it, the others will not be liable to be sued upon the instrument, whatever may be their liability as regards the consideration for which it may have been given (*a*).

(*a*) Bills in name of firm.

First, as regards bills having the name of the firm upon them. A bill drawn, indorsed, or accepted in the name of the firm is considered as bearing the names of *all* the persons who actually or ostensibly compose the firm at the time its name is put to the bill; and consequently all those persons, in-

1 Ex. D. 357; *Hough* v. *Manzanos*, 4 Ex. D. 104; *Southwell* v. *Bowditch*, 1 C. P. D. 374; *Paice* v. *Walker*, L. R. 5 Ex. 173. See, also, *Kay* v. *Johnson*, 2 Hem. & M. 118, where an agreement for a lease entered into by directors was enforced against them individually.

(*y*) 45 & 46 Vict. c. 61, § 23 (2); and *infra*, note (*b*) *et seq.*

(*z*) Ib. § 23; and *Lloyd* v. *Ashby*, 2 C. & P. 138; *Ducarry* v. *Gill*, 4 ib. 121; *Eastwood* v. *Bain*, 3 H. & N. 738.

(*a*) *Bottomley* v. *Nuttall*, 5 C. B. N. S. 122; *Miles' claim*, 9 Ch. 635. As to the difference between an acceptance in the form A. for B., and B. *per proc.* A., see *O'Reilly* v. *Richardson*, 17 Ir. Com. Law Rep. 74. Bills may be made payable to the holder of an office for the time being, 45 & 46 Vict. c. 61, § 7 (2).

cluding as well dormant as *quasi*-partners, may be sued upon the bill (*b*).

Edmunds *v.* Bushell.

Thus, where A. employed B. to carry on his business, and such business was carried on by B. for A. under the name of B. & Co., a bill accepted by B. in the name of B. & Co., for the purposes of the business, was held to be the acceptance of A.; although B. had positive instructions not to accept bills, and the holder of the bill, who was an indorsee for value, knew nothing of A. or B. or of the business (*c*).

Stephens *v.* Reynolds.

Moreover, if two partners, A. & B., carry on business in the name of A., a bill accepted by B. in the name of A. for the purposes of the partnership will bind both partners, although addressed to A. at a place where he carries on a separate business (*d*).

Two firms with one name.

If there are two firms with one name, a person who is member of both firms is liable to be sued on all bills bearing that name, and binding on either firm. But if a member of only one of the two firms is sued on the bill, his liability will depend first on the authority of the person giving the bill to use the name of the firm of which the defendant is a member; and, secondly, on whether the name of that firm has in fact been used. If both these questions are answered in the affirmative, he will be liable, but not otherwise.

Swan *v.* Steele.

Thus in *Swan* v. *Steele* (*e*) there were two firms of *Wood & Payne*, one a cotton firm, the other a grocer's firm. The defendant Steele was a partner in the cotton firm only. A bill was paid to the cotton firm for a debt due to it, and was made payable to its order. This bill was indorsed in the name of "Wood & Payne" by Steele's co-partners, for a debt owing to the plaintiff by the grocer's firm, to which Steele did not belong. Steele was nevertheless held liable on this bill,

(*b*) 45 & 46 Vict. c. 61, § 23 (2). See, as to dormant partners, *Swan* v. *Steele*, 7 East, 210; *Wintle* v. *Crowther*, 1 Cr. & J. 316; and as to *quasi*-partners, *Gurney* v. *Evans*, 3 H. & N. 122. A clerk who affixes the name of the firm is not liable on the bill. *Wilson* v. *Barthrop*, 2 M. & W. 863.

(*c*) *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97.

(*d*) *Stephens* v. *Reynolds*, 5 H. & N. 513, and at Nisi Prius, 1 Fos. & Fin. 739, and 2 ib. 147. N.B.—The bill was drawn on Reynolds at Woolwich, not at Walworth, as stated in 1 Fos. & Fin. 740.

(*e*) 7 East, 210.

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the plaintiff being a *bonâ fide* holder for value, without notice that any fraud on Steele was being committed. In this case the bill was properly indorsed "Wood & Payne," and the only question was who constituted that firm. The bill could only have been indorsed by the cotton firm. Steele was a member of *it*, though he was not a member of the firm for whose debt his partners paid it away. Lord Ellenborough held Steele's liability to be too clear for argument: for Steele was a member of the indorsing firm, and his co-partners in that firm were guilty of a fraud on him, of which the plaintiffs had no notice.

Name of firm same as that of individual.

Again, persons may carry on business in partnership in the name of one of themselves, and if they do, they expose themselves to serious liability. *Primâ facie* his acceptances will bind them, even although dishonestly given (*f*). At the same time if they can show that he gave the bills as his own and not as the bills of the firm, they will not be liable even to a *bonâ fide* holder for value. This was decided by the Court of Appeal in *The Yorkshire Banking Co.* v. *Beatson* (*g*), in which the law on this subject will be found exhaustively examined. In that case an accommodation acceptance given by one partner in his own name was held not binding on his dormant partner, as the acceptance was not intended to bind him, and was, in truth, a private transaction, and was not entered in the books of the firm. The fact that the plaintiffs took the bill as the bill of the persons, whoever they were, who might be associated with the partner whose name was on the bill, was held immaterial. The plaintiffs never knew of or gave credit to anyone else.

Yorkshire Banking Co. v. Beatson.

If A., B. & C. are partners, and A. draws a bill of exchange on B., and he accepts the bill, A., B. & C. cannot be sued upon it; and this is so whether A., B. & C. have a business name or not (*h*); and even although the bill may have been used for the joint benefit of the three partners (*i*). Even if it is agreed that the business of the three shall be carried on in the name

(*f*) See 5 C. P. D. 123 and 124.

(*g*) 5 C. P. D. 109, affirming S. C. 4 ib. 204, but on different grounds. N.B.—The Court set aside the verdict of the jury. See, also, *South Carolina Bank* v. *Case*, 8 B. & C. 427; *Ex parte Law*, 3 Deac. 541.

(*h*) See *Nicholson* v. *Ricketts*, 2 E. & E. 497, and *Miles' claim*, 9 Ch. 635.

(*i*) *Ibid.*

of one of them, it will not follow that all bills accepted by him will bind all the three partners. The question remains whose bill is it?

Miles' claim.

This was decided by the Court of Appeal in Chancery in *Miles' claim* (*j*). There four firms, F. & Co., M. & Co., M. & L., and A. & Co., engaged in a joint adventure, and agreed to carry on business under the name of F. & Co., and to divide profits and losses in equal shares. They also agreed that funds for the adventure should be raised by the drafts of any one of the four firms on the others: bills were drawn by M. & Co. on A. & Co., on M. & L., and on F. & Co., and were duly accepted. It was held that none of these bills bound all four firms jointly. As regards the bills drawn on A. & Co., and on M. & L., the case presented no difficulty, for it is plain that these bills were not drawn or accepted in the name in which the joint adventure was carried on. As regards the bills accepted by F. & Co., which was the name under which the joint adventure was carried on, there was an ambiguity; but the court held that this name, used as it was, really meant the separate firm F. & Co., and not the four firms engaged in the adventure, and that there was no sufficient reason for holding it to mean anything else.

Hall *v.* West.

Again, in *Hall* v. *West* (*k*), three brothers of the name of Dawson carried on in partnership under the name of *Dawson & Sons*, the business of millers, farmers, coal and corn dealers, and bone crushers. The defendant was a dormant partner in the bone crushing business only. *Dawson & Sons* overdrew their account with their bankers, who knew nothing of West, nor of his connection with the bone business. Having, however, discovered this, they sued him for the amount of the overdrawn account. He was held not liable; for in point of fact the balance due to the bankers was not in respect of any debt contracted by *Dawson & Sons* in connection with the bone crushing business; it was not, therefore, as between the partners themselves a debt of the firm of which the defendant

(*j*) 9 Ch. 635.

(*k*) A special case decided in the Exchequer, and afterwards in the Exchequer Chamber, in June, 1875. The above note of the case is taken from shorthand-writer's notes of the judgments.

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was a member; and there was no apparent as distinguished from real authority on which the bankers could rely as against West.

In the same case bills were drawn by West on and accepted by Dawson & Sons. With one exception these bills were drawn for purposes unconnected with the bone business. On the facts stated (but which it is unnecessary here to detail) the court held that all these bills had in fact been paid: it became unnecessary, therefore, to consider whether West could have been sued as an acceptor. It was contended, on the authority of *Baker* v. *Charlton* (*l*), that he was liable; but the Court of Exchequer (*m*) dissented from that case and expressed a clear opinion that *West* could not have been liable as an acceptor of the bills, with the exception of the one which had been given for the purposes of the bone business in which he was a partner. The Court of Exchequer Chamber expressed no opinion on this point, it being unnecessary to do so.

(*b*) Bills not in name of firm.

Secondly, as regards bills not drawn, accepted, or indorsed by the firm in proper form. In the absence of evidence to the contrary, a partner has no authority to use for partnership purposes any other name than the name of the firm (*n*); and if he does, and there is any substantial variation which cannot be shown to be authorised by his co-partners, the firm will not be liable. If, however, there is no substantial variation, the firm will be bound.

Faith *v.* Richmond.

In *Faith* v. *Richmond* (*o*), persons carrying on business in

(*l*) In *Baker* v. *Charlton*, Peake, 111 (ed. 3), two firms carried on business under the name of J. King & Co. The defendant was partner in one of them only, but his co-partners were members of both firms; the defendant was sued by an indorsee on a bill drawn by his co-partners in the name of "J. King & Co.;" the defendant resisted the action on the ground that the bill was not drawn by the firm to which he belonged, but by the other; but Lord Kenyon declared the defence invalid. Having traded with persons under the style of "J. King & Co.," the defendant was liable on bills drawn by them in that name. See, also, *Davidson* v. *Robertson*, 3 Dow, 218; *McNair* v. *Fleming*, 1 Mont. Part. 37, and 3 Dow, 229. But *Baker* v. *Charlton* cannot now be relied on.

(*m*) *i.e.* Kelly, C. B., and Amphlett, B.

(*n*) *Kirk* v. *Blurton*, 9 M. & W. 284; *Hambro'* v. *Hull and London Fire Insur. Co.*, 3 H. & N. 789.

(*o*) 11 A. & E. 339.

partnership under the name of *The Newcastle and Sunderland Wallsend Coal Company*, were held not liable on a note issued in the name of *The Newcastle Coal Company;* and in *Kirk* v. *Blurton* (*p*), where two persons carried on business under the name of *John Blurton*, one of them was held not liable on a bill drawn and indorsed by the other in the name of *John Blurton & Co.*

Kirk v. Blurton.

On the other hand, in *Norton* v. *Seymour* (*q*), where the name of the firm was *Seymour & Ayres*, a promissory note signed by one of the partners thus—"*Thomas Seymour & Sarah Ayres*," was held to bind both.

Norton v. Seymour.

In the above cases of *Faith* v. *Richmond* and *Kirk* v. *Blurton*, the name used was not the name of the firm sought to be made liable, nor was there any evidence to show that the firm was in the habit of making use of the name in question. If there had been such evidence the firm would have been liable; for whatever the name used may be, if it is that ordinarily employed by a partner whose business it is to attend to the bills and notes of the firm, the other partners will not be heard to say that such name is not the name of the firm for the purpose for which he has habitually used it.

Effect of frequent use of wrong name.

Therefore, where the name of a firm was *Hapgood & Co.*, but the managing partner was in the habit of indorsing bills of the firm in the name of *Hapgood & Fowler*, which had formerly been the name of the firm, it was held that such indorsement was valid, although the other partners were not shown to have authorised the use of the name in question (*r*).

Williamson v. Johnson.

Again, although in *Faith* v. *Richmond* and *Kirk* v. *Blurton*, the firm was held not bound, in consequence of the name of the firm not being used, those members of the firm who actually made use of the names in question were held liable; for the name used was made theirs by their own act (*s*). Upon the

Liability of persons using the wrong name.

(*p*) 9 M. & W. 284. This case was decided on the right principle; but most persons will probably agree with Martin, B., in thinking that the principle was not properly applied, and that it should have been left to the jury to say whether *John Blurton* and *John Blurton and Co.* did not in fact mean the same thing. See *per* Martin, B., 5 H. & N. 517.

(*q*) 3 C. B. 792.

(*r*) *Williamson* v. *Johnson*, 1 B. & C. 146.

(*s*) So in *Wild* v. *Keep*, 6 C. & P. 235, a person of the name of *Joseph*

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same principle, if blank bills are drawn and indorsed by a firm, and before they are negotiated one partner dies and the name of the firm is changed by the surviving partners, and the bills previously drawn and indorsed are then negotiated; these bills will be binding on the new firm, although the name on the bills is that of the old firm and not that of the new (*t*).

Cases in which error in name is unimportant.

A bill drawn on a firm by a wrong name and accepted in its right name, binds the firm (*u*); and a bill drawn on a firm and accepted by one partner in his own name only, has been held to bind the firm on the ground that the word "accepted," if written by one of the partners, is sufficient without any signature; and that his signature, if affixed, may be treated as redundant (*x*). But there is no other case in which a firm is liable on a negotiable instrument, made, drawn, or indorsed in the name of one of the partners only (*y*), unless indeed his name is the name of the firm (*z*). Even a bill drawn on one partner and accepted by him on behalf of the firm does not bind the firm, the other partners not being drawees (*a*).

Drawee and acceptor not identical.

A bill drawn on a firm and accepted by one partner in the name of the firm and in his own name, does not bind him separately if the firm is bound by his acceptance (*b*). But if he has no authority to bind the firm he is himself liable on the bill. This was held in *Owen* v. *Van Uster* (*c*), where a bill was drawn on "*The Allty-Crib Mining Company*," and was

Owen v. Van Uster.

Keep was held liable on a bill accepted by himself in the name of *John Keep & Co.*

(*t*) *Usher* v. *Dauncey*, 4 Camp. 97. If a change is made in a firm, and by a mistake a contract is entered into with it in its old name, the members of the new firm may sue on it, provided the other party is not prejudiced by their so doing, *Mitchell* v. *Lapage*, Holt, N. P. Ca. 253. But see *Boulton* v. *Jones*, 2 H. & N. 564.

(*u*) *Lloyd* v. *Ashby*, 2 B. & Ad. 23.

(*x*) *Mason* v. *Rumsey*, 1 Camp. 384; *Jenkins* v. *Morris*, 16 M. & W. 879; Byles on Bills, 43 and 45, ed. 11; p. 47 *et seq.*, ed. 14. In such a case the acceptor may also be sued alone. See *infra*.

(*y*) *Emly* v. *Lye*, 15 East, 7; *Ex parte Bolitho*, Buck, 100; *Lloyd* v. *Ashby*, 2 C. & P. 138; *Williams* v. *Thomas*, 6 Esp. 18.

(*z*) As to which, see *ante*, pp. 182, 183.

(*a*) *Nicholls* v. *Diamond*, 9 Ex. 154; *Mare* v. *Charles*, 5 E. & B. 978.

(*b*) *Re Barnard*, 32 Ch. D. 447; *Malcolmson* v. *Malcolmson*, L. R. Ir. 1 Ch. D. 228.

(*c*) 10 C. B. 318. The company in this case was a mere partnership.

accepted "*per proc. The Allty-Crib Mining Company, W. T. Van Uster, London, Manager.*" It was held that Van Uster was personally liable on this bill, he being one of the company on which the bill was drawn, and therefore one of the drawees, and also an acceptor.

(c) Promissory notes.

Thirdly, as regards promissory notes. With respect to promissory notes the following rules are deducible from the cases :—

Promise by one partner.

1. If a partner promises for himself, and not for himself and co-partners, he only is liable on the note, though he may promise to pay a partnership debt (*d*).

Promise by several partners.

2. If several partners sign a note in this form, "I promise to pay," all who sign the note are liable on it, jointly and severally (*e*).

Promise by one in name of firm.

3. If one partner promises in the name of the firm to pay that for which he and not the firm is liable, the promise binds him, at all events. As an illustration of this, reference may be made to *Shipton* v. *Thornton* (*f*). There the defendant, a partner in the house of Thornton and West, was solely liable to the plaintiff for certain freight, and he gave the plaintiff a note in this form :

Shipton v. Thornton.

> I HEREBY engage to pay the amount of freight, &c.,
> I am, &c.,
> R. & R. THORNTON & WEST.

On this note the defendant was held separately liable.

Joint and several notes.

4. One partner has no authority, as such, to bind himself and co-partners jointly and severally (*g*). But if some members of a firm make a joint and *several* promissory note they will be personally liable, although they may have signed only on behalf of themselves and co-partners; and persons signing notes in the following forms have been held liable on them as

(*d*) *Siffkin* v. *Walker*, 2 Camp. 308 ; *Murray* v. *Somerville*, 2 Camp. 99, note ; and see *Ex parte Harris*, 1 Madd. 583.

(*e*) *Clarke* v. *Blackstock*, Holt, N. P. C. 474 ; *March* v. *Ward*, 1 Peake, 177 (ed. 3).

(*f*) 9 A. & E. 314. See, too, *Hudson* v. *Robinson*, 4 M. & S. 475.

(*g*) *Maclae* v. *Sutherland*, 3 E. & B. 1, which shows that a joint and several promissory note is valid as a joint note, though it is not binding, as a several note, on any person who does not sign it.

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makers, and not merely incidentally as members of the company to which they belonged.

Healey *v.* Story.

We jointly and severally promise to pay, &c., value received, for and on behalf of the Wesleyan Newspaper Association.

Parker Story, James Ware, } Directors (*h*).

Penkivil *v.* Connell.

We, the directors of the Royal Bank of Australia, for ourselves and other shareholders of this company, jointly and severally promise to pay, &c., value received on account of the company.

T. W. Sutherland, J. Connell, M. Boyd, A. Duff, } Directors (*i*).

Bottomley *v.* Fisher.

Midland Counties Building Society.

We jointly and severally promise to pay, &c.

W. R. Heath, S. B. Smith, } Directors.

W. D. Fisher, Secretary (*k*).

Promise for self and co-partners.

5. If a partner promises for himself and co-partner, this amounts to a promise by the firm (*l*). Accordingly the firm has been held liable on notes in the following form:—

Galway *v.* Matthew.

Sixty days after sight I pay A. or order £200, value received.

For J. Matthew,
T. Whitsmith,
T. Smithson,
J. Matthew (*m*);

and, contrary to an older decision (*n*), the firm has been held liable on notes in the form following:—

(*h*) *Healey* v. *Story*, 3 Ex. 3, in which Story and Ware were sued jointly.

(*i*) *Penkivil* v. *Connell*, 5 Ex. 381, in which Connell only was sued.

(*k*) *Bottomley* v. *Fisher*, 1 H. & C. 211, in which Fisher only was sued.

(*l*) *Smith* v. *Bailey*, 11 Mod. 401; *Lane* v. *Williams*, 2 Vern. 277 and 292; *Smith* v. *Jarves*, 2 Lord Raymond, 1484.

(*m*) *Galway* v. *Matthew*, 1 Camp. 403.

(*n*) *Hall* v. *Smith*, 1 B. & C. 407, where the form was "I promise to pay —— for A. B., C. D., and E. F., signed A. B.," and which was held to bind A. B. separately.

Ex parte Buckley.

Leicester and Leicestershire Bank.

I PROMISE to pay the bearer on demand £5, value received,
For JOHN CLARKE,
RICHARD MITCHELL,
JOSEPH PHILLIPS,
THOMAS SMITH,
RICHARD MITCHELL (*o*).

SECTION VI.—LIABILITY OF PARTNERSHIPS IN RESPECT OF CONTRACTS NOT BINDING ON THEM, BUT OF WHICH THEY HAVE HAD THE BENEFIT.

Effect of having had the benefit of a contract.

It is an erroneous but popular notion that if a firm obtains the benefit of a contract made with one of its partners, it must needs be bound by that contract. Now, although the circumstance that the firm obtains the benefit of a contract entered into by one of its members tends to show that he entered into the contract as the agent of the firm (*p*), such circumstance is no more than evidence that this was the case, and the question upon which the liability or non-liability of the firm upon a contract depends is not—Has the firm obtained the benefit of the contract? but—Did the firm, by one of its partners or otherwise, enter into the contract? (*q*).

Emly *v.* Lye.

A leading case on this head is *Emly* v. *Lye* (*r*). There a partner drew bills in his own name, and sent them to an agent of the firm in order that he might get them discounted. They were discounted, and the money obtained was remitted by the agent, and was paid to the account of the firm. It was held that the firm was neither liable for the amount of the bills on the bills themselves, nor for their proceeds on the common counts. There was no loan to the partnership; no contract with it; and no liability attached to the firm by the fact that the partner who alone was liable had applied the money after

(*o*) *Ex parte Buckley*, 14 M. & W. 469, and 1 Ph. 562; and *Ex parte Clarke*, De Gex, 153, reversing *Ex parte Christie*, 3 M. D. & D. 736.

(*p*) *Per* Rolfe, B., in *Beckham* v. *Drake*, 9 M. & W. 99, 100.

(*q*) *Per* Rolfe, B., *ubi supra*. See, too, *Kingsbridge Flour Mill Co.* v. *The Plymouth Grinding Co.*, 2 Ex. 718; *Ernest* v. *Nicholls*, 6 H. L. C. 423. Similarly, the fact that one partner only has obtained the benefit of a contract, does not show conclusively that the firm is not bound, *Ex parte Bonbonus*, 8 Ves. 544.

(*r*) 15 East, 7.

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he got it for the benefit of his co-partners as well as for the benefit of himself.

Bevan v. Lewis.

Again, in *Bevan* v. *Lewis* (*s*), one partner borrowed money, and executed warrants of attorney to confess judgment. The money which he obtained was applied by him for the benefit of the partnership, and was obtained in part with the knowledge of his co-partner, in order that it might be so applied. But it was held that the partnership was not liable for the money; the loan having been clearly made to the one partner against whom alone judgment was to be entered, and not to the firm through him.

Money borrowed by one partner.

So, in ordinary cases, when one partner borrows money without the authority of his co-partners, the contract of loan is with him and not with the firm; and the nature of that contract is not altered by his application of the money. The lender of the money has, therefore, no right to repayment by the firm, although the money may have been applied for its benefit (*t*), unless he can bring himself within the equitable doctrine referred to below.

Goods supplied to one partner.

The same rule applies to goods, services, and works supplied to or done for one partner, either on his own account, or if for the firm, at the request of one of its members acting beyond the limits of his apparent as well as of his real authority. The firm does not, in any case of this sort, enter into any contract, express or implied, with the person dealing with the partner in question, and does not incur any obligation towards that person by reason of the circumstance that it gets the benefit of what he has done (*u*). The principle of these decisions governs those cases in which one partner in breach of trust, but without the knowledge or consent of his co-partners,

(*s*) 1 Sim. 376.

(*t*) See *Smith* v. *Craven*, 1 Cr. & J. 500; *Hartayne* v. *Bourne*, 7 M. & W. 595; *Burmester* v. *Norris*, 6 Ex. 796; *Ricketts* v. *Bennett*, 4 C. B. 686; *The Worcester Corn Exchange Co.*, 3 De G. M. & G. 180; *Fisher* v. *Taylor*, 2 Ha. 218. In all these cases the firm got the benefit of the money borrowed, and yet was held not liable to repay it.

(*u*) See, in addition to the cases already cited, *Kingsbridge Flour Mill Co.* v. *Plymouth Grinding Co.*, 2 Ex. 718; *Lloyd* v. *Freshfield*, 2 Car. & P. 325, and 9 Dowl. & R. 19; *Galway* v. *Matthew*, 10 East, 264; *Kilgour* v. *Finlyson*, 1 H. Blacks. 155; *Ex parte Wheatly*, Cooke's Bank. Law, 534, ed. 8; *Ball* v. *Lanesborough*, 5 Bro. P. C. 480; *Ex parte Perle*, 6 Ves. 603, 604; *Ex parte Hartop*, 12 ib. 352.

applies trust money over which he has control as a trustee, to the purposes of the firm. The fact that the firm has been benefited by the money in question does not necessarily render it liable to the owners of the money (*x*).

Equitable doctrine in these cases.

Where, however, money borrowed by one partner in the name of the firm but without the authority of his co-partners has been applied in paying off debts of the firm, the lender is entitled in equity to repayment by the firm of the amount which he can show to have been so applied: and the same rule extends to money *bonâ fide* borrowed and applied for any other legitimate purpose of the firm (*y*). This doctrine is founded partly on the right of the lender to stand in equity in the place of those creditors of the firm whose claims have been paid off by his money; and partly on the right of the borrowing partner to be indemnified by the firm against liabilities *bonâ fide* incurred by him for the legitimate purpose of relieving the firm from its debts or of carrying on its business (*z*). The equitable doctrine in question is limited in its application to cases falling under one or other of the principles above indicated (*a*).

(*x*) *Ex parte Apsey*, 3 Bro. C. C. 265; *Ex parte Heaton*, Buck, 386. See *ante*, p. 160.

(*y*) The leading cases on this subject are *Ex parte Chippendale* (*The German Mining Co.'s case*), 4 De G. M. & G. 19; *The Cork and Youghal Rail. Co.*, L. R. 4 Ch. 748; *Blackburn Building Soc.* v. *Cunliffe, Brooks & Co.*, 22 Ch. D. 61, and 9 App. Ca. 857, and 29 Ch. D. 902; *Baroness Wenlock* v. *River Dee Co.*, 19 Q. B. D. 155. The case of infants is analogous: an infant is liable for necessaries; but he was not liable at law for money lent, though applied in the purchase of necessaries. *Darby* v. *Boucher*, 1 Salk. 279. But otherwise in equity, *Marlow* v. *Pitfield*, 1 P. W. 558. So, a husband was not at law liable for money lent to his wife to enable her to obtain necessaries, and applied by her for that purpose. *Knox* v. *Bushell*, 3 C. B. N. S. 334. But see in equity, *Jenner* v. *Morris*, 1 Dr. & Sm. 218, and 3 De G. F. & J. 45; *Deare* v. *Soutten*, 9 Eq. 151; and observe that in the last case the plaintiff had no ground for suing in equity except his inability to recover at law.

(*z*) See *infra*, book iii. c. 3, § 1.

(*a*) See, in addition to the cases cited in note (*y*), *National Permanent Benefit Building Soc.*, 5 Ch. 309; *Magdalena Steam Nav. Co.*, Johns. 690; *Athenæum Life Ins. Soc.* v. *Pooley*, 3 De G. & J. 294.

CHAPTER II.

OF THE NATURE, EXTENT, AND DURATION OF THE LIABILITY OF INDIVIDUAL MEMBERS OF PARTNERSHIPS TO CREDITORS.

Bk. II. Chap. 2. Sect. 1.

Nature and extent of a partner's liability.

HAVING examined in the preceding pages the liabilities of a firm for the acts of its members, it is proposed in the present chapter to investigate the liability of the individual partners in respect of such obligations as upon the principles already discussed are binding on them all.

SECTION I.—NATURE OF THE LIABILITY.

1. *As regards contracts.*

No several liability on contracts binding the firm.

An agent who contracts for a known principal, is not liable to be himself sued on the contract into which he has avowedly entered only as agent. Consequently, a partner who enters into a contract on behalf of his firm, is not liable on that contract except as one of the firm: in other words, the contract is not binding on him separately, but only on him and his co-partners jointly (*a*). One partner may render himself separately liable by holding himself out as the only member of the firm (*b*); or by so framing the contract, as to bind himself separately from his co-partners as well as jointly with them (*c*); but unless there are some special circumstances of this sort, a contract which is binding on the firm is binding on all (*d*)

(*a*) See *Ex parte Buckley*, 14 M. & W. 469; *Re Clarke*, De Gex, 153; *Ex parte Wilson*, 3 M. D. & D. 57.

(*b*) *Bonfield* v. *Smith*, 12 M. & W. 405; *De Mautort* v. *Saunders*, 1 B. & Ad. 398.

(*c*) See *ante*, p. 179 *et seq.*, and *Ex parte Harding*, 12 Ch. D. 557; *Higgins* v. *Senior*, 8 M. & W. 834; *Ex parte Wilson*, 3 M. D. & D. 57.

(*d*) Not excluding dormant partners. *Beckham* v. *Drake*, 9 M. & W. 79; *Brett* v. *Beckwith*, 3 Jur. N. S. 31, M. R.

the partners jointly and on none of them severally. There is no difference in this respect between law and equity (*e*) except that which arises from the equitable jurisdiction to rectify mistakes, and from the principles adopted by courts of equity in administering the estates of deceased partners (*f*). These principles will be investigated at a later period in Book iv. ch. 3.

Partnership debts not several as well as joint.

It has often been said that in equity partnership debts are separate as well as joint; but this proposition is inaccurate and misleading. It is true that a creditor of a partnership can obtain payment of his debt out of the estate of a deceased partner (*g*); but the judgment which such a creditor obtains is quite different from that which a separate creditor is entitled to (*h*); and it is a mistake to say that the joint creditor of the firm is also in equity a separate creditor of the deceased partner (*i*). In Bankruptcy the joint debts of a firm are never treated as joint and several; and yet in Bankruptcy equitable as well as legal principles are always recognised.

Kendall v. Hamilton.

Effect of judgment against some partners.

In *Kendall* v. *Hamilton* (*k*) two out of three partners were sued for a partnership debt, and judgment was recovered against them. Afterwards the plaintiffs having discovered that the defendant Hamilton was a member of the firm, sued him for the same debt which was still unsatisfied. But it was held that the action could not be maintained; for the liability of Hamilton was a joint liability only, and the judgment obtained against his co-partners was a bar to another action against him. This case would have presented no difficulty before the passing of the Judicature Acts; but it was contended that Hamilton's liability was in equity several as well as joint, and that since the passing of the Judicature Acts he could be sued

(*e*) *Kendall* v. *Hamilton*, 4 App. Ca. 504, and 3 C. P. D. 403.

(*f*) *Ib.*, where the whole law on this subject will be found carefully examined.

(*g*) See the next note. *Houre* v. *Contencin*, 1 Bro. C. C. 27, shows that this was not always the case.

(*h*) See *Re Barnard*, 32 Ch. D. 447; *Hills* v. *M'Rae*, 9 Ha. 297; *Re Hodgson*, 31 Ch. D. 177; *Re McCrae*, 25 ib. 16, and *post*, book iv. c. 3.

(*i*) Except in partnership cases the liability in equity on a joint contract is the same as at law; *Other* v. *Iveson*, 3 Drew. 177; *Jones* v. *Beach*, 2 De G. M. & G. 886; *Rawstone* v. *Parr*, 3 Russ. 539.

(*k*) 4 App. Ca. 504, and 3 C. P. D. 403. This case arose after the Jud. Acts came into operation.

notwithstanding the judgment recovered against his co-partners. This construction, however, was decided to be unsound, and it did not prevail. Before the passing of the Judicature Acts the Court of Chancery would have had no jurisdiction in such a case as *Kendall* v. *Hamilton*, and there were no circumstances importing equitable considerations into it.

Effect of judgment against surviving partners.

It must not, however, be inferred from *Kendall* v. *Hamilton* that if a creditor of a firm sues the surviving partners and recovers judgment against them he cannot obtain payment of his demand out of the assets of a deceased member of the firm. The contrary is well established by a long series of cases which are in no way affected by *Kendall* v. *Hamilton*.

Equitable doctrine illustrated.

It has long been held that a creditor of the firm is himself entitled to obtain payment from the estate of the deceased, even although he may have taken as a security for his debt a bond or covenant binding the partners jointly (*l*).

Bishop *v.* Church.

Thus, in *Bishop* v. *Church* (*m*), two partners borrowed 2000*l.*, for which they afterwards gave their joint bond. One of them then died, and the other became bankrupt. A bill was filed by the creditor for payment of the bond out of the estate of the deceased partner; and it was held that his estate continued liable notwithstanding that it was discharged at law, the bond being joint and not joint and several. In this case, it was also held that the bond ought to be treated as joint and several so as to make the estate of the deceased partner liable as for a specialty debt and not as for a simple contract debt, as would have been the case without the bond (*n*).

Beresford *v.* Browning.

In *Beresford* v. *Browning* (*o*), four partners agreed that on the death of any of them the survivors should not be bound to

(*l*) See, in addition to the cases cited in the next few notes, *Primrose* v. *Bromley*, 1 Atk. 90; *Darwent* v. *Walton*, 2 Atk. 510; *Lane* v. *Williams*, 2 Vern. 292; and see *Sleech's case*, 1 Mer. 539; *Devaynes* v. *Noble*, 2 R. & M. 495, and the cases there commented on; *Smith* v. *Smith*, 3 Giff. 263. The cases only relate to mercantile partnerships, but quære if there is any difference in this respect between them and other partnerships.

(*m*) 2 Ves. S. 100 and 371. *Simpson* v. *Vaughan*, 2 Atk. 31, is a very similar case.

(*n*) The following cases are to the same effect as *Bishop* v. *Church*, viz., *Simpson* v. *Vaughan*, 2 Atk. 31; *Thomas* v. *Frazer*, 3 Ves. 399; *Burn* v. *Burn*, ib. 573; *Orr* v. *Chase*, 1 Mer. 729, Appendix.

(*o*) 20 Eq. 564, and 1 Ch. D. 30.

pay out his capital at once, but should pay it by certain instalments, as ascertained at the last preceding stock-taking. The agreement did not purport to bind the survivors jointly and severally. But it was held that, even if they were at law bound only jointly, they were liable in equity severally as well as jointly; and that the executor of the partner first dying was entitled to be paid the amount due to him out of the estate of a surviving partner, who had himself died, and was not restricted to suing the ultimate surviving partner.

Effect of judgment.

Nor, if the creditor sues the surviving partners and obtains judgment against them, will he be therefore precluded from proceeding to enforce his original claim against the estate of the deceased partner (*p*). In the case here supposed the judgment does not affect his estate. So, if the creditor of the firm first seeks payment out of the estate of a deceased partner, he is not precluded from afterwards suing the surviving partner (*q*).

Effect of rule on creditors inter se.

Burn *v.* Burn.

The doctrine acted on in *Bishop* v. *Church* and other cases of the same sort, is applied not only for the benefit of creditors against the partners and their representatives, but also as between competing creditors. This was settled in *Burn* v. *Burn* (*r*). In that case, partners being indebted to a large amount, gave to their creditor a joint bond; one of the partners died; the others afterwards became insolvent; and a bill was filed by the bond creditor for payment out of the estate of the deceased partner. Two questions then arose between the plaintiff and the simple contract creditors of the deceased partner, viz., first, whether the plaintiff could rank as a creditor at all against the assets of the deceased? and, secondly, whether, if he could, he should rank as a specialty or only as a simple contract creditor? The Court decided both questions in favour of the plaintiff, and held that he was entitled to rank as a specialty creditor, although the consequence was that after satisfying his demand, little remained for payment of the other creditors.

(*p*) *Liverpool Borough Bank* v. *Walker*, 4 De G. & J. 24; *Jacomb* v. *Harwood*, 2 Ves. Sen. 265.

(*q*) *Re Hodgson*, 31 Ch. D. 177.

(*r*) 3 Ves. 573, and see *Simms* v. *Barry*, there cited.

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Cases where the equitable and legal liabilities are the same.

But even in administering the estate of a deceased partner it must not be supposed that every joint debt contracted by the firm is payable out of his assets. It is a question of intention on the part of the firm and on the part of those with whom it deals. If, therefore, partners enter into a contract binding themselves jointly and not severally, and if such contract is not a mere security for the payment of a debt, or for the performance of a joint and several obligation, and if it has not been made joint in form by mistake, the effect of the contract will be in equity as in law to impose a joint obligation and no other (*s*).

Sumner *v.* Powell.

A leading case on this head is *Sumner* v. *Powell* (*t*). There one of a firm of partners died, the firm being at the time of his death liable for a breach of trust committed by one of its members. A new partner was admitted into the firm, and a deed was executed between the executors of the deceased partner and the surviving partners and the new partner, whereby, in consideration of certain payments by the executors and of a release by them of all demands, the surviving partners and the new partner covenanted *jointly* to indemnify the executors from the debts and liabilities of the old firm. A suit was afterwards instituted in respect of the breach of trust, and the executors were ordered to make good the same out of the assets of their testator. The executors then filed a bill to be indemnified out of the estate of the new partner, and contended that the covenant into which he had entered, though joint in form, ought to be considered as joint and several. But it was held otherwise, for the obligation of the new partner to indemnify the plaintiffs existed only by virtue of his covenant, and the extent of the obligation could therefore be measured only by the words of such covenant.

Clarke *v.* Bickers.

Again, in *Clarke* v. *Bickers* (*u*), a lease was made to two partners jointly, of lands wanted by them for partnership purposes. The demise and lessees' covenants were all joint.

(*s*) See, in addition to the cases noticed in the text, *Richardson* v. *Horton*, 6 Beav. 185; *Jones* v. *Beach*, 2 De G. M. & G. 886; *Other* v. *Iveson*, 3 Drew. 177; *Rawstone* v. *Parr*, 3 Russ. 424, 539.

(*t*) 2 Mer. 30, affirmed on appeal, T. & R. 423.

(*u*) 14 Sim. 639.

After the death of one of the partners his executors were sued in equity in respect of various breaches of covenant, and it was contended that the covenants ought to be treated as joint and several. But it was held on demurrer that no equity arose to the lessor from the fact that the lessees were co-partners; the lessor determined for himself how his leases should be granted. The demurrer was consequently allowed.

Wilmer v. Currey.

The same doctrine was acted on and even carried further in *Wilmer* v. *Currey* (*x*). In that case three partners dissolved partnership, one of them, the plaintiff, retiring. By a deed made between the three partners, the plaintiff assigned all his share and interest to the other two, and they *jointly* covenanted to pay the debts of the firm, and to indemnify the plaintiff therefrom, and to pay the plaintiff certain sums of money. One of the two continuing partners having died, and the covenants not having been performed, the plaintiff filed his bill against the surviving partner and the executors of the deceased partner in order to obtain the sums remaining due to him, and to have the unliquidated partnership debts paid. But it was held on demurrer that the plaintiff had no equity against the estate of the deceased partner; *for although that partner was, irrespectively of the deed, liable to contribute towards payment of the partnership debts*, that was different from the obligation which arose by virtue of the covenant of which the plaintiff sought the benefit. It is, however, difficult to reconcile this case with *Beresford* v. *Browning* (*y*).

Joint liability in cases of holding out.

A creditor who alleges that A., B., and C. are his debtors can, it is apprehended, prove his case by showing that one of them contracted on behalf of all three, and that the other two are estopped from denying his authority to do so. Cases in which persons have been held jointly liable on this principle are to be found in the books (*z*). The case of *Scarf* v. *Jardine* (*a*), which seems at first sight to throw some doubt on this doctrine, is really not opposed to it. In that case S. & R. carried on business in partnership under the name of R. & Co.

Scarf v. Jardine.

(*x*) 2 De G. & Sm. 347.

(*y*) The Court of Appeal, however, thought the two might be distinguished. See 1 Ch. D. 30.

(*z*) *Waugh* v. *Carver*, 1 H. Bl. 235, and other cases of holding out, *ante*, p. 40 *et seq.*

(*a*) 7 App. Ca. 345.

S. retired. R. continued the business in the old name, and took another person into partnership with him. J. was a customer of the old firm; he had no notice of S.'s retirement, and he continued to deal with and became a creditor of the new firm. J. then was made acquainted with the fact that S. had retired; but J. nevertheless sued the new firm for their debt to him, and on their bankruptcy he proved against their estate. He then sought to recover the same debt against S.; but it was decided that S. was not liable. It was held that J. had the option of suing the new firm or S., but that J. could not sue the new firm and S. jointly; and that having elected to sue the new firm, he could not afterwards sue S., who was not in fact a member of it. The importance of this case turns on the grounds on which it was held that J. could not have sued S. jointly with the members of the new firm. The reason why he could not have done so was that J. did not in fact contract with the new firm upon the faith that S. was a member of it (*b*). If it had been proved that J. had so contracted he could, it is apprehended, have sued S. and the other members of the new firm, and have proved S. to have been a partner by estoppel.

2. *As regards torts and frauds.*

Torts create joint and several liabilities.

For torts imputable to a firm all the partners are liable jointly and severally (*d*). To this general rule an exception occurs where an action *ex delicto* is brought against several persons in respect of their ownership in land, for then they are liable jointly, and not jointly and severally (*e*).

Distinction between torts and breaches of contract.

Although for general purposes it may be convenient to distribute acts and forbearances which give rise to obligations under the heads breach of contract and tort, it would not be difficult to show the impossibility of always distinguishing between the two (*f*). And yet if a breach of a contract binding

(*b*) See 7 App. Ca. 350, *per* Lord Selborne, and 357-8, *per* Lord Blackburn.

(*d*) *Mitchell* v. *Tarbutt*, 5 T. R. 649; 1 Wms. Saund. 291 *f*, and *g*; Com. Dig. Abatement, F. 8.

(*e*) See 1 Wms. Saund. 291 *f*, and *g*.

(*f*) See Pollock on Torts, ch. 13.

on the firm imposes a joint liability only on its living members (as to which see *ante*, pp. 192, 193), whilst a tort imputable to the firm imposes a joint and several liability, the importance of being able accurately to distinguish between a breach of contract and a tort becomes apparent. The difficulty, however, of doing so is increased by the doctrine that there are cases in which the same breach of an obligation may be regarded from two different points of view; and may at the option of the person injured, be made the foundation either of an action *ex contractu* or of an action *ex delicto* (*g*). Suppose, for example, that property is entrusted to a firm of bankers for the purpose of sale and investment, and that some member of the banking firm misapplies the property so entrusted. This breach of duty is a breach of the contract which was tacitly, if not expressly, entered into by the bankers when they received the property. But the misapplication of the property is a wrong independently of any contract; amounting in effect to a conversion or destruction of that which belonged to the customer. In equity the misapplication of the money is a breach of trust and imposes a joint and several liability on all the partners; on the ground that each partner is bound to see to the proper application of what is entrusted to the firm (*h*). In such cases as these, the several liability of each partner to the creditors of the firm is not affected by the circumstance that the act imposing such liability was done by one only of the members of the firm without the knowledge or consent and in fraud of the others. If the act in question imposes a liability which upon the principles of agency can be imputed to the firm, each member thereof is in equity severally liable for such act, just as much as if there had been no fraud in the case (*i*); and it is well established in equity that a breach of trust which is imputable to several

Breaches of trust impose joint and several liabilities.

(*g*) See on this subject, *Brown* v. *Boorman*, 11 Cl. & Fin. 1, and the cases there referred to. See, also, *Bryant* v. *Herbert*, 3 C. P. D. 389; *Fleming* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.*, 4 Q. B. D. 81.

(*h*) See *Re Oxford Benefit Building Soc.*, 35 Ch. D. 502; *Ex parte Adamson*, 8 Ch. D. 807; and *ante*, p. 161, note (*f*).

(*i*) See *Ex parte Adamson*, 8 Ch. D. 807; *Vulliamy* v. *Noble*, 3 Mer. 619; *Clayton's case*, 1 Mer. 576; *Wardle's case*, ib. 624.

persons, imposes upon them a liability which is both joint and several (*k*).

The effect of the Judicature Acts on this subject has not yet been judicially determined; but probably breaches of contract which are also breaches of trust will be held to impose several as well as joint liabilities both at law and in equity.

Ex parte Adamson.

In *Ex parte Adamson* (*l*) a partnership debt contracted by fraud was held to be joint and several, and to be proveable in Bankruptcy against the joint estate of the firm or against the separate estates of its members at the option of the creditor.

SECTION II.—EXTENT OF LIABILITY.

Extent of partner's liability at common law.

By the common law of this country, every member of an ordinary partnership is liable to the utmost farthing of his property for the debts and engagements of the firm. The law, ignoring the firm as anything distinct from the persons composing it, treats the debts and engagements of the firm as the debts and engagements of the partners, and holds each partner liable for them accordingly. Moreover, if judgment is obtained against the firm for a debt owing by it, the judgment creditor is under no obligation to levy execution against the property of the firm before having recourse to the separate property of the partners; nor is he under any obligation to levy execution against all the partners rateably; but he may select any one or more of them and levy execution upon him or them until the judgment is satisfied, leaving all questions of contribution to be settled afterwards between the partners themselves (*m*).

(*k*) *Re National Funds Assur. Co.*, 10 Ch. D. 118. See, also, the cases in the last two notes, and *Devaynes* v. *Noble, Sleech's case*, 1 Mer. 563; *Baring's case*, ib. 614; *Brydges* v. *Branfill*, 12 Sim. 369; *Wilson* v. *Moore*, 1 M. & K. 127 and 337. Compare, however, *Parker* v. *McKenna*, 10 Ch. 123, and *Vyse* v. *Foster*, L. R. 7 H. L. 318, as to liability for profits arising from breaches of trust.

(*l*) 8 Ch. D. 807, *per* James and Baggallay, L.JJ., Lord Bramwell dissenting. See, as to breaches of trust, *Ex parte Sheppard*, 19 Q. B. D. 84; and *ante*, note (*h*).

(*m*) See *per* De Grey, C. J., in *Abbott* v. *Smith*, 2 Wm. Blacks. 949, and *Wooley* v. *Kelley*, 1 B. & C. 65; Com. Dig. Execution, H. See further on this subject, *infra*, ch. 3, § 3.

Various attempts have been made from time to time to form partnerships without exposing their members to ruin in the event of loss. But the only effectual method of accomplishing this object is to stipulate with each creditor that he shall only be paid out of the funds of the partnership, and that he shall not be entitled to require the individual partners to pay more than a certain amount of those funds. Such stipulations, however, are never made in practice except where the partners are numerous; and in modern times they are practically confined to Insurance and other companies formed before the passing of the Companies Act, 1862. The cases on this subject will be found collected in the volume relating to companies (*n*). The statute under which a person may share profits without incurring the liability of a partner has been already alluded to (*o*).

Attempts to limit liability.

SECTION III.—DURATION OF LIABILITY.

In a preceding chapter it was shown that every member of an ordinary partnership is the general agent of the firm for the purpose of carrying on its business in the ordinary way. In the present section it is proposed to ascertain the duration of such agency, or in other words, when it begins and when it ends. The mode whereby a partner becomes discharged from liabilities incurred by him will then be considered, and thus the liabilities of incoming and outgoing partners to creditors will be determined.

1. Commencement of Liability.

The doctrine that each partner has implied authority to do whatever is necessary to carry on the partnership business in the usual way, is based upon the ground that the ordinary business of a firm cannot be carried on either to the advantage

Commencement of agency.

(*n*) The leading cases on this subject are *Halket* v. *Merchant Traders' Loan Assoc.*, 13 Q. B. 960; *Hassell* v. *Same*, 4 Ex. 525; *Hallett* v. *Dowdall*, 18 Q. B. 2; *Durham's case*, 4 K. & J. 517; *Re Athenæum Soc.*, Johns. 80, and 3 De G. & J. 660.

(*o*) 28 & 29 Vict. c. 86, *ante*, book i., ch. 1, § 2.

of its members or with safety to the public, unless such a doctrine is recognised. The existence of a partnership is, therefore, evidently presupposed; and although persons negotiating for a partnership, or about to become partners, *may* be the agents of each other before the partnership commences, such agency, if relied on, must be established in the ordinary way, and is not to be inferred from the mere fact that the persons in question were engaged in the attainment of some common end, or that they have subsequently become partners. This is shown by the cases already referred to, when the difference between partnerships and inchoate partnerships was being discussed. Almost all those cases, in fact, arose in consequence of attempts made to fasten liability on the defendants, by reason of some act done by other persons, alleged to be their partners; and each of those cases in which the plaintiff failed is an authority for the proposition that so long as there is no partnership there is no implied authority similar to that which exists after a partnership is formed (*p*). But, although this is undoubted law, still if persons agree to become partners as from a future day, upon terms to be embodied in a deed to be executed on that day, and the deed is not then executed, but they nevertheless commence their business as partners, they will all be liable for the acts of each, whether those acts occurred before or after the execution of the deed (*q*). For the question in such a case is not, When was the deed executed? but rather this, When did the partners commence to carry on business as such? The agency begins from that time, whether they choose to execute any partnership deed or not.

Liability of partners who defer the execution of articles.

Where there is an agreement for a partnership, and there is nothing to lead to the conclusion that the partnership was intended to commence at any other time, it will be held to commence from the date of the agreement (*r*).

Firm not liable for what a partner does before he joins it.

The agency of each partner commencing with the partnership, and not before, it follows that the firm is not liable for

(*p*) See the cases, *ante*, pp. 19 *et seq.*, and 43 *et seq.*; and especially *Edmundson* v. *Thompson*, 2 Fos. & Fin. 564, *Gabriel* v. *Evill*, 9 M. & W. 297.

(*q*) *Battley* v. *Lewis*, 1 Man. & Gr. 155.

(*r*) See *Williams* v. *Jones*, 5 B. & C. 108.

what may be done by any partner before he becomes a member thereof. So that if several persons agree to become partners, and to contribute each a certain quantity of money or goods for the joint benefit of all, each one is solely responsible to those who may have supplied him with the money or goods agreed to be contributed by him (*s*); and the fact that the money or goods so supplied have been brought in by him as agreed, will not render the firm liable (*t*).

Wilson v. Whitehead.

Upon this principle, apparently, it was held in *Wilson* v. *Whitehead* (*u*), that the author and publisher of a work were not liable for the paper supplied for it; the paper having been ordered by and supplied to the printer, who was to share the profits of the work. The agreement between the parties was that one should be the publisher, and make and receive general payments; that another should be editor; and that the third should print and find the paper for the work, charging it, however, to the account of the three at cost price. The profits were to be equally divided amongst the three. It was, therefore, urged that all were liable for the paper supplied: but it was held that they were not; for the printer was not authorised to buy the paper except on his own account, and when he had bought it he might have used it for some other book. The case was likened to that of coach proprietors, where each horses the coach for one or more stages, and each agrees to bring into the concern the work and labour of his horses, and none of the others has any interest in them, though all share the profits (*x*).

Observations on this case.

The propriety of the decision in this case has been doubted (*y*), and it is not easily reconcilable with a similar case decided at Nisi Prius (*z*). But the writer submits that upon principle *Wilson* v. *Whitehead* is perfectly correct; for

(*s*) See *Greenslade* v. *Dower*, 7 B. & C. 635; *Dickinson* v. *Valpy*, 10 B. & C. 141-2; *Fisher* v. *Taylor*, 2 Hare, 229, 230; and the cases in the next note.

(*t*) *Heap* v. *Dobson*, 15 C. B. N. S. 460; *Smith* v. *Craven*, 1 Cr. & J. 500.

(*u*) 10 M. & W. 503. See the observations of Wightman, J., on this case, in *Kilshaw* v. *Jukes*, 3 B. & Sm. 847.

(*x*) *Barton* v. *Hanson*, 2 Taunt. 49, which shows that in such a case each is alone liable for hay, &c., supplied to his own horses.

(*y*) See *per* Wightman, J., in 3 Best & Sm. 871.

(*z*) *Gardiner* v. *Childs*, 8 Car. & P. 345.

the publisher had no real authority to buy the paper on the author's credit, and no authority so to do ought to be implied in favour of a person who knew nothing of the author or of any partnership or quasi-partnership existing between him and the publisher (*a*).

Saville *v.* Robertson, Gouthwaite *v.* Duckworth.

The two well-known cases of *Saville* v. *Robertson* (*b*) and *Gouthwaite* v. *Duckworth* (*c*), further illustrate the principle now in question. These cases closely resemble each other in many respects: for in each there was an agreement for a joint adventure in goods; in each an attempt was made to compel a person who did not order the goods to pay for them, on the grounds that he was in partnership with the person who did order them, and that they were supplied and used for the joint adventure; and in each the defence was that the goods were ordered before any partnership commenced, so that the defendant was not liable for the purchase made by his co-partner. In *Saville* v. *Robertson* the defence was proved and prevailed, whilst in *Gouthwaite* v. *Duckworth* the defendant was compelled to pay. In order to explain the apparent conflict between the two cases, it is necessary to state shortly the material facts in each.

Saville *v.* Robertson.

In *Saville* v. *Robertson* (*d*), several persons agreed to share the profit and loss of an adventure in goods, of a kind to be fixed by a majority; but no one was to have any share or proportion in the adventure except to the amount of the goods ordered and shipped by himself; and no adventurer was to be answerable for anything ordered or shipped by any co-adventurer. One of the adventurers having ordered goods and not paid for them, it was contended that his co-adventurers were liable for them, on the ground that he and they were partners. But the Court held that no partnership commenced until the goods were on board; each partner was to bring in his share only, and his co-partners were not liable to persons who supplied him with the means which enabled him to bring in such share.

(*a*) See *Kilshaw* v. *Jukes*, 3 Best & Sm. 847, and *ante*, p. 31.

(*b*) 4 T. R. 720.

(*c*) 12 East, 421.

(*d*) 4 T. R. 720. See, also, *Hutton* v. *Bullock*, L. R. 8 Q. B. 331, and 9 ib. 572; *Kilshaw* v. *Jukes*, 3 Best & Sm. 847.

Gouthwaite v. Duckworth.

In *Gouthwaite* v. *Duckworth* (*e*), Browne and Powell, who were in partnership, were indebted to Duckworth, and it was agreed that all three should join in an adventure in the purchase and sale of goods; that the goods should be bought, paid for, and shipped by Browne and Powell, and that the proceeds of the sale should be remitted to Duckworth, who should deduct thereout the amount of his debt, and then share the profit of the adventure with Browne and Powell. It was also agreed that in the event of a loss Duckworth should share it. In consequence of this agreement, Browne bought goods for the adventure on credit, and it was held that all the three, viz., Browne, Powell, and Duckworth, were liable to pay for them; for the goods were bought, in pursuance of the agreement for *the adventure*, and although it was never intended that Duckworth should pay for the goods, yet it was thought that the adventure commenced with the purchase of the goods, and that Duckworth was therefore liable.

Observations on Gouthwaite v. Duckworth.

There is considerable difficulty in supporting this decision, if rested on the ground of partnership and implied agency resulting therefrom; for it is not easy to see how any partnership existed prior to the purchase of the goods. But if rested on the ground of agency independently of partnership, there is not the same difficulty. For although the goods were to be paid for by Browne and Powell, that might be regarded as nothing more than a stipulation to take effect as between them and Duckworth; it did not necessarily exclude the inference that as Browne and Powell were to buy for the adventure, they were at liberty to procure the goods on the credit of all concerned (*f*).

Liability of incoming partner.

As the firm is not liable for what is done by its members before the partnership between them commences, so upon the very same principle a person who is admitted as a partner into an existing firm does not by his entry become liable to the creditors of the firm for anything done before he became a partner. Each partner is, it is true, the agent of the firm;

(*e*) 12 East, 421; *Kilshaw* v. *Jukes*, 3 B. & Sm. 847, was certainly very like this case, but was decided in accordance with *Saville* v. *Robertson*. See *ante*, p. 31.

(*f*) See *Young* v. *Hunter*, 4 Taunt. 582, the judgment of Gibbs, J.

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but, as before pointed out, the firm is not distinguishable from the persons from time to time composing it; and when a new member is admitted he becomes one of the firm for the future, but not as from the past, and his present connection with the firm is no evidence that he ever expressly or impliedly authorised what may have been done prior to his admission. It may perhaps be said that his entry amounts to a ratification by him of what his now partners may have done before he joined them (*g*). But it must be borne in mind that no person can be rendered liable for the act of another on the ground that he has ratified, confirmed, or adopted it, unless, at the time the act was done, it was done on his behalf (*h*). Therefore, in *Young* v. *Hunter* (*i*), where Hunter & Co. had ordered goods of the plaintiff for sale in the Baltic, and *afterwards* it was agreed between Hunter & Co. and Hoffham & Co. that the latter should join in the adventure, and share the profit and loss, it was held to be clear that Hoffham & Co. were not liable to the plaintiff to pay for the goods.

Young v. Hunter.

So in *Ex parte Jackson* (*j*), a person who was indebted by bond for money borrowed to carry on a trade, took two other persons ostensibly into partnership. After two years a joint commission of bankruptcy issued against the three; and it was held that the bond debt was not provable as a partnership debt against the joint estate, but remained what it was originally, the separate debt of the obligor.

Ex parte Jackson.

Application of principle to promoters of companies.

Beale v. Mouls.

Again, in *Beale* v. *Mouls* (*k*), the members of a provisional committee of a company entered into a special agreement with the plaintiff for the manufacture of a steam carriage. Afterwards, but before the contract was completed, the defendant Mouls became a member of the committee, and interested himself in the completion of the carriage. Several alterations and payments on account were also made whilst he was a member, and with his knowledge. The carriage was completed, but the committee then refused to take it or to pay for it. In

(*g*) See *Horsley* v. *Bell*, 1 Bro. C. C. 101, note, *per* Gould, J.

(*h*) *Wilson* v. *Tumman*, 6 Man. & Gr. 236.

(*i*) 4 Taunt. 582.

(*j*) 1 Ves. J. 131.

(*k*) 10 Q. B. 976. See, too, *Bremner* v. *Chamberlayne*, 2 Car. & Kir. 569; *Kerridge* v. *Hesse*, 9 C. & P. 200.

an action brought against Mouls and the other members of the committee, it was held that Mouls was not liable. He was not liable on the special contract, for he was no party thereto, by himself or any agent; and he could not be made liable on any implied contract, for the existence of a special agreement excluded any implied contract relative to the same subject matter. It follows from the principles on which this case was determined, that if the carriage had been accepted by the committee, Mouls would not have been liable to pay for it. The delivery and acceptance in such a case would have been in pursuance of the contract, to which *ex hypothesi* he was no party; and no liability could attach to him by virtue of any implied contract to pay that which became payable by virtue of an express contract made with other people. It has, indeed, been expressly decided, that if several members of a committee order goods, and then a new member joins the committee, he is not liable to pay for the goods, though they are delivered after he joined it (*l*).

New contract.

Cases, however, of this kind must not be confounded with those in which a new though tacit contract is made after the introduction of a new partner. *Dyke* v. *Brewer* (*m*) illustrates the distinction alluded to. In that case the plaintiff agreed with A. to supply him with bricks at so much per thousand, and the plaintiff began to supply them accordingly. B. then entered into partnership with A., and the plaintiff continued to supply bricks as before. It was held that both A. and B. were liable to pay, at the rate agreed upon, for the bricks supplied to both after the partnership commenced. The ground of this decision was, that as A. had not ordered any definite number of bricks, each delivery and acceptance raised a new tacit promise to pay on the old terms; although if all the bricks delivered had been ordered by A. in the first instance, he alone would have been liable to pay for them (*n*).

Dyke *v.* Brewer.

(*l*) *Newton* v. *Belcher*, 12 Q. B. 921; *Whitehead* v. *Barron*, 2 Moo. & Rob. 248. In *Beech* v. *Eyre*, 5 Man. & Gr. 415, the goods were both ordered and supplied at a time when there was evidence to show that the defendant was one of the committee.

(*m*) 2 Car. & Kir. 828.

(*n*) *Helsby* v. *Mears*, 5 B. & C. 504 is another case turning on the same principle as is explained by Lord Denman in *Beale* v. *Mouls*, 10 Q. B. 976.

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Incoming partner taking debts on himself.

If an incoming partner chooses to make himself liable for the debts incurred by the firm prior to his admission therein, there is nothing to prevent his so doing. But it must be borne in mind, that even if an incoming partner agrees with his co-partners that the debts of the old shall be taken by the new firm, this, although valid and binding between the partners is, as regards strangers, *res inter alios acta*, and does not confer upon them any right to fix the old debts on the new partner (*o*). In order to render an incoming partner liable to the creditors of the old firm, there must be some agreement, express or tacit, to that effect entered into between him and the creditors, and founded on some sufficient consideration. If there be any such agreement, the incoming partner will be bound by it, but his liabilities in respect of the old debts will attach by virtue of the new agreement, and not by reason of his having become a partner.

Evidence of agreement to do so.

An agreement by an incoming partner to make himself liable to creditors for debts owing to them before he joined the firm, may be, and in practice generally is, established by indirect evidence. The Courts, it has been said, lean in favour of such an agreement, and are ready to infer it from slight circumstances (*p*); and they seem formerly to have inferred it whenever the incoming partner agreed with the other partners to treat such debts as those of the new firm (*q*). But this certainly is not enough, for the agreement to be proved is an agreement with the creditor; and of such an agreement an arrangement between the partners is of itself no evidence (*r*).

Ex parte Whitmore.

As an instance where an incoming partner made himself liable for debts contracted by the firm before he joined it, reference may be made to *Ex parte Whitmore* (*s*). In that

(*o*) See *per* Parke, J., in *Vere* v. *Ashby*, 10 B. & C. 298; *Ex parte Peele*, 6 Ves. 602; *Ex parte Williams*, Buck, 13.

(*p*) *Ex parte Jackson*, 1 Ves. J. 131; *Ex parte Peele*, 6 Ves. 602. See, also, *Rolfe* v. *Flower*, L. R. 1 P. C. 27.

(*q*) See Cooke's Bank. Law, 534 (8th ed.), citing *Ex parte Bingham* and *Re Staples; Ex parte Clowes*, 2 Bro. C. C. 595.

(*r*) *Ex parte Peele*, 6 Ves. 602; *Ex parte Parker*, 2 M. D. & D. 511. See, also, *Ex parte Freeman*, Buck, 471; *Ex parte Fry*, 1 Gl. & J. 96; *Ex parte Williams*, Buck, 13.

(*s*) 3 Deac. 365. See, also, *Rolfe*

case Warwick and Clagett became partners. Warwick, who had had dealings with merchants in America, informed them that he had taken Clagett into partnership, and requested them to make up their accounts, and transfer any balance due to or from him (Warwick) to the new firm. These instructions were repeated and confirmed by Warwick and Clagett, and were acted on. A debt owing from Warwick was placed to the debit of the new firm, and a bill was drawn on the firm for the amount of the debt and was accepted, but was dishonoured. On the bankruptcy of the firm it was held, that the debt in question had become the joint debt of Warwick and Clagett; and not only so, but that the joint liability of the two had been accepted in lieu of the sole liability of Warwick.

Bills by old partners for old debts a fraud on new partner.

Before leaving this subject, it may be as well to observe that, as an incoming partner does not, by the fact of entering the firm, take upon himself the then existing liabilities thereof, if after he has joined the firm his co-partners give a bill or note in their and his name for a debt contracted by them alone, this is *primâ facie* a fraud upon him, and consequently he will not be liable to a holder with notice (*t*). For similar reasons, an incoming partner will not, it is apprehended, be liable to pay a debt contracted before he became a partner, merely because his co-partner has afterwards stated an account with the creditor, and thereby admitted that the debt in question is due from the firm (*u*). But, as will be seen hereafter, an incoming partner, unless he takes care, may find himself liable to pay the balance of an open running account commencing before he joined the firm and continued afterwards, although payments have been made since he joined the firm sufficient to liquidate that part of the account for which he is directly responsible (*x*).

Account stated in respect of old debt.

v. *Flower*, L. R. 1 P. C. 27, which was a stronger case.

(*t*) See *Shirreff* v. *Wilks*, 1 East, 48, *ante*, p. 173.

(*u*) See as to accounts stated, *French* v. *French*, 2 Man. & Gr. 644, and *Lemere* v. *Elliott*, 6 H. & N. 656.

(*x*) See *Beale* v. *Caddick*, 2 H. & N. 326, and *Scott* v. *Beale*, 6 Jur. N. S. 559, noticed *infra*, under the head of Appropriation of Payments.

2. Termination of Liability.

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When a partner's liability ends.

Before examining the circumstances which put an end to a partner's liability to creditors of the firm, it is necessary to draw attention to the distinction between a partner's liability for what may be done after his co-partners have ceased to be his agents, and his liability for what may have been done whilst their agency continued. It is obvious that there may be many circumstances which have no effect upon a liability already accrued, but which, nevertheless, may prevent any liability for what is not yet done from arising; and in order to determine with accuracy the events which put an end to a partner's liability to creditors, it is necessary to distinguish his liability for the future from his liability for the past.

A. *Termination of liability as to future acts.*

A partner's agency ends by notice.

The agency of each partner in an ordinary firm, and his consequent power to bind the firm, *i.e.*, himself and his co-partners, may be determined by notice at any time during the continuance of the partnership (*y*); for his power to act for the firm is not a right attaching to him as partner independently of the will of his co-partners, and although any stipulations amongst the partners themselves will not affect non-partners who have not notice of them, yet if any person has notice that one member of the firm is not authorised to act for it, that person cannot hold the firm liable for anything done in the teeth of such notice (*z*).

With one or two exceptions, which will be mentioned presently, the agency of each partner and his consequent power to bind his co-partners, can only be effectually determined by giving notice of its revocation. The authority imputed to each partner must continue until some event happens to put an end to it, and this event ought to be as generally known as that which conferred the authority upon

(*y*) See *Vice* v. *Fleming*, 1 Y. & J. 227; *Willis* v. *Dyson*, 1 Stark. 164; *Booth* v. *Quin*, 7 Price, 193; *Galway* v. *Mathew*, 1 Camp. 402, and 10 East, 264.

(*z*) This subject has been already discussed, see *ante*, p. 170 *et seq.*

him. The same reason which leads to the imputation of the power to act for the firm at all, demands that such power shall be imputed so long as it can be exercised and is not known to have been determined (*a*).

To this principle there are exceptions which may be conveniently disposed of before the principle itself and its application are discussed.

Effect of death.

1. When a partner dies. Notice of death is not requisite to prevent liability from attaching to the estate of a deceased partner, in respect of what may be done by his co-partners after his decease (*b*). For, by the law of England, the authority of an agent is determined by the death of his principal, whether the fact of death is known or not (*c*).

Usher v. Dauncey.

The death of one partner does not, however, determine an authority given by the firm through him before his death; and consequently, if after his death such an authority is acted on, the surviving partners will be liable for it. In *Usher* v. *Dauncey* (*d*), bills were drawn and endorsed in blank by a partner in the name of the firm, and were given by him to a clerk to be filled up and negotiated as occasion might require. The partner in question died, and after his death, and after the name of the firm had been altered, one of the bills was filled up and negotiated. Lord Ellenborough held that the bill was binding on the surviving partners, considering that the power to fill up the bill emanated from the partnership and not from the individual partner who had died.

Contribution after death.

Moreover, it does not follow that because a creditor has no remedy against the estate of a deceased partner in respect of debts contracted by his co-partners since his death, his estate is not liable to contribute to such debts at the suit of the

(*a*) As to the liability of an outgoing partner for the acts of his late partners and a new partner, see *Scarf* v. *Jardine*, 7 App. Ca. 345, noticed *ante*, pp. 46 and 197.

(*b*) *Devaynes* v. *Noble*, *Houlton's case*, 1 Mer. 616; *Johnes' case*, ib. 619; *Price's case*, ib. 620; *Webster* v. *Webster*, 3 Swanst. 490. See *Vulliamy* v. *Noble*, 3 Mer. 614; *Brown* v. *Gordon*, 16 Beav. 302, as to the power of surviving partners who are the executors of the deceased partner, to bind his estate.

(*c*) See *Blades* v. *Free*, 9 B. & C. 167; *Smout* v. *Ilbery*, 10 M. & W. 1; *Campanari* v. *Woodburn*, 15 C. B. 400.

(*d*) 4 Camp. 97.

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surviving partners. That is a different matter altogether, and depends on the agreement into which he entered with his co-partners, as will be seen hereafter when the subject of dissolution is under consideration (*e*).

Effect of bankruptcy.

2. When a firm becomes bankrupt, the authority of each member to act for the firm at once determines. If one partner only becomes bankrupt, his authority is at an end, and his estate cannot be made liable for the subsequent acts of his solvent co-partners. At the same time, if notwithstanding the bankruptcy of one partner the others hold themselves out as still in partnership with him, they will be liable for his acts, as if he and they were partners (*f*); and although the estate of a bankrupt partner does not incur liability for the acts of the other partners done since the bankruptcy, yet the solvent partners have power to bring the partnership transactions to an end, and to dispose of the partnership property. This subject will be examined hereafter in the chapter on Bankruptcy, to which the reader is therefore referred (*g*).

Effect of retirement of dormant partner.

3. Another apparent but not real exception to the rule, is that if a dormant partner (*i.e.*, one not known to be a partner) (*h*) retires, the authority of his late partners to bind him ceases on his retirement, although no notice of it be given. But this is because he never was known to be a partner at all, and the reason for the general rule has therefore no application to his case. The following decisions illustrate this exception: In

Carter v. Whalley.

Carter v. *Whalley* (*i*), the defendant Saunders was a partner in the "*Plas Madoc Colliery Co.*," but there was nothing to show that the plaintiff or the public ever knew that such was the case. Saunders withdrew from the company, but no notice of his withdrawal was given either to the plaintiff or to the public. After his withdrawal, the company became indebted to

(*e*) For instances where the estate of a deceased shareholder has been held liable to contribute to debts incurred since his decease, see *Baird's case*, 5 Ch. 725; *Blakeley's Executor's case*, 3 Mc. & G. 726; *Hamer's Devisees' case*, 2 De G. M. & G. 366.

(*f*) See *Lacy* v. *Woolcott*, 2 Dowl. & Ry. 458.

(*g*) See *Fox* v. *Hanbury*, Cowp. 445; *Morgan* v. *Marquis*, 9 Ex. 145.

(*h*) A dormant partner known to a few persons to be a partner is not dormant as to them; see the cases cited *infra*, note (*r*).

(*i*) 1 B. & Ad. 11,

the plaintiff, and it was held that Saunders was not liable for the debt; because the name of the company gave no information as to the parties composing it, and Saunders himself was not known either to the plaintiff or to the public to have belonged to the company before he withdrew.

Heath v. Sansom.

In *Heath* v. *Sansom* (*k*), the defendants Sansom and Evans carried on business as partners under the style of *Philip Sansom & Co.*, but Evans was not known to be a partner. They dissolved partnership by mutual agreement, but did not notify the fact. After the dissolution, Sansom gave the plaintiff a promissory note on which he sued Sansom and Evans. The Court decided that Evans was not liable, for when his right to share profits ceased, he could not be held responsible for the subsequent acts of his co-partner, unless he authorised those acts or held himself out as still connected with him, and he had done neither (*l*).

Effect of lunacy.

With the three exceptions which have been noticed, the general proposition above stated holds good. Thus, if a partner becomes lunatic, and his lunacy is not apparent or made known, his power to bind the firm and his liability for the acts of his co-partners (*m*) will remain unaffected.

Effect of dissolution of which no notice is given.

So, if a partnership is dissolved, or one of the known members retires from the firm, until the dissolution or retirement is duly notified, the power of each to bind the rest remains in full force, although as between the partners themselves a dissolution or a retirement is a revocation of the authority of each to act for the others (*n*). Thus, if a known partner

(*k*) 4 B. & Ad. 172.

(*l*) See, too, *Evans* v. *Drummond*, 4 Esp. 89. This doctrine seems not to apply to Scotland, see *Hay* v. *Muir*, 3 Ross, L. C. on Com. Law, 639. The case of the *Western Bank of Scotland* v. *Needell*, 1 Fos. & Fin. 461, seems at first sight opposed to the authorities in the text, but it is conceived that in that case there must have been evidence to show that the defendant was known to the plaintiffs to have been a partner before he retired.

(*m*) See *Molton* v. *Camroux*, 2 Ex. 487, and 4 ib. 17; and *Baxter* v. *The Earl of Portsmouth*, 5 B. & C. 170, and the cases cited *post*, bk. iv. c. 1, § 2, to show that the lunacy of one partner does not dissolve the firm. See further on this subject, Story on Agency, § 481, and note there. See, also, *Drew* v. *Nunn*, 4 Q. B. D. 661.

(*n*) See *Mulford* v. *Griffin*, 1 Fos. & Fin. 145; *Faldo* v. *Griffin*, ib. 147, and the cases in the next note.

retires, and no notice is given, he will be liable to be sued in respect of a promissory note made since his retirement by his late partner, even though the plaintiff had no dealings with the firm before the making of the note (*o*). And in determining which was first in point of time, viz., notice of the dissolution or the making of the note, effect must be given to the presumption that the instrument was made and issued on the day it bore date, unless some reason to the contrary can be shown (*p*).

Torts after dissolution.

A partner who retires and does not give sufficient notice, exposes himself to the risk of being sued for torts committed subsequently to his retirement by his late co-partners or their agents; and in the absence of proof of the true state of things he would be held liable for them (*q*).

Case of dormant partner.

Moreover, if a dormant partner is known to certain individuals to have been a partner, he is as to them no longer in the situation of a dormant partner, and must therefore give them notice of his retirement if he would free himself from liability in respect of the future transactions between them and his late partners (*r*).

Importance of notifying dissolution.

It is obvious therefore, that on the dissolution of a firm or the retirement of a partner, it is of the greatest importance to notify the fact; and each partner has a right to notify it. If his co-partners prevent him from exercising that right, they will be compelled to do what may be necessary to enable notice to be given, *e.g.*, to sign advertisements for publication in the "Gazette" (*s*).

Each partner has a right to notify it.

(*o*) See *Parkin* v. *Carruthers*, 3 Esp. 248; *Williams* v. *Keats*, 2 Stark. 290; *Brown* v. *Leonard*, 2 Chitty, 120; *Dolman* v. *Orchard*, 2 C. & P. 104, in which three last cases, however, there was a continual holding out. See, as to ordering such a bill to be delivered up, *Ryan* v. *Mackmath*, 3 Bro. C. C. 15.

(*p*) See *Anderson* v. *Weston*, 6 Bing. N. C. 296.

(*q*) *Stables* v. *Eley*, 1 Car. & P. 614. In this case such proof was given, and the defendant was nevertheless held liable, on the ground of holding out. This, however, was a wrong application of that doctrine. See *ante*, p. 47, and Pollock Dig. 25, ed. 3.

(*r*) *Farrar* v. *Deflime*, 1 Car. & K. 580. See, too, *Evans* v. *Drummond*, 4 Esp. 89, and *Carter* v. *Whalley*, 1 B. & Ad. 14.

(*s*) *Hendry* v. *Turner*, 32 Ch. D.

Effect of notice of dissolution.

Effect of notice of dissolution.—Subject to two exceptions, which will be examined hereafter, notice of dissolution of a firm or the retirement of a partner duly given, determines the power previously possessed by each partner to bind the others. Hence, after the dissolution of a firm or the retirement of a member and notification of the fact, no member of the previously existing firm is, by virtue of his connection therewith, liable for goods supplied to any of his late partners subsequently to the notification (*t*); nor is he liable on bills or notes subsequently drawn, accepted, or indorsed by any of them in the name of the late firm (*u*); even although they may have been dated before the dissolution (*x*); or have been given for a debt previously owing from the firm (*y*) by the partner expressly authorised to get in and discharge its debts (*z*).

Cases in which notice is immaterial.

There are, it is true, cases to be met with in which notwithstanding a dissolution and notice, a bill or note in the name of the firm has been held to bind those who were members thereof prior to the dissolution; but in each of these cases there was some circumstance taking it out of the ordinary rule. In *Burton* v. *Issitt* (*a*), the continuing partner had authority to use the name of the retired partner in the prosecution of all suits for the recovery of partnership property. This was held to authorise the giving of a promissory note for sixpences, payable under the Lords' act, and the retired partner was therefore held bound by a note given by his late partner in payment of those sixpences. In *Smith* v. *Winter* (*b*), the continuing partner had express permission to use the name of his late partner, who was therefore justly held liable on a bill given in the name of the old firm after his retirement. The only case

Burton *v.* Issitt.

Smith *v.* Winter.

355; *Troughton* v. *Hunter*, 18 Beav. 470.

(*t*) *Minnit* v. *Whinery*, 5 Bro. P. C. 489.

(*u*) *Paterson* v. *Zachariah*, 1 Stark. 71; *Abel* v. *Sutton*, 3 Esp. 108; *Spenceley* v. *Greenwood*, 1 Fos. & Fin. 297.

(*x*) *Wrightson* v. *Pullan*, 1 Stark. 375, S. C. *Wright* v. *Pulham*, 2 Chitty, 121.

(*y*) *Kilgour* v. *Finlyson*, 1 H. Blacks. 156; *Dolman* v. *Orchard*, 2 Car. & P. 104.

(*z*) *Kilgour* v. *Finlyson*, 1 H. Blacks. 156. See *Lewis* v. *Reilly*, *infra*, note (*c*).

(*a*) 5 B. & A. 267.

(*b*) 4 M. & W. 454.

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Lewis v. Reilly.

indeed of this description which presents any difficulty, is *Lewis* v. *Reilly* (*c*). There two partners drew a bill payable to their own order, and afterwards dissolved partnership. One of them then indorsed the bill in the name of both to the plaintiff, who knew of the dissolution. It was held, in an action by him against both partners, that he was entitled to recover on the bill, and that it was immaterial whether he knew of the dissolution or not. The precise ground of this decision does not distinctly appear. The Court seems to have proceeded on the supposition that an indorsement by one of several payees in the name of all is sufficient; but the writer has been unable to find any previous authority for such a doctrine, save where the indorsers are partners, which in the case in question they were not, as the plaintiff was found by the jury to have known. The case is certainly anomalous and requires reconsideration (*d*).

Exceptions to rule.

The exceptions alluded to above as qualifying the rule that the agency of each partner is determined by dissolution (or retirement) and notice are—

When a partner continues to hold himself out.

First, where a partner who has retired and notified his retirement, nevertheless continues to hold himself out as a partner; and secondly, where what is done only carries out what was begun before.

1. If a partner retires and gives notice of his retirement, and he nevertheless allows his name to be used as if he were still a partner, he will continue to incur liability on the principle of holding out, explained in an earlier part of this treatise.

Williams v. Keats.

In *Williams* v. *Keats* (*e*), after a partner had retired, and after notice thereof had been given by advertisement, a bill was accepted by his co-partner in the names of himself and late partner. The names of both still remained painted up over their late place of business, and Lord Ellenborough held that the partner who had retired was liable on this bill notwithstanding the advertisement; for there was no evidence to show

(*c*) 1 Q. B. 349.

(*d*) See Story on Bills, § 197, and *Abel* v. *Sutton*, 3 Esp. 108. The cases go further than is suggested in *Garland* v. *Jacomb*, L. R. 8 Ex. 220, for the notice of dissolution is what creates the difficulty. See *infra*, p. 220, note (*s*).

(*e*) 2 Stark. 290. See, too, *Dolman* v. *Orchard*, 2 Car. & P. 104; *Emmet* v. *Butler*, 7 Taunt. 600.

Effect of not preventing use of name.

that the plaintiff in fact knew of the dissolution (*f*). Upon this, however, it is to be observed that the only evidence that the retired partner authorised the continued use of his name, was the fact that he had not prevented it. Now, authorities are not wanting to show that if a partner retires, and notice of his retirement is given by advertisement, he will not continue to incur liability by the acts of his co-partners, simply because they continue to carry on business in the old name, and he does not take steps to stop them (*g*). His forbearance in this respect does not necessarily amount to an authority to use his name as before; and unless his name is used by his authority he is not liable on the ground that he holds himself out as a partner (*h*). But although it may be doubtful whether in *Williams* v. *Keats* there was a sufficient holding out, it is clear that if a partner retires and does still hold himself out as a partner, this is in fact signifying that he is willing to incur the responsibilities of a partner for the sake of those with whom his name is associated; and therefore he will continue to be answerable for their conduct, even to persons dealing with them with knowledge of his retirement. This was decided in *Brown* v. *Leonard* (*i*), in which the plaintiff sued on a promissory note made in the name of Spring, Leonard, and Bush. Before the note was made, Bush had retired from the firm, and the plaintiff, before he took the note, was told by Bush that he had ceased to be a partner with Leonard and Spring, but that his name was to continue for a certain time. Bush was held liable on the note; for, notwithstanding his retirement, his name was continued, and with it his responsibility (*k*).

Principle of Williams *v.* Keats correct.

Brown *v.* Leonard.

2. It is said that a firm, notwithstanding its dissolution, continues to exist so far as may be necessary for the winding up of its business (*l*). This doctrine requires consideration.

Agency continuing for purposes of winding up.

(*f*) See, as to this, *Brown* v. *Leonard*, 2 Chitty, 120, *infra*.

(*g*) See *Newsome* v. *Coles*, 2 Camp. 617.

(*h*) As to a retiring partner's right to an injunction to restrain the continuing partners from carrying on business in the old name, see *De Tastet* v. *Bordenave*, Jac. 516; *Webster* v. *Webster*, 3 Swanst. 490, note; *Lewis* v. *Langdon*, 7 Sim. 421.

(*i*) 2 Chitty, 120.

(*k*) Bush, however, seems to have undertaken that the notes should be provided for. See the judgment.

(*l*) *Ex parte Williams*, 11 Ves. 5; *Peacock* v. *Peacock*, 16 ib. 57: *Craw-*

No doubt after, as well as before dissolution, each partner can pay, or receive payment of, a partnership debt; for it is clearly settled that payment by one of several joint debtors, or to one of several joint creditors (*m*), extinguishes the debt irrespectively of any question of partnership. So, again, as regards dealing with the partnership assets, it has been held that the power of a continuing or surviving partner to sell or pledge partnership assets is as extensive as that of a partner in a going concern (*n*). But when questions of a different sort arise, considerable difficulty is experienced, and this difficulty is rather increased than diminished by the loose statement, that a partnership which is dissolved is nevertheless deemed to continue so far as may be necessary for winding up its affairs.

Doctrine not admitted at law.

Lyon v. Haynes.

Lyon v. *Haynes* (*o*) is a strong authority to show that when an unincorporated company is dissolved by a resolution of a meeting competent to dissolve it, the power of a majority of shareholders to bind the minority is at an end; and that even as regards the mode of winding up the concerns of the defunct company, the majority of its shareholders cannot bind either a dissentient minority or absentees.

Other cases.

Other cases, which have been already referred to (*p*), clearly show that after the dissolution of an ordinary partnership, no

shay v. *Collins*, 15 Ves. 227, and 2 Russ. 342; *Wilson* v. *Greenwood*, 1 Swanst. 480; *Crawshay* v. *Maule*, ib. 507; *Butchart* v. *Dresser*, 4 De G. M. & G. 542. N.B.—The *dicta* of Lord Eldon were not made in any case in which the power of one partner to bind the others after a dissolution was before him for decision.

(*m*) *i.e.*, if they are not trustees. Payment to one of several trustees is no discharge, *Webb* v. *Ledsam*, 1 K. & J. 385.

(*n*) See *Fox* v. *Hanbury*, Cowp. 445; *Smith* v. *Stokes*, 1 East, 363; *Smith* v. *Oriell*, ib. 368; *Harvey* v. *Crickett*, 5 M. & S. 336; *Morgan* v. *Marquis*, 9 Ex. 145; *Butchart* v. *Dresser*, 4 De G. M. & G. 542; *Re Clough*, 31 Ch. D. 324.

(*o*) 5 Man. & Gr. 504. The question in this case was whether an action would lie by a shareholder against directors for not applying the assets of the company as prescribed by a resolution made after the company had been dissolved. It was held that such action did not lie, although the directors had assumed to wind up the company under the authority of the resolution.

(*p*) *Ante*, p. 215, especially *Kilgour* v. *Finlyson*, 1 H. Blacks. 156, and *Abel* v. *Sutton*, 3 Esp. 108. See, too, *Pinder* v. *Wills*, 5 Taunt. 611.

one aware of the dissolution is entitled on any ground of implied agency to hold the members of the late firm responsible for acts done by each other subsequently to the dissolution; and every one must feel the force of Lord Kenyon's observation in *Abel* v. *Sutton*, that if the contrary doctrine were to prevail, a man could never know when he was to be at peace and freed from all the concerns of the partnership.

Abel v. Sutton.

Extent of the doctrine.

The doctrine now in question cannot, it is submitted, be carried further than this, viz., that notwithstanding dissolution, a partner has implied authority to bind the firm so far as may be necessary to settle and liquidate existing demands, and to complete transactions begun, but unfinished, at the time of the dissolution (*q*). Even *Butchart* v. *Dresser* (*r*), which goes further than any other case, does not carry the doctrine beyond this. In that case two persons in partnership as sharebrokers contracted to buy shares. Before paying for them they dissolved partnership, and that fact was known to their bankers. After the dissolution one of the partners pledged the shares to the bankers for money to pay for their purchase, and authorised the bankers to sell the shares to indemnify themselves. The other partner contended that this was done without his authority, and that as the bankers knew of the dissolution, they could not retain the shares against him. The Vice-Chancellor, however, held that the partner who pledged the shares had authority, after the dissolution, to complete the contracts previously made by the firm; that he therefore necessarily had authority to raise the funds to pay for the shares in question, and that he had not gone beyond his authority in raising the money by pledging them with the bankers, as he had done. The Lords Justices took the same view. "The general law," it was said, "is clear that a partnership, though dissolved, continues for the purpose of winding up its affairs. Each partner has, after and notwithstanding the dissolution, full authority to receive and pay money on account of the partnership, and has the same authority to deal with the property of the partner-

Butchart v. Dresser.

(*q*) See in *Lyon* v. *Haynes*, 5 Man. & Gr. 541, and in *Smith* v. *Winter*, 4 M. & W. 461, 462; Pollock Dig. 83, ed. 3.

(*r*) 10 Ha. 453, and 4 De G. M. & G. 542. *Re Clough*, 31 Ch. D. 324, was a similar case, only the pledge was for an old debt.

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ship for partnership purposes as he had during the continuance of the partnership. This must necessarily be so. If it were not, at the instant of the dissolution it would be necessary to apply to this Court for a receiver in every case, although the partners did not differ on any one item of the account."

Observations on this case.

It is to be observed that in *Butchart* v. *Dresser*, nothing was done except for the purpose of completing a transaction unfinished at the time of the dissolution. The case did not require the statement of so general a proposition as that until the affairs of a partnership are wound up, the agency of each partner continues to be as extensive as if no dissolution had taken place. At the utmost, the case under consideration decides, that in the event of a dissolution, it is competent for one partner to dispose of the partnership assets for partnership purposes (*s*). But neither *Butchart* v. *Dresser* nor any other case shows that a person who knows that a partnership is dissolved, can hold one partner liable for acts of his late co-partners done subsequently to the dissolution, and without authority; and if in *Butchart* v. *Dresser* the money to pay for the shares had been raised by a bill, it could not, consistently with prior decisions, have been held that the dissolved firm was liable, either upon the bill itself, or for the money raised by its means.

Ault *v.* Goodrich.

Before leaving this subject it is necessary to notice *Ault* v. *Goodrich* (*t*), which is sometimes supposed to go much further than it really does. In that case, two persons, Wilcox the elder and Wilcox the younger, partners as timber merchants, entered into a joint speculation with the plaintiff and another in the purchase and sale of some trees. Wilcox the younger had the chief management of the affair, and before the adventure was closed, the two Wilcoxes dissolved partnership. Wilcox the younger seems to have misapplied some of the monies received by him on the joint account, and it was considered clear that Wilcox the elder was responsible for the

(*s*) *Qu.* if *Lewis* v. *Reilly*, 1 Q. B. 349, and *ante*, p. 216, can be supported on this principle? Lord Denman's judgment seems to have proceeded on it. But see *Smith* v. *Winter*, 4 M. & W. 454.

(*t*) 4 Russ. 430.

dealings and transactions of Wilcox the younger during the continuance of their partnership. It was also considered that as there was no evidence of any new agreement between any of the parties upon the dissolution of partnership between the Wilcoxes, the other parties to the adventure were to be treated as having continued to rely on the joint responsibility of the two Wilcoxes, in respect of the dealings of Wilcox the younger. Wilcox the elder was accordingly declared to be responsible for the conduct of Wilcox the younger after the dissolution.

Observations on this case.

Upon this case it may be observed; first, that the facts are not satisfactorily stated; and, secondly, that the judgment leads to the inference, that the responsibility of Wilcox the elder for the conduct of Wilcox the younger, did not turn upon the circumstance that they were partners, but upon the circumstance that they were jointly entrusted with the management of the tree speculation. In this view of the case it was obviously immaterial whether the Wilcoxes had dissolved partnership or not.

Notice in case of retirement of dormant partner.

What amounts to notice of dissolution.—It has been already seen that when a dormant partner retires, he need give no notice of his retirement in order to free himself from liability in respect of acts done after his retirement (*u*). The reason is that, as he was never known to be a partner, no one can have relied on his connection with the firm, or truly allege that, when dealing with the firm, he continued to rely on the fact that the dormant partner was still connected therewith.

Notice in case of retirement of ostensible partner.

But when an ostensible partner retires, or when a partnership between several known partners is dissolved, the case is very different; for then those who dealt with the firm before a change took place are entitled to assume that no change has occurred until they have notice to the contrary (*x*). And even those who never had dealings with the firm, and who only knew of its existence by repute, are entitled to assume that it still exists until something is done to notify publicly that it exists no longer (*y*). An old customer, however, is entitled to a more

Old customers entitled to special notice.

(*u*) *Ante*, p. 212.

(*x*) See *per* Lord Selborne in *Scarf* v. *Jardine*, 7 App. Ca. 349.

(*y*) *Parkin* v. *Carruthers*, 3 Esp. 348.

specific notice than a person who never dealt with the firm at all (*z*); and in considering whether notice of dissolution or retirement is or is not sufficient, a distinction must be made according as the person sought to be affected by notice was or was not a customer of the old firm.

When a known partner retires, or a partnership is dissolved, notice of the fact is usually given to the world at large by advertisement, and to old customers by some special communication.

Public notices by advertisement.

Public notice given by advertisement in the "Gazette" is sufficient, not only against all who can be shown to have seen it, but also as against all who had no dealings with the old firm, whether they saw it or not (*a*). But an advertisement in any other paper is no evidence against any one who cannot be shown to have seen it (*b*). If, however, it can be shown that he was in the habit of taking the paper (*c*), that is evidence to go to the jury of his having seen not only the particular paper containing the advertisement, but also the advertisement itself (*d*); and if the jury are satisfied that he saw the advertisement, that will be sufficient, although no advertisement was inserted in the "Gazette" (*e*). An advertisement, moreover,

Such notice not indispensable.

is not indispensable; its place may be supplied by something else. Thus a change in the name of a firm painted on its counting-house, accompanied by a removal of the business of the old firm (for the purpose of winding up), and coupled with announcements of the change by circulars sent to the old customers, was held to be sufficient without any advertisement as against a person who had not been an old customer, and who was not proved to have had any distinct notice (*f*).

(*z*) *Graham* v. *Hope*, Peake, 154.

(*a*) *Godfrey* v. *Turnbull*, 1 Esp. 371; *Wrightson* v. *Pullan*, 1 Stark. 375; *Godfrey* v. *Macaulay*, 1 Peake, N. P. 209; *Newsome* v. *Coles*, 2 Camp. 617.

(*b*) *Leeson* v. *Holt*, 1 Stark. 186; *Boydell* v. *Drummond*, 2 Camp. 157, and 11 East, 144 *n*.

(*c*) Showing that the paper circulated in his neighbourhood goes for nothing alone. *Norwich and Lowestoft Co.* v. *Theobald*, M. & M. 153.

(*d*) See *Jenkins* v. *Blizard*, 1 Stark. 418, where, however, the plaintiff had a verdict; *Rowley* v. *Horne*, 3 Bing. 2.

(*e*) *Rooth* v. *Quin*, 7 Price, 193.

(*f*) *M'Iver* v. *Humble*, 16 East, 169; but see *Gorham* v. *Thompson*, 1 Peake, N. P. 60.

As against persons who dealt with the firm before any change in it took place, an advertisement without more is of little or no value, whether it be in the "Gazette" or elsewhere (*g*). But if notice in point of fact can be established, it matters not by what means; for it has never been held that any particular formality must be observed. If an old customer can be shown to have seen an advertisement, that will be sufficient; and evidence that he took in a certain paper is some evidence that he knew of a dissolution advertised therein (*h*). Again, general notoriety, a change in the name of the firm, and advertisements, coupled with the execution of powers of attorney to the new firm, were held (Bolland, B. *dissentiente*), to warrant the jury in finding knowledge by an old customer of a change in the old firm (*i*). So, in the case of bankers, a change in the name of the firm appearing on the face of the cheques used by their customers, has been held sufficient notice to an old customer who had drawn cheques in the new form (*k*).

Stamp on advertisements.

With respect to advertisements, it may be here remarked, that an advertisement of an agreement to dissolve is not admissible in evidence unless stamped; but that an advertisement of an actual dissolution is admissible without a stamp (*l*).

B. *Termination of liability as to past acts.*

Termination of partner's liability in respect of past transactions.

When once it can be shown that liability has attached to any partner, the *onus* of proving that such liability has ceased is upon that partner, or those representing him (*m*). The events which have to be considered with reference to this subject may be reduced to four classes, viz.—

1. Events over which his creditor has no control, *e.g.*, the death or bankruptcy of the partner.

2. Dealings and transactions between the creditor and the partner whose liability is in question.

(*g*) *Graham* v. *Hope*, Peake, 154.

(*h*) *Ante*, note (*d*).

(*i*) *Hart* v. *Alexander*, 2 M. & W. 484; 7 C. & P. 746.

(*k*) *Barfoot* v. *Goodall*, 3 Camp. 147.

(*l*) *May* v. *Smith*, 1 Esp. 283; *Jenkins* v. *Blizard*, 1 Stark. 418.

(*m*) See 3 Mer. 619.

3. Dealings and transactions between the creditor and the other members of the firm; and,

4. Lapse of time.

The second of these classes of events does not require special notice. The effect of bankruptcy and death will be examined in a subsequent part of this work. There only remain, therefore, to be considered here the third and fourth classes of events alluded to.

Termination of joint obligations.

The nature of an obligation which is joint, or joint and several, is such that although each person subject to the obligation is responsible for its performance, yet each is not bound to perform it without reference to the question whether it has already been performed by the others. Whether the obligation be joint, or joint and several, it has only to be performed once; and performance by any one of the persons obliged is available as a defence to a second demand made against the others (*n*). And not only is a joint, or joint and several, obligation at an end when performed by one of the persons in whom it resides, but whatever extinguishes the right to demand performance of that obligation extinguishes the obligation itself, and discharges all the persons in whom it resided (*o*). But an event which merely disables a creditor from suing one of several persons jointly, or jointly and severally, indebted to him, does not necessarily extinguish the debt. For example, if one of the persons indebted becomes bankrupt and obtains his discharge, although *his* liability is thereby at an end, yet the other persons indebted are not discharged from their obligation to pay (*p*). So a covenant by the creditor not to sue one of several persons liable jointly, or jointly and severally, does not extinguish the creditor's right to obtain payment; its effect only being to give the covenantee a right to be indemnified by the creditor against the conse-

(*n*) See, as to payment by one, *Watters* v. *Smith*, 2 B. & Ad. 889; *Thorne* v. *Smith*, 10 C. B. 659; *Beaumont* v. *Greathead*, 2 ib. 494.

(*o*) See *Cheetham* v. *Ward*, 1 Bos. & P. 630; *Ex parte Slater*, 6 Ves. 146; *Ballam* v. *Price*, 2 Moo. 235; *Cocks* v. *Nash*, 9 Bing. 341; *Wallace* v. *Kelsall*, 7 M. & W. 264; *Nicholson* v. *Revill*, 4 A. & E. 675.

(*p*) 46 & 47 Vict. c. 52, § 30, cl. 4. *Crosse* v. *Smith*, 7 East, 256; *Noke* v. *Ingham*, 1 Wils. 89; 1 Wms. Saund. 207, *a*.

nces of an exercise of his right (*q*). So, if the creditor eives from one of several debtors part of the debt, this s not discharge the others from their liability to pay the due (*r*).

n order to show the application of these principles to the charge of a partner from a liability already incurred by him, ill be convenient to consider the effect of

1. Payment.
2. Release.
3. Substitution of debtors and securities.
4. Lapse of time.

An examination of these subjects will involve an inquiry o the mode in which retired partners and the estates of eased partners cease to be liable to creditors of the firm to ich they belonged.

1. *Payment.*

Payment by one partner of partnership debts.

Payment of a partnership debt by any one partner discharges all the others, if the object of the partner paying was extinguish the whole debt, or if he made the payment out of partnership funds (*s*). But if a firm is unable to pay a bt, and one partner out of his monies pays it, but in h a way as to show an intention to keep the debt alive inst the firm for his own benefit, this payment by him will no answer to an action brought against the firm by the ditor suing on behalf of the partner who made the payment (*t*).

Imputation of payment made by one partner with money of firm.

If a partner is indebted on his own account to a person to om the firm is also indebted, and that partner, with the nies of the firm, makes a payment to the creditor without ecifying the account on which it is paid, the payment must taken to have been made on the partnership account, and ist be applied accordingly (*u*).

(*q*) See *Lacy* v. *Kinaston*, 1 Ld. Ym. 688; *Dean* v. *Newhall*, 8 R. 168; *Walmesley* v. *Cooper*, 11 & E. 216.

(*r*) See *Watters* v. *Smith*, 2 B. & . 889.

(*s*) See the cases cited, *ante*, p. 224, note (*u*).

(*t*) *McIntyre* v. *Miller*, 13 M. & W. 725; *infra*, note (*y*).

(*u*) *Thompson* v. *Brown*, Moo. & M. 40. See, also, *Nottidge* v. *Prichard*, 2 Cl. & Fin. 379, affirming *Prichard* v. *Draper*, 1 R. & M. 191.

Payment by new firm discharges old firm.

Inasmuch as a payment by A. of B.'s debt, on behalf of B., enures to the benefit of B. if the creditor accepts the money and B. does not repudiate the payment (*x*), it follows that if a firm is indebted, and, by the retirement of the original partners and the introduction of other partners, a wholly new firm is called into existence, a payment by the new firm expressly or impliedly on behalf of the old firm, of the debts contracted by the old firm, will extinguish its debt as between that firm and its creditor. But if there are circumstances showing that the money was paid, not on behalf of the old firm and in discharge of its liability, but as the consideration for a transfer to the new firm of the creditor's right against the old firm, the right of the creditor to sue the old firm will not be extinguished, but can still be exercised for the benefit of the new firm (*y*).

As regards discharge by payment, it is important to bear in mind the general rules relating to the appropriation of payments, and especially the rule in *Clayton's case*. The general rules upon this subject are as follows (*z*) :—

General rules as to appropriation of payments.

1. Where one person is indebted to another on various accounts, the debtor is at liberty to pay in full whichever debt he likes first (*a*).

2. But a debtor has no right to insist on paying a debt partly at one time and partly at another (*b*); although if he does pay a debt in part and the creditor accepts the payment the debt is extinguished to the extent of the payment thus made and accepted (*c*).

3. The right of a debtor to appropriate a payment to whichever of several debts he prefers, can only be exercised at the time of payment, not afterwards (*d*).

(*x*) Co. Litt. 207, *a*. See *Belshaw* v. *Bush*, 11 C. B. 191; *Jones* v. *Broadhurst*, 9 C. B. 193, &c.; *Kemp* v. *Balls*, 10 Ex. 607; *Lucas* v. *Wilkinson*, 1 H. & N. 420.

(*y*) See *Lucas* v. *Wilkinson*, 1 H. & N. 420; *McIntyre* v. *Miller*, 13 M. & W. 725, where one partner paid a debt due from the firm, but had the debt transferred to a trustee for himself.

(*z*) For more detailed information the reader is referred to an article by the author in the Law Magazine for August, 1855 (vol. 54, p. 21).

(*a*) *Peters* v. *Anderson*, 5 Taun. 596; *Mitchell* v. *Cullen*, 1 McQu. 190.

(*b*) *Dixon* v. *Clark*, 5 C. B. 365.

(*c*) As to payments of so much in the pound, see *infra*.

(*d*) *Peters* v. *Anderson*, 5 Taun. 596.

4. An appropriation by a debtor at the time of payment need not be express, but may be inferred from the nature of the debt and from the mode and circumstances of payment (*e*).

5. Where the debtor, having the opportunity so to do (*f*), makes no appropriation, express or tacit, at the time of payment, the creditor is entitled to appropriate the payment to whichever debt he pleases (*g*).

6. And the creditor may exercise this right at any time he likes (*h*); but when he has once exercised it and given notice of such exercise to the debtor, no different appropriation can be made (*i*).

7. The creditor may exercise his right in appropriating a payment, to a debt barred by the Statute of Limitations rather than to one that is not so barred (*k*); to a simple contract debt rather than to a specialty debt (*l*); to a new rather than to an old debt (*m*); to a debt not guaranteed rather than to one that is (*n*); and to a debt not bearing interest rather than to one which does (*o*). But the debt must be one which is, or if not barred by time would be, enforceable by legal proceedings (*p*); and one which exists at the time the payment was made (*q*); and one which is then ascertained in amount (*r*); and one which is owing by the debtor and not by other persons (*s*).

(*e*) Ib., and see *infra*, rule 8.

(*f*) This is essential. See *Waller* v. *Lacy*, 1 Man. & Gr. 54; *Young* v. *English*, 7 Beav. 10.

(*g*) See *Simson* v. *Ingham*, 2 B. & C. 65, and the other cases cited in the next few notes.

(*h*) *Philipotts* v. *Jones*, 2 A. & E. 41; *Mills* v. *Fowkes*, 5 Bing. N. C. 455.

(*i*) *Simson* v. *Ingham*, 2 B. & C. 65. See, as to representations made by the creditor, *Wickham* v. *Wickham*, 2 K. & J. 478.

(*k*) *Mills* v. *Fowkes*, 5 Bing. N. C. 455; *Williams* v. *Griffiths*, 5 M. & W. 300; *Nash* v. *Hodgson*, Kay, 650. Such an appropriation, however, does not amount to an admission by the debtor that the barred debt is due, and consequently does not take that debt out of the statute; see the last three cases.

(*l*) *Peters* v. *Anderson*, 5 Taunt. 596.

(*m*) Ib.

(*n*) *Kirby* v. *Duke of Marlboro'*, 2 M. & S. 18; *Williams* v. *Rawlinson*, 3 Bing. 71; *Pease* v. *Hirst*, 10 B. & C. 122; *Re Sherry*, 25 Ch. D. 692. Compare *Kinnaird* v. *Webster*, 10 Ch. D. 139.

(*o*) *Chase* v. *Cox*, Freem. 261; *Manning* v. *Westerne*, 2 Vern. 606.

(*p*) *Wright* v. *Laing*, 3 B. & C. 165.

(*q*) *Hammersley* v. *Knowlys*, 2 Esp. 666.

(*r*) *Goddart* v. *Hodges*, 1 Cr. & M. 33.

(*s*) See *infra*, rule 8 (*d*).

8. In the absence of evidence to the contrary, an appropriation by the debtor is inferred, and the right of the creditor to appropriate differently is excluded in the following amongst other cases:—

(*a*) Interest is presumed to be paid before principal (*t*).

(*b*) The earlier items of one entire account are presumed to be paid before the later items of the same account (*u*).

(*c*) Money coming to the hands of a creditor by the realisation of a particular security is presumed to be appropriated to the debt thereby secured (*x*).

(*d*) Money belonging to one person is presumed to have been paid in discharging his own and not another person's debt; and where a person fills several characters, the character in which he held the money which he paid, *primâ facie* determines the debt to which the payment must be appropriated (*y*).

(*e*) A dividend of so much in the pound on several debts is presumed to be paid in respect of them all, and must be applied accordingly (*z*).

Rule in Clayton's case.

Of these rules the most important with reference to the subject-matter of the present treatise is that which is known as the rule in *Clayton's case* (*a*), that where there is one single open current account between two parties, every pa

(*t*) *Bower* v. *Marris*, Cr. & Ph. 351; *Thompson* v. *Hudson*, 10 Eq. 497; *Warrant Finance Co.'s case*, 4 Ch. 643.

(*u*) *Clayton's case*, 1 Mer. 585, noticed *infra*.

(*x*) *Brett* v. *Marsh*, 1 Vern. 468; *Young* v. *English*, 7 Beav. 10; *Pearl* v. *Deacon*, 24 Beav. 186, and 1 De G. & J. 461.

(*y*) *Burland* v. *Nash*, 2 Fos. & Fin. 687; *Nottidge* v. *Prichard*, 2 Cl. & Fin. 379; *Goddart* v. *Cox*, 2 Str. 1194; *Thompson* v. *Brown*, Moo. & M. 40; *Bowes* v. *Lucas*, Andr. 55. Compare *Sterndale* v. *Hankinson*, 1 Sim. 393, and *Beale* v. *Caddick*, 2 H. & N. 326, where the rule in Clayton's case also applied.

(*z*) *Thompson* v. *Hudson*, 6 C 320; *Hobson* v. *Bass*, ib. 79 *Raikes* v. *Todd*, 8 A. & E. 84 *Thornton* v. *McKewan*, 1 Hem. M. 525; *Paley* v. *Field*, 12 V 435.

(*a*) 1 Mer. 572. See, in additi to the cases cited in the text illustrating the rule in questi *Ex parte Randleson*, 2 D. & Ch. 5 *Copland* v. *Toulmin*, 7 Cl. & F 349; *Brown* v. *Adams*, 4 Ch. 7 *Laing* v. *Campbell*, 36 Beav. 3: as to the application of the rule trust monies mixed with ot monies, *Re Hallett's estate*, 13 D. 696; *Pennell* v. *Deffell*, 4 De M. & G. 372.

ent which cannot be shown to have been made in discharge some particular item, is imputed to the earliest item standg to the debit of the payer at the time of payment. If, herefore, a customer of a firm of bankers has funds standing his credit at the time they dissolve partnership, and his ccount is continued by their successors, they taking new eposits and honouring his drafts as if no change had occurred, nd blending the accounts, then the payments first made by he new firm will be deemed to have been made in liquidaion of the earliest item on the credit side of the customer's ccount, viz., the balance due to him at the time of the dissolution; and consequently, if, proceeding on this principle, that alance is liquidated, the customer has no claim against the ld firm in respect of his account with them.

This doctrine is of great importance in questions relating to he discharge of retired and deceased partners.

Effect of rule in the case of retired and deceased partners.

The application of the rule in question will discharge from liability the estates of deceased partners (*b*); the estates of sole traders if their businesses have been carried on by others without any break (*c*); and retired partners, whether known (*d*) or dormant (*e*). Moreover, the discharge of the deceased or retired partner being the consequence of the payment of his former creditor, the discharge does not depend on the knowledge of the creditor of the change which has taken place in the firm (*e*). It is true that if the creditor had known of the change he might have objected to continue to deal with the continuing or surviving partners unless the old and new accounts were kept distinct; but this circumstance does not entitle him to treat his old debt as still unpaid when he has in fact dealt on the footing of there being only one continuous account, and when on this footing he has been paid his old debt (*f*).

(*b*) As in *Clayton's case*, 1 Mer. 572.

(*c*) *Sterndale* v. *Hankinson*, 1 Sim. 393; *Smith* v. *Wigley*, 3 Moo. & Sc. 174.

(*d*) *Hooper* v. *Keay*, 1 Q. B. D. 178.

(*e*) *Brooke* v. *Enderby*, 2 Brod. & Bing. 70; *Newmarch* v. *Clay*, 14 East, 239.

(*f*) See the last note. The creditors in those cases did not know of the changes in the firms with which they dealt. See, also, *Merriman* v. *Ward*, 1 J. & H. 371.

Application of rule to all single running accounts.

Discharge of surety.

The rule in *Clayton's case* applies to all accounts of th nature of one entire debit and credit account, without referenc to any question of partnership, and is available not only by firm against an old creditor, but also against a firm for th benefit of its debtors. For example, where a person become surety to a firm guaranteeing a debt owing to it by a thir party, then, if the debt is an item in an account between th third party and the firm, and is liquidated by general paymen with which he is credited, the debt guaranteed will be extin guished, and the surety will be discharged, although upon th whole account there may always have been a balance owing the firm (*g*). On the other hand if the guaranteed debt is n extinguished by the rule in question, the surety will not discharged (*h*). Moreover, the rule applies even as betwe persons who do not know that they are being affected it, and who, if they did, might take care to exclude operation (*i*).

Rule applies against the debtor as well as against the creditor.

Further, as a creditor has no right to take the accou subsisting between him and his debtor backwards, so as make himself appear a creditor in respect of the earlier ratl than of the later items of the account, so, on the other ha a debtor, after making general payments in respect of entire account, is not at liberty to have those payments appl in liquidation of the subsequent rather than of the ear items (*k*).

Effect on incoming partner.

This has an important bearing on the position of incom partners; for although they are not liable for debts contrac before they joined the firm, still if such debts and others s sequently contracted are allowed by an incoming partne

(*g*) See *Kinnaird* v. *Webster*, 10 Ch. D. 139; *Bodenham* v. *Purchas*, 2 B. & A. 39; *Field* v. *Carr*, 5 Bing. 11; *Pemberton* v. *Oakes*, 4 Russ. 154; *Toulmin* v. *Copland*, 3 Y. & C. Ex. 625, and *Copland* v. *Toulmin*, 7 Cl. & Fin. 350; *Bank of Scotland* v. *Christie*, 8 Cl. & Fin. 214; *Medcwe's trust*, 26 Beav. 588. Compare *Ex parte Whitworth*, 2 M. D. & D. 164; *City Discount Co.* v. *Maclean*, L. R. 9 C. P. 692, where, notwithstanding the mode in w the books were kept, the real in tion was to keep the second separate from the others.

(*h*) *Re Sherry*, 25 Ch. D. *Williams* v. *Rawlinson*, 3 Bing.

(*i*) *Ante*, note (*f*); *Merrima Ward*, 1 J. & H. 371; *Scott* v. 6 Jur. N. S. 559.

(*k*) *Beale* v. *Caddick*, 2 H. 329.

rm one single running account, and payments are made gene-
lly in respect of it, those payments, although made with the
oney of the new firm, will be applied to the old debt, and a
lance will be left for which the incoming partner will be
able (*l*). But the rule in *Clayton's case* cannot be insisted on
o the prejudice of a new partner without his consent, express
r tacit. Without such consent a creditor of the old firm who
oes on dealing with the new firm has no right to appropriate
payment made by a new partner to a debt owing by his
o-partners, nor to run two distinct accounts together, and treat
general payment as made in respect of the earliest items.
Burland v. *Nash* (*m*) may be referred to as an illustration of
his. In that case A. succeeded B. in business, and agreed
with him to take his debts upon himself; A. then contracted
lebts of his own to one of B.'s creditors, and A. afterwards
nade such creditor a general payment on account; it was held
hat the creditor could not, without A.'s consent, apply this
ayment in discharge of the debt owing by his predecessor B.

Burland v. Nash.

The rule in *Clayton's case*, however, applies only to an entire
nbroken account, and has no application to cases where one
erson is indebted to another in respect of several matters,
ach of which forms the subject of a distinct account. In such
case, if the debtor does not appropriate the payment when
e makes it, the creditor is at liberty to apply the payment to
hichever account he thinks proper (*n*). Moreover, when a
hange takes place in a firm by the retirement or death of a
ember, a creditor of the firm is under no obligation to assent
o a carrying over of his debt, so that it shall form the first
item in a fresh account with the new firm. He is at liberty to
keep the accounts with the two firms distinct, and if he does so,
payments made generally by the new firm will not necessarily
d

Rule inapplicable where there are distinct accounts.

Right of appropriation in such a case.

(*l*) See the last case, and also *Scott* v. *Beale*, 6 Jur. N. S. 559. This case is badly reported, but it is tolerably plain that the incoming partner was held liable to pay, not the debt due to the plaintiff when the partnership commenced, but the balance of monies due to him on his whole account, and which balance consisted of monies received by the defendants after the partnership between them was created.

(*m*) 2 Fos. & Fin. 687. Quære whether the evidence did not warrant the inference that the two accounts had been run into one with the consent of the defendant.

(*n*) *Ante*, p. 227.

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go, by virtue of the rule in *Clayton's case*, in liquidation of the debt owing by the old firm. A remarkable illustration of this is afforded by the well-known case of *Simson* v. *Ingham* (*o*). There, two country bankers, Benjamin and Joshua Ingham, gave a bond to a London bank, as a security for advances, which it might make on account of the persons constituting the country bank, or either of them, associated or not with any other persons. Benjamin died, and at his death a considerable sum was due to the London bank for advances made to the country bank. The London bank was in the habit of sending in monthly accounts to the country bank. In the month following Benjamin's death the London bank received and paid considerable sums on account of the country bank, and the sums were entered by the London bank in its own books in continuation of the former account between it and the old country bank. No account, however, was sent to the country bank until two months after Benjamin's death; and then two accounts were sent, one of them being an account of receipts and payments prior to his death, and the other being an account of receipts and payments made subsequently thereto. A considerable balance was due to the London bank on the first of these accounts, and to recover this balance an action was brought against Benjamin's representatives. It was contended that his estate was discharged, by virtue of the rule in *Clayton's case*, the London bank having received since his death much more than sufficient to liquidate that balance; but it was held that the rule in question did not apply. The judgment of Mr. Justice Bayley contains such an admirable statement of the principles applicable to such cases that no hesitation has been felt in setting it out at length.

Simson *v.* Ingham.

"The general rule is, that the party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money. But there is a third rule, viz., that where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old

(*o*) 2 B. & C. 65.

and new firms in one entire account, then the payments made from time to time by the surviving partners, must be applied to the old debt. In that case, it is to be presumed that all the parties have consented that it should be considered as one entire account, and that the death of one of the partners has produced no alteration whatever. In this case, the partner died in September, 1814. If in the ordinary course of business a monthly account had been sent in, stating the transactions before and after the death of the partner, as forming part of one entire account, and the balance is due from the survivors, in that case the creditor would have been precluded, and would have had no right to have said that the payments made subsequently to the death of the partner should be applied to any but the old account. In fact, the bankers in London did not send in any account after the death of the partner until November, and then they sent in two distinct accounts, one made up to the day of the death of the partner, and the other commencing from that period. At that time, therefore, the bankers in London expressed their dissent from making the whole one entire account. It has been insisted that at that period of time they had no right so to do, because they were precluded by the entries which they had already made in their own books in the intermediate space of time. If, indeed, a book had been kept for the common use of both parties as a pass-book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering that account; but entries made by a man in books which he kept for his own private purposes, are not conclusive on him until he has made a communication on the subject of those entries to the opposite party. Until that time he continues to have the option of applying the several payments as he thinks fit. For these reasons, I am of opinion that the plaintiffs were not precluded from applying the payments to the new account, and therefore this award is right."

Right to blend accounts.

The case of *Simson* v. *Ingham* was decided upon the principle that a creditor of a firm has a right, when a change occurs in the firm, to decide for himself whether the sum due to him from the old firm shall or shall not form an item in his account with the new firm. This principle is further illustrated by the case of *Jones* v. *Maund* (*p*). There, three persons, A., B., and C. were partners, and D. was indebted to them in a sum secured by a covenant and a mortgage. A. and B. died, C. retired, and assigned her interest to E. who, with F., continued the business of the old firm under the old name. D. continued to deal with the new firm, and he made it several payments, more than sufficient to liquidate the debt above mentioned if appropriated thereto. The mortgage had been realised, and the sum arising from it had been applied in part discharge of

Jones v. Maund.

(*p*) 3 Y. & C. Ex. 347.

the debt secured by it. There was nothing to show that D.'s debt had been made an item in the account between him and the new firm, and it was consequently held that D. had no right to insist that the payments made by him generally to the new firm should be applied to the balance due from him on his covenant (*q*).

Transfer of debt from one account to another.

It should be borne in mind with reference to cases of this description, that one partner can bind the firm by assenting to a transfer of a debt, due to or by it, from one account to another (*s*).

Rule in Clayton's case inapplicable where it defeats the intentions of the parties.

The rule in *Clayton's case*, viz., that in current accounts it is presumably the sum first paid in that is first drawn out, or in other words, that presumably it is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side, is a rule based on the presumed intention of the parties (*t*). It is not, as is sometimes represented, a rule of law obtaining independently of their will; and consequently, if it can be shown that some other appropriation was intended, the rule ceases to be applicable. An intention to appropriate a payment to a later rather than to an earlier item in the account, may be inferred from the usual course of business between the parties (*u*); from the source from which the money was obtained (*x*); from the security to meet which the payment was made (*y*); from the fact that the earlier item was secured and intended to be kept separate from the

(*q*) The case was decided on demurrer, and according to the report, it was held that the balance due on the covenant could not be considered as liquidated, unless it could be shown that it had, *with C.'s assent*, been made an item in the account between D. and the new firm. But quære what C. had to do with it, she having assigned all her interest in the debt to the new firm? Did she not thereby authorise the new firm to deal with the debt as it liked? See *Pemberton* v. *Oakes*, 4 Russ. 154.

(*s*) *Ante*, pp. 230, 231; *Beale* v. *Caddick*, 2 H. & N. 326.

(*t*) *Re Hallett's estate*, 13 Ch. D. 696; *Wilson* v. *Hurst*, 4 B. & Ad. 767, *per* Lord Denman. In *Copland* v. *Toulmin*, 7 Cl. & Fin. 349, there was evidence to show an agreement for a different appropriation, but it was not deemed sufficient to exclude the rule.

(*u*) *Taylor* v. *Kymer*, 3 B. & Ad. 320; *Lysaght* v. *Walker*, 5 Bli. N. S. 1.

(*x*) *Stoveld* v. *Eade*, 4 Bing. 154; *Thompson* v. *Brown*, Moo. & M. 40.

(*y*) *Newmarch* v. *Clay*, 14 East, 240.

others (*z*); from the fact that the payment was a dividend on all debts (*a*); from the representations of the parties (*b*); and from other circumstances (*c*).

Wickham *v.* Wickham.

An instructive case on this head is *Wickham* v. *Wickham* (*d*), which in substance was as follows:—A firm of Finch and Sons, as agents of the plaintiffs, supplied goods to the firm of Smith and Willey upon the terms that the latter should become debtors to the plaintiff in respect of such goods. Finch and Sons also supplied Smith and Willey with other goods on their own behalf. In the accounts between Finch and Sons and Smith and Willey, no distinction was made between goods supplied by Finch and Sons on their own behalf, and those which they supplied as agents of the plaintiffs. Smith and Willey made payments generally on account; and applying the rule in *Clayton's case*, nothing was due from Smith and Willey in respect of the goods supplied to them on behalf of the plaintiffs. However, Edward Finch was a partner in both firms, and representations were made to the plaintiffs by the firm of Finch and Sons to the effect that a large debt was due to the plaintiffs from the firm of Smith and Willey, and Finch and Sons undertook that Edward Finch should use his influence as a partner in the firm of Smith and Willey, to secure the reduction of such debt. Upon the faith of this representation and undertaking, the plaintiffs forebore to sue Smith and Willey. It was held, that the firm of Smith and Willey was precluded from treating its debt to the plaintiffs as liquidated by the payments made by it to the firm of Finch and Sons; for it was not competent to the two firms so to arrange their accounts as to liquidate a debt which a person who was a partner in both firms represented to the plaintiffs as still owing to them.

Application of the rule in cases of fraud.

Upon the same principle, viz., that the rule in *Clayton's case* is founded on the presumed intention of the parties, it follows that it cannot be applied as against a person who is a

(*z*) *City Discount Co.* v. *Maclean*, L. R. 9 C. P. 692. See *ante*, p. 230.

(*a*) *Ante*, p. 228.

(*b*) *Wickham* v. *Wickham*, 2 K. & J. 478; *Merriman* v. *Ward*, 1 J. & H. 371.

(*c*) See *Henniker* v. *Wigg*, 4 Q. B. 792. Compare *Re Boys*, 10 Eq. 467.

(*d*) 2 K. & J. 478. See, too, *Merriman* v. *Ward*, 1 J. & H. 371.

creditor in respect of a fraud committed on him and of which he is ignorant. This in fact was determined in *Clayton's case* itself. For Clayton, in addition to the claim which was held to have been discharged by the operation of the rule noticed above (*e*), had another claim upon Devaynes' estate, arising out of a breach of trust committed by a fraudulent sale of some exchequer bills, and of which sale he was kept in ignorance. The payments made to Clayton since Devaynes' death were more than sufficient to satisfy both claims; but it was held, that the claim arising out of the concealed sale of the bills was not affected by those payments (*f*). So if one partner fraudulently overdraws his account with the firm and keeps paying money in and drawing money out, so that his fraudulent overdrawing is never discovered, it will not be treated as having been made good so long as there is a balance against him (*g*).

Imputation of payment where debts are owing to a firm and to a member of it.

Before leaving the subject of appropriation of payments it may be as well to advert to a question of some difficulty which arises when a person indebted to a firm, and also to an individual member of it, pays him a sum of money under such circumstances that it cannot be ascertained on account of which debt the payment was made. In such a case ought the payment to be applied in liquidation of the debt due to the partnership, or of that due to the individual member? Pothier (*h*) says that good faith requires that the partner receiving the money, should apply it proportionally to both demands. The writer is not aware of any decision on this subject, but he apprehends that, as between the partner and the debtor, the payment might be applied to either debt at the option of the partner, whilst, as between the partner and his co-partners, good faith would require that the payment should be applied wholly to the partnership debt (*i*).

(*e*) *Ante*, p. 228.

(*f*) See *Clayton's case*, 1 Mer. 572—580.

(*g*) *Lacey* v. *Hill*, 4 Ch. D. 537.

(*h*) Pothier, "Société," § 121.

(*i*) See *Thompson* v. *Brown*, Moo. & M. 40, and *Nottidge* v. *Prichard*, 2 Cl. & Fin. 379.

2. *Release.*

Release of one partner is a release of the firm.

A release of one partner from a partnership debt discharges all the others (*k*); for where several persons are bound jointly, or jointly and severally, a release of one is a release of them all (*l*). But in this respect a covenant not to sue differs from a release; for, although where there is only one debtor and one creditor, a covenant by the latter never to sue the former is equivalent to a release, it has been decided on several occasions that a covenant not to sue does not operate as a release of a debt owing to or by other persons besides those who are parties to the covenant (*m*).

Covenant not to sue has a different effect.

Releases in form held to be covenants not to sue.

If a release is so drawn as to show that it was intended to enure only for the benefit of the releasee personally, and not to avail even him in an action by the releasor against the releasee, jointly with other people, then persons jointly liable with him in respect of the debt released will not be discharged therefrom. In such a case the deed will itself show that it was not in fact intended to operate as a release.

Solly *v.* Forbes.

In *Solly* v. *Forbes* (*n*) the defendants, Forbes and Ellerman, were partners, and were indebted to the plaintiffs, and had stopped payment. In consideration of a sum paid by Ellerman, the plaintiffs released him from all further demands, but it was declared in the release (to which, however, Forbes was not a party), that nothing therein contained should affect the plaintiffs' rights against Forbes, either separately or as partner with Ellerman, or against the joint estate of the two; and that it should be lawful for the plaintiffs to sue Ellerman, either jointly with Forbes, or separately, for the purpose of obtain-

(*k*) *Bower* v. *Swadlin*, 1 Atk. 294; *Ex parte Slater*, 6 Ves. 146; *Cheetham* v. *Ward*, 1 Bos. & P. 630; *Cocks* v. *Nash*, 9 Bing. 341.

(*l*) See the last note, and as to joint and several obligations, Co. Lit. 232, *a*; *Lacy* v. *Kinaston*, 1 Ld. Raymond, 690; *Kiffin* v. *Evans*, 4 Mod. 379.

(*m*) *Clayton* v. *Kynaston*, 2 Salk. 573; *Lacy* v. *Kynaston*, 1 Ld. Raymond, 688, and 2 Salk. 575; *Hutton* v. *Eyre*, 6 Taunt. 289; *Dean* v. *Newhall*, 8 T. R. 168; *Waimesley* v. *Cooper*, 11 A. & E. 216; and see *Price* v. *Barker*, 4 E. & B. 760.

(*n*) 2 Brod. & Bing. 38. See, too, *Price* v. *Barker*, 4 E. & B. 760; *Thompson* v. *Lack*, 3 C. B. 540; *Willis* v. *De Castro*, 4 C. B. N. S. 216; *Bateson* v. *Gosling*, L. R. 7 C. P. 9.

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ing satisfaction of their debt, either out of the joint estate of the two, or from Forbes. In an action brought by the plaintiffs against Forbes and Ellerman to recover the debt owing by them, it was held that this deed was no bar to the action.

Hartley v. Manton.

Again, in *Hartley* v. *Manton* (*o*), where a bill was drawn by a firm on, and was accepted by, one partner, it was held that a release of the drawers did not discharge the acceptor; the object of the release being to discharge the joint liability of the firm, but not to affect the several liability of the accepting partner.

Recitals of releases.

In construing releases particular attention must be paid to the recitals; for, however general the operative words of the deeds may be, they will be confined so as not to affect more than the parties appear from the deed itself to have contemplated (*p*).

Removing seal.

If several persons are bound by a bond jointly, or jointly and severally, and their creditor removes the seal of one of them from the bond, all the others are discharged; but if the obligors are only bound severally, then the removal of the seal of one of them does not affect the liability of the others (*q*).

Arrest.

Before arrest for debt was abolished (as it now is except in a few special cases) an arrest of a debtor, followed by a discharge of him by the arresting creditor, was equivalent to a release by the creditor of his debt; whence it followed that if a creditor of a firm obtained judgment against it, and arrested the partners, and then let one of them go, the others were entitled to be discharged from custody (*r*).

Composition in bankruptcy.

If a creditor accepts a composition in bankruptcy in respect of a joint debt, he is not precluded from suing one of the debtors who may be separately liable to him in respect of the same debt (*s*).

(*o*) 5 Q. B. 247.

(*p*) See, for illustration of this rule, *Lindo* v. *Lindo*, 1 Beav. 496; *Payler* v. *Homersham*, 4 M. & S. 423; *Simons* v. *Johnson*, 3 B. & Ad. 175; *Boyes* v. *Bluck*, 13 C. B. 652; *Lampon* v. *Corke*, 5 B. & A. 606.

(*q*) See *Collins* v. *Prosser*, 1 B. & C. 682.

(*r*) *Ballam* v. *Price*, 2 Moo. 235.

(*s*) *Simpson* v. *Henning*, L. R. 10 Q. B. 406; *Megrath* v. *Gray*, L. R.

A receipt given to one partner in satisfaction of all demands against him, will not discharge his co-partners unless that also was intended (*t*).

Receipt in full.

3. *Substitution of debtors and securities.*

A liability which is originally joint or joint and several, may be extinguished by being replaced by a liability of a different nature; and this may happen in one of two ways, viz., either by an agreement to that effect come to between the parties liable and the person to whom they are liable (*u*); or by virtue of the doctrine of merger, independently of any such agreement.

(*a.*) *Of substitution by agreement.*

Extinction of liability by substitution of debtors.

In order that one liability may be extinguished by being replaced by another by agreement, it is essential that the person in whom the correlative right resides should be a party to the agreement, or should, at all events, show by some act of his own that he accedes to the substitution. If A., being indebted to B., transfers his liability to C., and B. does not assent to the transfer, his rights are wholly unaffected: he will neither acquire any right against C. nor lose his former right against A. As regards B. the agreement between A. and C. is *res inter alios acta*, and it does not in any way benefit or prejudice him. But if B. assents to the arrangement come to between A. and C., and adopts C. as his debtor instead of A., then A.'s liability to B. is at an end, and B. must look for payment to C. and to him alone (*x*).

Agreement between partners does not affect creditors.

To apply this to cases of partnership, let it be supposed that a firm of three members, A., B., and C., is indebted to D.; that A. retires, and B. and C. either alone, or together with a

9 C. P. 216. *Wilson* v. *Lloyd*, 16 Eq. 60, *contra*, must be considered as overruled on this point; *Cragoe* v. *Jones*, L. R. 8 Ex. 81, was a case of a surety.

(*t*) *Ex parte Good*, 5 Ch. D. 46, where one partner was a nominal partner, and not, therefore, liable to indemnify the others.

(*u*) Sometimes called Novation, but nothing is really gained by using this word. See, as to this word, 1 Ch. D. 322, *per* James, L. J.

(*x*) See *per* Buller, J., in *Tatlock* v. *Harris*, 3 T. R. 180.

new partner, E., take upon themselves the liabilities of the old firm. D.'s right to obtain payment from A., B., and C. is not affected by the above arrangement, and A. does not cease to be liable to him for the debt in question (*y*). But if, after A.'s retirement, D. accepts as his sole debtors B. and C., or B., C., and E. (if E. enters the firm), then A.'s liability will have ceased, and D. must look for payment to B. and C., or to B., C., and E., as the case may be. When, therefore, a partner has retired, and a creditor of the firm continues to deal with the continuing partners and such other persons, if any, as may have become associated with them in partnership, it is of great importance to ascertain whether the creditor has or has not accepted the new firm as his debtors, in lieu of the old firm. If he has, the retired partner's liability will have ceased, whilst if he has not, it will still continue.

Liability not got rid of by transferring share.

Nothing used to be more common than for promoters of companies to put forward a prospectus in which it was said that all liability on the part of a shareholder would cease on a transfer of his share; but the hope thus held out was as false and delusive as that intended to be raised by the assertion that the liability of the shareholders would be limited to the amount of their shares (*z*). It cannot be too often repeated that, merely by retiring, a partner or a shareholder gets rid of no liability as to past transactions, unless there is some statutory enactment applicable to his case; and the same observation applies to a total dissolution. To use the words of Mr. Justice Heath, "when a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future. With regard to things past, the partnership continues, and always must continue" (*a*).

The cases which bear upon the question of discharge by virtue of a substitution by a creditor of one debtor for another

(*y*) *Smith* v. *Jameson*, 5 T. R. 601; *Rodgers* v. *Maw*, 4 Dowl. & L. 66; *Dickenson* v. *Lockyer*, 4 Ves. 36; *Cummins* v. *Cummins*, 8 Ir. Eq. 723.

(*z*) See *Blundell* v. *Winsor*, 8 Sim. 613.

(*a*) *Wood* v. *Braddick*, 1 Taunt. 104. Therefore, partners continue liable on the covenants entered into by them in a lease of the partnership premises, although the firm may have been dissolved since the lease was granted. See *Hoby* v. *Roebuck*, 7 Taunt. 157; *Graham* v. *Whichelo*, 1 Cr. & M. 188.

will be found, notwithstanding some conflict between them, to be all professedly based on the foregoing principles and on a few simple rules, the most important of which are as follows:

Creditors not presumed to discharge outgoing partners.

1. There is no *à priori* presumption to the effect that the creditors of a firm do, on the retirement of a partner, enter into any agreement to discharge him from liability (*b*).

Creditor may agree to look only to continuing partners.

2. An agreement by a creditor of several persons, liable to him jointly, to discharge one or more of them, and look only to the others, is not necessarily invalid for want of consideration (*c*).

Effect of doctrine that a release of one partner is a release of all.

3. Except under special circumstances, a creditor who releases one partner discharges all (*d*). Consequently, if a creditor discharges a retired partner, and acquires no fresh right to obtain payment from the others, either alone or with a new partner, the creditor will be altogether remediless. One test, therefore, by which to determine whether a retired partner has been discharged, is to see whether the creditor has obtained a new right to demand payment; for if he has not, no discharge can possibly be made out by any evidence which fails to establish an extinguishment of the creditor's demand altogether.

Classification of cases.

It is proposed now to examine the cases relating to the liability of retired partners for debts incurred before their retirement. They may be conveniently classified thus:—

A. Cases in which a retired partner has not been discharged;
   (*a*) No new partner having been introduced into the firm.
   (*b*) Although a new partner has been introduced into the firm.
B. Cases in which a retired partner has been discharged.

After these cases have been examined, the analogous cases relating to the discharge of the estate of a deceased partner will be noticed.

(*b*) Such an agreement must be proved. See *Benson* v. *Hadfield*, 4 Ha. 37.

(*c*) *Lyth* v. *Ault*, 7 Ex. 669.

(*d*) *Ante*, p. 237.

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Class A *a*.—Cases in which a retired partner has not been discharged, no new partner having been introduced into the firm.

Promise to look only to continuing partners.

Lodge *v.* Dicas.

David *v.* Ellice.

The strongest cases of this class are *Lodge* v. *Dicas* (*e*), and *David* v. *Ellice* (*f*). In each of these a partnership had been dissolved, one member retiring and the other continuing the business, and agreeing to pay the debts of the old firm. In each case the plaintiff knew of the arrangement, and his debt was transferred with his consent to the books of the new firm. In each case, moreover, there was strong evidence to show that the plaintiff had agreed to discharge the retired member, and to look only to the others. But in each it was held that the retired partner continued liable, and that the plaintiff had done nothing to discharge him; and the fact that no person had become liable to the plaintiff who was not so originally, was relied upon by the Court as showing that there was no consideration for the alleged discharge (*g*).

Observations on these cases.

These two cases have been much criticised (*h*), and they certainly went too far; for the proposition that a creditor of a firm cannot, for want of consideration, abandon his right against a retiring partner, and retain it against the others, unless they give some fresh security, has been shown to be erroneous, and is now exploded (*i*); and there can be little doubt that if similar cases were to arise again, and the jury found for the defendant, the verdict would not be disturbed.

Thompson *v.* Percival.

This appears from *Thompson* v. *Percival* (*k*). In that case, the defendants, Charles Percival and James Percival, had as partners become indebted to the plaintiff. The partnership was dissolved, and it was agreed that the business should be carried on by James, and that he should receive and pay all debts, and assets sufficient to pay debts of the firm were left in his hands. The plaintiff, on applying to James for pay-

(*e*) 3 B. & A. 611.

(*f*) 5 B. & C. 196, and 1 C. & P. 369.

(*g*) See, too, *Thomas* v. *Shillibeer*, 1 M. & W. 124.

(*h*) See 5 B. & Ad. 933; 2 Cr. & M. 623; 2 M. & W. 493.

(*i*) *Ante*, p. 241, note (*c*).

(*k*) 5 B. & Ad. 925.

ment, was told that he must look to him, James, alone, and the plaintiff accordingly drew a bill on James, and the bill was accepted by him. The bill being afterwards dishonoured, the plaintiff sued both James and Charles for the original debt, and obtained a verdict for the full amount; but the defendants had leave to move for a nonsuit if the Court should be of opinion that Charles had been discharged. The Court, without deciding that point, held that the question ought to have been left to the jury, and a new trial was therefore directed. The Court held that the facts proved raised a question for the jury, whether it was agreed between the plaintiff and James that the former should accept the latter as his sole debtor, and should take the bill of exchange accepted by him alone, by way of satisfaction for the debt due from both. If it was so agreed, the Court thought that the agreement and receipt of the bill would be a good answer on the part of Charles by way of accord and satisfaction (*l*).

Effect of these three cases.

It is not unusual to represent *Lodge* v. *Dicas* and *David* v. *Ellice*, as altogether overruled by *Thompson* v. *Percival*, and other cases. This, however, is not quite correct. The three cases together establish (1.) that a creditor who treats the continuing partners as his debtors, does not necessarily abandon his right to resort to a retired partner for payment; (2.) that whether he does or does not is a mixed question of law and fact which ought to be submitted to a jury; and (3.) that their verdict will not be disturbed by the Court upon the grounds acted on in *Lodge* v. *Dicas* and *David* v. *Ellice*.

Treating continuing partners as debtors.

That a creditor who treats the continuing partners as his debtors, does not without more discharge a retired partner, is shown by other cases, and especially by those in which the continuing partners have paid interest on the old debt at a rate, or in a manner, differently from that previously adopted.

Heath v. Percival.

An old case on this head, and one often referred to, is *Heath* v. *Percival* (*m*), in which two partners indebted to the plaintiff on a bond dissolved partnership. One of them continued to

(*l*) In *Evans* v. *Drummond*, 4 Esp. 89, and *Reed* v. *White*, 5 ib. 122, a retiring partner was held discharged on the ground here referred to. See *post*, p. 247.

(*m*) 1 P. Wms. 682, and 1 Str. 403.

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carry on the business, and took upon himself the partnership debts, and public notice was given that the creditors of the firm were either to come in and be paid their debts, or to look for payment to the continuing partner only. The plaintiff came in, but instead of being paid off, he kept the bond, receiving interest at 6*l.* instead of 5*l.* per cent. It was held that he did not thereby discharge the retired partner from his liability to pay the bond with interest at 5*l.* per cent.

Taking a new security from them.

Moreover, if the continuing partners give a new security for the old debt, this will not operate to discharge the retired partner, unless the creditor intended that such should be the case, or unless the new security is of such a nature as to merge the original debt. In *Bedford* v. *Deakin* (*u*), three partners were indebted to the plaintiff on bills of exchange. They dissolved partnership, and arranged between themselves that one of them should pay the plaintiff. The plaintiff was informed of this arrangement, and took from one of the partners his separate promissory note, indorsed by a third party, for the amount of the debt, but expressly reserved his right to look to all three partners for payment, and the plaintiff retained the bills already in his possession. The notes when due were taken up by other bills, and they in their turn were several times renewed. Ultimately the plaintiff sued all the three partners on the original bills, and he was held entitled so to do, never having discharged any of them, either intentionally or otherwise.

Bedford *v.* Deakin.

Liability same in equity as at law.

Oakford *v.* European Ship Co.

Nor was there any difference in such cases as these between the liability of a retired partner at law and in equity. In *Oakford* v. *European and American Steam Ship Company* (*o*), a partner retired, and the continuing partners indemnified him against all claims that might be made against him as a member of the firm. Disputes afterwards arose between the continuing partners and a company respecting a contract entered into before the retirement. These disputes were

(*u*) 2 B. & A. 210. See, too, *Swire* v. *Redman*, 1 Q. B. D. 536, where the plaintiff had not expressly reserved his rights against the retired partner. See, also, *Featherstone* v. *Hunt*, 1 B. & C. 113; *Spenceley* v. *Greenwood*, 1 Fos. & Fin. 297. Compare *Evans* v. *Drummond*, 4 Esp. 89, noticed *infra*, p. 247.

(*o*) 1 Hem. & M. 182.

partly adjusted. Those unadjusted were referred to arbitration pursuant to a clause in the contract. The reference was afterwards revoked; and an action upon the contract was then brought against the continuing partners and the retired partner. The retired partner sought to have this action restrained by injunction, upon the ground that his retirement and indemnity had placed him in the position of a surety only for the due performance of the contract; and that what had taken place since the retirement which was known to the company had discharged him. But it was held that his liability continued, and his bill was dismissed with costs.

Position of dormant partners.

The principle of the above cases applies to *dormant* partners even more strongly than to others; for a creditor who has a security of which he is unaware, cannot intentionally give up that security. Therefore, if A. and B. are partners, and the two become indebted to a creditor who knows only of A., and then B., the dormant partner, retires, no dealings between the creditor and A. will discharge B. from his liability to be sued when discovered, unless those dealings extinguish the original debt not only as against B. but also as against A. (*p*).

Class A *b*.—Cases in which a retired partner has not been discharged, although a new partner has been introduced into the firm.

Effect of introduction of new partner on the liability of a retired partner.

The introduction of a new partner has no effect on the liability of a retired partner, unless the liability of the former is substituted by the creditor for that of the latter, which cannot be the case unless the creditor can, as of right, hold the new partner liable for the old debt. This, moreover, he cannot do by virtue of any agreement between the partners themselves; and even if the new firm adopts the old debt and pays interest on it, this is *primâ facie* only in pursuance of some agreement between the partners themselves; and a creditor who does no more than allow the partners to carry out that agreement, does not debar himself of his right to look for payment to those originally indebted to him.

(*p*) *Robinson* v. *Wilkinson*, 3 Price, 538.

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Kirwan v. Kirwan.

A leading case on this head is *Kirwan* v. *Kirwan* (*q*). There, three partners, C., M., and N., were indebted to the plaintiff. C. retired, and M. and N. continued in partnership together and agreed to discharge the debts of the old firm. M. afterwards retired, and N. took in a new partner. The plaintiff's account was transferred from the books of the old to the books of the new partnership, and interest was paid, and accounts were rendered to him as before. The plaintiff was informed of the dissolution, and had stated to one of the retired partners that he was aware he had no further claim upon him. But it was held, that the three original partners remained liable, as there was nothing to show that the security of the new firm had been substituted for that of the old, and the statement above referred to could not be regarded as an agreement to discharge the retired partner.

Gough v. Davies.

In *Gough* v. *Davies* (*r*), three persons were partners as bankers, and were indebted to the plaintiff. One of the partners retired; a new partnership was formed between the continuing partners and other persons; the plaintiff's debt was transferred to the books of the new firm, and he assented to such transfer. Moreover, the plaintiff continued to deposit money with the new firm, and was paid by it interest on the old debt and new deposits, as if they all formed one debt. But it was held, that there was nothing in all this to show any agreement by the plaintiff to discharge the retired partner, and he was consequently held liable for the old debt.

Blew v. Wyatt.

Blew v. *Wyatt* (*s*) is another case to the same effect. A clerk lent money to his employers, who were in partnership as brewers, and took an acknowledgment for it. Several changes took place in the firm, one of the original partners retiring and other persons from time to time coming in and going out. The clerk remained in the employ of the firm notwithstanding these changes, and was aware of them, and was always paid interest by the firm for the time being. He was nevertheless held entitled to sue the two original partners for the money he had lent them.

Right to sue new

Whether in these cases of *Kirwan* v. *Kirwan*, *Gough* v.

(*q*) 2 Cr. & M. 617.
(*r*) 4 Price, 200.
(*s*) 5 Car. & P. 397.

Davies, and *Blew* v. *Wyatt*, the creditor could have sued the new firm, may perhaps be open to doubt (*t*). If he could not, it would be absurd to contend that the liability of the new firm was substituted for that of the old; whilst if he could, the evidence was not sufficient to show an intention on his part to deprive himself of the security afforded by the undoubted liability of the original firm before any change in it took place. It by no means follows that a creditor who assents to an arrangement by which a new person becomes liable to him, consents to abandon his hold on another person clearly liable to him already; and unless a substitution of liability can be established, the old liability remains (*u*).

Firm not inconsistent with right to sue the old firm.

Class B.—Cases in which a retired partner has been discharged.

In all these cases it will be found that the Court or a jury has come to the conclusion that the creditor has in fact, either expressly or impliedly from his course of dealing with the continuing partners, adopted them as his sole debtors, and thereby in fact discharged the retired partner (*x*).

That a retired partner *may* be discharged by the creditor's adoption of the other partners as his sole debtors, although no new partner has been introduced into the firm, is clear from the case of *Thompson* v. *Percival* (*y*) already noticed.

Retired partner may be discharged though no new partner comes in.

In *Evans* v. *Drummond* (*z*), a firm of two partners gave a partnership bill for goods supplied them. One of the partners retired, and the bill when due was not paid, but was renewed by another bill given by the partner who continued the business. The creditor took this bill knowing of the change in the firm. Lord Kenyon held, that by so doing the creditor had relied on the sole security of the continuing partner, and had dis-

Evans v. Drummond.

(*t*) See *per* Bolland, B., 2 Cr. & M. 628; *Daniel* v. *Cross*, 3 Ves. 277; *Fergusson* v. *Fyffe*, 8 Cl. & Fin. 121.

(*u*) See *Harris* v. *Farwell*, 15 Beav. 31.

(*x*) Mr. Pollock says truly, that there is nothing to prevent a firm from stipulating with any creditor that he shall look only to the members of the firm for the time being. Dig. 30, ed. 3. See *Hort's case* and *Grain's case*, 4 Ch. D. 307.

(*y*) 5 B. & Ad. 925; *ante*, p. 242.

(*z*) 4 Esp. 89. Compare *Bedford* v. *Deakin*, 2 B. & A. 210, noticed *ante*, p. 244.

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charged the other. *Reed* v. *White* (*a*) is a similar case and to the same effect.

Effect of introduction of new partner.

The inference that a retired partner has been discharged is greatly facilitated by the circumstance that a new partner has joined the firm and become liable to the creditor in respect of the debt in question (*b*). But this is not necessarily conclusive; for there may be circumstances showing that such was not the intention of the parties (*c*). At the same time, in the absence of any such evidence, the acceptance by the creditor of the liability of a new partner will practically preclude him from afterwards having recourse to the retired partner (*d*).

Hart *v.* Alexander.

In *Hart* v. *Alexander* (*e*), the plaintiff, an officer in the East India Company's service, had in 1813 opened an account with the house of Alexander and Co. of Calcutta, which failed in 1832. The defendant retired from the firm in 1822, when a new partner was introduced, and since that time other changes had taken place, some of the old partners retiring and new ones coming in. The defendant's retirement was advertised, and there was evidence to show that the plaintiff was aware of the fact. The new firms from time to time accounted with the plaintiff and paid him interest, sometimes at one rate and sometimes at another. On the bankruptcy of the firm in 1832, the plaintiff proved the amount of his debt against its joint estate. The plaintiff afterwards sued the defendant; and the case was tried before Lord Abinger, who is reported to have said to the jury:—

"To ask you if there was an agreement by the plaintiff to discharge the defendant, is to put the case upon a false issue, the agreement, if any, being an agreement raised by construction of law: the true question being whether the plaintiff did not go on dealing with the new firm, and making up fresh accounts with them, so as to discharge the defendant. I take the law to be this: Where a debtor who is a partner in a firm, leaves that firm, and any person trading with the firm has notice of it, and he goes on dealing

(*a*) 5 Esp. 122.

(*b*) See as to this, *ante*, p. 205 *et seq.*

(*c*) See *infra*, p. 254, and *Keay* v. *Fenwick*, 1 C. P. D. 745.

(*d*) As to the effect of taking a new security when no new partner comes in, see *ante*, p. 244.

(*e*) 7 C. & P. 746, and 2 M. & W. 484. See, also, *Wilson* v. *Lloyd*, 16 Eq. 60; *Oakeley* v. *Pasheller*, 4 Cl. & Fin. 207, noticed *infra*, p. 251. Compare *Commercial Bank Corp. of India and the East*, 16 W. R. 958, and *Ex parte Gibson*, 4 Ch. 662.

with the firm and making fresh contracts, that discharges the retiring partner, though no new partner comes in. So it is if the creditor draws for part of his balance and sends in more goods; so, if the creditor strike a fresh balance with the new partners for a different rate of interest; so, if a new partner comes in and the creditor accept an account in which the new partner is made liable for the balance—that discharges the old firm, as both firms cannot be liable at once for the same debt. This is the law as laid down in several cases in which indeed there is some contradiction: however, I believe that what I have stated is the result of them" (*f*).

The jury found for the defendant. A new trial was moved for on the ground that there was no evidence to go to the jury to show that the plaintiff had agreed to discharge the defendant from his liability, but the Court (*g*) thought that there was abundant evidence to show that the plaintiff knew of the defendant's retirement, and a new trial was refused.

To this class of cases also belong those already noticed, in which the joint liability of old and new partners has been substituted for that of the old partners only (*h*).

Release by estoppel.

A creditor may so conduct himself as to be estopped from saying that a retired partner is still liable to him. But it is not often that this can be established. A settlement by partners of their accounts on the footing that one of them only is liable to a creditor, will not affect him unless he has been guilty of some fraud, or has done some act or made some statement in order to induce the partners, or one of them, to settle their accounts on the faith that one of them is no longer liable (*i*).

Discharge of estate of deceased partner.

Closely allied to the subject which has just been discussed, is that which relates to the discharge of the estate of a deceased partner from the liabilities to which he was subject as a partner at the time of his death. The position of the estate of a deceased partner, with reference to the question of discharge by reason of a creditor's dealings with the surviving

(*f*) The learned judge was scarcely warranted by those cases in going so far as he did.

(*g*) Bolland, B., *dissentiente*.

(*h*) *Ex parte Whitmore*, 3 Deac. 365; *Rolfe* v. *Flower*, L. R. 1 P. C. 27, noticed *ante*, pp. 208, 209.

(*i*) See *Davison* v. *Donaldson*, 9 Q. B. D. 623; *Featherstone* v. *Hunt*, 1 B. & C. 113, a case of alleged fraud.

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partners, is very similar to the position of a retired partner. The same principles are applicable to both, and the authorities which are in point as regards the one, are so also as regards the other. The parallel between the two would be complete, were it not that before the Judicature Acts the estate of a partner who died in the lifetime of his co-partners was liable for the joint debts of the firm in equity only (*k*); and there might have been circumstances to induce a Court of equity to hold that estate discharged, although the same circumstances would not, in the case of a retiring partner, have operated as a discharge at law (*l*), and *vice versâ* (*m*).

It has been decided in equity that if a creditor of a firm knows of the death of one of the firm and continues to deal as before with the survivors, he does not lose the remedy which he had against the estate of the deceased partner, unless there is evidence showing an intention to abandon the right of having recourse thereto for payment (*n*); and an attempt by the creditor to obtain payment from the survivors is not sufficient evidence of such an intention. Thus, if he sues the survivors, and obtains judgment against them, this will not necessarily deprive him of his right to obtain payment out of the estate of the deceased (*o*). So, proving in bankruptcy against the estate of the new firm, is not, *per se*, sufficient to preclude the creditor from afterwards having recourse to the assets of the dead partner (*p*). Still less will any dealing with the surviving partner if induced by his fraud (*q*).

Liability not discharged by dealing with new persons.

Even where a new partner has been introduced, a creditor of the old firm, who continues to deal with the new firm as he dealt with the old, and is paid interest by the new firm

(*k*) As to the nature of this liability, see *ante*, p. 194.

(*l*) See *Ex parte Kendall*, 17 Ves. 522 and 525.

(*m*) *Jacomb* v. *Harwood*, 2 Ves. S. 265.

(*n*) *Winter* v. *Innes*, 4 M. & Cr. 101, and see *Devaynes* v. *Noble*, *Sleech's case*, 1 Mer. 539; *Clayton's case*, ib. 579; *Palmer's case*, ib. 623; *Braithwaite* v. *Britain*, 1 Keen, 206.

(*o*) *Jacomb* v. *Harwood*, 2 Ves. S. 265; and *ante*, p. 195, and *infra*, p. 257.

(*p*) *Sleech's case*, 1 Mer. 570; *Harris* v. *Farwell*, 15 Beav. 31. But compare *Brown* v. *Gordon*, 16 Beav. 302, and *Bilborough* v. *Holmes*, 5 Ch. D. 255, *infra*, note (*s*).

(*q*) As in *Plumer* v. *Gregory*, 18 Eq. 621.

as if the debt was its own, does not thereby deprive himself of his right to be paid out of the estate of a deceased member of the old firm (*r*). In *Harris* v. *Farwell* (*s*), a banking firm consisting of three partners became indebted to a customer on a deposit note; one of them died, and the survivors took his son into partnership with them. The new partnership paid interest on the note for some time, and then became bankrupt. The plaintiff proved against the new firm for the amount of his debt, and was paid a dividend out of its estate. It was held that he had done nothing which precluded him from having recourse to the estate of the deceased partner.

Harris *v.* Farwell.

On the other hand, if, after the death of a partner, a creditor of the old firm knows of the death, and does not take any steps to obtain payment from the estate of the deceased, if the creditor lies by and allows that estate to be administered as if he had no claim upon it, and if he continues to deal with the surviving partners as if they and they alone were his debtors, in that case the creditor will not be allowed to resort to the assets of the deceased. *Oakeley* v. *Pasheller* and *Brown* v. *Gordon* may be referred to as illustrating this doctrine.

Effect of administering the estate.

In *Oakeley* v. *Pasheller* (*t*) two partners, A. and B., executed three joint and several bonds to the plaintiff to secure repayment of money lent. A. died, and B. took in C. as a partner with him. An agreement was come to between A.'s executors and B. and C., that the latter should take the assets and liabilities of the old firm, and indemnify A.'s estate from those liabilities. Of this the plaintiff had notice (*u*). He was paid interest on his bond by the new firm, and received accounts from it in which the old debt and the debts contracted by the new firm were blended together. On two occasions the plaintiff

Oakeley *v.* Pasheller.

(*r*) *Daniel* v. *Cross*, 3 Ves. 277.

(*s*) 15 Beav. 31. It does not appear from the report when the customer first knew of the change in the firm. Compare *Bilborough* v. *Holmes*, 5 Ch. D. 255, a somewhat similar case, where the estate of the deceased partner was held to be discharged. The proof, however, there, was for money lent to the new firm.

(*t*) 10 Bli. N. S. 548, and 4 Cl. & Fin. 207. See on it, *Swire* v. *Redman*, 1 Q. B. D. 543. In *Wilson* v. *Lloyd*, 16 Eq. 60, this case was followed, though no new partner joined the firm, but *Wilson* v. *Lloyd* cannot be relied upon. See *Simpson* v. *Henning*, L. R. 10 Q. B. 406.

(*u*) See 4 Cl. & Fin. 212. The marginal note states that he had not.

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had agreed to give, and had given, the new firm considerable further time to pay the bonds, but A.'s executors had no notice of this. Ultimately the plaintiff took from B. and C. an assignment of some policies as a collateral security for payment of the bonds, expressly reserving his rights against A.'s estate. It was, however, held that A.'s estate had been discharged from its liability from what had previously taken place. The Court thought that A.'s estate had become, as it were, surety only for payment of the debt, and that it had been discharged by the long indulgence granted by the plaintiff to the other debtors (*x*). The true *ratio decidendi*, however, was that the plaintiff had accepted B. and C. as his sole debtors.

Brown *v.* Gordon.

In *Brown* v. *Gordon* (*y*), the plaintiff deposited money with a banking firm consisting of three partners, A., B., and C.; D. afterwards became a partner. A. died, having made a will containing a trust for payment of his debts. After A.'s death his son, who was also his executor and residuary devisee and legatee, became a partner in the bank. Some time afterwards B. and C. died. The bank had been continued, first, by B., C., D., and A.'s son; then by D., C., and A.'s son, and lastly by D. and A.'s son; but it ultimately stopped payment, and the two surviving partners were adjudged bankrupts. Interest had been paid to the plaintiff by the successive firms, and the plaintiff's debt was proved in the Bankruptcy Court. On a bill filed for the purpose of obtaining payment out of A.'s estate, it was held that the plaintiff, by neglecting for sixteen years to make any claim against the assets of the deceased, and by treating the successive firms as his debtors, had discharged the estate of the deceased, and that he could not be considered as a creditor of the deceased, so as to avail himself of the trust in the will for payment of debts.

Cases of fraud.

In whatever way a creditor may have dealt with the surviving

(*x*) This quasi suretyship is surely a false analogy, unless the creditor has assented to such a change in his debtor's position. See, on this point, *Oakford* v. *European, &c., Ship Co.*, 1 Hem. & M. 182, *ante*, p. 244; *Swire* v. *Redman*, 1 Q. B. D. 537. See, also, *Rodgers* v. *Maw*, 4 Dowl. & L. 66.

(*y*) 16 Beav. 302; *Bilborough* v. *Holmes*, 5 Ch. D. 255, a similar case, but not so strong. See *ante*, note (*s*).

partners, he cannot be held to have adopted them as his sole debtors in respect of a demand arising out of a fraudulent transaction, of which he has been constantly kept in ignorance (*z*).

Recapitulation.

Before leaving this subject, it may be useful shortly to review the effect of the numerous cases which have been noticed in the preceding pages. Those cases establish that:—

1. An express agreement by the creditor to discharge a retired partner, and to look only to a continuing partner, is not inoperative for want of consideration; for *Lodge* v. *Dicas* (*a*) has, as to this point, been overruled by *Thompson* v. *Percival* (*b*);

2. An adoption by the creditor of the new firm as his debtor does not by any means necessarily deprive him of his rights against the old firm either at law (*c*) or in equity (*d*);

3. And it will certainly not do so if, by expressly reserving his rights against the old firm, he shows that by adopting the new firm he did not intend to discharge the old firm (*e*);

4. And by adopting a new firm as his debtor, a creditor cannot be regarded as having intentionally discharged a person who was a member of the old firm, but was not known to the creditor so to be (*f*);

5. But the fact that a creditor has taken from a continuing partner a new security for a debt due from him and a retired partner jointly, is strong evidence of an intention to look only to the continuing partner for payment (*g*);

6. And a creditor who assents to a transfer of his debt from an old firm to a new firm, and goes on dealing with the latter for many years, making no demand for payment against the

(*z*) See *Clayton's case*, 1 Mer. 579; *ante*, pp. 235, 236.

(*a*) 3 B. & A. 611.

(*b*) 5 B. & Ad. 925.

(*c*) *David* v. *Ellice*, 5 B. & C. 196; *Thompson* v. *Percival*, 5 B. & Ad. 925; *Heath* v. *Percival*, 1 P. W. 682, and 1 Str. 403; *Kirwan* v. *Kirwan*, 2 Cr. & M. 617; *Gough* v. *Davies*, 4 Price, 200; *Blew* v. *Wyatt*, 5 C. & P. 397.

(*d*) *Oakford* v. *European, &c., Ship Co.*, 1 Hem. & M. 182; *Sleech's case*, 1 Mer. 539; *Clayton's case*, ib. 579; *Palmer's case*, ib. 623; *Braithwaite* v. *Britain*, 1 Keen. 206; *Winter* v. *Innes*, 4 M. & Cr. 101.

(*e*) *Bedford* v. *Deakin*, 2 B. & A. 210; *Jacomb* v. *Harwood*, 2 Ves. S. 265.

(*f*) *Robinson* v. *Wilkinson*, 3 Price, 538.

(*g*) *Evans* v. *Drummond*, 4 Esp. 89; *Reed* v. *White*, 5 ib. 122.

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old firm, may not unfairly be inferred to have discharged the old firm. If a jury finds that he has done so, the Court will not disturb the verdict (*h*); and if the question arises before a Judge, *e.g.*, in bankruptcy or in the administration of the estate of a deceased partner, the Court will consider all the circumstances of the case, and will infer a discharge if, upon the whole, justice to all parties so requires (*i*). But the small number of cases in which relief has been refused, compared with those in which it has been granted, shows that the leaning of the Court is strongly in favour of the creditor.

(b.) Of the effect of merger and judgment recovered.

Merger of one security in another.

Having now examined the mode in which a partner may be discharged from liability, by reason of a substitution of some other person in his place with the creditor's assent, it is necessary to advert to a doctrine by which a partner occasionally finds himself discharged, simply because his creditor has obtained a security of a higher nature than that which he previously possessed.

Bills, &c., create no merger.

If a person solely indebted enters into partnership with another, and the two give a joint note or bill for the debt of the first, and the note or bill is not paid, the creditor is not precluded from demanding payment from his original debtor (*k*), unless it can be shown that the bill or note was taken in satisfaction of the original demand (*l*). So, if two partners are indebted on the partnership account, and one of them gives a bill or note for the debt, and that bill or note is dishonoured, the creditor who took it will not be precluded from having recourse to both partners for payment (*m*), unless it can be

(*h*) *Hart* v. *Alexander*, 2 M. & W. 484.

(*i*) *Ex parte Kendall*, 17 Ves. 522-5; *Oakeley* v. *Pasheller*, 4 Cl. & Fin. 207; *Wilson* v. *Lloyd*, 16 Eq. 60; *Brown* v. *Gordon*, 16 Beav. 302.

(*k*) *Ex parte Seddon*, 2 Cox, 49; *Ex parte Lobb*, 7 Ves. 592; *Ex parte Meinertzhagen*, 3 Deac. 101; *Ex parte Hay*, 15 Ves. 4; *Ex parte Kedie*, 2 D. & C. 321.

(*l*) As in *Ex parte Whitmore*, 3 Deac. 365; *Ex parte Kirby*, Buck, 511; *Ex parte Jackson*, 2 M. D. & D. 146.

(*m*) *Keay* v. *Fenwick*, 1 C. P. D. 745; *Bottomley* v. *Nuttall*, 5 C. B. N. S. 122; *Whitwell* v. *Perrin*, 4 C. B. N. S. 412; *Ex parte Hodgkinson*, 19 Ves. 291. See, too, *Ex parte Raleigh*, 3 M. & A. 670; *Bedford* v. *Deakin*, 2 B. & A. 210, noticed *ante*, p. 244.

shown that he intended to substitute the liability of the one for the joint liability of the two (*u*).

Securities of a higher nature do.

But when a creditor obtains from his debtor a security of a higher nature than he had before, and does not take care to accept it as a collateral security (*o*), the original debt is merged in the higher security, and can no longer be made the foundation of an action, or of proof in bankruptcy (*p*); and this doctrine is as much applicable to joint as to several obligations. And there is no mean authority for saying that if two parties are jointly indebted by simple contract, and one of them gives his bond for payment of the debt, the joint debt is at an end (*q*); but there are recent decisions to the contrary (*r*), and the question cannot be considered as yet settled. If a joint creditor obtains judgment against one of the partners only, he loses his remedy against the others even if not known to him (*s*). But this rule does not apply when the other partners are abroad, and cannot therefore be sued here with effect (*t*). If one partner only is sued, and judgment is given for him, the creditor is not precluded from afterwards suing the others, unless the first action failed for a reason which applies equally to the second (*u*).

Judgment recovered.

It has been already seen that a judgment recovered against continuing partners and an incoming partner is a defence to an

(*n*) As the jury found was the case in *Evans* v. *Drummond*, 4 Esp. 89, and *Reed* v. *White*, 5 ib. 122. Compare the cases in the last note.

(*o*) As in *Ex parte Hughes*, 4 Ch. D. 34, note.

(*p*) *Ex parte Oriental Financial Corporation*, 4 Ch. D. 33; *Higgen's case*, 6 Co. 44 *b*; *Owen* v. *Homan*, 3 Mc. & G. 378; *Price* v. *Moulton*, 10 C. B. 561; *Shack* v. *Anthony*, 1 M. & S. 573. A judgment on a covenant in a mortgage does not affect the right of the mortgagee to foreclose; *Popple* v. *Sylvester*, 22 Ch. D. 98; *Ex parte Fewings*, 25 Ch. D. 338.

(*q*) *Basset* v. *Wood*, 11 Vin. Ab. Exting. B. 8; and see *Owen* v. *Homan*, 3 Mc. & G. 407; *Ex parte Hernaman*, 12 Jur. 642, and 17 L. J. Bk. 17.

(*r*) *Sharpe* v. *Gibbs*, 16 C. B. N. S. 527; *Ansell* v. *Baker*, 15 Q. B. 20; and *infra*, note (*c*).

(*s*) *Kendall* v. *Hamilton*, 4 App. Ca. 504; *King* v. *Hoare*, 13 M. & W. 494; *Ex parte Higgins*, 3 De G. & J. 33. See as to dormant partners, *Cambefort* v. *Chapman*, 19 Q. B. D. 229, noticed in the addenda. In *Baddeley* v. *Consolidated Bank*, 34 Ch. D. 536, the surety had not recovered judgment, and this rule did not apply. A colonial judgment creates no merger, *Bank of Australasia* v. *Nias*, 16 Q. B. 717.

(*t*) See 19 & 20 Vict. c. 97, § 11; *Ex parte Waterfall*, 4 De G. & S. 199.

(*u*) *Phillips* v. *Ward*, 2 Hurlst. & C. 717.

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action against a retired partner who might have been sued with the continuing partners in the first instance (*x*).

Merger of joint and several obligations.

With respect to obligations which are joint as well as several, there is more difficulty. A joint and several obligation, arising *ex delicto*, is extinguished by a judgment recovered against any one of the persons obliged (*y*); but, as regards joint and several obligations arising *ex contractu*, although a joint judgment against all the persons obliged extinguishes the separate liability of each, for *nemo debet bis vexari pro eâdem causâ*, yet a judgment obtained against one of them only does not extinguish the separate liability of the others (*z*). In order that this effect may be produced the judgment must be satisfied (*a*). As regards joint and several liabilities arising from breaches of trust, a joint judgment does not preclude proof in bankruptcy against the separate estates of the judgment debtors (*b*).

Further, if several persons are jointly liable, and one of them afterwards gives a separate collateral security on which judgment is recovered against him, this will not merge the prior joint liability (*c*).

Effect of doctrines of merger on securities for future advances.

The rule that a bond or judgment merges any simple contract debt in respect of which it may have been given or obtained, only applies if the simple contract debt existed first in order of time, and if the specialty creditor is the same as the simple contract creditor. So that if a bond is given or a judgment is obtained (under a warrant of attorney) as a security for *future* advances (*d*); or if a simple contract debtor gives a bond or

(*x*) *Scarfe* v. *Jardine*, 7 App. Ca. 345, *ante*, pp. 46 and 197. See also *Cambefort* v. *Chapman*, 19 Q. B. D. 229, noticed in the addenda.

(*y*) *Brinsmead* v. *Harrison*, L. R. 6 C. P. 584, aff. 7 ib. 547; *Brown* v. *Wootton*, Cro. Jac. 73; *Buckland* v. *Johnson*, 15 C. B. 145; and see, as to the plea of another suit depending, *Boyce* v. *Douglas*, 1 Camp. 61.

(*z*) *Ex parte Christie*, Mon. & Bl. 352. See, also, *Ansell* v. *Baker*, 15 Q. B. 20.

(*a*) *Higgen's case*, 6 Co. 46 *a*; *King* v. *Hoare*, 13 M. & W. 494; and see *Drake* v. *Mitchell*, 3 East, 251.

(*b*) *Re Davison*, 13 Q. B. D. 50.

(*c*) *Drake* v. *Mitchell*, 3 East, 251. See, too, *Re Clarkes*, 2 Jo. & Lat. 212; *Ex parte Bate*, 3 Deac. 358. Compare *Cambefort* v. *Chapman*, 19 Q. B. D. 229, noticed in the addenda.

(*d*) *Holmes* v. *Bell*, 3 Man. & Gr. 213, and the note there.

confesses a judgment to a trustee for his creditor (*e*), in neither of these cases will there be any merger.

Estates of deceased partners.

It must also be borne in mind that as regards the liability of the estate of a deceased partner, at law when a partner died his liability on contracts survived to his copartner, who alone could be sued in respect of them. Hence a judgment recovered against the surviving members of a firm does not preclude the judgment creditor from obtaining payment of his original debt from the estate of the deceased partner in equity (*f*); nor does proof against his estate afford a defence to an action against the surviving partners (*g*).

Merger not an extinction of the debt.

Further, it is to be observed that merger does not, properly speaking, extinguish a debt; for, notwithstanding the fact that a debt is merged in a higher security, the merged debt is sufficient to support an adjudication of bankruptcy against the debtor (*h*).

Proof in bankruptcy.

Again, proof in bankruptcy against the estate of one partner in respect of a partnership debt does not preclude the proving creditor from afterwards suing the solvent partners, and recovering from them what he may have failed to obtain in the bankruptcy (*i*).

4. *Lapse of Time.*

Statutes of Limitation.

By a number of well-known enactments, usually referred to as the Statutes of Limitation, a certain definite time has been prescribed, within which, if at all, a person having a demand against another must enforce it. These statutes apply as well to partners as to other persons, and it becomes, therefore, necessary to advert to them in the present work.

The principal statutes are the following (*k*):—21 Jac. 1,

(*e*) *Bell* v. *Banks*, 3 Man. & Gr. 258. In such a case equity would probably follow the law, *ut res magis valeat quam pereat.*

(*f*) *Jacomb* v. *Harwood*, 2 Ves. S. 265; *Liverpool Borough Bank* v. *Walker*, 4 De G. & J. 24. See, also, *Rawlins* v. *Wickham*, 3 De G. & J. 304, *ante*, pp. 195, 250.

(*g*) *Re Hodgson*, 31 Ch. D. 177.

(*h*) *Re Davison*, 13 Q. B. D. 50; *Re Griffiths*, 3 De G. M. & G. 174, and the cases there cited.

(*i*) *Keay* v. *Fenwick*, 1 C. P. D. 745; *Whitwell* v. *Perrin*, 4 C. B. N. S. 412; *Bottomley* v. *Nuttall*, 5 C. B. N. S. 122.

(*k*) The principal act relating to Ireland is 16 & 17 Vict. c. 113. See § 20.

c. 16; 4 & 5 Anne, c. 16; 3 & 4 Wm. 4, c. 27; 3 & 4 Wm. 4, c. 42; 19 & 20 Vict. c. 97; 37 & 38 Vict. c. 57.

Times limited for bringing actions.

Neglecting those provisions of the Statutes of Limitation, which are of little importance to partners, the times prescribed for the prosecution of actions are as follows:—

Twelve years.

Twelve years for the recovery of legacies, of rent, of money charged on lands, of money due on judgments, bonds, and mortgages, and for the redemption of mortgages (3 & 4 Wm. 4, c. 27, §§ 28 and 40; 3 & 4 Wm. 4, c. 42; 37 & 38 Vict. c. 57).

Six years.

Six years for the recovery of arrears of rent, and of interest on money charged on land (3 & 4 Wm. 4, c. 27, §§ 41, 42); and for the recovery of seamen's wages (4 & 5 Anne, c. 16, § 17); and of money due on bills of exchange, promissory notes, or in respect of any other contract which is not under seal (21 Jac. 1, c. 16, § 3); and of money due on awards where the submission is not under seal (3 & 4 Wm. 4, c. 42, § 3); and for the institution of actions or suits for an account (21 Jac. 1. c. 16, § 3, and 19 & 20 Vict. c. 97, § 9).

Four years.

Four years for the recovery of damages in respect of an assault, battery, or false imprisonment (21 Jac. 1, c. 16, § 3).

Two years.

Two years for the recovery of damages for words of themselves defamatory (21 Jac. 1, c. 16, § 3); and for the recovery of penalties, damages, or sums given by statute to the party grieved (3 & 4 Wm. 4, c. 42).

Further time.

There are provisions extending these periods in favour of persons who, when their right to sue accrues, are within the age of twenty-one, under the disability of coverture, or of unsound mind (*l*); and also in favour of those whose demands are against persons beyond the seas (*m*). But the absence beyond the seas of one of several joint debtors does not now, as it did formerly, enlarge the time for suing the others (*n*).

(*l*) 21 Jac. 1, c. 16, § 7; 3 & 4 Wm. 4, c. 42, § 4; 3 & 4 Wm. 4, c. 27, § 16, &c.; 37 & 38 Vict. c. 57, § 3. The imprisonment or absence beyond the seas of a creditor does not now enlarge his time for suing, 19 & 20 Vict. c. 97, § 10, *Cornill* v. *Hudson*, 8 E. & B. 429; *Pardo* v. *Bingham*, 4 Ch. 735. The absence beyond the seas of one of several joint creditors did not enlarge their time for suing under the old law *Perry* v. *Jackson*, 4 T. R. 516.

(*m*) 4 & 5 Anne, c. 16, § 19, and 3 & 4 Wm. 4, c. 42, § 4.

(*n*) 19 & 20 Vict. c. 97, § 11. See, as to what is beyond the seas, § 12, and as to the old law, *Fannin* v. *Anderson*, 7 Q. B. 811; *Towns* v. *Mead*, 16 C. B. 123.

Account between merchants.

By the statute of James, actions "for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants," were excepted from limitation, but this exception no longer exists (*o*); and actions for an account, or for not accounting, must be brought within six years (*p*).

General rules applicable to the Statutes of Limitation.

In applying the Statutes of Limitation to any particular case, it is important to bear in mind one or two principles applicable to them all.

Foreign debts.

1. Although a debt may have been contracted abroad, any person who attempts to enforce it in this country must do so within the time limited by the English statutes; for it is by them, and not by the law of the place where the debt was contracted, that English courts are governed in a matter of this description (*q*).

Continuous running of time.

2. When once time has begun to run, no subsequent disability or inability to sue stops it (*r*): except where a defendant dies and there is no representative to sue (*s*).

When time begins to run.

3. Time begins to run from the moment the right to sue arises (*t*); but in a case of concealed fraud, from the moment

(*o*) 19 & 20 Vict. c. 97, § 9.

(*p*) See 19 & 20 Vict. c. 97, § 9, and 21 Jac. 1, c. 16, s. 3. This branch of the subject will be examined more at length in that part of the work which treats of accounts between partners. The principal cases on the exception relating to merchants' accounts are, *Inglis* v. *Haigh*, 8 M. & W. 769; *Cottam* v. *Partridge*, 4 Man. & Gr. 271; *Robinson* v. *Alexander*, 8 Bli. N. S. 352; *Forbes* v. *Skelton*, 8 Sim. 335. See *Webber* v. *Tyrill*, 2 Wms. Saund. 124, and the note there.

(*q*) See *The British Linen Co.* v. *Drummond*, 10 B. & C. 903; *Huber* v. *Steiner*, 2 Bing. N. C. 202.

(*r*) See *Rhodes* v. *Smethurst*, 4 M. & W. 42, and 6 ib. 351; *Goodall* v. *Skerratt*, 3 Drew. 216; *Wych* v. *East India Co.*, 3 P. W. 309. There is, however, an exception to this rule, where an action brought in time becomes abated, and another is afterwards commenced. See *Sturyis* v. *Darrell*, 4 H. & N. 622, and 6 ib. 120. See, as to how far merely landing at an English port is a return, so as to make time begin to run, *Gregory* v. *Hurrill*, 5 B. & C. 341, and 1 Bing. 324.

(*s*) *Swindell* v. *Bulkeley*, 18 Q. B. D. 250.

(*t*) This was so at law, even in cases of concealed fraud; *The Imperial Gas Co.* v. *The London Gas Co.*, 10 Ex. 39; *Hunter* v. *Gibbons*, 1 H. & N. 459. See *Bree* v. *Holbech*, Dougl. 655. But see now, Jud. Act, 1873, § 24; Jud. Act, 1875, § 10, cl. 11, and the cases in the next note.

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when the person acquiring the right first becomes aware of it (*u*).

Cases of trust.

4. The claim of a *cestui que trust* against his trustee in respect of a breach of an express trust is not barred by mere lapse of time (*x*); although it is otherwise if the trust is only constructive (*y*). In consequence of the first branch of this rule, if a partner dies, having made a will containing a trust for payment of his debts, his estate will be liable to the demands of creditors of the firm much longer than if there were no such trust in the will (*z*).

Revival of debts.

5. After time has begun to run, and even after it has run, a debt may be revived by a written promise to pay it; or by an acknowledgment in writing, from which a promise to pay it may be inferred (*a*); or by a payment on account of the principal or interest due (*b*), from which a similar promise may be implied (*c*).

Application of these rules to partners.

In order that the application of these general rules to partners may be fully understood, it becomes necessary to consider the extent to which one partner can affect the other by acknowledging and promising to pay, or by making payments on account of a partnership debt. The old law upon this subject

Old law.

was materially altered by the Mercantile Law Amendment Act,

(*u*) *Gibbs* v. *Guild*, 9 Q. B. D. 59; *South Sea Co.* v. *Wymondsell*, 3 P. W. 143; *Blair* v. *Bromley*, 2 Ph. 354, and 5 Ha. 542; *Petre* v. *Petre*, 1 Drew. 397. The fraud in *Urquhart* v. *Macpherson*, 3 App. Ca. 838, was not alleged to have been concealed.

(*x*) See Jud. Act, 1875, § 10, cl. 2.

(*y*) *Banner* v. *Berridge*, 18 Ch. D. 254; *Beckford* v. *Wade*, 17 Ves. 87.

(*z*) See *Ault* v. *Goodrich*, 4 Russ. 430; *Braithwaite* v. *Britain*, 1 Keen, 206; *Brown* v. *Gordon*, 16 Beav. 302. See, also, *Pare* v. *Clegg*, 29 Beav. 589, where a society's property was on its dissolution subjected to a trust for the payment of its creditors.

(*a*) See *Tanner* v. *Smart*, 6 B. & C. 603. The cases upon the question, what is a sufficient acknowledgment? are innumerable. The following are selected for reference:—*Green* v. *Humphreys*, 26 Ch. D. 474; *Mitchell's claim*, 6 Ch. 822, a letter without prejudice; *Bourdin* v. *Greenwood*, 13 Eq. 281, a mem. on a prom. note; *Bush* v. *Martin*, 2 H. & C. 311, entry by a committee in their minutes; letter asking for an account, or admitting a liability to account; *Banner* v. *Berridge*, 18 Ch. D. 254; *Quinecy* v. *Sharpe*, 1 Ex. D. 72; *Prance* v. *Sympson*, Kay, 678. A letter from one partner to another will not avail a creditor whose debt is mentioned and recognised in it, *Re Hindmarsh*, 1 Dr. & Sm. 129.

(*b*) See *Whitcomb* v. *Whiting*, 1 Smith, L. C., and the note there.

(*c*) See *Morgan* v. *Rowlands*, L. R. 7 Q. B. 493.

but in order to understand its provisions a short allusion to the law as it previously stood is necessary. Prior to the act in question, it was held that :—

Admissions by one partner.

1. An admission by one of several joint debtors that their debt was still due, was not sufficient to take the case out of the statutes as against the others; nor even as against the person making the admission, unless it were in writing signed by him (*d*).

Promise by one partner.

2. An actual promise by one of several joint debtors that the debt should be paid, was of no validity against any person except him who made it, and not even against him unless it were in writing and signed by him (*e*).

Payment by one partner.

3. But as regards payment (*f*), it was held that if one of several joint debtors paid any money on account of the principal or interest due from them all, such payment was sufficient to take the debt out of the statute, not only as against the person making the payment, but as against all the others jointly liable with him (*g*). But even before the Mercantile

(*d*) 9 Geo. 4, c. 14, § 1; *Hyde* v. *Johnson*, 2 Bing. N. C. 777; *Bristow* v. *Maxwell*, 11 Ir. Law Rep. 461. It was otherwise before 9 Geo. 4, c. 14. See *Manderston* v. *Robertson*, 4 Man. & Ry. 440. As to admissions by one partner, see *ante*, p. 128.

(*e*) See the last note.

(*f*) As to payment by bills, see *Gowan* v. *Forster*, 3 B. & Ad. 507; *Irving* v. *Veitch*, 3 M. & W. 90; *Turney* v. *Dodwell*, 3 E. & B. 136.

(*g*) See *Whitcomb* v. *Whiting*, 2 Dougl. 652, and 1 Sm. L. C.; 9 Geo. 4, c. 14, § 1. The doctrine that payment by one partner took a debt out of the statute as against all, was generally rested on the ground that the partner making the payment acted virtually as the agent for the rest. But the right of one of several co-debtors (whether they are partners or not) to make a payment on account of the joint debt, is not derived from any authority conferred by the other debtors, for they have no right to prevent their co-debtor from relieving himself from a liability to which he is subject as much as they. Moreover, admitting that the doctrines of agency are applicable to payments made by one of several co-debtors, it is impossible to justify, on that ground, the decisions which have just been noticed. They were all, it is said, based upon this, that a part payment is evidence of a *new* promise to pay more (*Bateman* v. *Pinder*, 3 Q. B. 574). But upon what principle can it be held, that after a partnership is dissolved, one partner has any implied authority from his late partners, to bind them by a fresh promise to pay an old debt? Assuming the debt to be already barred, the question can admit of no satisfactory answer, and yet the decisions went the length of binding the firm even in this extreme case. See the excellent judgment in *Bell* v. *Morrison*, 1 Peters, 351, set out in Story on Part. § 324, note.

Law Amendment Act payment by a surviving partner did not prejudice the estate of a deceased partner (*h*) any more than a payment by the executors of the deceased prejudiced the partners who survived (*i*); for the executors of a deceased partner are not liable jointly with the surviving partners. But if one of the surviving partners was an executor of the deceased, then a question of a different nature arose, turning not only on the effect of the payment as such, but on whether it was made by the survivors as surviving partners only, or as to one of them in his character of executor also (*k*).

Liability in equity of estate of deceased partner.

The effect of the Statutes of Limitation upon suits in equity against the executors of a deceased partner was not well settled. In *Winter* v. *Innes* (*l*) Lord Cottenham expressed a doubt whether the executors could set up the statute where the surviving partner continued liable and had a right of contribution against them: but in *Way* v. *Bassett* (*m*) the statute was successfully relied upon as a defence by the executors of a deceased partner, although the surviving partners had by various payments kept the debt alive as against themselves. The law now is in accordance with the latter decision (*n*).

Way *v.* Bassett.

Alterations introduced by 19 & 20 Vict. c. 97.

By the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, it is enacted as follows:—

§ 13. In reference to the provisions of the acts of 9 Geo. 4, c. 14, §§ 1 and 8, and 16 & 17 Vict. c. 113, §§ 24 and 27 (Irish), an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorised to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

Payments by one of several co-debtors.

§ 14. In reference to the provisions of the acts 21 Jac. 1, c. 16, § 3; 3 & 4 Wm. 4, c. 42, § 3, and 16 and 17 Vict. c. 113, § 20 (Irish), when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any co-contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be charge-

(*h*) *Atkins* v. *Tredgold*, 2 B. & C. 23.

(*i*) *Slater* v. *Lawson*, 1 B. & Ad. 396.

(*k*) See *Braithwaite* v. *Britain*, 1 Keen, 206, where the payment prevailed; *Way* v. *Bassett*, 5 Ha. 55; *Brown* v. *Gordon*, 16 Beav. 302, where it did not. See, further, *Griffin* v. *Ashby*, 2 Car. & Kir. 139; *Atkins* v. *Tredgold*, 2 B. & C. 23.

(*l*) 4 M. & Cr. 101.

(*m*) 5 Ha. 55.

(*n*) 19 & 20 Vict. c. 97, § 14, *infra*.

able in respect or by reason only (*o*) of payment of any principal, interest or other money, by any other or others of such co-contractors, or co-debtors, executors or administrators.

Effect of above statute on partners.

The above statute, it will be observed, has materially altered the law as regards the effect of acknowledgments and part payments. An acknowledgment by an agent being now sufficient to affect his principal, acknowledgment by one partner will, it is apprehended, be regarded as an acknowledgment by the firm: and notwithstanding § 14, a part-payment by a partner will probably be regarded as a part-payment by the firm (*p*).

But after a dissolution a part-payment by a continuing or a surviving partner will not prevent a retired partner (*q*), or the executors of a deceased partner (*r*), from availing themselves of the statute; and the same is true of an acknowledgment (*s*).

(*o*) See, as to this word, *Cockrill* v. *Sparkes*, 1 H. & C. 699.

(*p*) See *Goodwin* v. *Parton*, 42 L. T. 568; *Watson* v. *Woodman*, 20 Eq. p. 730.

(*q*) Ibid. 721.

(*r*) *Thompson* v. *Waithman*, 3 Drew. 628, in which the surviving partner was the sole executor of the deceased. In this case, § 14 of the act in question was treated as having a retrospective operation, and as destroying the effect of a payment made before the act passed. This, however, was a mistake. In every other respect the case is good law. As to the non-retrospective operation of § 14 of the statute, see *Jackson* v. *Woolley*, 8 E. & B. 778; *Flood* v. *Patterson*, 29 Beav. 295.

(*s*) If in any case it could be shown that a continuing or surviving partner was in point of fact authorised to act for the late partner or his executors in making acknowledgments or payments, the case would be different.

CHAPTER III.

OF ACTIONS BETWEEN PARTNERS AND NON-PARTNERS.

Bk. II. Chap. 3.

General observations.

In order to complete the subjects discussed in the preceding chapters it is necessary to examine the remedies by which rights and obligations between partners and non-partners can be enforced.

It is unnecessary to dwell upon criminal prosecutions, for although partners may be prosecutors or prosecuted in respect of criminal offences, the fact that they are partners has little, if any, effect on their position in a criminal point of view.

The remedies which alone are of sufficient importance to require consideration in a treatise like the present are actions, defences by way of set-off, proceedings to enforce judgments, and proceedings in bankruptcy. The subject of bankruptcy will be discussed hereafter, and the present chapter will therefore be confined to actions, set-off, and execution.

SECTION I.—ACTIONS BY AND AGAINST PARTNERS.

General observations.

The Judicature Acts, 1873 and 1875, and the rules of the Supreme Court, 1883, have materially altered and improved legal proceedings by and against partnerships and unincorporated companies.

1. There is now no distinction between legal and equitable rules as regards parties to sue and be sued (*a*).

2. No action can be defeated by reason of the misjoinder or non-joinder of parties (*b*); and pleas in abatement are abolished (*c*). If too many or too few persons join as plain-

(*a*) See Supreme Court Rules, 1883, Order xvi.

(*b*) Ord. xvi. r. 11.

(*c*) Ord. xxi. r. 20.

tiffs, and the defendant can show that he is thereby prejudiced, he can apply to have the improper plaintiffs struck out, or the proper plaintiffs joined, as the case may be (*d*).

3. All persons may be joined as plaintiffs, or as defendants, in or against whom the right to any relief claimed is alleged to exist, whether jointly or severally, or in the alternative (*e*).

4. A plaintiff may at his option join, as parties to the same action, all or any of the persons severally, or jointly and severally liable on any one contract, including parties to bills of exchange and promissory notes (*f*).

5. Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant (*g*), provided no inconvenience is thereby occasioned (*h*).

6. Parties required by a defendant to be joined for his indemnity or relief by way of contribution may be brought before the Court (*i*).

7. Where there are numerous parties having the same interest in one action, one or more of them may sue or be sued on behalf of all (*k*).

8. Any two or more persons claiming or being liable as copartners may sue or be sued in the names of the firms of which they were members when the cause of action accrued (*l*); and provision is made for the discovery of the individuals so suing or being sued (*m*).

Actions in the mercantile name.

With reference to this last rule, it is to be observed that the firm's name, when used in any action, is merely a convenient method of expressing the names of those who constituted the firm when the cause of action accrued. The rule does not incorporate the firm (*n*); so that if A. is a creditor of a firm, B., C. and D., and D. retires and E. takes his place and the name of the firm continues unchanged, A. cannot maintain an

(*d*) Ord. xvi. r. 11.
(*e*) Ord. xvi. rr. 1 and 4.
(*f*) Ord. xvi. r. 6.
(*g*) Ord. xviii. r. 6.
(*h*) Ib. r. 7.
(*i*) Ord. xvi. r. 48, *et seq.* See *Birmingham Land Co.* v. *L. & N. W. Rail. Co.*, 34 Ch. D. 261.
(*k*) Ord. xvi. r. 9.
(*l*) Ib. rr. 14 and 15.
(*m*) Ord. xvi. rr. 14 and 15, and Ord. vii. r. 2. See, as to the old law, *Wolf* v. *City Steam Boat Co.*, 7 C. B. 103.
(*n*) See *per* James, L. J., in *Ex parte Blain*, 12 Ch. D. 533. As to the Scotch law from which the rule was taken, see *Bullock* v. *Caird*, L. R. 10 Q. B. 276.

action against B., C. and E. in the name of the firm, unless B., C. and E. have become or are content to be treated as his debtors. In the case supposed, an action against the firm would mean an action against B., C. and D., *i.e.*, A.'s real debtors.

Where there have been no changes in the firm.

Where there have been no changes amongst the members of a firm since the cause of action accrued, there is no difficulty in following the rules. The writ may be served either upon any one or more of the partners, or at the principal place of business of the firm, upon any person having the control or management of the partnership business there (*o*). Appearances are entered by the partners in their own names, but subsequent proceedings continue in the name of the firm (*p*). If all the members of the firm have properly appeared, judgment may be entered up against the firm (*q*), but not otherwise (*r*).

Where there have been changes.

Where changes have occurred amongst the members of the firm since the cause of action accrued little, if any, advantage is derived from using the name of the firm. If an action is brought against a firm, which the plaintiff knows has been dissolved before the commencement of the action, the writ must be served upon all the persons sought to be made liable (*s*). If, as sometimes happens, the plaintiff sues a firm and obtains judgment against it, without having discovered that any changes have occurred in it since the cause of action accrued, he may find himself in a difficulty when he seeks to enforce his judgment. In such a case it may well happen that the person against whom he seeks to enforce it is not one of those mentioned in Ord. XLII., r. 10, and is, in fact, not liable to execution without further proceedings, if at all (*t*).

A debt due from a firm under a judgment recovered against

(*o*) Ord. ix. r. 6. See, as to foreign firms, *Pollexfen* v. *Sibson*, 16 Q. B. D. 792; *Baillie* v. *Goodwin*, 33 Ch. D. 604; and as to lunatics, *Fore Street Warehouse Co.* v. *Durrant & Co.*, 10 Q. B. D. 471.

(*p*) Ord. xii. r. 15.

(*q*) Ib. *Jackson* v. *Litchfield*, 8 Q. B. D. 474.

(*r*) *Adam* v. *Townend*, 14 Q. B. D. 103; *Jackson* v. *Litchfield*, 8 Q. B. D. 474; *Munster* v. *Cox*, 10 App. Ca. 680, affirming *Munster* v. *Railton*, 11 Q. B. D. 435. As to execution, see *infra*, § 3.

(*s*) Ord. xvi. r. 14.

(*t*) See *Munster* v. *Cox*, 10 App. Ca. 680, and *infra*, § 3, as to execution.

it in its mercantile name cannot be attached under the garnishee orders (*u*).

It frequently happens that there are reasons which prevent the joinder as plaintiffs of all who *primâ facie* ought to be joined: in such a case those who cannot be so joined may be made defendants. Thus if a firm has a cause of action, and one member has improperly released it, the other members can nevertheless maintain the action, joining him as a defendant, so that justice may be done both to the plaintiffs and to their opponents (*x*). Again, there appears to be no reason why an action should not now be maintained for the recovery of a debt due from one partner to the firm (*y*); nor why, if two firms have a common partner, an action should not be maintained by one firm against the other; not, perhaps, in their mercantile names, but by those members of one firm which are not common to both against the members of the other firm; *e.g.*, if there are two firms, A., B. and C. and A., D. and E. an action may, it is conceived, be now maintained by A., B. and C. against D. and E. or by B. and C. against A., D. and E. or *vice versâ* (*z*).

Two firms with common partner.

As a general principle, what a person has no right to do himself, he cannot acquire a right to do by associating others with him (*a*). Thus, it being a rule that a trustee cannot claim from his *cestui que trust* compensation for trouble, or loss of time in the execution of the trust, it has been held that if one

Defences to actions by partners founded on the conduct of one of them

(*u*) *Walker* v. *Rooke*, 6 Q. B. D. 631.

(*x*) See the cases in the next note.

(*y*) *Piercy* v. *Fynney*, 12 Eq. 69; *Taylor* v. *Midland Rail. Co.*, 28 Beav. 287, and 8 H. L. C. 751, show that suits in equity would lie in these cases in aid of legal rights. See, also, *Luke* v. *South Kensington Hotel Co.*, 11 Ch. D. 121; *Williamson* v. *Barbour*, 9 Ch. D. 536, *per* Jessel, M. R.

(*z*) Before the Judicature Acts such actions could not be maintained, *Bosanquet* v. *Wray*, 6 Taunt. 598; 1 Wms. Saund. 291 *h*. But suits in equity could. See the cases in the last note. See as to the non-application of this rule at law to companies, *Bosanquet* v. *Woodford*, 5 Q. B. 310. As to estimating damages sustained by one firm by reason of being prevented from completing a contract made with another firm, some members being common to both, see *Waters* v. *Towers*, 8 Ex. 401.

(*a*) See, in addition to the cases cited *infra*, *ante*, pp. 116, 117, and *Salomons* v. *Nissen*, 2 T. R. 674

of a firm of solicitors is a trustee, and the firm acts as solicitors in the matter of the trust, the firm cannot claim payment for its services; the disability of one of its members thus extending to them all (*b*). So if one member of a firm is guilty of fraud in entering into a contract on behalf of the firm, his fraud may be relied on as a defence to an action on the contract brought by him and his co-partners; for their innocence does not purge his guilt (*c*). So if one partner resident abroad sells partnership goods, and he knows they are to be smuggled into this country, and he is privy to their being so smuggled, then although his co-partners are innocent, the firm cannot recover the price of such goods (*d*). So if one of several partners draws a bill in his own name, and the bill is accepted upon condition that he will provide for it when due, he cannot, by indorsing that bill to the firm to which he belongs, entitle himself and his co-partners to sue upon it (*e*).

Astley *v.* Johnson.

In *Astley* v. *Johnson*, one of three partners purchased a bill in the partnership name, and undertook to pay for it at the end of a month. He remitted the bill to his co-partners in England, and they sued upon it. The bill, however, had not been paid for as agreed, and it was held that the plaintiffs were not entitled to recover, and were in no better position without their co-partner than they would have been had he been a co-plaintiff in the action (*f*).

Surviving partners prejudiced by conduct of deceased partner.

Ex parte Bell.

In such cases as these the inability of the firm to sue is not removed by the death of the partner who has created the inability. Thus in *Ex parte Bell* (*g*), one of a firm advanced money of the firm to a stranger for an illegal purpose; and it was held, after the death of the partner who advanced the

(*b*) See *Broughton* v. *Broughton*, 2 Sm. & G. 422, and 5 De G. M. & G. 160; *Christophers* v. *White*, 10 Beav. 523; *Collins* v. *Carey*, 2 ib. 128; *Matthison* v. *Clark*, 3 Drew. 3. See the exception in cases of litigation, *Cradock* v. *Piper*, 1 Mc. & G. 664, and *Re Corsellis*, 34 Ch. D. 675.

(*c*) See *Kilby* v. *Wilson*, Ry. & Mood. 178.

(*d*) *Biggs* v. *Lawrence*, 3 T. R. 454.

(*e*) *Sparrow* v. *Chisman*, 9 B. & C. 241; and see *Richmond* v. *Heapy*, 1 Stark. 202.

(*f*) *Astley* v. *Johnson*, 5 H. & N. 137.

(*g*) 1 M. & S. 751. See, also, *Brandon* v. *Scott*, 7 E. & B. 237, and compare *Innes* v. *Stephenson*, 1 Moo & Rob. 147.

money, that the survivors could not recover it from the person to whom it was lent. So if a firm has become bankrupt, its trustee is in general in no better position than the partners themselves would have been in, and is therefore frequently liable to be defeated on similar grounds (*h*). But the trustee of a bankrupt partner can disaffirm and avoid such of his acts as are fraudulent as against his creditors, and consequently acts of this nature afford no defence to an action by the trustee and the solvent partner. Thus in *Heilbut* v. *Nevill* (*i*), a solvent partner and the assignees of a bankrupt partner successfully maintained an action for a bill of the firm, given by the bankrupt to a creditor of his own, under circumstances which amounted to a fraudulent preference.

Heilbut *v.* Nevill.

Frauds by one partner on the firm.

Owing to the old technical rules relating to the joinder of parties to actions, the principle above discussed was, moreover, applied at law to cases where it produced great injustice; viz., to cases where one partner acted in fraud of his co-partners. For example, where a partner pledged partnership property, and in so doing clearly acted beyond the limits of his authority, still, as *he* could not dispute the validity of his own act, it was held at law that he and his co-partners could not recover the property so pledged (*k*). So although a partner has no right to pay his own separate debt by setting it off against a debt due from his creditor to the firm, yet if he actually agreed that such set-off should be made, and it was made accordingly, it was held at law that he and his co-partners could not afterwards recover the debt due to the firm (*l*). So where a firm of three partners deposited goods upon the terms that they were not to be parted with except on the joint authority of all three partners, and they were nevertheless given up to one of them, it was held at law that the firm could sustain no action for the recovery of the goods (*m*). In such cases, as observed by Lord Tenterden, in *Jones* v. *Yates* (*n*), there is no instance

(*h*) *Jones* v. *Yates*, 9 B. & C. 532.

(*i*) L. R. 4 C. P. 354.

(*k*) *Brownrigg* v. *Rae*, 5 Ex. 489.

(*l*) See *Wallace* v. *Kelsall*, 7 M. & W. 264; *Gordon* v. *Ellis*, 7 Man. & Gr. 607. Compare *Kendal* v. *Wood*, L. R. 6 Ex. 243, where the technical difficulty did not arise.

(*m*) *Brandon* v. *Scott*, 7 E. & B. 234.

(*n*) 9 B. & C. 532, and see *Richmond* v. *Heapy*, 1 Stark. 202.

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"in which a person has been allowed as plaintiff in a court of law to rescind his own act, on the ground that such act was a fraud on some other person; whether the party seeking to do this has sued in his own name only, or jointly with such other person."

In such cases as these, however, relief might have been had in equity (*o*): and it is apprehended that the cases at law above referred to can no longer be relied upon; the Judicature Acts having removed the technical difficulties which led to their decision.

If a partner in collusion with a debtor to the firm gives him a receipt for his debt although no payment or anything equivalent to payment is made, an action for the recovery of the debt is nevertheless maintainable by the firm, *i.e.*, by the partner giving the receipt and his co-partners (*p*). For a receipt does not preclude the person giving it from showing that the money therein expressed to be received, was not in fact received (*q*), nor does it discharge the debt. Again, a right of set-off which might be pleadable to an action brought by one partner, is not pleadable to an action by him and his co-partners (*r*); nor if one partner covenants not to sue for a partnership debt, will this preclude him from joining with his co-partners in an action for the recovery of that debt (*s*). In each of these cases there is only a right of cross action against the one partner; and although such right might be relied on as a defence to an action by him alone, it is held not to affect the firm to which he belongs.

Result of the decisions.

The conclusion to be drawn from the foregoing cases appears to be that the conduct of one partner affords a defence to an action by him and his co-partners, or by them without him, where they are bound by his act, either by adopting and seeking the benefit of it (*t*), or upon the ground that it is on

(*o*) *Piercy* v. *Fynney*, 12 Eq. 69; *Midland Counties Rail. Co.* v. *Taylor*, 8 H. L. C. 751, affirming *Taylor* v. *Midland Counties Rail. Co.*, 28 Beav. 287.

(*p*) *Henderson* v. *Wild*, 2 Camp. 561; *Farrar* v. *Hutchinson*, 9 A. & E. 641.

(*q*) *Skaife* v. *Jackson*, 5 Dow. & Ry. 290, and 3 B. & C. 421.

(*r*) See *infra*, book ii. ch. 3, § 2.

(*s*) See *Walmsley* v. *Cooper*, 11 A. & E. 216.

(*t*) As in *Ex parte Bell*, 1 M. & S. 751; *Broughton* v. *Broughton*, 5 De G. M. & G. 160.

ordinary principles of agency the act of the firm; and binding upon him and his co-partners accordingly. But the cases at law which go further than this cannot, it is submitted, be now relied upon.

Power of one partner to act for the firm.

The power of one partner to act for the firm in legal proceedings, may be conveniently noticed in the present place.

One partner suing in the name of the firm.

A partner may sue in the name of himself and co-partners, without their consent (*u*): but if he sues against their consent, he must indemnify them against the costs (*x*). So, one partner may defend an action brought against the firm, indemnifying the firm against the consequences of so doing, if he acts against the will of the other partners (*y*).

One partner staying proceedings.

But if it is competent for one partner to sue for the firm, it is as competent to any other partner to stay proceedings, or to put an end to the action altogether by means of a release; and although the Court will not allow this to be done by collusion with the defendant, for the purpose of defrauding the other partners of their rights (see *ante*, p. 145), a release will be effectual where there is no fraud in the case.

Harwood v. Edwards.

In *Harwood* v. *Edwards* (*z*), one of three partners, without the knowledge or consent of the other two, brought an action in his name and theirs for the recovery of a debt due to the firm. The other two afterwards agreed with the defendant that proceedings should be stayed; and the Court held that this agreement bound all three; and proceedings were stayed accordingly, although the partner who promoted the action disputed the validity of the agreement, and, by the partnership articles, it had been agreed between the partners, that one

(*u*) *Whitehead* v. *Hughes*, 2 Cr. & M. 318; and see *Harwood* v. *Edwards*, Gow on Part. 65, note, where it was held by Chapple, J., that the action must be considered as brought by all. See below, note (*z*).

(*x*) *Whitehead* v. *Hughes*, 2 Cr. & M. 318.

(*y*) In *Goodman* v. *De Beauvoir*, 12 Jur. 989 and 1037, a solicitor employed by a managing committee to defend a suit, was held authorised to enter an appearance for a member of a provisional committee, who had made the managing committee his agents. See, further, as to the authority of one partner to enter an appearance for his co-partner, *Harrison* v. *Jackson*, 7 T. R. 207; *Morley* v. *Strombom*, 3 Bos. & P. 254; *Goldsmith* v. *Lery*, 4 Taunt. 299. The authority has been doubted in America, see *Hall* v. *Lanning*, 1 Otto, 160.

(*z*) Gow on Part. 65, note.

of them should not give a release without the assent of the others.

Consenting to arbitration.

If an action is brought for the recovery of a debt due to the firm, one of the partners cannot bind the firm by consenting to a judge's order referring all matters in difference between the plaintiffs and the defendant to arbitration (*a*).

Consenting to judgment, &c.

In an action against a firm it has been held that one partner has no authority to bind the firm by consenting to an order for judgment against it (*b*); or by giving a *cognovit* to pay the debt and costs (*c*). But a warrant of attorney executed by one partner in the name of the firm with the consent of the other partners, is not invalid, simply because the others have not executed it (*d*).

Costs.

If in an action costs are ordered to be paid to one partner, payment to another partner is not sufficient (*e*).

Service on one partner.

One partner is not the agent of his co-partner, except as to partnership matters; and if one partner is sued in respect of some private affair of his own, he must be proceeded against like any other individual, and service of writs, &c., must be made accordingly, and they must not be left at the place of business of the firm, to be served on the other partners (*f*). And even in proceedings relating to partnership matters, although service on one partner is sometimes held equivalent to service on all, this is not the case where the service is relied on as the foundation of process of contempt, or of any proceedings of a penal nature (*g*).

(*a*) *Hatton* v. *Royle*, 3 H. & N. 500.

(*b*) *Hambridge* v. *De la Croüée*, 3 C. B. 742. See, also, *Munster* v. *Cox*, 10 App. Ca. 680.

(*c*) *Rathbone* v. *Drakeford*, 4 Moo. & P. 57, and 6 Bing. 375.

(*d*) *Brutton* v. *Burton*, 1 Chitty, 707.

(*e*) *Showler* v. *Stoakes*, 2 Dowl. & L. 3. But as to payment out of money in Court, see the Sup. Ct. Funds Rules, 1886, r. 63.

(*f*) See *Petty* v. *Smith*, 2 Y. & J. 111; *Fairlie* v. *Quin*, 1 Smythe, 189. See as to substituted service, *Leese* v. *Martin*, 13 Eq. 77, and as to delivering a solicitor's bill of costs, *Eggington* v. *Cumberledge*, 1 Ex. 271.

(*g*) *Young* v. *Goodson*, 2 Russ. 255; and see *Moulston* v. *Wire*, 1 Dowl. & L. 527; *Re Holiday*, 9 Dowl. 1020; *Grant* v. *Prosser*, Smith & Batty, 95; *Murray* v. *Moore*, 1 Jo. Ir. Ex. 129; *Nolan* v. *Fitzgerald*, 2 Ir. Com. Law R. 79; *Kitchen* v. *Wilson*, 4 C. B. N. S. 483. In *Leese* v. *Martin*, 13 Eq. 77; *Carrington* v. *Cantillon*, Bunb. 107; and *Coles* v. *Gurney*, 1 Madd. 187, service of a bill on one partner

Having made these general observations, it will be convenient to consider, in the first place, the general rules which apply to actions by and against partners, when there has been no change in the firm between the time when the right sought to be enforced accrued, and the time when proceedings are taken to enforce it; and then to consider how far those rules apply or have to be modified when a change has taken place.

2. *Actions by and against partners where no change in the firm has occurred.*

A. *Actions in respect of legal rights.*

(*a.*) *Actions by the firm.*

Actions ex contractu.

In order to determine who ought to sue on behalf of a firm upon a contract made with it, it is necessary to distinguish between

1. Contracts under seal.
2. Bills of exchange and promissory notes.
3. Other contracts.

1. As regards contracts under seal, the old rule was that if such a contract was entered into with one partner only, he alone could sue upon it; and that if it was entered into with more than one partner, all those with whom it was expressly entered into must sue upon it, and no others could, whatever their interest in its performance might be (*h*). But their joinder will now be of no consequence, unless the defendant is prejudiced by it (*i*).

1. Actions by partners on contracts under seal.

was allowed, the other being abroad; and in ejectment against a firm, service on an acting partner is sufficient, *Doe* v. *Roe*, 9 Dowl. 1039, and in an action against a firm on its promissory note, the order to compute (after judgment by default), need only be served on one of the defendants. *Figgins* v. *Ward*, 2 Cr. & M. 424; *Carter* v. *Southall*, 3 M. & W. 128.

(*h*) See the note to *Cabell* v. *Vaughan*, 1 Saund. 291, *i*; *Metcalf* v. *Rycroft*, 6 M. & S. 75; *Scott* v. *Godwin*, 1 Bos. & P. 67; *Vernon* v. *Jefferys*, 2 Str. 1146.

(*i*) Ord. xvi. r. 11.

Covenant with A. & Co.

It is apprehended that a covenant entered into with A., B. & Co., may be sued upon by the persons who, when the covenant was made, constituted that firm.

2. Actions by partners on bills and notes.

2. As regards bills of exchange and promissory notes. If they have been indorsed in blank any person holding them may sue upon them (*k*).

Blank indorsements.

Special indorsements.

When a bill or note is not indorsed in blank, the proper persons to sue upon it are those named in the instrument as drawers, payees, or indorsees, as the case may be (*l*). Whether they are partners or not is of no consequence; and therefore if a bill is drawn in the name of two persons as if they were partners, they ought both to join in an action on the bill, although one of them has no interest in it (*m*). So it is immaterial whether the bill or note relates to partnership matters or not, for if a debtor to a firm makes his promissory note payable to one of the partners only, such one is the proper person to sue on the note (*n*).

Bills in name of A. & Co.

If a bill is drawn by or in favour of a firm in its commercial name the persons who composed the firm when the bill was drawn, ought to be plaintiffs (*o*). But they can now sue in their mercantile name (*p*).

Bills accepted for honour.

If one partner in his own name accepts a bill drawn on a stranger for his honour, and pays the bill when due out of the funds of the partnership with the consent of his co-partners, the partner who accepted the bill is the proper person to sue the drawee for indemnity (*q*).

3. Actions by

3. With respect to other simple contracts, whether written

(*k*) See *Ord* v. *Portal*, 3 Camp. 239; *Attwood* v. *Rattenbury*, 6 Moore, 579; *Lowe* v. *Copestake*, 3 Car. & P. 300. See, also, *Law* v. *Parnell*, 7 C. B. N. S. 282, in which the manager of a joint-stock bank was held entitled to sue, in his own name, on a bill indorsed in blank and given to him by a customer of the bank on account of advances made by it to him; *Maclell* v. *Kinnear*, 1 Stark. 499, is rendered unimportant by Ord. xvi. rr. 1 and 11.

(*l*) See *Pease* v. *Hirst*, 10 B. & C. 122.

(*m*) *Guidon* v. *Robson*, 2 Camp. 302. Sed *quære* now. See Ord. xvi.

(*n*) *Barden* v. *Howell*, 3 Man. & Gr. 638.

(*o*) *McBirney* v. *Harran*, 5 Ir. Law Rep. 428; *Phelps* v. *Lyle*, 10 A. & E. 113.

(*p*) *Ante*, p. 265.

(*q*) *Driver* v. *Burton*, 17 Q. B. 989.

partners on ordinary contracts.

or verbal, where a contract is entered into with several persons jointly, they should all join in an action upon it (*r*). But if a simple contract, written or verbal, expressed or implied, has been entered into with an agent, it may be sued upon by his principal, even if undisclosed, provided he can show that in point of fact the agent contracted on his behalf (*s*).

All may sue, though not named.

This doctrine is constantly applied in partnership cases; it happens every day that a firm sues on a contract entered into on its behalf by one of its members, and it is not by any means necessary that the person dealing with him should have been aware that the one partner was acting on behalf of himself and other people. The question is, With whom was the contract made in point of law? And the true answer to this question does not by any means entirely depend on the answer to be given to the more simple question, With whom was the contract made in point of fact?

Garrett *v.* Handley.

Thus in *Garrett* v. *Handley* (*t*) all the members of a firm were held entitled to sue on a written guarantee given to one of the partners only, there being evidence to show that the guarantee was intended for the benefit of the firm. So, where a member of a firm of bankers was asked for a loan, and he made it out of the funds of the bank, it was held than an action for the recovery of the money lent was properly brought by all the members of the firm, although the borrower had not requested any loan from the bank (*u*). So, where one partner

(*r*) 1 Wms. Saund. 291 *k*, and 1 Chitty on Plead. 10—15. Formerly, mistakes in this respect were fatal, but see now Ord. xvi. r. 11.

(*s*) See *Phelps* v. *Prothero*, 16 C. B. 370; *Sims* v. *Bond*, 5 B. & Ad. 389. See, also, *Beckham* v. *Drake*, 9 M. & W. 79, and 11 ib. 315, noticed *ante*, p. 178, and *Trueman* v. *Loder*, 11 A. & E. 589, as to suing undisclosed principals on written contracts. Foreign principals, as a rule, do not enter into contracts in this country through agents. The agents here themselves contract as principals, though acting for others. See *Elbinger Actien Gesellschaft* v. *Claye*, L. R. 8 Q. B. 313; *Hutton* v. *Bulloch*, L. R. 8 Q. B. 331, and 9 ib. 572.

(*t*) 4 B. & C. 664. See the same case, 3 B. & C. 462, where an action by the one partner failed. See *Hopkinson* v. *Smith*, 1 Bing. 13, as to actions by attorneys not retained by the defendant.

(*u*) *Alexander* v. *Barker*, 2 Cr. & J. 133; *Sims* v. *Britain*, 4 B. & Ad. 375, and *Sims* v. *Bond*, 5 ib. 389.

sells goods belonging to the firm (*x*), or does work (*y*) of the kind he and his co-partners undertake, an action for payment may be maintained by him and them jointly, although the person to whom the goods were sold, or for whom the work was done, knew nothing of the other partners. In *Cooke* v. *Seeley* (*z*), a partner had an account at a bank in his own name, but there was evidence to show that it was a partnership account, and was known to the bankers to be so, and under these circumstances it was held that all the partners were entitled to sue the bankers for dishonouring a cheque drawn on them by the one partner for partnership purposes.

Cooke v. Seeley.

Dormant partners.

It follows from the principle on which these cases were decided, and although formerly doubted (*a*), it is now clearly established, that dormant partners may join as plaintiffs in an action on a contract entered into on behalf of the firm of which they are members (*b*).

But a dormant partner never *need* be joined as a co-plaintiff in an action on a contract entered into with the firm or with one of its members (*c*).

Position of nominal partners.

Nominal partners, *i.e.*, persons who are not entitled to share the profits of the firm, but whose names appear and are used as if they were, never need join as plaintiffs in an action on an ordinary contract not under seal (*d*). If a partner retires, and leaves his name in the firm, it is not necessary that he should be a co-plaintiff in an action brought by the continuing partners in respect of what has happened since the retirement (*e*).

Where nominal partners must sue.

But if a nominal partner's name is on a bill of exchange or promissory note, he ought to be a party to the action brought

(*x*) *Skinner* v. *Stocks*, 4 B. & A. 437.

(*y*) *Townsend* v. *Neale*, 2 Camp. 189; *Arden* v. *Tucker*, 4 B. & Ad. 817.

(*z*) 2 Ex. 746.

(*a*) See *Mawman* v. *Gillett*, 2 Taunt. 325; *Lloyd* v. *Archbowle*, ib. 324.

(*b*) *Cothay* v. *Fennell*, 10 B. & C. 671. See, also, *ante*, notes (*s*) and (*t*); *Robson* v. *Drummond*, 2 B. & Ad. 303, *per* Littledale, J.

(*c*) *Leveck* v. *Shafto*, 2 Esp. 468, action for work and labour. See *Phelps* v. *Lyle*, 10 A. & E. 113, as to contracts with the "directors" of a company.

(*d*) *Kell* v. *Nainby*, 10 B. & C. 20. See, also, *Spurr* v. *Cass*, L. R. 5 Q. B. 656, where the contract was in writing and with the nominal partner.

(*e*) *Cox* v. *Hubbard*, 4 C. B. 317.

upon it; and the same rule applies to actions on contracts under seal (*f*).

Actions by one partner.

One partner may sue alone on a written contract made with himself if it does not appear from the contract itself that he was acting as agent of the firm (*g*); and one partner ought to sue alone on a contract entered into with himself, if such contract is in fact made with him as a principal, and not on behalf of himself and others. Therefore, if each of several partners lends money out of his own funds, each ought to sue alone for repayment of his advance, although the loans may have been made in pursuance of some arrangement with all the partners; for each loan creates a separate debt to each partner, and the several loans do not together form one debt to the firm (*h*). Again, if one partner alone holds a certain office and does work in his official capacity, he alone ought to sue for payment of the work so done (*i*). Again, if a partner enters into a contract under seal for the payment of money, and the money is paid out of the funds of the firm, and it then appears that the contract was invalid on the ground of fraud, the partner who entered into the covenant may sue alone for the recovery back of the money (*k*). Lastly, if one partner acting for the firm has represented himself to be acting on his own account only, and has ostensibly entered into a contract on his own account, he alone ought to sue on it (*l*).

Covenant with one partner.

The Judicature acts and the rules promulgated under them have rendered it comparatively unimportant to consider whether

(*f*) *Guidon* v. *Robinson*, 2 Camp. 302.

(*g*) See *Skinner* v. *Stocks*, 4 B. & A. 437, and *Cothay* v. *Fennell*, 10 B. & C. 671. See, also, *Cawthron* v. *Trickett*, 15 C. B. N. S. 754, as to actions by a master and part owner of a ship, on bills of lading, and *Agacio* v. *Forbes*, 14 Moo. P. C. 160, in the privy council, where it was held that one partner might maintain an action upon an agreement in writing made with him alone, although the agreement related to the business of the firm, and was, in truth, for its benefit, and the consideration was a release by the partner in question of a debt due to the firm.

(*h*) See *Thacker* v. *Shepherd*, 2 Chitty, 652; *Brand* v. *Boulcott*, 3 Bos. & P. 235.

(*i*) *Brandon* v. *Hubbard*, 2 Brod. & Bing. 11.

(*k*) *Leferre* v. *Boyle*, 3 B. & Ad. 877.

(*l*) *Lucas* v. *De la Cour*, 1 M & S. 249.

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in any given case all partners who can sue must do so, and whether an action should be brought in the name of one partner or of all; for mistakes on such matters are no longer fatal to an action. At the same time mistakes create delay and expense, and attention ought therefore still to be paid to the points above adverted to; and if all the members of a firm sue when one only ought to do so, or one only sues when all ought to do so, and the defendant can show that he is thereby prejudiced, he can apply to have the improper parties struck out or the proper parties joined, as the case may be (*m*).

Actions ex delicto.

Actions by partners for torts.

With respect to actions by partners not founded on any breach of contract, or of *quasi* contract, but on some tort, the general principle is that where a joint damage accrues to several persons from a tort, they ought all to join in an action founded upon it (*n*); whilst on the other hand several persons ought not to join in an action *ex delicto*, unless they can show a joint damage (*o*).

Actions for libel.

These doctrines are well illustrated by actions for libel. A libel on a firm can be made the subject of an action by the firm (*p*). If the libel reflects directly on one partner, and through him on the firm, two actions will lie, viz., one by the party libelled, and the other by him and his co-partners (*q*); but the damage in the first action must not appear to be joint, nor must that in the second appear to be confined to the libelled partner only (*r*). If one partner is libelled, and the firm cannot be shown to have been damnified, an action for the libel should be brought in the name of the individual partner

(*m*) See Ord. xvi. r. 11.

(*n*) See 1 Wms. Saund. 291, *m*; *Addison* v. *Overend*, 6 T. R. 766; *Sedgworth* v. *Overend*, 7 T. R. 279.

(*o*) 2 Wms. Saund. 116, *a*.

(*p*) See *Cooke* v. *Batchellor*, 3 Bos. & P. 150; *Forster* v. *Lawson*, 3 Bing. 452; *Williams* v. *Beaumont*, 10 Bing. 260; *The Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 4 H. & N. 87.

(*q*) The two actions can now be combined in one. See Ord. xviii. r. 6.

(*r*) See *Harrison* v. *Bevington*, 8 C. & P. 708; and *Forster* v. *Lawson*, 3 Bing. 452; 2 Wms. Saund. 117, *b*; *Haythorne* v. *Lawson*, 3 C. & P. 196.

aggrieved, and not by the firm (*s*); and he may sue alone, although the libel more particularly affects him in the way of his business (*t*). Moreover, a general statement not clearly pointing to any particular person, but libellous as to an entire class, may be treated by any individual of that class, who can show that he was in fact intended, as a libel on himself; and this principle is as applicable to libels affecting a firm as to those affecting single individuals (*u*).

Consequence of non-joinder of partners.

An action for the recovery of goods of the firm, or for damages for their loss or injury ought to be brought in the name of the firm or by all its members (*x*); but if one only sues he will be entitled to recover damages in respect of his interest in the goods (*x*); and if, after he has done so, another action is brought by one of his co-partners, that action cannot be stopped (*y*).

Actions where one partner colludes with defendant.

If a person colludes with one partner in a firm to injure the other partners, the latter can jointly sustain an action against such person. Thus, where the bankers of a firm of four partners knew that one of them was in the habit of drawing bills in the name of the firm for his own private purposes, and the bankers colluded with him and kept his co-partners in ignorance of what was going forward, and paid the funds when due out of the funds standing to the credit of the firm, it was held that an action lay against the bankers at the suit of the other three partners (*z*).

Actions of ejectment.

An action of ejectment for the recovery of real property belonging to the firm ought to be brought in the names of all those persons in whom the legal estate is vested (*a*). If, however, one partner only has made a lease of the partnership property, then as his title cannot be disputed by the lessee, notice to quit may be given and ejectment maintained

(*s*) *Solomons* v. *Medex*, 1 Stark. 191.

(*t*) *Harrison* v. *Bevington*, 8 C. & P. 708; *Robinson* v. *Marchant*, 7 Q. B. 918.

(*u*) *Le Fanu* v. *Malcolmson*, 1 H. L. C. 637.

(*x*) See *Addison* v. *Overend*, 6 T. R. 766; *Bleadon* v. *Hancock*, 4 Car. & P. 152. See *Dockway* v. *Dickenson*, Comb. 366.

(*y*) *Sedgworth* v. *Overend*, 7 T. R. 279.

(*z*) *Longman* v. *Pole*, Moo. & Mal. 223. Now the other partner might be joined as a defendant. See *ante*, p. 267, note (*y*).

(*a*) See 1 Chitty on Plead. 74.

require his co-partners to be joined (*o*); and by the Companies act, 1862, members of a registered company, who know that it has carried on business for more than six months with less than seven members, are severally liable for the debts of the company contracted after such six months, and cannot require the other members to be joined (*p*).

Actions on joint and several contracts.

With respect to joint and several contracts, the rule now is that all persons liable on them may be sued jointly or separately, or in the alternative in one action (*q*).

Actions on contracts not binding on firm.

The previous remarks have been addressed to the case of actions on contracts binding the firm. But a contract may be entered into by a partner and not bind the firm, either because it was not entered into on behalf of the firm, or because if it was, the partner entering into it exceeded his authority express and implied. In such cases the old rule was that the partner contracting, and no one else, ought to be sued. If he contracted as a principal, he ought to be sued on the contract; whilst, if he contracted as an agent, he ought to be sued as having done so without authority (*r*). If a partner entered into a contract on behalf of the firm, but exceeded his authority, and the contract did not bind the firm, and the firm repudiated it, the partner contracting, and not the firm, ought to have been sued for money paid to him under it, and sought to be recovered back (*s*). But now in cases of this description, whenever there is any doubt as to who ought to be sued, the prudent course is to sue all the partners, and so to frame the statement of claim as to be able to obtain judgment against the right persons according to the evidence on the trial (*t*).

(*o*) 11 Geo. 4 & 1 Will. 4, c. 68, §§ 5, 6.

(*p*) 25 & 26 Vict. c. 89, § 48.

(*q*) Ord. xvi. rr. 1, 4, 6. See, as to the old law, the note to *Cabell* v. *Vaughan*, 1 Wms. Saund. 291 *g*; and as to staying one action, when the creditor has been satisfied in another, see *Carne* v. *Legh*, 6 B. & C. 124; *Nesbitt* v. *Howe*, 8 Ir. Law Rep. 273.

(*r*) See *Lewis* v. *Nicholson*, 18 Q. B. 503.

(*s*) See *Hudson* v. *Robinson*, 4 M. & S. 475.

(*t*) See Ord. xvi. r. 1. *Honduras Rail. Co.* v. *Tucker*, 2 Ex. D. 301.

Actions ex delicto.

Actions of tort against partners.

It is not every tort which though committed by several persons acting together, is legally imputable to them all jointly (*u*); but supposing a tort to be imputable to a firm, an action in respect of it may be brought against all or any of the partners. If some of them only are sued, they cannot insist upon the other partners being joined as defendants (*x*), and this rule applies even where the tort in question is committed by an agent or servant of the firm, and not otherwise by the firm itself (*y*). But there is a distinction between ordinary actions of tort, and those which are brought against persons in respect of their common interest in land; for all joint tenants, or tenants in common ought to be joined in an action for an injury arising from the state of their land (*z*); and this rule applies to partners as well as to persons who are not partners.

B. *Actions in respect of equitable rights.*

Parties to actions in the Chancery Division.

Actions by and against partnerships for the specific performance or the rescission of contracts, for taking agency accounts, as well as in respect of frauds, breaches of trust, and other matters, are by no means unusual; and an action by a creditor of a firm to obtain payment out of the estate of a deceased partner, is a matter of almost daily occurrence (*a*).

As a general rule an action in the Chancery Division by or against an ordinary partnership will be defective for want of parties, unless all the partners are before the Court. But it was early held, that where some partners are abroad, a suit against those who remain may be prosecuted with effect, and a decree be obtained against them for payment of the whole of the amount due from the firm (*b*).

All the members of a firm ought to be parties to an action

(*u*) See 2 Wms. Saund. 117, *b* and *c*; 1 Chitty, Plead. 96-7.

(*x*) *Sutton* v. *Clarke*, 6 Taunt. 29.

(*y*) *Mitchell* v. *Tarbutt*, 5 T. R. 649; *Ansell* v. *Waterhouse*, 6 M. & S. 385.

(*z*) 1 Wms. Saund. 298, *f* and *g*, and *Mitchell* v. *Tarbutt*, 5 T. R. 649.

(*a*) See, on this subject, book iv. ch. 3.

(*b*) See *Darwent* v. *Walton*, 2 Atk. 510; *Cowslad* v. *Cely*, Prec. in Chanc. 83; and see *Orr* v. *Chase*, 1 Mer. 729.

for a general account (*c*); and in an action for payment of a partnership debt out of the assets of a deceased partner the surviving partners ought to be parties (*d*). But if the ground of action is fraud it is not necessary to join a partner not implicated in it and not sought to be made liable (*e*).

Actions against agents.

An agent of the firm may be sued for an account by all the partners, although he only knew of one of them, and was employed by and has transacted business with that one alone (*f*). At the same time, an agent is only liable to account to his principal; and therefore if a person has been employed by one partner only as principal, or has been induced by that partner to believe that he alone was the principal, in such a case the other partners have no right to call the person so employed to account with them (*g*). On the other hand, if a person has throughout dealt with some partners only, and has all along treated them as principals, he can be compelled by them to account, and he cannot successfully insist that the other partners ought to be parties to the action (*h*).

Actions by surviving partner.

A surviving partner may sue an agent of the firm for an account without making the executors of the deceased partner parties (*i*); for the surviving partners are the proper persons to get in and give receipts for debts owing to the firm (*k*).

3. *Actions by and against partners where a change in the firm has occurred.*

Effect of change in firm on actions by and against it.

In the preceding remarks upon the persons who ought to sue and be sued when a right is sought to be enforced by or against a firm, it has been assumed that no change in the members of the firm has occurred between the period when the right in

(*c*) *Coppard* v. *Allen*, 2 De G. J. & S. 173.

(*d*) *Ex parte Hodgson*, 31 Ch. D. 177; *Hills* v. *M'Rae*, 9 Ha. 297. See, also, *infra*, book iv. ch. 3, § 2.

(*e*) See *Plumer* v. *Gregory*, 18 Eq. 621; *Atkinson* v. *Mackreth*, 2 Eq. 570.

(*f*) See *Killock* v. *Greg*, 4 Russ. 285; *Anon.*, Godb. 90.

(*g*) See *Killock* v. *Greg*, 4 Russ. 285; *Maxwell* v. *Greig*, 1 Coop. Ca. in Ch. 491.

(*h*) *Benson* v. *Hadfield*, 4 Ha. 32; and see *Aspinall* v. *The London and N.-W. Rail. Co.*, 11 Ha. 325.

(*i*) *Haig* v. *Gray*, 3 De G. & Sm. 741.

(*k*) See *Philips* v. *Philips*, 3 Ha. 281; *Brasier* v. *Hudson*, 9 Sim. 1.

question accrued and the time when the action to enforce it is brought. It is proposed now to consider to what extent the rules above established require modification, when some such change has taken place by reason either of the introduction of a new partner, or of the retirement, death, or bankruptcy of an old one.

First, with respect to changes caused by the introduction of new partners and the retirement of old ones.

Alterations made by Judicature acts.

By § 25, cl. 6 of the Judicature act, 1873, debts may now be assigned by writing and notice to the debtor so as to entitle the assignee to sue for them in his own name. Consequently, if on the introduction of a new partner or the retirement of an old partner the debts due to the old firm are thus assigned to the new firm, the new firm can sue in respect of them, either in its mercantile name or in the names of its members. Again, a new partner may, it is apprehended, always be joined in an action to recover a debt or enforce a demand in which he has an interest, provided his joinder does not prejudice the rights of the defendants. Further, if an incoming partner has agreed with his co-partners to take upon himself the debts and liabilities of the old firm, they can require him to be made a defendant for their own partial indemnity (*l*).

When new partner can be sued.

Except, however, in these cases an incoming partner can neither sue nor be sued in respect of a liability of the old firm, unless there is some agreement express or implied between himself and the person suing him or being sued by him (*m*).

As regards negotiable instruments, indeed, any persons who can agree to sue jointly upon them may do so, provided the instrument is in such a state as to pass by delivery; therefore, if a bill or note, indorsed in blank, is given to a firm consisting of certain individuals, who afterwards take in a new partner, they and he, or some or one of them, may sue on that bill or note (*n*).

(*l*) Ord. xvi. rr. 48 and *seq.*

(*m*) See, accordingly, *Wilsford* v. *Wood*, 1 Esp. 182; *Ord* v. *Portal*, 3 Camp. 239, note; *Waters* v. *Paynter*, Chitty on Bills, 406, note 5, ed. 10; *Vere* v. *Ashby*, 10 B. & C. 288; *Young* v. *Hunter*, 4 Taunt. 582. See *Radenhurst* v. *Bates*, 3 Bing. 463. See *ante*, book ii. ch. 2, § 3.

(*n*) See *Ord* v. *Portal*, 3 Camp. 239, and *ante*, p. 274.

Effect of retirement of old partner.

So, as regards changes occasioned by the retirement of a partner. It has been already shown, that the retirement of a partner in no way affects his rights against or obligations to strangers in respect of past transactions. Subject, therefore, to the above observations, a retired partner ought to join as a plaintiff, and be joined as a defendant, in every action to which, had he not retired, he would have been a necessary party. This rule holds good, even where a contract is entered into before, and the breach of it occurs after the retirement of a partner (*o*). In one case, indeed, it was held at Nisi Prius that where two partners sold goods, and they afterwards dissolved partnership, an action for the price of those goods was sustainable by the one partner who continued to carry on the business of the late firm (*p*); but the propriety of this decision is more than questionable. Whether, however, it is now necessary to join as a plaintiff a retired partner against whom the defendant has no claim, and who has no beneficial interest in what is sought to be recovered admits of some doubt.

Sometimes one partner retires and a new partner comes in, and an agent of the firm, in ignorance of the change which has occurred, enters into a contract on behalf of the firm; in such a case the members of the new firm may sue on the contract, unless the defendant is prejudiced by their so doing (*q*). The liability of the retired partner on such a contract will, however, cease if the creditor sues the new firm and recovers judgment against it (*r*).

Fresh contract.

And a new firm may sue or be sued in respect of a fresh contract entered into by or with it to pay a debt owing to or by an old firm. Thus, where A. was indebted to B., and afterwards C. entered into partnership with B., and A. contracted a further debt with both, and then settled an account with both, as well upon what was due to B. before his partnership with C., as upon the debt contracted afterwards, it was held that B. and

(*o*) See *Dobbin* v. *Foster*, 1 Car. & K. 323.

(*p*) *Atkinson* v. *Laing*, Dowl. & Ry. N. P. Ca. 16.

(*q*) *Mitchell* v. *Lapage*, Holt, N. P. Ca. 253. But see *Boulton* v. *Jones*, 2 H. & N. 564.

(*r*) See *Scarfe* v. *Jardine*, 7 App. Ca. 345, noticed *ante*, pp. 46 and 197.

C. might join in an action of assumpsit on an account stated, and recover the whole debt (*s*).

Change in firm may prevent it from suing.

Although a change in a firm, whether by the introduction of a new partner or the retirement of an old one, cannot, except as already mentioned, confer upon the partners any new right of action against strangers, or *vice versâ*, as regards what may have occurred before the change took place, it may, nevertheless operate so as to discharge a person from a contract previously entered into by him. Thus, as was pointed out in the sixth chapter of the first book (*t*), a person who is surety to a firm is discharged from his suretyship, for the future, by a change amongst its members, and cannot, therefore, be sued either by the old or by the new partners for any default of the principal debtor occurring subsequently to the change. Again, if a person enters into a contract with a firm, and that contract is of a purely personal character, to be performed by the individuals who have entered into it, and not by any one else, a change in the firm may operate as a dissolution of the contract, so that neither the new nor the old partners can sue in respect of any alleged breach which may have occurred since the change took place. An illustration of this is afforded by *Robson* v. *Drummond* (*u*). In that case A. and B. were partners as coachmakers. C., who knew nothing of B., entered into a contract with A. for the hire of a carriage for five years, at so much a-year, and A. undertook to keep the carriage in proper order for the whole five years. Before the five years were out, A. and B. dissolved partnership, and A. assigned the carriage and the benefit of the contract relating to it to B. B. gave C. notice of the dissolution and arrangement respecting the carriage; but C. declined to continue the contract with B., and returned the carriage. An action was then brought by A. and B. against C., for not performing the contract; but it was held that the action would not lie, the contract having been with A. alone, to be performed by him personally, and he having disabled himself from continuing to perform it on his

Robson *v.* Drummond.

(*s*) *Moor* v. *Hill*, Peake, Add. Cases, 10.

(*t*) *Ante*, p. 117.

(*u*) 2 B. & Ad. 303. Compare *British Wagon Co.* v. *Lea*, 5 Q. B. D. 149.

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part. In *Stevens* v. *Benning* (*x*), the same principle was applied to a contract between an author and a firm of publishers; and it was held that the contract was one of a personal character, and that consequently the author was discharged from it by a change in the firm, and an assignment of the benefit of the contract to persons of whom the author knew nothing.

Stevens v. Benning.

Effect of death.

Secondly, with respect to changes caused by death. Before the Judicature acts, when a partner died in the lifetime of any one or more of his co-partners, all actions brought in respect of any contract entered into by or on behalf of the firm before his death, must have been brought by or against the surviving members of the firm, and by or against them alone; for the representatives of the deceased partner could neither sue nor be sued at law in respect of any such contract (*y*). So an action for the conversion of partnership goods must have been brought by the surviving partners (*z*).

Actions by and against surviving partners.

It followed from the above rule that the last surviving partner, or if he was dead his legal personal representative, was the proper person to sue and be sued at law in respect of the debts and engagements of the firm (*a*).

These rules, however, can be no longer relied upon, except where the obligation sought to be enforced is joint in equity as well as at law. Wherever it is several as well as joint (*b*), an action may, it is apprehended, be brought by or against the surviving partners and the executors or administrators of the deceased partner (*c*).

Effect of bankruptcy.

Lastly, with respect to changes caused by bankruptcy.

(*x*) 1 K. & J. 168, and 6 De G. M. & G. 223. See, also, *Hole* v. *Bradbury*, 12 Ch. D. 886.

(*y*) *Dixon* v. *Hammond*, 2 B. & A. 310, which shows that an agent of the firm must account to the surviving partners. See, too, *Martin* v. *Crompe*, 1 Ld. Raym. 340, and 2 Salk. 444; and *Webber* v. *Tyvill*, 2 Wms. Saund. 121 *e*. Formerly this was otherwise, see the authorities collected in *Buckley* v. *Barber*, 6 Ex. 178.

(*z*) *Kemp* v. *Andrews*, Carth. 170; but see *Buckley* v. *Barber*, 6 Ex. 164. An indictment for stealing them may be preferred by the surviving partners, and the next of kin of the deceased partner. *R.* v. *Gaby*, Russ. & Ry. 178; *R.* v. *Scott*, ib. 13.

(*a*) *Richards* v. *Heather*, 1 B. & A. 29; *Calder* v. *Rutherford*, 3 Brod. & Bing. 302.

(*b*) As to which, see *ante*, p. 194.

(*c*) Ord. xvi. rr. 1, 4, 6, 8.

Formerly, if a partner was bankrupt, his assignees were required to join in his stead in any action in which, had no bankruptcy intervened, the bankrupt himself would have been necessarily joined as a plaintiff (*d*). If the assignees declined to join, the solvent partners were entitled to make use of their names upon indemnifying them against the costs of the action (*e*). If all the partners were bankrupt, any action which it would have been necessary to bring in the names of all the partners, if bankruptcy had not intervened, must have been brought by their assignees (*f*). But this was subject to the qualification that bankrupts, whether partners or not, might sue in their own names as trustees for other people (*g*). By the Bankruptcy act, 1883, a bankrupt partner is not required to join the solvent partners in suing on a joint contract made with the firm (*h*); and it is presumed that the trustee of the bankrupt partner need not be joined in such a case. But the trustee may join in the action if authorised to do so by the Bankruptcy Court (*i*); and his joinder is necessary where an act of the bankrupt is sought to be impeached (*k*).

Actions against bankrupt.

As regards actions against a firm, one or more of the members of which have become bankrupt, it need hardly be observed that there is no remedy by action against trustees in respect of liabilities of the bankrupt they represent. The only remedy is by proof against his estate, or by proof and by an action against him if he has not obtained his order of discharge, or if his order of discharge is no bar. When, therefore, it is desired to recover a debt due from a firm, and all the partners are bankrupt, an action is not the remedy unless the partners have not obtained their discharge, or unless the debt could not have been proved in bankruptcy. If, however, some only of

(*d*) *Eckhardt* v. *Wilson*, 8 T. R. 140; *Thomason* v. *Frere*, 10 East, 418; *Graham* v. *Robertson*, 2 T. R. 282.

(*e*) *Whitehead* v. *Hughes*, 2 Cr. & M. 318.

(*f*) See *Ray* v. *Davies*, 8 Taunt. 134. The trustee of a firm may sue for debts owing to the members thereof individually. *Stonehouse* v. *De Silva*, 3 Camp. 399; *Hancock* v. *Haywood*, 3 T. R. 433; *Scott* v. *Franklin*, 15 East, 428.

(*g*) See *Castelli* v. *Boddington*, 1 E. & B. 66; *Winch* v. *Keeley*, 1 T. R. 619.

(*h*) See 46 & 47 Vict. c. 52, § 114.

(*i*) Ibid. § 113.

(*k*) See *Heilbut* v. *Nevill*, L. R. 5 C. P. 478.

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the partners are bankrupt, the solvent partners only need be sued (*l*); and the Court of Bankruptcy can restrain an action against the bankrupt partner (*m*).

SECTION II.—OF SET-OFF.

Closely connected with the subjects discussed in the preceding section, is the right of a defendant to set up, in opposition to the claim made against him, a counter claim, which the defendant might himself make the subject of a cross action against the plaintiff. The power of a defendant to do this is much more extensive than it was; for by Order XIX. rule 3, a defendant may set off or set up by way of counter-claim any right or claim, whether to a definite amount or not; but provision is made for disallowing a cross claim if it cannot be conveniently disposed of in the particular action in which it is set up. A short account, however, of the law as it stood before this alteration may still be useful.

1. Set-off at law.

The right of setting off one claim against another appears only to exist at common law, where a person seeks to avail himself of a lien on goods in his possession, but of which he is not the owner. But, by statute 2 Geo. 2, c. 22, where there were mutual debts between the plaintiff and the defendant, one debt might be set against the other (*n*). The statute, however, only applied to debts in the narrow sense of the word, *i.e.*, definite and ascertained sums of money, owing by each party to the other (*o*); and to debts owing to and by each party in the same capacity (*p*).

(*l*) 46 & 47 Vict. c. 52, § 114. *Hawkins* v. *Ramsbottom*, 6 Taunt. 178.

(*m*) 46 & 47 Vict. c. 52, § 10 (2). See *Ex parte Mills*, 6 Ch. 594.

(*n*) 2 Geo. 2, c. 22; and see 8 Geo. 2, c. 24, as to setting off simple contract debts against specialty debts.

(*o*) See *Boddington* v. *Castelli*, 1 E. & B. 66 and 879; *Attwooll* v. *Attwooll*, 2 ib. 23; *Luckie* v. *Bushby*, 13 C. B. 864; and *Hutchinson* v. *Sydney*, 10 Ex. 438.

(*p*) See *Hutchinson* v. *Sturges*, Willes, 261; *Watts* v. *Rees*, 9 Ex. 696, and 11 ib. 410; *Mardall* v. *Thellusson*, 6 E. & B. 976; *Pedder* v. *Mayor of Preston*, 12 C. B. N. S. 535.

Courts of equity, although governed in questions of set-off by principles similar to those which governed courts of law, went further than courts of law in applying those principles; admitting set-off in some cases where courts of law did not, and disallowing it in others where they did (*q*).

Rules as to set-off.

The combined effect of the rules at law and in equity on the subject of set-off so far as it is necessary to allude to them in the present treatise are as follows:—

1. Joint debts owing to and by the same persons in the same right can be set off both at law and in equity.

2. Separate debts owing to and by the same person in the same right can also be set off both at law and in equity.

3. Debts not owing to and by the same persons in the same right can not be set off either at law or in equity. But before the Judicature acts and in considering whether debts were so owing, courts of law regarded the legal right, whilst courts of equity regarded the equitable right; and this led to the following amongst other important practical and different results (*r*).

Set-off by and against surviving partners.

For example, if a surviving partner was sued at law for a non-partnership debt, he could set off a partnership debt owing by the plaintiff to him and his late co-partners (*s*); and in an action by a surviving partner for a debt due to himself separately, the defendant could set off a debt due to himself from the plaintiff and his late partners (*t*). In equity, however, this could not have been done. When a creditor of a firm seeks to obtain payment of his debt out of the estate of a deceased partner, that creditor can not set off a debt due from himself to the deceased on a separate account: the creditor must pay this last debt in full, and then, as regards the debt in respect of which he sues, rank as any other creditor of the firm against the assets of the deceased (*u*). It is obvious that if in such

(*q*) See, generally, as to set-off in equity, *Rawson* v. *Samuel*, Cr. & Ph. 161; *Clark* v. *Cort*, ib. 154; *Freeman* v. *Lomas*, 9 Ha. 109. See, also, *Hunt* v. *Jessel*, 18 Beav. 100, as to set-off between creditors and trustees of creditors' deeds. See, also, *Agra and Masterman's Bank* v. *Hoffman*, 5 N. R. 214, *sed qu.* this case.

(*r*) See *Fletcher* v. *Dyche*, 2 T. R. 32, and the cases in the next two notes.

(*s*) *Slipper* v. *Stidstone*, 5 T. R. 493; *Golding* v. *Vaughan*, 2 Chitty, 436.

(*t*) *French* v. *Andrade*, 6 T. R. 582.

(*u*) *Addis* v. *Knight*, 2 Mer. 117.

a case the two debts were set against each other, the separate creditors of the deceased would be paying a joint creditor of the firm, unless the assets of the deceased were sufficient to pay both classes of creditors in full.

On the other hand, debts which were really debts owing to and by a firm could be set off in equity although not at law. Thus in *Smith* v. *Parkes* (*x*), a firm of three partners covenanted to pay a certain sum of money to the defendant Parkes, who was indebted to the firm in certain other sums on another account. By the death of two of the members of the firm, the plaintiff Smith had become the sole surviving partner, and he was sued by Parkes on the covenant, and judgment was obtained. It was held that, notwithstanding the judgment and its effect at law, Smith was entitled in equity to set off against the judgment debt the amount of what was due from Parkes to the late firm; and it was also held that Smith had this right not only as against Parkes, but also against persons to whom he had assigned the debt due to him.

Smith *v.* Parkes.

Setting off joint debts against separate, and *vice versâ*.

4. Except under special circumstances a debt due to or from several persons jointly cannot be set off against a debt due from or to one of such persons separately (*y*). This rule, which is really involved in the last, also prevailed before the Judicature acts both at law and in equity (*z*), and was of great importance to partners. It scarcely requires to be pointed out that to allow a set-off of such debts would be to enable a creditor to obtain payment of what is due to him from persons in no way indebted to him. As a rule, therefore, a debt owing by one of the members of a firm can not be set off at law against a debt owing to him and his co-partners (*a*): nor can a debt owing to one of the members of a firm be set off against a debt owing by him and his co-partners (*b*). And this rule applies even where one partner only has been dealt with, and

(*x*) 16 Beav. 115.

(*y*) See *Kinnerley* v. *Hossack*, 2 Taunt. 170; *Cheetham* v. *Crook*, McLel. & Y. 307; *Vulliamy* v. *Noble*, 3 Mer. 618. See, also, *Jebsen* v. *East and West India Dock Co.*, L. R. 10 C. P. 300.

(*z*) It cannot be done in equity even in cases of fraud, see *Middleton* v. *Pollock*, 20 Eq. 515.

(*a*) *Gordon* v. *Ellis*, 2 C. B. 821; *France* v. *White*, 8 Scott, 257.

(*b*) *Arnold* v. *Bainbridge*, 9 Ex. 153; *McGillivray* v. *Simson*, 2 Car. & P. 320; *Boswell* v. *Smith*, 6 C. & P. 60.

the debts sought to be set against each other are a debt owing by him, and a debt owing to him and others, but arising out of transactions with him alone.

Gordon v. Ellis.

This last point is well illustrated by *Gordon* v. *Ellis* (*c*). There, an action was brought by three partners, for the recovery from the defendant of money received by him for goods of the plaintiffs sold by the defendant on their account. The defendant pleaded in effect, that he had been employed by A. only, that A. sent the goods for sale as if they were his own, and that the goods were sold by the defendant as A.'s goods, and that A. was indebted to the defendant in a larger amount than that sought to be recovered in the action. It was admitted, that if B. and C. had by their conduct induced the defendant to believe that A. was the sole owner of the goods in question, and to deal with A. on that supposition, the defendant would have had a good defence to the action; but it was held that, as the defendant did not allege that such had been the case, his plea was a mere attempt to set off a debt due from one member of the firm against a debt due to the firm itself, and was bad.

In strict analogy to the above rule it has been decided in equity that if the members of a firm have separate private accounts with the bankers of the firm, and a balance is due to the bankers from the firm on the partnership account, the bankers have no lien for such balance on what may be due from themselves to the members of the firm on their respective separate accounts; and that the debt due to the bankers from the partners jointly cannot be set off against the debts due from the bankers to the partners separately (*d*).

Effect of Judicature acts.

The Judicature acts have extended the equitable principles of set-off to all actions in the High Court (*e*); and notwithstanding the rules relating to joint and to several claims (*f*), the old rule precluding the set-off of a joint against a separate debt, or *vice versâ*, is still in force (*g*).

(*c*) 2 C. B. 821; and see the same case, 7 Man. & Gr. 607, where it will be observed the plea was materially different.

(*d*) See *Watts* v. *Christie*, 11 Beav. 546; *Cavendish* v. *Geares*, 24 ib. 173.

(*e*) See §§ 24 and 25 (6) (11) of the Judicature act, 1873.

(*f*) Ord. xvi. rr. 1, 4, 6, *ante*, p. 282.

(*g*) *Bowyear* v. *Pawson*, 6 Q. B. D.

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Exceptions to general rule.

To the general rule which precludes the set-off of a debt due to a firm against a debt owing by one of its members, and *vice versâ*, there are, however, a few exceptions.

Agreement.

If it can be shown that all parties concerned have expressly or impliedly agreed that a debt owing by one of them only shall be set off against a debt owing to them all or *vice versâ*, effect will be given to that agreement, and the application of the general doctrine in question will thereby be precluded. Regard, therefore, must be had to any agreement which the parties themselves may have come to, and to their course of dealing with each other (*h*).

So if a joint and several promissory note is made by partners, and one of them sues the payee for some separate demand, the defendant can set off the note; for, *ex hypothesi*, it is the several note of the partner suing him (*i*).

An agreement by one partner that a debt due from himself separately shall be set off against a debt due to him and his co-partners jointly is *primâ facie* a fraud on them; and a set-off founded on such an agreement cannot, it is apprehended, be maintained in the absence of special circumstances, rendering such an agreement binding on the other partners (*k*).

Another exception occurs where one partner has been allowed by his co-partners to act as if he were a principal and not an agent of the firm.

Set-off where there is a dormant partner.

It has been seen that dormant partners may join their co-partners in suing on contracts entered into in form with the latter only. But dormant partners cannot, by coming forward and suing on such contracts, deprive the defendant of any right of set-off of which he might have availed himself if the non-dormant partners only had been plaintiffs. This was held by

540. However, in *Manchester, Sheffield & Linc. Rail. Co.* v. *Brooks*, 2 Ex. D. 243, a separate debt was allowed to be pleaded by way of set-off to an action for a joint debt. This can hardly have been right.

(*h*) See *Vulliamy* v. *Noble*, 3 Mer. 593; *Downam* v. *Matthews*, Prec. in Ch. 580; *Cheetham* v. *Crook*, McLel. & Y. 307; *Kinnerley* v. *Hossack*, 2 Taunt. 170.

(*i*) See *Owen* v. *Wilkinson*, 5 C. B. N. S. 526.

(*k*) *Wallace* v. *Kelsall*, 7 M. & W. 264, is the other way, but is to be explained by the old technical rules of pleading, which are now abolished, see *ante*, p. 269; *Piercy* v. *Fynney*, 12 Eq. 69; *Nottidge* v. *Pritchard*, 2 Cl. & Fin. 379.

Lord Kenyon in *Stracey* v. *Deey* (*l*), where the plaintiffs Stracey, Ross, and others, were in partnership as grocers, and Ross was the only person who appeared to the public as concerned in the partnership business. The defendant had dealt with Ross, and had become indebted for grocery supplied by him. On the other hand, the defendant had expended money for Ross, and had done so on the supposition that the monies thus expended could be set off against what was due for the grocery. The plaintiffs, however, contended that this set-off could not be made; but Lord Kenyon held that as the defendant had a good defence by way of set-off against Ross, and had been by the conduct of the plaintiffs led to believe that Ross was the only person he contracted with, they could not pull off the mask and claim payment of debts supposed to be due to Ross alone, without allowing the defendant the same advantages and equities in his defence as he would have had in an action brought by Ross solely (*m*).

In this case, all the partners except Ross were dormant, and by the terms of the agreement into which all had entered, Ross alone was to be the apparent trader. His co-partners were therefore simply in the position of undisclosed principals, and were treated accordingly by the Court.

Cases where one partner only has been dealt with.

Gordon v. Ellis.

In *Gordon* v. *Ellis* (*n*), which has been before referred to, an attempt was made to extend the principle on which Lord Kenyon decided *Stracey* v. *Deey*, to all cases in which one partner only transacts the business of the firm, and becomes himself indebted to the person with whom he deals. But it was held, and rightly, that a person liable to be sued by a firm cannot set off a debt due from one only of its members, on the ground that he only was dealt with by the defendant, unless it can be shown that the other members of the firm induced the defendant by their conduct to treat their co-partner as the only person with whom the defendant had to do (*o*).

(*l*) 7 T. R. 361, note, and 2 Esp. 469. See, too, *Teed* v. *Elworthy*, 14 East, 213, and *De Mautort* v. *Saunders*, 1 B. & Ad. 398, overruling *Dubois* v. *Ludert*, 5 Taunt. 609.

(*m*) See *Cooke* v. *Eshelby*, 12 App. Ca. 271; *George* v. *Clagett*, 7 T. R. 359; *Borries* v. *Imperial Ottoman Bank*, L. R. 9 C. P. 38.

(*n*) 2 C. B. 821, *ante*, p. 293.

(*o*) See *Ramazotti* v. *Bowring*, 7 C. B. N. S. 851; *Bonfield* v. *Smith*, 12 M. & W. 405; *ante*, p. 280; and *Baring* v. *Corrie*, 2 B. & A. 137.

But here again it is to be observed, that if the debt due from one partner can be treated as due from the firm, that debt may be set off against another debt due to it. This is illustrated by the same case of *Gordon* v. *Ellis* (*p*), where in an action by a firm for money due to it from the defendant for goods of the firm sold by him, the latter was held entitled to set off a debt due to him for an advance made by him to one of the partners on account of those goods. The Court thought that although the money was advanced to one partner only, the defendant had a right to treat it as an advance to the firm made on that partner's requisition, whilst acting within the scope of his apparent authority as agent of the firm. In point of fact, the defendant, instead of waiting until he had sold the goods, and then handing over the money produced by their sale, made a payment on account; and he sought nothing more than to have the amount so prepaid deducted from the sum for which he sold the goods.

Gordon v. Ellis.

Attempt to avoid set off by suing one partner.

It sometimes happens that in order to avoid a defence of set-off, a plaintiff who is indebted to a firm sues one of its members alone for a debt owing to the plaintiff by the firm. In such a case, the defendant may require his co-partners to be joined (*q*). Again, if a firm holds the note of a person to whom it is itself indebted, and in order to deprive him of his right of set-off, indorses the note to one of its members, and he alone sues on it, a defence disclosing the facts and setting off the debt owing to the defendant by the firm will be good (*r*).

Set-off where there has been an assignment.

The provision of the Judicature acts relating to the assignment of debts (*ante*, p. 285) has greatly facilitated defences by way of set-off where there has been a change in a firm. The principles applicable to such cases are well illustrated by the following decision.

Cavendish v. Geaves.

In *Cavendish* v. *Geaves* (*s*), the plaintiff was indebted on bonds to a firm of bankers. Many changes in the firm took

(*p*) 7 Man. & Gr. 607.

(*q*) Ord. xvi. r. 11. See *Stackwood* v. *Dunn*, 3 Q. B. 823, and *Bonfield* v. *Smith*, 12 M. & W. 405.

(*r*) *Fuller* v. *Roe*, 1 Peake, N. P. 260.

(*s*) 24 Beav. 163. See, also, *Jefferys* v. *Agra and Masterman's Bank*, 2 Eq. 674; and as to set-off at law as against the assignee of a debt after notice of the assignment, *Watson* v. *Mid-Wales Rail. Co.*, L. R. 2 C. P. 593.

place, and the bonds in question were on each change assigned by the old to the new firm. The plaintiff had an account with the bank as one of its customers, and when the bank stopped payment a balance was owing to him on that account; but the bonds had been previously assigned to third parties, without notice however to the plaintiff. The question then arose, whether, notwithstanding the various changes in the firm, and the assignment of the bonds, the plaintiff was entitled to set-off against the debt due from him on the bonds, the amount due to him as a customer of the bank, and it was held that he was. The judgment in this case is peculiarly instructive, and the following extract from it is submitted to the reader without apology.

Effect of assignments and of changes in firm on right of set-off.

"If a customer borrow money from his bankers and give a bond to secure it, and afterwards, on the balance of his general banking account a balance is due to the customer from the same bankers who are the obligees of the bond, a right to set off the balance against the money due on the bond will exist both at law and in equity (*t*).

"If the firm were altered and the bond assigned by the original obligees to the new firm, and notice of that assignment were given to the debtor, and if after this a balance were due to him from the new firm (the assignees of the bond), then no right of set-off would exist at law, because the assignment of the chose in action would be inoperative at law, and the obligees of the bond, and the debtor on the general account would be different persons; but as in equity the persons entitled to the bond, and the debtors on the general account, would be the same persons, a right to set-off would exist in this court, and the customer would in equity be entitled to set off the balance due to him against the bond debt due from him.

"If after the bond had been given it had been assigned to strangers, and no notice of that assignment had been given to the original debtor (the obligor of the bond), then his rights would remain the same. Thus, if the assignment had been made to the stranger before any alteration of the firm then the right of set-off would still remain at law, where the obligees of the bond and the debtors on the general account would be the same persons, and in equity also, if the matter on account were brought here, as the assignees of the chose in action would be bound by the equities affecting their assignors.

"But if notice of that assignment had been given to the original debtor, no right of set-off would exist in this court for the balance subsequently due by the bankers to the obligor; because the persons entitled to the bond would, as the obligor knew, be different persons from the debtors to him on the general account with whom he had continued to deal.

"If the assignment of the bond had been made to the new firm with

(*t*) *Roxburghe* v. *Cox*, 17 Ch. D. 520.

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notice to the obligor they would, if debtors on the general account, be liable to the same rights of set-off in equity as if they had been the obligees.

Effect of assignments and changes in firm on right of set-off.

"If, after the alteration of the firm and after the assignment of the bond to the new firm, with notice to the debtor or obligor of that assignment, an assignment had been made of the bond to strangers, and no notice of that second assignment given to the obligor, then the rights of set-off would still remain to him in equity as against the first assignees of whose assignment he had notice, and the second assignees would in equity be bound by it, because, as I have stated, the assignees of the bond take it subject to all the equities which affect the assignors."

The court, after laying down these general propositions, came to the conclusion on the evidence in the case, that the plaintiff was informed that the successive firms with which he dealt as customers, were his creditors in respect of the bonds, but that he had no notice of their assignment by the firm which stopped payment to the holders of them, and that therefore he was entitled, even as against such holders, to set off what was due to him as a customer of the bank when it stopped payment.

The above decisions are sufficient to show that in allowing debts to be set off against each other, courts of equity went far beyond courts of law, although they did not introduce any new principle of set-off. The truth of this was still more apparent from the cases in which set-off was not allowed, one of the debts being joint and the other several only.

SECTION III.—OF EXECUTION AGAINST PARTNERS FOR THE DEBTS OF THE FIRM.

Execution against partners.

If a judgment has been obtained against several persons sued jointly, the writ of execution founded on the judgment must be against all of them, and not against some or one of them only; for the judgment does not warrant such a writ (*u*). But, although the writ of execution on a joint judgment must be joint in form, it may be *levied* upon all or any one or more of the persons named in it; for each is liable to the judgment creditor for the whole, and not for a proportionate part of the

(*u*) See *Penoyer* v. *Brace*, 1 Lord Raymond, 244; *Clarke* v. *Clement*, 6 T. R. 526; 2 Wms. Saund. 72 *l*; Bac. Ab. Exec. G. 1.

sum for which judgment is obtained (*x*). The consequence of this is that the sheriff may execute a writ issued against several partners jointly, either on their joint property, *or* on the separate property of any one or more of them, *or* both on their joint and on their respective separate properties; and so long as there is, within the sheriff's bailiwick, any property of the partners, or any of them, a return of *nulla bona* is improper (*y*). Of course, if the judgment creditor has had execution and satisfaction against one of the partners, he cannot afterwards go against any of the others (*z*); but the important point to observe is, that the sheriff is not bound to levy on the goods of the firm before having recourse to the separate properties of its members, and that they cannot require the sheriff to execute the writ in one way rather than another.

Similar rules are applicable to attachments of debts under the Common law procedure act, 1854 (17 & 18 Vict. c. 125, § 61), it having been determined that a judgment creditor of three persons can, under the act in question, attach debts owing to any one or more of his judgment debtors (*a*).

The extent to which the right to levy execution against the effects of a firm is affected by bankruptcy will be examined hereafter.

The procedure on a judgment against a firm (*b*) is regulated by Order XLII., Rule 10, which is as follows:—

Execution against partners on judgment against firm.

Where a judgment or order is against a firm, execution may issue:—

(*a.*) Against any property of the partnership;

(*b.*) Against any person who has appeared in his own name under Order XII., Rule 15, or who has admitted on the pleadings that he is, or has been adjudged to be, a partner;

(*c.*) Against any person who has been served, as a partner, with the writ of summons, and has failed to appear.

If the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Judge for leave so to do; and the Court or Judge may give such leave if the liability be not disputed, or, if such liability

(*x*) See *per* De Grey, C. J., in *Abbot* v. *Smith*, 2 Wm. Blacks. 949; and *Herries* v. *Jamieson*, 5 T. R. 556, *per* Lord Kenyon.

(*y*) See *Jones* v. *Clayton*, 4 M. & S. 349.

(*z*) See Com. Dig. Execution, H.

(*a*) *Miller* v. *Mynn*, 1 E. & E. 1075.

(*b*) The firm here means the partners when the cause of action accrued, *ante*, p. 265.

be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined.

It is not clearly said in this rule that execution must first be levied against the joint estate of the firm before having recourse to the separate estates of the members; and, having regard to the previous well-established practice, the rule cannot be construed as rendering such a course necessary.

The proper mode of entering up judgment has been already considered, *ante*, p. 266.

Execution on judgment against firm.

If judgment is entered up against a firm in its mercantile name, execution can only issue without leave against the property of the firm (*c*), or against those persons specially mentioned in Order XLII., Rule 10, other persons sought to be made liable must be proceeded against in some other way and some judgment or order must be obtained against them establishing their liability before execution can issue against them (*d*). An action founded on the judgment may be brought against them, and it is not necessary to proceed by an issue and an order under the rule (*e*). But the judgment cannot be made the foundation of a debtor's summons in bankruptcy against them if they dispute their liability; for in the case supposed their liability in respect of the judgment has not yet been established (*f*).

The mode of taking in execution the share of one partner on a separate judgment against him will be examined hereafter (see Bk. III. c. 5, § 4).

(*c*) If there is a receiver, application must be made to the court, *Kewney* v. *Attrill*, 34 Ch. D. 345.

(*d*) *Davis* v. *Morris*, 10 Q. B. D. 436.

(*e*) *Clark* v. *Cullen*, 9 Q. B. D. 355.

(*f*) *Ex parte Young*, 19 Ch. D. 124; *Ex parte Blain*, 12 Ch. D. 522, where the alleged debtor was a foreigner residing abroad.

BOOK III.

OF THE RIGHTS AND OBLIGATIONS OF MEMBERS OF PARTNERSHIPS BETWEEN THEMSELVES.

CHAPTER I.

OF THE RIGHT TO TAKE PART IN THE MANAGEMENT OF THE AFFAIRS OF THE FIRM.

Each member of partnership entitled to take part in its management.

In partnerships, the good faith of the partners is pledged mutually to each other that the business shall be conducted with their actual personal interposition, so that each may see that the other is carrying it on for their mutual advantage (*a*).

In the absence of an express agreement to the contrary, the powers of the members of a partnership are equal, even although their shares may be unequal; and there is no right on the part of one or more to exclude another from an equal management in the concern (*b*). Moreover, if two persons are in partnership, and one of them mortgages all his share and interest therein to the other, the latter will not be permitted, during the continuance of the partnership, to avail himself of his rights as a mortgagee and to exclude his co-partner from interference in the partnership (*c*). Indeed, speaking generally, it may be said that nothing is considered as so loudly calling for the interference of the Court between partners, as the improper exclusion of one of them by the others from taking part in the management of the partnership business (*d*).

(*a*) *Per* Lord Eldon in *Peacock* v. *Peacock*, 16 Ves. 51.

(*b*) *Rowe* v. *Wood*, 2 Jac. & W. 558; see, too, *Lloyd* v. *Loaring*, 6 Ves. 777.

(*c*) *Rowe* v. *Wood*, 2 Jac. & W. 558.

(*d*) See, in addition to the cases last cited, *Goodman* v. *Whitcomb*, 1 Jac. & W. 589; *Marshall* v. *Colman*, 2 ib. 266.

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Unless otherwise agreed.

It need, however, hardly be observed that it is perfectly competent for partners to agree that the management of the partnership affairs shall be confided to one or more of their number exclusively of the others; and that where such an agreement is entered into, it is not competent for those who have agreed to take no part in the management, to transact the partnership business without the consent of all the other partners. But, as was seen in an earlier part of the treatise, every member of an ordinary firm is *primâ facie* its agent for carrying on its business in the usual way (*e*); and persons dealing with a partner within the limits of his apparent authority, are entitled to hold the firm answerable for his conduct, unless such persons had distinct notice that his real authority was less extensive than they had a right to assume it to be.

(*e*) *Ante*, book ii. ch. 1.

CHAPTER II.

OF THE GENERAL DUTY OF PARTNERS TO OBSERVE GOOD FAITH.

SECTION I.—PRELIMINARY REMARKS.

High standard of honour requisite among partners,

In societatis contractibus fides exuberet (*a*). The utmost good faith is due from every member of a partnership towards every other member; and if any dispute arise between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has law on his side, but that his conduct will bear to be tried by the highest standard of honour (*b*). Thus, if one partner knows more about the state of the partnership accounts than another, and concealing what he knows, enters into an agreement with that other, relative to some matter as to which a knowledge of the state of the accounts is material, such agreement will not be allowed to stand (*c*).

and among those about to become partners,

This obligation to perfect fairness and good faith, is, moreover, not confined to persons who actually are partners. It extends to persons negotiating for a partnership, but between whom no partnership as yet exists (*d*); and also to persons who have dissolved partnership but who have not completely wound up and settled the partnership affairs (*e*); and most especially is good faith required to be observed when one

and among those who have ceased to be partners.

(*a*) Cod. iv. tit. 37, l. 3.

(*b*) See *Blisset* v. *Daniel*, 10 Ha. 522, 536. Compare *Cassels* v. *Stewart*, 6 App. Ca. 64, noticed *infra*, which shows how difficult it is to apply this general principle.

(*c*) See *Maddeford* v. *Austwick*, 1 Sim. 89.

(*d*) See *Hichens* v. *Congreve*, 1 R. & M. 150; *Fawcett* v. *Whitehouse*, ib. 132.

(*e*) See *Lees* v. *Laforest*, 14 Beav. 250; *Clegg* v. *Fishwick*, 1 Mac. & G. 294; *Perens* v. *Johnson*, 3 Sm. & G. 419; *Clements* v. *Hall*, 2 De G. & J. 173.

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partner is endeavouring to get rid of another, or to buy him out (*f*).

Each must do his duty.

Notwithstanding the universal application to partners of the rule requiring perfect good faith, if one partner repudiates the contract of partnership and will not perform his duty towards his co-partners, he cannot justly complain if they in return decline to treat him on a footing of equality with themselves (*g*). As observed by Lord Eldon in *Const* v. *Harris*: "A partner who complains that the other partners do not do their duty towards him, must be ready at all times and offer himself to do his duty towards them" (*h*). But if a partner has been set at defiance by his co-partners; if they have denied that he is a partner, and that he has any right to interfere in the partnership, they can derive no advantage from the circumstance that he has not performed his duty to them (*i*).

A partner whose rights are denied should be prompt in asserting them, or he may be seriously prejudiced. This subject will be further adverted to in that part of the work which relates to the defences to actions between partners (*k*).

Principle of good faith the basis of the internal law of partnership.

The foregoing general principles may be regarded as the basis of the law of partnership, so far as it relates to the rights and obligations of partners as between themselves, and they will be found to be more or less illustrated throughout the whole of the present book. Those cases, however, which more especially relate to the obligation of partners not to benefit themselves at the expense of their co-partners, and to the rights of majorities, require to be specially noticed.

(*f*) *Blisset* v. *Daniel*, 10 Ha. 493; *Maddeford* v. *Austwick*, 1 Sim. 89; *Perens* v. *Johnson*, 3 Sm. & G. 419; *Chandler* v. *Dorsett*, Finch, 431. As to withholding information, see *McLure* v. *Ripley*, 2 Mac. & G. 274.

(*g*) See *McLure* v. *Ripley*, 2 Mac. & G. 274; *Reilly* v. *Walsh*, 11 Ir. Eq. 22.

(*h*) Turn. & R. 524.

(*i*) See *Dale* v. *Hamilton*, 2 Ph. 276.

(*k*) *Infra*, ch. 10, § 3.

SECTION II.—OF THE OBLIGATION OF PARTNERS NOT TO BENEFIT THEMSELVES AT THE EXPENSE OF THEIR CO-PARTNERS.

No partne allowed to benefit himself at the expense of the firm.

Good faith requires that a partner shall not obtain a private advantage at the expense of the firm. He is bound in all transactions affecting the partnership, to do his best for the common body, and to share with his co-partners any benefit which he may have been able to obtain from other people, and in which the firm is in honour and conscience entitled to participate; *Semper enim non id quod privatim interest unius ex sociis servari solet, sed quod societati expedit* (*l*).

There are two modes in which, more especially, partners attempt unfairly to acquire gain at the expense of their co-partners, viz., 1, by directly making a profit out of them; and 2, by appropriating to themselves benefits which they ought to have acquired, if at all, for the common advantage of the firm. It will be convenient to advert to each of these modes in turn.

1. Deriving profit from dealings with the firm.

In the first place, then, it may be laid down as a general rule, that one partner is not allowed to derive profit at the expense of the firm from any dealings between him and the partnership, unless it is clearly agreed that he is to have such profit. For example, if a partner is buying or selling for a firm, he cannot sell to it or buy from it at a profit to himself.

Sale to firm.

Bentley v. Craven.

In *Bentley* v. *Craven* (*m*), one of the several partners was employed to purchase goods for the firm. He, unknown to his co-partners, supplied them, at the market price, with goods previously bought by himself when the price was lower, and he so made a considerable profit. But it was held that the transaction could not be sustained, and that he was accountable to the firm for the profit thus made. The Master of the Rolls in delivering judgment, observed: "The case is this,—Four partners established a partnership for refining sugar; one of them is a wholesale grocer, and from his business is peculiarly cognizant with the variations in the sugar-market, and has great skill in buying sugar at a right and proper time for the business. Accordingly the business of selecting and pur-

(*l*) Dig. xvii. tit. 2, *pro socio*, *l.* 65, § 5.

(*m*) 18 Beav. 75.

chasing the sugar for the sugar refinery is entrusted to him. He being the person to buy, it is his duty and business to employ his skill in buying for the sugar refinery at the time he thinks most beneficial. Having according to his skill and knowledge bought sugar at a time when he thought it likely to rise, and it having risen, and the firm being in want of some, he sells his own sugars to the firm without letting the partners know that it was his sugar that was sold." Being the agent for the firm for buying sugars, he sold his own sugars to the firm and made a profit, and the firm was held entitled to that profit accordingly.

Purchase from firm.

Dunne v. English.

In *Dunne* v. *English* (*n*), the plaintiff and the defendant had agreed to buy a mine for 50,000*l.*, with a view to re-sell it at a profit. It was ultimately arranged that the defendant should sell it to certain persons for 60,000*l.*, and that the profit of 10,000*l.* should be equally divided between the plaintiff and the defendant. The defendant, however, in fact sold the mine for much more than 60,000*l.* to a company in which he himself had a large interest. The plaintiff was held entitled to one-half of the whole profit made by the re-sale.

Full disclosure necessary.

There was in this case some evidence that the plaintiff knew that the defendant had some interest in the purchase beyond his share of the known profit of 10,000*l.*; but the plaintiff did not know what that interest was, and the real truth was concealed from him. It was held that the defendant being the plaintiff's partner, and expressly entrusted with the conduct of the sale, was bound fully to disclose the real facts to the plaintiff, and not having done so, could not exclude him from his share of the profits which the defendant realised by the sale (*o*).

Authority to sell at a given price no waiver of share of higher price.

This case also shows, what indeed is obvious enough without authority, that one partner who authorises another to sell partnership property at a given price, does not thereby deprive himself of his right to share a higher price if a higher price should be realised (*p*).

(*n*) 18 Eq. 524.

(*o*) See, also, *Imp. Merc. Credit Assoc.* v. *Coleman*, L. R. 6 H. L. 189.

(*p*) See, also, *Parker* v. *McKenna*, 10 Ch. 96, and *De Bussche* v. *Alt*, 8 Ch. D. 286; and see ib. p. 317, as to a custom authorising such a practice.

2. Obtaining benefits which in honour belong to the firm.

The same principles apply to attempts made by partners to secure for themselves benefits which it was their duty to obtain, if at all, for the firm to which they belong (*q*).

Carter v. Horne.

Thus in *Carter* v. *Horne* (*r*), the plaintiff and the defendant agreed for the purchase of an estate in moieties between them. The estate was subject to several incumbrances, which were to be discharged out of the purchase money. The defendant had abatements made to him by some of the incumbrancers of several sums due for interest and otherwise, which they in consideration of services and friendship agreed should be to his own use. However, on a bill brought against him by his co-purchaser for an account of the rents and profits, the Court would not allow the defendant the exclusive benefit of these abatements, but held that he must account for them; the purchase being made for the equal benefit of both parties, and on a mutual trust between them.

Renewing leases.

Clandestine renewal.

Featherstonhaugh v. Fenwick.

It has been decided more than once, that if one partner obtains in his own name, either during the partnership or before its assets have been sold, a renewal of a lease of the partnership property, he will not be allowed to treat this renewed lease as his own and as one in which his co-partners have no interest. This was laid down and acted on by Sir Wm. Grant in the celebrated case of *Featherstonhaugh* v. *Fenwick* (*s*), where two partners having obtained in their own names a renewal of the lease of the partnership premises, immediately dissolved the partnership, and sought to exclude the plaintiff, their co-partner, from all interest in the new lease: but in taking the accounts of the partnership, the new lease was held to be part of the assets of the firm.

Clegg v. Fishwick.

Clegg v. *Fishwick* (*t*) is another case to the same effect.

(*q*) *Parker* v. *Hills*, 5 Jur. N. S. 809, is not opposed to these cases, for there the money was paid for a lease which was held to belong to one partner only.

(*r*) 1 Eq. Ab. 7. See, also, *De Bussche* v. *Alt*, 8 Ch. D. 286; *Morison* v. *Thompson*, L. R. 9 Q. B. 480, as to the right of a principal to profits made by his agent or sub-agent. Compare *Great Western Insur. Co.* v. *Cunliffe*, 9 Ch. 525, and *Baring* v. *Stanton*, 3 Ch. D. 502, where the agent's profits were part of his remuneration.

(*s*) *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298. In such cases the other partners cannot restrain the landlord from granting the lease to the one partner only. Their remedy is to treat the lessee as a trustee for the firm, *Alder* v. *Fouracre*, 3 Swanst. 489.

(*t*) 1 Mac. & G. 294. See, too, *Clements* v. *Hall*, 2 De G. & J. 173, and 24 Beav. 333.

There the plaintiff was the administratrix of one of several partners in a coal mine, and she filed a bill, some years after the death of the deceased, against the surviving partners, for an account and a dissolution, and for a declaration that a renewed lease, which had been obtained by the defendants, might be declared subject in equity to a trust for the benefit of the partnership. A twofold defence was set up, viz., first, that the old partnership ended with the old lease, and that the plaintiff could not therefore claim any interest in the new lease; and secondly, that she had some time before the filing of the bill, assigned all the share of the deceased to his children; and that she, therefore, at any rate, had no right to institute proceedings respecting such share. It was, however, decided first, that the old lease was the foundation for the new one, and that parties interested jointly with others in a lease, could not take the benefit of a renewal to the exclusion of those others; and secondly, that what had been assigned by the plaintiff, was the share of the deceased in the partnership, which share had never been ascertained; and that the effect of the assignment was merely to constitute her a trustee of the share for the assignees after she had got it in, and not to deprive her of her power to call for a realisation of the partnership property.

Open renewal.

In both of these cases the renewal of the lease was clandestine. But that is not an essential feature. In the more recent and very important case of *Clegg* v. *Edmondson* (*u*), the partnership was at will; the managing partners gave notice of dissolution and of their intention to renew the old lease for their own benefit. They afterwards did so, the other partners protesting, and there was evidence to show that the landlord objected to renew to any persons except the managing partners (*x*). It was held, however, that it was not competent for the managing partners thus to acquire for themselves alone the benefit of the renewed lease (*y*).

Clegg *v.* Edmondson.

Right to reject renewed lease.

A partner by renewing a lease against the will of his co-

(*u*) 8 De G. Mc. & G. 787.

(*x*) See as to this, *Fitzgibbon* v. *Scanlon*, 1 Dow. 269.

(*y*) At the same time relief against them was refused on the ground of laches and delay on the part of the plaintiffs. On this point the case will be noticed hereafter. See book iii. c. 10, § 3.

partners, cannot force it on them and compel them to treat the property comprised in it as acquired for the firm, unless there is some agreement binding them so to do (*z*).

Benefits derived from use of partnership property.

The principle which precludes a partner from retaining for himself benefits which he ought to share with his co-partners, is applied to cases in which unfairness and misconduct are by no means so apparent as in those just cited. A high standard of honour requires that no partner shall derive any exclusive advantage by the employment of the partnership property, or by engaging in transactions in rivalry with the firm.

Burton v. Wookey. Profits of tally shop.

Thus, in *Burton* v. *Wookey* (*a*), the plaintiff and the defendant were partners as dealers in *lapis calaminaris*. The defendant who was a shopkeeper, lived near the mines in which the ore was got, and he purchased it of the miners. Instead, however, of paying them with money, he paid them with shop goods, and in his account with the plaintiff charged him as for cash paid to the amount of the *selling* price of the goods. The plaintiff contended that the price of the ore ought, as between himself and the defendant, to be considered as being the *cost* price of the goods given in exchange for it, and that the profit made by the exchange ought to be accounted for to the partnership. The Court adopted this view; holding that it was the duty of the defendant to buy the ore at the lowest possible price, and to charge the partnership with no more than he actually gave for the goods bartered for the ore. An account of the profit made by the defendant in his barter of the goods was decreed accordingly.

Gardner v. McCutcheon. Part-owners of ships.

Again, in *Gardner* v. *McCutcheon* (*b*), a ship, of which the plaintiffs and the defendant were part-owners and the defendant was master, was employed for the common benefit of all in

(*z*) *Clements* v. *Norris*, 8 Ch. D. 129, where an attempt of this sort was defeated.

(*a*) 6 Madd. 367.

(*b*) 4 Beav. 534. See, too, *Benson* v. *Heathorn*, 1 Y. & C. C. C. 326, and 2 Coll. 309; *Miller* v. *Mackay*, 31 Beav. 77; *Shallcross* v. *Oldham*, 2 J. & H. 609; and as to commissions, *Holden* v. *Webber*, 29 Beav. 117. Compare *Miller* v. *Mackay*, 34 Beav. 295, where the profits were held to belong to him who made them. In *Moffatt* v. *Farquharson*, 2 Bro. C. C. 338, a part-owner of a ship was held to be exclusively entitled to money paid him for his vote in the appointment of a master. But see on that case the note to it in Mr. Belt's edition. See *infra*, c. 4, § 1.

trading and carrying under charter. The defendant, during the time the ship was thus employed, traded on his own account and made considerable profit. It was held that he was bound to account for the profits thus obtained. He was bound to trade to the best of his ability for the joint interest of himself and co-owners; he had no right to employ the partnership property in a private speculation for his own benefit; and although he alleged that the profits were made solely by the employment of his own private capital, and that by custom masters of ships were allowed to trade for their own benefit, the Court declined to recognise any such custom, and considered that the profits had been made by the employment of what was not the defendant's exclusively, and that the plaintiffs had therefore a right to share them.

Benefits resulting from connection with the firm.

A partner, moreover, is not allowed in transacting the partnership affairs, to carry on for his own sole benefit any separate trade or business which, were it not for his connection with the partnership, he would not have been in a position to carry on. Bound to do his best for the firm, he is not at liberty to labour for himself to their detriment; and if his connection with the firm enables him to acquire gain, he cannot appropriate that gain to himself on the pretence that it arose from a separate transaction with which the firm had nothing to do. This is well exemplified by the cases as to renewed leases which have been already referred to (*c*), and by *Russell* v. *Austwick*, which also shows that the same principles apply wherever there is an agreement to share profits.

Carriers not partners inter se.

Russell *v.* Austwick.

In *Russell* v. *Austwick* (*d*) several persons agreed to carry on business as carriers between London and Falmouth; *but they expressly stipulated that no partnership should subsist between them*, and that each should have a certain portion of the road over which he was to carry. Business was commenced and carried on by the parties to this agreement under the name of Messrs. Russell & Co., and they were employed to carry bullion from Falmouth and Plymouth to London. On the

(*c*) *Ante*, p. 307.

(*d*) 1 Sim. 52. See, also, as to benefits derived by one co-owner of a mine from the use of a shaft situate in his own land, but used for the mine, *Clegg* v. *Clegg*, 3 Giff. 322.

issue of a new silver coinage by the Bank of England, Austwick, who appears to have been the London agent of the carriers, entered into a contract with the Master of the Mint for the carriage of the new coin to towns on the road between London and Falmouth. Shortly afterwards he entered into another contract with the Master of the Mint for the conveyance of more new coin to towns in Middlesex, and the adjoining counties. None of these last towns lay on the road leading from London to Falmouth, and many of them were only accessible by cross country roads, and in consequence of the increased risk of carriage along these roads, the Mint authorities agreed to pay 7*s.* 6*d.* per cent. *for all the coin sent from the Mint*, instead of 5*s.* per cent., which was the remuneration agreed on in the first contract. Austwick contended that he was entitled to the whole benefit of this second contract, because (except as to the extra 2*s.* 6*d.*) it had nothing to do with the carrying business between London and Falmouth; and because, as to the 2*s.* 6*d.*, that sum, although calculated on all the coin carried, whether under the first or the second agreement, was in fact paid by the Mint in consideration only of the extra risk attending the carriage to the towns specified in the second contract. On the other hand it was contended and held, that the second agreement ought to be considered as made on account of all the persons interested in the first agreement; because, although the common concern had no connection with the provincial roads which were the occasion of the second agreement, yet this agreement was entered into by the officers of the Mint as connected with, and a continuation of, the first agreement, and in confidence of the responsibility of the parties to it.

This case of *Russell* v. *Austwick* shows how difficult it is for a partner to benefit himself exclusively, by dealings which in honour he ought not to have engaged in except for the common benefit of the firm.

Distinct businesses.

Lock v. *Lynam*, which came before the Court of Chancery in Ireland, affords another instructive example of the application of the same wholesome doctrine. In this case (*e*) the plaintiff

Lock v. Lynam.

(*e*) *Lock* v. *Lynam*, 4 Ir. Ch. 188. Compare this and the last case with *Miller* v. *Mackay*, 34 Beav. 295; and see *Somerville* v. *Mackay*, 18 Ves. 382.

and the defendant had agreed to share the profit and loss arising from contracts taken by the defendant for the supply of meat and bread to Her Majesty's forces in Ireland. Whilst this agreement was in force the defendant entered into secret agreements with other persons to share with them the profit and loss accruing in respect of similar contracts entered into and taken by them. The plaintiff claimed a share in the profits made by the defendant under these secret agreements; whilst the defendant contended that he was entitled to retain them for his own exclusive benefit. The Lord Chancellor observed, that in all cases of this kind the real question was, whether, from the nature of the transaction between the partners, there was any express or implied contract against other dealings of a like character; and that although there was no engagement not to enter into any other partnership of the same kind, still it never could have been in the contemplation of either of the parties that one partner should, in his own name or in that of any other person, adopt contracts to the prejudice of the other's interest. A decree was accordingly made directing an enquiry whether, during the period for which any partnership between the plaintiff and the defendant existed, the defendant, either alone or jointly with any other person or persons, separately from the plaintiff, entered into, or was beneficially interested in, any other contract or dealing of the like nature with those in which the plaintiff and the defendant were engaged as partners.

One partner competing with firm.

After the decisions to which attention has now been drawn, there can be little doubt that a partner cannot, either openly or secretly, lawfully carry on for his own benefit any business in rivalry with the firm to which he belongs (*f*). But where a partner carries on a business not connected with or competing with that of the firm, his partners have no right to the profits he thereby makes, even if he has agreed not to carry on any separate business (*g*).

(*f*) See *Glassington* v. *Thwaites*, 1 Sim. & Stu. 124; *England* v. *Curling*, 8 Beav. 129, in which, however, there was something more than mere rivalry.

(*g*) *Dean* v. *Macdowell*, 8 Ch. D. 345. An injunction might have been obtained, and perhaps damages for a breach of covenant.

Buying share. Cassels v. Stewart.

Again, it has been held competent for one partner to acquire for himself the share of a co-partner in the partnership business, without informing the other partners of the purchase, and without giving them an opportunity of acquiring it (*h*). The articles of partnership did not forbid such a purchase; nor was it any part of the business of the firm to buy the shares of its members.

Partnership not yet formed. Fawcett v. Whitehouse.

The same obligation to act with good faith exists between persons who have agreed to become partners; and if one of them in negotiating for the acquisition of property for the intended firm, receives a bonus or commission, he must account for it to the firm when formed (*i*). He cannot retain it for himself on the ground that it was paid him for personal services rendered to the vendor before any partnership existed. Having obtained the benefit, whilst negotiating for himself and his future partners, he must share such benefit with them (*k*).

SECTION III.—OF THE POWERS OF A MAJORITY OF PARTNERS.

Disputes between partners.

In the event of a difference arising between partners, it becomes necessary to consider whether there is any method of determining which of them is to give way to the other. It is not uncommonly supposed that the minority of the partners, if they are unequally divided, must submit to the majority. But this is by no means the case; for, as will be seen presently, the majority cannot oblige the minority except within certain limits.

How to be settled.

The first point to determine is, whether the partnership articles, do or do not contain any express provision applicable to the matter in question; for if they do, such provision ought to be obeyed (*l*). If they do not, then the nature of the

(*h*) *Cassels* v. *Stewart*, 6 App. Ca. 64.

(*i*) *Fawcett* v. *Whitehouse*, 1 R. & M. 132.

(*k*) Ibid. See, also, *Hichens* v. *Congreve*, 1 R. & M. 150, and other cases of that class, relating to promoters of companies.

(*l*) As to the construction of partnership articles, see *infra*, c. 9.

question at issue must be examined; for there is an important distinction between differences which relate to matters incidental to carrying on the legitimate business of a partnership, and differences which relate to matters with which it was never intended that the partnership should concern itself.

1. Disputes on matters arising in ordinary course of business.

With respect to the first class of differences, regard must be had to the state of things actually existing; for, as a rule, if the partners are equally divided, those who forbid a change must have their way: *in re communi potior est conditio prohibentis* (*m*). Upon this principle it is that one partner cannot either engage a new or dismiss an old servant against the will of his co-partner (*n*); nor, if the lease of the partnership place of business expires, insist on renewing the lease and continuing the business at the old place (*o*).

Power of majority in such cases.

If, however, in a case of this description, unprovided for by previous agreement, the partners are unequally divided, the minority must, the author apprehends, give way to the majority (*p*). This is the rule applicable to companies whether incorporated or unincorporated (*q*); it is the rule adopted in the Indian contract act (*r*); and it is practically reasonable and convenient. The only alternative is to hold that if partners disagree, even as to trifling matters of detail, the minority can forbid all change, and perhaps bring the business of the firm to a dead-lock, for which the only remedy is a dissolution. At the same time the author is not aware of any clear and distinct authority in support of the proposition that even in such matters a dissentient partner must give way to his co-partners (*s*).

However, a majority cannot against the will of the minority

(*m*) But see as to the employment of a ship, Abbott on Shipping, p. 82, ed. 9, and p. 58, ed. 12; and as to completing contracts already entered into, *Butchart* v. *Dresser*, 4 De G. M. & G. 545.

(*n*) See *Donaldson* v. *Williamson*, 1 Cr. & M. 345.

(*o*) *Clements* v. *Norris*, 8 Ch. D. 129. N.B.—The partnership had not expired.

(*p*) See *Gregory* v. *Patchett*, 33 Beav. 595; *Const* v. *Harris*, T. & R. 518; *Robinson* v. *Thompson*, 1 Vern. 465; as to opening accounts, *Morgan's case*, 1 M. & G. 235.

(*q*) See *Stevens* v. *South Devon Rail. Co.*, 9 Ha. 326; *Simpson* v. *Westminster Palace Hotel Co.*, 2 De G. F. & J. 141; *Kent* v. *Jackson*, 2 De G. M. & G. 49, and 14 Beav. 367.

(*r*) § 253, cl. 5.

(*s*) Pollock's Dig. § 36, adopts the author's view, but apparently on his authority.

delegate to a manager the right to sign the partnership name (*t*); and it is doubtful whether a majority can decide where the partnership business shall be carried on when the lease of its place of business expires (*u*).

All partners entitled to be heard.

A very important rule respecting the powers and votes of majorities is, that a majority, to have any weight, must act and be constituted with perfect good faith; for every partner has a right to be consulted, to express his own views, and to have those views considered by his co-partners. In the language of Lord Eldon, "that is the act of all which is the act of the majority, provided all are consulted, and the majority are acting *bonâ fide*, meeting not for the purpose of negativing what any one may have to offer, but for the purpose of negativing what, when they are met together, they may after due consideration think proper to negative. For a majority of partners to say, We do not care what one partner may say; we, being the majority, will do what we please, is, I apprehend, what a court of equity will not allow" (*x*).

Majorities at meetings.

Moreover, where powers are conferred on a majority present at a meeting of not less than a certain number of persons, unless such meeting be duly convened and the requisite number be present at the meeting the powers in question cannot be exercised; and although it may be true that the required number of persons was summoned, and that the absentees could not have turned the scale, this will not render valid the acts of the majority of those actually present, for that is not such a majority as was originally contemplated (*y*).

2. Disputes on matters involving a change in the nature of the business.

Passing now to the second class of differences, viz., those which relate to matters with which the partnership was never intended to concern itself, it has been over and over again decided that no majority, however large, can lawfully engage the partnership in such matters against the will of even one dissentient partner. Each partner is entitled to say to the

One dissentient can forbid a change.

(*t*) See *Beveridge* v. *Beveridge*, L. R. 2 Sc. App. 183.

(*u*) See *Clements* v. *Norris*, 8 Ch. D. 129, but note there the firm consisted of two members only.

(*x*) *Const* v. *Harris*, Turn. & R. 525, and see ib. 518, and *Blisset* v. *Daniel*, 10 Ha. 493; *Great Western Rail. Co.* v. *Rushout*, 5 De G. & Sm. 310.

(*y*) See *Re London and Southern Counties Freehold Land Co.*, 31 Ch. D. 223; *Howbeach Coal Co.* v. *Teague*, 5 H. & N. 151; *Ex parte Morrison*, De G. 539.

others, "I became a partner in a concern formed for a definite purpose, and upon terms which were agreed upon by all of us, and you have no right, without my consent, to engage me in any other concern, nor to hold me to any other terms, nor to get rid of me, if I decline to assent to a variation in the agreement by which you are bound to me and I to you." Nor is it at all material that the new business is extremely profitable (*z*).

In companies as well as in partnership.

This principle is applicable to all partnerships and companies, whether great or small, and is evidently one which requires only to be stated to be at once assented to as being just. No cases upon this subject can be referred to with greater advantage than *Natusch* v. *Irving* and *Const* v. *Harris*, both of which were decided by Lord Eldon (*a*).

Fire and life Insurance Company turning into a Maritime Insurance Company.

Natusch v. Irving.

In *Natusch* v. *Irving* (*b*), a company was formed in the early part of the year 1824 for granting fire and life assurances. The capital was 5,000,000*l*., divided into fifty thousand 100*l*. shares. The plaintiff was one of the original subscribers, and held fifteen shares, in respect of which he had paid the required deposit, but he had not executed the company's deed of settlement. In conformity with the rules of the company he had effected a policy with it on his life for 1500*l*. In the summer of 1824, the act of 6 Geo. 1, prohibiting companies from carrying on the business of marine insurance, was repealed, and shortly afterwards advertisements appeared in the newspapers, stating that the company would commence the business of marine insurance. The plaintiff, in answer to an inquiry whether this announcement was authorised by the directors, was informed that it was, and that if he objected to the course about to be pursued he might receive back his deposit with interest, and have his policy cancelled and the premium returned. In reply to this, the plaintiff stated that he was ready to execute any deed which was in conformity with the prospectus; that he conceived it competent for him to insist that the business in which he was a partner should be carried

(*z*) *A.-G.* v. *Great Northern Rail. Co.*, 1 Dr. & Sm. 154.

(*a*) See, too, *Davies* v. *Hawkins*, 3 M. & S. 488; *Fennings* v. *Grenville*, 1 Taunt. 241; *Glassington* v. *Thwaites*, 1 Sim. & Stu. 131.

(*b*) Gow on Partnership, App. 398, ed. 3. See, also, *The Phœnix Life Insur. Co.*, 2 J. & H. 441.

on according to the agreement which united the partners together: that he could not think his doing so would entitle the managers of that partnership to pay him out his capital, and deprive him of a share in a concern of which he had the highest opinion; that he therefore required the directors to abstain from any contracts or engagements relating to marine insurance, as not being contemplated by himself and those who joined the company upon the terms of the prospectus, and that he required an undivided attention on the part of the directors to the objects defined therein. The plaintiff afterwards attended at the office of the company, to execute its deed of settlement, but finding that it contained provisions enabling the company to carry on the business of marine insurance, he refused to execute it, as not being conformable to the terms on which the company was formed. In pursuance of the advertisements, the company had commenced, and it was carrying on, the business of marine insurance; but there was no evidence to show acquiescence on the part of the plaintiff, and there was evidence to show continued opposition by him to the carrying on of such business. The plaintiff applied for an injunction to restrain the directors from effecting marine insurances, and an injunction was granted (*c*). The judgment of Lord Eldon, as far as it relates to the power of a majority, is particularly valuable, and the following extracts from it are constantly referred to.

Answer to objection that dissentient can retire.

With respect to the liberty given to the plaintiff to retire, his lordship said: "An offer is made to the plaintiff that he may receive back his deposit, with interest from the date of the payment, and he is desired to consider himself as having received notice thereof. But it is not, I apprehend, competent to any number of persons in a partnership (unless they show a contract rendering it competent to them) formed for specified purposes, if they propose to form a partnership for very different purposes, to effect that formation by calling upon some of their partners to receive their subscribed capital and interest and quit the concern; and in effect, merely by compelling them to retire upon such terms, so to form a new company. This would, as to partnerships, be a most dangerous doctrine.

(*c*) The bill was filed by the plaintiff on behalf of himself and all others the shareholders of the company against the directors, and prayed a dissolution, and, if necessary, a receiver, and an injunction to restrain the defendants from effecting marine insurances in the name and on account of the company, and from using the name, and from applying the capital of the company for such purposes.

Bk. III. Chap. 2. Sect. 3.

Natusch *v.* Irving.

Where a partnership is dissolved (even where it can be in a sense dissolved the instant after notice to dissolve is given, if there be no contract to the contrary), it must still continue for the purpose of winding-up its affairs, of taking and settling all its accounts, and converting all the property, means, and assets of the partnership, existing at the time of the dissolution, as beneficially as may be, for the benefit of all who were partners, according to their respective shares and interests; and the other partners cannot say to him to whom they have given an offer of his deposit and interest, Take that, and we are a new company, keeping the effects, means, assets, and property of the old, as the property of the new partnership. The company will indemnify the plaintiff against loss by its transactions already had, or hereafter to be had, not for the specified purposes of the institution. But the right of a partner is to hold to the specified purposes his partners whilst the partnership continues, and not to rest upon indemnities with respect to what he has not contracted to engage in. A dissatisfied partner may sell his shares for double what he originally gave for them. But he cannot be compelled to part with them for that reason; it may be his principal reason for keeping them, having the partnership concern carried on according to the contract. The original contract and the loss which his partners would suffer by a dissolution, is his security that it shall be so carried on for him and them beneficially, and with augmented improvement in the value of his shares and their shares."

Dissentient need not accept an offer of indemnity.

Answer to argument that the change was warranted by statute.

With respect to the alteration of the law enabling companies to carry on the business proposed, his lordship observed: "The repeal of the act 6 Geo. 1, which merely made it lawful for societies or partnerships, however numerous their members might be, to insure against marine risks, could not make it lawful for companies or societies, which were formed for specified purposes of insurance upon lives and against fire, to insure against marine risks, unless the contracts by which such companies were formed, either expressly or impliedly (where individual partners did not consent to embarking in new projects, either originally, or subsequently to the formation of the companies), created an authority in some part of the body to bind all the body to the adoption of such new undertakings."

Observations on powers of majorities.

With respect to the power of a majority, his lordship laid it down that, "If six persons joined in a partnership of life assurance, it seems clear that neither the majority nor any select part of them, nor five out of the six, could engage that partnership in marine insurances, unless the contract of partnership expressly or impliedly gave that power: because if this was otherwise, an individual or individuals, by engaging in one specified concern, might be implicated in any other concern whatever, however different in its nature, against his consent. But if a part of the six openly and publicly professed their intention to engage the partnership in another concern, and clearly and distinctly brought this to the knowledge of one or more of the other partners, and such one or more of the other partners could be clearly shown to have acquiesced in such intention, and to have permitted the other partners to have entered upon, and to have engaged themselves and the body in such new projects, and thereby to have placed their partners so engaged in difficulties and embarrassments unless they were permitted to proceed in the farther execution of such projects, if a court of equity would not go the length of holding that such conduct was

consent, it would scarcely think parties so conducting themselves entitled to the *festinum remedium* of injunction." * * * * "Courts must struggle to prevent particular members of those bodies from engaging other members in projects in which they have not consented to be engaged, or the engaging in which they have not encouraged, assented to, or empowered, or acquiesced in, expressly or tacitly, so as to make it not equitable that they should seek to restrain them. The principles which a Court would act upon in the case of a partnership of six, must, as far as the nature of things will admit, be applied to a partnership of 600." * * * "They who seek to embark a partner in a business not originally part of the partnership concern, must make out clearly that he did expressly or tacitly acquiesce."

Const v. Harris.

Altering principle on which profits should be dealt with.

In *Const* v. *Harris* (*d*), the proprietors of Covent Garden Theatre agreed that the profits should be exclusively appropriated to certain definite purposes. Afterwards, the proprietors of seven out of eight shares, entered into an agreement to apply the profits in a different manner, but they had not consulted the owner of the other eighth share, and he disapproved of the alteration. It was held by Lord Eldon, that the majority had no power to depart from the terms of the original agreement; and upon a bill filed by the one dissentient partner for a specific performance of that agreement, a receiver of the profits was appointed. In a long and elaborate judgment, Lord Eldon distinctly recognised the principle, that articles which had been agreed on to regulate a partnership, cannot be altered without the consent of *all* the partners (*e*).

In modern times the same principle has been constantly recognised and followed. Indeed it is never now disputed, although its application frequently gives rise to controversy. The decisions bearing on this subject relate, however, to companies, and are not, therefore, further noticed in the present treatise (*f*).

(*d*) Turn. & R. 496.

(*e*) See Turn. & R. 517, 523. The whole judgment is well worthy of attentive perusal; but being much to the same effect as that in *Natusch* v. *Irving*, the writer has not felt it necessary to make extracts from it.

(*f*) *Auld* v. *Glasgow Working Men's Building Soc.*, 12 App. Ca. 197, is one of the most recent cases.

CHAPTER III.

OF THE CAPITAL OF PARTNERSHIPS.

Bk. III. Chap. 3.

Capital of partnerships.

By the capital of a partnership is meant the aggregate of the sums contributed by its members for the purpose of commencing or carrying on the partnership business, and intended to be risked by them in that business. The capital of a partnership is not therefore the same as its property: the capital is a sum fixed by the agreement of the partners; whilst the actual assets of the firm vary from day to day, and include everything belonging to the firm and having any money value. Moreover, the capital of each partner is not necessarily the amount due to him from the firm; for not only may he owe the firm money, so that less than his capital is due to him; but the firm may owe him money in addition to his capital, *e.g.*, for money advanced by him to the firm by way of loan, and not intended to be wholly risked in the business. The distinction between a partner's capital and what is due to him for advances by way of loan to the firm, is frequently very material: *e.g.*, with reference to interest; with reference to clauses in partnership articles fixing the amount of capital to be advanced and risked, and prohibiting the withdrawal of capital; and above all with reference to priority of payment in the event of dissolution and a deficiency of assets (*a*). The amount of each partner's capital ought, therefore, always to be accurately stated, in order to avoid disputes on a final adjustment of account; and this is more important where the capitals of the partners are unequal, for if there is no evidence as to the amounts contributed by them, the shares of the whole assets will be treated as equal (*b*).

(*a*) See on this subject, *infra*, book iii. ch. 8, § 1, on partnership accounts.

(*b*) See as to the equality of shares, *infra*, book iii. ch. 5, § 2.

Increase and diminution of capital.

When the agreed amount of capital of a partnership has been exhausted, and the business cannot be carried on to a profit, the partnership may be dissolved, as will be pointed out hereafter (*c*). A partner cannot be compelled to furnish more capital than he has agreed to bring in and risk; although he cannot, by limiting the amount of his capital, limit his liability for debts incurred by the firm (*d*). On the other hand, a partner who has agreed to furnish a certain amount of capital, is bound not only to bring it into the firm, but also to leave it in the business until the firm is dissolved.

It follows from these considerations that the agreed capital of a partnership cannot be either added to or withdrawn except with the consent of all the members of the partnership (*e*); and this rule is perfectly consistent with the obvious fact, that the assets and liabilities of a partnership are necessarily liable to fluctuation, and that the value of each partner's share of such assets constantly fluctuates also.

Borrowing money and increasing capital.

The difference between borrowing money on the credit of a firm and increasing its capital, has been already adverted to (*f*); and it has been seen that although each member of an ordinary trading partnership can pledge its credit for money borrowed in order to carry on its business, he cannot render it liable to repay money borrowed by him to enable him to furnish the amount of capital which he has agreed to bring in (*g*).

(*c*) *Infra*, book iv. ch. 1, § 2.

(*d*) *Ante*, p. 200.

(*e*) See *Heslin* v. *Hay*, 15 L. R. Ir. 431, where an attempt was made to violate this rule; and see the obs. of Lord Bramwell in *Bouch* v. *Sproule*, 12 App. Ca. 405.

(*f*) *Ante*, pp. 132, 133.

(*g*) Ib.

CHAPTER IV.

OF JOINT AND SEPARATE PROPERTY.

Bk. III. Chap. 4.

Partnership property.

THE expressions partnership property, partnership stock, partnership assets, joint stock, and joint estate, are used indiscriminately to denote everything to which the firm, or in other words *all* the partners composing it, can be considered to be entitled as such (*a*). The qualification *as such* is important; for persons may be entitled jointly or in common to property, and the same persons may be partners, and yet that property may not be partnership property; *e.g.*, if several persons are partners in trade, and land is devised or a legacy is bequeathed to them jointly or in common, it will not necessarily become partnership property and form part of the common stock in which they are interested as partners (*b*). Whether it does so or does not, depends upon circumstances which will be examined hereafter.

Importance of distinguishing partnership property from the separate property of the partners.

It is often a difficult matter to determine what is to be regarded as partnership property, and what is to be regarded as the separate property of each partner. The question, however, is of importance not only to the partners themselves, but also to their creditors; for, as will be seen hereafter, if a firm becomes bankrupt, the property of the firm and the separate property of each partner have to be distinguished from each other, it being a rule to apply the property of the firm in the first place in payment of the creditors of the firm, and to apply the separate properties of the partners in the first place to the payment of their respective separate creditors.

(*a*) The expression joint estate sometimes has a wider signification, including all property which, on the bankruptcy of the firm, is distributable amongst its creditors. See *post*, book iv. ch. 4, sec. 3, Reputed Ownership.

(*b*) *Morris* v. *Barrett*, 3 Y. & J. 384, and see the judgment in *Ex parte The Fife Banking Co.*, 6 Ir. Eq. 197, S. C. on appeal under the name of *Re Littles*, 10 ib. 275.

It is proposed, therefore, to examine the rules by which to determine what is the property of the firm, and what the separate property of its members.

Question determined by agreement.

It is for the partners to determine by agreement amongst themselves what shall be the property of them all, and what shall be the separate property of some one or more of them. Moreover, it is competent for them by agreement amongst themselves to convert what is the joint property of all into the separate property of some one or more of them, and *vice versâ*. The determination, therefore, of the question, What is, and what is not the property of the firm? involves an inquiry into the three following subjects, viz.:—

Joint estate.

Separate estate.

Conversion of one into the other.

Each of these will be examined in order.

SECTION I.—OF JOINT ESTATE.

1. Property of the firm.

Whatever at the commencement of a partnership is thrown into the common stock, and whatever has from time to time during the continuance of the partnership been added thereto or obtained by means thereof, whether directly by purchase or circuitously by employment in trade, belongs to the firm, unless the contrary can be shown (*c*).

Property paid for by the firm.

The mere fact that the property in question was purchased by one partner in his own name is immaterial, if it was paid for out of the partnership monies; for in such a case he will be deemed to hold the property in trust for the firm, unless he can show that he holds it for himself alone (*d*). Upon this

(*c*) See *Crawshay* v. *Collins*, 2 Russ. 339, as to the patents; *Nerot* v. *Burnand*, 4 Russ. 247, and 2 Bli. N. S. 415; *Bone* v. *Pollard*, 24 Beav. 283. See, also, as to co-owners of mines not being co-partners, *Clegg* v. *Clegg*, 3 Giff. 322. As to outlays of partnership money on the separate property of one partner, see *infra*, § 2.

(*d*) See *per* Lord Eldon in *Smith* v. *Smith*, 5 Ves. 193; *Robley* v. *Brooke*, 7 Bli. 90; *Morris* v. *Barrett*, 3 Y. & J. 384. See, also, *Helmore* v. *Smith*, 35 Ch. D. 436.

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principle it is held that land purchased in the name of one partner, but paid for by the firm, is the property of the firm, although there may be no declaration or memorandum in writing disclosing the trust, and signed by the partner to whom the land has been conveyed (*e*). So, if shares in a company are bought with partnership money, they will be partnership property, although they may be standing in the books of the company in the name of one partner only, and although it may be contrary to the company's deed of settlement for more than one person to hold shares in it (*f*).

Ships.

As regards ships there was often a difficulty arising from the ship registration acts. For as it was clearly settled that a ship belonged, both at law and in equity, to the person or persons who were registered as her owners, and to no one else, it followed that if a ship had been bought with partnership money, had been used as partnership property, and had always been treated as such by all the partners, yet if she was registered in the name of one partner only, there was no method by which that one could be prevented from effectually asserting an exclusive right to the ship, and depriving his co-partners of all their interest in her (*g*). The provisions of the present Merchant shipping acts differ, however, in several material respects from the enactments previously in force; and now, in the case above supposed, the registered partner would be deemed a trustee for the firm (*h*).

(*e*) *Forster* v. *Hale*, 5 Ves. 308, and 3 ib. 696.

(*f*) *Ex parte Connell*, 3 Deac. 201; *Ex parte Hinds*, 3 De G. & S. 613.

(*g*) See *Slater* v. *Willis*, 1 Beav. 354; *Battersby* v. *Smyth*, 3 Madd. 110; *Camden* v. *Anderson*, 5 T. R. 709; *Curtis* v. *Perry*, 6 Ves. 739; *Ex parte Yallop*, 15 Ves. 60; *Ex parte Houghton*, 17 Ves. 251; and as to the old law relating to equitable interests in ships, see an article by the author in the Law Magazine for May, 1862 (vol. xiv. p. 70, N. S.). If a ship was registered in the name of two partners, the shares in which they were interested might have been shown. See *Ex parte Jones*, 4 M. & S. 450. As to the right of one partner to sell or mortgage a ship belonging to the firm, see *Ex parte Howden*, 2 M. D. & D. 574.

(*h*) 17 & 18 Vict. c. 104, §§ 37 and 43, and 25 & 26 Vict. c. 63, § 3. Upon the construction of the former act, see *Hughes* v. *Sutherland*, 7 Q. B. D. 160; *Liverpool Borough Bank* v. *Turner*, 1 J. & H. 159, and 2 De G. F. & J. 502. A ship may be registered in the name of a com-

Strong as is the presumption that what is bought with partnership money is partnership property, the presumption may be rebutted; *e. g.*, by showing that the money was lent by the firm to one partner, and so was not in fact partnership money when invested (*i*). Moreover, it is to be observed that property which has been used and treated as partnership property cannot be presumed to belong to one partner only, simply because he paid for it; for the presumption in such a case is rather that the property in question was his contribution to the common stock (*j*). This subject will be adverted to more at length in the next section.

Cases where property paid for by the firm does not belong to it.

It has been already seen that one partner will not be allowed to retain for his own exclusive benefit any property which he may have acquired in breach of that good faith which ought to regulate the conduct of partners *inter se*. Whatever property has been so acquired, will be treated as obtained for the benefit of all the partners, and as being part of the assets of the firm; and this rule applies to property obtained by a continuing or surviving partner in breach of the good faith which he is bound to exercise towards a retired partner, and the representatives of a deceased partner, so long as their interest in the partnership assets continues (*k*).

Secret benefits obtained by one partner.

At the same time, if an advantage which has been obtained by a partner is wholly unconnected with the partnership affairs, or, being connected with them, has been conferred upon him with a view to his own personal benefit, he cannot be called upon to account for it to the partnership. For example, where a ship, belonging to a Frenchman and two Americans as partners, was captured by a British cruiser, and compensation was made to the Americans, but to them only, the Frenchman being expressly excluded, it was held that the sum awarded to the Americans belonged to them alone, and that the Frenchman had no interest in it (*l*). So, if one partner is

Money paid to one partner for his exclusive benefit.

pany, though some of its members are foreigners. See 17 & 18 Vict. c. 104, § 18; and *R.* v. *Arnaud*, 9 Q. B. 806.

(*i*) As in *Smith* v. *Smith*, 5 Ves. 193. See, also, *Walton* v. *Butler*, 29 Beav. 428; *Ex parte Emly*, 1 Rose, 64.

(*j*) See *Ex parte Hare*, 1 Deac. 25, *per* Sir J. Cross.

(*k*) See *ante*, p. 305 *et seq.*

(*l*) *Campbell* v. *Mullett*, 2 Swanst. 551. See, also, *Burnand* v. *Rodocanachi*, 7 App. Ca. 333; *Thompson*

the lessee of property to which the firm is only entitled so long as the partnership continues, and on the dissolution of the partnership the lease is sold or renewed, the price of the sold lease, or the renewed lease, as the case may be, will belong, not to the firm, but to that partner in whom the lease is by hypothesis exclusively vested (*m*).

Property acquired after dissolution.

As regards property acquired after a dissolution, but before the affairs of a dissolved partnership have been wound up, such property is not necessarily to be considered as partnership property, even though the partner acquiring it has continued to carry on the business of the dissolved firm without the consent of his late partners. This was decided in *Nerot* v. *Burnand* (*n*).

Nerot *v.* Burnand.

In that case, in effect, an hotel-keeper bequeathed his business to his son and daughter. After the death of the testator, the daughter continued to carry on the business. She afterwards transferred it to a new house in Clifford Street, and this house was conveyed to her in fee. She continued to carry on the business there for some time, and ultimately she married. During the greater part of the time which had elapsed since the death of the testator, his son had been abroad, and on his return he insisted that he ought to be considered as a partner with his sister, and that as such he was entitled to have the new house taken by her, and all the stock in trade and effects purchased by her in order to carry on the business, treated as partnership property. The Vice-Chancellor decided that the testator's son and daughter had become partners, but that the partnership between them had been dissolved on her marriage. He also held, that the new house, and all the goods, furniture, plate, linen, china, wines, stock-in-trade, implements and other effects, being in and about the premises, formed a part of the partnership property. Upon appeal this decision was affirmed, so far as it related to the existence and subsequent dissolution of partnership; but was varied so far as it related to what ought to be considered as partnership property.

v. *Ryan*, 2 Swanst. 565, *n.*; *Moffatt* v. *Farquharson*, 2 Bro. C. C. 338. See the note on this case in Belt's edition of Brown's Reports.

(*m*) See *Burdon* v. *Barkus*, 3 Giff. 412, aff. on appeal, 4 De G. F. & J. 42.

(*n*) 4 Russ. 247, and 2 Bli. N. S. 215. See, too, *Payne* v. *Hornby*, 25 Beav. 280.

Upon this head the Lord Chancellor's judgment was as follows:—

"It appears to me satisfactorily made out from all the circumstances, that the house in Clifford Street was bought with the partnership property; bought, in the first instance, partly with the partnership property, partly with money borrowed by Miss Nerot and afterwards repaid out of the partnership effects, and partly upon the credit of the house that belonged to the partnership, and I think that part of the Vice-Chancellor's decree by which he directs the house to be sold, must be affirmed. Nerot *v.* Burnand.

"There is a part of the decree, however, in which I cannot concur. The dissolution of the partnership took place in September, 1819. The Vice-Chancellor has directed all the property to be sold which was in the house in Clifford Street at the time when the decree was pronounced, several years after the dissolution of the partnership, as if all the property which at the time of the decree existed in the house was, without enquiry, to be considered as partnership property. Lord Eldon doubted greatly whether that part of the decree could be sustained; and in my opinion it must be varied by directing the Master to take an account of the particulars of the partnership property which were in the house in Clifford Street at the time of the dissolution, and of the value of the property at that time; and to enquire whether any part of that property still remains in the house (*o*).

Goodwill.

The goodwill of a partnership, in so far as it has a pecuniary value, is partnership property, unless the contrary can be shown. This subject, however, will be more conveniently discussed hereafter, when treating of partnership articles (*p*).

SECTION II.—SEPARATE ESTATE.

2. Property of the individual partners.

The preceding enquiry into what constitutes the property of the firm, has rendered it unnecessary to enquire at length into what constitutes the separate property of its members. A few additional observations, pointing out the danger of relying too much on circumstances which are often regarded as decisive, may, however, be usefully added.

(*o*) See, also, *Ex parte Morley*, 8 Ch. 1026, where a surviving partner continued the business, sold the old stock in trade, and it was held that the new stock in trade formed part of his separate estate.

(*p*) See *infra*, book iii. ch. 9, § 2.

That which produces partnership profits may belong to one partner only.

It by no means follows that persons who are partners by virtue of their participation in profits, are entitled as such to that which produces those profits. For example, coach-proprietors who horse a coach and divide the profits, may each make use of horses which belong to himself alone and not to the firm of proprietors (*q*). So, where a merchant employs a broker to buy goods for him and to sell them again on his account, although it may be agreed that the profits are to be divided, the goods themselves, and the money arising from their sale, are the property of the merchant, and not the joint property of himself and the broker (*r*); and it not unfrequently happens that dormant partners have no interest in anything except the profits accruing to the firm to which they belong (*s*).

Property used for partnership purposes not necessarily partnership property.

Again, it by no means follows that property used by all the partners for partnership purposes, is partnership property. For example, the house and land in and upon which the partnership business is carried on, often belongs to one of the partners only, either subject to a lease to the firm, or without any lease at all (*t*). So it sometimes happens, though less frequently, that office furniture (*u*), and even utensils in trade (*x*), are the separate property of one of the partners, subject to the right of the others to use them as long as the partnership continues. If, however, a partner brings such property into the common stock as part of his capital it becomes partner-

(*q*) As in *Fromont* v. *Coupland*, 2 Bing. 170; *Barton* v. *Hanson*, 2 Taunt. 49, and see *Wilson* v. *Whitehead*, 10 M. & W. 503, as to an author's interest in paper supplied for his work to the publisher.

(*r*) *Smith* v. *Watson*, 2 B. & C. 401; *Meyer* v. *Sharp*, 5 Taunt. 74; *Burnell* v. *Hunt*, 5 Jur. 650, Q. B.

(*s*) See *Ex parte Hamper*, 17 Ves. 404, 405; *Ex parte Chuck*, Mont. 373.

(*t*) See *Burdon* v. *Barkus*, 3 Giff. 412, aff. on appeal, 4 De G. F. & J. 42, as to a lease of a coal mine; *Ex parte Murton*, 1 M. D. & D. 252; *Balmain* v. *Shore*, 9 Ves. 500; *Rowley* v. *Adams*, 7 Beav. 548; *Doe* v. *Miles*, 1 Stark. 181, and 4 Camp. 373. If there is no lease and the firm is dissolved, the owner can eject his late partners without notice to quit. *Doe* v. *Bluck*, 8 C. & P. 464; *Benham* v. *Gray*, 5 C. B. 138 (an action of trespass). As to an injunction in such cases, see *Elliot* v. *Brown*, 3 Swanst. 489, *n.*; *Hawkins* v. *Hawkins*, 4 Jur. N. S. 1044, V.-C. Stuart.

(*u*) *Ex parte Owen*, 4 De G. & Sm. 351. See *Ex parte Hare*, 1 Deac. 16; *Ex parte Murton*, 1 M. D. & D. 252.

(*x*) *Ex parte Smith*, 3 Madd. 63.

ship property, and any increase in its value will belong to the firm (*y*).

Property bought with the money of the firm.

It does not even necessarily follow that property bought with the money of the firm is the property of the firm. For it sometimes happens that property, although paid for by the firm, has been, in fact, bought for one partner exclusively, and that he has become debtor to the firm for the purchase-money (*z*).

Agreement of the partners the true test.

It is obvious, therefore, that the only true method of determining as between the partners themselves what belongs to the firm, and what not, is to ascertain what agreement has been come to upon the subject. If there is no express agreement, attention must be paid to the source whence the property was obtained, the purpose for which it was acquired, and the mode in which it has been dealt with. The following cases, in which there was very little evidence to show what agreement had been made, may be usefully referred to on this subject.

Ex parte Owen. Stock in trade and furniture.

In *Ex parte Owen* (*a*) one Bowers, who was a grocer, provision dealer, and wine merchant, and who possessed stock in trade and household furniture at his place of business, took two partners, without any agreement except that they were to participate in the profits of the concern. They brought in no capital and paid no premium, and no deed or agreement was executed. Bowers bought with his own money, but in the name of the firm, new stock required for the business. Upon the bankruptcy of the firm, the question arose to whom the stock in trade and furniture belonged. The Court, coming to the best conclusion it could from such materials as were before it, held that there was an agreement between the three, expressed or implied, that all the stock in trade should become the property of the three, subject to an account, in

(*y*) *Robinson* v. *Ashton*, 20 Eq. 25.

(*z*) See *Smith* v. *Smith*, 5 Ves. 193; *Walton* v. *Butler*, 29 Beav. 428; *Ex parte Emly*, 1 Rose, 64. Compare the case of the *Bank of England*, 3 De G. F. & J. 645, noticed *infra*, p. 330.

(*a*) 4 De G. & Sm. 351. See, also, *Pilling* v. *Pilling*, 3 De G. J. & S. 162. As to a lease of saltworks belonging originally to one partner, but which became the property of the firm, *Parker* v. *Hills*, 5 Jur. N. S. 809, and on appeal, 7 ib. 833.

which the partnership would be debited in favour of Bowers for the value of the articles which belonged to him or for which he paid. But the Court thought there was not the same ground for such an inference as to the household furniture, and that therefore was held to have continued and to remain the separate estate of Bowers.

Outlays on property.

Sometimes a firm lays out money on property which belongs exclusively to one partner; or some of the partners lay out their own monies on the property of the firm; and in such cases the question arises whether the money laid out can be considered as a charge on the property on which it has been expended, or whether the owners of the property obtain the benefit of the outlay. The agreement of the partners, if it can be ascertained, determines their rights in such cases. But where, as often happens, it is extremely difficult, if not impossible, to ascertain what was agreed, the only guide is that afforded by the burden of proof. It is for those claiming an allowance in respect of the outlay to establish their claim. On the other hand an intention to make a present of a permanent improvement is not to be presumed.

Streatfield, Lawrence, & Co. Houses built on partnership property.

In *Re Streatfield, Lawrence, & Company* (*b*), two partners bought an estate with partnership money. The land was conveyed to them in undivided moieties to uses to bar dower, and each partner built a house on the land with money of the firm, but charged to him in his private account. An account was opened in the partnership books, and in this account the purchased estate was debited with all monies of the partnership expended in the purchase. At the time of the purchase the land was in lease, but the tenant surrendered to the partners those portions which they wanted, they reducing his rent. The rents, viz., both that paid by the tenant for what he held, and that paid to him for what he gave up, were treated in the books of the firm as paid to and by it. There was evidence to show that the partners intended to come to some arrangement respecting the division of the estate, but

(*b*) *Bank of England case*, 3 De G. F. & J. 645. In *Pawsey* v. *Armstrong*, 18 Ch. D. 698, an inquiry was directed as to buildings paid for out of partnership monies, but erected on the separate property of one of the partners. See, also, *Burdon* v. *Barkus*, 3 Giff. 412, and 4 De G. F. & J. 42, where a pit was sunk by the firm in a partner's property.

they became bankrupt before doing so. It was held that both the land and the houses on it were the joint property of the firm, and not the separate properties of the partners.

Collins v. Jackson. Appointments.

In *Collins* v. *Jackson* (*c*), two persons were in partnership as solicitors, and one of them held several appointments; he was clerk to poor law guardians, superintendent registrar of births, marriages, and deaths, treasurer of a turnpike trust, steward of a manor, treasurer of a charity, and receiver of tithes. The question arose whether the profits of these offices belonged to the partnership or not. There was no written agreement specifically applying to these offices, but there was a memorandum relating to some others reserved by the father of one of the partners when he retired from business, and the Master of the Rolls held that all the offices in question were to be treated as held on behalf of both partners, and not for the exclusive benefit of the partner who actually filled the offices (*d*).

Cases where co-owners share profits.

The cases, however, which present most difficulty, are those in which the co-owners are partners in the profits derived from their common property (*e*). Suppose, for example, that two or more joint tenants, or tenants in common, of a farm or a mine, work their common property together as partners, contributing to the expenses and sharing all profits and losses equally, there will certainly be a partnership; and yet, unless there is something more in the case, it seems that the land will not be partnership property, but will belong to the partners as co-owners, just as if they were not partners at all (*f*): and the result may even be the same if they purchase out of their profits other lands for the purpose of more conveniently developing their business (*g*).

Land acquired

In *Morris* v. *Barrett* (*h*) lands were devised to two persons

(*c*) 31 Beav. 645.

(*d*) See, also, *Smith* v. *Mules*, 9 Ha. 556; and *Ambler* v. *Bolton*, 14 Eq. 427, as to the mode of dealing with such offices on a dissolution.

(*e*) As to the distinction between co-ownership and partnership, see *ante*, p. 51 *et seq.*

(*f*) See *Crawshay* v. *Maule*, 1 Swanst. 523; and *Roberts* v. *Eberhardt*, Kay, 159. See, also, *Williams* v. *Williams*, 2 Ch. 294, where the partnership had expired, but an agreement to divide the property was held to have been come to.

(*g*) *Steward* v. *Blakeway*, 4 Ch. 603, and 6 Eq. 479, a case of a farm and quarry. But compare *Morris* v. *Barrett*, *Phillips* v. *Phillips*, and *Waterer* v. *Waterer*, cited below.

(*h*) 3 Y. & J. 384. Compare *Waterer* v. *Waterer*, *infra*, p. 333.

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as joint tenants. They farmed those lands together for twenty years, and kept their money in one common stock to which each had access, but they never came to any account with each other. Out of their common stock they bought other lands, which were conveyed to one of them only, but were farmed by both, like the first lands. It was held that the devised farms were not partnership property, but that the purchased farms were.

by devise farmed in common.

Morris *v.* Barrett.

Joint tenants by devise partners in profits.

Brown *v.* Oakshot.

In *Brown* v. *Oakshot* (*i*) a brewer devised his real estates to trustees for a term of 500 years, upon trust, to pay certain annuities, and to divide the surplus rents between his sons, and he devised the same estates subject to this term to his sons as joint tenants. The sons carried on their father's business in partnership together, and used the real estates devised to them for the purposes of the business; but it was nevertheless held that the reversion in fee continued to be vested in them jointly, and not in common, as would have been the case had it become partnership property.

Public-houses devised to partners in a brewery.

Phillips *v.* Phillips.

In *Phillips* v. *Phillips* (*k*) public-houses were devised to two persons who carried on a brewery in partnership, and it was held that such houses did not become partnership property, though used for the purposes of the partnership. In the same case some mortgage debts secured on public-houses were bequeathed to the two partners, and they afterwards purchased the equities of redemption, and paid for them out of the funds of the partnership, but it was held that the property thus acquired did not form part of the partnership property, the equities of redemption following the mortgage debts. But in this very case it was held that other public-houses purchased by the partners out of the partnership funds, and used for the purposes of its trade, did form partnership property to all intents and purposes (*l*).

Devisees of a

On the other hand, in *Jackson* v. *Jackson* (*m*), a testator had

(*i*) 24 Beav. 254.

(*k*) As stated in Bisset on Partnership, p. 50. The report in 1 M. & K. 649, is silent as to the property devised. Mr. Bisset considers the decision as an authority on the point of conversion. But if, as he represents, the Court came to the conclusion that the devised property was not in fact partnership property, the question of conversion would not arise. Compare *Waterer* v. *Waterer*, 15 Eq. 402, *infra*.

(*l*) 1 M. & K. 649.

(*m*) 9 Ves. 591, and 7 ib. 535. Compare this with *Brown* v. *Oakshot*, 24 Beav. 254, noticed *supra*.

trade and of land for the purpose of carrying it on. Jackson v. Jackson.

devised to his two sons jointly, his trading business and lands used by him for the purpose of carrying it on. The sons took the business and carried it on in partnership; and it was held that the lands formed part of the partnership property, and did not belong to the sons as mere joint tenants. In this case, not only was there some evidence to show that the sons considered the land as part of their property as partners, but there was also this peculiarity, that a trading business was left to them, and that the land was accessory to that trade; so that it was very difficult, as observed by the Lord Chancellor, to sever the profits from the land and to hold the devisees to be partners as to the former, but not as to the latter.

Devisees of mines. Crawshay v. Maule.

Upon this last ground it was held in *Crawshay* v. *Maule* (*n*), that mines devised to several persons for the express purpose of being worked by them in partnership, and which were worked accordingly, were partnership property.

Devise of nursery grounds. Waterer v. Waterer.

In *Waterer* v. *Waterer* (*o*), a nurseryman who carried on business with his sons, although not in partnership, left his residuary estate, including the good-will of his business, to his sons in common; they, after his death, carried on the business in partnership, and bought more land for the purposes of the business, and paid for it out of his estate; then one son died, and the others bought his share and paid for it out of money raised by mortgage of the nursery ground, and out of their father's estate. On the death of one of the surviving sons intestate, it was held that all the land thus acquired had become partnership property, and that the share of such son was to be treated as personal and not as real estate.

Land acquired for the purposes of trade.

By a slight extension of the same principle, if several persons take a lease of a colliery, in order to work the colliery as partners, and they do so work it, the lease will be partnership property (*p*). So, if co-owners of land form a partnership, and the land is merely accessory to their trade, and is treated as part of the common stock of the firm, the land will be partnership property (*q*).

(*n*) 1 Swanst. 495.

(*o*) *Waterer* v. *Waterer*, 15 Eq. 402. See, also, *Davies* v. *Games*, 12 Ch. D. 813, a similar case.

(*p*) *Faraday* v. *Wightwick*, Taml. 250, and 1 R. & M. 45. See *Bentley* v. *Bates*, 4 Y. & C. Ex. 182.

(*q*) *Essex* v *Essex*, 20 Beav. 442.

Result of foregoing cases.

Upon the whole, therefore, it seems that land acquired, whether gratuitously or not, for the purpose of carrying on a partnership business, and used for that purpose, is to be considered as property of the partnership; but that land which is not so acquired, but which, belonging to several persons jointly or in common, is employed by them for their common profit, does not become partnership property unless there is some evidence to show that it has been treated by them as ancillary to the partnership business, and as part of the common stock of the firm (*r*).

SECTION III.—CONVERSION OF JOINT ESTATE INTO SEPARATE ESTATE, AND *VICE VERSA*.

3. Agreement sufficient to alter the ownership of property.

It is competent for partners by agreement amongst themselves to convert that which was partnership property into the separate property of an individual partner, or *vice versâ* (*s*). And the nature of the property may be thus altered by any agreement to that effect; for neither a deed nor even a writing is absolutely necessary (*t*); but so long as the agreement is dependent on an unperformed condition, so long will the ownership of the property remain unchanged (*u*).

Creditors not entitled to be consulted.

Moreover, as the ordinary creditors of an individual have no lien on his property, and cannot prevent him from disposing of it as he pleases, so the ordinary creditors of a firm have no lien on the property of the firm so as to be able to prevent it from parting with that property to whomsoever it

Compare *Steward* v. *Blakeway*, 4 Ch. 603, and 6 Eq. 479.

(*r*) See *Steward* v. *Blakeway*, 4 Ch. 603, and 6 Eq. 479, and cases *ante*, p. 332.

(*s*) *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Williams*, 11 ib. 3; *Ex parte Fell*, 10 ib. 348; *Ex parte Rowlandson*, 1 Rose, 416.

(*t*) See *Pilling* v. *Pilling*, 3 De G. J. & Sm. 162; *Ex parte Williams*, 11 Ves. 3; *Ex parte Clarkson*, 4 D. & C. 56, *per* Sir G. Rose; *Ex parte Owen*, 4 De G. & Sm. 351. None of these cases, however, turned on the effect of an unwritten agreement relating to land. See, as to a transfer by a partner of his shares in the partnership property when it consists wholly or in part of land, *post*, ch. 5, § 5.

(*u*) *Ex parte Wheeler*, Buck, 25; *Ex parte Cooper*, 1 M. D. & D. 358; *Hawkins* v. *Hawkins*, 4 Jur. N. S. 1044.

chooses. Accordingly it has frequently been held, that agreements come to between partners converting the property of the firm into the separate estate of one or more of its members, and *vice versâ*, are, unless fraudulent, binding not only as between the partners themselves, but also on their joint and on their respective several creditors; and that, in the event of bankruptcy, the trustees must give effect to such agreements (*x*).

A conversion of joint into separate property, or *vice versâ*, most frequently takes place when a firm and one of its partners carry on distinct trades; or when a change occurs in a firm by the retirement of some or one of its members, or by the introduction of a new partner.

Dealings between one partner and the firm.

When a firm and one of its members carry on distinct trades, property passing in the ordinary way of business from the partner to the firm, ceases to be his and becomes the property of the partnership, and *vice versâ*, just as if he were a stranger to the firm. This was settled in the great case of *Bolton* v. *Puller* (*y*), in which there were two banking firms, one carrying on business at Liverpool and one in London. All the partners in the latter firm were partners in the former. Some bills of exchange came in the ordinary course of business into the hands of the Liverpool firm, to be placed to the general account of its customers. These bills were remitted by the Liverpool firm to the London firm, to be placed to the credit of the former in the general account between the two houses. Both houses afterwards becoming bankrupt, it was held that the bills were the property of the London firm and not of the Liverpool firm, or of its customers. Lord C. J. Eyre, in delivering judgment, adverted to the question now under consideration in the following terms:—

Bolton v. Puller.

"There can be no doubt that as between themselves a partnership may have transactions with an individual partner or with two or more of the partners having their separate estate engaged in some joint concern in which the general partnership is not interested; and that they may by

(*x*) See *Ex parte Ruffin*, and the other cases cited in the last two notes, and *Campbell* v. *Mullett*, 2 Swanst. 575; *Ex parte Clarkson*, 4 D. & Ch. 56; *Ex parte Peake*, 1 Madd. 358.

(*y*) 1 Bos. & P. 539.

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their acts convert the joint property of the general partnership into the separate property of an individual partner, or into the joint property of two or more partners, or *è converso*. And their transactions in this respect will, generally speaking, bind third persons, and third persons may take advantage of them in the same manner as if the partnership were transacting business with strangers: for instance, suppose the general partnership to have sold a bale of goods to the particular partnership, a creditor of the particular partnership might take those goods in execution for the separate debt of that particular partnership."

Change of property on change in firm.

Where a change occurs in a firm by the retirement of one or more of its members, nothing is more common than for the partners to agree that those who continue the business shall take the property of the old firm and pay its debts, or that part of the property of the old firm shall become the property of those by whom its business is to be continued, whilst the rest of the property shall be otherwise dealt with. So, again, when a partnership is first formed, or when a new partner is taken into an existing firm, or when two firms amalgamate into one, some agreement is generally come to by which what was before the property of some one or more only of the members of the firm, becomes the joint property of all such members. All such agreements, if *bonâ fide*, and not fraudulent against creditors, are valid, and have the effect of altering the equitable ownership in the property affected by them (*z*).

Ex parte Ruffin.

In *Ex parte Ruffin* (*a*), which is the leading case on this subject, Thomas Cooper, a brewer, took James Cooper into partnership. That partnership was afterwards dissolved by articles, by which the buildings, premises, stock in trade, debts, and effects were assigned to James by Thomas, who retired. James afterwards became bankrupt, and some of the partnership debts being unpaid, an attempt was made to have what had been the property of the partnership applied in liquidation of those debts. But it was held that such property was no

(*z*) Such an agreement is not a breach of a covenant not to assign without the consent of the lessor. See *Corporation of Bristol* v. *Westcott*, 12 Ch. D. 461; *Varley* v. *Coppard*, L. R. 7 C. P. 505.

(*a*) 6 Ves. 119. See, too, *Ex parte Walker*, 4 De G. F. & J. 509; *Ex parte Sprague*, 4 De G. M. & G. 866; *Ex parte Clarkson*, 4 D. & Ch. 56; *Ex parte Gurney*, 2 M. D. & D. 541; *Ex parte Peake*, 1 Madd. 346; *Ex parte Fell*, 10 Ves. 348.

longer the joint property of the two partners, but had been converted into the separate property of James.

Ex parte Williams.

Ex parte Williams (*b*) was a similar case, only that on the dissolution no assignment was made. There was not even any written agreement showing the terms on which the dissolution took place. But it was sworn that the partner who continued the business was to take all the stock and effects of the old firm; and it was held that they had become his separate property, and could not be considered as the joint property of the dissolved partnership.

These decisions have always been regarded as settling the law upon the subject of conversion of partnership property, and have been constantly followed. They were not, it will be observed, decided with reference to the doctrine of reputed ownership, but with reference only to the real agreement come to between the partners. They apply as much to cases of a change of interest on death as on retirement (*c*).

Ex parte Owen.

The case of *Ex parte Owen* (*d*), which has been already referred to (*e*), shows that similar principles must be applied in order to determine what, on the formation of a partnership, has been converted from separate into joint estate (*f*).

Agreement must be executed.

In order, however, that an agreement may have the effect of converting joint into separate estate, or *vice versâ*, the agreement must be executed, and not be executory merely. In *Ex parte Wheeler* (*g*), a retiring partner and a continuing partner entered into an agreement in writing, by which the retiring

Ex parte Wheeler.

(*b*) 11 Ves. 3. Compare *Ex parte Cooper*, 1 M. D. & D. 358.

(*c*) See *Re Simpson*, 9 Ch. 572; and compare *Ex parte Morley*, 8 Ch. 1026, and *Ex parte The Manchester Bank*, 12 Ch. D. 917, and 13 ib. 465. These three cases turned on the construction of the partnership articles, combined in the last two with the wills of the deceased partners. The wills and the articles together prevented a conversion.

(*d*) 4 De G. & Sm. 351.

(*e*) *Ante*, p. 329.

(*f*) See, too, *Ex parte Barrow*, 2 Rose, 252; and *Belcher* v. *Sikes*, 8 B. & C. 185, for a case where separate estate was made joint by a deed of dissolution not clearly expressed.

(*g*) Buck. 25. See, too, *Ex parte Wood*, 10 Ch. D. 554; *Ex parte Cooper*, 1 M. D. & D. 358; and the case of the *Bank of England*, 3 De G. F. & J. 645, noticed *ante*, p. 330; and compare *Ex parte Gibson*, 2 Mont. & Ayr. 4; *Ex parte Sprague*, 4 De G. M. & G. 866; *Hawkins* v. *Hawkins*, 4 Jur. N. S. 1044.

partner assigned the stock, goodwill, lease, furniture, fixtures, books, and debts of the firm, to the continuing partner, and the latter agreed to pay certain debts of the partnership for which his father, he said, would be security. The father, however, refused to give any security, and this further act was necessary to be done in order to complete the transfer of the property. The continuing partner having become bankrupt, the court held that the property of the old firm had not been converted into the separate estate of the continuing partner, the agreement being still executory when the bankruptcy occurred.

Effect of fraud.

Moreover, an agreement which can be successfully impeached for fraud, will not affect the property to which it may relate (*h*); and it must not be forgotten, that in the event of bankruptcy, the trustee, as representing the creditors, may be able to impeach as fraudulent against them, agreements by which the bankrupt himself would have been bound (*i*). In a case where both the partnership and the individual partners were insolvent, an agreement by one of them transferring his interest to the others, and thereby converting what was joint estate into the separate estate of the transferee, was held invalid; for, although no fraud may have been intended, the necessary effect of the arrangement was to delay and defeat the joint creditors (*k*). The firm became bankrupt shortly after the assignment was made.

(*h*) *Ex parte Rowlandson*, 1 Rose, 416.

(*i*) See *Re Kemptner*, 8 Eq. 286; *Anderson* v. *Maltby*, 2 Ves. J. 244; *Billiter* v. *Young*, 6 E. & B. 40.

(*k*) *Ex parte Mayou*, 4 D. G. J. & S. 664; *Ex parte Walker*, 4 De G. F. & J. 509. See, also, *Luff* v. *Horner*, 3 Fos. & Fin. 480, which seems to have been a clear case of fraud upon a creditor.

CHAPTER V.

OF SHARES IN PARTNERSHIPS.

Subject of present chapter.

In the present chapter it is proposed to examine the following subjects:—

§ 1. The nature of a share in a partnership, and the rules which govern its devolution in case of death.

§ 2. The amount of each partner's share.

§ 3. The lien which each partner has on the joint property, and on the shares of his co-partners.

§ 4. The mode in which a share is taken in execution for the separate debts of its owner.

§ 5. The transfer of shares.

SECTION I.—OF THE NATURE OF A SHARE, AND THE RULES WHICH GOVERN ITS DEVOLUTION IN CASE OF DEATH.

Nature of a share in a firm.

In the absence of a special agreement to that effect, all the members of an ordinary partnership are interested in the whole of the partnership property; but it is not quite clear whether they are interested therein as tenants in common, or as joint tenants without benefit of survivorship, if indeed there is any difference between the two. It follows from this community of interest, that no partner has a right to take any portion of the partnership property, and to say that it is his exclusively (*a*). No partner has any such right, either during the existence of the partnership or after it has been dissolved.

Share a right to money.

What is meant by the *share* of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and all the debts and liabilities have been paid and discharged (*b*). This it is, and this only, which

(*a*) *Lingen* v. *Simpson*, 1 Sim. & Stu. 600; *Cockle* v. *Whiting*, Taml. 55; and see the cases cited in the next note.

(*b*) See *Doddington* v. *Hallet*, 1 Ves. S. 498-9; *Croft* v. *Pike*, 3 P.

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on the death of a partner passes to his representatives, or to a legatee of his share (*c*); which under the old law was considered as *bona notabilia* (*d*); which on his bankruptcy passes to his trustee (*e*); and which the sheriff can dispose of under a *fi. fa.* issued at the suit of a separate creditor (*f*), or under an extent at the suit of the Crown (*g*). It is however to be observed that the Crown never holds jointly or in common with its subjects (*h*). Consequently, if a partner is outlawed, whereby his interest in the partnership is forfeited, the other partners lose their interests also; the Crown first taking the share of the delinquent partner, and then by its prerogative excluding the other partners with whom it would otherwise be a tenant in common. It need hardly be said that this prerogative is not enforced in modern times (*i*).

Of the doctrine of non-survivorship between partners.

Jus accrescendi, &c.

It is an old and well-established maxim, that *Jus accrescendi inter mercatores locum non habet* (*k*). This is a common law, and not only an equitable maxim; but whilst its application in equity was subject to few, if any, exceptions (*l*), it was not at law so universally applicable as the generality of its terms might lead one to suppose.

W. 180; *West* v. *Skip*, 1 Ves. S. 242; *Taylor* v. *Fields*, 4 Ves. 396; *Crawshay* v. *Collins*, 15 Ves. 229; *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Darby* v. *Darby*, 3 Drew. 503.

(*c*) *Farquhar* v. *Hadden*, 7 Ch. 1. See *infra*, book iv. ch. 3, § 3.

(*d*) *Ekins* v. *Brown*, 1 Spinks, Ecc. & Adm. Rep. 400; *A.-G.* v. *Higgins*, 2 H. & N. 339. See, as to the locality of a share, *Re Ewing*, L. R. 6 P. D. 19.

(*e*) See the last note but two, and *Smith* v. *Stokes*, 1 East, 363.

(*f*) *Skipp* v. *Harwood*, 2 Swanst. 586; *Re Wait*, 1 Jac. & W. 605; *Johnson* v. *Evans*, 7 Man. & Gr. 240.

(*g*) *R.* v. *Sanderson*, Wightw. 50; *R.* v. *Rock*, 2 Price, 198; *R.* v. *Hodge*, 12 ib. 537; *Spears* v. *The Lord Advocate*, 6 Cl. & Fin. 180.

(*h*) 2 Bl. Com. 409; *Hales* v. *Petit*, Plow. 257.

(*i*) See Collyer on Partn. 72. Forfeiture for felony and treason was abolished by 33 & 34 Vict. c. 23, § 1. See *ante*, p. 74.

(*k*) Co. Lit. 182 *a*.

(*l*) In *Nelson* v. *Bealby*, 4 De G. F. & J. 321, affirming S. C., 30 Beav. 472, articles of partnership provided that on the death of A. his executors should receive one-half of the assets from B.; but they were silent as to what was to be done on the death of B. It was, however, held that his executors were entitled to half the assets from A.

Devolution of legal estate in land.

As regards real property and chattels real, the legal estate in them is governed by the ordinary doctrines of real property law; and, therefore, if several partners are jointly seised or possessed of land for an estate in fee, or for years, on the death of any one, the legal estate therein will devolve on the surviving partners (*m*); and they can mortgage it for partnership debts (*n*) and sell it for the purpose of winding up the affairs of the partnership (*o*). But the surviving partners are, as regards the interest of the deceased partner, deemed to be trustees thereof for the persons entitled to his estate, and are compellable to account with them accordingly (*p*). This, however, is only the case on the assumption that the property in question is partnership property, and forms part of the common stock in which the deceased had an interest as a partner (*q*).

Rule as to the equitable estate.

Devolution of choses in action.

As regards choses in action, the right to sue for a debt owing to the firm, as well as the liability to be sued for a debt owing by it, also, at law, devolved, in the event of the death of one partner, upon the surviving partners exclusively (*r*). In equity,

(*m*) *Jefferys* v. *Small*, 1 Vern. 217; *Elliot* v. *Brown*, 3 Swanst. 489, n.

(*n*) *Re Clough*, 31 Ch. D. 324, and *ante*, p. 218.

(*o*) *Shanks* v. *Klein*, 15 Otto, 18 (Amer.). See, also, *West of England, &c. Bank* v. *March*, 23 Ch. D. 138.

(*p*) *Jefferys* v. *Small*, 1 Vern. 217; *Lake* v. *Craddock*, 3 P. W. 158; *Lake* v. *Gibson*, 1 Eq. Ca. Ab. 290; *Elliot* v. *Brown*, 3 Swanst. 489, n.; *Lyster* v. *Dolland*, 1 Ves. J. 435; *Jackson* v. *Jackson*, 9 Ves. 596, 597. See, also, *Re Ryan*, L. R. Ir. 3 Eq. 222, where the title of persons claiming under a deceased partner prevailed against a mortgagee of the surviving partner; the mortgage being for his separate debt, and the mortgagee having notice of the equitable interest. As to part of the property there was no such notice, and as to that the mortgagee's title prevailed.

(*q*) *Morris* v. *Barrett*, 3 Y. & J. 384; *Reilly* v. *Walsh*, 11 Ir. Eq. 22. A case of a lease acquired for the purpose of a partnership which was never formed. See *ante*, p. 331.

(*r*) *Kemp* v. *Andrews*, Carth. 170; *Dixon* v. *Hammond*, 2 B. & A. 310; *Martin* v. *Crompe*, 1 Lord Raymond, 340, and 2 Salk. 344; and see *Slipper* v. *Stidstone*, 5 T. R. 493; *French* v. *Andrade*, 6 T. R. 582. There is indeed an old case in which an action of *assumpsit* for a partnership debt was held to be properly brought by the executors of a deceased partner, and the surviving partners jointly; *Hall* v. *Huffam*, alias *Hall* v. *Rougham*, 2 Lev. 188 and 228, and 3 Keble, 798; but this case is in direct opposition to the last cited, and is contrary to what was clearly settled before the Judicature Acts.

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however, the legal personal representatives of a deceased partner were entitled to have a debt due to the partnership brought into account by the surviving partners (*s*), and were liable to be proceeded against by a creditor of the firm (*t*). The Judicature Acts have not materially altered the law in this respect (*u*).

Devolution of ordinary chattels.

Buckley v. Barber.

As regards ordinary chattels, it was held in *Buckley* v. *Barber* (*v*), that the interest of a deceased partner in chattels belonging to the firm did not devolve upon the surviving partners, so as to enable them to give a good legal title to the chattels as against the executors of the deceased; and that consequently such chattels might be seized under a *fi. fa.* issued on a judgment obtained against the executors by a separate creditor of the deceased partner (*x*).

Goodwill.

The extent to which goodwill survives will be noticed hereafter (*y*).

Before quitting the present subject, it may be observed that the doctrine of non-survivorship amongst partners is not confined to merchants nor even to traders, but extends to partners generally (*z*). But it does not apply to societies not having gain for their object, and the members of which are merely joint tenants of the property they hold (*a*).

(*s*) The receipt of the survivors for a debt due to the firm is a good discharge to the debtor, *Brasier* v. *Hudson*, 9 Sim. 1; *Philips* v. *Philips*, 3 Ha. 281; and the surviving partner can, without making the executors of the deceased parties, sustain an action for an account against a debtor to the firm, *Haig* v. *Gray*, 3 De G. & Sm. 741.

(*t*) *Ante*, book ii. ch. 2, § 1.

(*u*) See *ante*, book ii. ch. 2 and 3.

(*v*) *Buckley* v. *Barber*, 6 Ex. 164; and see *per* Dampier, J., in *R.* v. *The Collector of Customs*, 2 M. & S. 223.

(*x*) This case was certainly perplexing. It made a useless distinction between land, debts, and ordinary chattels; it logically involved the consequence that a surviving partner could only properly sell his share of a partnership chattel; and it was inconsistent with the principles which induced courts of equity to decline (except under special circumstances) to grant a receiver at the instance of the executors of a deceased against a surviving partner. In *Taylor* v. *Taylor*, 7 Mar. 1873, Lord Justice James, sitting for V.-C. Wickens, expressed his disapproval of *Buckley* v. *Barber*. All this is, however, of little consequence now.

(*y*) See book iii. ch. 9, § 2.

(*z*) See *Buckley* v. *Barber*, 6 Ex. 164; *Aunand* v. *Honiwood*, 2 Ch. Ca. 129; *Jefferys* v. *Small*, 1 Vern. 217; *Lake* v. *Gibson*, 1 Eq. Ca. Ab 290; *Lake* v. *Craddock*, 3 P. W. 158.

(*a*) As an instance, see *Brown* v *Dale*, 9 Ch. D. 78.

Of the doctrine that shares are personal estate.

Shares personal estate.

From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows that, in equity, a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, unless indeed such conversion is inconsistent with the agreement between the parties (*b*). And although the decisions upon this point are conflicting, the authorities which are in favour of the above conclusion certainly preponderate over the others.

Thornton v. Dixon.

In *Thornton* v. *Dixon* (*c*), the Court recognised the rule that partnership property must be considered as personal estate; but held that the lands which were there in question, could not be so considered, as they had been conveyed to all the partners in common, and there was no agreement for a sale.

Bell v. Phyn.

In *Bell* v. *Phyn* (*d*), partners in trade purchased with the funds of the firm a share in a plantation, and kept the accounts relating to the estate in the partnership books; and it was held upon the authority of the last case, that assuming the land to have become partnership property, it ought not to be regarded as personal estate.

Randall v. Randall.

In *Randall* v. *Randall* (*e*), the partners were farmers, malt-sters, and biscuit-makers. They bought land for the farming business, and it was held that as it was not acquired for the purpose of any partnership in trade, the land could not be treated as personalty.

Cookson v. Cookson.

In *Cookson* v. *Cookson* (*f*), a father who was seised in fee of land on which he carried on business as a bottle-manufacturer, took his son into partnership, and conveyed a share in the land to him. The land was declared by the articles of partnership to be partnership property. But on the death of the

(*b*) See, as to this, *Steward* v. *Blakeway*, 4 Ch. 603, and 6 Eq. 479.
(*c*) 3 Bro. C. C. 199.
(*d*) 7 Ves. 453.
(*e*) 7 Sim. 271.
(*f*) 8 Sim. 529.

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father, it was held that his share in the land was to be treated as real estate, no sale being required for the payment of the partnership debts for any other purpose.

These are the cases which militate against the rule under discussion. The following are those which support it:—

Ripley v. Waterworth.

In *Ripley* v. *Waterworth* (*g*), partnership land was conveyed to trustees upon trust, upon a dissolution of the partnership, to sell and pay the partnership debts, and divide the residue of the money arising from the sale amongst the partners; and it was held, upon the death of one of them, that his share in the land was personal estate, although the land was not in fact sold, and the deceased's share in it was purchased by the surviving partners under a clause enabling them so to do, and contained in the conveyance to the trustees.

Townshend v. Devaynes.

In *Townshend* v. *Devaynes* (*h*), two persons in partnership as paper-makers, purchased paper mills for the use of the firm, and paid for them out of its funds. It was agreed that on the death of either, the survivor should have the option of purchasing his share. One of the partners died, and his share was purchased by the survivor. It was held that the whole of the purchase-money formed part of the personal estate of the deceased, although most of the money was paid in respect of the interest of the deceased in the mills.

Phillips v. Phillips.

In *Phillips* v. *Phillips* (*i*), two persons in partnership as brewers purchased public-houses for the purposes of their trade, and had them conveyed to both in fee. On the death of one of them, it was held that his share in the houses was to be treated as personal estate.

Broom v. Broom.

Broom v. *Broom* (*k*) is a decision to the same effect as the last, and decided on its authority.

Morris v. Kearsley.

In *Morris* v. *Kearsley* (*l*), a partnership of brewers was possessed of real estate conveyed partly to the partners as tenants in common, and partly to one or more of the partners in trust

(*g*) 7 Ves. 425.

(*h*) 1 Mont. Part. note 2 A. Appx. p. 96; see, too, 11 Sim. 498, n.

(*i*) 1 M. & K. 649. See *ante*, p. 332, note (*k*), as to the estates which were devised, and which were held not converted into personalty.

(*k*) 3 M. & K. 443.

(*l*) 2 Y. & C. Ex. 139. The report does not state how, when, or for what purpose, the property was originally acquired.

for the firm; and it was decided that the several lands, hereditaments, and premises belonging to the partnership, ought to be considered as personal estate.

Houghton v. Houghton.

In *Houghton* v. *Houghton* (*m*), two brothers, A. and B., were partners as soap-boilers. They purchased land for the purposes of their trade, took a conveyance to themselves as tenants in common, and mortgaged the land for the purchase money. They then built on the land, insured the buildings, and paid the expenses and the interest on the mortgage debt out of the partnership funds. A. died intestate, and B. took another brother, C., into partnership. B. and C. paid off the mortgage, and took a reconveyance to themselves as joint tenants in fee, and expended money in building and insurance, defraying the expense, as well as providing the mortgage money, out of the funds of the partnership. On B.'s death it was held that the land and buildings had clearly become partnership property, and that it ought, therefore, to be treated as personal estate.

Darby v. Darby.

In *Darby* v. *Darby* (*n*), two brothers embarked in joint speculations in land. Their scheme was to buy land, convert it into building sites, and then sell it at a profit. This was done on several occasions, the land being generally conveyed to one of them only. On the death of that one it was held that his interest in all the land bought by both, and still unsold, was personal and not real estate.

Essex v. Essex.

In *Essex* v. *Essex* (*o*), two brothers were, under the will of their father, seised of freehold lands. They agreed to become partners as curriers and tanners for fourteen years, and to carry on their business on those lands. It was stipulated that if either died during the co-partnership term, the other should take his share in the freeholds, and that the entirety thereof, including the plant and tan-pits, should be valued at 5,000*l*. The fourteen years expired, but the partnership was continued as before. On the death of one of the partners, it was held that his share in the freeholds was to be regarded as personal estate; they having been converted by the agreement for sale.

(*m*) 11 Sim. 491.
(*n*) 3 Drew. 495.
(*o*) 20 Beav. 442.

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Waterer v. Waterer.

In *Waterer* v. *Waterer* (*p*), the property of a nurseryman, devised by him, with the goodwill of his business, to his sons as tenants in common, was on the death of one of them treated as personal and not as real estate.

There are also various *dicta* of Lord Eldon in favour of the broad principle that partnership property is to be regarded as personal and not as real estate (*q*).

Result of the cases.

Upon the whole, therefore, it is submitted,

1. That notwithstanding *Thornton* v. *Dixon*, *Bell* v. *Phyn*, and *Randall* v. *Randall*, the true rule is, as stated by the Vice-Chancellor Kindersley, in *Darby* v. *Darby* (*r*), "that whenever a partnership purchases real estate for the partnership purposes, and with the partnership funds, it is, as between the real and personal representatives of the partners, personal estate" (*s*).

2. That, notwithstanding *Cookson* v. *Cookson*, no satisfactory distinction, with reference to the question of conversion, can be drawn between land purchased with partnership monies, and land acquired in any other way, provided such land is in the proper sense of the expression an asset of the partnership (*t*).

3. That the general rule may, nevertheless, be excluded by an agreement express or implied to the effect that the land shall not be sold. The reason of the rule excludes its application in such a case (*u*).

Steward v. Blakeway.

Upon this ground it was held in a recent and difficult case, that a farm and quarry worked by co-owners in partnership, and additional lands bought by them out of their profits for the purposes of their business, were not to be treated as converted into money. The Court held that no partner could

(*p*) 15 Eq. 402, noticed *ante*, p. 333. See, also, *Murtagh* v. *Costello*, 7 L. R. Ir. 428.

(*q*) See the judgment of V.-C. Kindersley, in *Darby* v. *Darby*, 3 Drew. 499, &c.

(*r*) 3 Drew. 506.

(*s*) See, in addition to the cases referred to above, *Holroyd* v. *Holroyd*, 7 W. R. 426.

(*t*) See *per* Lord Eldon in *Jackson* v. *Jackson*, 9 Ves. 593. "It is very difficult to make a distinction between a joint tenancy by will, by a gratuitous deed, or a purchase. The law of merchants, if it applies to one, must apply to all."

(*u*) *Steward* v. *Blakeway*, 4 Ch. 603, and 6 Eq. 479.

have enforced a sale, either of the original farm and quarry or of the subsequent additions to it (*x*).

The rule only applies to partnership property.

It is well settled that the doctrine of conversion does not apply to co-owners as distinguished from co-partners; nor to property owned by persons, who, although they may be partners in profits, are only co-owners of the land which yields them. Thus, where two out of three partners were owners of land occupied by the firm, and for which the firm paid a rent, and the land was in fact kept distinct from the joint property of the three partners, it was properly held, on the death of one of the two partners to whom the rent was paid, that his interest in the land was not to be considered as personal, but as real estate (*y*). So, if land belongs to all the partners as tenants in common, but not as partners, and that land is used by them for partnership purposes, but is nevertheless intended to remain vested in them as tenants in common, and not to form part of the assets of the firm, the share of each partner will be real and not personal estate (*z*). In the case now supposed, co-owners of land are partners, but the co-ownership continues unaffected by the partnership. But it is not possible on this ground to uphold *Thornton* v. *Dixon*, *Bell* v. *Phyn*, *Randall* v. *Randall*, or *Cookson* v. *Cookson*. In each of these four cases the land had become part of the assets of the firm, or it had not; if it had, these four cases are in direct conflict with those which have been alluded to above; whilst, if it had not, they are in no less direct conflict with other cases which are authorities on the question what is and what is not property of the firm.

Doctrine of conversion has only a restricted application.

The doctrine of conversion which has just been considered, merely amounts to this, that on the death of a partner his share in the partnership property is to be treated as money and not as land. It follows, however, from this doctrine that probate duty and legacy duty are payable in respect of the share of a deceased partner in partnership real estate (*a*); and a part-

(*x*) Ibid.

(*y*) *Rowley* v. *Adams*, 7 Beav. 548; *Balmain* v. *Shore*, 9 Ves. 500. See, too, *Phillips* v. *Phillips*, *ante*, p. 332.

(*z*) *Steward* v. *Blakeway*, 4 Ch. 603, and 6 Eq. 479.

(*a*) See, as to probate duty, *A.-G.* v. *Hubbuck*, 13 Q. B. D. 275, and 10 ib. 488; *A.-G.* v. *Marquis of Ailesbury*, W. N. 1887, p. 172, reversing S. C.

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ner's share in such estate is clearly within the Charitable Uses Act, 9 Geo. 2, c. 36 (*b*).

Qualification for vote.

Whether a partner's share in partnership real estate can give him a qualification for voting on elections of members of Parliament has been much discussed of late. It is settled that if a partner has no interest in partnership realty as distinguished from the money arising from its sale, his interest in it does not confer a qualification (*c*); but unless this is the case the equitable doctrine of conversion, which has no practical operation until his death, does not deprive him of the qualification which he would otherwise have as a joint tenant or tenant in common (*d*).

A share in a cost-book mining company is not an interest in land within the 4th section of the Statute of Frauds (*e*); nor is it goods or chattels within the 17th section (*f*).

SECTION II.—OF THE AMOUNT OF EACH PARTNER'S SHARE.

The proportions in which the members of a firm are entitled to the property of the firm, or in other words, the amount of each partner's share in a partnership, depends upon the agreement into which the partners have entered.

Shares are primâ facie equal.

In the event of a dispute between the partners as to the amount of their shares, such dispute, if it does not turn on the construction of written documents, must be decided like any other pure question of fact (*g*); and if there is no evidence

16 Q. B. D. 408; *A.-G.* v. *Brunning*, 8 Ho. Lo. Ca. 243: as to legacy duty, *Forbes* v. *Steven*, 10 Eq. 178. *Custance* v. *Bradshaw*, 4 Ha. 315, is to the contrary, but it cannot now be relied upon.

(*b*) *Ashworth* v. *Munn*, 15 Ch. D. 363.

(*c*) *Watson* v. *Black*, 16 Q. B. D. 270; *Bennett* v. *Blain*, 15 C. B. N. S. 518; *Freeman* v. *Gainsford*, 18 ib. 185. See, also, *Spencer* v. *Harrison*, 5 C. P. D. 97; *Wadmore* v. *Dear*, L. R. 7 C. P. 212.

(*d*) *Baxter* v. *Brown*, 7 Man. & Gr. 198; *Rogers* v. *Harvey*, 5 C. B. N. S. 3.

(*e*) *Watson* v. *Spratley*, 10 Ex. 222. Compare *Vice* v. *Anson*, 7 B. & C. 409; *Boyce* v. *Green*, Batty, 608.

(*f*) *Watson* v. *Spratley*, 10 Ex. 222.

(*g*) See *Peacock* v. *Peacock*, 16 Ves. 49; *McGregor* v. *Bainbridge*, 7 Ha. 164; *Binford* v. *Dommett*, 4 Ves. 756.

from which any satisfactory conclusion as to what was agreed can be drawn (*h*), the shares of all the partners will be adjudged equal (*i*).

Observations on this rule.

This rule no doubt occasionally leads to apparent injustice; but it is not easy to lay down any other rule which, under the circumstances supposed, could be fairly applied. It is sometimes suggested that the shares of partners ought to be proportionate to their contributions; but without in any way denying this, it may be asked, how is the value of each partner's contribution to be measured? Certainly not merely by the capital he may have brought into the firm. His skill, his connection, his command of the confidence and respect of others, must all be taken into account; and if it is impossible to set a money value on each partner's contribution in this respect, it is obviously impossible to determine in the manner suggested, the shares of the partners in the partnership. Nor can it be said to be unreasonable to infer, in the absence of all evidence to the contrary, that the partners themselves have agreed to consider their contributions as of equal value, although they may have brought in unequal sums of money, or be themselves unequal as regards skill, connection, or character. Whether, therefore, partners have contributed money equally or unequally, whether they are or are not on a par as regards skill, connection, or character, whether they have or have not laboured equally for the benefit of the firm, their shares will be considered as equal, unless some agreement to the contrary can be shown to have been entered into (*k*).

Meaning of equality.

When it is said that the shares of partners are *primâ facie* equal, although their capitals are unequal, what is meant is that losses of capital like other losses must be shared equally; but it is not meant that on a final settlement of accounts,

(*h*) *Stewart* v. *Forbes*, 1 Mac. & G. 137; *Webster* v. *Bray*, 7 Ha. 159; *Copland* v. *Toulmin*, 7 Cl. & Fin. 349.

(*i*) *Robinson* v. *Anderson*, 20 Beav. 98, and 7 De G. M. & G. 239; *Peacock* v. *Peacock*, 16 Ves. 49; *Webster* v. *Bray*, 7 Ha. 159; *Farrar* v. *Beswick*, 1 M. Rob. 527.

(*k*) See the last three notes. *Peacock* v. *Peacock*, 2 Camp. 44, and *Sharpe* v. *Cummings*, 2 Dowl. & L. 504, which was apparently decided on its authority, cannot be supported. See, as to Scotch law, *Thompson* v. *Williamson*, 7 Bli. N. S. 432; 3 Ross, L. C. on Com. Law 381.

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capitals contributed unequally are to be treated as one aggregate fund which ought to be divided between the partners in equal shares (*l*).

Evidence showing inequality.

An agreement for inequality may be conclusively inferred from the mode in which the partners have dealt with each other, and from the contents of the partnership books (*m*). Moreover, if an agreement for inequality clearly at one time existed, no presumption of any alteration in this respect will arise from the mere fact, that some of the original members have retired. In the absence of evidence to the contrary, the inference is that the shares of the retiring members have been taken by the continuing parties in the proportions in which these last were originally interested in the concern (*n*).

Rule as to presumptive equality applies to partnerships in single transactions.

Robinson *v.* Anderson.

The rule that the shares of partners are equal, unless they have otherwise agreed, applies not only to persons who are partners in business generally, but also to those who are partners as regards one single matter only. Thus in *Robinson* v. *Anderson* (*o*), where two solicitors, not in partnership, were jointly retained to defend certain actions, and there was no satisfactory evidence to show in what proportions they were to divide their remuneration, it was held that they were entitled to share it equally, although they had been paid separately and had done unequal amounts of work. The Master of the Rolls, after observing on the importance in such cases of attending to the *onus probandi*, said:

"Now I should entertain no doubt, even if I had not been confirmed by the two cases of *Webster* v. *Bray*, and *McGregor* v. *Bainbridge*, that where two solicitors undertake a matter of business on behalf of a client, the same rule would follow in that, as in any other undertaking where two persons carry on a business jointly on behalf of themselves, or as agents of other persons. It is, in point of fact, a limited partnership for a particular sort of business. Assuming nothing to have been said as to the manner in which the profits were to be divided, it appears to me to follow as a necessary consequence of law, that they are to be divided equally between them. And, although one may do more business and have exerted himself more

(*l*) See *infra*, ch. 8, § 1, on partnership accounts.

(*m*) As in *Stewart* v. *Forbes*, 1 Mac. & G. 137.

(*n*) *Robley* v. *Brooke*, 7 Bli. N. S. 90; and see *Copland* v. *Toulmin*, 7 Cl. & Fin. 349.

(*o*) 20 Beav. 98, and 7 De G. M. & G. 239. See, too, *Webster* v. *Bray*, 7 Ha. 159, and *McGregor* v. *Bainbridge*, ib. 164, note; *Hanslip* v. *Kitton*, 8 Jur. N. S. 835, V.-C. S.

than the other, yet if nothing is said upon the subject of profits, the presumption is that they are to be equally divided between them. It appears to me, that if the clients had gone to Mr. Robinson and Mr. Anderson, and said—We wish you to undertake the business for us, and thereupon Mr. Robinson and Mr. Anderson had both said, We agree to do so, and nothing had taken place between them as to the manner in which they were to be paid, the necessary consequence would have been that after payment of the costs out of pocket, the net profits made by the business would have been divisible equally between them, and that neither of them could say to the other—I have done more business than you have, and am therefore entitled to a larger share of profits. It was the duty of the party who intended that this should not be a partnership transaction, and that he should be paid for the amount of business which he did without participating in that of the other, so to express himself."

Applications of rule where one firm comprises another.

A question of some difficulty arises when a firm, say of two partners, engages in a partnership speculation with a third person not a member of that firm. Is the interest of such person in the speculation to be treated as one half, the other two persons being treated as one? or is the interest of each of the three to be treated as equal, each taking one-third? The answer to these questions must depend upon whether the two partners entered into the speculation as a firm or as two individuals. If the former, there will in substance be only two parties interested in the speculation, and the profits thereof must be divided into two equal parts; whilst if the latter is the case, there will be three parties interested, and the profits must be divided into three equal parts (*p*).

SECTION III.—OF THE LIEN WHICH EACH PARTNER HAS ON THE PROPERTY OF THE FIRM, AND ON THE SHARES OF HIS CO-PARTNERS.

In order to discharge himself from the liabilities to which a person may be subject as partner, every partner has a right to have the property of the partnership applied in payment of the debts and liabilities of the firm. And in order to secure a

(*p*) See *Warner* v. *Smith*, 1 De G. J. & S. 337, where the profits were held to be divisible into two and not three parts.

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proper division of the surplus assets, he has a right to have whatever may be due to the firm from his co-partners, as members thereof, deducted from what would otherwise be payable to them in respect of their shares in the partnership.

Foundation of partner's lien.

In other words, each partner may be said to have an equitable lien on the partnership property for the purpose of having it applied in discharge of the debts of the firm; and to have a similar lien on the surplus assets for the purpose of having them applied in payment of what may be due to the partners respectively, after deducting what may be due from them, as partners, to the firm (*q*).

Consequences of the lien.

This right, lien, *quasi*-lien, or whatever else it may be called, does not exist for any practical purpose until the affairs of the partnership have to be wound up, or the share of a partner has to be ascertained; nor has any partner a right to insist as against a judgment creditor of the firm, that he shall have recourse to the assets of the firm before seeking to obtain payment from the partners individually (*r*). But when partnership accounts have to be taken, and the shares of the partners have to be ascertained, the lien of the partners on the assets of the partnership, and on each other's shares, becomes of the greatest importance. Whilst the partnership lasts, the lien attaches to everything that can be considered partnership property, and is not therefore lost by the substitution of new stock in trade for old (*s*). Further, on the death or bankruptcy of a partner, his lien continues in favour of his representatives or trustees, and does not terminate until his share

To what property it attaches.

(*q*) *West* v. *Skip*, 1 Ves. S. 239; *Skipp* v. *Harwood*, 2 Swanst. 586; *Doddington* v. *Hallet*, 1 Ves. S. 498 and 499; *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Williams*, 11 ib. 3; *Holderness* v. *Shackels*, 8 B. & C. 612. *Smith* v. *De Silva*, Cowp. 469, can hardly be reconciled with the other cases, but see upon it the observations of Lord Tenterden, in 8 B. & C. 618. As to the right of a minority of partners to insist on the payment of a partnership debt out of the partnership assets, see the observations of Turner, V.-C., in *Stevens* v. *The South Devon Rail. Co.*, 9 Ha. 326. Any member of an ordinary firm is at liberty to pay any debt of the firm, and to charge the firm with the amount paid.

(*r*) See *ante*, p. 299.

(*s*) See *West* v. *Skip*, 1 Ves. S. 239; *Skipp* v. *Harwood*, 2 Swanst. 586; *Stocken* v. *Dawson*, 9 Beav. 239, and 17 L. J. (Ch.) 282. Compare the cases in the next note but one.

has been ascertained and provided for by the other partners (*t*). But after a partnership has been dissolved, the lien is confined to what was partnership property at the time of the dissolution, and does not extend to what may have been subsequently acquired by the persons who continue to carry on the business. In this respect the lien in question differs from the lien of a mortgagee on a varying stock-in-trade assigned to him as a security for his loan (*u*).

Lien exists only on partnership assets.

It follows from the principle on which the lien of a partner is founded, that it only extends to the property of the firm, and to the separate interest of each partner in such property. In those cases, therefore, where there is a partnership in profits only, but that which produces those profits belongs exclusively to one of the partners, the lien of the others is confined to the profits, and does not extend to that which produces them (*x*). Moreover, if two persons engage in a joint adventure, each consigning goods for sale upon the terms that each is to have the produce of his own goods, neither of them will have a lien on the goods of the other, nor on the produce of such goods, although each may have raised the money to pay for his own goods by a bill drawn on himself by the other, and ultimately dishonoured (*y*).

Lien exists as against all persons claiming a share in the assets.

The lien of each partner exists not only as against the other partners, but also against all persons claiming through them or any of them; and it is therefore available against their executors, execution creditors, and trustees in bankruptcy (*z*). To hold, however, that this lien could be enforced against persons purchasing partnership property, would be in effect to prevent any sale of that property without the consent of the whole firm, and would practically stop all partnership trade. Whilst, therefore, a person who purchases a share of a partner takes that share subject to the liens of the other partners (*a*), a

(*t*) See *Stocken* v. *Dawson*, 9 Beav. 239, affirmed 17 L. J. (Ch.) 282, and the cases cited in note (*s*).

(*u*) *Payne* v. *Hornby*, 25 Beav. 280. See, too, *Nerot* v. *Burnand*, 4 Russ. 247, and 2 Bli. N. S. 215, *ante*, p. 326; *Ex parte Morley*, 8 Ch. 1026. Compare the cases in the last note but one.

(*x*) See *infra*, as to the lien of co-owners.

(*y*) *Ex parte Gemmel*, 3 M. D. & D. 198.

(*z*) *West* v. *Skip*, and other cases cited, *ante*, note (*s*).

(*a*) *Cavander* v. *Bulteel*, 9 Ch. 79.

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person who *bonâ fide* purchases from one partner specific chattels belonging to the firm, acquires a good title to such chattels, whatever liens the other partners might have had on them prior to their sale (*b*).

Re Langmead's Trusts.

In *Re Langmead's trusts* a partnership between A. and B. was dissolved. A. retired, and by deed agreed to execute an assignment to B. of the partnership assets (part of which consisted of a policy of which the partners were assignees), and B. agreed to covenant to pay the partnership debts, and indemnify A. against them. No further instrument was executed. A. died, and B. afterwards assigned the policy by way of mortgage to a person who had notice of the deed. A.'s executors were afterwards compelled to pay partnership debts, which ought to have been discharged by B., and B. became bankrupt. The policy being adversely claimed by the mortgagee, by A.'s executor, and by a purchaser from B.'s assignees, it was held that, even if A. and his executors had been entitled to pursue any portion of the partnership property in the hands of B., and to have it applied in payment of the partnership debts, yet that they had no such right as against the purchaser from B., though with notice, for he was not bound to see to the application of the purchase money (*c*).

No lien on a partner's share for ordinary debts due from him to firm.

The lien of partners on the partnership property extends, as has been stated, to whatever is due to or from the firm, by or to the members thereof, as such. It does not, however, extend to debts incurred between the firm and its members, otherwise than in their character of members. It has therefore been held that where a partner borrowed money from the firm for some private purpose of his own, and then became bankrupt, his assignees were entitled to his share in the partnership, ascertained without taking into account the sum due from him to the firm in respect of this loan; and that the solvent partners were driven to prove against his estate in order to obtain payment of the money lent (*d*).

(*b*) See *Re Langmead's Trusts*, 20 Beav. 20, and 7 De G. M. & G. 353.

(*c*) Ibid.

(*d*) See *Ryall* v. *Rowles*, 1 Ves. S. 348, and 1 Atk. 165; and *Meliorucchi* v. *The Royal Exchange Assur. Co.*, 1 Eq. Ca. Ab. 8; and *Croft* v. *Pike*, 3 P. W. 180. Perhaps *Smith* v. *De Silva*, Cowp. 469, was decided on this principle, as suggested by Lord Tenterden, in 8 B. & C. 618.

Loss of lien.

Further, a partner's lien on partnership property is lost by the conversion of such property into the separate property of another partner. Therefore, if on a dissolution it is agreed between the partners that the property of the firm shall be divided in specie among them, and that the debts shall be paid in some specified manner; and if the property is accordingly divided, but the debts remain unpaid, the lien which each partner had on the property before its division is gone: and consequently no partner has a right to have the specific things, allotted to any other partner, brought back into the common stock, and applied in liquidation of the partnership liabilities (*e*). Upon the same principle, if two partners consign goods for sale, and direct the consignee to carry the proceeds of the sale equally to their separate accounts without any reserve, and this is done, neither partner has any lien on the share of the other in those proceeds; although it would have been otherwise if they had remained part of the common property of the two (*f*).

No lien if partnership is illegal.

If a partnership is illegal its members have no lien upon their common property, or upon each other's shares therein (*g*); unless it be by virtue of some agreement not affected by the illegality.

Lien of co-owners.

Mere co-owners have no such lien as is enjoyed by co-partners (*h*). But a part owner of a ship has a right to have the gross freight applied in the first place in payment of the expenses incurred in earning it (*i*).

(*e*) *Lingen* v. *Simpson*, 1 Sim. & Stu. 600; and see *Re Langmead's Trusts*, 7 De G. M. & G. 353, the judgment of L. J. Turner.

(*f*) See *Holroyd* v. *Griffiths*, 3 Drew. 428. In *Holderness* v. *Shackels*, 8 B. & C. 612, the transfer to each partner was subject to the lien, which was not therefore lost.

(*g*) See *Ewing* v. *Osbaldiston*, 2 M. & Cr. 88.

(*h*) *Re Leslie*, 23 Ch. D. 552; *Kay* v. *Johnston*, 21 Beav. 536; *ante*, book i. ch. 1, § 6.

(*i*) See *Green* v. *Briggs*, 6 Ha. 395; *Alexander* v. *Simms*, 18 Beav. 80, and 5 De G. M. & G. 57; *Lindsay* v. *Gibbs*, 22 Beav. 522, and 3 De G. & J. 690. See, as to the lien of the master on freight, *Bristow* v. *Whitmore*, 4 De G. & J. 325, reversing S. C. Johns. 96; *Smith* v. *Plummer*, 1 B. & A. 582.

SECTION IV.—OF THE MODE IN WHICH A SHARE IS TAKEN IN EXECUTION FOR THE SEPARATE DEBTS OF ITS OWNER.

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Execution against a partner for a separate debt.

The nature of a partner's share in partnership property, and the effect of the lien noticed in the preceding sections, are well seen when a separate judgment creditor of a partner seeks to levy execution upon that partner's share in the partnership. Such a creditor has always been at liberty to execute his judgment, not only against his debtor's separate property, but also against the property of any firm in which the debtor may be a partner. This at first sight seems extremely unjust; inasmuch as it looks like taking one man's property for another man's debt; but in truth the creditor gets only what belongs to his debtor, although it must be confessed that executions of the nature in question put the debtor's partners to no small inconvenience.

In order to explain the consequences of an execution against the partnership property for a separate debt of one of the partners, it will be convenient to examine the law as it stood before the Judicature acts with reference to

1. The duty of the sheriff.
2. The position of the purchaser from him.
3. The position of the execution debtor.

The position of the execution creditor and of his debtor's co-partner will appear in the course of this examination.

The effect of the Judicature acts will then be noticed.

1. *Of the duty of the sheriff.*

1. Of the duty of the sheriff.

There has been considerable doubt as to the proper mode of levying execution against the property of a firm upon a judgment recovered against one of its members only (*k*).

Sheriff seizes the partnership property.

Before the time of Lord Mansfield it seems that the sheriff was in the habit of acting upon the supposition that each partner was entitled to an undivided share of every article belonging to the firm, without reference to the state of the partnership accounts: and in executing a *fi. fa.* against a partner for his

(*k*) *Burton* v. *Green*, 3 Car. & P. 306.

separate debt, the sheriff *seized the whole* of the partnership effects (or of so many of them as were requisite), and *sold the undivided share* of the judgment debtor therein (*l*).

The sheriff seized the whole of every chattel which he sold, because he could not otherwise seize the share of the execution debtor. But he did not sell the whole of what he seized, because his authority was limited by the writ to the goods and chattels of the debtor, and an undivided share can be sold though it cannot alone be seized. As stated by Lord Holt in *Heydon* v. *Heydon* (*m*) (where there were two partners, against one of whom a judgment had been obtained), "the sheriff must seize all because the moieties are undivided; for if he seize but a moiety and sell that, the other will have a right to a moiety of that moiety: but he must seize the whole and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner" (*n*).

Heydon *v.* Heydon.

Lord Mansfield endeavoured to introduce what at first sight appears to be a more equitable practice. In his time the sheriff seems to have seized and sold the whole of a sufficient portion of the partnership goods (instead of selling only an undivided share thereof), and then an account was directed to be taken of the judgment debtor's share of the proceeds of the sale, and that share, or a sufficient part of it, was handed over to the execution creditor (*o*). This, however, was a very imperfect mode of proceeding; for it was impossible to ascertain the share of the debtor partner in the goods seized, without taking *all* the partnership accounts, and this a court of law had no power to do. Lord Mansfield's innovation was therefore discontinued (*p*); and it was finally settled, in conformity with the older cases, that the sheriff's duty was, and it still is,

Lord Mansfield's innovation.

Modern rule.

(*l*) See *Heydon* v. *Heydon*, 1 Salk. 392; *Jackey* v. *Butler*, 2 Ld. Raymond, 871; *Backhurst* v. *Clinkard*, 1 Show. (K. B.) 169; *Pope* v. *Haman*, Comb. 217; *Mariott* v. *Shaw*, Comyn, 277; *Dutton* v. *Morrison*, 17 Ves. 205; *Re Wait*, 1 Jac. & W. 608.

(*m*) 1 Salk. 392.

(*n*) See, too, *per* Tindal, C. J., in *Johnson* v. *Evans*, 7 Man. & Gr. 249, 250.

(*o*) See *Eddie* v. *Davidson*, 2 Dougl. 650.

(*p*) See *Parker* v. *Pistor*, 3 Bos. & P. 288; *Chapman* v. *Koops*, ib. 289; *Morley* v. *Strombom*, 3 Bos. & P. 254. Lord Eldon greatly disapproved of it, see *Waters* v. *Taylor*, 2 V. & B. 301.

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to seize the whole of the partnership effects (seizable under a *fi. fa.*), or of so much of them as may be requisite, and to sell the undivided share of the debtor partner therein, without reference to the state of the accounts as between him and his co-partners (*q*).

Sale of execution debtor's share.

The sheriff, having seized the property of the firm, proceeds to sell the interest of the judgment debtor in the chattels seized, and to assign the same to the purchaser (*r*). Formerly the sale had to be by auction, but now it may be made by private contract (*s*).

Rights of the other partners.

It is to be observed that the sheriff seizes, sells, and assigns; but he has no business to take the goods of the firm out of the possession of the solvent partners (*t*); and if the sheriff sells not the share of the execution debtor, but the goods themselves, he is accountable to the solvent partners for so much of the proceeds of the sale as is proportional to their share in the partnership (*u*).

2. *Of the position of the purchaser from the sheriff.*

2. Of the purchaser from the sheriff.

If the purchaser is a stranger unconnected with the firm, he acquires for his own benefit all the judgment debtor's interest in the property comprised in the bill of sale, and becomes, as regards such property, tenant in common with the judgment debtor's co-partners (*x*). The next step, therefore, is to adjust the conflicting rights of the purchaser, and these partners. Now it is clear from the nature of the lien which each partner has on the partnership property, that a partner holds a partnership chattel with his co-partner, subject to all

(*q*) See *Helmore* v. *Smith*, 35 Ch. D. 436; *Holmes* v. *Mentze*, 4 A. & E. 127; S. C. 5 Nev. & Man. 563, and 4 Dowl. Pr. Ca. 300; *Johnson* v. *Evans*, 7 Man. & Gr. 240. In *Holmes* v. *Mentze*, it was held that a sheriff, who for the debt of one partner executed a *fi. fa.* against the property of the firm, was not entitled to make the execution creditor and the co-partner of the debtor interplead; but that if the execution creditor denied the partnership he was bound to indemnify the sheriff.

(*r*) See *Habershon* v. *Blurton*, 1 De G. & Sm. 121.

(*s*) See *Ex parte Villars*, 9 Ch. 432.

(*t*) See *per* Patteson, J., in *Burnell* v. *Hunt*, 5 Jur. 650, Q. B.

(*u*) *Mayhew* v. *Herrick*, 7 C. B. 229.

(*x*) See *Helmore* v. *Smith*, 35 Ch. D. 436.

the equities which that co-partner has upon it (*y*), and subject therefore to his right to have all the creditors of the firm paid out of the assets of the firm, and consequently, *pro tanto*, out of the chattels seized by the sheriff (*z*). It is equally clear that in this respect the purchaser from the sheriff is in no better position than the partner whose undivided share has been sold (*a*). Before the Judicature acts, therefore, a suit in equity became necessary, in order that the partnership accounts might be taken, and the partnership property duly applied (*b*).

Injunction.

The right of the partners of the judgment debtor being of the nature described, and it being incompatible with that right that the partnership property seized by the sheriff should be removed or sold by him, the Court of Chancery would, before the Judicature acts, on a bill filed by the judgment debtor's co-partners against the judgment debtor and his creditor and the sheriff, direct the partnership accounts to be taken, and restrain the sheriff from selling the property and appoint a receiver (*c*).

3. *Of the position of the execution debtor.*

3. Of the execution debtor.

With respect to the execution debtor, it is to be observed that, in the first place, the execution generally (*d*) operates as a dissolution of the partnership (*e*). In the next place, the assignment by the sheriff to the purchaser transfers to the pur-

(*y*) *Barker* v. *Goodair*, 11 Ves. 85.

(*z*) See the next note.

(*a*) *Skipp* v. *Harwood*, 2 Swanst. 586; *Taylor* v. *Fields*, 4 Ves. 396; *Young* v. *Keighly*, 15 Ves. 557; *Dutton* v. *Morrison*, 17 Ves. 205-6; *Ex parte Hamper*, ib. 404-5; *Re Wait*, 1 J. & W. 608.

(*b*) See *Parker* v. *Pistor*, 3 Bos. & Pul. 288.

(*c*) See *Bevan* v. *Lewis*, 1 Sim. 376. As to an injunction against the sheriff, compare *Newell* v. *Townsend*, 6 Sim. 419, with *Garstin* v. *Asplin*, 1 Madd. 150, and *Jackson* v. *Stanhope*, 10 Jur. 676; and see Story on Partn. § 264; and as to making the sheriff a party, see Lord Eldon's obs. in *Franklyn* v. *Thomas*, 3 Mer. 235, and *Hawkshaw* v. *Parkins*, 2 Swanst. 549.

(*d*) Not necessarily in all cases; see *Helmore* v. *Smith*, 35 Ch. D. 436, where the solvent partner (in effect) paid out the sheriff with partnership monies.

(*e*) *Aspinall* v. *The London & N. W. Rail. Co.*, 11 Ha. 325; *Habershon* v. *Blurton*, 1 De G. & Sm. 121; *Skipp* v. *Harwood*, 2 Swanst. 587.

chaser whatever the sheriff had power to assign, and did assign, but no more; and as, under a *fi. fa.*, the sheriff may not have power to sell everything which, as between the partners, is to be considered partnership property, it by no means follows that the assignment has transferred to the creditor all the judgment debtor's share and interest in the partnership (*f*). In a case, therefore, where a stranger purchased from the sheriff the execution debtor's interest, and then assigned it to the other partners, it was held that the execution debtor was still entitled to an account from them; the sale by the sheriff not having divested him of all his interest in the concern (*g*).

Purchase of his interest by his co-partners.

Upon a sale by the sheriff of the interest of one partner in the property seized, there is nothing to prevent a purchase of that interest by his co-partners. But the co-partners purchasing of the sheriff must act with perfect fairness. If they do anything to conceal the true value of the share, so as to enable themselves to buy it for less than it would otherwise have fetched, the sale will not be allowed to stand. In *Perens* v. *Johnson* (*h*), the share of a partner in a leasehold colliery was sold by the sheriff under a *fi. fa.* The sale was by auction. The other partners bought the share; the execution creditor was paid off; and a balance was handed over by the sheriff to the execution debtor. It appeared, however, that before the sale took place, it was expected that a valuable seam of coal would be reached; that the solvent partners had removed the gear so as to prevent any one going down the mine; that they had also removed some ironstone recently raised, so as to lead persons visiting the mine to believe that coal was not so nearly within reach as it was; and that a few days after the sale, and after only one day's working, a rich seam of coal was actually discovered. The execution debtor thereupon filed a bill against his late co-partners, praying that the sale might be set aside, on the ground that the purchase from the sheriff was contrary to that good faith which should be observed by one partner towards another; and a decree was made in his

Perers *v.* Johnson.

(*f*) See *Helmore* v. *Smith*, 35 Ch. D. 436.

(*g*) *Habershon* v. *Blurton*, 1 De G. & Sm. 121.

(*h*) *Perens* v. *Johnson*, and *Johnson* v. *Perens*, 3 Sm. & G. 419. See, also, *Smith* v. *Harrison*, 26 L. J. Ch. 412, V.-C. W., where a sale by the sheriff was also set aside.

favour setting the sale aside upon repayment of the purchase-money, with interest at 5*l.* per cent.

Purchase with partnership monies.

Again, if the solvent partners buy the execution debtor's share in the goods seized and pay for it out of the partnership monies, they cannot hold the share for their own benefit and treat the execution debtor as no longer a partner or interested in the share purchased (*i*).

Right of the execution creditor.

The execution creditor has no title to goods seized under a *fi. fa.* issued by him, unless he purchases them from the sheriff. Consequently where, under a *fi. fa.* issued against one partner for a private debt, the sheriff seized the goods of the firm, which afterwards became bankrupt, and the assignees sold the goods seized, it was held that an action by the execution creditor against the assignees for money had and received to his use, would not lie; first, because *he* had no title to the goods; and secondly, because if he had, his interest in them could not be ascertained without taking the accounts of the partnership (*k*).

4. *Modifications introduced by the Judicature acts.*

The Judicature acts and rules promulgated under them do not unfortunately contain any directions applicable to the subject now under consideration. Nor has the new practice under them yet been reduced to shape. The writer can only, therefore, offer the following suggestions with reference to their combined effect:—

1. The practice must be the same in all divisions of the High Court.

2. The old practice must be adhered to so far as it is consistent with the modern procedure.

3. Some form of procedure must be adopted which shall have the effect of a suit for an account, and an injunction, and a receiver.

4. There appears to be no reason why the sheriff should not proceed to seize the partnership goods, and sell the execution debtor's share as before; and there is in strictness no more

(*i*) *Helmore* v. *Smith*, 35 Ch. D. 436, where the assignment by the sheriff was set aside.

(*k*) *Garbett* v. *Veale*, 5 Q. B. 408.

necessity for him to interplead now than before (*l*); and yet as no order for his withdrawal can be made in his absence, a proceeding by him in the nature of an interpleader summons, bringing all parties interested before the Court, would probably be the most convenient course to adopt.

5. Upon a seizure by the sheriff the partners of the execution debtor should obtain an order dissolving the partnership, directing the sheriff to withdraw, and directing the accounts of the partnership to be taken, and the value of the execution debtor's interest in the property seized by the sheriff to be ascertained, and appointing a receiver.

6. After the accounts have been taken, and the above value ascertained, the receiver should be directed to pay the amount of such value to the purchaser from the sheriff, if any, and the rest of the share of the execution debtor in the assets of the partnership to him. If the share has not been sold the execution creditor must be paid out of, or to the extent of the above value. The receiver can then be discharged.

7. Whether all this can be done without a transfer to the Chancery Division is not clear; but probably it very often may be done; and practically a sale by the sheriff will probably be frequently dispensed with. A sale usually produces great hardship, as the value of the share sold is unknown; and its sale seldom answers any useful purpose except that of getting rid of the sheriff.

Suggested alteration of the law.

The truth, however, is that the whole of this branch of the laws is in a most unsatisfactory condition, and requires to be put on an entirely new footing. The statutory enactments relating to charging orders should be extended to all cases in which the share of a partner is sought to be taken in execution for a separate debt of his own.

(*l*) See acc. W. N. 1875, p. 204.

SECTION V.—OF THE TRANSFER OF SHARES.

Transfer of shares.

When persons enter into a contract of partnership, their intention ordinarily is, that a partnership shall exist between themselves and themselves alone. The mutual confidence reposed by each in the other is one of the main elements in the contract, and it is obvious that persons may be willing enough to trust each other, and yet be unwilling to place the same trust in any one else. Hence it is one of the fundamental principles of partnership law that no person can be introduced as a partner without the consent of all those who for the time being are members of the firm. If, therefore, a partner dies, his executors or devisees have no right to insist on being admitted into partnership with the surviving partners, unless some agreement to that effect has been entered into by them (*m*).

Effect of transfer.

Still less can a partner by assigning his share entitle his assignee to take his place in the partnership against the will of the other members (*n*). The assignment, however, is by no means inoperative: on the contrary, it involves several important consequences, more especially as regards the dissolution of the firm and the right of the assignee to an account (*o*).

Effect of assignment.

1. As regards dissolution.

As regards dissolution, it is remarkable that there should be so little authority to be found. It is generally stated, that if a member of an ordinary partnership transfers his share, he thereby dissolves the partnership; but this proposition requires qualification. The true doctrine, it is submitted, is that if the partnership is at will, the assignment dissolves it (*p*); and if the partnership is not at will, the other members are entitled to treat the assignment as a cause of dissolution. It can hardly be that a partner, who has himself no right to dissolve or to introduce a new partner, can, by assigning his share, confer on the assignee a right to have the accounts of the firm

(*m*) *Pearce* v. *Chamberlain*, 2 Ves. S. 33; *Crawford* v. *Hamilton*, 3 Madd. 254; *Bray* v. *Fromont*, 6 ib. 5; *Crawshay* v. *Maule*, 1 Swanst. 495; *Tatam* v. *Williams*, 3 Ha. 347.

(*n*) See *Jefferys* v. *Smith*, 3 Russ. 158.

(*o*) In *Marshall* v. *Maclure*, 10 App. Ca. 325, a surrender of a partner's share in property mortgaged was held, under special circumstances, to include the firm's share.

(*p*) See *Heath* v. *Sansom*, 4 B. & Ad. 172.

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taken, and the affairs thereof wound up, in order that he may obtain the benefit of his assignment.

2. As regards account.

Although a partner cannot, by transferring his share, force a new partner on the other members of the firm without their consent, there is nothing to prevent a partner from assigning or mortgaging his share without consulting his co-partners; and if a partner does assign or mortgage his share, he thereby confers upon the assignee or mortgagee a right to payment of what, upon taking the accounts of the partnership, may be due to the assignor or mortgagor (*q*). But the assignee or mortgagee acquires no other right than this (*r*); and he takes subject to the rights of the other partners; and will be affected by equities arising between the assignor and his co-partners subsequently to the assignment (*s*). Even if the assignee gives notice of the assignment, he cannot (if the partnership is for a term) acquire a right to the assignor's share as it stands at the time of the assignment or notice, discharged from subsequently arising claims of the other partners (*t*). The assignment cannot deprive them of their right to continue the partnership, and consequently to bring subsequent dealings and transactions into account. It seems, however, that an assignee of a share in a partnership can compel the other partners to come to an account with him (*u*); but the analogy furnished by sub-partnerships leads to the inference that the assignee must, to use Lord Eldon's language, be satisfied with the share of the profits arising and given to the assignor (*x*).

Transfer allowed by agreement.

If partners choose to agree that any of them shall be at

(*q*) *Whetham* v. *Davey*, 30 Ch. D. 574; *Glyn* v. *Hood*, 1 Giff. 328, and 1 De G. F. & J. 334. See, also, *Cassels* v. *Stewart*, 6 App. Ca. 73.

(*r*) *Smith* v. *Parkes*, 16 Beav. 115.

(*s*) See *Cavander* v. *Bulteel*, 9 Ch. 78; *Lindsay* v. *Gibbs*, 3 De G. & J. 690; *Guion* v. *Trask*, 1 De G. F. & J. 379, *per* Turner, L. J. See, also, *Re Knapman*, 18 Ch. D. 300; *Bergmann* v. *McMillan*, 17 ib. 423; *Morris* v. *Livie*, 1 Y. & C. C. 380.

(*t*) See *Bergmann* v. *McMillan*, 17 Ch. D. 423; *Cavander* v. *Bulteel*, 9 Ch. 78; *Kelly* v. *Hutton*, 3 Ch. 703; *Redmayne* v. *Forster*, 2 Eq. 467.

(*u*) See *Whetham* v. *Davey*, 30 Ch. D. 574; *Glyn* v. *Hood* and *Kelly* v. *Hutton*, *ubi supra*. But *Kelly* v. *Hutton* appears to have been a case of co-ownership in the newspaper and a partnership in its profits.

(*x*) See *ante*, p. 48; and *Brown* v. *De Tastet*, Jac. 284, where the bill was dismissed against the other partners.

liberty to introduce any other person into the partnership, there is no reason why they should not; nor why, having so agreed, they should not be bound by the agreement (*y*). Persons who enter into such an agreement consent prospectively and once for all to admit into partnership any person who is willing to take advantage of their agreement, and to observe those stipulations, if any, which may be made conditions of his admission. Such an agreement as this is the basis of every partnership the shares in which are transferable from one person to the other. Those who form such partnerships, and those who join them after they are formed, assent to become partners with any one who is willing to comply with certain conditions (*z*).

Lovegrove v. Nelson.

As observed in *Lovegrove* v. *Nelson* (*a*), "To make a person a partner with two others their consent must clearly be had, but there is no particular mode or time required for giving that consent; and if three enter into partnership by a contract which provides that on one retiring, one of the remaining two, or even a fourth person who is no partner at all, shall name the successor to take the share of the one retiring, it is clear that this would be a valid contract which the Court must perform, and that the new partner would come in as entirely by the consent of the other two as if they had adopted him by name."

Effect of transfer where there is a right to assign.

Where a partner has an unconditional right to transfer his share, he may transfer it to a pauper, and thus get rid of all liability as between himself and his co-partners in respect of transactions subsequent to the transfer and notice thereof given to them (*b*). But even in this case the transfer alone does not render the transferee a member of the partnership, and liable as between himself and the other members to any of the debts of the firm (*c*). In order to render him a partner with the other members, they must acknowledge him to be a partner, or permit him to act as such (*d*).

Effect on continuity of firm.

As an ordinary partnership is not distinguishable from the persons composing it, and as every change amongst those

(*y*) *Lovegrove* v. *Nelson*, 3 M. & K. 20.

(*z*) See *Fox* v. *Clifton*, 9 Bing. 119.

(*a*) 3 M. & K. 1.

(*b*) *Jefferys* v. *Smith*, 3 Russ. 158.

(*c*) Ibid.

(*d*) Ibid.

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persons creates a new partnership, it follows that every time a partner transfers his share to a non-partner the continuity of the firm is broken. In this respect such companies as are not mere partnerships on a large scale differ from ordinary firms, their continuance not being interrupted by changes amongst their members (*e*).

Mining partnerships.

An apparent exception to the rule that a share in a partnership cannot be transferred without the consent of all the partners exists in the case of mining partnerships. Mines are a peculiar species of property, and are in some respects governed by the doctrines of real property law, and in others by the doctrines which regulate trading concerns. Regarding them as real property, and their owners as joint tenants or tenants in common, each partner is held to be at liberty to dispose of his interest in the land without consulting his co-owners; and a transfer of this interest confers upon the transferee all the rights of a part-owner, including a right to an account against the other owners (*f*). But even here, if the persons originally interested in the mine are not only part-owners but also partners, a transferee of the share of one of them, although he would become a part-owner with the others, would not become a partner with them in the proper sense of the word, unless by agreement express or tacit (*g*).

Ships.

Similar observations apply to transfers of shares in ships.

(*e*) See *Mayhew's case*, 5 De G. M. & G. 837.

(*f*) See *Bentley* v. *Bates*, 4 Y. & C. Ex. 182; *Redmayne* v. *Forster*, 2 Eq. 467.

(*g*) As in *Jefferys* v. *Smith*, 3 Russ. 158; *Crawshay* v. *Maule*, 1 Swanst. 518.

CHAPTER VI.

OF CONTRIBUTION AND INDEMNITY WITH REFERENCE TO PARTNERSHIPS.

Bk. III. Chap. 3.

Subject of present chapter.

In this chapter it is proposed to consider the nature of those expenses and losses which, as between the members of a firm, are chargeable to the firm, and also the nature of those which are properly chargeable against some one or more of the members exclusively of the others. In other words, it is proposed to investigate the principles upon which, in taking the accounts of a firm, a given expense or loss is to be placed to the debit of the firm, or to the debit of one or more of its members separately.

In connection with this subject it must always be borne in mind that every member of an ordinary firm is, to a certain extent, both a principal and an agent. He is liable as a principal to the debts and engagements of the firm, and in respect of them he is entitled to contribution from his co-partners; for they have no right to throw on him alone the burden of obligations which, *ex hypothesi*, are theirs as much as his (*a*). Again, each member as an agent of the firm is entitled to be indemnified by the firm against losses and expenses *bonâ fide* incurred by him for the benefit of the firm, whilst pursuing the authority conferred upon him by the agreement entered into between himself and his co-partners. On the other hand, a partner has no right to charge the firm with losses or expenses incurred by his own negligence or want of skill, or in disregard of the authority reposed in him (*b*).

The above general principles are the basis of the whole of this branch of partnership law; but in order to apply them

(*a*) See *Robinson's case*, 6 De G. M. & G. 572; *Spottiswoode's case*, ib. 345; *Lefroy* v. *Gore*, 1 Jo. & Lat. 571.

(*b*) *Thomas* v. *Atherton*, 10 Ch. D. 185; *Bury* v. *Allen*, 1 Coll. 604.

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correctly to the infinite variety of circumstances which occu in the ordinary course of life, it will be convenient to notice th leading doctrines on the subject of contribution and indemnit generally, and then to allude more particularly to the rights o partners with respect to compensation for trouble; outlay and advances; debts, liabilities, and losses and interest.

SECTION I.—GENERAL OBSERVATIONS.

Foundation of the right to contribution.

The right of contribution.

Whether a person who has suffered loss is entitled to b indemnified wholly or partly by others, is a question whic cannot be decided in the negative merely upon the groun that no agreement for contribution or indemnity has bee entered into. An agreement may undoubtedly give rise to right to indemnity or contribution; but the absence of a agreement giving rise to such a right, is by no means fatal t its existence. The general principle which prescribes equalit of burden and of benefit, is amply sufficient to create a right o contribution in many cases in which it is impossible to foun it upon any genuine contract, express or tacit. The commo feature of such cases is, that one person has sustained som loss which would have fallen upon others as well as upon him self, but which has been averted from them at his expense for example, where one tenant in common repairs the commo property, and so saves it from destruction (*c*); where one o several sureties pays a debt for which all are liable (*d*); wher one person has his goods thrown overboard in order to sav the ship and the rest of its cargo (*e*). In all these cases right of contribution arises; not by virtue of any contract but because the safety of some cannot justly be purchased a the expense of others; and all must therefore contribute t the loss sustained (*f*).

(*c*) *Ante*, p. 60.

(*d*) *Dering* v. *Winchelsea*, 1 Cox, 318.

(*e*) Abbott on Shipping, part. iv ch. 10; and part vi. ch. 1, ed. 12.

(*f*) *Lefroy* v. *Gore*, 1 Jo. & Lat

Again, where one man's goods have been lawfully seized for the debt of another, the owner of the goods has a right to redeem them and to be indemnified by the debtor (*g*).

Exclusion of right by agreement.

But although a right to contribution may exist where there is no contract upon which it can be founded, it cannot exist if excluded by agreement; and it is so excluded whenever those who would otherwise be contributories have entered into any contract, express or tacit, amongst themselves, which is inconsistent with a right on the part of one to demand contribution from the others (*h*). This is too obvious to require comment, but it must be borne in mind as qualifying the common saying, that the right to contribution is independent of agreement.

Exclusion of right by fraud

Again, a right to contribution may be excluded by fraud, as is the case where a person induces another by false and fraudulent representations to join him in partnership. In such a case the person defrauded has a right to rescind the contract of partnership, and, as between himself and co-partner, to throw all the partnership losses upon the latter alone (*i*).

Of the right of agents and trustees to indemnity from their principals and cestuis que trustent.

Agent's right to indemnity.

In order to clear the way for the discussion of the right of a partner to be indemnified by his firm, it is necessary to advert shortly to the right of agents and trustees to be indemnified by their principals and *cestuis que trustent*.

With respect to agents the following cases have to be considered.

1. When the agent having instructions executes them;

571; *Spottiswoode's case*, 6 De G. M. & G. 345; *Ashurst* v. *Mason*, 20 Eq. 225, a case of co-directors. See, too, the cases in 1 Eq. Ca. Ab. Contribution and Average, and in the note to *Averall* v. *Wade*, Ll. & Gould (temp. Sug.), 264.

(*g*) *Edmunds* v. *Wallingford*, 14 Q. B. D. 811.

(*h*) As in *Gillan* v. *Morrison*, 1 De G. & S. 421; *Re The Worcester Corn Exchange Co.*, 3 De G. M. & G. 180.

(*i*) See *Newbigging* v. *Adam*, 34 Ch. D. 582; *Pillans* v. *Harkness*, Colles, 442; *Rawlins* v. *Wickham*, 1 Giff. 355, and 3 De G. & J. 304, noticed hereafter under the head Rescission of Contract. See, too, *Carew's case*, 7 De G. M. & G. 43.

2. When the agent having instructions does not follow them;

3. When the agent having no instructions acts nevertheless for his principal.

1. When he obeys his instructions.

1. With respect to the first of these three classes of cases, nothing is clearer than that an agent who has instructions to act in a certain manner, is entitled to be reimbursed by his principal for all outlays made in pursuance of these instructions, and to be indemnified for any loss sustained by executing them (*k*). Even if what the agent does is unlawful he is entitled to indemnity (*l*); unless, indeed, the act be one which the agent must have known his principal could under no circumstances justify; for then the maxim *in pari delicto melior est positio defendentis* applies, and the agent can obtain no indemnity from a court of justice (*m*).

2. When he disobeys his instructions.

2. It is equally clear that, speaking generally, an agent who acts *contrary* to his instructions is not entitled to any indemnity or reimbursement for losses or expenses incurred whilst so acting (*n*). Even although the instructions may have been given by the principal under a misapprehension of facts, and the agent, being aware that such was the case, may have acted *bonâ fide* for the benefit of his principal (*o*), still the agent will not be entitled to indemnity; for it is the duty of an agent to obey and not to disregard his orders. But if the principal chooses to ratify the agent's conduct, the latter acquires a right to be considered as having acted in pursuance of instructions, and to be entitled to reimbursement and indemnity

(*k*) Story on Agency, § 335 *et seq.*; Paley on Agency, ch. 2; Smith, Merc. Law, pp. 119, 120, ed. 9; *Curtis* v. *Barclay*, 5 B. & C. 141. See, also, *Ireland* v. *Livingstone*, L. R. 5 Ho. Lo. 416, as to ambiguous instructions. As to costs of actions unsuccessfully defended, see *Broom* v. *Hall*, 7 C. B. N. S. 503.

(*l*) *Adamson* v. *Jarvis*, 4 Bing. 66; *Betts* v. *Gibbins*, 2 A. & E. 57; *per* Tindal, C. J., in *Collins* v. *Evans*, 5 Q. B. 830. See, as to conforming to an illegal custom unknown to the principal, *Perry* v. *Barnett*, 15 Q. B. D. 388.

(*m*) See *Merryweather* v. *Nixan*, 2 Sm. L. C.; *Collins* v. *Blantern*, 1 ib.; *Josephs* v. *Pebrer*, 3 B. & C. 639; *Shackell* v. *Rosier*, 2 Bing. N. C. 634.

(*n*) See *Stokes* v. *Lewis*, 1 T. R. 20; *Galway* v. *Mathew*, 10 East, 264; *Child* v. *Morley*, 8 T. R. 610; *Warwick* v. *Slade*, 3 Camp. 127.

(*o*) *Howard* v. *Tucker*, 1 B. & Ad. 712.

accordingly; for the principal cannot, whilst ratifying the agent's conduct so far as it is beneficial, repudiate it so far as it is onerous (*p*).

Effect of revocation of authority.

The position of an agent who has already acted on his instructions, and has thereby incurred a legal obligation to third parties, is different. The better opinion is that in this case he is not bound on the command of his principal to stop short and refuse to perform the obligation incurred. There is no doubt that, as between himself and his principal, an agent is *entitled* to obey the counter order, and to obtain a full indemnity from the consequences of so doing. But it is apprehended that he is at liberty so far to carry out the instructions on which he has begun to act, as may be necessary to relieve himself from all the legal liabilities incurred before notice of the countermand, and having done so, to insist upon indemnity and reimbursement as if the principal had not changed his instructions. *Nemo potest mutare consilium suum in alterius injuriam* is the maxim of the civil law, and expresses the correct principle for the decision of these cases (*q*).

3. When he acts without instructions.

3. There remains the third class of cases, viz., where the agent, having no instructions to guide him, acts for his principal, and then seeks to be indemnified by him. Now, here, as in the last class of cases, ratification by the principal removes all difficulty, and may be excluded from consideration. Again, an agent having no specific instructions may yet have an implied authority to act in a given way for his principal; and in the absence of orders to the contrary, an agent always has implied authority to act in the manner in which he has been accustomed to act with the approval of his principal; and to act with respect to any matter as other persons situate like himself usually act with respect to similar matters; and to take all those steps which are usual and necessary to enable

(*p*) Story on Agency, § 250.

(*q*) See *Read* v. *Anderson*, 13 Q. B. D. 779; *Seymour* v. *Bridge*, 14 ib. 460; *Loring* v. *Davis*, 32 Ch. D. 625. The position in the text is supported by Pothier, Mandat. No. 121, and Story, Agency, § 465, &c., and by *Balsh* v. *Hyham*, 2 P. W. 453; *Sutton* v. *Tatham*, 10 A. & E. 27; and the cases already cited. On the other hand, see 2 Kent. Com. 644. In *Child* v. *Morley*, 8 T. R. 610, and *Warwick* v. *Slade*, 3 Camp. 127, the agent was only bound in honour.

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him duly to execute his instructions (*r*). It may therefore well happen that an agent who has no positive instructions, may nevertheless act within the limits of his real authority; and so long as he keeps within those limits he is entitled to reimbursement and indemnity (*s*). The principle applicable to the first class of cases applies here; but if the agent claims an indemnity against loss sustained by the commission by him of an illegal act, he must be prepared with very strong evidence to show that such acts fell within the limits of his authority (*t*). In a case of doubt no authority to commit an unlawful act can be inferred.

Rights of a person who unasked acts for another.

The greatest difficulty arises when an agent acts without any authority, express or tacit, but *bonâ fide* for the benefit of his principal. There is a leaning in many minds in favour of the agent in such cases, and it cannot be denied that circumstances may occur which render officious conduct justifiable, and even benevolent. On the other hand, *culpa est immiscere se, rei ad se non pertinenti* (*u*); and by the law of England a person who chooses, unasked, to incur expense for another, must, speaking generally, trust rather to gratitude than to judicial aid for reimbursement (*x*). The only established exceptions to this rule seem to be—1, where one person alone sustains a loss or incurs expense for the relief of himself and others from some risk or obligation common to all; and, 2, where one person does for another that which the latter is legally bound to do, but either cannot or will not do himself. The first class of exceptions has been already alluded to. The second may be illustrated by those cases in which executors and husbands are held liable for the expenses of funerals, although they gave

(*r*) Story on Agency, ch. 6.

(*s*) *Curtis* v. *Barclay*, 5 B. & C. 141; *Sutton* v. *Tatham*, 10 A. & E. 27; see, too, 1 Wms. Saund. 264 *b*; *Pettman* v. *Keble*, 15 Jur. 38; *Wolfe* v. *Horncastle*, 1 Bos. & P. 323, *per* Buller, J. This was also the principle applied in *R.* v. *Essex*, 4 T. R. 591, and referred to by Lord Cottenham in *A.-G.* v. *The Mayor of Norwich*, 2 M. & Cr. 424.

(*t*) See, as to unreasonable or illegal customs not known to the principal, *Perry* v. *Barnett*, 15 Q. B. D. 388.

(*u*) Dig. L. tit. 17, De Reg. Jur. L. 36.

(*x*) See *Falcke* v. *Scottish Imp. Ins. Co.*, 34 Ch. D. 248; *Re Leslie*, 23 Ch. D. 552. See as to the *negotiorum gestor* of the Roman law, Dig. III. tit. 5, De Negot. Gest., Thibaut's System des Pand. Recht, § 558, ed. 9.

no orders for them, and took no part in them (*y*); and by cases in which one man's goods have been lawfully seized for another man's debt (*z*).

General rule.

The general rule, certainly, is that the officious conduct of one person imposes no obligation on another to compensate him for, or indemnify him from, the consequences of his own spontaneous act; and even although the other may be benefited, he cannot on that ground alone be compelled to pay for what he never sought to obtain (*a*). A very strong illustration of this is afforded by the case of *Edmiston* v. *Wright* (*b*). There the defendant was the owner of some estates in Georgia, and of some negroes in Jamaica. The plaintiff's partner was the defendant's agent, and the general manager of his West Indian estates. The negroes in Jamaica were shipped for Georgia, and seized by Custom-house officers in consequence of the captain of the ship having neglected to procure some necessary documents. The plaintiff, for the purpose of redeeming the negroes from the authorities who had seized them, paid the sum of 1200*l.*, and the negroes were then allowed to proceed to the defendant's estate in Georgia. The plaintiff sued the defendant for the sum of 1200*l.* as money paid to his use, but Lord Ellenborough held that it was a voluntary payment made by the plaintiff, and one which he could not recover from the defendant.

Edmiston *v.* Wright.

Right of trustees to indemnity.

The right of a trustee to indemnity from his *cestui que trust* very closely resembles the right of an agent to indemnity from his principal—

1. A trustee is clearly entitled to be indemnified out of the trust property against all costs, charges, and expenses properly incurred, and against all losses sustained by him, in the execution of his trust (*c*); and if the trust property is not sufficient for the purpose of indemnifying him in respect of such matters,

(*y*) See *Ambrose* v. *Kerrison*, 10 C. B. 776; *Rogers* v. *Price*, 3 Y. & J. 28; *Jenkins* v. *Tucker*, 1 H. Bl. 91.

(*z*) *Edmunds* v. *Wallingford*, 14 Q. B. D. 811.

(*a*) 1 Wms. Saund. 264 *a*; 6 B. & C. 444, *per* Bayley, J.; *Stokes* v. *Lewis*, 1 T. R. 20; *Child* v. *Morley*, 8 T. R. 610.

(*b*) 1 Camp. 88.

(*c*) *Re Bleckley*, 35 Beav. 449, where this rule was applied in favour of a trustee for a company against its debenture-holders. See, as to losses which may never arise,

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his *cestui que trust*, if under no disability, is personally liable to indemnify him (*d*), unless such liability is excluded by some special circumstance (*e*).

2. On the other hand, a trustee who commits a breach of trust is entitled to no indemnity in respect thereof, except from those *cestuis que trustent*, if any, at whose request he wrongfully acted, or who have sanctioned and benefited by his improper conduct (*f*).

3. Every act of a trustee respecting the trust property must necessarily either be warranted by the trust reposed in him, or amount to a breach of trust, and must therefore be governed by one or other of the two foregoing principles. But as with agents, so with trustees; their acts may be proper, although not expressly authorised; and whatever is necessary in order duly to execute an express trust, is warranted by that trust, and entitles the trustee to indemnity accordingly. But even this principle will not entitle a trustee to indemnity in respect of everything he may do *bonâ fide* for the benefit of his *cestui que trust;* regard must be had to the nature of the trusts to be executed.

Of some former differences between contribution at law and in equity.

1. As to indemnity before loss has been sustained.

Before the passing of the Judicature acts, a right to contribution or indemnity, arising otherwise than by special agreement, was only enforceable at law by a person who could prove that he had already sustained a loss (*g*). But in equity it was very reasonably held, that even in the absence of any

Hughes-Hallett v. *Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561; *Hobbs* v. *Wayet*, 36 Ch. D. 256; and as to the right of indemnity where trustees hold two funds for different sets of people, but under the same instrument, *Fraser* v. *Murdoch*, 6 App. Ca. 855.

(*d*) See *Oriental and Commercial Bank*, 3 Ch. 791; *Balsh* v. *Hyham*, 2 P. W. 453; *Phene* v. *Gillan*, 5 Ha. 1; and *Ex parte Chippendale*, 4 De G. M. & G. 52.

(*e*) If there is an express covenant to indemnify, the obligation will be limited by the covenant. See *Selwyn* v. *Harrison*, 2 J. & H. 334; *Gillan* v. *Morrison*, 1 De G. & Sm. 421.

(*f*) See Lewin on Trusts, pp. 642 and 910, ed. 8.

(*g*) See *Maxwell* v. *Jameson*, 2 B. & A. 51. Compare *Spark* v. *Heslop*, 1 E. & E. 563, and the judgment of Crompton, J., in *Randall* v. *Raper*, E. B. & E. 84.

special agreement, a person who was entitled to contribution or indemnity from another could enforce his right before he had sustained actual loss (*h*) provided loss was imminent (*i*); and this principle will now prevail in all divisions of the High Court (*k*). Therefore a person who is entitled to be thus indemnified against loss is not obliged to wait until he has suffered, and perhaps been ruined, before having recourse to judicial aid. Thus, in the ordinary case of principal and surety, as soon as the creditor has acquired a right to immediate payment from the surety, the latter is entitled to call upon the principal debtor to pay the amount of the debt guaranteed, so as to relieve the surety from his obligation (*l*); and where one person has covenanted to indemnify another, an action for specific performance may be sustained before the plaintiff has actually been damnified (*m*); and the limit of the defendant's liability to the plaintiff is the full amount for which he is liable; or if he is dead or insolvent the full amount provable against his estate, and not only the amount of dividend which such estate can pay (*n*). In strict conformity with these principles, partners and directors who are individually liable to be sued on bonds and notes, which as between them and their co-partners are to be regarded as the bonds and notes of the firm or company, are entitled to call for contribution before these bonds or notes have been actually paid (*o*). So a trustee of shares liable to calls is entitled to be indemnified by his *cestui que trust* against them before they are paid (*p*).

(*h*) See *Hobbs* v. *Wayet*, 36 Ch. D. 256; *Lacey* v. *Hill*, 18 Eq. 182.

(*i*) *ib.*; *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561.

(*k*) See Jud. Act, 1873, §§ 24 and 25.

(*l*) *Wooldridge* v. *Norris*, 6 Eq. 410; *Nesbit* v. *Smith*, 2 Bro. C. C. 582. As to the right of one surety to contribution from another, see *Ex parte Snowdon*, 17 Ch. D. 44.

(*m*) See *Ranelagh* v. *Hayes*, 1 Vern. 190.

(*n*) *Cruse* v. *Paine*, 6 Eq. 641, and 4 Ch. 441.

(*o*) See, for example, *The Norwich Yarn Co.'s case*, 22 Beav. 143; the money borrowed by the directors in that case was secured by their own notes, but these notes had not been actually paid when the call on the shareholders was made. This does not appear very clearly from the report referred to, but the writer has been informed by persons conversant with the case that the above statement is correct.

(*p*) *Oriental Commercial Bank*, 3 Ch. 791; *Cruse* v. *Paine*, 6 Eq. 641, and 4 Ch. 441. See also *Hobbs* v. *Wayet*, 36 Ch. D. 256, where the calls were not yet made.

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2. As to the amount payable by each contributory.

Another difference between law and equity which formerly prevailed, and to which it is necessary to advert, affects the mode in which the amount to be paid by each of several contributories was ascertained.

Rule at law.

At law, before the Judicature acts, if several persons had to contribute a certain sum, the share which each had to pay, was the total amount divided by the number of contributors; and no allowance was made in the event of the inability of some of them to pay their shares (*q*). But in equity, in the absence of agreement to the contrary (*r*), those who could pay were compellable not only to contribute their own shares, ascertained as above, but also to make good the shares of those who were unable to furnish their contributions. This rule also now prevails in all divisions of the High Court (*s*). For example, if A., B., C., and D. are liable to a debt, A. can compel B. and C. to contribute one-third each, if D. can contribute nothing; and this, as between A., B., and C., is evidently only fair and just (*t*).

Rule in equity.

Wadeson *v.* Richardson.

In *Wadeson* v. *Richardson* (*u*), one of four partners assigned property to trustees upon trust, *inter alia*, to pay his proportion or share of all such debts as were or should be owing by him and his three co-partners. He and they afterwards became bankrupt; and it was held that the share and proportion of debts which the trustees were to pay was, not the share and proportion which, as between the assignor and his co-partners, he ought to contribute to the funds of the firm, but the share and proportion which, as between him and the creditors of the firm, it was necessary for him to pay, in order that they might receive twenty shillings in the pound. The creditors were therefore held entitled to come in under the deed for so much as they were not paid out of the partnership funds, and as they could not recover from the estates of the other partners.

Rule applies where one part-

So, where a loss has been incurred under circumstances

(*q*) See *Cowell* v. *Edwards*, 2 Bos. & P. 268; *Batard* v. *Hawes*, 2 E. & B. 287.

(*r*) *McKewan's case*, 6 Ch. D. 447. The agreement, if any, determines the extent of the right.

(*s*) Jud. Act, 1873, §§ 24 and 25.

(*t*) *Dering* v. *Winchelsea*, 1 Cox, 318; *Hole* v. *Harrison*, 1 Ch. Ca. 246; *Peter* v. *Rich*, Rep. in Ch. 19.

(*u*) 1 V. & B. 103.

which render it wholly chargeable to the account of the partner who caused it, yet, so far as he is unable to make it good, it must be borne rateably by the other partners (*x*). Upon the same principle, when a company is being wound up, the solvent shareholders must, if their liability to creditors is not limited, contribute whatever may be necessary to pay all the creditors in full; and must make up rateably amongst themselves what ought to have been contributed by those shareholders who are insolvent (*y*); and this holds even where the creditors are themselves shareholders, and where the liability of the shareholders is as between themselves proportionate to their shares (*z*).

Partner ought to indemnify the rest; and to the winding up of companies.

Of contribution between wrong-doers.

There is a saying that there is no contribution amongst wrong-doers (*a*); but this doctrine is certainly inapplicable to partners in the general form in which it is enunciated. It is true, that if a partnership is itself illegal, no member of it can, in respect of any transaction tainted with the illegality which infects the firm, obtain relief against any other member; but there is no authority for saying that if one of the members of a firm sustains a loss owing to some illegal act not attributable to him, but nevertheless imputable to the firm, such loss must be borne entirely by him, and that he is not entitled to contribution in respect thereof from the other partners (*b*).

Of contribution amongst wrong-doers.

The claim of a partner to contribution from his co-partners in respect of a partnership transaction cannot be defeated on the ground of illegality, unless the partnership is itself an illegal partnership (*c*); or unless the act relied on as the basis of the

Application of doctrine to partners.

(*x*) See *Oldaker* v. *Lavender*, 6 Sim. 239; *Cruikshank* v. *McVicar*, 8 Beav. 117, 118.

(*y*) *Robinson's Ex. case*, 6 De G. M. & G. 572.

(*z*) *Professional Life Ass. Co.*, 3 Eq. 668, and 3 Ch. 167.

(*a*) *Merryweather* v. *Nixan*, 8 T. R. 186, and 2 Sm. L. C.; *Colburn* v. *Patmore*, 1 Cr. M. & R. 73; *A.-G.* v. *Wilson*, Cr. & Ph. 1.

(*b*) See, at law, *Betts* v. *Gibbins*, 2 A. & E. 57; *Adamson* v. *Jarvis*, 4 Bing. 66, and see in equity, *Ramskill* v. *Edwards*, 31 Ch. D. 100; *Lingard* v. *Bromley*, 1 V. & B. 114; *Baynard* v. *Woolley*, 20 Beav. 583; *Ashurst* v. *Mason*, 20 Eq. 225.

(*c*) As to which, see *ante*, p. 91.

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Implied authority.

the House, expressed a strong opinion that the defence of Illegality which was set up could not be supported. His Lordship said, "If this objection could prevail that because these parties were all guilty of a common offence, therefore one of such a numerous body could raise it would be an answer to him for the whole against the other parties." 24 & 25 Vict. c. 96, s. 1.

Again, where a company had illegally commenced business before the amount of capital required by statute to be paid up had been paid up in full but the shareholders were nevertheless liable amongst themselves to contribute to the discharge of the debts of the company *j*. Payment and non-payment.

The case which presents most difficulty is one in which it was intended but has been wrongly performed by all the parties, so that all are *in pari delicto*. There is a dictum of Lord Cottenham to the effect that in such a case each partner must bear all the loss he may happen to sustain, but that he cannot require any repayment to make that loss *k*. But on the other hand there is a decision which goes far to show that the loss ought to be apportioned between all the partners, unless the illegal act in question is a pure tort *l*. Where all are in pari delicto.

j Ex parte Eyston, In re Hull and Selby Railway Company, 3 De G. & Sm. 131; 16 Jur. 1; 21 L. J. (Ch.) 1; 1 Rail. Cas. 1; 1 Eq. Rep. 1. See also Ex parte Mackay, In re Mackay, 1 De G. & Sm. 63; 16 Jur. 1; 21 L. J. (Ch.) 1; 1 Rail. Cas. 1; 1 Eq. Rep. 1. See also Ex parte Bagshaw, In re Bagshaw, 1 De G. & Sm. 63; 16 Jur. 1; 21 L. J. (Ch.) 1; 1 Rail. Cas. 1; 1 Eq. Rep. 1.

SECTION II.—OF COMPENSATION FOR TROUBLE.

Bk. III. Chap. 6. Sect. 2.

Partner not entitled to charge firm for his services.

Under ordinary circumstances the contract of partnership excludes any implied contract for payment for services rendered for the firm by any of its members (*l*). Consequently, under ordinary circumstances, and in the absence of an agreement to that effect, one partner cannot charge his co-partners with any sum for compensation, whether in the shape of salary, commission, or otherwise, on account of his own trouble in conducting the partnership business (*m*); and in this respect a managing partner is in no different position from any other partner (*n*). Upon the same principle it has been held, that in taking the accounts of three partnerships, viz., of the firm A. and B., of its successors, A., B., and C., and of *its* successors B. and C., this last firm could not charge a commission for collecting the debts due to the two preceding firms (*o*). So, a partner employed to buy or sell goods for the firm, cannot charge it with any commission for so doing (*p*).

Rule applies though the partners may have worked unequally.

Even where the amount of the services rendered by the partners is exceedingly unequal, still, if there is no agreement that their services shall be remunerated, no charge in respect of them can be allowed in taking the partnership accounts. In such a case the remuneration to be paid to either for personal labour exceeding that contributed by the other, is considered as left to the honour of the other; and where that principle is wanting, a court of justice cannot supply it (*q*).

(*l*) *Thompson* v. *Williamson*, 7 Bli. N. S. 432, *per* Lord Wynford; *Holmes* v. *Higgins*, 1 B. & C. 74.

(*m*) As to a charge of commission by a ship's husband, see *Miller* v. *Mackay*, 31 Beav. 77, and 34 Beav. 295: as to the managing owner of a ship, see *The Meredith*, 10 P. D. 69.

(*n*) *Hutcheson* v. *Smith*, 5 Ir. Eq. 117. There a managing partner was disallowed all salary, commission, and compensation for *treating* customers.

(*o*) *Whittle* v. *McFarlane*, 1 Knapp, 311.

(*p*) See *Bentley* v. *Craven*, 18 Beav. 75.

(*q*) See *per* Wigram, V.-C., in *Webster* v. *Bray*, 7 Ha. 179. In that case an allowance for trouble was made to the defendant, but it was offered by the plaintiff. In *Robinson* v. *Anderson*, 20 Beav. 98, which was a similar case, no allowance was offered, nor was any given by the Court.

Wilful inattention to business.

But where, as is usually the case, it is the duty of each partner to attend to the partnership business, and one partner in breach of his duty wilfully leaves the others to carry on the partnership business unaided, they are, it would seem, entitled to compensation for their services. In *Airey* v. *Borham* (*r*), two partners had agreed to devote their whole time to the partnership business; they quarrelled, and one of them only afterwards attended to it: the partnership was ultimately dissolved, and an inquiry was directed for the purpose of ascertaining what allowance ought to be made to him for having carried on the business alone.

Airey *v.* Borham.

Rule as to services rendered after a dissolution.

The rule, moreover, which precludes a partner from charging his co-partners with payment for his services, does not apply to services rendered in carrying on the business of the firm after its dissolution: and it has been held that a surviving partner who carries on the business of the firm for the benefit thereof is entitled to remuneration for his trouble in so doing (*s*); unless there be some special reason to the contrary, as where he is the executor of his deceased partner (*t*).

Indian allowances.

In India an executor is allowed a per-centage on the assets collected by him; and a surviving partner who is the executor of his deceased co-partner, has been allowed this per-centage even on the amount due from the partnership to the estate of the deceased (*u*).

SECTION III.—OF OUTLAYS AND ADVANCES.

Outlays and advances made by one partner.

In taking a partnership account, each partner is entitled to be allowed against the other everything he has advanced or brought in as a partnership transaction, and to charge the other in the account with what that other has not brought in,

(*r*) *Airey* v. *Borham*, 29 Beav. 620.

(*s*) *Featherstonhaugh* v. *Turner*, 25 Beav. 382; *Brown* v. *De Tastet*, Jac. 284; *Crawshay* v. *Collins*, 2 Russ. 347. See, also, *Mellersh* v. *Keen*, 27 Beav. 242, where one partner became lunatic, and the business was continued by the others.

(*t*) *Burden* v. *Burden*, 1 V. & B. 172; *Stocken* v. *Dawson*, 6 Beav. 371.

(*u*) *Cockerell* v. *Barber*, 2 Russ. 585, and 1 Sim. 23.

Bk. III. Chap. 6. Sect. 3.

or has taken out more than he ought; and nothing is to be considered as his share but his proportion of the residue on the balance of the account (*x*). Although, therefore, a partner is not entitled to compensation for trouble, he is entitled to charge the partnership with sums *bonâ fide* expended by him in conducting the business thereof (*y*). Thus, where the managing director of a cost-book mining company advanced money for the purpose of enabling the business of the company to be carried on, he was held entitled to be reimbursed by the company, there being no question as to his authority to carry on the business on credit (*z*). So, where the directors of a mining company advanced money to keep the mine at work, and it would otherwise have been drowned, they were held entitled to be reimbursed, although they had no power to borrow money on the credit of the company (*a*).

Payments on account of debts.

So a partner is clearly entitled to charge the firm with whatever he may have been compelled to pay in respect of its debts (*b*); or in respect of obligations incurred by him alone at the request of the firm, as where he is compelled to pay a bond given by himself alone, but for the benefit of the firm and as a trustee for it (*c*), or where he sacrifices a debt due to himself in order to enable the firm to obtain a debt due to it (*d*).

Useless outlays.

It need hardly be observed, that an outlay made by one partner with the approbation of his co-partners and for the benefit of the firm, must be made good by the firm, however

(*x*) *Per* Lord Hardwicke in *West* v. *Skip*, 1 Ves. S. 242.

(*y*) *Burden* v. *Burden*, 1 V. & B. 172, where a surviving partner, who was also executor, was allowed to charge expenses actually incurred, but not time and trouble. Compare *Hutcheson* v. *Smith*, 5 Ir. Eq. 117, *ante*, p. 380, note (*u*).

(*z*) *Ex parte Sedgwick*, 2 Jur. N. S. 949.

(*a*) *Ex parte Chippendale*, 4 De G. M. & G. 19. See *ante*, book ii. ch. 1, § 6. This case, and others of the same class, will be noticed more at length in the vol. on Companies.

(*b*) *Prole* v. *Masterman*, 21 Beav. 61. A partner who negligently pays a debt claimed, but not due, cannot charge the payment to the firm, *Re Webb*, 2 B. Moore, 500; *McIlreath* v. *Margetson*, 4 Doug. 278; noticed in the next section.

(*c*) *Croxton's case*, 5 De G. & S. 432; *Sedgwick's case*, 2 Jur. N. S. 949, V.-C. W.; *Gleadow* v. *The Hull Glass Co.*, 13 Jur. 1020, V.-C. E.

(*d*) *Lefroy* v. *Gore*, 1 Jo. & Lat. 571, where one partner released a witness whose evidence was essential to the firm.

useless the outlay may have been. For example, if a firm purchases a patent which is paid for by one member individually, he is entitled to charge the purchase-money to the firm, however worthless the patent may ultimately prove to be (*e*). On the other hand, if a partner makes an improper outlay or advance on behalf of a firm, he cannot charge it to the firm, unless his conduct is ratified by it; or unless the firm's assets have been increased or preserved by such outlay or advance. This last qualification is rendered necessary by *The German Mining Company's case* (*f*).

Useful but unauthorised outlays.

An outlay which may have been very proper and even necessary for the conduct of the partnership business, cannot be charged to the partnership account, if so to do would be inconsistent with the agreement into which the partners have entered. In *Thornton* v. *Procter* (*g*), the plaintiff and the defendant had become partners as wine-merchants, and the plaintiff, who for some time had principally conducted the business, had expended considerable sums of money in treating customers, and this was found to be necessary in that trade. The plaintiff had for several years kept the accounts of the partnership, and in such accounts he never made any charge for entertaining customers, or demanded any allowance on that account. He, nevertheless, afterwards contended that he ought to be allowed, in taking the accounts of the partnership, to debit the firm with 50*l.* a year for entertainments, and this was proved to be a reasonable sum. But it was shown to be usual, in cases of this sort, to insert some special clause in the articles if an allowance was intended to be made, and the articles into which the partners had entered contained nothing more than a general stipulation, that all losses and expenses should be borne equally. It was accordingly held that the plaintiff was not entitled to any allowance, for he could only claim it as being a gross article of expenditure, and he was precluded from charging it in that way by not having included it in the yearly accounts.

Thornton *v.* Procter.

(*e*) *Gleadow* v. *The Hull Glass Co.*, 13 Jur. 1020.

(*f*) 4 De G. M. & G. 19. See *ante*, book ii. ch. 1, § 6.

(*g*) 1 Anstr. 94. See, too, *Hutcheson* v. *Smith*, 5 Ir. Eq. 117; *East India Co.* v. *Blake*, Finch, 117.

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No allowance for expenses unless proved to have been incurred.

A partner is not entitled to charge the firm with any moneys alleged by him to have been laid out for the benefit of the firm if he declines to give the particulars of his outlays; he cannot charge for secret service money (*h*), nor for general expenses (*i*). Nor can a partner charge the firm with travelling expenses unless they have been *bonâ fide* and properly incurred by him when travelling for the purpose of transacting its business (*k*).

Charges for valuation.

Again, a partner expending money for valuations to carry out a transaction between himself and co-partners, which they afterwards succeed in setting aside, cannot charge them with any part of what he may have so expended (*l*).

Outlays on separate property of one partner.

Not only may one partner make outlays or advances for the benefit of the firm, but the firm may make advances and outlays to or for the benefit of one partner. Under ordinary circumstances such advances and outlays will be equivalent to a loan by the firm to him, and must be treated accordingly in taking the partnership accounts. But occasionally considerable difficulty arises, *e.g.*, where there has been an outlay by the firm on property belonging exclusively to one of the partners, but used by the firm for partnership purposes. In the absence of all evidence of any agreement upon the subject, justice seems to require that in taking the partnership accounts the owner of the property in question should not be allowed exclusively to gain the benefit of the outlay, but that the improved value of his property should be treated as a partnership asset, and be shared between him and his co-partners accordingly (*m*).

Burdon *v.* Barkus.

In *Burdon* v. *Barkus*, a managing partner had, with the knowledge of his co-partner, expended partnership monies in sinking a pit for partnership purposes on land which belonged exclusively to the latter partner; the managing partner had erroneously supposed that the partnership was for a term of years; but the partnership was suddenly and unexpectedly

(*h*) See *The York and North Midland Rail. Co.* v. *Hudson*, 16 Beav. 485.

(*i*) *The East India Co.* v. *Blake*, Finch, 117.

(*k*) *Stainton* v. *The Carron Co.*, 24 Beav. 356.

(*l*) *Stocken* v. *Dawson*, 6 Beav. 375.

(*m*) See *ante*, p. 330.

dissolved, and the pit thereby became the sole property of the partner in whose land it had been sunk; but an inquiry was directed whether any allowance should be made in respect of the outlay in sinking the pit (*n*). So in *Pawsey* v. *Armstrong* (*o*) an inquiry was directed as to buildings erected by a firm on the property of one of the partners.

Pawsey *v.* Armstrong.

SECTION IV.—OF DEBTS, LIABILITIES, AND LOSSES.

Mutuality of profit and loss presumed.

In the absence of any agreement to the contrary, partners are liable to share losses in the same proportion as they are entitled to share profits (*p*). As a general rule, therefore, if one partner has been compelled to pay more than his share of a partnership debt, or if, in properly conducting the affairs of the firm, he has personally incurred a liability, he is entitled to be indemnified by his co-partners so far as may be necessary to place all on a footing of equality (*q*).

Presumption rebutted by evidence.

But it by no means follows, that a person liable to be sued as if he were a partner, is, as between himself and his co-partners, bound to share the losses of the firm; for his co-partners may have agreed to indemnify him altogether from losses, and if such is the case, they cannot require him to contribute thereto with them (*r*). So, where the promoters of a company agree with the shareholders that certain preliminary expenses to be incurred in obtaining surveys, reports, &c., shall not exceed a certain sum, and the promotors spend more than that sum, they cannot require the shareholders to make good the difference; although the extra expenditure may have been caused by circumstances which were unforeseen, and over which the promoters had no control (*s*).

(*n*) *Burdon* v. *Barkus*, 3 Giff. 412, aff. on appeal, 4 De G. F. & J. 42.

(*o*) 18 Ch. D. 707. Compare the converse case, *Bank of England case*, 3 De G. F. & J. 645, *ante*, p. 330.

(*p*) See *Re Albion Life Ass. Soc.*, 16 Ch. D. 83, where this rule was recognised, but was held not to apply to policy holders participating in profits.

(*q*) *Wright* v. *Hunter*, 5 Ves. 792; and see *Robinson's Executors' case*, 6 De G. M. & G. 572; *Lefroy* v. *Gore*, 1 Jo. & Lat. 571, and *Hamilton* v. *Smith*, 7 W. R. 173, as to promoters of companies.

(*r*) See *Geddes* v. *Wallace*, 2 Bli. 270.

(*s*) *Gillan* v. *Morrison*, 1 De G. & S. 421; *Re The Worcester Corn Ex.*

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General obligation of partners to contribute to losses.

The general principle, however, that partners must contribute rateably to their shares towards the losses and debts of the firm, is not open to question. Their obligation to contribute is not necessarily founded upon, although it may be modified and even excluded altogether by, agreement (*t*). For example, where there is no agreement to the contrary, it is clear that if execution for a partnership debt contracted by all the partners, or by some of them when acting within the limits of their authority, is levied on any one partner, who is compelled to pay the whole debt, he is entitled to contribution from his co-partners (*u*). So, if one partner enters into a contract on behalf of the firm, but in such a manner as to render himself alone liable to be sued, he is entitled to be indemnified by the firm, provided he has not, as between himself and his co-partners, exceeded his authority in entering into the contract (*x*); and if, in such a case, he with their knowledge and consent defend an action brought against him, he is entitled to be indemnified by the firm against the damages, costs, and expenses which he may be compelled to pay (*y*).

Losses attributable to one partner more than to another.

Ex parte Letts.

Even if a loss sustained by a firm is imputable to the conduct of one partner more than to that of another, still, if the former acted *bonâ fide* with a view to the benefit of the firm, and without culpable negligence, the loss must be borne equally by all. Thus, where A. represented to his co-partner B. that shares in a certain company rendered the holders only liable to the engagements of the company to a limited extent, and B. thereupon, and at A.'s request, authorised him to take shares on the partnership account, and it ultimately turned out that the liability of the shareholders was not limited, and A. and B. were made contributories, it was held that, as between them-

Co., 3 De G. M. & G. 180. See, too, *Mowatt and Elliott's case*, 3 De G. M. & G. 254, and *Carew's case*, 7 ib. 43.

(*t*) *Ante*, p. 368.

(*u*) *McOwen* v. *Hunter*, 1 Dr. & Walsh. 347; *Evans* v. *Yeatherd*, 2 Bing. 132; *Robinson's Executors' case*, 6 De G. M. & G. 572. See, too, *Lefroy* v. *Gore*, 1 Jo. & Lat. 571, as to provisional directors.

(*x*) *Gleadow* v. *The Hull Glass Co.*, 13 Jur. 1020; *Sedgwick's case*, 2 Jur. N. S. 949.

(*y*) *Browne* v. *Gibbins*, 5 Bro. P. C. 491; *Croxton's case*, 5 De G. & S. 432.

selves, B. could not throw the loss on A. alone (*z*). Again, in *Cragg* v. *Ford* (*a*), the plaintiff and the defendant were partners, and the defendant was the managing partner. The partnership was dissolved, and the winding up of its affairs devolved on the defendant. Part of the assets consisted of bales of cotton, and the plaintiff requested that these might be immediately sold. The defendant, however, delayed to sell them, and they were ultimately sold at a much lower price than they would have fetched if they had been sold when the plaintiff desired. The plaintiff contended that the loss sustained by the postponement of the sale ought to be borne by the defendant alone. But the Court held that the plaintiff, if he had chosen, might himself have sold the cotton; and that, as the defendant, in delaying the sale, had acted *bonâ fide* and in the exercise of his discretion, the loss ought not to be thrown on him alone, but ought to be shared by the plaintiff.

Cragg *v.* Ford.

Losses attributable to one partner's misconduct or negligence.

But if a partner is guilty of a breach of his duty to the firm, and loss results therefrom, such loss must fall on him alone. As was said by the Court in *Bury* v. *Allen* (*b*), "Suppose the case of an act of fraud, or culpable negligence, or wilful default by a partner during the partnership to the damage of its property or interests, in breach of his duty to the partnership: whether at law compellable or not compellable, he is certainly in equity compellable to compensate or indemnify the partnership in this respect" (*c*). In conformity with this rule, the justice of which cannot be disputed, it has been decided that if a claim is made against a firm for payment of a debt alleged to be due from it, but which is not so in point of fact, and one partner chooses to pay it, he cannot charge such payment to the account of the firm (*d*). So, if one partner does that

(*z*) *Ex parte Letts and Steer*, 26 L. J. Ch. 455. See, too, *Lingard* v. *Bromley*, 1 V. & B. 114.

(*a*) 1 Y. & C. C. C. 280.

(*b*) 1 Coll. 604.

(*c*) See acc. *Thomas* v. *Atherton*, 10 Ch. D. 185, a case of gross negligence on the part of the managing partner of a mine working beyond the boundary.

(*d*) *Re Webb*, 2 B. Moore, 500; *McIlreath* v. *Margetson*, 4 Doug. 278, where a payment was made *bonâ fide* and on the faith of false and fraudulent representations. *Quære* if the same rule would apply if the debt being due was barred by the Statute of Limitations. See *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415.

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which, though imputable to the firm on the principles of agency, is in truth his act alone, and a fraud upon his co-partners, they are entitled, as between themselves and him, to throw the whole of the consequences upon him (*e*). So, if one partner, without the authority of his co-partners, wilfully does that which is illegal, he must indemnify them from the consequences (*f*).

Adoption by firm of losses not chargeable to it.

When it is said that losses incurred by the unauthorised, culpably negligent, or fraudulent conduct of one partner must be borne by him alone, it is assumed that his conduct has not been ratified by the firm, and that the loss has not been treated by the partners themselves as a partnership loss. A loss which is properly chargeable to the account of one partner only, becomes chargeable to the firm if the partners have knowingly allowed it to be so charged in their accounts, and have thus taken it upon themselves. A strong instance of this is afforded by the case of *Cragg* v. *Ford* (*g*), already referred to on another point. There the plaintiff and the defendant were partners; the defendant had engaged in adventures not authorised by the partnership articles. The plaintiff protested against this, but although the adventures ended in loss, and that loss was charged against the firm in the partnership books, the plaintiff did not at the time object, or insist that the loss should be borne by the defendant. When, however, the partnership was dissolved, and its accounts were made up, the plaintiff refused to allow the losses in question to be charged against the firm. But the Court held that, under all the circumstances of the case, the Master who had charged the losses against the partnership had not done wrong; and exceptions which had been taken to his report by the plaintiff were overruled.

Cragg v. Ford.

(*e*) See *Robertson* v. *Southgate*, 6 Ha. 540.

(*f*) See *Campbell* v. *Campbell*, 7 Cl. & Fin. 166, *ante*, p. 378.

(*g*) 1 Y. & C. C. C. 285; but see as to losses arising from illegal acts, the observations of Lord Eldon on *Watts* v. *Brook*, in *Aubert* v. *Maze*, 2 Bos. & P. 371.

SECTION V.—OF INTEREST.

Interest in accounts between partners.

The principles upon which, in taking partnership accounts, interest is allowed or disallowed, do not appear to be well settled. The state of the authorities is, in fact, not such as to justify the deduction from them of any general principle upon this important subject.

General rule as to interest.

By the common law, in the absence of a special custom or agreement, a loan does not bear interest (*h*); and, notwithstanding many dicta to the contrary, the same rule appears to have prevailed in equity (*i*). This rule is, no doubt, attributable to the old notions on the subject of usury; but although the usury laws are abolished the rule remains, and the consequence is that interest is frequently not payable by law when in justice it ought to be.

At the same time, by the custom of merchants interest has long been payable in cases where by the general law it was not; and mercantile usage and the course of trade dealings are held to authorise a demand for interest in cases where it would not otherwise be payable (*k*). In applying therefore the general rule against the allowance of interest to partnership accounts, attention must be paid not only to any express agreement which may have been entered into on the subject, but also to the practice of each particular firm, and to the custom of the trade it carries on.

Interest on capital.

As a general rule partners are not entitled to interest on their respective capitals unless there is some agreement to that effect, or unless they have themselves been in the habit of charging such interest in their accounts (*l*); and even where one partner has brought in his stipulated capital and the other

(*h*) See *Calton* v. *Bragg*, 15 East, 223; *Higgins* v. *Sargent*, 2 B. & C. 349; *Shaw* v. *Picton*, 4 ib. 723; *Page* v. *Newman*, 9 B. & C. 378; *Gwyn* v. *Godby*, 4 Taunt. 346.

(*i*) See *Tew* v. *The Earl of Winterton*, 1 Ves. J. 451; *Creuze* v. *Hunter*, 2 ib. 157; *Booth* v. *Leycester*, 1 Keen, 247, and 3 M. & Cr. 459.

(*k*) See *Ex parte Chippendale*, 4 De G. M. & G. 36.

(*l*) See *Cooke* v. *Benbow*, 3 De G. J. & Sm. 1; *Miller* v. *Craig*, 6 Beav. 433, where interest was allowed, that having at one time been in accordance with the usage of those who carried on the business; and *Pim* v. *Harris*, Ir. Rep. 10 Eq. 442, where the decision was based on the terms of the contract.

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has not, the former will not be entitled to interest on the winding up of the partnership if it has not been previously charged and allowed in the accounts of the firm (*m*); and where a person is paid for his services by a share of profits, interest on capital cannot be charged against him, unless there is some agreement to that effect (*n*). Moreover, where interest on capital is payable, the interest stops at the date of dissolution unless otherwise agreed (*o*); and undrawn profits are not necessarily to be treated as bearing interest like the capital (*p*).

Interest on advances to the firm.

An advance by a partner to a firm is not treated as an increase of his capital, but rather as a loan on which interest ought to be paid; and by usage, interest is payable on money *bonâ fide* advanced by one partner for partnership purposes; at least when the advance is made with the knowledge of the other partners (*q*). The rate of interest given in such cases, is simple interest at 5 per cent. (*r*), unless a different rate is payable by the custom of the particular trade (*s*), or has been charged and allowed in the books of the particular partnership (*t*).

Interest on overdrawings and balances in hand.

Inasmuch as what is fair for one partner is so for another, and the firm when debtor is charged with interest, it seems to follow that if one partner is indebted to the firm either in respect of money borrowed, or in respect of balances in his hands, he ought to be charged with interest on the amount so owing, even though on the balance of the whole account, a

(*m*) *Hill* v. *King*, 3 De G. J. & Sm. 418.

(*n*) *Rishton* v. *Grissell*, 5 Eq. 326, where the capital was borrowed at interest.

(*o*) *Barfield* v. *Loughborough*, 8 Ch. 1; *Watney* v. *Wells*, 2 Ch. 250; *Pilling* v. *Pilling*, 3 De G. J. & Sm. 162, *contra*, on this point is practically overruled. As to the calculation of interest where the capital is payable by instalments with interest, see *Ewing* v. *Ewing*, 8 App. Ca. 822.

(*p*) *Dinham* v. *Bradford*, 5 Ch. 519. See, also, *Rishton* v. *Grissell*, 10 Eq. 393, as to interest on arrears of a share of profits.

(*q*) See *Ex parte Chippendale*, 4 De G. M. & G. 36. See, also, *Omychund* v. *Barker*, Coll. on Partn. 231, note; *Denton* v. *Rodie*, 3 Camp. 496. But see *contra*, *Stevens* v. *Cook*, 5 Jur. N. S. 1415.

(*r*) *Ex parte Bignold*, 22 Beav. 167; *Troup's case*, 29 ib. 353. See, also, *Hart* v. *Clarke*, 6 De G. M. & G. 254.

(*s*) As to compound interest in the case of bankers, see *Bate* v. *Robins*, 32 Beav. 73; *Fergusson* v. *Fyffe*, 8 Cl. & Fin. 121.

(*t*) As in *Re Magdalena Steam Nav. Co.*, Johns. 690, where 6 per cent. was allowed.

sum might be due to him (*u*). Except, however, where there has been a fraudulent retention (*x*), or an improper application (*y*) of money of the firm, it is not the practice of the Court to charge a partner with interest on money of the firm in his hands (*z*); for example, under ordinary circumstances a partner is not charged with interest on sums drawn out by him or advanced to him (*a*). In a case (*b*), A. and B. were partners; A. died, and his son and executor C. succeeded him in partnership with B. B. afterwards retired in favour of his own son D. At the time of B.'s retirement, a considerable sum was due to him from A.'s estate in respect of monies drawn out by A. This sum was treated as a debt of the new firm of C. and D., and had not been paid off. B. having died, his executors claimed interest from the time of his retirement; but the claim was disallowed on the ground that no agreement to pay interest had been entered into, and the claim was opposed to the course of dealing between the partners themselves.

Rhodes *v.* Rhodes.

Where one partner claims a benefit obtained by his co-partner and succeeds in establishing his claim, the claimant is charged, as the price of the relief afforded, not only with the amount actually expended by his co-partner in obtaining the benefit, but with interest on that amount at the rate of 5*l.* per cent. (*c*). On the other hand, if one partner has, in breach of the good faith due to his co-partners, obtained money which he is afterwards compelled to account for to the firm, he will be charged with interest upon the amount at the rate of 4*l.* per cent. (*d*).

Interest where firm claims what has been obtained by one partner.

(*u*) See *Beecher* v. *Guilburn*, Moseley, 3.

(*x*) As in *Hutcheson* v. *Smith*, 5 Ir. Eq. 117, where, however, the partner retaining the money was also a receiver appointed by the Court.

(*y*) As in *Evans* v. *Coventry*, 8 De G. M. & G. 835.

(*z*) See *Webster* v. *Bray*, 7 Ha. 159, where interest on balances in the hands of the defendants was asked for but not given. See, too, *Stevens* v. *Cook*, 5 Jur. N. S. 1415; *Turner* v. *Burkinshaw*, 2 Ch. 488.

(*a*) *Cooke* v. *Benbow*, 3 De G. J. & Sm. 1; *Meymott* v. *Meymott*, 31 Beav. 445. See the case in the next note.

(*b*) *Rhodes* v. *Rhodes*, Johns. 653, but better reported in 6 Jur. N. S. 600.

(*c*) See *Hart* v. *Clarke*, 6 De G. M. & G. 254. See, too, *Perens* v. *Johnson*, 3 Sm. & G. 419.

(*d*) See *Fawcett* v. *Whitehouse*, 1 R. & M. 132.

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Confused accounts.

Where a partnership has been dissolved by the death of one partner, and the surviving partner keeps the accounts in such a way as to render it impossible, until after the lapse of a considerable time, to ascertain the balances due to himself and his deceased partner, neither the surviving partner nor his representatives can claim interest on the sum ultimately found due to him or his estate (*e*).

(*e*) *Boddam* v. *Ryley*, 1 Bro. C. C. 239; 2 ib. 2; and 4 Bro. P. C. 561.

CHAPTER VII.

OF THE DIVISION OF PROFITS.

Division of profits.

THE realisation and division of profit is the ultimate object of every partnership; and the right of every partner to a share of the profits made by the firm to which he belongs, is too obvious to require comment. Where there is no right to share profits, there can be no partnership, and almost all the other rights possessed by partners may be said to be incidental to the right in question.

Times, &c., of division.

The times at which the profits are to be divided, the quantum to be divided at any one time, the sums, if any, which are to be placed to the debit of the firm in favour of any particular partner for salary, interest on capital, &c., before any profits are to be divided, these and all similar matters are usually made the subject of express agreement; but where no such agreement has been made, and no tacit agreement relative to them can be inferred, the principles laid down in the preceding chapter must be applied (*a*). With respect to the times of division and quantum to be divided at any given time, it is conceived that the majority must govern the minority where no agreement upon the subject has been come to (*b*); for these are matters of purely internal regulation, and with respect to such matters a dissentient minority have only one alternative, viz., either to give way to the majority, or, if in a position so to do, to dissolve the partnership.

(*a*) As to the mode of ascertaining profits where a person not a partner is entitled to a share of them, see *Rishton* v. *Grissell*, 5 Eq. 326, and 10 Eq. 393; *Geddes* v. *Wallace*, 2 Bli. 270.

(*b*) See *Stevens* v. *South Devon Rail. Co.*, 9 Ha. 326, and *Corry* v. *Londonderry, &c., Co.*, 29 Beav. 263, as to declaring dividends before paying debts; *Browne* v. *Monmouthshire, &c., Co.*, 13 Beav. 32, as to paying dividends before works are finished.

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What is divisible as profit.

Profit is the excess of receipts over expenses (*c*); and in winding up a partnership, nothing is properly divisible as profit which does not answer this description. But for the purposes of business, and of facilitating annual divisions of profits, a distinction is made between ordinary and extraordinary receipts and expenses; and whilst all extraordinary expenses are frequently defrayed out of capital, and out of money raised by borrowing, the ordinary expenses are defrayed out of the returns of the business; and the profits divisible in any year are ascertained by comparing the ordinary receipts with the ordinary expenses of that year. It is obvious that, unless some such principle as this were had recourse to, there could be no division of profits, even of the most flourishing business, whilst any of its debts were unpaid, and any of its capital sunk. What losses and expenses ought to be treated as ordinary, and therefore payable out of current receipts, and what ought to be treated as extraordinary, and payable legitimately out of capital or money borrowed, is a question on which opinions may often honestly differ; and one which, when open to honest diversity of opinion, a majority of members can lawfully determine (*d*). But if the current receipts exceed the current expenses, the writer apprehends that the difference can be divided as profit, although the capital may be spent and not be represented by saleable assets (*e*).

Cases where dividends have been held not improper.

Under ordinary circumstances, and in the absence of any agreement to the contrary, monies earned ought to be treated as profits of the year in which they are received and not as profits of the year in which they are earned (*f*).

(*c*) As to the payment of income-tax, see *Last* v. *London Ass. Corp.*, 10 App. Ca. 438; *Lawless* v. *Sullivan*, 6 App. Ca. 373: and where business is carried on abroad, see *Colquhoun* v. *Brooks*, 19 Q. B. D. 400; *Erichsen* v. *Last*, 8 Q. B. D. 414; *Cesena Sulphur Co.* v. *Nicholson*, 1 Ex. D. 428; *Sully* v. *A.-G.*, 5 H. & N. 711.

(*d*) See *Gregory* v. *Patchett*, 33 Beav. 595.

(*e*) As to the construction of clauses relating to payment of dividends out of profits, see *Davison* v. *Gillies*, 16 Ch. D. 347, *n.*; *Dent* v. *London Tramways Co.*, ib. 344. As to paying dividends out of capital, *Bloxam* v. *Metropolitan Rail. Co.*, 3 Ch. 337; *Fliteroft's case*, 21 Ch. D. 519. This subject will be more fully discussed in the vol. on Companies.

(*f*) See *per* Turner, L. J., in *Maclaren* v. *Stainton*, 3 De G. F. & J. 214. Compare *Browne* v. *Collins*, 12 Eq. 586.

Exclusion from share of profits.

As will be seen hereafter, in the absence of an express agreement to that effect, partners have no right to expel one of their number nor to forfeit his share (*g*). Neither can they exclude him from the enjoyment of his share of profits (*h*). A partner so excluded can compel his co-partners to restore him to his rights and account to him accordingly (*i*).

(*g*) *Infra*, bk. iv. ch. 1, § 1.

(*h*) *Griffith* v. *Paget*, 5 Ch. D. 894; *Adley* v. *The Whitstable Co.*, 17 Ves. 315, 19 ib. 304, and 1 Mer. 107.

(*i*) Ib.; and see *infra*, ch. 10, under the heads Account and Injunction.

CHAPTER VIII.

OF THE ACCOUNTS OF PARTNERSHIPS.

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In the present Chapter it is proposed to consider, (1), the mode in which partnership accounts are kept; (2), the duty of keeping and the right of inspecting the accounts of partnerships. The subject of opening settled accounts will be referred to in a subsequent Chapter.

SECTION I.—OF THE MODE OF KEEPING PARTNERSHIP ACCOUNTS.

Partnership accounts.

It is usual among mercantile men to treat all the accounts of a partnership as accounts of the firm, and to deal with the accounts of individual partners as if they were simply debtors or creditors of the firm. The property brought into the concern is credited to the stock account of the firm, and is then distributed through the ledger accounts; and in these ledger accounts the several articles and persons are made debtors to stock for the several items passed into these accounts. Each partner has his own separate account opened with the firm (usually in a private ledger), and is credited with everything he brings into it, and is debited with everything he draws out of it. Upon a rest, the net profits are determined, and are divided between the partners in the proper proportions, and the share of each partner is carried to the credit of his own separate account. The partners are creditors of the firm for all its stock, and they are debtors to it for all its deficiencies. When they first bring in their capital, the firm is in the private ledger made debtor to each of them for his proportion of capital. Whenever stock is taken, and a surplus appears, that surplus is divided according to the shares, and is carried to the

accounts of the respective partners. If, instead of a surplus, a deficiency appears, the loss is apportioned in the same way (*a*).

Each partner being thus treated like an ordinary creditor and debtor, in respect of what he brings in and what he draws out, the balance standing to his credit or to his debit, as the case may be, in the private ledger, shows how his account with the *firm* stands. Upon payment of that balance by the firm to him, if the balance is in his favour, or by him to the firm, if the balance is against him, his account with the firm is closed and settled.

Mode of ascertaining partner's share of profit or loss.

Each partner's share of a profit to be divided, or of a loss to be made good, is ascertained by a simple rule of three calculation. If the partners have agreed to share profits and losses equally, the share of each, of any particular profit or any particular loss, is ascertained by dividing the whole profit or whole loss, as the case may be, by the number of partners. If, however, the partners share profits and losses in proportion to their respective capitals, then as the united capitals are to the whole profit or whole loss, so will each partner's share of capital be to his share of such profit or loss.

Examples.

In order to illustrate the principle upon which partnership accounts are kept let it be supposed that A., B., and C. are partners, with a capital of 3,000*l.* subscribed by them equally; that they share profits and losses in proportion to their respective capitals, and that A. has drawn out 500*l.* and B. has advanced 100*l.* There are, then, three cases to be considered.

Case 1.—*Where there are no profits or losses.*

The accounts will then stand thus (*b*):—

1. *Partnership Account.*

Dr. to stock.	.	.	3000	0	0	*Cr.* by A.'s sum withdrawn . . .	500	0	0
to B. for advance	.	100	0	0		by balance . . .	2600	0	0
		£3100	0	0			£3100	0	0

(*a*) See Cory on Accounts, ed. 2, p. 71 *et seq.*

(*b*) In this case no notice is taken of interest. In cases 2 and 3 interest is supposed to be calculated.

2. *A.'s Account.*

Dr.				*Cr.*			
to sum withdrawn	500	0	0	by capital . .	1000	0	0
to balance . .	500	0	0				
	£1000	0	0		£1000	0	0

3. *B.'s Account.*

Dr.				*Cr.*			
				by capital . .	1000	0	0
to balance . .	1100	0	0	by advance . .	100	0	0
	£1100	0	0		£1100	0	0

4. *C.'s Account.*

Dr.				*Cr.*			
				by capital . .	1000	0	0
to balance . .	1000	0	0				
	£1000	0	0		£1000	0	0

5. *Balance Sheet.*

Dr.				*Cr.*			
to balance as above (from 1) . .	2600	0	0	by balance due as above to A. . .	500	0	0
				„ B. . .	1100	0	0
				„ C. . .	1000	0	0
	£2600	0	0		£2600	0	0

Case 2.—*Where there is a profit to be divided.*

The accounts will then stand as under, if the profit is supposed to be 1000*l.*, and interest at 5 per cent. is charged on all sums brought in and taken out by each partner, and on his capital.

1. *Partnership Account.*

Dr.				*Cr.*			
to stock . . .	3000	0	0	by A.'s sum withdrawn with interest for one year . .	525	0	0
to interest on ditto for one year . .	150	0	0				
to B. for advance with interest for one year	105	0	0				
to profit . . .	1000	0	0	by balance . .	3730	0	0
	£4255	0	0		£4255	0	0

2. *A.'s Account.*

Dr.	£	s.	d.	*Cr.*	£	s.	d.
to sum withdrawn with interest for one year	525	0	0	by capital	1000	0	0
to balance	858	6	8	by interest on ditto	50	0	0
				by ⅓ share of profit	333	6	8
	£1383	6	8		£1383	6	8

3. *B.'s Account.*

Dr.	£	s.	d.	*Cr.*	£	s.	d.
				by capital	1000	0	0
				by interest on ditto	50	0	0
				by advance and interest thereon	105	0	0
to balance	1488	6	8	by ⅓ share of profits	333	6	8
	£1488	6	8		£1488	6	8

4. *C.'s Account.*

Dr.	£	s.	d.	*Cr.*	£	s.	d.
				by capital	1000	0	0
				by interest on ditto	50	0	0
to balance	1383	6	8	by ⅓ share of profits	333	6	8
	£1383	6	8		£1383	6	8

5. *Balance Sheet.*

Dr.	£	s.	d.	*Cr.*	£	s.	d.
to balance as above (from 1)	3730	0	0	by balance due as above to A.	858	6	8
				„ B.	1488	6	8
				„ C.	1383	6	8
	£3730	0	0		£3730	0	0

Case 3.—*Where there is a loss to be made good.*

Then if the loss is supposed to be 5000*l.*, and interest is calculated as in the last example, the accounts will stand thus:—

1. *Partnership Account.*

Dr.	£	s.	d.	*Cr.*	£	s.	d.
to stock	3000	0	0	by loss	5000	0	0
to interest on ditto for one year	150	0	0	by A.'s sum withdrawn with interest for one year	525	0	0
to B. for advance with interest for one year	105	0	0				
to balance	2270	0	0				
	£5525	0	0		£5525	0	0

2. *A.'s Account.*

Dr.					*Cr.*				
to sum withdrawn					by capital			1000	0 0
with interest for one year		525	0	0	by interest on ditto			50	0 0
to ⅓ share of loss		1666	13	4	by balance			1141	13 4
	£	2191	13	4		£		2191	13 4

3. *B.'s Account.*

Dr.					*Cr.*				
to ⅓ share of loss		1666	13	4	by capital			1000	0 0
					by interest on ditto			50	0 0
					by advance with interest			105	0 0
					by balance			511	13 4
	£	1666	13	4		£		1666	13 4

4. *C.'s Account.*

Dr.					*Cr.*				
to ⅓ share of loss		1666	13	4	by capital			1000	0 0
					by interest on ditto			50	0 0
					by balance			616	13 4
	£	1666	13	4		£		1666	13 4

5. *Balance Sheet.*

Dr.					*Cr.*				
to balance due as above from A.		1141	13	4	by balance as above (from 1)			2270	0 0
„ B.		511	13	4					
„ C.		616	13	4					
	£	2270	0	0		£		2270	0 0

Effect of each partner being his own creditor or debtor.

The balances ultimately arrived at in the foregoing accounts are the sums payable—in the first two cases by the firm to the individual partners, and in the last case to the firm by them—in order to wind up the affairs of the firm. But it must not be imagined that the balances in question are debts owing to each partner by his co-partners. The balances are owing by and to the *firm*, and each partner being included in the firm is, to the extent of his share, his own debtor and his own creditor.

In what sense a partner is debtor to or creditor of the firm.

Accountants are quite right in debiting each partner in his account with the firm with the whole of whatever he draws out, and in crediting him with the whole of whatever he brings in.

"But," as observed by Lord Cottenham, "though these terms 'debtor' and 'creditor' are so used, and sufficiently explain what is meant by the use of them, nothing can be more inconsistent with the known law of Partnership, than to consider the situation of either party as in any degree resembling the situation of those whose appellation has been so borrowed. The supposed creditor has no means of obtaining payment of his debt; and the supposed debtor is liable to no proceedings either at law or in equity—assuming always that no separate security has been taken or given (*c*). The supposed creditor's debt is due from the firm of which he is a partner; and the supposed debtor owes the money to himself in common with his partners" (*d*).

Ultimate adjustment of accounts.

The final adjustment of a partnership account frequently gives rise to questions of some difficulty. One is, whether the principles on which profits and losses have been previously ascertained are to be adhered to, or whether they are to be more or less departed from; another is, whether on a final adjustment of accounts anything can be regarded as profit or loss until the capitals of the partners have been repaid or exhausted as the case may be. In order to solve these and similar questions regard must always be had to the terms of the partnership articles; but an express agreement with refer-

(*c*) The remedies available by one partner against another will be examined hereafter. See, also, *ante*, p. 110.

(*d*) *Richardson* v. *The Bank of England*, 4 M. & Cr. 171-2. Suppose that a firm consists of three partners, A., B., and C.; that their respective capitals are a, b, c, and that they share profits and losses in proportion to those capitals. Then $a+b+c$ will be the joint capital of the three partners; and if M. represents the amount of loss or gain to be shared, A.'s share of such loss or gain will be $\frac{M}{a+b+c} \times a$; B.'s share will be $\frac{M}{a+b+c} \times b$; and C.'s share will be $\frac{M}{a+b+c} \times c$. Upon precisely the same principle, if the firm is indebted to A. in a sum a', A. will owe himself in respect of this debt $\frac{a'}{a+b+c} \times a$; B. will owe A. $\frac{a'}{a+b+c} \times b$; and C. will owe A. $\frac{a'}{a+b+c} \times c$. So if B. is indebted to the firm in a sum b'; B. will owe himself in respect of this debt $\frac{b'}{a+b+c} \times b$; he will owe A. $\frac{b'}{a+b+c} \times a$; and will owe C. $\frac{b'}{a+b+c} \times c$.

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ence to the taking of accounts may be, and frequently is, only applicable to the case of a continuing partnership, and may not be intended to be observed on a final dissolution of the firm, or even on the retirement of one of its members (*e*). A similar observation applies to the mode in which the partners themselves have been in the habit of keeping their accounts: that which has been done for the purpose of sharing annual profits or losses is by no means necessarily a precedent to be followed when a partnership account has to be finally closed(*f*). Bearing these observations in mind, the following rules are submitted as those which ought to be followed upon a final settlement of partnership accounts, where there is nothing else to serve as a guide.

Rules to be observed.

In adjusting the accounts of partners, losses ought to be paid, first out of assets excluding capital, next out of capital, and lastly by having recourse to the partners individually (*g*); and the assets of the partnership should be applied as follows:

1. In paying the debts and liabilities of the firm to non-partners;

2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital (*h*);

3. In paying to each partner rateably what is due from the firm to him in respect of capital;

4. The ultimate residue, if any, will then be divisible as profit between the partners in equal shares, unless the contrary can be shown.

If the assets are not sufficient to pay the debts and liabilities to non-partners, the partners must treat the difference as a loss and make it up by contributions *inter se*. If the assets are more than sufficient to pay the debts and liabilities of the

(*e*) See, for examples, *Lawes* v. *Lawes*, 9 Ch. D. 98; *London India Rubber Co.*, 5 Eq. 519; *Blisset* v. *Daniel*, 10 Ha. 493; *Wade* v. *Jenkins*, 2 Giff. 509; *Wood* v. *Scales*, 1 Ch. 369; and as to interest, *ante*, p. 390, note (*o*); compare *Re Barber*, 5 Ch. 687.

(*f*) For example, the value of goodwill seldom, if ever, appears in annual accounts, see *Stewart* v. *Gladstone*, 10 Ch. D. 626, 659; *Wade* v. *Jenkins*, 2 Giff. 509.

(*g*) See *Binney* v. *Mutrie*, 12 App. Ca. 160; *Crawshay* v. *Collins*, 2 Russ. 347, and *Richardson* v. *Bank of England*, 4 M. & Cr. 173.

(*h*) These come before costs of winding-up, see *Potter* v. *Jackson*, 13 Ch. D. 845; *Austin* v. *Jackson*, 11 ib. 942, *note*.

partnership to non-partners, but are not sufficient to repay the partners their respective advances, the amount of unpaid advances ought, it is conceived, to be treated as a loss, to be met like other losses. In such a case the advances ought to be treated as a debt of the firm, but payable to one of the partners instead of to a stranger (*i*). If after paying all the debts and liabilities of the firm and the advances of the partners, there is still a surplus, but not sufficient to pay each partner his capital, the balances of capitals remaining unpaid must be treated as so many losses to be met like other losses (*k*).

Equality of loss and inequality of capital.

The only case which practically gives rise to difficulty, is when partners have advanced, or agreed to advance, unequal capitals and to share profits and losses equally. If nothing more than this is agreed, a deficiency of capital must be treated like any other loss; and the assets remaining after payment of all debts and advances must be distributed amongst the partners so as to make each partner's loss of capital equal; and if the assets are not sufficient, there must be such a contribution amongst the partners, or some of them, as to put all on an equality (*l*). But, if the true meaning of the partners is that all debts shall be paid out of the assets, and that any surplus assets remaining after payment of debts shall be divided between the partners in proportion to their interests therein or to their capitals, effect must be given to such an agreement, and those partners who agree to bring in most capital will lose most (*m*).

(*i*) See *Wood* v. *Scoles*, 1 Ch. 369.

(*k*) See the next two notes.

(*l*) *Binney* v. *Mutrie*, 12 App. Ca. 160. See the form of order there; see, also, *Nowell* v. *Nowell*, 7 Eq. 538; *Anglesea Colliery Co.*, 2 Eq. 379, and 1 Ch. 555; *Ex parte Maude*, 6 Ch. 51. Compare *Holyford Mining Co.*, Ir. Rep. 3 Eq. 208.

(*m*) *Wood* v. *Scoles*, 1 Ch. 369, is an instance of such a case.

SECTION II.—OF THE DUTY TO KEEP AND THE RIGHT TO INSPECT PARTNERSHIP ACCOUNTS.

Bk. III. Chap. 8. Sect. 2.

Duty to keep proper accounts,

It is one of the clearest rights of every partner to have accurate accounts kept of all money transactions relating to the business of the partnership, and to have free access to all its books and accounts (*n*). So important is it to every partnership that proper accounts shall be kept and be accessible to all the partners, that whenever any written articles of partnership are entered into, clauses are inserted for the purpose of removing whatever doubts there might otherwise be upon the subject. The usual nature and the general effect of such clauses will be adverted to in the next chapter, and the right to discovery in an action, will also be discussed hereafter. In the present place it will be sufficient to observe, that it is the duty of every partner to keep precise accounts and to have them always ready for inspection (*o*). 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 (*p*). 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 the books of the firm (*q*); and no partner can deprive his co-partners of this right by keeping the partnership accounts in a private book of his own, containing other matters with which they have no concern (*r*). At the same time, if a person entitled to a share of the profits of a business expressly agrees that he will accept the balance sheets prepared by others as correct, and will not investigate the books or accounts himself, he will be bound by that agreement (*s*).

and to allow them to be examined.

(*n*) See *per* Lord Eldon in *Rowe* v. *Wood*, 2 Jac. & W. 558-9, and in *Goodman* v. *Whitcomb*, 1 ib. 593.

(*o*) *Rowe* v. *Wood*, 2 Jac. & W. 558. See, too, *Goodman* v. *Whitcomb*, 1 ib. 593, and 3 V. & B. 36.

(*p*) See *Taylor* v. *Davis*, 3 Beav. 388, note; *Greatrex* v. *Greatrex*, 1 De G. & S. 692; *Charlton* v. *Poulter*, 19 Ves. 148, note.

(*q*) See *Stuart* v. *Lord Bute*, 12 Sim. 460; *Taylor* v. *Rundell*, 1 Ph. 222, and 1 Y. & C. C. C. 128. This right was not enforceable at law even in an action by one partner against another, *Ward* v. *Apprice*, 6 Mod. 264.

(*r*) See *Freeman* v. *Fairlie*, 3 Mer. 43; *Toulmin* v. *Copland*, 3 Y. & C. Ex. 655.

(*s*) See *Turney* v. *Bayley*, 4 De G. J. & S. 332.

Effect of keeping no books or of destroying them.

If no books of account at all 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 misconduct the non-production of proper accounts is due (*t*). If all the persons interested in the account are in *pari delicto*, this rule cannot 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 occurred (*u*).

(*t*) See *Walmsley* v. *Walmsley*, 3 Jo. & Lat. 556; *Gray* v. *Haigh*, 20 Beav. 219.

(*u*) See *Ex parte Toulmin*, 1 Mer. 598, note; *Toulmin* v. *Copland*, 3 Y. & C. Ex. 655; and as to losing all right to interest by keeping the accounts improperly, see *Boddam* v. *Ryley*, 1 Bro. C. C. 239, and 2 ib. 2; and 4 Bro. P. C. 561, noticed *ante*, p. 392.

CHAPTER IX.

OF PARTNERSHIP ARTICLES.

SECTION I.—GENERAL OBSERVATIONS.

Bk. III. Chap. 9. Sect. 1.

THE rights and obligations of partners *inter se*, are generally, to a certain extent, regulated by special agreement, the true meaning of which is to be ascertained by the ordinary rules of construction (*a*).

In considering the effect, however, of partnership articles, the following principles are to be borne in mind :—

Partnership articles are not intended to define all the rights and duties of partners.

1. In the first place, partnership articles are not intended to define, and are not construed as defining *all* the rights and obligations of the partners *inter se*. A great deal is left to be understood. The maxim *expressum facit cessare tacitum* naturally applies to partnership articles as to other agreements; but the rights and obligations of partners, so far as they are not expressly declared, are determined by general principles, which are always applicable where not clearly excluded. In the language of Lord Langdale, in *Smith* v. *Jeyes* (*b*),

Smith *v.* Jeyes.

"The transactions of partners with each other cannot be considered merely with reference to the express contract between them. The duties and obligations arising from the relation between the parties are regulated by the express contract between them, so far as the express contract extends and continues in force; but if the express contract, or so much of it as continues in force, does not reach to all those duties and obligations, they are implied and enforced by the law; and it is often matter to be collected and inferred from the conduct and practice of the parties, whether they have held themselves, or ought or ought not to be held, bound by the particular

(*a*) See Chapter X. of Story on Part.; Collyer on Part. 137, &c. See, also, the head Partnership in Jarman and Bythewood's Conveyancing and Davidson's Conveyancing.

(*b*) 4 Beav. 505. See, too, *Nelson* v. *Bealby*, 30 Beav. 472, and *Browning* v. *Browning*, 31 Beav. 316, as to the non-application of the maxim *expressio unius est exclusio alterius*.

provisions contained in their express agreement. When it is insisted that the conduct of one partner entitles the other to a dissolution, we must consider not merely the specific terms of the express contract, but also the duties and obligations which are implied in every partnership contract"(*c*).

Articles to be construed with reference to the objects of the partners.

2. The attainment of the objects which the partners have declared they had in view is always regarded as of the first importance. All the provisions of the articles are to be construed so as to advance and not to defeat those objects; and however general the language of partnership articles may be, they will be construed with reference to the end designed, and, if necessary, receive a restrictive interpretation accordingly (*d*). This rule is of especial importance in considering the limits of general powers conferred on committees, directors, and others. For example, in *Chapple* v. *Cadell* (*e*) the proprietors of a newspaper entrusted the management of the paper to a committee of five, and gave them power to call general meetings, and agreed that the resolutions of the majority present at such meetings should be binding on all the proprietors. A meeting was convened, and the majority present resolved that the paper and the shares of all the proprietors in it should be sold by auction. But it was held that the majority had no power to sell the shares of a dissentient and protesting minority.

Chapple v. Cadell.

Other illustrations of the same principle will be found in Bk. III., c. 2, § 3, which treats of the powers of majorities.

Conformably with the same rule,

Articles to be construed so as to defeat fraud;

3. Any provision, however worded, will, if possible, be construed so as to defeat any attempt by one partner to avail himself of it for the purpose of defrauding his co-partner. Thus it is very common for partners to agree that half-yearly accounts shall be made out and signed, and not be afterwards disputed; but, notwithstanding such a clause, if one partner knowingly makes out a false account, and his co-partners sign it upon the faith that it is correct, they will not be bound by it (*f*). Again, it is by no means unusual for partners to agree that yearly accounts shall be taken, and that, in the case of the death of a partner, his representatives shall be paid his share

(*c*) See, too, *Blisset* v. *Daniel*, 10 Ha. 522.

(*d*) See Coll. on Part. 137.

(*e*) Jac. 537.

(*f*) See *Oldaker* v. *Lavender*, 6 Sim. 239.

as appearing in the last account, with interest instead of subsequent profits; but if the partners do not for several years make out any accounts, and then one of them dies, the survivors are not entitled to act on the letter of the agreement, and pay only the amount which in the last account was carried to the credit of the deceased, with interest on such amount (*g*).

and the taking of unfair advantages.

4. Every power conferred by the articles on any individual partner, or on any number of partners, is deemed to be conferred with a view to the benefit of the whole concern; and an abuse of such power, by an exercise of it, warranted perhaps by the words conferring it, but not by the truth and honour of the articles, will not be countenanced. Thus, in a case which has been already frequently referred to (*h*), a power to expel any partner was vested in the holders of two-thirds of the shares in the firm; but it was held that, although this power was so framed that it might be exercised without any reason being assigned, it could not be put in force for the unfair purpose of obtaining the share of the expelled partner at less than its value.

Provisions may be waived by tacit agreement.

5. Any article, however express, is capable of being abandoned by the consent of *all* the partners; and this consent may be evidenced, not only by express words, but by conduct (*i*).

The maxim *modus et conventio vincunt legem* is especially applicable to cases of this description. In the language of Lord Eldon,

> "In ordinary partnerships nothing is more clear than this, that, although partners enter into a written agreement, stating the terms upon which the joint concern is to be carried on, yet if there be a long course of dealing, or a course of dealing not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct. For instance, if in a common partnership the parties agree that no one of them shall draw or accept bills of exchange in his own name, without the concurrence of all the others, yet, if they afterwards slide into a habit of permitting one of them to draw or accept bills without the concurrence of the others, this

(*g*) *Pettyt* v. *Jameson*, 6 Madd. 146.

(*h*) *Blisset* v. *Daniel*, 10 Ha. 493. See, also, *Wood* v. *Woad*, L. R. 9 Ex. 190.

(*i*) This rule appears to be of comparatively modern date; it was not acted on in *Smith* v. *The Duke of Chandos*, Barn. 419.

Court will hold that they have varied the terms of the original agreement in that respect" (*k*).

Examples.

This principle was acted on by Lord Eldon in a case where the partners had agreed that annual accounts should be taken, and that in case of the death of a partner, his representatives should be paid an allowance instead of profits; for it appeared that for some years no accounts had been taken, and that the partners had engaged in transactions of such a nature, that it would have been unfair to have applied the original agreement (*l*). So a practice treating losses as bad when discovered so to be, was held to apply as between the executors of a deceased partner and the surviving partners, although the effect was to give the executors much more than they would otherwise have been entitled to (*m*). So, where articles contained a stipulation that the partners should contribute to losses and share profits in a certain proportion, and it appeared that a person who managed the affairs of the firm had always received a share of the profits, but had never been called upon to contribute to losses, it was held, that assuming him to be a partner in the proper sense of the term, and to have been originally bound by the articles to contribute to losses, the articles, so far as they obliged him so to contribute, had been varied by the conduct of the parties, and were no longer binding on him (*n*).

Varying articles.

If it is proposed to make an alteration in the articles by an agreement which shall be binding on all parties, notice of the proposed change and of the time and place at which it is to be taken into consideration, ought to be given to all the partners (*o*). For, even if the change is one which it is competent for a majority to make against the assent of the minority, all are

(*k*) *Const* v. *Harris*, T. & R. 523. See, also, *Coventry* v. *Barclay*, 33 Beav. 1, and on app. 3 De G. J. & Sm. 320; *Pilling* v. *Pilling*, 3 De G. J. & Sm. 162; *England* v. *Curling*, 8 Beav. 133 and 137; *Somes* v. *Currie*, 1 K. & J. 605, and the cases in the next three notes.

(*l*) See *Jackson* v. *Sedgwick*, 1 Swanst. 460; *Pettyt* v. *Janeson*, 6 Madd. 146; *Simmons* v. *Leonard*, 3 Ha. 581. Compare *Lawes* v. *Lawes*, 9 Ch. D. 98, where the day for making up the accounts had been altered.

(*m*) *Ex parte Barber*, 5 Ch. 687.

(*n*) *Geddes* v. *Wallace*, 2 Bli. 270.

(*o*) See *Const* v. *Harris*, T. & R. 524.

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entitled to be heard upon the subject; and unless all have an opportunity of opposing the change, those who object to it will not be bound by the others (*p*).

Reverting to original rules.

It seems that a person who comes into a firm through another who has acquiesced in a variation of the terms of the partnership articles, is bound by that acquiescence, and cannot revert to the original articles (*q*); and this principle has been applied to companies (*r*).

Original articles apply to partnership continued under them.

6. The last general rule which it is necessary to notice is this: if a partnership, originally entered into for a definite time, is continued after the expiration of that time, without any new agreement, the articles under which the partnership was first carried on continue, so far as they are applicable to a partnership at will, to regulate the rights and obligations of the partners *inter se* (*s*). Thus, in *King* v. *Chuck* (*t*), three partners, A., B., C., agreed that if either of them should die, his capital, as appearing by the last account, should be paid to his representatives by the surviving partners, on whom the trade was then to devolve. A. died, and this agreement was acted on, and B. and C. continued in partnership without coming to any fresh agreement. Then B. died, and it was held that B. and C. had in fact continued in partnership on the old terms, and that B.'s executors were therefore to be paid the amount appearing to be his capital in the last account come to between him and C.

King *v.* Chuck.

Provisions applicable during the term of partnership.

Even where a partnership is entered into for a term of years, and the articles provide for events happening *during the term*, or *during the partnership*, the above rule has been still applied. Thus, where two persons agreed to become partners for fourteen years, and stipulated that if either died *during this co-partnership term*, his share should be taken by the other at a certain sum, and the fourteen years expired, and the two persons continued in partnership together without coming to

(*p*) Ib. 525; see, also, ib. 518.

(*q*) See *Const* v. *Harris*, T. & R. 524.

(*r*) *Ffooks* v. *South-Western Rail. Co.*, 1 Sm. & G. 142; *Peck* v. *Gurney*, 13 Eq. 79.

(*s*) See *Neilson* v. *Mossend Iron Co.*, 11 App. Ca. 298, where a new agreement was contemplated, but not concluded; *Crawshay* v. *Collins*, 15 Ves. 228; *Featherstonhaugh* v. *Fenwick*, 17 Ves. 307; *Booth* v. *Parkes*, 1 Molloy, 465.

(*t*) 17 Beav. 325.

any fresh agreement, and then one of them died: it was held that the above stipulation was binding, and that the share of the deceased belonged to the survivor upon payment of the sum mentioned (*u*). The expression, "the partnership term," was held equivalent to the time during which the partners continue in partnership without coming to any fresh agreement.

But the authorities on this head are not uniform (*x*). In their present state it is doubtful whether a clause giving a right of pre-emption is one of those which is operative after the termination of the partnership originally contemplated, unless the articles are clear upon the subject (*y*). A right of expulsion has been held not to apply to a partnership continued after the expiration of the time for which it was originally entered into (*z*). But an arbitration clause has been held to apply (*a*).

SECTION II.—ON THE USUAL CLAUSES IN ARTICLES OF PARTNERSHIP.

Usual clauses in partnership articles.

Having now alluded to the more important general rules which require to be borne in mind in considering the effect of special agreements between partners, it is proposed to notice shortly the provisions usually met with in partnership articles, and the interpretation which has been put upon them by the courts.

In framing articles of partnership, it should always be remembered, that they are intended for the guidance of persons who are not lawyers; and that it is therefore unwise to insert only such provisions as are necessary to exclude the application of rules which apply where nothing to the contrary is said. The articles should be so drawn as to be a code of directions,

(*u*) *Essex* v. *Essex*, 20 Beav. 442; *Cox* v. *Willoughby*, 13 Ch. D. 863.

(*x*) Compare the two last cases with *Yates* v. *Finn*, 13 Ch. D. 839, and *Cookson* v. *Cookson*, 8 Sim. 529.

(*y*) See the two last notes. *Yates* v. *Finn* was not referred to in *Willoughby* v. *Cox*, but the former case is very shortly reported on this point.

(*z*) *Clark* v. *Leach*, 32 Beav. 14, and 1 De G. J. & Sm. 409. See *Neilson* v. *Mossend Iron Co.*, 11 App. Ca. 298.

(*a*) *Gillett* v. *Thornton*, 19 Eq. 599.

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to which the partners may refer as a guide in all their transactions, and upon which they may settle among themselves differences which may arise, without having recourse to Courts of Justice.

1. Nature and place of business.

1. *The nature of the business,* should always be stated. Upon it depends the extent to which each partner is to be regarded as the implied agent of the firm in his dealings with strangers; and upon it also in a great measure depends the power of a majority of partners to act in opposition to the wishes of the minority (*b*).

Place of business.

The place of business, should also be stated; and if the place is held on lease which will expire during the partnership, provision should be made for the renewal of the lease, or for the acquisition of another place of business. Otherwise the business may come to a premature end (*c*).

2. Commencement of the partnership.

2. *The time of the commencement of a partnership.—Primâ facie,* articles of partnership, like other instruments, take effect from their date; and if they are executed on the day of their date, and contain no expression indicating when the partnership is to begin, it must be taken to commence on the day of the date of the articles, and parol evidence to show that this was not intended is not admissible (*d*).

Retrospective and prospective partnership.

It occasionally happens that it is expressly declared by the partnership articles that the partnership is to date from a specified time, either prior or subsequent to the day on which the articles are executed. The effects of such a declaration, as between the parties to the articles, and as between them on the one hand, and third persons on the other, are by no means the same. As between the parties themselves the time specified is that from which the accounts of profits and losses are to date; but as between those parties and third persons the time in question is of little if any importance; for an agreement that a partnership shall date from a time past does not

(*b*) See *ante*, p. 313, *et seq.*

(*c*) See *Clements* v. *Norris*, 8 Ch. D. 129, where the business was to be carried on at a particular place, or such other place as the partners might agree upon, and they disagreed.

(*d*) *Williams* v. *Jones*, 5 B. & C. 108. If the articles are not dated, parol evidence is admissible to show that they were not to take effect from the time of their execution. See *Davis* v. *Jones*, 17 C. B. 625.

enure to the benefit of creditors (*e*); and an agreement that it shall date from a time future does not prejudice them, if, in fact, the parties act as partners before such time arrives (*f*).

Formal contract to be drawn up.

It occasionally happens that an agreement for a partnership is drawn up and signed, but a more formal instrument is intended to be executed. If in a case of this sort the execution of the formal instrument is delayed, the commencement of the partnership is not necessarily delayed also. Whether it is or is not must depend on the terms of the preliminary agreement; for by that agreement the parties are bound, and its terms will regulate their rights and obligations *inter se*, so long as the more formal instrument is unexecuted (*g*).

3. The style of the firm.

3. *The name or style of the firm*, should be expressed; and it should be declared that no partner shall enter into an engagement on behalf of the firm except in its name. Such an agreement is capable of being enforced (*h*); and it may be of use in determining, as between the partners, whether a given transaction is to be regarded as a partnership transaction or not.

4. The duration of the partnership.

4. *The duration of the partnership.*—If the time for which the partnership is to endure is not limited to a definite period, either expressly or by necessary implication, the partnership may be dissolved at the will of any partner (*i*). But it must not be forgotten that a partnership entered into for a definite time is dissolved by the death or bankruptcy of any one of its members before that time has expired (*k*), and that it is therefore necessary to provide for these events in order to give effect to the agreement as to time.

A partnership entered into for a certain time, and continued after that time has expired, is a partnership at will (*l*).

5. The premium.

5. *The premium.*—The points to be attended to with reference to this, are, 1, when, to whom, and how it is to be paid; and, 2, whether the whole or any part of it is to be returned in

(*e*) *Vere* v. *Ashby*, 10 B. & C. 288.

(*f*) *Battley* v. *Lewis*, 1 Man. & Gr. 155.

(*g*) See *England* v. *Curling*, 8 Beav. 133.

(*h*) See *Marshall* v. *Colman*, 2 J. & W. 268.

(*i*) *Infra*, book iv. ch. 1, § 1.

(*k*) Ibid.

(*l*) *Featherstonhaugh* v. *Fenwick*, 17 Ves. 307; *Neilson* v. *Mossend Iron Co.*, 11 App. Ca. 298, and *infra*, book iv. ch. 1, § 1.

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any and what events. The law relating to this subject has been already noticed (*m*).

6. The capital and property of the firm.

6. *The capital and property of the firm.*—The articles should always carefully specify what is and what is not to be considered partnership property; particularly where one partner is, or is to be, solely entitled to what is to be used for the common purposes of all. If one partner is entitled to land which is to become partnership property, it is usual (in order to prevent a sale to a person for value without notice), to have that land conveyed or assigned to trustees for the firm; but, as between the partners themselves, all that is requisite is to declare in the articles that the land shall form part of the assets of the firm. It is also prudent to declare that, as between the real and personal representatives of any deceased partner, his share shall be deemed personal estate. It should be declared that apprentice fees and other casual payments belong to the firm, and form part of its profits.

If the firm is to spend money on the separate property of one of the partners, the right of the firm to a lien for its outlay should be expressly stipulated for or expressly excluded (*n*).

Official appointments.

A kind of property which is difficult to deal with, and which should always be made the subject of an express agreement, is the benefit accruing from an office or appointment obtained by one of the partners. For example, in the case of a firm of solicitors, one of them may be a clerk to some turnpike trust, or to a poor law board, or he may hold some other appointment yielding a salary. Care should always be taken to specify whether the salary is to belong solely to the partner holding the appointment, or whether it is to form part of the partnership assets (*o*); and if the latter, provision should be made for the payment of a sum by the partner holding the appointment in the event of the dissolution of the firm, whilst the appointment continues. If the profits of the office are

(*m*) *Ante*, p. 64, *et seq.*

(*n*) *Ante*, pp. 380 and 384.

(*o*) See *Collins* v. *Jackson*, 31 Beav. 645, noticed *ante*, p. 321, where profits arising from appointments of this sort were held to belong to the partnership, although *prima facie* they do not.

partnership assets, and the firm is dissolved whilst the office is held by one of its members, the Court, in winding up the partnership, will leave him in the enjoyment of the office, but charge him with its value in his account with the firm (*p*).

Trade secrets, patents, &c.

When a partnership is formed for working some secret and unpatented invention, the articles should specify to whom exclusively the right of working such invention shall belong in the event of dissolution. For if there be no agreement on the subject, all the parties will have a right to work it, in opposition to each other, there being no ground upon which any of them can be prevented from so doing. If, however, it can be proved by the inventor that his secret was to be kept from his co-partners, or that they, if they discovered it, were not to make use of their discovery, they will not be allowed to violate the agreement into which they have entered, or the trust reposed in them; and the circumstance that the invention has not been patented will not be material (*q*).

Good-will.

Good-will is a kind of property which ought also to be expressly provided for; but this is most conveniently done in connection with the dissolution clauses (*r*).

Contributions of capital.

The proportions in which the capital is to be contributed by the partners, and the proportions in which they are to be entitled to it when contributed, ought also to be carefully expressed. It by no means follows that the partners are to be entitled to the assets in the proportions in which they contribute to the capital. Indeed, if no express declaration upon the subject is made, the *primâ facie* inference is, that all the partners are entitled to share the assets (minus the capital) equally, although they may have contributed to the capital unequally (*s*).

Capital should be money.

The capital should be expressed to be so much money; and if one of the partners is to contribute lands or goods instead of money, such lands or goods should have a value set upon them, and their value in money should be considered as his contribution. If this be not done, the articles and accounts

(*p*) See *Smith* v. *Mules*, 9 Ha. 556; *Ambler* v. *Bolton*, 14 Eq. 427.

(*q*) See *Morison* v. *Moat*, 9 Ha. 241.

(*r*) See as to this, *infra*.

(*s*) *Ante*, pp. 348, *et seq.*, and 402-3.

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and the proportions in which profits and losses are to be shared will be less perspicuous and free from doubt than will otherwise be the case; and the partner who contributes land will generally be inclined to look upon such land as his, and not as part of the common stock.

Rules as to conditions precedent.

When the articles provide that each partner shall bring in so much capital, or do some other specified thing, the question sometimes arises how far the fulfilment by each of his obligations is a condition precedent to his right to call for fulfilment by the others of their obligations. The rules laid down in the well-known note to *Pordage* v. *Cole* (*t*), must be applied to all such cases. These rules are as follows:—

"1. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, *before* the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money or for not doing such other act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent; and so it is where *no time* is fixed for performance of that which is the consideration of the money or other act.

"2. When a day is appointed for the payment of money, &c., and the day is to happen *after* the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance.

"3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration.

"4. But where the mutual covenants go to the *whole consideration* on both sides, they are mutual conditions, and the performance must be averred.

"5. Where two acts are to be done at *the same time*, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay a sum of money on the *same day*, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale."

Stavers v. Curling.

In conformity with these rules, it was held, in *Stavers* v. *Curling* (*u*), that the plaintiff who had covenanted to proceed on a whaling voyage, and to obey the instructions of the

(*t*) 1 Wms. Saund. 320, *a*. (*u*) 3 Bing. N. C. 355.

defendants, but who had not obeyed them, could nevertheless maintain an action against them for the share of the profits which they had covenanted to pay him, although they had only covenanted to pay him on the performance by him of his covenants.

Kemble v. Mills.

So in *Kemble* v. *Mills* (*x*), where two persons had agreed to become partners, and one of them was to bring in 2000*l*., and do certain things, and the other was to bring in 5000*l*., it was held that an action lay for non-payment of the 5000*l*., although the plaintiff did not state that he had brought in his 2000*l*., or had done any other of the acts which he had agreed to do.

Bringing in so much in good debts.

Capital is sometimes agreed to be brought in in the shape of good debts. Where, on the formation of a partnership, it was agreed that one of the partners should bring in 40,000*l*. of good debts, and that sum was owing to him by persons who continued customers of the firm after its formation, and became indebted to it, and who in time paid it 40,000*l*. and more, it was held that this sum had been brought in as agreed. For nothing having been said as to the accounts on which the payments were made, and each customer's account having been kept in such a way as to form one single continuous account, the 40,000*l*. was treated as having been paid in discharge of the earliest items in their respective accounts; or, in other words, in discharge of the debts owing to the partner who undertook to bring in that amount of good debts, and not in discharge of the subsequent debts contracted with the firm (*y*).

Cooke v. Benbow.

In *Cooke* v. *Benbow*, a father, who was in business, took his sons into partnership, and agreed to bring into the business all the capital, plant, and stock in trade then and usually employed by him in the business. In estimating the capital, the book debts due to the father were valued at twenty per cent. below their nominal amount, but they, in fact, realized more; and it was held that the surplus constituted part of

(*x*) *Kemble* v. *Mills*, 9 Dowl. 446. Compare *Marsden* v. *Moore*, 4 H. & N. 500.

(*y*) *Toulmin* v. *Copland*, 2 Cl. & Fin. 681; S. C., 3 Y. & C. Ex. 636.

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the father's capital, and not part of the profits of the partnership (*z*).

Guarantee against debts.

When a person is about to enter a firm, he sometimes requires a guarantee that its debts do not exceed a certain sum. If such a guarantee is given, and it turns out that the debts of the firm exceeded the sum mentioned at the time in question, the guarantor is liable to an action; and the amount of damages which the plaintiff is entitled to recover is the loss he has sustained in consequence of the excess of debts above the sum mentioned; but not the loss he may have suffered by having joined the firm (*a*).

7. Interest, allowances, &c.

7. *Interest, allowances, &c.*—The allowance of interest on capital and on advances should be made the subject of special agreement. The interest should be made payable before the profits to be divided are ascertained, and the interest on advances should be made payable before interest on capital (*b*).

Monies to be drawn out.

Most articles of partnership contain a clause authorising each partner to draw out of the partnership funds a certain sum per month for his own private purposes. Such a clause should provide for the repayment with interest of whatever may be drawn out in excess of the sum mentioned.

Expenses to be charged to the firm.

The articles should also specify what expenses are to be borne by the firm; and particular notice should be taken of allowances of an unusual kind, but which the partners may intend shall be made, *e. g.*, an allowance for treating customers, for management, for rent, maintenance of servants, &c., &c. (*c*).

8. Conduct and powers of partners.

8. *Conduct and powers of the partners.*—It is the practice to insert in partnership articles an express covenant by each partner to be true and just in all his dealings with the others. This, however, is always implied; and the clause in question is of little use in a legal point of view, although it may serve to remind the partners of their mutual obligations to good faith.

The effect of the clause in creating a specialty debt is very

(*z*) *Cooke* v. *Benbow*, 3 De G. J. & Sm. 1.

(*a*) *Walker* v. *Broadhurst*, 8 Ex. 889.

(*b*) See, as to interest, when there is no agreement to allow it, *ante*, p. 389.

(*c*) *Ante*, p. 383.

limited. In *Powdrell* v. *Jones* (*d*) two partners covenanted that they respectively would be true and just to each other in all their contracts, reckonings, receipts, payments, and dealings; and each bound himself to the other in the penal sum of 5000*l.* for the due performance of the covenants in the articles. One of the partners became greatly indebted to the firm in respect of receipts by him on its account. It was contended that the debt was a specialty debt by reason of the covenant above referred to; but it was held that the debt was only a specialty debt to the extent of 5000*l.*, the amount of the penalty in which each partner was bound to the other, and that the residue of the debt was a simple contract debt only.

Hiring servants, &c.

It is useful to state who is to have the power of hiring and dismissing servants (*e*).

Amount of attention to be given to affairs of the firm.

The time and attention which the partners are to give to the affairs of the firm should be expressly mentioned; especially if one of them is to be at liberty to give less of his time and attention than the others. Inattention to business by reason of illness is, however, no breach of an agreement to attend to it (*f*).

Stipulations that one partner shall not do certain things without the consent of the others.

It is usual to insert in partnership articles a clause prohibiting any partner from doing certain things without previously obtaining the consent of the others; *e.g.*, becoming surety, releasing debts, speculating in the funds, drawing, accepting, or indorsing bills, otherwise than in the usual course of business, &c., &c.

Agreement not to carry on any other business.

An agreement not to carry on any other business is binding and can be enforced; but a breach of it does not necessarily involve a liability to account to the firm for the profits derived from the business carried on in violation of the agreement (*g*).

Majority.

If the number of partners exceeds two, the majority should be expressly entrusted with the power of deciding what shall be done as regards any matter in dispute between the partners, and relating to the business of the partnership, as

(*d*) *Powdrell* v. *Jones*, 2 Sm. & G. 205.

(*e*) See *ante*, p. 313.

(*f*) *Boast* v. *Firth*, L. R. 4 C. P. 1; *Robinson* v. *Davison*, L. R. 6 Ex. 269.

(*g*) *Dean* v. *Macdowell*, 8 Ch. D. 345, and see *ante*, book iii. ch. 2, § 2.

defined by the articles (*h*). It is difficult to lay down a general rule for the determination of what is to be done if the partners are equally divided. Articles of partnership, as usually drawn, are silent upon this question; but if it were declared that in such a case matters should be left in *statu quo*, probably some little assistance would be given to the preservation of peace and good will.

9. Custody of the partnership books.

9. *Partnership books.*—In order to prevent any disputes as to the custody of the partnership books, it is advisable to declare that they shall be kept at the office of the partnership, and that each partner shall have free access to them. A Court will restrain the removal or detention of the partnership books contrary to an express agreement entered into by the partners (*i*); and even in the absence of any special agreement, the Court would probably interfere, for it is an implied obligation on the part of every partner not to exclude his co-partners from access to the books of the firm (*k*).

10. Accounts to be kept and taken.

10. *Accounts.*—The object of taking partnership accounts is two-fold, viz., 1. To show how the firm stands as regards strangers; and 2. To show how each partner stands towards the firm. The accounts, therefore, which the articles should require to be taken, should be such as will accomplish this two-fold object. The articles should consequently provide, not only for the keeping of proper books of account, and for the due entry therein of all receipts and payments, but also for the making up yearly of a general account, showing the then assets and liabilities of the firm, and what is due to each partner in respect of his capital and share of profits, or what is due from him to the firm, as the case may be.

Accounts agreed to not to be re-opened.

In order, moreover, to prevent accounts which have been once fairly taken and settled from being afterwards disputed, the articles usually declare that an account when signed shall be treated as conclusive; or not be opened except for some

(*h*) See as to the powers of a majority, *ante*, p. 313, *et seq.*, and *Falkland* v. *Cheney*, 5 Bro. P. C. 476, which turned on the wording of the articles.

(*i*) See *Taylor* v. *Davis*, 3 Beav. 388, note; *Greatrex* v. *Greatrex*, 1 De G. & Sm. 692.

(*k*) In *Greatrex* v. *Greatrex*, 1 De G. & Sm. 692, it does not appear whether any express agreement as to the custody of the books had been entered into or not.

manifest error discovered within a given time. A provision to this effect is extremely useful, and should never be omitted (*l*); but however stringently it may be drawn, no account will be binding on any partner who may have been induced to sign it by false and fraudulent representations, or in ignorance of material circumstances dishonourably concealed from him by his co-partners (*m*). Where, however, all parties act *bonâ fide* such clauses are operative; but the usual provision as to manifest errors applies only to errors in figures and obvious blunders, not to errors in judgment, *e.g.*, in treating as good, debts which ultimately turn out to be bad, or in omitting losses not known to have occurred (*n*). All errors are manifest when discovered; but such clauses as those here alluded to are intended to be confined to oversights and blunders, so obvious as to admit of no difference of opinion.

Accounts conclusive for one purpose but not for another.

Moreover, an account may be conclusive for one purpose, although not for another, *e.g.*, for the purpose of calculating the profits to be divided so long as the firm is unchanged, but not for calculating the total amount to be paid to a partner on his expulsion from the firm (*o*).

So, from the fact that nothing is reckoned for good-will in taking annual accounts with a view to a division of profits, it does not follow that the good-will is not to be reckoned on a dissolution of the partnership by the death or retirement of a partner (*p*). Nor does it follow that because profits and losses are annually divided equally, the losses on a final winding up are to be divided equally, without reference to the capitals of the partners (*q*).

Coventry *v.* Barclay.

A most important and instructive case on this subject is *Coventry* v. *Barclay* (*r*). There it was provided that accounts

(*l*) See the obs. of V.-C. Bacon in *London Financial Ass.* v. *Kelk*, 26 Ch. D. 151.

(*m*) See *Oldaker* v. *Lavender*, 6 Sim. 239; *Blisset* v. *Daniel*, 10 Ha. 493.

(*n*) See *Ex parte Barber*, 5 Ch. 687; *Laing* v. *Campbell*, 36 Beav. 3, where, however, there were no articles.

(*o*) *Ante*, pp. 401, 402; *Blisset* v. *Daniel*, 10 Ha. 493. Compare *Coventry* v. *Barclay*, *infra*.

(*p*) *Wade* v. *Jenkins*, 2 Giff. 509. Compare *Stewart* v. *Gladstone*, 10 Ch. D. 626.

(*q*) *Binney* v. *Mutrie*, 12 App. Ca. 160; *Wood* v. *Scoles*, 1 Ch. 369.

(*r*) 33 Beav. 1, and on appeal, 3 De G. J. & Sm. 320. See, also, *Ex parte Barber*, 5 Ch. 687.

should be taken and signed yearly, and not be afterwards disputed, and that on the death of a partner the survivors should be at liberty to take his share at its value, according to the last annual account preceding his death. The partners were accustomed in their annual accounts to put a nominal value on their plant and stock in trade, and to carry over a portion of their profits to a separate account, in order to form a reserve fund to answer unforeseen losses. Shortly before the death of one of the partners, the others *bonâ fide* made up an annual account in the usual way, and sent him a copy of it, which he never signed, but never in any way disapproved. It was held (both by Lord Romilly and Lord Westbury) that the executors of the deceased partner were bound by the nominal valuation of the stock, &c., but (by Lord Westbury, reversing the decision below) that they were entitled to a share of the surplus of the reserve fund after paying the losses, &c., to meet which it was created.

Accounts not signed.

The accounts having, in this case, been taken *bonâ fide* and in the usual way, and no errors being suggested, the absence of the deceased partner's signature was treated as of no importance, for he could not properly have refused to sign them (*s*).

11. Retiring from the firm.

11. *Retiring.*—In the absence of a special provision enabling a partner to retire, there is no method by which he can do so without a general dissolution and winding up of the firm; unless, of course, some agreement can be made between all the partners at the time of retirement. Moreover, as will be seen hereafter (*t*), a partnership which has been entered into for a definite time, cannot be dissolved at the will of any member. It is obviously, therefore, in many cases necessary to insert in the articles a special clause enabling a partner to retire, and defining the terms on which, as between himself and co-partners, he is to be at liberty so to do (*u*).

Power to sell share.

If it is provided that a partner may sell his share, and no restrictions are mentioned, he may sell to any one he likes, even to a pauper; and on giving his co-partners notice of his withdrawal from the firm, he will cease to be a member thereof as between himself and them; even although the purchaser

(*s*) The same thing occurred in *Ex parte Barber*, 5 Ch. 687.

(*t*) Book iv. ch. 1, § 1.

(*u*) As to the interest in the goodwill where nothing is said about it, see *infra*.

from him does not come forward and take his place as a partner in the firm (*x*).

Co-partners to have refusal of share.

It is sometimes declared that a partner who is desirous of retiring shall offer his share to his co-partners before selling it to any one else.

Cassels *v.* Stewart.

In a recent Scotch case a clause of this kind was held not to preclude one of the continuing partners from buying for himself the share of the outgoing partner (*y*).

Homfray *v.* Fothergill.

In *Homfray* v. *Fothergill* (*z*), the articles provided that the offer should be made first to the other partners collectively; and if they should decline, then to those desirous of collectively purchasing; and if none such, then to the partners individually. It was held that an offer by one partner to all the others was equivalent to an offer to all of them, and also to such of them as might be desirous of buying, and that one of them having declined to buy, the others were at liberty to do so, although no fresh offer to sell to them had been made, and the retiring partner refused to make such offer.

How notice may be given.

Glassington *v.* Thwaites.

In *Glassington* v. *Thwaites* (*a*), the articles provided that no share should be disposed of by any partner until one month after notice in writing under his hand had been given to the other proprietors at a monthly meeting. A partner desirous of selling his share, wrote a notice to that effect in a book which was produced at monthly meetings, and which all the partners had at all times power to inspect. It was held that the notice so given was sufficient, even although the book was not seen by all the partners. As a general rule, however, notice should be given to each partner individually (*b*).

Sale if offer is declined.

Featherston-haugh *v.* Turner.

Where two persons became partners, and agreed that in the case of the death of either, the other should buy his share, or if he declined so to do, then that the share of the deceased should be sold to any person who might choose to buy it, one of the partners died, and the survivor declined to buy his share, or to enter into partnership with any purchaser of it. Under these circumstances, the Court, at the suit of the

(*x*) *Jefferys* v. *Smith*, 3 Russ. 158, *ante*, p. 365.

(*y*) *Cassels* v. *Stewart*, 6 App. Ca. 64. The clauses were not so worded as to prevent such a sale.

(*z*) 1 Eq. 567.

(*a*) Coop. *temp.* Brougham, 115.

(*b*) Ib.

executor of the deceased partner, decreed a sale of his share, and directed that, if no *bonâ fide* sale could be effected, an account should be taken in order to ascertain the value of such share. No sale being effected, and the accounts having been taken, the surviving partner was decreed to pay the amount of the share of the deceased and the costs of the suit (*c*).

Declaring option to purchase.

Articles of partnership frequently contain a clause to the effect, that in case a partner is desirous of retiring, he shall give so many months' notice to his co-partner, who shall have the option of purchasing the share of the retiring partner. If such a clause is acted on, and a partner notifies his desire to retire to his co-partner, and the latter declares his option to purchase the share of the retiring partner, a contract is thereby concluded between them, from which neither can depart without the consent of the other (*d*). Consequently, the retiring partner cannot withdraw his notice and dissolve the partnership under some other clause in the deed (*d*). Even if the co-partner who is to purchase the other's share infringes the partnership articles, the Court will not willingly interfere and dissolve the partnership; although, if the partner who is to retire conducts himself so as to prejudice the business and exclude the other, the Court will interpose for the protection of the latter; for otherwise the business to which he is shortly to be solely entitled may be entirely ruined (*e*).

Enlarging time for purchasing.

With respect to the exercise of a right of pre-emption, it must be borne in mind that if the right is to be exercised within a given time it cannot be exercised afterwards, unless the time has been enlarged by the parties themselves. Courts will not extend the time on the ground that it was accidentally allowed to slip by (*f*).

Where an offer to sell was made to a person who became lunatic after it was made, but before the time for accepting it had expired, it was held that his committee was not

(*c*) *Featherstonhaugh* v. *Turner*, 25 Beav. 382.

(*d*) See *Warder* v. *Stilwell*, 3 Jur. N. S. 9, V.-C. Stuart; *Homfray* v. *Fothergill*, *ante*, p. 423.

(*e*) See *Warder* v. *Stilwell*, 3 Jur. N. S. 9.

(*f*) See, on this subject, *Brooke* v. *Garrod*, 2 De G. & J. 62; *Lord Ranelagh* v. *Melton*, 2 Dr. & Sm. 278.

entitled to an extension of such time, nor to a renewal of the offer (*g*).

12. Dissolving the firm.

12. *Dissolving the firm.*—Where the articles expressly stipulate that it shall be lawful for either partner to dissolve the partnership upon the commission by the other of certain specifically forbidden acts, the partnership may of course be determined if either partner does these acts. But this clause, like any other, may be waived by mutual consent; and even if not waived, advantage cannot be taken of it to dissolve the partnership on the ground of the commission of any forbidden act, after the lapse of any considerable time since such act came to the knowledge of the partner seeking to avail himself of it (*h*).

In case of insolvency.

It is not unusual to provide for a dissolution or retirement in case a partner shall become insolvent. The word *insolvent*, unless controlled by the context, means unable to pay debts, in the ordinary acceptation of that phrase. A person may therefore be insolvent, although his assets, if all turned into money, might enable him to pay his debts in full (*i*); and although he has not been adjudicated bankrupt or compounded with his creditors (*k*). But a person is not deemed insolvent merely because he keeps renewing a bill which he cannot conveniently meet (*l*).

Giving notice where one partner is insane.

A clause enabling any partner to determine the partnership by giving notice to the others, may be acted on, although one of the firm has become insane; for the partner serving the notice is not bound to find understanding for him who is served (*m*).

(*g*) *Rowlands* v. *Evans*, and *Williams* v. *Rowlands*, 30 Beav. 302.

(*h*) See *Anderson* v. *Anderson*, 25 Beav. 190, which must not be considered as an authority for the doctrine that the Court will not hold partners to their articles. The notice to dissolve in that case was given six months after the commission of the act complained of, and not on account of such act, but in consequence of other disputes.

(*i*) See *per* Le Blanc, J., in *Bayly* v. *Schofield*, 1 M. & S. 338.

(*k*) See *Parker* v. *Gossage*, 2 C. M. & R. 617, and *Biddlecombe* v. *Bond*, 4 A. & E. 332, in which it was held that "insolvent" had not the technical meaning of having taken the benefit of the acts for the relief of insolvent debtors.

(*l*) *Cutten* v. *Sanger*, 2 Y. & J. 479; and see *Anon.*, 1 Camp. 492.

(*m*) *Robertson* v. *Lockie*, 15 Sim. 285.

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Withdrawal of notice.

A notice once given cannot be withdrawn except by consent (*n*).

Informal notice.

A notice to dissolve on a given day of the week, and a given day of the month, is bad if there is any mistake in either date; *e.g.*, a notice to dissolve on Monday the 9th is bad, if the 9th falls on a Friday (*o*).

Dissolution to be by deed.

In a case where it was provided that the dissolution should be by deed, it was held that a submission by deed of all matters in dispute between the partners, and an award under seal made upon that submission dissolving the partnership, had the effect of dissolving it, although nothing was said about dissolution in the submission (*p*).

Signing notices of dissolution.

When power is given to retire or dissolve the firm, or to expel a partner from it, power should also be given to any partner to sign, in the name of himself and co-partners, a notice of dissolution for insertion in the "Gazette" (*q*).

13. Powers of expulsion.

13. *Expelling.*—In order that an objectionable partner may be summarily got rid of, clauses are sometimes inserted providing for expulsion in certain events. The Court cannot control the exercise of a power to expel if it is exercised *bonâ fide* (*r*). But all clauses conferring such a power are construed strictly, on account of the abuse which may be made of them, and of the hardship of expulsion; and the Court will never allow a partner to be expelled if he can show that his co-partners, though justified by the wording of the expulsion clause, have, in fact, taken advantage of it for base and unworthy purposes of their own, and contrary to that truth and honour which every partner has a right to demand on the part of his co-partners.

Blisset *v.* Daniel.

In *Blisset* v. *Daniel* (*s*), the expulsion clause was as follows:—

"That it shall be lawful for the holders of two-thirds or more of the shares for the time being, from time to time to expel any partner, by giving

(*n*) *Jones* v. *Lloyd*, 18 Eq. 265.

(*o*) *Watson* v. *Eales*, 23 Beav. 294.

(*p*) *Hutchinson* v. *Whitfield*, Hayes (Ir. Ex.), 78.

(*q*) See *Troughton* v. *Hunter*, 18 Beav. 470. The Court will, however, compel a partner to do this on a dissolution, *Hendry* v. *Turner*, 32 Ch. D. 355.

(*r*) *Russell* v. *Russell*, 14 Ch. D. 471; *Stewart* v. *Gladstone*, 10 ib. 626.

(*s*) *Blisset* v. *Daniel*, 10 Ha. 493. See, also, *Wood* v. *Woad*, L. R. 9 Ex, 190.

to, or leaving for him, at his then or last place of abode in England or Wales, a notice in writing under their hands of such expulsion, which, in such event, shall operate from and at the time of the giving or leaving such notice, and shall be in the following form, namely, 'We do hereby give you notice that you are hereby expelled from the partnership carried on under the firm of *John Freeman and Copper Company*. Witness our hands this —— day of ——.'"

The power, therefore, was in the most general terms; no reasons for its exercise were required to be given, no meetings or deliberations were declared to be necessary, before serving the notice. The holders of two-thirds of the shares signed a notice in the form prescribed, and served it on the partner whom they desired to expel. They gave no reasons, and relied upon the clause set out above. But it appeared that they desired to get rid of their co-partner, not because so to do was in any sense for the benefit of the firm in a mercantile point of view, but because he objected to the appointment of one of his co-partner's sons as co-manager with his father. It further appeared that the offended father had complained to the other partners behind the back of the expelled partner, and had prevailed upon them to sign the notice, intimating that either the expelled partner or himself must leave the firm. The expelling partners having resolved to exercise the power, induced the expelled partner to sign certain accounts, in order that he might be bound by them when expelled. Their intention to expel him was, however, concealed until after the accounts were signed; and the notice of expulsion, which gave him the first intimation of any design to get rid of him, was not served until he had signed the accounts. Under these circumstances, the Court declared that the notice of expulsion was void, and restored the expelled partner to his rights as a member of the firm.

Opportunity for explanation.

Having regard to the principles acted upon in cases of this description, it is conceived that a power to expel for misconduct cannot be safely acted upon until the delinquent partner has had an opportunity of explaining his conduct (*t*).

All must concur.

A power of expulsion cannot be exercised without the con-

(*t*) See the judgment in *Blisset* v. *Daniel*, and *Cooper* v. *Wandsworth Board of Works*, 14 C. B. N. S. 180.

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currence of *all* those whose concurrence may be required by the articles (*u*).

Notice of expulsion.

A notice of expulsion under one clause, cannot, if invalid, operate as a notice of dissolution under some other clause (*x*).

Smith *v.* Mules.

In *Smith* v. *Mules* it was provided, in effect, that if a partner should do or omit to do certain things, the others should be at liberty to dissolve the partnership, by giving notice to the partner who should offend; and that upon giving such notice the partnership should cease and be dissolved in the same manner, and with the same consequences, as if it had been determined by the voluntary retirement of the offending partner. The firm consisted of three partners, A., B., and C., who was B.'s son. B. was guilty of conduct for which he might have been compelled to retire. A. gave B. and C. notice that he dissolved the partnership under the clause above referred to. C., however, had done nothing rendering it competent for A. to expel him. It was therefore decided: 1, that A. had no right to expel B. without C.'s concurrence; 2, that A. had no right to dissolve the firm, so far as C. was concerned; 3, that C. having adopted the notice after it was given, A. could not treat the partnership as continuing; and 4, that the dissolution actually brought about was not a dissolution provided for by the articles, and did not, therefore, entail the consequences of a dissolution under them (*y*).

Power to expel in case of omitting to do things.

When a power of expulsion is given in the event of a partner omitting to do certain things, *e.g.*, entering in the partnership book all monies he may receive on account of the partnership, the power will not, as a rule, be exerciseable, unless the omission was a studied omission (*z*).

As to power to expel, in case a partner becomes insolvent, see *ante*, p. 425.

A power to expel contained in articles for a partnership for a term of years is not exerciseable after the term has expired,

(*u*) See *Steuart* v. *Gladstone*, 10 Ch. D. 626; *Smith* v. *Mules*, 9 Ha. 556.

(*x*) See *Smith* v. *Mules*, 9 Ha. 556; *Hart* v. *Clarke*, 6 De G. M. & G. 232, and *Clarke* v. *Hart*, 6 H. L. C. 633.

(*y*) *Smith* v. *Mules*, 9 Ha. 556.

(*z*) See *Smith* v. *Mules*, 9 Ha. 556.

although the partnership may have been continued on the old footing (*a*).

14. Valuation of shares.

14. *Valuation of shares.*—Having provided for the events upon which a partnership is to cease, the next point is to specify the method in which its affairs are to be wholly or partially wound up.

General rule where the articles cannot be acted on.

Where the articles have prescribed no method of winding up, or where the method prescribed cannot be carried into effect, then, unless the partners can come to some agreement as to what is to be done, there must, as a general rule, be a conversion of all the partnership property into money; and this money, after payment of the partnership debts, must be divided amongst the partners in the shares in which they may be entitled to it (*b*).

Agreements for fair division.

An agreement that on a dissolution the partnership property shall be fairly and equally divided, after payment of its debts, has been held to mean that the property shall be sold, and that the money produced by the sale shall be divided after the debts have been paid (*c*).

Methods of avoiding sale.

In order to prevent the ruin consequent on a sale when a partnership happens to be dissolved, several devices are had recourse to. The simplest is to specify in the articles a sum at which the share of an outgoing or deceased partner may be taken by his co-partners (*d*). But it is seldom possible to fix a sum beforehand, and consequently such a provision is not common. It is more usual to stipulate that the share shall be taken to be of the value appearing in the last-signed account, and be paid with the addition of subsequent profits, or with interest at a certain rate, in lieu of such profits. If a stipulation to this effect is made, and the accounts have been regularly taken and signed, or regularly taken but not signed (*e*),

(*a*) *Clark* v. *Leach*, 32 Beav. 14, and 1 De G. J. & Sm. 409. See *Neilson* v. *Mossend Iron Co.*, 11 App. Ca. 298.

(*b*) See *Cook* v. *Collingridge*, Jac. 607; *Kershaw* v. *Matthews*, 2 Russ. 62; *Wilson* v. *Greenwood*, 1 Swanst. 482. That this rule is not to be rigorously applied, see *Pettyt* v. *Janeson*, 6 Madd. 146, and *Simmons* v. *Leonard*, 3 Ha. 581, noticed *infra*, p. 431.

(*c*) *Rigden* v. *Pierce*, 6 Madd. 353; *Cook* v. *Collingridge*, Jac. 607.

(*d*) Effect was given to such a provision in *Essex* v. *Essex*, 20 Beav. 442.

(*e*) As in *Ex parte Barber*, 5 Ch. 687; *Coventry* v. *Barclay*, 3 De G. J. & Sm. 320.

so that the shares of the partners appear from the accounts as intended, all parties must abide by the stipulation (*f*), although difficulties may arise as to the true construction of the articles (*g*). But if, as frequently happens, the accounts intended to be taken and signed have not been taken, or have been taken irregularly, so that the last-signed account is not so late a one as is contemplated by the articles, in such a case the account must be made up to the latest date at which it ought to have been made up, regard being had to the articles and the practice of the partners; and the share of the outgoing or deceased partner must be taken at its value, as the same appears by the account so taken.

Effect of not keeping accounts as agreed.

Pettyt v. Janeson.

Thus in *Pettyt* v. *Janeson* (*h*), the articles provided that the partnership accounts should be taken every 25th of March, and that if either partner died during the continuance of the partnership, his interest should be regulated by the last yearly settlement, and what should then appear to be due to him should be paid to his executors, with five per cent. interest, instead of subsequent profits. For some time the partnership accounts were regularly settled every 25th of March; but afterwards they were made up very irregularly, and often not for sixteen or eighteen months. A partner died in February, 1813. The last account prior to his death was settled on the 5th of November, 1811. The executors insisted that as there had been no annual settlement, as contemplated by the articles, they were entitled to a share of the profits calculated to the time of their testator's death. The surviving partner, on the other hand, contended that all they were entitled to was the amount of their testator's share, as appearing by the account settled in November, 1811, with interest thereon. But the Vice-Chancellor observed:—

(*f*) *King* v. *Chuck*, 17 Beav. 325; *Gainsborough* v. *Stork*, Barn. 312; and the cases in the last note.

(*g*) A provision that a share shall be paid for as the same stood at the time of the last account, means as it stood in the partnership books. See *Blisset* v. *Daniel*, 10 Ha. 493, p. 511. See, as to clauses of this description, *Coventry* v. *Barclay*, *ante*, p. 421; *Ex parte Barber*, *ubi supra*; and *Browning* v. *Browning*, 31 Beav. 316, as to interest and subsequent drawings out. As to the calculation of interest where the share is to be paid out, with interest, by instalments, see *Ewing* v. *Ewing*, 8 App. Ca. 822. As to goodwill, *Stewart* v. *Gladstone*, 10 Ch. D. 626, and *infra*.

(*h*) 6 Madd. 146.

"That the articles had two plain intentions—that there should be an annual settlement, and that the estate of a deceased partner should receive no profits for the fraction of the year since the last annual settlement. That the settlement of the 5th November, 1811, was to be considered as a settlement substituted by the agreement of the parties in the place of the settlement stipulated for in the articles. That if the testator had died on the 1st October, 1812, it could not have been contended that his estate was to take profits subsequent to the 5th November, 1811, being the last settlement within a year of the death; and if this were to be treated in that case as a settlement, within the spirit of the articles, against the testator's estate, it must be equally considered as a settlement for the testator's estate as a settlement on the 5th November, 1811, which bound each party to come to the next annual settlement on the 5th November, 1812. That the Court must act upon that which ought to have been done as if it had been done, and must declare the testator's estate entitled to a share in the profits up to the 5th November, 1812, being the day which ought to have been the last annual settlement before the testator's death."

Simmons *v.* Leonard.

The same principle was acted upon by V.-C. Wigram, in *Simmons* v. *Leonard* (*i*), although no account having ever been taken between the parties, and the day mentioned in the articles for taking the account not being apparently considered of much importance, the account directed to be taken did not stop at the day at which the last account would have been taken if the articles had been acted on. In *Simmons* v. *Leonard*, the articles provided that a general account and rest should be taken every 31st of December, or on such other day as the partners should agree upon; and that if a partner died during the term his executors should receive payment of his share as ascertained at the last annual rest, with interest thereon, in lieu of subsequent profits; and that his executors should have no right to look into the partnership books. The provision relative to the annual settlement of an account was never acted upon at all. One of the partners died, and the Vice-Chancellor held that the primary object of all parties was, that the death of one of them should not cause a general dissolution and winding up; that this object might be attained, although no such account as was contemplated had been taken; that it was absolutely necessary to take an account of some sort, and to let the executors, therefore, look into the partnership books; and that, having regard to the omission of

(*i*) 3 Ha. 581.

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the partners to settle any account at all, the only account which could be taken was a general account of what was due to the testator at the time of his death for his share of capital and profits.

Lawes v. Lawes.

In *Lawes* v. *Lawes* (*k*) the articles provided for taking half-yearly accounts, and that on the death of a partner his share should be taken at the amount settled by the last half-yearly account. The accounts were in fact settled once a year only; but on the death of a partner it was held that his share was not to be taken at the amount shown by the last annual account actually taken, but at the amount shown by an account to be taken at the end of the half-year next before his death as stipulated by the articles.

These cases not only afford good illustrations of the rule that in construing partnership articles regard must be had to the conduct of the partners, even where a circumstance has arisen of which the partners had no previous experience (*l*), but they also show that this rule will not be applied unfairly, and further that the rule that there must be a sale of the partnership property whenever there is a dissolution, unless the articles provide for some other method of dealing with it, and the provisions in the articles are capable of being rigorously carried out, must be taken with considerable qualification (*m*).

Taking share at a valuation.

It is not unusual to stipulate that the share of an outgoing or deceased partner shall be taken by the continuing or surviving partners at a valuation; and although as a rule specific performance of an agreement for sale at a valuation will not be decreed unless the valuation has been made (*n*); yet where persons enter into partnership upon certain terms, one of which is, that on a dissolution one partner shall take the share of another at a valuation, the Court will, on a dissolution under the articles, enforce such a stipulation, and if necessary

(*k*) 9 Ch. D. 98.

(*l*) See, too, *Jackson* v. *Sedgwick*, 1 Swanst. 460; *Coventry* v. *Barclay*, and *Ex parte Barber*, *ante*, note (*c*).

(*m*) See, as to the rule referred to, *ante*, p. 429.

(*n*) See *Vickers* v. *Vickers*, 4 Eq. 529, a case between partners and the authorities there cited. The rule does not apply to a valuation of things which are accessories to the main purchase. See *Jackson* v. *Jackson*, 1 Sm. & G. 184.

itself ascertain the value of the share (*o*). It has, however, been held, that an agreement for a sale at a price to be fixed by valuers, one to be appointed by the seller and the other by the purchaser, or in case the valuers differ, by an umpire, does not enable the Court to appoint an umpire if the valuers will not do so, and are yet themselves unable to fix a price (*p*). Moreover, *Wilson* v. *Greenwood* (*q*), throws considerable doubt on the validity, in the event of a bankruptcy, of an agreement that the share of a bankrupt partner shall be taken at a valuation by his co-partners.

15. Introduction of new partner in lieu of a dead or retired partner.

15. *Transmission of shares and introduction of new partners.*— It is a common provision in partnership articles that on the death of a partner his executors, or his son, or some other person, shall be entitled to take his place. The effect of any such provision must of course depend on its words; but speaking generally it may be said,—

1. That clauses of this kind, although they bind the surviving partners to let in the person nominated (*r*), do not bind him to come in, but give him an option whether he will do so or not (*s*);

2. That before making up his mind he is entitled to make himself acquainted with the state of the partnership affairs, although he is not entitled to have its accounts formally taken (*t*);

3. That if he is desirous of coming in, he must comply strictly with the terms upon which alone he is entitled to do so (*u*);

(*o*) *Dinham* v. *Bradford*, 5 Ch. 519. See, as to contracts to sell at a fair valuation, as distinguished from a valuation to be made by particular individuals, Fry on Spec. Perf. 154, 2nd ed.

(*p*) *Collins* v. *Collins*, 26 Beav. 306; and see *Vickers* v. *Vickers*, 4 Eq. 529.

(*q*) 1 Swanst. 471. See, also, *Whitmore* v. *Mason*, 2 J. & H. 204.

(*r*) In *Wainwright* v. *Waterman*, 1 Ves. J. 311, a person was declared entitled to be admitted, although those with whom that question rested were divided in opinion. But in *Milliken* v. *Milliken*, 8 Ir. Eq. 16, it was held that a person who is to be let in, provided he conducts himself to the satisfaction of the survivors, is without remedy if they will not admit him.

(*s*) *Pigott* v. *Bagley*, McCl. & Y. 569; *Madgwick* v. *Wimble*, 6 Beav. 495; *Downs* v. *Collins*, 6 Ha. 418; *Page* v. *Cox*, 10 Ha. 163. See, too, *Pearce* v. *Chamberlain*, 2 Ves. S. 33.

(*t*) *Pigott* v. *Bagley*, McCl. & Y. 569.

(*u*) *Holland* v. *King*, 6 C. B. 727; *Brooke* v. *Garrod*, 3 K. & J. 608, and 2 De G. & J. 62; *Milliken* v. *Milliken*, *supra*, note (*r*). See *Ex parte Marks*, 1 D. & Ch. 499.

4. That if he declines to come in, and there is no provision as to what is then to be done, the partnership must be dissolved and wound up in the usual way (*v*).

Person entitled to succeed will be assisted in equity.

As a general rule, and excluding cases of agency, an agreement between two persons cannot be enforced against either of them by a third person, even although such third person was intended to derive a benefit from the agreement (*x*). In

Page *v.* Cox.

Page v. *Cox* it was attempted to apply this rule to an agreement between two partners, that on the death of one his widow should succeed him. One of the partners was dead; it was contended that his widow had no right to succeed. But it was held that the rule in question had no application to such a case; that the articles had created a valid trust in favour of the widow; and that she was entitled to come to the Court for a decree for the execution of such trust (*y*).

Cases of settled share.

Balmain *v.* Shore.

In a case where articles provided that in the event of the death of a partner during the term for which the partnership was intended to last, his share should go to his widow for life, and after her death to his children, and in default of children to his widow's executors, administrators, or assigns; it was held that the children of a partner who had died leaving a widow, did not take any vested interest in the partnership assets during her life (*z*).

Appointment of successor.

Ponton *v.* Dunn.

In another case partnership articles provided that on the death of a partner the survivor should carry on the business for the benefit of himself and such person as the other should by will appoint, and, in default of appointment, for the benefit of his widow, or (if she should be dead) for the benefit of his children, and in default of children for the benefit of his executors or administrators; and that such person, or the said widow, children, executors, or administrators, should stand in the place of the deceased, and be entitled to the same share in, and have the same control over, the partnership trade and assets, as the deceased would himself have been entitled to if

(*v*) *Kershaw* v. *Matthews*, 2 Russ. 62; *Downs* v. *Collins*, 6 Ha. 418; *Madgwick* v. *Wimble*, 6 Beav. 495.

(*x*) See *Colyear* v. *The Countess of Mulgrave*, 2 Keen, 81; *Re Empress Engineering Co.*, 16 Ch. D. 125.

(*y*) *Page* v. *Cox*, 10 Ha. 163. See, also, *Murray* v. *Flavell*, 25 Ch. D. 89; *Dale* v. *Hamilton*, 2 Ph. 266.

(*z*) *Balmain* v. *Shore*, 9 Ves. 500.

living. It was held that this was not, technically speaking, a power of appointment, and that consequently a partner could bequeath his share by a will which did not allude either to the power or to the partnership (*a*).

Position of incoming partner.

When a person has been admitted into an existing firm, and no express agreement has been made as to his rights and liabilities, the inference is that as between themselves his position is the same as that of the other partners. If they are bound by existing articles he will be bound by the same articles, if his conduct justifies the conclusion that he has assented to them; and if any special agreement is made with him, it will be regarded as incorporated with any previous agreement between the older partners, although so far as the two agreements may be inconsistent, the latest will prevail (*b*). If, indeed, the incoming partner has no knowledge of any prior agreement between the others, he cannot be bound thereby (*c*); for nothing that he can have done can be regarded, under these circumstances, as evidence of any assent thereto on his part; and it is upon such presumed assent that the rule in question is founded.

16. Annuities to widows, &c.

16. *Annuities to widows.*—Sometimes it is agreed that if a partner dies the survivor shall pay an annuity, or a share of the profits, to his widow. There is now no difficulty in framing a clause of this sort without making the widow a partner or a quasi-partner by virtue of her participation in profits (*d*); and after her husband's death she can enforce payment of the provision intended for her (*e*).

Annuity payable out of profits and none made. Ex parte Harper.

If the annuity is made payable out of the profits, and the business is carried on and no profits are made, no annuity will be payable. So, if the surviving partner has an option to pay either an annuity or a share of the profits, and there should be no profits, he will not be bound to pay anything; for, *ex hypothesi*, it is competent for him to elect to pay out of the

(*a*) *Ponton* v. *Dunn*, 1 R. & M. 402. See, also, *Beamish* v. *Beamish*, Ir. Rep. 4 Eq. 120, where a bequest of a share of residue was held not to amount to a nomination of a successor.

(*b*) See *Austen* v. *Boys*, 24 Beav. 598, and 2 De G. & J. 626.

(*c*) Ibid.

(*d*) See, as to this, *ante*, p. 35.

(*e*) See *Murray* v. *Flavell*, 25 Ch. D. 89; *Page* v. *Cox*, 10 Ha. 163, *ante*, p. 434.

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profits, and his right to make this election in no way depends on their amount (*f*). Moreover, in construing a provision giving a widow of a deceased partner a share of the profits, the partnership which, strictly speaking, determined when her husband died, is regarded as continuing, and the profits which she is to share must be ascertained on that principle. They ought not to be calculated as if the returns yielded by the new business had not to be applied in liquidating the demands on the old firm (*g*).

Annuity payable until eviction. Holyland *v.* De Mendez.

In *Holyland* v. *De Mendez* (*h*) a continuing partner gave a bond conditioned to be void on payment of an annuity, or on being without his own default dispossessed of the partnership property assigned to him. It was held that the annuity did not cease on the bankruptcy of the continuing partner; dispossession by his assignees not being such a dispossession as was contemplated in the bond.

Effect of discontinuing business.

An agreement to pay an annuity out of profits involves an obligation not wilfully to prevent the earning of profits; and if, therefore, the person who has to pay the annuity wilfully ceases to carry on business he becomes liable to an action for damages (*i*). In order, however, to provide as far as possible against any attempt to defeat the annuity by discontinuing the business, it is desirable that the partner continuing the business should covenant not only that he will carry on the business and pay the annuity, but that he will not transfer the business, or take in any fresh partner, without procuring from the transferee or new partner a similar covenant on his part (*k*).

17. Prohibitions against continuing in business.

17. *Prohibitions against carrying on business.*—A subject upon which it is always desirable to make some express agreement is the extent to which a retiring partner shall be restrained from commencing business on his own account, and in opposition to the continuing partner. In the absence of any

(*f*) *Ex parte Harper*, 1 De G. & J. 180.

(*g*) Ibid.

(*h*) 3 Mer. 184.

(*i*) *McIntyre* v. *Belcher*, 14 C. B. N. S. 654. *Telegraph Dispatch Co.* v. *McLean*, 8 Ch. 658. Compare *Rhodes* v. *Forwood*, 1 App. Ca. 256.

(*k*) A purchaser of the business with notice of such a covenant would take subject to it, see *Werderman* v. *Société Générale d'Electricité*, 19 Ch. D. 246.

Rule where there is no prohibition.

agreement upon the subject, a retiring partner is as much at liberty to set up for himself, in opposition to the firm he has quitted, as he would be if he had never belonged to it; and on a general dissolution of partnership, all the partners are at liberty to commence business in opposition to each other, as freely as if they had never been partners, unless they have entered into some agreement not to do so. A dissolution *per se* obliges no partner to retire from business, or to refrain from seeking a livelihood in the manner in which he has been accustomed so to do, and in the neighbourhood where he is known (*l*).

After sale of goodwill.

As will be seen presently, even a sale by an outgoing partner of all his interest in the partnership business, including the goodwill thereof, does not preclude him from setting up a new business in opposition to the continuing partners; but it does preclude him from so doing in the name of the old firm and from representing himself as continuing the business sold (*m*). But an agreement by an outgoing partner not to carry on business in rivalry with his late co-partners may be implied even where not distinctly expressed (*n*).

Agreement not to carry on business enforced.

An agreement by a retiring partner not to commence business in opposition to his late partners, will be enforced, if the restriction imposed upon him is not unlimited, both as regards time and distance, and is not unreasonable, having regard to the nature of the partnership business (*o*). Thus, in *Williams* v. *Williams* (*p*), the defendant, who had been in partnership

Williams v. Williams.

(*l*) See *Dawson* v. *Beeson*, 22 Ch. D. 504; *Farr* v. *Pearce*, 3 Madd. 78; *Davies* v. *Hodgson*, 25 Beav. 177; and the next head, No. 18, Goodwill.

(*m*) *Churton* v. *Douglas*, Johns. 174, noticed *infra*, p. 441.

(*n*) See *infra*, p. 442.

(*o*) See, generally, as to covenants not to carry on business, *Mitchell* v. *Reynolds*, 1 Smith's L. C.; also the useful table appended to *Avery* v. *Langford*, Kay, 663. As to whether such covenants can be reasonable, if unlimited both as to time and space, see *Davies* v. *Davies*, 36 Ch. D. 359, where the covenant was unlimited "so far as the law allows," and was held to be too uncertain to be enforced, and also to be personal to the covenantees. In *Palmer* v. *Mallet*, 36 Ch. D. 411, the covenant was joint in form, but was held to be joint and several as regards the covenantees. Distances are measured as the crow flies, *Duignan* v. *Walker*, Johns. 446; *Mouflet* v. *Cole*, L. R. 7 Ex. 70, and 8 Ex. 32.

(*p*) 2 Swanst. 253.

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with the plaintiffs, in running coaches between Reading and London, sold his share in the business to them, and covenanted not to run any coach between Reading and London, or so as to injure the business of the plaintiffs; and this covenant was enforced in equity. So, in *Tallis* v. *Tallis* (*q*), the Court of Queen's Bench upheld a covenant entered into by a retiring member of a firm of booksellers not to carry on the canvassing trade in London, nor within 150 miles of the General Post-Office, nor in, nor within fifty miles of Dublin or Edinburgh, nor in any town in Great Britain or Ireland in which the continuing partner or his successors might at the time have an establishment.

Tallis v. Tallis.

Consideration.

An agreement entered into when a partnership is formed, to the effect that a retiring partner shall not carry on the business carried on by the firm, cannot be invalid for want of consideration (*r*).

An agreement with a bankrupt to take his son into partnership, and to employ the bankrupt, is a sufficient consideration for an agreement by him not to carry on business in competition with the firm (*s*).

Solicitors' papers, &c.

In framing articles of partnership between solicitors, provision should always be made respecting the deeds and documents in their possession, but belonging to their clients.

It need hardly be observed that no agreement which the solicitors may make between themselves, will prejudice their clients. Subject to any question of lien, the clients are entitled to have their deeds and documents, and all drafts and copies thereof, paid for by them, delivered up on request (*t*). They have, moreover, a right to the joint assistance of all the members of the firm employed by them; and although, if the firm is dissolved, a client cannot insist that the partners shall continue to act as his solicitors, it is clear that they cannot, without his consent, turn him over to one of themselves (*u*);

(*q*) 1 E. & B. 391. See, too, *Atkyns* v. *Kinnier*, 4 Ex. 776; *Reynolds* v. *Bridge*, 6 E. & B. 528.

(*r*) *Per* Lord Cranworth, in *Austen* v. *Boys*, 2 De G. & J. 626.

(*s*) *Clarkson* v. *Edge*, 33 Beav. 227.

(*t*) *Ex parte Horsfall*, 7 B. & C. 528.

(*u*) *Cook* v. *Rhodes*, 19 Ves. 272, note.

nor act against him as if he had never been a client (*x*). The dissolution operates as a discharge of the client by the solicitors; and the client is thereupon entitled, subject to any question of lien, to have his deeds and papers delivered up to him (*y*).

But, as between the solicitors themselves, it is competent for them to agree that, if they dissolve partnership, the clients of the old firm, and all their deeds and papers, shall be divided amongst the partners, or belong solely to the partner who continues to carry on the business of the firm; and such an agreement will be enforced (*z*). If no such agreement is come to, each partner may, after a dissolution, do his best to induce the old clients to continue him as their sole solicitor.

18. *Good-will.*—In connection with the subject considered under the last head, it is necessary to allude to the good-will of a trade or business. 18. Good-will.

The term good-will can hardly be said to have any precise signification. It is generally used to denote the benefit arising from connection and reputation; and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business its good-will has a marketable value, whether the business is that of a professional man or of any other person (*a*). But it is plain that good-will has no meaning except in connection with a continuing business (*b*); it may have no value except in connection with a particular house, and may be so inseparably connected with it as to pass with it under a will or deed without being specially mentioned (*c*). In such a case the good- Nature of good-will.

(*x*) *Cholmondeley* v. *Clinton*, 19 Ves. 261.

(*y*) *Griffiths* v. *Griffiths*, 2 Ha. 587; *Colegrave* v. *Manley*, T. & R. 400; and see *Vaughan* v. *Vanderstegen*, 2 Drew. 409; and *ante*, p. 120.

(*z*) *Whittaker* v. *Howe*, 3 Beav. 383. See, however, *Davidson* v. *Napier*, 1 Sim. 297.

(*a*) Good-will is property within the meaning of the stamp acts, *Potter* v. *The Commissioner of the Inland Revenue*, 10 Ex. 147.

(*b*) See, as to a legacy of good-will, apart from any share in a business, *Robertson* v. *Quiddington*, 28 Beav. 529.

(*c*) As in *Blake* v. *Shaw*, Johns. 732; *Chissum* v. *Dewes*, 5 Russ. 29; *Ex parte Punnett*, 16 Ch. D. 226; *Pile* v. *Pile*, 3 Ch. D. 36; and see *per* Cotton, L. J., in *Cooper* v. *Met. Board of Works*, 25 Ch. D. 479.

will increases the value of the house; but the value of the good-will of any business to a purchaser depends, in some cases entirely, and in all very much, on the absence of competition on the part of those by whom the business has been previously carried on.

Now it has just been seen that there is no obligation on the part of any of the partners to retire from business merely because the partnership between them is dissolved.

Carrying on business after selling it.

Further, it is held, although it is certainly an extraordinary doctrine, that if a person sells the good-will of his trade or business, that does not disentitle him from recommencing a similar trade or business in the immediate vicinity of the place where the old one was carried on (*d*); and, therefore, if it is simply agreed that a partnership shall be dissolved, and that one partner shall buy the other out, and this agreement is carried into effect, the retiring partner will nevertheless be at liberty to recommence business in the old line in the old neighbourhood (*e*); and he may not only advertise the fact (*f*), but he may also solicit business from, and carry on business with, the old customers and correspondents of the firm (*g*). But he must not hold himself out as continuing *the* business which he has sold, and must not therefore carry it on in the name in which it was carried on before he sold it (*h*). At the same time, if that name happens to be his own, it is by no

(*d*) *Cruttwell* v. *Lye*, 17 Ves. 335; *Harrison* v. *Gardner*, 2 Madd. 198; *Kennedy* v. *Lee*, 3 Mer. 455; *Shackle* v. *Baker*, 14 Ves. 468. See, too, *Davies* v. *Hodgson*, 25 Beav. 177, and *Churton* v. *Douglas*, Johns. 174. In *Johnson* v. *Helleley*, 34 Beav. 63, notice of this right was directed by the Court to be given in the particulars of the sale of the good-will.

(*e*) See *Kennedy* v. *Lee*, 3 Mer. 452; *Mellersh* v. *Keen*, 27 Beav. 236; *Bradbury* v. *Dickens*, ib. 53; *Smith* v. *Everett*, ib. 446, and the next note.

(*f*) *Hookham* v. *Pottage*, 8 Ch. 91; *Labouchere* v. *Dawson*, 13 Eq. 322, and see *Cruttwell* v. *Lye*, 17 Ves. 335.

(*g*) *Pearson* v. *Pearson*, 27 Ch. D. 145; *Vernon* v. *Hallam*, 34 ib. 748, overruling, as to this, *Labouchere* v. *Dawson*, 13 Eq. 322; *Ginesi* v. *Cooper & Co.*, 14 Ch. D. 596; and *Leggott* v. *Barrett*, 15 Ch. D. 306. N.B.—The order against soliciting the old customers was not appealed against in this last case. See, also, *Walker* v. *Mottram*, 19 Ch. D. 355; *Dawson* v. *Beeson*, 22 ib. 504.

(*h*) *Churton* v. *Douglas*, Johns. 174; *Hookham* v. *Pottage*, 8 Ch. 91, where the defendant described himself as P. from H. & P., the old firm, but in a way calculated to deceive.

means clear that he could be restrained from carrying on business in that name (*i*).

Churton v. Douglas.

The last propositions are well illustrated by the important case of *Churton* v. *Douglas* (*k*). There two of the plaintiffs, and the defendant, whose name was *John Douglas*, carried on business in partnership under the firm of *John Douglas & Co.*, as stuff merchants at Bradford. The defendant retired from the firm; a new partner was taken in; and the defendant assigned to his old partners and their new partner (being the plaintiffs) all his, the defendant's, share and interest in the old firm, and in the good-will thereof. The plaintiffs continued to carry on the old business under a new name, with the addition *late John Douglas & Co.* The defendant formed a new partnership with three persons who had been in the employ of the old firm, and whom he had enticed to leave the service of its successors and to join him; and he and his new partners commenced business as stuff merchants at Bradford, in a house adjoining the place of business of the old firm; and they did so in the name of *John Douglas & Co.* They further affixed that name to the house they had taken, and sent circulars to the old customers of the old firm, so as to lead them to suppose that the business of that firm was being continued by the defendant and his new partners. On a bill filed by the plaintiffs against the defendant it was held, (1), that he was entitled to carry on, by himself or in partnership with others, the kind of business previously carried on by him with his late partners; and, (2), that he was entitled so to do in the immediate neighbourhood of the place where he and his late partners previously carried on their business. But it was also held, (3), that the plaintiffs alone had the right to carry on the business previously carried on by *John Douglas & Co.*; (4), that the plaintiffs had the right to represent themselves as the successors of that firm; (5), that the defendant had no right to represent himself as its successor; (6), that he could not acquire such a right by taking other persons into partnership with him; and, (7), that although his name was John Douglas, he had not, either alone or in partnership with others, the

(*i*) See ib. and *ante*, book i. ch. 6, § 2.

(*k*) Johns. 174.

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right to carry on the old kind of business, in the old place, under the old name of *John Douglas & Co.* An injunction was granted accordingly to restrain the defendant from carrying on the business of a stuff merchant, at or in the immediate neighbourhood of Bradford, either alone or in partnership, under the style *John Douglas & Co.*, or in any other manner holding out that he was carrying on the business of a stuff merchant in continuation of, or in succession to, the business carried on by the late firm of *John Douglas & Co.*

Implied agreement not to continue in business.

Cooper *v.* Watson.

An agreement by a partner that he will not carry on business in opposition to his late co-partners may however be implied from some other agreement into which he and they have entered. Thus where two persons became partners as brewers for eleven years, and it was provided in the articles that either of the parties, on giving six months' notice to the other, should be at liberty to *quit the trade and mystery of a brewer*, and that the other should be at liberty to continue the trade on his own account; it was held that one of the partners who had retired from the firm after giving notice to the other was not at liberty to continue in the trade at all (*l*).

Award disposing of business.

Harrison *v.* Gardner.

Again, where on the retirement of a partner, it was left to an arbitrator to determine what the continuing partner should pay for the good-will, and the arbitrator fixed a sum upon the understanding that the retiring partner would not commence a new business in the same street in which the old one was carried on; an injunction was granted restraining the retiring partner from carrying on business in that street, although the award itself was silent upon the point (*m*).

It follows from the foregoing observations that the good-will of a valuable partnership business may be practically unsaleable and worthless, at least to any one except a former partner desiring to continue the business of the firm (*n*). It is only so far as good-will has a saleable value that it can be regarded as an asset of any partnership; and the good-will of

(*l*) *Cooper* v. *Watson*, 3 Dougl. 413; S. C. sub nomine *Cooper* v. *Watlington*, 2 Chitty, 451. Compare *Davies* v. *Davies*, 36 Ch. D. 359, *ante*, p. 437, note (*o*).

(*m*) *Harrison* v. *Gardner*, 2 Madd. 198.

(*n*) See *Davies* v. *Hodgson*, 25 Beav. 177, where the good-will was treated as valueless on this very ground.

a business is frequently of no value at all, except in connection with the place of business (*o*). This, however, is by no means always the case. The value of the good-will of a newspaper, for example, attaches to its name, and is scarcely, if at all, dependent on the place of publication.

Good-will assets of the firm.

The saleable value of the good-will of a partnership business, whatever that value may be, must be considered as belonging to the firm, unless there is some agreement to the contrary; and it follows from this—

1. That if a firm is dissolved, and there is no agreement to the contrary, the good-will must be sold for the benefit of all the partners, if any of them insist on such sale (*p*);

2. That, so far as is possible, having regard to the right of every partner to carry on business himself, the Court will, on a dissolution, interfere to protect and preserve the good-will until it can be sold (*q*);

3. That if a partner has himself obtained the benefit of the good-will, he can be compelled to account for its value, *i.e.*, for what it would have sold for, he being himself at liberty to compete in business with the purchaser (*r*).

Good-will in cases of death.

In the event of dissolution by death, it has been said that the good-will survives, and there is a clear decision to this effect (*s*). But this is not in accordance with modern authorities; they are wholly opposed to the notion that the value of the good-will, as such, belongs to the survivor (*t*). It undoubtedly may happen that the survivor may obtain the benefit of the good-will without paying for it; for he is at liberty

(*o*) As in *Blake* v. *Shaw*, Johns. 732. See *ante*, p. 439, note (*c*).

(*p*) *Pawsey* v. *Armstrong*, 18 Ch. D. 698; *Bradbury* v. *Dickens*, 27 Beav. 53, and the cases cited *infra*.

(*q*) See *Turner* v. *Major*, 3 Giff. 442, where, however, there was an express agreement for the sale of the good-will. In *Lewis* v. *Langdon*, 7 Sim. 425, the V.-C. Shadwell seemed to think that a surviving partner was under no obligation to preserve the good-will. But his opinion was probably influenced by *Hammond* v. *Douglas*, 5 Ves. 539, which was not then overruled.

(*r*) *Smith* v. *Everett*, 27 Beav. 446; *Mellersh* v. *Keen*, ib. 236, and 28 Beav. 453.

(*s*) *Hammond* v. *Douglas*, 5 Ves. 539.

(*t*) *Wedderburn* v. *Wedderburn*, 22 Beav. 104; *Smith* v. *Everett*, 27 Beav. 446, and *Mellersh* v. *Keen*, ib. 236, and 28 Beav. 453. See, also, *Gibblett* v. *Read*, 9 Mod. 459, a case of a newspaper.

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(unless restrained by agreement) to carry on business on his own account (*u*), and possibly in the old place of business and in the name of the late firm (*x*). Under these circumstances, if, on the death of a partner, the good-will is put up for sale, it will produce nothing if it is known that the surviving partner will exercise his rights. He will therefore acquire all the benefit of the good-will; but he does not acquire it by survivorship, as something belonging to him exclusively, and with which the executors of the deceased partner have no concern; for if he did, he might sell the good-will for his own benefit, and this he cannot do (*y*). When, therefore, it is said that on the death of one partner the good-will of the firm survives to the other, what is meant is, that the survivor is entitled to all the advantages incidental to his former connection with the firm, and that he is under no obligation, in order to render those advantages saleable, to retire from business himself (*z*).

Good-will in case of retirement of one partner.

Again, when a partner retires not only from the firm, but from the business carried on by it, the continuing partners will acquire the benefit arising out of the good-will for nothing, unless it has been agreed that they shall pay for it; for they retain possession of the old place of business, and they continue to carry on that business under the old name. This, in fact, secures the good-will to them, and they cannot be compelled to pay separately for it, unless some agreement to that effect has been entered into (*a*).

Good-will in connection with use of name.

The right to continue the use of a partnership name is frequently the most important element in the good-will, and is governed by principles similar to those applicable to it. The

(*u*) *Farr* v. *Pearce*, 3 Madd. 74; *Davies* v. *Hodgson*, 25 Beav. 177.

(*x*) See, as to this, *infra*, note (*e*).

(*y*) See *Smith* v. *Everett*, 27 Beav. 446; *Mellersh* v. *Keen*, ib. 236, and 28 ib. 453; *Wedderburn* v. *Wedderburn*, 22 Beav. 104. See, however, *Farr* v. *Pearce*, 3 Madd. 74, and *Hammond* v. *Douglas*, 5 Ves. 539, *contra*. The last case cannot be regarded as now law.

(*z*) See *Farr* v. *Pearce*, 3 Madd. 74; *Davies* v. *Hodgson*, 25 Beav. 177; *Mellersh* v. *Keen*, 27 Beav. 236, and 28 ib. 453.

(*a*) See *infra*. An agreement to pay out a retiring partner the value of his share, as shown by the last annual account, does not entitle him to have the good-will valued, *Steuart* v. *Gladstone*, 10 Ch. D. 626. Compare *Wade* v. *Jenkins*, 2 Giff. 509, *infra*, p. 448.

purchaser of the good-will of a business acquires the right not only to represent himself as the successor of those who formerly carried it on (*b*), but also to use the old name (*c*) and to prevent other persons from doing the like (*d*). If then the good-will of a partnership business has any saleable value at all, it seems impossible to hold that on a dissolution of a partnership, whether by death or otherwise, any partner can continue the old business in the old name for his own benefit, unless there is some agreement to that effect, or at least to the effect that the assets are not to be sold. Such a right on his part is inconsistent with the right of the other partners to have the good-will sold for the common benefit of all. There are, however, authorities tending to show that, in the case of death, the surviving partners are entitled to continue to carry on business in the old name (*e*), and to restrain the executors of the deceased partner from doing the like (*f*). But if these cases are carefully examined, they will be found scarcely to warrant so general a proposition. In *Webster* v. *Webster* (*g*), the executors of a deceased partner sought to restrain the surviving partners from carrying on business in the name of the old firm; but the application was based upon the untenable ground that by so doing the surviving partners exposed the estate of the deceased partner to continued liability. No question of good-will appears to have been in dispute. In *Lewis* v. *Langdon* (*h*), the V.-C. Shadwell certainly intimated his opinion to be, that surviving partners had a right to continue to carry on business in the old name (*i*); but the real question there was, whether the executors of a deceased partner were entitled to continue the use of that name; and it was held that they were not, which is quite consistent with the absence of the same right on the part of the surviving partner. There seems, moreover, to have been some agree-

Webster *v.* Webster.

Lewis *v.* Langdon.

(*b*) *Churton* v. *Douglas*, Johns. 174, *ante*, p. 441.

(*c*) *Levy* v. *Walker*, 10 Ch. D. 436.

(*d*) See the last two notes.

(*e*) *Webster* v. *Webster*, 3 Swanst. 490; *Lewis* v. *Langdon*, 7 Sim. 421; *Robertson* v. *Quiddington*, 28 Beav. 536; *Banks* v. *Gibson*, 34 Beav. 566.

(*f*) *Lewis* v. *Langdon*, 7 Sim. 421.

(*g*) 3 Swanst. 490.

(*h*) 7 Sim. 421.

(*i*) See, too, *per* Lord Romilly, in 28 Beav. 536.

ment not set out in the report (*k*), which influenced the judge's decision; and at the time it was pronounced the doctrine that good-will is, if saleable, a partnership asset, was not so well established as it is at present.

Continued use of name only wrong on one of two grounds.

In considering this question, the right of a late partner not to be exposed to risk by having his name continued in a business must not be forgotten (*l*); and where his name is part of the name of the firm, *e.g.*, if his name is A. B., and the name of the firm is A. B. & Co., so long as he lives he would, it is apprehended, in the absence of an agreement to the contrary, be entitled to restrain his late co-partners and their representatives from carrying on business under the old name, and so continually exposing him to risk. But a sale by him of his interest in the good-will includes the right to use the old name even if it is his own (*m*). The right of a late partner to prevent the continued use of his own name on the ground of exposing him to risk is a purely personal right, and does not devolve either on his executors or on his trustee in bankruptcy, for they would not be exposed to risk. Their right, and indeed the right of any partner whose name does not appear in the name of the firm, to prevent the continuance of the use of the name of the firm, can only be maintained upon the ground that such right is involved in the more general right of having the partnership assets, including the good-will, sold for the common benefit. And if upon a dissolution this right is waived, or if the terms of dissolution are such as to preclude its exercise, then each partner can not only carry on business in competition with the others, but each can represent himself as late of, or as successor to, the old firm: and each may use the old name without qualification (*n*); at all events if he does

(*k*) See the last line in 7 Sim. 425.

(*l*) See *Routh* v. *Webster*, 10 Beav. 561; *Bullock* v. *Chapman*, 2 De G. & Sm. 211; *Troughton* v. *Hunter*, 18 Beav. 470. See, also, *Hodges* v. *London Trams Omnibus Co.*, 12 Q. B. D. 105.

(*m*) *Levy* v. *Walker*, 10 Ch. D. 436; *Banks* v. *Gibson*, 34 Beav. 566. Note in the first of these, Miss Charbonnel having married and changed her name, was not in fact held out as a partner.

(*n*) See *Banks* v. *Gibson*, 34 Beav. 566, and the cases cited in the last four notes. See, as to describing oneself as late with or from another, *Glenny* v. *Smith*, 2 Dr. & Sm. 476.

not hold out the other partners as still in partnership with himself (*o*).

Good-will in connection with trade marks.

The use of a partnership trade mark is another very important element in the good-will of its business. A partnership trade mark is an asset of the firm, saleable on a dissolution like any other asset (*p*). The partnership name may be a trade mark (*q*).

Valuation of good-will.

Good-will is generally valued at so many years' purchase on the amount of profits.

Agreements as to paying for good-will on retirement, &c.

In framing articles of partnership, too great care cannot be taken to express as clearly as possible what is intended to be done with respect to good-will; and in order to avoid all ambiguity, the word itself should be made use of. There are cases which show that an agreement to take a retiring partner's share in the property and effects of the partnership (*r*), or in the partnership premises (*s*), do not entitle him to anything in respect of good-will. But in another case a clause authorising a surviving partner to take the stock of the partnership at a valuation was held to entitle the executors of a deceased partner to a share of the value of the good-will of the partnership, and of a trade mark belonging to it (*t*).

When an agreement is entered into, to the effect that a retiring partner shall be entitled to be paid for his interest in the good-will of the firm, it is material to determine whether the firm is to be regarded as of definite or of indefinite duration. For upon this will depend the amount to be paid to the retiring partner.

Austen v. Boys.

In *Austen* v. *Boys* (*u*), a partnership was entered into for seven years, with power for any partner to retire. In case of

(*o*) Even this qualification is doubtful. See *Levy* v. *Walker*, 10 Ch. D. 436.

(*p*) See *Bury* v. *Bedford*, 4 De G. J. & Sm. 352; *Hall* v. *Barrows*, 4 De G. J. & Sm. 150. Trade marks registered under 46 & 47 Vict. c. 57, § 70, are only assignable with the good-will of the business, see *Wellcome's Trade mark*, 32 Ch. D. 213.

(*q*) 46 & 47 Vict. c. 57, § 64. See *ante*, book i. ch. 6, § 2.

(*r*) See *Hall* v. *Hall*, 20 Beav. 139; *Kennedy* v. *Lee*, 3 Mer. 452.

(*s*) *Burfield* v. *Rouch*, 31 Beav. 241. Compare *Blake* v. *Shaw*, Johns. 732.

(*t*) *Hall* v. *Barrows*, 4 De G. J. & Sm. 150.

(*u*) 24 Beav. 598, affirmed 2 De G. & J. 626.

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retirement the retiring partner was to be paid by the continuing partners the fair market value of his interest and share in the partnership business, and in the good-will thereof. Two days before the expiration of the seven years, one of the partners retired, and the question arose, whether in ascertaining the value of his interest in the good-will of the business, the partnership business was to be considered as continuing, or as ending at the expiration of the seven years. It was held that the good-will to be valued, was the good-will of a business ending with the seven years, and that therefore the retiring partner's interest in it was nominal merely.

Wade v. Jenkins.

In *Wade* v. *Jenkins* (*x*), partnership articles stipulated that the good-will should be deemed to be of the value of 6000*l.* and should belong to the partners in the proportions in which they were entitled to the capital, but that the value of the good-will should not be taken into account in any of the accounts between the partners. On the death of one of the partners it was held that he was entitled to a share of the good-will; and that the last-mentioned stipulation only applied to the accounts taken during the continuance of the partnership.

Turner v. Major.

In *Turner* v. *Major* (*y*), partners agreed to dissolve and to have the assets and good-will sold by two persons selected by them; an injunction was granted to restrain one of the partners from violating this agreement, by carrying on business on his own account before the good-will of the partnership had been disposed of.

19. Getting in debts on dissolution.

19. *Getting in debts.*—When a firm is dissolved, it is usual to appoint one of the partners, or some third person, to collect and get in the debts of the firm. But notwithstanding any such arrangement and notice thereof, a debtor to the firm will be discharged if he pays to any one of the partners (*z*). Effect, however, will be given by the Court to an agreement of the nature in question, by appointing a receiver, and, if necessary, granting an injunction (*a*). If the agreement is under seal and is broken, an action for damages may be

(*x*) 2 Giff. 509. Compare *Steuart* v. *Gladstone*, 10 Ch. D. 626, where there was no clause specially applicable to good-will.

(*y*) 3 Giff. 442.

(*z*) *Ante*, p. 134.

(*a*) *Davis* v. *Amer*, 3 Drew. 64.

brought upon it (*b*). But it has been held that an agreement not under seal entered into between two members of a dissolved partnership, to the effect that one of them shall get in the debts of the firm, and pay what he shall receive in respect thereof to his co-partner, is not an agreement on which the latter can maintain any action for damages in case the debts are got in, and the money received on account of them is not paid over; for it is said there is no consideration for such an agreement (*c*). But it seems to have been admitted, in the case in which this was decided, that if the partner to whom the money when received is to be paid agrees that he will take no steps to collect the debts himself, that will be a sufficient consideration to support the promise to pay.

Getting in debts when one firm succeeds another.

When a partner retires, on the terms that the continuing partners are to get in the old debts, and that such debts, when got in, are to be taken into account in ascertaining the share of the retiring partner, the latter will have a right to charge the continuing partners with whatever debts they may choose to take to themselves and not get in. As observed by Lord Romilly: "If continuing partners who are bound to get in debts belonging to an old firm, think fit to enter into a new agreement with the debtors of the old firm, by which those debtors become the debtors of the new firm, and the debts of the old firm become merged in that of the new firm by a security taken for the aggregate debt, such continuing partners are liable to the retiring partners for the amount of the old debt as one of the assets received by them" (*d*).

20. Assignment of share, &c., by retiring partner.

20. *Assignment of share, &c.*—When a partner retires or dies, and he or his executors are paid what is due in respect of his share, it is customary for him or them formally to assign and release his interest in the partnership, and for the continuing or surviving partners to take upon themselves the payment of the outstanding debts of the firm, and to indemnify their late partner or his estate, from all such debts.

(*b*) As in *Belcher* v. *Sikes*, 8 B. & C. 185.

(*c*) See *Lewis* v. *Edwards*, 7 M. & W. 300, where such an agreement was come to between a solvent partner and the assignees of a bankrupt partner.

(*d*) *Lees* v. *Laforest*, 14 Beav. 262.

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Assignment of debts.

An assignment of all the partnership stock, debts, sums of money, and all other the personal estate and effects of the assignors as partners, did not before the Judicature acts give the assignees a right to sue one of the assignors for a debt due from him to the partnership (*e*). But if one of the assignors after the execution of the deed releases a debt which has been assigned, or negotiates a bill held by the firm, he becomes liable to an action, for he has no right to derogate from his own grant (*f*).

Stamp on assignment by outgoing partner.

An assignment by a partner of his share and interest in the firm to his co-partners, in consideration of the payment by them of what is due to him from the firm, is regarded as a *sale* of property within the meaning of the Stamp acts; and consequently the deed of assignment requires an *ad valorem* stamp (*g*). But if the retiring partner, instead of assigning his interest, takes the amount due to him from the firm, gives a receipt for the money, and acknowledges that he has no more claims on his co-partners, they will practically obtain all they want; but such a transaction, even if carried out by deed, could hardly be held to amount to a sale; and no *ad valorem* stamp it is apprehended would be payable (*h*).

21. Usual indemnity.

21. *Indemnity to outgoing partner.*—An indemnity is ordinarily given by a bond or covenant entered into by the continuing or surviving partners, in consideration of the assignment to them of all the share and interest of the retiring or deceased partner. The bond or covenant should be joint and several (*i*). The effect of such a bond or covenant is to render a retiring partner, as between himself and his late co-partners, a surety only for the payment of the partnership debts (*k*);

(*e*) See *Aulton* v. *Atkins*, 18 C. B. 249.

(*f*) *Aulton* v. *Atkins*, 18 C. B. 249.

(*g*) *Christie* v. *Commissioners of Inland Revenue*, L. R. 2 Ex. 46; *Phillips* v. *Same*, ib. 399; *Potter* v. *The Commissioners of Inland Revenue*, 10 Ex. 147. These cases overrule *Belcher* v. *Sikes*, 6 B. & C. 234.

(*h*) In *Steer* v. *Crowley*, 14 C. B. N. S. 337, a release by the executors of a deceased partner did not state the consideration, and bore only a common deed stamp; and it was held that the deed was a good document of title, although some penalty might be payable by the parties to it, or by their solicitors, for not stating the consideration.

(*i*) See, as to this, *ante*, p. 196.

(*k*) *Rodgers* v. *Maw*, 4 Dowl. & L. 66; *Oakeley* v. *Pasheller*, 4 Cl. & Fin. 207, *ante*, p. 251.

and to render him their specialty creditor if, notwithstanding their indemnity, he is compelled to pay those debts (*l*).

Right to indemnity.

It is to be observed, that in the absence of any agreement to that effect, a retiring partner or the executor of a deceased partner has no right to an indemnity from the other partners, except so far as he may be entitled to have the assets of the firm applied in payment of its debts, and to enforce contribution in case he has to pay more than his share of those debts. But if all the assets of the firm are assigned to the continuing or the surviving partners, it is only fair that they should undertake to pay its debts : and if it appears that it was the intention of all parties that they should do so, effect will be given to such intention, although the undertaking on their part is not explicit in its terms (*m*).

Effect of express indemnity on lien.

When a retiring partner assigns his interest in the partnership assets, and obtains from the continuing partners a covenant of indemnity, his lien on the partnership assets seems to be at an end. In *Re Langmead's trusts* (*n*) the assignment was made expressly subject to the payment of the retiring partner's share of the partnership debts. The continuing partner became bankrupt; and the retiring partner's executors were compelled to pay the unsatisfied partnership debts. It was nevertheless held that they had no lien on the specific assets of the old firm, but were confined to their remedy on the covenant for indemnity.

Re Langmead's trusts.

22. *Arbitration clauses.*—With respect to these, it is to be observed :—

22. Arbitration clauses.

1. That an agreement to refer to arbitration is one which a court will not decree to be specifically performed (*o*); and

2. That it is one which (independently of the Common law procedure act of 1854) cannot be effectually set up as a defence to any action relative to a matter agreed to be re-

(*l*) *Musson* v. *May*, 3 V. & B. 194.

(*m*) See *Saltoun* v. *Houstoun*, 1 Bing. 433.

(*n*) 7 De G. M. & G. 333. See, too, *Lingen* v. *Simpson*, 1 Sim. & Stu. 600. See, *ante*, pp. 354, 355.

(*o*) *Agar* v. *Macklew*, 2 Sim. & Stu. 418; *Street* v. *Rigby*, 6 Ves. 818. An action will lie for not referring in pursuance of an agreement so to do, *Livingston* v. *Ralli*, 5 E. & B. 132. See, generally, Fry, Spec. Perf. ch. 8 (ed. 2).

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ferred (*p*); unless, indeed, the reference has been expressly made a condition precedent to the right to sue (*q*). At the same time a Court will sometimes decline to interfere between partners who have agreed that their disputes should be referred to arbitration, and who have not attempted so to settle them (*r*).

17 & 18 Vict. c. 125, § 11.

By 17 & 18 Vict. c. 125, which contains several important provisions respecting agreements to refer to arbitration, it is amongst other things (by § 11) enacted that,—

"Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree (*s*) that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them, in *respect of the matters so agreed to be referred*, or any of them, it shall be lawful for the court in which action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance, and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms, as to costs and otherwise, as to such court or judge may seem fit; Provided always that any such rule or order may at any time afterwards be discharged or varied as justice may require."

The section does not apply where a submission to refer has been revoked before action (*t*).

(*p*) *Dawson* v. *Fitzgerald*, 1 Ex. D. 257; *Edwards* v. *Aberayron, &c., Soc.*, 1 Q. B. D. 563; *Cooke* v. *Cooke*, 4 Eq. 77; and the older cases referred to there.

(*q*) See *Scott* v. *Avery*, 5 H. L. C. 811; *Halfhide* v. *Fenning*, 2 Bro. C. C. 336. The last case is generally regarded as overruled, but *quære* whether it is not capable of being supported on the principle recognised in *Scott* v. *Avery*. See the observations of Lord St. Leonards in *Dimsdale* v. *Robertson*, 2 Jo. & Lat. 91, and of V.-C. Wood in *Cooke* v. *Cooke*, 4 Eq. 77.

(*r*) *Waters* v. *Taylor*, 15 Ves. 10.

(*s*) In *Blyth* v. *Lafone*, 1 E. & E. 435, it was held that the agreement to refer must be contained in the instrument on which the dispute arises. But this has been overruled. See *Randell, Saunders, and Co.* v. *Thompson*, 1 Q. B. D. 748, and *Mason* v. *Haddan*, 6 C. B. N. S. 525.

(*t*) *Randell, Saunders, and Co.* v. *Thompson*, 1 Q. B. D. 748.

The Court will decide whether the matters in dispute are or are not within the arbitration clause (*u*). But even if they are, the section is not imperative; and the Court in the exercise of its discretion has declined to interfere where there were several matters in dispute, some only of which were within the agreement to refer (*v*); where one of the parties had become bankrupt (*x*); where there was a *bonâ fide* suggestion of fraud (*y*); where there was really no question in dispute, and the defendant's only object was delay (*z*); where the object was to stop a suit, and not really to settle a dispute, which the defendant desired to refer before the suit was commenced (*a*).

Where, however, there is a *bonâ fide* dispute within the meaning of an agreement to refer, and there is no satisfactory reason why such dispute should not be settled by arbitration, legal proceedings will be stayed (*b*); even although the agreement to refer is contained in articles of partnership for a term of years which has expired (*c*).

In one case the Court refused to interfere where the plaintiff sought to have a partnership dissolved, and to have a receiver appointed, on the ground of the defendant's misconduct (*d*); but this case has not been followed (*e*); nor is there any reason why the Court should not appoint a receiver, if necessary, pending the arbitration (*f*).

(*u*) See *Piercy* v. *Young*, 14 Ch. D. 200.

(*v*) *Wheatley* v. *Westminster, &c., Coal Co.*, 2 Dr. & Sm. 347.

(*x*) *Pennell* v. *Walker*, 18 C. B. 651.

(*y*) *Wallis* v. *Hirsch*, 1 C. B. N. S. 316. Compare *Russell* v. *Russell*, 14 Ch. D. 471, where the party complaining of fraud resisted arbitration.

(*z*) *Lury* v. *Pearson*, 1 C. B. N. S. 639. The true grounds of this decision appear to have been those stated above, but the report is obscure.

(*a*) *Corcoran* v. *Witt*, 8 Ch. 476 *n.*, explained in 16 Eq. 571.

(*b*) As in *Russell* v. *Russell*, 14 Ch. D. 471, where notice to dissolve had been given; *Law* v. *Garrett*, 8 Ch. D. 26, where the agreement was to refer to a foreign tribunal; *Plews* v. *Baker*, 16 Eq. 564; *Willesford* v. *Watson*, 8 Ch. 473, and 14 Eq. 572; *Randegger* v. *Holmes*, L. R. 1 C. P. 679; *Seligmann* v. *Le Boutillier*, ib. 681; *Russell* v. *Pellegrini*, 6 E. & B. 1020; *Hirsch* v. *Im Thurn*, 4 C. B. N. S. 569.

(*c*) *Gillett* v. *Thornton*, 19 Eq. 599.

(*d*) *Cook* v. *Catchpole*, 10 Jur. N. S. 1068.

(*e*) *Plews* v. *Baker*, 16 Eq. 564; *Gillett* v. *Thornton*, 19 Eq. 599.

(*f*) See as to this, *infra*, note (*o*).

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Power of arbitrator.

Under a general submission by partners of all matters in difference between them, an arbitrator may dissolve the partnership (*g*); and may order one partner to pay or give security for the payment of a certain sum to the other (*h*); and apportion the assets between them (*i*); and order conveyances to be made (*k*); and direct one partner to sue in the name of himself and others, and give them a bond of indemnity (*l*); and restrain one partner from carrying on business within certain limits (*m*); and direct mutual releases to be executed (*n*). It seems, however, that the arbitrator cannot appoint a receiver to collect and get in the partnership assets and credits (*o*); nor direct one of the partners to pay money to him (the arbitrator) in order that he may apply it in payment of certain specified debts (*p*). It has also been held that an arbitrator cannot enter into the question whether any part of a premium paid on entering into the partnership shall be refunded, unless the submission pointedly raises that question for determination (*q*).

23. Penalties, &c.

23. *Penalties and liquidated damages.*—The last clause in a partnership deed is often one by which each partner binds himself to pay, either by way of penalty or by way of liquidated damages, a certain sum in case of the infringement by him of any agreement contained in the previous clauses. A stipulation that on the breach of any agreement in the articles, a sum

(*g*) *Green* v. *Waring*, 1 W. Blacks. 475; *Hutchinson* v. *Whitfield*, Hayes, Ir. Ex. 78. *Simmonds* v. *Swaine*, 1 Taunt. 549, shows that a dissolution need not be awarded.

(*h*) *Simmonds* v. *Swaine*, 1 Taunt. 549.

(*i*) *Lingood* v. *Eade*, 2 Atk. 505; *Wood* v. *Wilson*, 2 Cr. M. & R. 241; *Wilkinson* v. *Page*, 1 Ha. 276.

(*k*) *Wood* v. *Wilson*, 2 Cr. M. & R. 241.

(*l*) *Burton* v. *Wigley*, 1 Bing. N. C. 665; and see *Goddard* v. *Mansfield*, 19 L. J. Q. B. 305; *Philips* v. *Knightley*, 2 Str. 903.

(*m*) *Morley* v. *Newman*, 5 D. & R. 317. In *Burton* v. *Wigley*, 1 Bing. N. C. 665, the award permitted a partner to carry on business, although the articles provided for his not doing so.

(*n*) *Lingood* v. *Eade*, 2 Atk. 505, where the arbitrator directed such releases to be settled by a Master in Chancery.

(*o*) *Lingood* v. *Eade*, 2 Atk. 505; *Re Mackay*, 2 A. & E. 356. But a receiver was appointed in *Routh* v. *Peach*, 2 Anstr. 519, and 3 ib. 637.

(*p*) *Re Mackay*, 2 A. & E. 356.

(*q*) See *Tattersall* v. *Groote*, 2 Bos. & P. 131.

shall be paid by way of penalty is of little real use, and is sometimes worse than useless, for the sum mentioned will not be payable unless damage to its amount can be proved (*r*); and on the other hand the penalty generally limits the compensation which can be obtained, even although damage to a greater extent has been sustained (*s*). Moreover, if there are several covenants, and if for any breach, however trivial, of any of them involving the payment of a small sum of money, it is stipulated that a large sum shall be paid by way of liquidated damages, the stipulation is always construed as a stipulation for payment of the larger sum by way of penalty (*t*). An agreement to pay a definite sum as liquidated damages in certain specified events, *e.g.*, on carrying on business within prescribed limits, may no doubt prove useful (*u*); but even in these cases care must be taken not to make the contract alternative; for if it is and the stipulated sum is paid, a court will not interfere by injunction (*x*). The mere existence of an agreement for liquidated damages does not, however, necessarily make a contract alternative, and preclude such interference (*y*).

(*r*) See the note to *Gainsford* v. *Griffith*, 1 Wms. Saund. 57.

(*s*) See *Clarke* v. *Ld. Abingdon*, 17 Ves. 106.

(*t*) See *Wallis* v. *Smith*, 21 Ch. D. 243, where all the older cases are reviewed. See, also, *Elphinstone* v. *Monkland Iron and Coal Co.*, 11 App. Ca. 332.

(*u*) *Atkyns* v. *Kinnier*, 4 Ex. 776; *Reynolds* v. *Bridge*, 6 E. & B. 528 may be referred to as examples. See, too, *The East India Co.* v. *Blake*, Finch. 117, where it was held that though a court of equity would relieve against a penalty, it would not relieve against payment of liquidated damages.

(*x*) *Sainter* v. *Ferguson*, 1 Mac. & G. 286; *Woodward* v. *Gyles*, 2 Vern. 119.

(*y*) *French* v. *Macale*, 2 Dr. & War. 269; *Coles* v. *Sims*, 5 De G. M. & G. 1; and see *Avery* v. *Langford*, Kay, 663; *Clarkson* v. *Edge*, 33 Beav. 227.

CHAPTER X.

OF ACTIONS BETWEEN PARTNERS.

SECTION I.—GENERAL OBSERVATIONS.

1. *Law before the Judicature acts.*

Bk. III. Chap. 10. Sect. 1.

THE mutual rights and obligations of partners having been examined, it is proposed in the next place to consider the means by which those rights and obligations can be enforced.

Legal proceedings between partners.

It has been already seen (Bk. ii., c. 3) that before the Judicature acts there was no method by which an ordinary firm could sue or be sued by any of its members, either at law or in equity; for the firm, as distinguished from the persons composing it, had no judicial existence. All proceedings, therefore, which had for their object the enforcement of the mutual rights and obligations of partners, had to be taken by some or one of the members of a firm individually against some others or other of them also individually. The consequences of this rule were important, for it followed from it—

1. That no action at law could be brought by one partner against another for the recovery of money or property payable to the firm as distinguished from the partner suing;

2. That no suit in equity was maintainable by one partner against another with respect to a matter in which the firm was interested, without bringing all the members thereof before the court. This rule was subject to exceptions, as will be seen hereafter; but it was established as a rule, and flowed from the non-recognition of the firm.

Moreover, until the law was altered by 31 & 32 Vict. c. 116, no criminal prosecution was sustainable by one partner against

another for stealing the property of the firm (*a*). But this inconvenience has been removed by the above mentioned statute (*b*).

The inability of a *firm* to sue one of its members, and *vice versâ*, arose from the circumstance, that in an action by a firm against one of its members, or *vice versâ*, the member in question must be both a plaintiff and a defendant. Practically it is often extremely inconvenient to have recourse to the intervention of a trustee, and to procure agreements to be made with him so as to enable him to sue and be sued thereon. But, inconvenient as this was, it was only through the intervention of a trustee that agreements between partners and the firms to which they belonged, could be so entered into as to be enforceable by action at law (*c*). An agreement by each partner with his co-partners might indeed be framed so as to enable one to be sued by the others, if care was taken to exclude the partner sued from all share in what was sought to be recovered from him, and to exclude the partner suing from all obligation to contribute to his own payment (*d*); but an agreement drawn

(*a*) In *R.* v. *Warburton*, L. R. 1 Cr. Ca. Res. 274, it was held that a partner might be convicted of conspiring with others to defraud his co-partner by falsifying the accounts of the firm, and thereby, in effect, robbing his co-partner. But in *R.* v. *Evans*, 9 Jur. N. S. 184, a partner who misrepresented the partnership accounts, and thereby obtained more than his share of money, was held not liable to conviction for obtaining money under false pretences: and in *R.* v. *Loose*, 29 L. J. M. C. 132, *R.* v. *Marsh*, 3 Fos. & Fin. 523, *R.* v. *Bren*, 3 N. R. 176, members of friendly societies indicted for stealing the monies of the societies were held not liable to conviction. However, in *R.* v. *McDonald*, 7 Jur. N. S. 1127, a servant who was paid a salary and a percentage of profits was convicted of embezzlement; and in *R.* v. *Burgess*, 2 N. R. 85, and in *R.* v. *Webster*, 7 Jur. N. S. 1208, a member of a friendly society was convicted of larceny, and in *R.* v. *Proud*, 10 W. R. 62, of embezzlement. In the last three cases, however, there were special circumstances as regards the possession of the money and the trust reposed in the prisoner. A shareholder in a banking company governed by 7 Geo. 4, c. 46, was convicted of embezzling money of the company in *R.* v. *Atkinson*, Car. & Marsh. 525.

(*b*) See on it, *R.* v. *Smith*, L. R. 1 Cr. Ca. R. 266; *R.* v. *Robson*, 16 Q. B. D. 137; *Roope* v. *D'Avigdor*, 10 ib. 412.

(*c*) See *Bedford* v. *Brutton*, 1 Bing. N. C. 399, as to an action by a partner against the trustees of himself and co-partners.

(*d*) *Radenhurst* v. *Bates*, 3 Bing. 463.

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so as to accomplish both these objects, was not generally convenient.

Stipulation that secretary, &c., for time being shall sue.

It was not, however, competent for partners to establish, even as amongst themselves, a rule that some officer, *e.g.*, the treasurer or secretary of the firm for the time being, should, as it were, represent the firm and sue and be sued on its behalf accordingly. Consistently with the established law, effect could not be given to such a rule, and it was simply nugatory (*e*). The consequences of this doctrine when applied to companies were extremely serious.

2. *Effect of Judicature acts.*

Effect of the Judicature acts.

The general effect of the Judicature acts, so far as they relate to legal proceedings by partnerships, has been already investigated (Bk. ii., c. 3); and it was then seen that a firm can now sue and be sued in its mercantile name; that where parties are numerous and have a common interest, some of them may sue and be sued on behalf of all in respect thereof. Further, there is now the same facility in arranging parties to actions in all divisions of the High Court as there was formerly in arranging parties to suits in equity; and the fact that an account has to be taken in order to ascertain what is due from one party to another is no longer any reason why an action by one against the other should fail; at most, such a circumstance may render it expedient to transfer the action from one division of the High Court to the other at some stage of the action. Nor is there any danger now of an action for an account being held unsustainable on the ground that an action for damages is the proper remedy (*f*).

Actions by and against the firm.

With respect to actions by the firm, it has been already

(*e*) *Hybart* v. *Parker*, 4 C. B. N. S. 209; *Evans* v. *Hooper*, 1 Q. B. D. 45; *Gray* v. *Pearson*, L. R. 5 C. P. 568. As to Bills of Exchange, see *ante*, p. 180, note (*a*).

(*f*) See as to the jurisdiction of the Court of Chancery to entertain a suit for an account where there was no partnership, trust, or fraud, *Smith* v. *Leveaux*, 2 De G. J. & Sm. 1; *Moxon* v. *Bright*, 4 Ch. 292; *Hemings* v. *Pugh*, 4 Giff. 456; *Barry* v. *Stevens*, 31 Beav. 258. See, also, as to claims for mere damages, *Great Western Ins. Co.* v. *Cunliffe*, 9 Ch. 525; *Duncan* v. *Luntley*, 2 Mc. & G. 30; *Clifford* v. *Brooke*, 13 Ves. 132.

pointed out that the name of the firm is only a compendious expression, for denoting the individuals composing the firm when the name of the firm is used. It has not yet been decided whether an action in the name of the firm can be maintained by or against one of its own members; but the writer sees no difficulty in principle in supporting such an action; the firm being regarded for the purposes of the action as one collective whole (*g*). This, however, is comparatively an unimportant matter; for if an action in that form cannot be maintained, it is plain that one partner can sue another whenever he has legal or equitable rights to be enforced or adjusted (*h*).

Actions by or against some on behalf of others.

With respect to actions by or against some partners on behalf of themselves and others, it must be borne in mind that suits in this form have long been familiar in courts of equity, and certain rules respecting them have been settled which are not interfered with by the Judicature acts. These rules will be fully investigated presently.

SECTION II.—PARTIES TO ACTIONS BETWEEN PARTNERS.

1. *General rule as to partnership actions.*

General rules as to actions between partners.

In actions between partners not involving any partnership account or any interference with persons against whom no relief is sought, the general principles applicable to actions generally must be observed (*i*). But partnership disputes usually involve the taking of some account in which all the partners are interested, or the granting of an injunction or the appointment of a receiver, which materially affects them all. Hence, it has long been a rule in Chancery that where

(*g*) Such actions are common in Scotland.

(*h*) There may, however, still be difficulties in framing an action properly as in *Robertson* v. *Southgate*, 6 Ha. 536. In that case there was a partnership of three persons, A., B., and C.; A. retired, B. filed a bill against A. and C. to set aside a fraudulent transaction in which the two defendants had concurred; then A. and B. became bankrupt; it was held that the joint assignees of A. and B. could not proceed with the suit against C.

(*i*) *Ante*, book ii. ch. 3.

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the number of partners is not great they must all be parties to a suit for an account if within the jurisdiction of the court (*k*); and subject to the question how far the firm can be treated as representing them all, this rule is still in force.

Action against estate of deceased partner.

Upon a similar principle, where a creditor of a firm sought payment of his debt out of the estate of a deceased partner, the surviving partners had to be made co-defendants with the executors of the deceased (*l*).

Actions for dissolution.

It follows from the same principle that to an action for a dissolution and winding up of an ordinary partnership, all the partners within the jurisdiction must be parties (*m*); and that the representatives of deceased partners must be parties also if they have any interest in the partnership accounts (*n*).

Action for share of ascertained sum.

But although in an action for obtaining payment of a proportion of an unascertained sum, all the persons interested in that sum must, as a general rule, be parties, yet, where the sum to be divided is ascertained, and the shares into which it is to be divided are also ascertained, an action for the payment of one of those shares may be maintained without making the persons interested in the other shares parties (*o*).

Sub-partnership.

So, where the account which is sought is one in which the partnership is not concerned, it is not necessary or proper to make all the partners parties. If, therefore, a partner has agreed to share his profits with a stranger, and the latter seeks an account of those profits, he should bring his action against that one partner alone, and not make the others parties (*p*).

(*k*) See *Hills* v. *Nash*, 1 Ph. 594.

(*l*) *Re Hodgson*, 31 Ch. D. 192; *Wilkinson* v. *Henderson*, 1 M. & K. 582. This subject will be examined hereafter.

(*m*) *Evans* v. *Stokes*, 1 Keen, 24; *Richardson* v. *Hastings*, 7 Beav. 301; *Harvey* v. *Bignold*, 8 ib. 343; *Decks* v. *Stanhope*, 14 Sim. 57; *Wheeler* v. *Van Wart*, 9 ib. 193; *Long* v. *Yonge*, 2 ib. 369; *Moffat* v. *Farquharson*, 2 Bro. C. C. 338; *Ireton* v. *Lewis*, Finch. 96.

(*n*) See *Cox* v. *Stephens*, 9 Jur. N. S. 1144, and 2 N. R. 506; *Baboo Janokey Doss* v. *Bindabun Doss*, 3 Moo. In. App. 175, and *Carthorn* v. *Chalie*, 2 Sim. & Stu. 127, where it appears that a surviving partner will, if necessary, be constituted the legal personal representative of the deceased.

(*o*) See *Weymouth* v. *Boyer*, 1 Ves. J. 416; *Smith* v. *Snow*, 3 Madd. 10. Compare *Hills* v. *Nash*, 1 Ph. 594.

(*p*) *Brown* v. *De Tastet*, Jac. 284; *Raymond's case*, cited by Lord Eldon in *Ex parte Barrow*, 2 Rose, 255; *Bray* v. *Fromont*, 6 Madd. 5; and see *Killock* v. *Greg*, 4 Russ. 285.

This rule, however, does not apply to an action for an account brought by an assignee of a partner's share (*q*): and where an equitable mortgagee of a share in a mine brings an action for foreclosure, all the partners ought to be parties (*r*).

Actions against executors for account of profits.

Whether in an action against the executor of a partner for an account of profits made by wrongfully employing the assets of the deceased in the business of a firm of which the executor is a member, it is necessary to make the other members of the firm parties, is not always easy to decide. The rule appears to be that they are necessary parties if the account sought is an account of all the profits made by the use of the capital of the deceased; but not if the account is confined to so much of those profits as the executors have themselves received (*s*).

Effect of praying injunction.

Although a person may have no interest in the account to be taken, and would therefore be an improper party to an action confined to such account, yet, if an injunction is sought to be obtained against him specially, he must be made a party. For this reason, the Bank of England and Sheriffs are often made parties to actions in which they have no real interest (*t*).

2. *Where some partners may sue or be sued on behalf of themselves and others.*

Some on behalf of themselves and others.

It has been held in many cases, that to a bill praying for a dissolution of a partnership, all the partners, however numerous, are necessary parties, and that consequently, a bill filed by some on behalf of themselves and others, and praying for a dissolution, is bad on demurrer (*u*). This rule is supposed to admit of no exception, and it has, though with expressions of

(*q*) See *Bergmann* v. *Macmillan*, 17 Ch. D. 423; *Whetham* v. *Davey*, 30 ib. 574.

(*r*) *Redmayne* v. *Forster*, 2 Eq. 467.

(*s*) See *Vyse* v. *Foster*, 8 Ch. 309, and L. R. 7 H. L. 318; *Simpson* v. *Chapman*, 4 De G. M. & G. 154. Compare *McDonald* v. *Richardson*, 1 Giff. 81.

(*t*) See, for example, *Vulliamy* v. *Noble*, 3 Mer. 593; *Bevan* v. *Lewis*, 1 Sim. 376.

(*u*) *Evans* v. *Stokes*, 1 Keen, 24; *Richardson* v. *Hastings*, 7 Beav. 301; *Harvey* v. *Bignold*, 8 ib. 343; *Decks* v. *Stanhope*, 14 Sim. 57; *Wheeler* v. *Van Wart*, 9 Sim. 193; *Long* v. *Yonge*, 2 Sim. 369; *Ireton* v. *Lewis*, Finch, 96; *Moffat* v. *Farquharson*, 2 Bro. C. C. 338.

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regret, been held to apply to unincorporated companies as well as to ordinary partnerships (*x*). The reason given for the rule is, that the affairs of a partnership cannot be finally wound up and settled without deciding all questions arising between all the partners, which cannot be done in the absence of any one of them (*y*).

Presence of public officer not sufficient.

Even if a partnership is empowered to sue and be sued by a public officer, his presence is not, in an action for a dissolution, equivalent to the presence of all the partners (*z*).

No instance of decree for dissolution where all the partners were not before the court.

But notwithstanding these numerous authorities, it may be permitted to doubt whether it can be considered as a rule admitting of no exception whatsoever, that to every action for a dissolution, all the partners must individually be parties. All that can on principle be requisite, is that every conflicting interest shall be substantially represented by some person before the court. If, which is possible, the interest of each partner conflicts with that of all the others, then all must undoubtedly be parties. But if the partners are numerous, and it can be shown that they are divisible into classes, and that all the individuals in each class have a common interest, then although the interest in each class conflicts with that of every other class, there seems to be no reason why, if each class is represented by one or two of the individuals composing it, a decree for a dissolution should not be made (*a*). There is not, however, so far as the writer is aware, any case in which a decree for a dissolution has actually been made in the absence of any of the partners.

(*x*) See cases in last note and *Van Sandau* v. *Moore*, 1 Russ. 441; and *Davis* v. *Fisk*, in Farren on Life Assurances, and cited by counsel in Younge's Reports, p. 425.

(*y*) See *Richardson* v. *Hastings*, 7 Beav. 307.

(*z*) See *Van Sandau* v. *Moore*, 1 Russ. 441; *Davis* v. *Fisk*, cited in You. 425; *Abraham* v. *Hannay*, 13 Sim. 581; *Seddon* v. *Connell*, 10 Sim. 58.

(*a*) See *Richardson* v. *Larpent*, 2 Y. & C. C. C. 514, and the observations of Lord Cottenham in *Wallworth* v. *Holt*, 4 M. & Cr. 635. As to *Cockburn* v. *Thompson*, 16 Ves. 321, see the obs. of V.-C. Shadwell, 2 Sim. 380, and observe that the real object was to make the defendants account for the money they had received, and that the question as to want of parties was not raised with reference to that part of the prayer of the bill which sought a dissolution. See, also, Ord. xvi. r. 9, and Ord. lv. rr. 3 to 9.

Action not in terms seeking a dissolution.

In an action not claiming a dissolution, the question of parties turns entirely on the nature of the right sought to be enforced. If an account is required, and it is one in which the interest of *each* partner is distinct from and in conflict with that of *all* the others, then all the partners, however numerous, must be parties, and their representation by others, or by a public officer or secretary, will not be sufficient (*b*). On the other hand, if there are no such conflicting interests as above supposed, it will be sufficient if each distinct interest is represented by a party to the record (*c*).

Wallworth *v.* Holt.

It was held in *Wallworth* v. *Holt* (*d*), that where partners are too numerous to be brought before the Court, and they are divisible into classes, and all the individuals in one class have a common interest, a suit instituted by a few individuals of that class on behalf of themselves and all the other individuals of the same class against the other members of the company, is sustainable. Since this decision, there have been many suits by some shareholders on behalf of themselves and others, praying for very general accounts (but studiously avoiding a prayer for a dissolution), and such suits have been successful whenever the interest of the absent partners has been the same as that of the plaintiffs on the record (*e*).

Actions not seeking division of assets.

When no dissolution is claimed, and no winding up of the partnership is sought, an action may be properly instituted by some of a number of numerous partners, on behalf of themselves and all others whose interest is identical with their own: and this form of action is constantly adopted where numerous

(*b*) See *Van Sandau* v. *Moore*, 1 Russ. 441; *Seddon* v. *Connell*, 10 Sim. 58; *Abraham* v. *Hannay*, 13 ib. 581; *McMahon* v. *Upton*, 2 ib. 473; *Sibley* v. *Minton*, 27 L. J. Ch. 53.

(*c*) Comp. *Harrison* v. *Brown*, 5 De G. & Sm. 728.

(*d*) 4 M. & Cr. 619. *Cockburn* v. *Thompson*, 16 Ves. 321, is an earlier decision on this point. See, too, *Good* v. *Blewitt*, 13 Ves. 397. See, as to some on behalf, &c., in cases of voluntary societies assuming to be corporations, *Lloyd* v. *Loaring*, 6 Ves. 773.

(*e*) See *Apperley* v. *Page*, 1 Ph. 779. See, for other instances, *Cramer* v. *Bird*, 6 Eq. 143; *Wilson* v. *Stanhope*, 2 Coll. 629; *Harvey* v. *Collett*, 15 Sim. 332; *Cooper* v. *Webb*, ib. 454; *Clements* v. *Bowes*, 17 Sim. 167, and 1 Drew. 684; *Richardson* v. *Hastings*, 7 Beav. 323; *Butt* v. *Monteaux*, 1 K. & J. 98; *Sheppard* v. *Oxenford*, ib. 491; *Sibson* v. *Edgeworth*, 2 De G. & S. 73. Compare *Williams* v. *Salmond*, 2 K. & J. 463.

partners seek to make their managers account for secret benefits and advantages obtained by them in breach of the good faith owing to those whose affairs they conduct (*f*); or to rescind contracts into which the partnership has been induced to enter by false and fraudulent representations (*g*). So in the case of mutual insurance societies and friendly societies one member may sue the trustees or committee and one of each class of members as representing all the other members, where the object of the action is to obtain payment of what is due to the plaintiff (*h*).

SECTION III.—CASES IN WHICH COURTS WILL NOT INTERFERE BETWEEN PARTNERS.

General rules as to interference between partners.

There are three general rules by which courts of equity were influenced when their interference was sought by one partner against another, and to which it will be convenient at once to refer; for the same rules are observed by all divisions of the High Court in all actions which before the Judicature acts would have been suits in equity; in other words, in all actions for specific performance, for an account, for a receiver, for an injunction, and in those actions for fraud in which equitable relief as distinguished from the simple recovery of damages is sought. The rules in question, however, have no application to cases in which prior to the Judicature acts one partner could have sued another at law. The rules alluded to are, 1, not to interfere except with a view to dissolve the partnership; 2, not to interfere in matters of internal regulation; 3, not to interfere at the instance of persons who have been guilty of laches.

1. *Of the rule not to interfere except with a view to a dissolution.*

Necessity of praying for a dissolution.

Formerly courts of equity were adverse to interfering at all

(*f*) *Chancey* v. *May*, Prec. in Ch. 592; *Hichens* v. *Congreve*, 4 Russ. 562; *Taylor* v. *Salmon*, 4 M. & Cr. 134; *Beck* v. *Kantorowicz*, 3 K. & J. 237.

(*g*) See *Small* v. *Attwood*, You. 407; and 6 Cl. & Fin. 232.

(*h*) See *Pare* v. *Clegg*, 29 Beav. 589; *Bromley* v. *Williams*, 32 ib. 177; *Harvey* v. *Beckwith*, 2 Hem. & M. 429.

between one partner and another, unless it was for the purpose of dissolving the partnership; or, if it was dissolved already, of finally winding up its affairs. Hence it will be found on reference to the older reported decisions, that if a dissolution was not sought, the Court would not decree a partnership account, nor restrain a partner from infringing the partnership articles, nor protect the partnership assets from destruction or waste. This rule, at no time perhaps very inflexible, has gradually been relaxed; it having been discovered to be more conducive to justice to interfere to prevent some definite wrong, or to redress some particular grievance, than to decline to interfere at all unless complete justice can be done by winding up the partnership, and in that manner settling all disputes. At the same time so difficult is it to shake off old associations, and to run counter to established rules, that traces of the aversion alluded to may yet be found in the decisions of the courts, and especially in those which relate to the specific performance of agreements to form partnerships, and in those which relate to the appointment of receivers and managers. Indeed, notwithstanding the extent to which the rule has been relaxed in actions for an account, or for an injunction, one of the first points for consideration, even now, when one partner sues another for equitable relief, is, can relief be had without dissolving the partnership? Undoubtedly it may, much more certainly than formerly, but not always when perhaps it ought (*i*). Without stopping to inquire how the question is to be answered in any particular case (for that will be discussed hereafter), it may be stated as a general proposition, that courts will not, if they can avoid it, allow a partner to derive advantage from his own misconduct by compelling his co-partner to submit either to continued wrong, or to a dissolution (*j*); and that rather than permit an improper advantage to be taken of a rule designed to operate for the benefit of all parties, courts will interfere in modern times where formerly they would have declined to do so. At the same time courts will not take the management of a going concern into their own hands, and, if they cannot usefully interfere in any other manner, they will

Modern rule.

(*i*) See *infra*, § 6.

(*j*) See *Fairthorne* v. *Weston*, 3 Ha. 392.

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not interfere at all unless for the purpose of winding up the partnership.

2. *Of the rule not to interfere in matters of internal regulation.*

Disinclination to interfere in matters of internal regulation.

A court of justice will not interfere between partners merely because they do not agree. It is no part of the duty of the Court to settle all partnership squabbles: it expects from every partner a certain amount of forbearance and good feeling towards his co-partner; and it does not regard mere passing improprieties, arising from infirmities of temper, as sufficient to warrant a decree for dissolution, or an order for an injunction, or a receiver (*k*). And when partners have themselves agreed that the management of their affairs shall be entrusted to one or more of them exclusively, the Court will not remove the managers, or interfere with them, unless they are clearly acting illegally or in breach of the trust reposed in them (*l*).

Clubs.

The rule not to interfere in matters of merely internal regulation or discipline is strongly exemplified in cases of clubs (*m*).

It is, however, in dealing with disputes between the members of companies that the rule in question is practically of greatest importance. The application of it to them is, however, beyond the scope of the present volume (*n*).

3. *Of the rule not to interfere at the instance of persons who have been guilty of laches.*

Laches a bar to relief in equity;

Independently of the Statutes of Limitation, a plaintiff may be precluded by his own laches from obtaining equitable relief. Laches presupposes not only lapse of time, but also

(*k*) See *Marshall* v. *Colman*, 2 J. & W. 266; *Smith* v. *Jeyes*, 4 Beav. 503; *Lawson* v. *Morgan*, 1 Price, 303; *Cofton* v. *Horner*, 5 Price, 537; *Warder* v. *Stilwell*, 3 Jur. N. S. 9; *Anderson* v. *Anderson*, 25 Beav. 190.

(*l*) See *Lawson* v. *Morgan*, 1 Price, 307; *Waters* v. *Taylor*, 15 Ves. 10.

(*m*) See *Fisher* v. *Keane*, 11 Ch. D. 353; *Labouchere* v. *Wharncliffe*, 13 ib. 346; *Dawkins* v. *Antrobus*, 17 ib. 615.

(*n*) See *Foss* v. *Harbottle*, 2 Ha. 461, and other cases of that class, in the vol. on Companies.

the existence of circumstances which render negligence imputable; and unless reasonable vigilance is shown in the prosecution of a claim to equitable relief, the Court, acting on the maxim, *vigilantibus non dormientibus subveniunt leges*, will decline to interfere (*o*).

to a suit for an account. Sherman *v.* Sherman.

In the early case of *Sherman* v. *Sherman* (*p*), two persons had dealings as merchants; one of them died; his widow filed a bill for an account, but, although the Statute of Limitations did not apply, the bill was dismissed, on the ground that many years had elapsed since the dealings in question had taken place, and the deceased had allowed any claims he might have had to slumber (*q*). Again, where an account has been rendered, and has been long acquiesced in, unless fraud be proved, a court will not re-open it, although the account may be shown to be erroneous, and although no final settlement was ever come to (*r*). The same principle is acted on in taking accounts; for charges long improperly made and acquiesced in, or long omitted to be made, and known so to be, are regarded, in the absence of fraud, as having been made or omitted by agreement, and the question of mistake will not be gone into (*s*).

Acquiescence in account.

Laches in enforcing agreements for partnerships.

The doctrine of laches is of great importance where persons have agreed to become partners, and one of them has unfairly left the other to do all the work, and then, there being a profit, comes forward and claims a share of it. In such cases as these, the plaintiff's conduct lays him open to the remark that nothing would have been heard of him had the joint adventure ended in loss instead of gain; and a court will not aid those who can be shown to have remained quiet in the hope of being able to evade responsibility in case of loss, but of being able to claim a share of gain in case of ultimate success.

(*o*) Laches may preclude relief, although actual assent or intelligent acquiescence on the part of the plaintiff may not be proved, see *Evans* v. *Smallcombe*, L. R. 3 H. L. 256. See, as to acquiescence, *De Bussche* v. *Alt*, 8 Ch. D. 314.

(*p*) 2 Vern. 276.

(*q*) See, too, *Sturt* v. *Mellish*, 2 Atk. 610.

(*r*) *Scott* v. *Milne*, 5 Beav. 215, and on appeal, 7 Jur. 709. See, too, *Williams* v. *Page*, 24 Beav. 654; *Stupart* v. *Arrowsmith*, 3 Sm. & G. 176.

(*s*) *Thornton* v. *Procter*, 1 Anst. 94, and see *ante*, p. 383.

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Cowell v. Watts.

Thus, in *Cowell* v. *Watts* (*t*) the plaintiff and the defendant had agreed to take land for the purpose of improving it, and letting it upon building leases. A long lease was accordingly obtained, and was taken in the name of the defendant. The plaintiff then applied to the defendant to enter into a written agreement upon the subject of their joint adventure, but this the defendant declined. The defendant also assumed to act as sole owner of the land obtained; he removed the plaintiff's cattle from it, and borrowed money on a mortgage of the land, and expended such money in building upon it. The plaintiff all this time did nothing, although he was aware of what was going on. After a lapse of eighteen months the plaintiff, by his solicitor, called upon the defendant to perform the original agreement; and the defendant declining, a suit for specific performance was instituted. The bill, however, was dismissed with costs, on the ground that the plaintiff had by his conduct induced the defendant to suppose that the plaintiff had abandoned the speculation, and that the defendant had the sole right to the land.

Laches where partnership is a mining partnership.

The doctrine now under discussion is especially applicable to mining and other partnerships of a highly speculative character. Mining operations are so extremely doubtful as to their ultimate success, that it is of the highest importance that those engaged in them should know on whom they can confidently rely for aid; if, therefore, a person engages in a mining adventure in partnership with others, and disputes arise between them, and he is denied a partner's rights, he should be careful to assert his claims whilst the dispute is fresh; for if he lies by until the mine has been rendered prosperous by his co-partners, and he then comes forward insisting on his rights as a partner, and seeks equitable as distinguished from legal relief, he will be refused it; on the ground that he has applied for it too late (*u*). On this principle, in *Senhouse* v. *Christian* (*x*), where several persons were lessees of a colliery, and the lease being about to expire, one

Senhouse v. Christian.

(*t*) 2 H. & Tw. 224.

(*u*) See, in addition to the cases cited below, *Alloway* v. *Braine*, 26 Beav. 575, and *Walker* v. *Jeffreys*, 1 Ha. 341.

(*x*) Cited 19 Ves. 157, and reported in a note to 19 Beav. 356.

of them obtained a renewal of it in his own name, Lord Rosslyn dismissed with costs a bill filed by the others claiming the benefit of the renewed lease. The plaintiffs had allowed the defendant to work the colliery single-handed at a great expense; and although they were aware of all the facts when the original lease expired, they did not take any proceedings to enforce their rights until four years afterwards. This case was referred to with approbation by Lord Eldon, in the case of *Norway* v. *Rowe* (*y*), in which he refused a motion for a receiver made on behalf of a person claiming to be a partner, but whose rights had been long denied.

Norway v. Rowe.

Again, in *Prendergast* v. *Turton* (*z*), where the capital subscribed for working a mine was spent, and the plaintiffs refused to contribute more, but the other partners did contribute more, and ultimately, after a lapse of some years, succeeded in making the mine profitable, and then the plaintiffs came forward claiming their shares in the concern, their bill was dismissed by the Vice-Chancellor Knight Bruce, and his decision was affirmed on appeal. The same doctrine was applied in *Clegg* v. *Edmonson* (*a*), the facts of which were similar to those of *Senhouse* v. *Christian*, already referred to. In two respects *Clegg* v. *Edmonson* goes further than the other cases; for first, the defendants had brought in no fresh capital, the mine having paid its own expenses; and secondly, although the plaintiffs had not asserted their claims by legal proceedings, they had constantly insisted on their right to participate in the profits obtained by the defendants under the renewed lease. Upon this point, however, it was observed by the Lord Justice Turner, that he could not agree to a doctrine so dangerous as that a mere assertion of a claim, unaccompanied by any act to give effect to it, can avail to keep alive a right which would otherwise be precluded (*b*).

Prendergast v. Turton.

Clegg v. Edmonson.

(*y*) 19 Ves. 144. There were more grounds than one for this decision, but the case is always regarded as an authority in support of the doctrine acted on by Lord Rosslyn in *Senhouse* v. *Christian*.

(*z*) 1 Y. & C. C. C. 98, and on appeal, 13 L. J. Ch. 238.

(*a*) 8 De G. M. & G. 787. The suit in so far as it sought for an account up to the time of dissolution was sustained.

(*b*) This general proposition must of course be taken with reference

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Rule v. Jewell.

In *Rule* v. *Jewell* (*c*) a member of a cost-book mining company, which was seriously in debt, had his shares forfeited for non-payment of calls. After five years he disputed the validity of the forfeiture and claimed to be reinstated as a partner. But it was held that he was precluded by his own laches from obtaining relief.

Effect of evidence of abandonment.

In the cases already referred to it will be observed that there was no positive evidence that the plaintiff had ever abandoned his rights (*d*); and in *Clegg* v. *Edmonson* there was evidence to show that no abandonment had ever been contemplated. It need, however, scarcely be observed that positive evidence of abandonment, in addition to the negative evidence derived from mere lapse of time, during which nothing has been done by the plaintiff, greatly improves the position of his opponent.

Jekyl v. Gilbert.

There are several cases illustrating this. In *Jekyl* v. *Gilbert* (*e*), two artificers agreed to do work for their joint benefit; after the work was done, the person for whom it was done refused to pay; the defendant requested the plaintiff to join in legal proceedings to compel payment, but the plaintiff declined. Thereupon the defendant brought an action for payment of the work done by him, and obtained a verdict. The plaintiff then claimed half the amount recovered, but the Court held that he was not entitled to any share of it.

Davis v. Johnston.

So if a part-owner of a ship disapproves of a proposed voyage, and arrests the ship until the other part-owners give him security for his share, he is not entitled to any portion of the profits arising from such voyage (*f*).

to the case before the Court. It cannot be laid down as universally true that protests are useless. They exclude inferences which, in their absence, might fairly be drawn from the conduct of the party protesting, and are conclusive to show that no abandonment of right was intended. See in *Hart* v. *Clarke*, *infra*, p. 472.

(*c*) 18 Ch. D. 660. The Statute of Limitations was pleaded, but was held not to be a defence, though the action was not commenced until after six years from the alleged forfeiture. *Sed qu.*

(*d*) In *Prendergast* v. *Turton* perhaps there was, and it is on the ground that there was, that Lord Chelmsford distinguished that case from *Hart* v. *Clarke*, which will be noticed hereafter. See 6 H. L. C. 657-9. See, also, *Garden Gully, &c., Co.* v. *McLister*, 1 App. Ca. p. 57.

(*e*) McNaghten's Select Cases in Chancery, 29.

(*f*) *Davis* v. *Johnston*, 4 Sim. 539.

Reilly *v.* Walsh.

Again, where two persons agreed to take land on lease for a building speculation, and one of them afterwards opposed the prosecution of the speculation and died without ever having done anything to further it, it was held that the equitable estate and the legal estate were in the same person, viz., the survivor, and that he was not a trustee as to any portion of the land for the executors of the deceased (*g*).

A fortiori, if a partner formally withdraws from an adventure when its prospects are bad will he be unable to claim a share of the profits resulting from it if it ultimately proves to be profitable (*h*); such cases, however, are not so much cases of laches as of estoppel or agreements to release.

Cases in which laches has not been a bar to relief.

It is now necessary to advert to one or two cases apparently at variance with the foregoing, and in which persons claiming the rights of partners have succeeded in obtaining the assistance of a court of equity, although their demands have been stale, and although the success of the joint adventure has been due to the exertions of those against whom those demands were made.

Lake *v.* Craddock.

The case of *Lake* v. *Craddock* (*i*) is sometimes referred to as one of the class now in question. But this case, in truth, only decided that if one of several partners chooses to claim the benefit of partnership dealings, after having for some time ceased to take any part in the affairs of the partnership, he must contribute his share of the outlays made by the other partners, with interest. It was not decided in *Lake* v. *Craddock* that a partner could, on the above terms, claim the benefit of what had been done by the others; and although the decree gave a partner who had long abandoned the concern the option of either claiming a share on proper terms, or of being excluded altogether, the other partners do not appear to have raised any objection to this option being given.

The cases which are most at variance with those referred to

(*g*) *Reilly* v. *Walsh*, 11 Ir. Eq 22.

(*h*) *Maclure* v. *Ripley*, 2 Mac. & G. 275.

(*i*) 3 P. W. 158. The bill in effect was filed by the plaintiff against four persons, his co-partners for an account. One of the defendants had long ceased to take any part in the partnership affairs. An account was decreed, and liberty was given to this defendant to come in on terms, or to be excluded. He appealed, being discontented with the terms imposed.

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in the preceding pages, are the recent cases of *Hart* v. *Clarke* and *Clements* v. *Hall*.

Hart v. Clarke.

In *Hart* v. *Clarke* (*k*) the facts were shortly as follows,—a mining company was formed on the cost-book principle, and there was no express agreement authorising the forfeiture of shares on the non-payment of calls. The plaintiff and the defendants were lessees of the mine, and the only shareholders therein. Money being required for carrying on the mine, and the plaintiff not furnishing his proportion of the sum required, was, on more than one occasion, informed that on continued non-payment his shares would be forfeited, and ultimately they were declared forfeited. The plaintiff, who had all along denied the power of his co-adventurers to forfeit his shares, and had suggested modes of obtaining money which they had not approved, gave them notice that, in the event of the mine proving successful, he should expect his share of the profits, and should, if necessary, take legal proceedings to enforce his claim. A year and a half then elapsed, and at the end of that time he asserted his claim; and the defendants refusing to recognise it, a bill was filed for an account. The Master of the Rolls held it to be clear that no number of partners could exclude another partner and forfeit his share, but that the plaintiff was not entitled to be considered as still a partner; (1), because the notice to forfeit his share might be regarded as a notice to dissolve the partnership; and (2), because for nearly two years he had taken no step whatever to assert his rights, but had allowed other people to work the mine, and had only come forward when he found it had proved a profitable speculation. On appeal it was also held, that the supposed right to forfeit had no existence; but it was further held, (1), that the notice of forfeiture could not operate as a dissolution, inasmuch as that was not the object with which the notice had been given; and, (2), that, under the peculiar circumstances

(*k*) *Clarke* v. *Hart*, 6 H. L. C. 633, affirming *Hart* v. *Clarke*, 6 De G. M. & G. 232, and reversing S. C. 19 Beav. 349. See, also, *Garden Gully, &c., Co.* v. *McLister*, 1 App. Ca. 39, also a case of forfeiture. Compare *Rule* v. *Jewell*, 18 Ch. D. 660. Shares in cost-book companies may now be forfeited, see 32 & 33 Vict. c. 19, § 16, &c.

of the case, the plaintiff could not be held to have shown any intention to abandon the undertaking, and that the nature of mining speculations was such as to render it inequitable to lay down as a general rule that no adventurer should be entitled to relief in equity when the adventure becomes productive, unless he had paid up his calls whilst it remained unproductive.

Ground of the decision in the last case.

The ground of the decision in the above case, and that which distinguishes it from *Senhouse* v. *Christian* and other cases alluded to above, is this, viz., that the plaintiff in *Hart* v. *Clarke* had, as one of the lessees of the mine, a legal interest therein, which nothing had displaced. The Court, therefore, was in this position: it was compelled either to make a decree in favour of the plaintiff, or to declare him a trustee of his share in the mine for the defendants; and there not being sufficient grounds for justifying the latter alternative, the former was necessarily adopted (*l*). Upon no other ground can the case, it is submitted, be distinguished from *Clegg* v. *Edmonson* and the other cases alluded to above; for, although reliance was placed, in the judgment in *Hart* v. *Clarke*, on the distinct notice given by the plaintiff that he did not acquiesce in the defendant's conduct, and should insist on his rights, it was decided in *Clegg* v. *Edmonson* that a protest did not enlarge the time within which redress must be sought in a court of equity (*m*).

Clements v. Hall.

Clements v. *Hall* (*n*) is another case in which, notwithstanding the lapse of a considerable time, it was held that relief ought to be given to a person claiming an interest in a mine; but the facts in that case were very peculiar, and four judges were equally divided, Lord Cranworth and Lord Justice Turner holding that the plaintiff was entitled to relief, whilst Lord Justice Knight Bruce and Lord Romilly were of a contrary opinion. The facts were in substance as follows. A. and B. were lessees of a mine which they worked as partners. The lease expired, but the lessees continued in posses-

(*l*) See acc. *Rule* v. *Jewell*, 18 Ch. D. 660.

(*m*) *Ante*, p. 469.

(*n*) 2 De G. & J. 173, and 24 Beav. 333.

sion as tenants from year to year, and worked the mine as before. In 1847 A. died, leaving C. his executor, and bequeathing an interest in the mine to D. B., after the death of A., worked the mine alone, claiming it as his own entirely, and refusing to give any account to C., who, however, constantly pressed for one. In 1850 B. negotiated for and obtained from the landlord a new lease, but on more onerous terms than before. Of this C. had no notice. After the new lease, B., who since the death of A. had only kept the mine going, began to work it in earnest and at a profit; and in 1851 D. filed a bill against B. and C. to establish his interest in the mine. C. admitted D.'s title, but B. put in no answer, and the suit was not prosecuted. In 1853 B. died and C. became his representative. In 1854 the plaintiff, who was the assignee of D.'s interest, filed a bill in the nature of a supplemental bill to D.'s former bill, and sought to have D.'s interest in the mine secured for his, the plaintiff's benefit. C., who as the representative of A. had admitted D.'s right in his suit, now, as representative of B., opposed the plaintiff's claim, and insisted on lapse of time as a defence to the suit. But it was held, (1), that on A.'s death, his interest in the mine did not determine; (2), that his estate was entitled to share the benefit of the renewed lease; (3), that A.'s representative was not precluded in 1853 from asserting this right against B., inasmuch as B. had kept A.'s representative in ignorance of the real state of the concern; and, (4), that there had been no laches on the part of the plaintiff or of D., through whom he claimed, inasmuch as, since 1851, there had been a bill on the file to secure their interest.

Effect of recognition of title.

Lastly, on the subject of laches it may be observed that, as positive evidence of abandonment materially strengthens the case of those resisting a stale demand, so, on the other hand, positive evidence of recognition affords an answer to a defence grounded on laches and lapse of time. Thus, where a shareholder in a company became bankrupt, but his shares were carried in the books of the company to a separate account, and he was regularly credited with the dividends which became payable in respect of those shares, his assignees were held entitled to the shares and accumulated dividends, although

twenty years had elapsed since any claim had been made to them (*o*).

Result of the cases.

Notwithstanding *Hart* v. *Clarke* and *Clements* v. *Hall*, it is submitted that the doctrine laid down and acted upon in *Norway* v. *Rowe*, *Senhouse* v. *Christian*, *Prendergast* v. *Turton*, *Clegg* v. *Edmonson*, and *Rule* v. *Jewell* may still be safely relied on in all cases except those in which the court can be driven, as it was in *Hart* v. *Clarke*, to the alternative of holding either that the plaintiff is entitled to relief, or that he has abandoned and lost his former *legal* status (*p*).

Demurrer on the ground of laches.

Laches if relied on as a defence to an action ought to be expressly pleaded; it cannot be taken advantage of by demurrer, or its modern equivalent, if it can only be made out inferentially from the statements in the claim (*q*).

SECTION IV.—ACTIONS FOR SPECIFIC PERFORMANCE.

General rule against specific performance of agreements for partnership.

If two persons have agreed to enter into partnership, and one of them refuses to abide by the agreement, the remedy for the other is an action for damages, and not, excepting in the cases to be presently noticed, for specific performance. To compel an unwilling person to become a partner with another would not be conducive to the welfare of the latter, any more than to compel a man to marry a woman he did not like would be for the benefit of the lady. Moreover, to decree specific performance of an agreement for a partnership at will would be nugatory, inasmuch as it might be dissolved the moment after the decree was made; and to decree specific performance of an agreement for a partnership for a term of years would involve the court in the superintendence of the partnership throughout the whole continuance of the term. As a rule,

(*o*) *Penny* v. *Pickwick*, 16 Beav. 246. See, too, the recognition of title in *Clements* v. *Hall*, *ante*, p. 473.

(*p*) See, also, *Garden Gully, &c., Co.* v. *McLister*, 1 App. Ca. 39, which shows that in such a case as *Hart* v. *Clarke*, something more than mere laches is necessary to deprive a plaintiff of relief. In *Beningfield* v. *Baxter*, 12 App. Ca. 167, there was a fiduciary relation.

(*q*) See *Delaraine* v. *Browne*, 3 Bro. C. C. 633; Mitf. Pl. 212; *Turner* v. *Borlase*, 11 Sim. 17.

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therefore, courts will not decree specific performance of an agreement for a partnership (*r*). Nor will specific performance be decreed of an agreement to become a partner and bring in a certain amount of capital, or in default to lend a sum of money to the plaintiff (*s*).

Cases in which a decree will be made.

However, if the parties have agreed to execute some formal instrument which would have the effect of conferring rights which do not exist so long as the agreement is not carried out, in such a case, and for the purpose of putting the parties into the position agreed upon, the execution of that formal instrument may be decreed, although the partnership thereby formed might be immediately dissolved (*t*). The principle upon which the Court proceeds in a case of this description, is the same as that which induces it to decree execution of a lease under seal, notwithstanding the term for which the lease was to continue has already expired (*u*).

England *v.* Curling.

In *England* v. *Curling* (*x*), the plaintiff and two of the defendants agreed to become partners as ship agents, for seven, fourteen, or twenty-one years, and they signed with their initials an agreement to that effect. A deed was prepared to carry out the agreement; the deed, however, was never executed, and it differed somewhat from the agreement. The parties carried on business as partners under the agreement for eleven years, and then they began to quarrel. The defendant Curling, who appears to have been in the wrong from the beginning, gave notice to dissolve in three months; he retired from the partnership, and entered into partnership with other persons, and carried on business with them on the premises and in the name of the old firm. The new firm opened the

(*r*) *Scott* v. *Rayment*, 7 Eq. 112; *Hercy* v. *Birch*, 9 Ves. 357; *Sheffield Gas, &c., Co.* v. *Harrison*, 17 Beav. 294; *Downs* v. *Collins*, 6 Ha. 418. See, also, *Maxwell* v. *The Port Tennant Co.*, 24 Beav. 495, and *Vivers* v. *Tuck*, 1 Moore, P. C. N. S. 516, where, however, there was fraud. See, generally, Fry on Spec. Perf. pt. vi. ch. 3, ed. 2.

(*s*) *Sichel* v. *Mosenthal*, 30 Beav. 371.

(*t*) *Buxton* v. *Lister*, 3 Atk. 385, and see 1 Swanst. 513, note, and *Stocker* v. *Wedderburn*, 3 K. & J. 403.

(*u*) See *Wilkinson* v. *Torkington*, 2 Y. & C. Ex. 726, and the cases there cited.

(*x*) 8 Beav. 129. See the observations of Lord Romilly on this case, in 30 Beav. 376.

letters addressed to the old one, and gave notice of its dissolution to its correspondents. The plaintiff then filed a bill for specific performance and an injunction, and he obtained a decree (*y*).

Specific performance where an account only is wanted.

The only other class of cases in which anything like specific performance of an agreement for a partnership will be decreed, is where a person who has agreed with another to share the profits of some joint adventure, seeks to obtain that share after the adventure has come to an end. Although the decree giving him the relief he asks may be prefaced by a declaration that the agreement relied upon ought to be specifically performed, this has not the effect of creating a partnership to be carried on by the litigants, but merely serves as a foundation for the decree for an account, which is the substantial part of what is sought and given. An instance of this class of cases is afforded by *Dale* v. *Hamilton* (*z*). There, in substance, three persons had agreed to purchase land; to build on it and improve it; and then to sell it for their common benefit. Land was accordingly obtained, built upon, and improved, and subsequently the right of one of the three persons to any share in the adventure was denied by the other two. He thereupon filed a bill for a sale of the land, for an account of the joint speculation, and for a proper distribution of the monies arising from the sale; and the Court held him entitled to this relief.

Dale *v.* Hamilton.

Another instance of the same kind is afforded by *Webster* v. *Bray* (*a*). In that case the plaintiff and the defendant had been jointly retained as solicitors to a company. They were

Webster *v.* Bray.

(*y*) The following was the minute of the decree:—"The Court doth declare that the agreement for a co-partnership, dated, &c., is a binding agreement between the parties thereto, and ought to be specifically performed and carried into execution, and doth order and decree the same accordingly. Refer it to the Master to inquire whether any and what variations have been made in the said agreement by and with the assent of the several parties thereto since the date thereof. Let the Master settle and approve of a proper deed of co-partnership between the said parties in pursuance of the said agreement, having regard to any variations which he may find to have been made in the said agreement as hereinbefore directed, and let the parties execute it. Continue the injunction against the defendant Curling."

(*z*) 5 Ha. 369, and 2 Ph. 266.

(*a*) 7 Ha. 159.

not in partnership as solicitors generally, but the plaintiff insisted that they were partners as regarded the business done for the company, and that the payments made by the company to each ought to be shared by both. The defendant insisted that there was no partnership, and that each was to be paid for the work done by himself, and to retain for his own benefit all payments in respect of such work. The plaintiff having resigned, filed a bill for an account, and the Court made a decree in his favour, declaring that the plaintiff and the defendant were jointly and equally interested in the profits and loss of the business transacted by them, or either of them, as solicitors to the company (*b*).

Other cases of specific performance between partners.

Relief in the shape of specific performance may be required for other purposes besides carrying into execution agreements to form partnerships. The assistance of a Court is often requisite to compel those engaged in a going concern, to act conformably to the articles of partnership; and also to compel those who have dissolved partnership, to observe the stipulations into which they have entered. The principles on which the Courts act in granting or withholding assistance when sought for the former purpose, will be considered hereafter; and with respect to the specific performance, after a dissolution of partnership, of agreements entered into by the partners previously to, or at the time of dissolution, it need only be observed that relief will be granted or refused upon the principles by which the Court is ordinarily guided in questions of specific performance, and that nothing turns on the circumstance of the litigants having been partners. It would, therefore, be foreign to the objects of the present treatise to prosecute this subject further; but for purposes of reference, it may be useful to mention that the Court has enforced the following agreements entered into upon or with a view to a dissolution; namely—

Agreements not to carry on business within a certain distance or for a certain space of time (*c*);

(*b*) *Robinson* v. *Anderson*, 20 Beav. 98, and 7 De G. M. & G. 239, is a similar case.

(*c*) *Whittaker* v. *Howe*, 3 Beav. 383; *Turner* v. *Major*, 3 Giff. 442; and see *Coates* v. *Coates*, 6 Madd. 287, and *Williams* v. *Williams*, 1 Wils. Ch. 473, note.

Agreements as to the custody of partnership books and the furnishing of copies thereof (*d*);

Agreements that a third party, and he only, shall get in debts (*e*);

Agreements that the value of the share of an outgoing or a deceased partner, shall be ascertained in a specified way and taken accordingly (*f*);

Agreements that an outgoing partner shall offer his share to his co-partners, before selling it to other persons (*g*);

Agreements to grant an annuity to a retiring partner and his widow (*h*);

Agreements not to divulge or make use of a trade secret (*i*).

SECTION V.—ACTIONS FOR MISREPRESENTATION AND FRAUD.

1. *General observations.*

The proper remedy for a person who has been induced by fraud to become a partner with another, depends in the first place on who the person is who committed the fraud. Speaking generally and subject to certain qualifications which will be noticed hereafter, if the fraud complained of has been committed by the other partner, the person defrauded has the

(*d*) *Lingen* v. *Simpson*, 1 Sim. & Stu. 600, and see *Whittaker* v. *Howe*, 3 Beav. 383.

(*e*) *Davis* v. *Amer*, 3 Drew. 64; *Turner* v. *Major*, 3 Giff. 442.

(*f*) *Morris* v. *Kearsley*, 2 Y. & C. Ex. 139; *Essex* v. *Essex*, 20 Beav. 442; *King* v. *Chuck*, 17 Beav. 325; and see *Featherstonhaugh* v. *Turner*, 25 Beav. 382, and *Gibson* v. *Goldsmid*, 5 De G. M. & G. 757, reversing S. C. 18 Beav. 584. Compare *Downs* v. *Collins*, 6 Ha. 418, where to have enforced the agreement would have been to decree specific performance of a contract for a partnership; and *Cooper* v. *Hood*, 7 W. R. 83, where a decree was refused on the ground that the agreement sought to be enforced was too vague in its terms. See, as to agreements for a valuation, *ante*, p. 432.

(*g*) *Homfray* v. *Fothergill*, 1 Eq. 567.

(*h*) *Aubin* v. *Holt*, 2 K. & J. 66; *Page* v. *Cox*, 10 Ha. 163. See, also, *Murray* v. *Flavell*, 25 Ch. D. 89, and *Bonville* v. *Bonville*, 6 Jur. N. S. 414, M. R., where the agreement sued upon was decided not to bear the construction contended for by the plaintiff.

(*i*) *Morison* v. *Moat*, 9 Ha. 241.

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option of affirming or of rescinding the contract into which he has been induced to enter; and whether he affirms it or disaffirms it he is entitled to damages for any loss which he may have sustained by reason of the fraud (*k*). But if the fraud has been committed by some third person and is not in point of law imputable to the other partner, then the person defrauded has no such option: he cannot rescind the contract: he can only sue those who defrauded him for damages. But it will be observed from this general statement that in cases of this class there is always a preliminary question to be considered, and which, if negatived, leaves the complainant without any redress at all: that question is, Has he in fact been induced by fraud to enter into the contract of which he complains? On this preliminary question a few observations may be useful.

1. Untruth necessary.

No attempt is ever made to give any precise definition of fraud, or to restrict by words the circumstances which may be regarded as amounting to it in point of law. New cases of fraud must always be met by new decisions. But by the law of this country a sharp line is drawn between a breach of a promise or the disappointment of hopes raised by the expression of intentions or expectations, on the one hand, and an untrue statement on the other (*l*); and speaking generally there is no fraud sufficient to support an action for damages or to set aside a contract in the absence of some untrue statement of fact or of some concealment of fact which makes what is stated substantially untrue (*m*).

(*k*) *Small* v. *Attwood*, You. 507, and 6 Cl. & Fin. 232; *Pulsford* v. *Richards*, 17 Beav. 87; *Cruikshank* v. *McVicar*, 8 Beav. 106. And see *Beck* v. *Kantorowicz*, 3 K. & J. 230, and cases of that class.

(*l*) See *Jordan* v. *Money*, 5 H. L. C. 185; *Harris* v. *Nickerson*, L. R. 8 Q. B. 286; *Smith* v. *Chadwick*, 9 App. Ca. 187. *Houldsworth* v. *City of Glasgow Bank*, 5 App. Ca. 317, is not opposed to this; it turned on the statutory enactments relating to the winding up of companies.

(*m*) See as to concealment, *New Sombrero Phosphate Co.* v. *Erlanger*, 3 App. Ca. 1218, and 5 Ch. D. 73; *Peek* v. *Gurney*, L. R. 6 H. L. 377, and 13 Eq. 79; *Central Rail. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99; *Oakes* v. *Turquand*, ib. 325; *New Brunswick, &c., Rail. Co.* v. *Muggeridge*, 1 Dr. & Sm. 381. See, also, *Gover's case*, 1 Ch. D. 182, and the judgment of Fry, J., in *Davies* v. *Lon. & Prov. Marine Ins. Co.*, 8 Ch. D. 474.

In the next place the untrue statement must relate to some material matter, and have been made to the complainant directly, or indirectly as one of the public (*n*), and have been in fact relied upon by him (*o*).

2. Untruth must be material and have been relied upon.

Whether the untrue statement must have been untrue to the knowledge of the person making it has given rise to much controversy. If, indeed, he had no honest belief in its truth his ignorance of its untruth is immaterial. But if he honestly believed it to be true, courts of law and courts of equity have taken different views. It seems, however, now to be settled that, except under special circumstances, an action for damages will not lie in such a case, although an action to rescind a contract founded on the statement can be maintained (*p*). These two classes of actions require further notice.

3. Whether the untruth must have been known at the time.

2. *Actions for damages.*

Actions for misrepresentation.

Where a person has been induced by the false and fraudulent representations of another to enter into partnership with him, an action will clearly lie at the suit of the first person against the second for the recovery of damages in respect of such fraud (*q*). And if false representations are made by means of advertisements issued for the purpose of inducing persons to take shares, &c., any person who is ensnared by those advertisements, and acts on the faith of them, may maintain an action against those persons who caused them to be published, knowing them to be false (*r*). In order to maintain an action

(*n*) That this is sufficient see *Clarke* v. *Dickson*, 6 C. B. N. S. 453.

(*o*) See *Smith* v. *Chadwick*, 9 App. Ca. 187; *Bellairs* v. *Tucker*, 13 Q. B. D. 562; *Pulsford* v. *Richards*, 17 Beav. 87, and others of that class. In the remarkable case of the *Panama and South Pacific Telegraph Co.* v. *India Rubber Co.*, 10 Ch. 515, it was held that a contract might be rescinded for fraud subsequent to its date, but rendering its performance impossible.

(*p*) *Ante*, pp. 163 *et seq.* *Slim* v. *Croucher*, 1 De G. F. & J. 518, has not been followed. The Court apparently thought that an action for damages might have been maintained at law. In support of the statement in the text, see *Arkwright* v. *Newbold*, 17 Ch. D. 301; *Redgrave* v. *Hurd*, 20 Ch. D. 1; *Newbigging* v. *Adam*, 34 Ch. D. 582. As to misrepresentations of authority, see *Firbank's Ex.* v. *Humphreys*, 18 Q. B. D. 54, and the cases there cited.

(*q*) See the cases in the next two notes, and *Dobell* v. *Stevens*, 3 B. & C. 623.

(*r*) *Edgington* v. *Fitzmaurice*, 29

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for misrepresentation, it is not necessary that there should have been any direct communication between the defendant and the plaintiff (*s*).

3. *Actions for rescission of contract.*

Rescission of contracts of partnership.

Where a person is induced by the false representations of others to become a partner with them, the Court will rescind the contract of partnership at his instance; and will compel them to repay him whatever he may have paid them, with interest, and to indemnify him against all the debts and liabilities of the partnership, and if the defendants have been guilty of fraud against all claims and demands to which he may have become subject by reason of his having entered into partnership with them, he on the other hand accounting to them for what he may have received since his entry into the concern (*t*).

Pillans *v.* Harkness.

The case of *Pillans* v. *Harkness* (*u*) affords a good example of this. In that case the plaintiff was induced by the fraud of the defendants to enter into partnership with them in a fishing business. They got money from him but contributed nothing themselves; they nevertheless induced him to sign a deed, stating that they had brought in their shares of capital. They deceived him for two years and referred him, when pressed, to books which, when examined, were found without any entry in them. The plaintiff then filed a bill against his partners for a

Ch. D. 459. Compare *Smith* v. *Chadwick*, 9 App. Ca. 187; *Bellairs* v. *Tucker*, 13 Q. B. D. 562. Older cases are *Davidson* v. *Tulloch*, 3 McQu. 783; *Cullen* v. *Thomson's Trustees & Kerr*, 4 ib. 424; *Bale* v. *Cleland*, 4 Fos. & Fin. 117; *Gerhard* v. *Bates*, 2 E. & B. 476; and see *Denton* v. *The Great North. Rail. Co.*, 5 E. & B. 860; *Watson* v. *Clark-mont*, 12 Q. B. 856.

(*s*) See *Clarke* v. *Dickson*, 6 C. B. N. S. 453; and see *Bedford* v. *Bagshaw*, 4 H. & N. 538.

(*t*) See, in addition to the cases noticed in the text, *Ex parte Broome*, 1 Rose, 71, and 1 Coll. 598, note; *Hamil* v. *Stokes*, Dan. 20, and 4 Price, 161; *Steinbank* v. *Fernley*, 9 Sim. 556; *Jauncey* v. *Knowles*, 8 W. R. 69. *Clifford* v. *Brooke*, 13 Ves. 131, was not a case of this class; the plaintiff there sought to recover money which he had paid, not for the admission of himself, but for the admission of his brother into partnership with the defendants. The plaintiff's remedy under these circumstances was held to be by an action at law.

(*u*) Colles, 442 (called *Harkness* v. *Steward*, and *Steward* v. *Harkness*, in the table of cases to the Dublin edit. of 1789).

discovery of their transactions and for the recovery of his money (*x*). The Chancellor decreed them to account for all monies paid by the plaintiff to them or either of them, and to pay what should appear due to him with interest, the plaintiff to be absolutely discharged from the articles, agreements, and partnerships, the defendants to indemnify him from all costs and damages whatsoever touching the articles, or any partnership in respect thereof, and to pay the costs of the suit. This decree was affirmed on appeal to the House of Lords.

Although the plaintiff might have ascertained the truth. Rawlins *v.* Wickham.

Another case of the same description is *Rawlins* v. *Wickham* (*y*). There the plaintiff was induced by the misrepresentations of two persons, A. and B., to enter into partnership with them as bankers, and he and they, after carrying on their business for four years, transferred it to other parties. Shortly after this transfer, the plaintiff for the first time became aware of the falsity of the statements by which he had been induced to become a partner. He brought an action against A. and B. for their misrepresentations; pending the proceedings at law, A. died, but the action was continued against B., and a verdict against him for damages was obtained. After the verdict B. became insolvent, and thereupon the plaintiff filed a bill against B. and the executors of A., praying that the partnership into which he had entered might be declared void, that the partnership articles might be cancelled, that the defendants might be decreed to repay him the sum paid by him on entering into the partnership, with interest, and to execute a sufficient indemnity against the outstanding debts and liabilities, which the plaintiff had or might become subject to, in respect of the dealings and transactions of the partnership, and for an account of such debts and liabilities, and of the monies already paid

(*x*) The defendants relied on the lapse of time and laches and acquiescence on the part of the plaintiff; and particularly on the fact that he had entered into another agreement with them to the effect that the defendants should become partners in another fishing concern and share their profits in that with the plaintiff, and that such partnership had been entered into. The evidence, however, failed to show that the plaintiff had any knowledge of this alleged other partnership, or that he was aware of what had been going on, until shortly before he filed his bill.

(*y*) 1 Giff. 355, and 3 De G. & J. 304.

by the plaintiff on account of the partnership debts, and for repayment of such monies with interest. A decree was made in the plaintiff's favour, and an appeal by A.'s executors was dismissed. In this case the deceased partner had clearly been a party to the misrepresentation; and although it was proved that he was ignorant of the real truth, and had not stated that to be true which he knew to be false, still it was held that he ought not to have stated what he did not know to be true, and that he was answerable for the falsity of his own assertions. It was also held that the plaintiff was entitled to assume that the statements made to him were true until he had reason to suppose that they were not; and that it was no answer to him that if he had examined the partnership books he would have discovered the true state of affairs (*z*).

Newbigging v. Adam.

Newbigging v. *Adam* (*a*) and *Mycock* v. *Beatson* (*b*) are more recent illustrations of the same doctrine. In the first of these cases it was held that where there is a right to rescind for misrepresentation, but not fraudulent, the right of the plaintiff to indemnity is less extensive than it is where he is in a position to claim damages for a fraudulent misrepresentation. In the second of the above cases the plaintiff was held entitled to a lien on the partnership assets (after satisfying the debts and liabilities) for the money he had paid on entering into the partnership; and also to stand in the place of any creditor of the partnership whom he paid off.

Extent of indemnity.

Mycock v. Beatson.

Lien for purchase money, &c.

Rescission of contracts made on a dissolution of partnership.

Besides being called upon to rescind agreements for the formation of a partnership, Courts are frequently applied to by partners, or those claiming under them, to rescind agreements of other descriptions, and especially agreements come to on or after a dissolution.

(*z*) See, also, *Jauncey* v. *Knowles*, 8 W. R. 69, where there was also means of knowledge. Compare *Jennings* v. *Broughton*, 17 Beav. 234, and 5 De G. M. & G. 126, where the plaintiff did not rely on the defendant's statements.

(*a*) 34 Ch. D. 582. The defendants were declared "jointly and severally bound to indemnify the plaintiff against all outstanding debts, claims, demands, and liabilities, which the plaintiff had become or might become subject to, or be liable to pay for or on account or in respect of the dealings and transactions of the partnership:" not necessarily equivalent to an indemnity against the consequences of having entered into the partnership. See the judgment of Bowen, L. J.

(*b*) 13 Ch. D. 384.

Bad bargain not set aside if there has been no fraud.

Supposing every member of a firm to be *sui juris*, any one may retire upon any terms to which he and his co-partners may choose to assent; and if there is no fraud or concealment on either side, all will be bound by any agreement into which he and they may enter, although it may ultimately turn out that a bad bargain has been made.

Knight *v.* Marjoribanks.

For example, in *Knight* v. *Marjoribanks* (*c*) certain persons were partners in a speculation in Australia. The speculation was not at first successful, and it was necessary for the partners frequently to contribute large sums of money for the purpose of carrying it on. The plaintiff, who was one of the partners, was greatly pressed for money, and was unable to contribute his proportion of the required capital. A sum of upwards of 5000*l.* was alleged to be due from him to the concern; he never questioned the accuracy of this statement, but assented to its correctness, and he never examined or sought to examine any books or accounts; and in consideration of the sum so alleged to be due, and of 250*l.* cash, he assigned all his interest in the concern to his co-partners, and released them from all demands. The speculation afterwards proving profitable, he sought to set aside this transaction on the ground of fraud and inadequacy of consideration. But as no fraud was proved, as the plaintiff knew very well what he was about, as he was content that no accounts should be taken, and that no person should act as his adviser, and as, although he was undoubtedly in distress, and his co-partners knew it, yet they had taken no unfair advantage of that circumstance, it was held both by Lord Langdale, and by Lord Cottenham on appeal, that the transaction was binding and could not be impeached (*d*).

Any arrangement which, on the principle here adverted to, is binding on the partners themselves, will also, as a general rule, be binding as between the trustee in bankruptcy or executors of the retiring partners on the one hand, and the continuing partners and their trustees or executors on the

(*c*) 11 Beav. 322, and 2 Mac. & G. 10.

(*d*) See, also, *Ex parte Peake*, 1 Madd. 346; *Ramsbottom* v. *Parker*, 6 Madd. 5; *M'Lure* v. *Ripley*, 2 Mac. & G. 274; *Cockle* v. *Whiting*, Taml. 55.

other (*e*). But as regards trustees in bankruptcy, it must not be forgotten that they can set aside arrangements entered into in fraud of creditors, although such arrangements may be binding as between the parties to them and their respective executors (*f*).

Agreements made on a dissolution and based on false accounts.

Notwithstanding the inability of a retiring partner, and of those claiming under him, to avoid an agreement fairly come to between him and his co-partners, the good faith and open dealing which one partner has a right to expect from another never require to be more scrupulously observed than when one of them is retiring upon terms agreed to upon the strength of representations as to the state of the partnership accounts; and an agreement entered into on a dissolution will be set aside if it can be shown to have been based upon error or to have been tainted by fraud, whether in the shape of positive misrepresentation or of concealment of the truth. Thus, in *Chandler* v. *Dorsett* (*g*), the plaintiff and the defendant dissolved partnership; an account was drawn up by the defendant, who made it appear that there was a balance against the plaintiff. The plaintiff gave his note for the amount of this balance, and afterwards having discovered mistakes in the account, filed a bill for a new account. The defendant pleaded an account stated: but the Court decreed that the defendant should come to a new account, and that what should appear to be due on taking it should be paid with interest. So, in *Spittal* v. *Smith* (*h*), where the plaintiff was entitled to a share of the produce of a whaling voyage, and the defendant paid him a sum of money as his share, for which the plaintiff gave a receipt; it was held that as there had been concealment on the part of the defendant, the plaintiff was entitled to an inquiry as to whether certain deductions which had been made were proper.

Chandler *v.* Dorsett.

Spittal *v.* Smith.

Arrangements with an expelled partner.

As has been more than once observed in the course of the

(*e*) *Ex parte Peake*, 1 Madd. 346; *Ramsbottom* v. *Parker*, 6 Madd. 5; *Luckie* v. *Forsyth*, 3 Jo. & Lat. 388.

(*f*) See *Anderson* v. *Maltby*, 2 Ves. J. 255; *Billiter* v. *Young*, 6 E. & B. 40; *Warden* v. *Jones*, 23 Beav. 497; *Heilbut* v. *Nevill*, L. R. 4 C. P. 354, affirmed 5 C. P. 478.

(*g*) Finch, 431. See, too, *Maddeford* v. *Austwick*, 1 Sim. 89.

(*h*) Taml. 45.

present treatise, the principles illustrated by the foregoing decisions apply most strongly to the case of a partner who is expelled by the others. Powers of expulsion are always construed strictly, and unless they are exercised with perfect good faith, the expulsion will be declared void, and the partner wrongfully expelled will be restored to his position, and will not be held bound by accounts which may have been signed by him in ignorance of material facts (*i*).

Agreements made with the representatives of a deceased partner.

Hitherto the arrangement entered into, and afterwards called in question, has been supposed to have been made between the partners themselves. But more difficulty arises where an arrangement is entered into between the representatives of a deceased partner on the one hand, and the continuing partners on the other. Two cases have here to be considered, according as the representative of the deceased is or is not himself a partner in the firm.

1. Where the representative is not himself a partner.

If an executor of a deceased partner is not a member of the firm, it is competent for him and the surviving partners to agree that the share of the deceased shall be ascertained in a particular way, or be taken at a certain value. And although it has been said that the creditors, or other persons interested in the estate of the deceased, may impeach such an agreement by instituting proceedings against the surviving partners and the executors of the deceased (*k*), still agreements of the kind in question cannot be successfully impeached, unless there has been some fraud or collusion between them and the executors. In *Davies* v. *Davies* (*l*) Lord Langdale observed :—

Davies v. Davies.

"It has been said in the course of the argument, that in a suit constituted as this is against the executor and surviving partner of the testator, for an account of the partnership transactions, it was not necessary to prove the fraud and collusion which are charged in the bill, and the case of *Bowsher* v. *Watkins* was cited in support of that proposition. I well recollect that there were special circumstances which induced Sir John Leach to come to the conclusion he did in that case, and that the decision was far from establishing the general proposition that in every case a bill might be

(*i*) See *Blisset* v. *Daniel*, 10 Ha. 538 ; as to damages see *Wood* v. *Woad*, L. R. 9 Ex. 190. See, also, *Russell* v. *Russell*, 14 Ch. D. 471.

(*k*) See *Bowsher* v. *Watkins*, 1 R. & M. 277 ; *Gedge* v. *Traill*, ib. 281.

(*l*) 2 Keen, 539.

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filed against an executor and surviving partner of the testator without charging and proving fraud or collusion. In this case there are no special circumstances. It is a bill filed by persons beneficially interested in the testator's estate against the executor and the surviving partner, and it seeks to have the partnership accounts now. The defendant, the surviving partner, by his plea avers that an account was settled with the executor on the 31st of December, 1832, and that, if unimpeached, is a sufficient defence to the bill."

Later cases are in conformity with this decision (*m*).

Effect of fraud and collusion.

If there has been fraud or collusion between the surviving partners and the executors of the deceased partner, the case naturally assumes a different aspect, and any arrangement between them will be liable to be set aside at the instance of the persons interested in the estate of the deceased (*n*). And, even although there be no fraud or collusion, still, if the executor has obtained less than the true value of the deceased's share in the partnership estate, the executor may be liable as for a *derastavit*, although the surviving partner may be protected against all demands. But if, in a case of difficulty, the executor has acted with a *bonâ fide* view to do his best for the estate he represents, the Court will not be willing to make him account for what, without his wilful default, he might have received from the surviving partners (*o*).

2. Where the representative is himself a partner.

If a partner dies and leaves his co-partner his executor, much greater difficulty is met with than in the case last supposed. By the present hypothesis the executor is invested with two characters, and his interest as surviving partner is often in conflict with his duty as representative of the deceased. This conflict of duty and of interest renders it almost impossible for the executor to enter into any arrangement with respect to the share of the deceased in the partnership estate which

(*m*) *Chambers* v. *Howell*, 11 Beav. 6; *Stainton* v. *The Carron Co.*, 18 Beav. 146; and as to accounts settled by one of several executors, *Smith* v. *Everett*, 27 Beav. 446.

(*n*) As in *Cook* v. *Collingridge*, Jac. 607; *Rice* v. *Gordon*, 11 Beav. 265. See also *Beningfield* v. *Baxter*, 12 App. Ca. 167. Less than fraud or collusion will justify an action against an executor of a deceased partner and the surviving partners, *Travis* v. *Milne*, 9 Ha. 141, but will not, it is apprehended, invalidate arrangements into which they may have entered for payment of the share of the deceased.

(*o*) See *Rowley* v. *Adams*, 7 Beav. 395, and 2 H. L. C. 725.

those interested in that share may not afterwards succeed in setting aside (*p*).

Wedderburn v. Wedderburn.

In *Wedderburn* v. *Wedderburn* (*q*), a leading case on this subject, an account of a deceased partner's estate was directed after a lapse of thirty years, and repeated changes in the firm, and after several deeds and a release had been executed by the parties beneficially interested. The surviving partners were the executors of the deceased, and were guardians of the persons beneficially entitled to his share, and the settlements and releases were executed in ignorance of the true state of the partnership accounts. So in *Millar* v. *Craig* (*r*), where one partner died, leaving four executors, of whom two were members of the firm; an account was settled between the executors and the residuary legatees, and releases were executed; but errors having been proved in the accounts, the releases were set aside, and the accounts were re-opened. Again, in *Stocken* v. *Dawson* (*s*), a partner by his will authorised a sale of his share to his co-partner, whom he appointed one of his executors. The surviving partner purchased the share of the deceased at a valuation, but the purchase was set aside at the suit of the son of the deceased, after a lapse of seven years. So in *Rice* v. *Gordon* (*t*), where a partner died, some of his co-partners obtained administration to his estate, and sold part of the assets of the deceased to another of the partners, but at an undervalue; the sale was set aside at the suit of a creditor.

Millar v. Craig.

Stocken v. Dawson.

Rice v. Gordon.

Difficult position of representative.

In all these cases there was some ground for setting aside the arrangement made by the executors, in addition to the mere fact that they were also surviving partners. But, as observed by Lord Eldon in *Cook* v. *Collingridge* (*u*), "one of the most firmly established rules is, that persons dealing as trustees and executors must put their own interest entirely out of the question, and this is so difficult to do in a transaction in which they are dealing with themselves that the Court will not

(*p*) See *Cook* v. *Collingridge*, Jac. 607.

(*q*) 2 Keen, 722, and 4 M. & Cr. 41.

(*r*) 6 Beav. 433; in this case no question was raised as against the partners who were not executors.

(*s*) 9 Beav. 239.

(*t*) 11 Beav. 265.

(*u*) Jac. 621.

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inquire whether it has been done or not, but at once says such a transaction cannot stand" (*x*).

Right of retainer out of assets.

However, a surviving partner who is the executor of his deceased co-partner, may retain out of his assets what is due from the deceased to himself on taking the partnership accounts (*y*).

Loss of right to rescind.

Assuming that, on the principles above explained, a person has a right to rescind a contract on the ground of misrepresentation, he may lose that right in one of two ways, viz., 1, by his own laches; and 2, by disabling himself from restoring what he may himself have received.

A person entitled to rescind a contract for fraud loses his right if he does not repudiate the contract within a reasonable time after the discovery of the fraud (*z*); and, *a fortiori*, if after such discovery he does anything to affirm the contract, or anything which is inconsistent with his right to rescind it; *e.g.*, if, in the case of shares fraudulently sold to him, he attempts to resell them (*a*), or continues to act as a shareholder (*b*).

Rescission *in toto*

Further, a person induced by fraud to enter into a contract cannot rescind it unless he is himself able to rescind it *in toto*, and to restore the other party to his former position, or unless his inability so to do is attributable to that party (*c*). But if the contract is severable, inability to rescind it as to part is not fatal to the right to rescind it as to another part (*d*).

Liability to creditors.

It must be remembered that a contract induced by fraud is voidable only and not void. Consequently a person induced by fraud to become a partner is liable to all creditors of the

(*x*) The position of the executors of the deceased partner will be examined at length hereafter, and the subject above noticed will be again adverted to on that occasion.

(*y*) *Morris* v. *Morris*, 10 Ch. 68, where the accounts were still unsettled.

(*z*) See, on this subject generally, *Clough* v. *L. & N.-W. Rail. Co.*, L. R. 7 Ex. 35, and as instances of repudiation being too late see *Deuton* v. *Macneil*, 2 Eq. 352; *Ashley's case*, 9 Eq. 263; *Scholey* v. *Central Rail. Co. of Venezuela*, ib. 266, note. Compare *Macnicll's case*, 10 Eq. 503; *Campbell* v. *Flemings*, 1 A. & E. 40.

(*a*) *Briggs' case*, 1 Eq. 483.

(*b*) *Sharpley* v. *Louth and East Coast Rail. Co.*, 2 Ch. D. 663.

(*c*) See *Urquhart* v. *McPherson*, 3 App. Ca. 831, a deed of dissolution and release. See, also, *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. D. 394; *Laing* v. *Campbell*, 36 Beav. 3; *Clarke* v. *Dickson*, E. B. & E. 148; *Maturin* v. *Tredinnick*, 2 N. R. 514, and 4 ib. 15.

(*d*) See last note.

firm in respect of its dealings with them whilst he is a partner (*e*).

SECTION VI.—ACTIONS FOR DISSOLUTION, ACCOUNT, ETC.

The remedy for a partner who insists on a dissolution which is opposed by his co-partners was formerly by a suit in equity, and is now by an action which should be brought in the Chancery Division of the High Court (*f*). Actions involving the taking of partnership accounts should also be brought in the same division.

In an action for dissolution the statement of claim should claim a dissolution and an account, and also an injunction and a receiver to restrain the defendants from dealing with the partnership assets and from issuing bills or notes in the name of the firm. Such an action lies, although the partnership be a partnership at will and can therefore be dissolved by the plaintiff himself (*g*); but if the partnership has been dissolved before action, the plaintiff should claim a declaration to that effect (*h*). If the partnership is admitted and the right to dissolve is not contested, the Court will decree a dissolution on motion before the hearing or trial (*i*). An action may be brought for rescission of the contract of partnership or in the alternative for dissolution of the partnership (*j*).

An action for the dissolution of an ordinary partnership may be maintained, although the partnership is one which may be wound up under the statutory jurisdiction conferred by the Companies act, 1862 (*k*); but practically it is more convenient to have recourse to that act where it applies.

The grounds on which the Court will dissolve a partner-

(*e*) See *Ex parte Broome*, 1 Rose, 69; *Jeffreys* v. *Smith*, 3 Russ. 158; *Macbride* v. *Lindsay*, 9 Ha. 574; and as to shareholders in companies, *Reese River Mining Co.* v. *Smith*, L. R. 4 Ho. Lo. 70; *Henderson* v. *The Royal British Bank*, 7 E. & B. 356; *Daniell* v. *The Royal British Bank*, 1 H. & N. 681; *Powis* v. *Harding*, 1 C. B. N. S. 533; *Howard* v. *Shaw*, 9 Ir. Law Rep. 335.

(*f*) Jud. Act, 1873, § 34.

(*g*) *Master* v. *Kirton*, 3 Ves. 74.

(*h*) The date of the dissolution depends on circumstances. See *infra*, book iv. ch. 1.

(*i*) *Thorp* v. *Holdsworth*, 3 Ch. D. 637, where the terms of the partnership were in dispute.

(*j*) *Bagot* v. *Easton*, 7 Ch. D. 1.

(*k*) *Jones* v. *Charlemont*, 16 Sim. 271; *Clements* v. *Lowes*, 17 ib. 167.

ship (*l*); and the mode of winding up the affairs of a partnership in the event of death or bankruptcy will be examined in Book IV.: in the present place it is proposed to deal with the subjects of Account and Discovery, Injunctions, Receivers, Sale of Partnership Property.

1. *Of account and discovery.*

Under this head it is proposed to consider, with reference to partners and persons claiming under them—

1. The right to an account and discovery generally.
2. The defences to an action for an account and discovery.
3. The judgment for a partnership account.

(*a*) *Of the right to an account and discovery generally, as between partners and those claiming under them.*

1. Action for an account.

1. *As to Account.*—The right of every partner to have an account from his co-partners of their dealings and transactions, is too obvious to require comment. An action for an account may be maintained by partners although the partnership accounts are not complicated (*m*); and although an action for damages may be sustainable (*n*); and although the defendant may have stolen or embezzled the money of the firm (*o*). Moreover, although formerly the Court of Chancery would not entertain a suit for damages merely, although the suit was in form a suit for an account (*p*); yet in a partnership suit involving a general account claims were adjusted which in ordinary cases would have formed the subject of an action at law (*q*); and it is apprehended that now the Court will in taking such an account deal with every claim which it may be

(*l*) As to fraud, see *ante*, p. 479 *et seq.*

(*m*) *Cruikshank* v. *M'Vicar*, 8 Beav. 106. See *Frietas* v. *Dos Santos*, 1 Y. & J. 574.

(*n*) *Wright* v. *Hunter*, 5 Ves. 792, where the bill was for contribution; *Blain* v. *Agar*, 1 Sim. 37, and 2 ib. 289, where the bill was for the recovery back of deposits. See, too, *Townsend* v. *Ash*, 3 Atk. 336, as to the profits of partnership real estate.

(*o*) *Roope* v. *D'Avigdor*, 10 Q. B. D. 412.

(*p*) *Duncan* v. *Luntley*, 2 Mac. & G. 30, where shares had been wrongfully sold by the secretary of a company. See, also, *Clifford* v. *Brooke*, 13 Ves. 132.

(*q*) See *Bury* v. *Allen*, 1 Coll. 589; *Mackenna* v. *Parkes*, *ante*, p. 67, note (*o*). Compare *Great Western Ins. Co.* v. *Cunliffe*, 9 Ch. 525.

necessary to investigate in order to adjust and finally settle the account. But disputes not affecting the account will naturally be excluded from it.

Persons entitled to an account.

An account may be had by one partner or his executors or administrators (*r*) against his co-partner or his executors or administrators (*s*). So by the trustees of a bankrupt partner against the solvent partner (*t*) or his executors (*u*). So a solvent partner may maintain an action for an account against the trustees of his bankrupt co-partner; and, notwithstanding the rule against making mere witnesses parties, the bankrupt himself may, it is said, be made a defendant for the purposes of discovery (*v*). Again, if a partner's share is taken in execution, the purchaser from the sheriff is entitled to an account from the solvent partners, as is, also, the execution debtor himself (*x*).

Servants, &c.

An agreement to pay out of profits confers a right to an account; and servants entitled to a share of profits can maintain an action for an account of them (*y*).

Sub-partners, &c.

A sub-partner has no right to an account from the principal firm, or any of the members of it, except the one with whom he is a sub-partner; for there is no contract or privity save between those two (*z*). It has even been said that if a partner charges or mortgages his share in favour of a creditor, the latter has no right to an account from the other partners of the profits to which their co-partner may be entitled. This, however, is not correct (*a*); and as regards partners in mines, it has been decided that a mortgagee of one partner is entitled to an account against the other partners (*b*). If a partner, with

(*r*) *Heyne* v. *Middlemore*, 1 Rep. in Ch. 138; *Hackwell* v. *Eustman*, Cro. Jac. 410.

(*s*) *Beaumont* v. *Grover*, 1 Eq. Ab. 8, pl. 7.

(*t*) As in *Wilson* v. *Greenwood*, 1 Swanst. 471.

(*u*) As in *Addis* v. *Knight*, 2 Mer. 119.

(*v*) *Whitworth* v. *Davis*, 1 V. & B. 545. See Mitford Pl. 187, ed. 5.

(*x*) See *Habershon* v. *Blurton*, 1 De G. & Sm. 121; *Perens* v. *Johnson*, 3 Sm. & G. 419.

(*y*) See *Harrington* v. *Churchward*, 6 Jur. N. S. 576; *Rishton* v. *Grissell*, 5 Eq. 326; *Turney* v. *Bayley*, 4 De G. J. & Sm. 332.

(*z*) *Brown* v. *De Tastet*, Jac. 284; *Raymond's case*, cited in *Ex parte Barrow*, 2 Rose, 252; *Bray* v. *Fromont*, 6 Madd. 5, and see *Killock* v. *Greg*, 4 Russ. 285, as to agents.

(*a*) See *Whetham* v. *Davey*, 30 Ch. D. 574, and *ante*, p. 364.

(*b*) *Bentley* v. *Bates*, 4 Y. & C. Ex. 182.

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the consent of his co-partners, assigns his share in the partnership, the assignee will, by virtue of this assent, acquire the rights of the assignor, and be, therefore, entitled to an account from the other partners (*c*).

Creditors, &c., of deceased partner.

If a partner dies, a question arises as to the right of his creditors and legatees to sue the other partners for an account of the share of the deceased. The creditors of the late firm can maintain an action against the executors of the deceased and the surviving partners, in order to obtain payment of their debt out of the assets of the deceased (*d*). But the separate creditors, or the legatees, or next of kin of a deceased partner, stand in a very different position. In the absence of special circumstances, they have no *locus standi* against the surviving partners, but only against the legal personal representative of the deceased partner (*e*); and it is only when there is collusion between these persons, or when circumstances have occurred which preclude the representative from himself obtaining an account of the share of the deceased, that his separate creditors, legatees, or next of kin, may themselves bring an action for that purpose against the surviving partners (*f*).

General or limited account.

The account which a partner may seek to have taken, may be either a general account of the dealings and transactions of the firm, with a view to a winding up of the partnership; or a more limited account, directed to some particular transaction as to which a dispute has risen.

Account without a dissolution.

It was formerly considered that no account between partners could be taken in equity, save with a view to a dissolution (*g*), and a bill praying an account but not a dissolution has been held bad on demurrer (*h*). But this rule has been gradually relaxed; for it has been felt that more injustice frequently arose from the refusal of the Court to do less than complete

(*c*) See *Fawcett* v. *Whitehouse*, 1 R. & M. 132; *Redmayne* v. *Forster*, 2 Eq. 467.

(*d*) *Wilkinson* v. *Henderson*, 1 M. & K. 582, and see book iv. ch. 3, § 3.

(*e*) *Davies* v. *Davies*, 2 Keen, 534; *Travis* v. *Milne*, 9 Ha. 141; *Langley* v. *The Earl of Oxford*, 2 Amb. 798, Blunt's ed.; *Seeley* v. *Boehm*, 2 Madd. 180.

(*f*) See the cases last cited. This subject will be again alluded to.

(*g*) *Forman* v. *Homfray*, 2 V. & B. 329; *Knebell* v. *White*, 2 Y. & C. Ex. 15; *ante*, p. 464 *et seq.*

(*h*) *Loscombe* v. *Russell*, 4 Sim. 8.

justice, than could have arisen from interfering to no greater extent than was desired by the suitor aggrieved (*i*). Accordingly, in *Prole* v. *Masterman* (*k*), where the promoter of a company sought to make his co-promoters contribute to a debt paid by him, but for which they were liable as well as he, it was held that a decree might be made without directing a general account of what was due from the plaintiff in respect of other matters. Again, in the case of a mutual insurance society, where the funds of the society are answerable for the payment of the monies due upon their policies, an assured member is entitled to an account of what is due to him upon his policy, and to a decree for the payment of what is so due, without involving himself in any general account of the dealings and transactions of the society, or seeking for a dissolution thereof (*l*).

Prole v. Masterman.

The old rule, therefore, that a decree for an account between partners will not be made save with a view to the final determination of all questions and cross claims between them, and to a dissolution of the partnership, must be regarded as considerably relaxed, although it is still applicable where there is no sufficient reason for departing from it.

Cases in which an account will be decreed, although no dissolution is prayed.

There are three classes of cases in which actions for an account, without a dissolution, are more particularly common, and to which it is necessary specially to refer. These are—

1. Where one partner has sought to withhold from his co-partner the profit arising from some secret transaction.

2. Where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his co-partner or to drive him to a dissolution.

3. Where the partnership has proved a failure, and the partners are too numerous to be made parties to the action, and a limited account will result in justice to them all.

1. Where one partner has obtained a secret benefit, from

1. Account where one partner

(*i*) See *ante*, § 3 (1) of this chap.

(*k*) 21 Beav. 61. Compare *Munnings* v. *Bury*, Tam. 147. The circumstance that an action for contribution would lie, did not oust the jurisdiction of a court of equity, *Wright* v. *Hunter*, 5 Ves. 792.

(*l*) See *Bromley* v. *Williams*, 32 Beav. 177; *Hutchinson* v. *Wright*, 25 Beav. 444; *Taylor* v. *Dean*, 22 Beav. 429. See, too, *Robson* v. *McCreight*, 25 Beav. 272.

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withholds what the firm is entitled to.

which he seeks to exclude his co-partners, but to which they are entitled, they can obtain their share of such benefit by an action for an account, and such action is sustainable, although no dissolution is sought. The cases illustrating this doctrine have been already noticed at length (*m*), and it will therefore be sufficient here to state that an account was directed, although the plaintiff did not seek to have the partnership dissolved, or its affairs wound up, in

Hichens v. *Congreve*, 1 R. & M. 150.
Fawcett v. *Whitehouse*, 1 R. & M. 132, *ante*, p. 313.
Beck v. *Kantorowicz*, 3 K. & J. 230.
The Society of Practical Knowledge v. *Abbott*, 2 Beav. 559.

In all the other cases of this class, except *Clegg* v. *Fishwick* (*n*), in which a dissolution was prayed, the report is silent as to whether a general winding up was sought or not.

The equity of the firm is against the delinquent partner only.

With reference to cases of this description, it may be observed that where the benefit which the plaintiffs assert their right to share has not yet been obtained, but only agreed for by their co-partners, the plaintiffs have no *locus standi* against the person with whom the agreement has been entered into by those partners, and cannot therefore restrain such person from performing that agreement. The proper course for the aggrieved partners to take is to proceed against their co-partners, and claim from them the benefit of the agreement into which they have entered (*o*).

2. Account in cases of exclusion, &c.

2. Where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his co-partner, or to drive him to a dissolution. In cases of this description an account has been directed, although no dissolution has been asked.

The general proposition that courts of equity would interfere under the circumstances now supposed, was laid down by Sir John Leach in *Harrison* v. *Armitage* (*p*), where, however, no

(*m*) *Ante*, p. 305 *et seq.*

(*n*) 1 Mac. & G. 294.

(*o*) See *Alder* v. *Fouracre*, 3 Swanst. 489, where an injunction was granted restraining the executors of a deceased partner who had agreed for a renewal of a lease from disposing of the lease when granted, except for the benefit of the partnership.

(*p*) 4 Madd. 143.

account was directed, inasmuch as the evidence did not establish a partnership. But in *Chapple* v. *Cadell* (*q*) an account was directed at the suit of a minority where the majority had sold a partnership newspaper to a stranger, and some of the more active of the majority had then entered into a fresh agreement with the purchaser to carry on the paper in partnership with him. *Richards* v. *Davies* (*r*) went a step further. There a partnership had been entered into for a term of years which was still unexpired. The defendants would come to no account with the plaintiff respecting the partnership dealings and transactions, but on the application of the plaintiff a decree for an account of all past transactions was made. Sir John Leach, in pronouncing judgment, observed that the plaintiff had no relief at law for money due to him on a partnership account; that if a court of equity refused him relief, he would be wholly without remedy; and in answer to the objection that if such a suit were entertained the defendant might be vexed by a new bill whenever new profits accrued (*s*), his Honour asked what right would the defendant have to complain of such new bill if he repeated the injustice of withholding what was due to the plaintiff?

Chapple *v.* Cadell.

Richards *v.* Davies.

Defendant refusing to account.

Fairthorne v. *Weston* (*t*) is another authority in point. In that case two solicitors entered into partnership for a term of years, and before the term expired the defendant conducted himself in such a way as to prevent the possibility of the partnership business being carried on. The defendant's object was to compel the plaintiff to dissolve. The plaintiff, however, instead of dissolving, filed a bill for an account of the partnership dealings and transactions since the last settlement, and for a receiver. The defendant insisted that the plaintiff was entitled to no relief except with a view to a dissolution; but the Court held otherwise, and observed that there was no universal rule to the effect that a bill, asking for a particular account but not for a dissolution, was demurrable; and that if

Fairthorne *v.* Weston.

Defendant seeking to drive plaintiff to dissolve.

(*q*) Jac. 537.

(*r*) 2 R. & M. 347.

(*s*) This objection was made by Lord Eldon in *Forman* v. *Homfray*, 2 V. & B. 330; by V.-C. Shadwell in *Loscombe* v. *Russell*, 4 Sim. 8; and by Baron Alderson in *Knebell* v. *White*, 2 Y. & C. Ex. 15.

(*t*) 3 Ha. 387.

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there were any such rule, a person fraudulently inclined, might, of his mere will and pleasure, compel his co-partner to submit to the alternative of dissolving a partnership, or ruin him by a continued violation of the partnership contract.

Other cases.

Again, where a person seeks to establish a partnership with another who denies the plaintiff's title to be considered a partner, if the former is successful upon the main point in dispute, an account of the past dealings and transactions will be decreed, although the plaintiff does not seek for a dissolution of the partnership which he has proved to exist (*u*). Upon the same principle it is apprehended, that if a partner is wrongfully expelled, and he is restored to his status as partner by the judgment of the Court, an account will be directed, but the partnership will not necessarily be dissolved (*x*).

Mines.

As regards mines it has also been decided, that if one co-owner excludes another from his share of the profits, an account will be directed, although no dissolution is prayed (*y*). But, as each co-owner of a mine can sell his share without the consent of the other owners, there is no occasion for him to ask for a dissolution, and the case of a mine is therefore, perhaps, not an apt illustration of the doctrine in question.

3. Account where concern has failed.

3. Where the partnership has proved a failure, and the partners are too numerous to be made parties to the action, and a limited account will result in justice to them all, such an account will be directed, although a dissolution is not asked for. The leading case in support of this proposition is *Wallworth* v. *Holt* (*z*), in which Lord Cottenham, in an elaborate and justly celebrated judgment, overruled a demurrer to a bill by some of the shareholders of an insolvent joint-stock bank, on behalf of themselves and others, against the directors, trustees, and public officer of the company, and certain share-

Wallworth *v.* Holt.

(*u*) *Knowles* v. *Haughton*, 11 Ves. 168, as reported in Collyer on Partn. 198, note. The defendant, however, did not resist the account after the question of partnership was decided against him.

(*x*) See *Blisset* v. *Daniel*, 10 Ha. 493, where the bill prayed for a dissolution, but no dissolution was decreed. In the case of an incorporated company this point cannot arise, *Garden Gully Co.* v. *McLister*, 1 App. Ca. 39, is an instance.

(*y*) *Bentley* v. *Bates*, 4 Y. & C. Ex. 182. See, also, *Redmayne* v. *Forster*, 2 Eq. 467.

(*z*) 4 M. & Cr. 619.

holders who had not paid up their calls, praying that an account might be taken of all the partnership assets, and that the outstanding assets might be got in by a receiver, and that the whole might be converted into money, and applied towards the satisfaction of the partnership debts. In delivering judgment the Lord Chancellor observed,—

"When it is said that the Court cannot give relief of this limited kind, it is, I presume, meant that the bill ought to have prayed a dissolution, and a final winding up of the affairs of the company. How far this Court will interfere between partners, except in cases of dissolution, has been the subject of much difference of opinion, upon which it is not my purpose to say anything beyond what is necessary for the decision of this case; but there are strong authorities for holding that, to a bill praying a dissolution, all the partners must be parties (*a*); and this bill alleges that they are so numerous as to make that impossible. The result, therefore, of these two rules would be—the one binding the Court to withhold its jurisdiction, except upon bills praying a dissolution, and the other requiring that all the partners should be parties to a bill praying it—that the door of this Court would be shut in all cases in which the partners or shareholders are too numerous to be made parties, which, in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the subjects of the realm, in some of the most important of their affairs. This result is quite sufficient to show that such cannot be the law."

In *Wallworth* v. *Holt*, the bill was filed for the sole purpose of having the assets of the company applied in payment of its joint debts; it did not pray an account of the partnership dealings and transactions, for the purpose of obtaining a division of the profits (if any) amongst the persons entitled thereto. If it had, probably a decree would have been refused, either because a dissolution ought to have been asked, or because all the shareholders were not parties to the bill (*b*). But since *Wallworth* v. *Holt* other cases have been decided, in which bills praying for a division of the surplus assets amongst the shareholders, but not expressly praying for a dissolution, have been held good on demurrer (*c*). The case which has gone furthest in this direction is *Sheppard* v. *Oxenford* (*d*); for

Later cases.

Sheppard v. Oxenford.

(*a*) See as to this, *ante*, p. 461.

(*b*) See *Richardson* v. *Hastings*, 7 Beav. 323, and 11 ib. 17; *Deeks* v. *Stanhope*, 14 Sim. 57, which were similar cases to *Wallworth* v. *Holt*.

(*c*) See *Apperly* v. *Page*, 1 Ph. 779; *Wilson* v. *Stanhope*, 2 Coll. 629; *Cooper* v. *Webb*, 15 Sim. 454, and *Clements* v. *Bowes*, 17 ib. 167.

(*d*) 1 K. & J. 491.

there every kind of relief which would have been required in the event of a dissolution was prayed for, although a dissolution in terms was not asked for. In *Sheppard* v. *Oxenford*, a number of persons formed an association for working mines in Brazil. The defendant was the sole trustee of the property, and the sole director. Disputes having arisen, a bill was filed by a shareholder on behalf of himself and all the other shareholders against the defendant for an account of the monies received and paid by him on behalf of the association, and for an account of its debts, and for their payment out of the available assets, and for a sale, if necessary for that purpose, of part of the property, and for a division of *profits*. The bill also prayed an injunction to restrain the defendant from selling or disposing of the property, and for a receiver to get in the debts due to the association, and to manage the affairs thereof, until the accounts were taken, but no dissolution was asked. A demurrer to this bill was put in and overruled (*e*), and an injunction was granted restraining the defendant from selling or disposing of the property otherwise than in the ordinary course of business; and a receiver and manager of the property in this country was appointed. It is to be observed that, although this was a case of a mine, the mine was in a foreign country, and was, strictly speaking, partnership property, and not merely so much land belonging jointly or in common to several co-owners.

Result of latest cases.

Having regard to the decisions in *Sheppard* v. *Oxenford*, and other modern cases of a similar kind, especially *Apperly* v. *Page* (*f*) and *Clements* v. *Bowes* (*g*), it is conceived that the doctrine established in *Wallworth* v. *Holt* may be considered as extending not only to cases where an account is sought for the purpose of having joint assets applied in discharge of the joint liabilities, but also to cases where an account is sought for the additional purpose of obtaining a division of the surplus assets and *profits* amongst the persons entitled thereto. If this be so, the last remnant of the doctrine that, in partnership cases, there can be no account without a dissolution, must be considered as swept away, at least as regards partnerships

(*e*) See 1 K. & J. 501.
(*f*) 1 Ph. 779.
(*g*) 17 Sim. 167.

the members of which are too numerous to be made parties to the action.

Offer by plaintiff to pay what is due from him.

A claim for an account need not contain an offer by the plaintiff to pay what, if anything, may be found due from him on taking such account (*h*).

Action for account of several partnerships.

An action for an account of partnership dealings is not objectionable, simply because it relates to the dealings of several partnerships, if they, in point of fact, are nothing more than continuations of one firm (*i*). But an action which involves the taking of an account of the dealings and transactions of two co-existing firms, may be open to objection on the ground of practical inconvenience (*k*).

Alternative cases.

Before the Judicature acts a bill in equity against two persons praying for relief against one, and in the event of the plaintiff not being entitled to relief against him, then for relief against the other, was demurrable (*l*). But now if the several defendants are so connected together as to render their respective liabilities doubtful, they can be all sued in one action, unless it is so embarrassing as to be incapable of being fairly and properly tried (*m*).

Motion before hearing.

In an action for a partnership account, if the partnership is admitted, and there is in fact nothing in dispute between the parties except the accounts, an order directing them may be obtained before the trial of the action (*n*).

2. Discovery.

2. *As to discovery and production of documents.*—The right of every partner to a discovery from his co-partner of all matters relating to the partnership dealings and transactions is as incontestable as his right to an account; and such right, like the right to an account, devolves upon and is enforceable against a partner's legal personal representatives and trustees in bankruptcy.

If a partner chooses to mix up partnership accounts with

(*h*) *The Colombian Government* v. *Rothschild*, 1 Sim. 103.

(*i*) See *Jefferys* v. *Smith*, 3 Russ. 158.

(*k*) See *Rheam* v. *Smith*, 2 Ph. 726.

(*l*) *Seddon* v. *Connell*, 10 Sim. 79.

(*m*) See Ord. xvi. rr. 4 and 7; xviii. r. 1; xix. r. 27; and compare *Honduras, &c., Co.* v. *Lefevre*, 2 Ex. D. 301, with *Evans* v. *Buck*, 4 Ch. D. 432; *Child* v. *Stenning*, 5 ib. 695; *Bagot* v. *Easton*, 7 ib. 1. See the obs. of Lord Selborne in *Burstall* v. *Beyfus*, 26 Ch. D. 39.

(*n*) *Turquand* v. *Wilson*, 1 Ch. D. 85.

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his own private accounts he must produce the whole, unless he can satisfactorily sever them (*o*).

How far discovery can be required from an alleged partner who denies the partnership alleged, will be examined hereafter; in the present place it will be sufficient to allude to a few points of practical importance arising where the right to discovery is not denied.

Oppressive interrogatories.

A party to an action for an account is often required to set forth in answer to interrogatories, details which it is impossible for him to remember, and to ascertain which inquiry and study are necessary; but all that he is bound to do is to furnish the interrogator with every means of information possessed or obtainable by himself, leaving the interrogator to make what he can of the materials thus furnished to him. The party interrogated is not bound to digest accounts, nor to set out voluminous accounts existing already in another shape, and which he offers to produce. Thus, in *Christian* v. *Taylor* (*p*), in which the executor of one deceased partner filed a bill for an account against the executors of another deceased partner, and required them to set out in detail many complicated and voluminous accounts, it was held that they were not bound to do so; that they were under no obligation of going through the books for the purpose of giving the plaintiff the information which he asked; and that the defendants could not be compelled to do more than to refer to the books and documents in their possession in such a way as to entitle the plaintiff to have them produced for his inspection (*q*).

Christian v. Taylor.

Drake v. Symes.

Where, however, there are specific questions, it is not sufficient to refer generally to books and say that, save as therein appears, no answer can be given. The person answering must go a step further, and point out where in particular the information required by each interrogatory is to be found (*r*).

(*o*) See *Pickering* v. *Pickering*, 25 Ch. D. 247.

(*p*) 11 Sim. 401.

(*q*) See, too, *Lockett* v. *Lockett*, 4 Ch. 336; *White* v. *Barker*, 5 De G. & Sm. 746; *Seeley* v. *Boehm*, 2 Madd. 176. A defendant is not entitled to set out the accounts sought for in a book, and to refer to the book instead of scheduling the accounts to the answer. See *Telford* v. *Ruskin*, 1 Dr. & Sm. 148.

(*r*) *Drake* v. *Symes*, Johns. 647. See, as to taking oppressive interro-

Person interrogated must make inquiries.

A person interrogated as to what he has done by himself or his agents (*s*), is bound to state what he knows, to make inquiries of his agents and servants, to obtain documents to the possession of which he has a right, and to afford his opponent either the information sought, or all the means of obtaining information which the answerer himself possesses (*t*). A person who has it in his power to obtain information cannot escape from discovery simply by saying he does not know: he must make reasonable efforts to inform himself (*u*).

In case it becomes necessary for a person interrogated to remove obstacles thrown in his way, he should apply for further time to answer, and not put in an answer which is insufficient (*x*).

Production of documents.

In connection with this subject it may be useful to remind the reader of the rule, that a person cannot be compelled to *produce* books which belong to himself and others who are not before the Court. Thus in *Murray* v. *Walter* (*y*), the defendant in his answer stated, that certain books relating to a concern in which the plaintiff claimed to be a partner with the defendant, were in the possession of the treasurer of the concern on behalf of the several shareholders in it, many of whom were not parties to the suit; and it was held that the defendant could not be compelled to produce the

gatories off the file, S. C. 2 De G. F. & J. 81, and generally on this subject Wigram on Discovery, 165—169; Bray on Disc., book i. ch. 4, § 6.

(*s*) *Rasbotham* v. *Shropshire Union Rail., &c., Co.*, 24 Ch. D. 110.

(*t*) As to what accountants' reports, &c., are privileged, see *Walsham* v. *Stainton*, 2 Hem. & M. 1; *Wilson* v. *Northampton & Banbury, &c., Rail. Co.*, 14 Eq. 477. As to setting out a list of the debtors to the firm, see *Telford* v. *Ruskin*, 1 Dr. & Sm. 148, where it was held that such a list must be given. Compare the observation of V.-C. Wood in *Drake* v. *Symes*, Johns. 651.

(*u*) See *Bolckow* v. *Fisher*, 10 Q. B. D. 161; *Taylor* v. *Rundell* (No. 1), 11 Sim. 391, and Cr. & Ph. 104; *Taylor* v. *Rundell* (No. 2), 1 Y. & C. C. C. 128, and 1 Ph. 222; *Stuart* v. *Lord Bute*, 11 Sim. 442, and 12 ib. 460; *A.-G.* v. *Rees*, 12 Beav. 50; *Earl of Glengall* v. *Fraser*, 2 Ha. 99, and compare *Martineau* v. *Cox*, 2 Y. & C. Ex. 638, where it was held that a partner here in a firm carrying on business in a foreign country, was not bound to set out a list of documents in the possession of the partners abroad.

(*x*) *Taylor* v. *Rundell* (No. 2), 1 Ph. 222; *Pickering* v. *Rigby*, 18 Ves. 484.

(*y*) Cr. & Ph. 114. The interest of the absent parties must be stated, *Bovill* v. *Cowan*, 5 Ch. 495.

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books in question, although it was insisted, on the authority of *Walburn* v. *Ingilby* (*z*), that the plaintiff had a right to have whatever access to the books the defendant himself was entitled to. There are several other decisions to the same effect as *Murray* v. *Walter* (*a*); but the doctrine there laid down does not apply to cases in which the absent parties interested in the books are in fact represented by the defendants on the record, and have no interest in conflict with theirs (*b*); nor it is said to an action by a *cestui que trust* against a trustee who is charged with trading with trust monies in partnership with other persons not before the Court (*c*).

Murray *v.* Walter.

Agreement precluding inspection.

If the plaintiff has agreed to accept the defendant's statement of profits, and not to investigate his books and accounts, the defendant will not be compelled to produce them before the hearing of the action (*d*).

Inspecting documents.

A person who obtains an order for the production of documents is entitled not only to inspect them himself, but to have them inspected by his solicitors and agents (*e*); but not by an agent to whom his opponents reasonably object (*f*). But neither he nor they are entitled to make public the information they obtain by means of such inspection. The order is made with a view to the administration of justice between the litigant parties; and an injunction will, if necessary, be granted to restrain the communication to strangers of what may be ascertained in the course of an examination of the books and documents produced under the order (*g*).

Inspection by accountants.

The common order does not entitle the person in whose favour it is made to inspect by a professed accountant specially

(*z*) 1 M. & K. 79.

(*a*) *Hadley* v. *M'Dougall*, 7 Ch. 312; *Reid* v. *Langlois*, 1 Mac. & G. 627; *Burbidge* v. *Robinson*, 2 Mac. & G. 244; *Penney* v. *Goode*, 1 Drew. 474; *Stuart* v. *Lord Bute*, 11 Sim. 453. Compare *Vyse* v. *Foster*, 13 Eq. 602.

(*b*) *Glyn* v. *Caulfeild*, 3 Mac. & G. 463.

(*c*) See *Vyse* v. *Foster*, 13 Eq. 602, which, however, turned on the sufficiency of an affidavit of documents. See *Freeman* v. *Fairlie*, 3 Mer. 43.

(*d*) *Turney* v. *Bayley*, 4 De G. J. & S. 332.

(*e*) *Williams* v. *Prince of Wales' Life, &c., Co.*, 23 Beav. 338.

(*f*) *Dadswell* v. *Jacobs*, 34 Ch. D. 278. See, also, *Draper* v. *Manchester & Sheffield Rail. Co.*, 7 Jur. N. S. 86.

(*g*) *Williams* v. *Prince of Wales' Life, &c., Co.*, 23 Beav. 338.

appointed for the purpose; but if there is any necessity for so doing, a special order for inspection by such a person will be made (*h*).

Books in use for daily business are ordered to be produced at the place where they are usually kept; and they will not be ordered to be deposited in court unless there is some special reason for so doing (*i*). Books in constant use.

3. *As to payment into court.*—If, in an action by one partner against another for an account, the defendant admits that he has in his hands money belonging to the firm, or that he had such money, and if he admits, or if it otherwise plainly appears (*k*) that he ought to have it still, he can be compelled to pay such money into court before the hearing of the action (*l*). As a general rule, however, a partner having partnership monies in his hands, cannot be made to pay those monies into court before trial, if he insists that on taking the accounts a balance will be found due to him (*m*). Nor will he be compelled so to do unless the other partners will pay in what they may have in their hands (*n*). Nor will a partner be ordered before trial to pay into court the amount of a debt due from him to the firm, if the amount to which he is indebted is not admitted, and cannot be readily ascertained (*o*). But if a partner admits that he has partnership monies in his hands, and it appears from his own statements that they came there improperly (*p*), or in violation of good faith, he will be 3. Payment of partnership monies into court.

(*h*) *Bonnardet* v. *Taylor*, 1 J. & H. 383.

(*i*) *Mertens* v. *Haigh*, Johns. 735.

(*k*) An admission of liability to pay is not necessary. See *Wanklyn* v. *Wilson*, 35 Ch. D. 180; *Dunn* v. *Campbell*, 27 Ch. D. 254, note.

(*l*) In *White* v. *Barton*, 18 Beav. 192, an admission by one partner that he and his co-partner who was not a party had money in their hands was held sufficient.

(*m*) *Richardson* v. *The Bank of England*, 4 M. & Cr. 165. But in *Birley* v. *Kennedy*, 6 N. R. 395, a partner who admitted that he had drawn out more than he ought was ordered to pay the excess into court.

(*n*) *Foster* v. *Donald*, 1 J. & W. 252.

(*o*) See *Mills* v. *Hanson*, 8 Ves. 68; *Wanklyn* v. *Wilson*, *ante*, note (*k*).

(*p*) See *Costeker* v. *Horrox*, 3 Y. & C. Ex. 530, where a surviving partner, being also the executor of his deceased co-partner, was ordered to pay into court 7000*l.*, the amount of assets of the deceased improperly applied to partnership purposes. See the next note.

compelled to pay them into court (q); so if he admits facts from which it appears that he is indebted to the firm in a certain sum, and he does not insist that on the whole the firm is indebted to him, the money admitted by him to be due will be ordered into court (r).

After trial the court will order a partner to pay into court a sum which is plainly due from him, although no certificate to that effect may have been made (s).

If the partnership debts are unpaid, and the defendant is liable to be sued for them, the order directing payment into court should reserve to him liberty to apply for payment out of court, of the amount of the debts he may be compelled or pressed to pay (t).

(3) Of the defences to an action for an account and discovery between partners and persons claiming under them.

The defence on the ground of illegality, of fraud, of laches on the part of the plaintiff, and of want of proper parties to the action, have already been examined (u). In addition, however, to these grounds of defence, there are others which require notice, and which cannot be more conveniently alluded to than in the present place, and under the following heads.

(q) *Lewis* v. *White*, 6 Ves. 788; *Foster* v. *Tyrrell*, 1 J. & W. 252; in the first of these cases the motion was made before answer. In *Hughes* v. *Empson*, 1 R. & M. 150, note, and *Schell* v. *Plumbe*, 26 Beav. 36, directors obtaining secret benefits for themselves were ordered to pay the monies received by them into court. Compare *Hall* v. *Jarvis*, 2 Ch. 449, where the liability of the defendants did not sufficiently appear.

(r) *Tait* v. *Copland*, 3 Y. & C. Ex. 643; *Sutcliffe* v. *Horrax*, 3 Y. & C. Ex. 330. In *Turner* v. *Hill*, 2 Russ. 372, an order was made though the defendants insisted that the plaintiff was entitled to nothing.

(s) *London Syndicate* v. *Lord*, 8 Ch. D. 54; *Cook* v. *Capell*, 6 Madd. 114.

(t) *Tait* v. *Copland*, 3 Y. & C. Ex. 643. In S. C. 6 Price, 405, it was held that a surviving partner was not entitled to have partnership funds, on which the plaintiffs had put a *distringas*, transferred to him to enable him to pay outstanding debts.

(u) See, as to illegality, *ante*, p. 102 *et seq.*; as to fraud, *ante*, p. 479 *et seq.*; as to laches, *ante*, p. 466 *et seq.*; as to parties, *ante*, p. 439 *et seq.*

1. Denial of partnership.
2. Statute of Limitations.
3. Account stated.
4. Award.
5. Payment, and accord and satisfaction.
6. Release.

1. Denial by defendant of the alleged partnership.

1. *Denial of partnership.*—An action by one partner against another for an account of the dealings and transactions of an alleged partnership may be met by a denial of the existence of any such partnership (*x*). This defence if relied upon as a reason for not answering interrogatories or making a discovery of documents must be accompanied by statements on oath denying those allegations which, if true, would establish the partnership, and denying the possession of documents relevant to the question of partnership or no partnership (*y*). In *Mansell* v. *Feeney* (*z*) it was held that the plaintiff was entitled to an inspection of all documents admitted by the defendant to be in his possession and to be relevant to the matters in question in the suit, although the defendant denied the partnership alleged by the bill, and also denied that the documents in question tended to prove its existence. The defendant, however, was allowed to seal up those parts of the books which he swore had no relation to the matters in question.

Mansell v. Feeney.

Before the Judicature acts it was a rule in equity that except in one or two cases a defendant could not by answer (as distinguished from a plea), protect himself from giving discovery; if he answered at all he had to answer fully (*a*). This rule, which no longer exists (*b*), was often productive of great hardship; but in conformity with it, a person sued for a partnership account was not allowed by answer to deny the alleged partnership, and excuse himself on that ground from setting forth accounts, or producing documents which the

(*x*) *Drew* v. *Drew*, 2 V. & B. 159; *Hare* v. *London and North-Western Rail. Co.*, John. 722, is an instance in which a bill was successfully met by a plea denying that the plaintiff was a shareholder in the company.

(*y*) *Mansell* v. *Feeney*, 2 J. & H. 313; *Harris* v. *Harris*, 3 Ha. 450; *Sanders* v. *King*, 6 Madd. 61.

(*z*) 2 J. & H. 320. See, also, *Saull* v. *Browne*, 9 Ch. 364.

(*a*) See *Elmer* v. *Creasy*, 9 Ch. 69.

(*b*) Ord. xxxi. r. 6.

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plaintiff required to see (*c*). However, notwithstanding this rule, the Court in more than one instance declined to enforce it; and ordered applications for discovery in such cases to be postponed until after the necessity for making them appeared (*d*); and as now a court, or judge at chambers, can order any question in dispute to be tried before any other (*e*), a person denying an alleged partnership can easily be protected against a vexatious or oppressive exercise of a right to discovery. Whilst on the one hand he must give all such discovery as bears upon the question of partnership or no partnership, he will not be compelled to set out accounts or produce documents which he swears throw no light on that question and can only be material after it has been decided in favour of the plaintiff (*f*).

2. Statute of Limitations.

2. *The Statute of Limitations.*—The Statute of Limitations, 21 Jac. 1, c. 16, § 3, enacts that all actions of account (other than for such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants (*g*)) shall be commenced and sued within six years next after the cause of such action or suit. Before the Judicature acts a court of equity was as much bound by this statute as a court of law (*h*); and advantage could be taken of it by plea (*i*), or

(*c*) *Hall* v. *Noyes*, 3 Bro. C. C. 483; ——— v. *Harrison*, 4 Madd. 252; *Shaw* v. *Ching*, 11 Ves. 303; *Somerville* v. *Mackay*, 16 Ves. 382; *The Great Luxembourg Rail. Co.* v. *Magnay*, 23 Beav. 646; *Reade* v. *Woodrooffe*, 24 ib. 421; *Bleckley* v. *Rymer*, 4 Drew. 248; *Mansell* v. *Feeney*, 2 J. & H. 313; *Thompson* v. *Dunn*, 5 Ch. 573; *Saull* v. *Browne*, 9 Ch. 364.

(*d*) *Clegg* v. *Edmondson*, 8 De G. M. & G. 787; *De La Rue* v. *Dickinson*, 3 K. & J. 388; *Lockett* v. *Lockett*, 4 Ch. 336; *Great Western Coll. Co.* v. *Tucker*, 9 Ch. 376; *Carver* v. *Pinto Leite*, 7 Ch. 90; *Wier* v. *Tucker*, 14 Eq. 25.

(*e*) Ord. xxxvi. r. 8.

(*f*) See *Re Leigh's estate*, 6 Ch. D. 256; *Parker* v. *Wells*, 18 ib. 477; *Whyte* v. *Ahrens*, 26 ib. 717.

(*g*) See, as to this exception, *Robinson* v. *Alexander*, 8 Bli. N. S. 352, and 2 Cl. & Fin. 717, and the cases there referred to.

(*h*) *Knox* v. *Gye*, L. R. 5 H. L. 656; *Foley* v. *Hill*, 1 Ph. 399; *Hovenden* v. *Annesley*, 2 Sch. & Lef. 607; and see *Whitley* v. *Lowe*, 25 Beav. 421, and 2 De G. & J. 704.

(*i*) See *Bridges* v. *Mitchell*, Bunb. 217; *Whitley* v. *Lowe*, 25 Beav. 421, and 2 De G. & J. 704; *Welford* v. *Liddel*, 2 Ves. S. 400; Beames' Pleas in Eq. 161. In *Robinson* v. *Field*, 5 Sim. 14, and *Jones* v. *Pengree*, 6 Ves. 580, the plea was overruled as covering too much.

by answer (*k*), or by demurrer if the facts sufficiently appeared on the face of the bill (*l*).

The exception as to merchants' accounts was repealed by 19 & 20 Vict. c. 97, § 9. Whilst that exception was in force the statute of James was held not to apply to suits for an account between partners (*m*); although even then where a partner died, and seventeen years afterwards a bill for an account was filed against his executors by the surviving partners, the bill was dismissed with costs (*n*).

Tatam *v.* Williams.

The authorities which have been already referred to also show that before the act 19 & 20 Vict. c. 97, § 9, the statute of limitations did not apply to open unsettled accounts, extending from a time more than six years before a bill was filed, down to a time within such six years. Notwithstanding the words of the statute of James, "All actions of account . . . . . shall be commenced and sued," &c., it was held that, even as between persons who were not within the exception as to merchants' accounts, the statute did not begin to run so long as the account was continued (*o*); and that the statute did not, in any case, apply to an unsettled, open, mutual account, with items on both sides representing cross demands (*p*). The law in this respect was modified by Lord Tenterden's act (*q*), the effect of which is, that, although there may be a mutual open running account, the mere existence of items not barred, is not sufficient, in actions of debt or assumpsit, to take earlier items out of the statute of limitations (*r*). Lord Tenterden's act, however, did not apply to merchants' accounts as to which there was no statutory bar; nor did Lord Tenterden's act apply to the mode of taking

Merchants' accounts.

Application of statute to current accounts

(*k*) As in *Martin* v. *Heathcote*, 2 Eden, 169; *Barber* v. *Barber*, 18 Ves. 286; *Tatam* v. *Williams*, 3 Ha. 347.

(*l*) *Foster* v. *Hodgson*, 19 Ves. 180; *Hoare* v. *Peck*, 6 Sim. 51; *Prance* v. *Sympson*, Kay, 678. See also, since, *Noyes* v. *Crawley*, 10 Ch. D. 31.

(*m*) *Martin* v. *Heathcote*, 2 Eden, 169; *Barber* v. *Barber*, 18 Ves. 286, and some other older cases to the contrary were overruled by *Robinson* v. *Alexander*, 2 Cl. & Fin. 717.

(*n*) *Tatam* v. *Williams*, 3 Ha. 347.

(*o*) See *per* Lord Eldon in *Foster* v. *Hodgson*, 19 Ves. 185; *Scudemore* v. *White*, 1 Vern. 456.

(*p*) See the notes to *Webber* v. *Tivill*, 2 Wms. Saund. 124 *et seq.*, and *Catling* v. *Skoulding*, 6 T. R. 189.

(*q*) 9 Geo. 4, c. 14.

(*r*) *Williams* v. *Griffiths*, 2 Cr. M.

such accounts in a suit in Chancery. But now by 19 & 20 Vict. c. 97, § 9, merchants' accounts are placed on the same footing as other accounts; and partnership accounts, whether they are or are not merchants' accounts, are within the statute of limitations; and those statutes are a bar to an action for an account extending to a period more remote than six years before the commencement of the action, unless there has been a breach of an express trust, or fraud, or payment, or an acknowledgment, such as required by Lord Tenterden's act, or unless the partnership articles are under seal. So long, indeed, as a partnership is subsisting, and each partner is exercising his rights and enjoying his own property, the statute of limitations has, it is conceived, no application at all; but as soon as a partnership is dissolved, or there is any exclusion of one partner by the others, the case is very different, and the statute begins to run (*s*). This has been decided by the House of Lords in *Knox* v. *Gye* (*t*), in which a surviving partner relied on the statute as a defence to a suit for an account instituted by the executor of a deceased partner. The deceased partner had died more than six years before the filing of the bill, and the right of his executor had never been recognised; the surviving partner, however, had continued the partnership business, and had got in outstanding assets within six years. The V.-C. Wood held that the statute was not a bar to the suit; but the decision was reversed by Lord Chelmsford on appeal, and the House of Lords affirmed Lord Chelmsford's decision.

Knox *v.* Gye.

In a still more recent case it has been held that the statute of limitations affords a good defence to an action for an account of the dealings and transactions of a partnership

Noyes *v.* Crawley.

& R. 45; *Cottam* v. *Partridge*, 4 Man. & Gr. 271; *Ashby* v. *James*, 11 M. & W. 542; *Clark* v. *Alexander*, 8 Scott, N. R. 147; *Inglis* v. *Haigh*, 8 M. & W. 780. See, too, *Jackson* v. *Ogg*, Johns. 397.

(*s*) *Noyes* v. *Crawley*, 10 Ch. D. 31. See some remarks as to the effects of the statute between partners in *Winter* v. *Innes*, 4 M. & Cr. 111, and *Way* v. *Bassett*, 5 Ha. 68.

(*t*) L. R. 5 H. L. 656. See 19 & 20 Vict. c. 97, § 9. *Miller* v. *Miller*, 8 Eq. 499, is hardly consistent with this, unless it be upon the ground that there was no dissolution, or that there was a trust deed excluding the statute. See the obs. of Malins, V.-C., in 10 Ch. D. 37.

which has been dissolved more than six years before the commencement of the action (*u*).

Effect of acknowledgment.

With reference to acknowledgments, it has been held in a partnership case, where no account had been come to for six years, that a signed acknowledgment of a liability to account in respect of matters more than six years old, was sufficient to justify a decree for an account in respect of them, although the acknowledgment did not contain an admission that anything was due, nor any express promise to pay what might be found due on taking the account (*x*).

Payment by receiver in a suit.

Where a partnership account is agreed to be taken, and a receiver is appointed, a payment made by the receiver to one of the partners on account of a debt owing to him by another partner, is not sufficient to prevent the statute from being a bar to such debt (*y*).

Cases where the statute affords no defence.

It must be remembered that the statute of limitations does not apply to cases of express trust or of concealed fraud. Therefore, if a partner has died, having by will disposed of his property on trust for payment of his debts, this is sufficient to justify a decree for an account of partnership transactions in respect of which claims existed when he died, although more than six years have elapsed since that time, and before the commencement of the action (*z*). Again, in cases of breach of trust and of fraud, there seems to be no limit to the time at which a court will interfere and afford redress to the parties aggrieved. The mere lapse of thirty or forty years since the right first accrued, is insufficient to bar the remedy in such cases.

Stainton *v.* Carron Company.

In *Stainton* v. *The Carron Company* (*a*), the management of the affairs of a company was entrusted to a person who was entitled to one-sixth of the shares in it. He was the manager of the company from 1808 until 1851, when he died. For twenty-five years he rendered accounts regularly,

(*u*) *Noyes* v. *Crawley*, 10 Ch. D. 31.

(*x*) See *Prance* v. *Sympson*, Kay, 678. The expression was, "you and I must go into it and settle the account." See, also, *Banner* v. *Berridge*, 18 Ch. D. 254; *Skeet* v. *Lindsay*, 2 Ex. D. 314. Compare *Mitchell's claim*, 6 Ch. 822.

(*y*) *Whitley* v. *Lowe*, 25 Beav. 421, and 2 De G. & J. 704.

(*z*) *Ault* v. *Goodrich*, 4 Russ. 434.

(*a*) 24 Beav. 346.

and these accounts were never questioned during his life. But after his death, it was discovered that upwards of 2000*l.* a year for many years had not been properly accounted for by him, and the company claimed from his estate nearly 70,000*l.* in respect of this annual deficiency, and asserted a lien for this sum on his shares and assets in the hands of the company. Notwithstanding the lapse of time, and the reception without dispute of the accounts sent in by the manager from year to year, a decree was made, opening the whole account from the year 1825 down to his death (*b*).

3. Account stated.

3. *Account stated.*—To an action for an account of partnership dealings and transactions, an account thereof already stated and settled between the parties (*c*) affords a good defence (*d*). No precise form is necessary to constitute a stated and settled account; but an account stated, unless it be in writing, is no defence to an action for a further account. It is not, however, necessary that the account should be signed by the parties, if it can be shown to have been acquiesced in by them (*e*); and an account may be stated and settled, although a few doubtful items are omitted (*f*). It is to be observed, that the fact that an account has already been *rendered* by the defendant to the plaintiff does not deprive the latter of his right to have the same account taken under the direction of a court (*g*); to have that effect an account must not only have been sent in to the plaintiff, but also have been acquiesced in by him (*h*). It is further to be observed, that although the

(*b*) See, too, *Allfrey* v. *Allfrey*, 1 Mac. & G. 87; *Wedderburn* v. *Wedderburn*, 2 Keen, 722, and 4 M. & Cr. 41.

(*c*) Of course the maxim, *Res inter alios*, &c., applies to settled accounts, *Carmichael* v. *Carmichael*, 2 Ph. 101.

(*d*) *Taylor* v. *Shaw*, 2 Sim. & Stu. 12; *Endo* v. *Culcham*, You. 306. An account settled by a majority was held binding on the minority in *Robinson* v. *Thompson*, 1 Vern. 465. See, too, *Stupart* v. *Arrowsmith*, 3 Sm. & G. 176, and *Kent* v. *Jackson*, 2 De G. M. & G. 49.

(*e*) See *Hunter* v. *Belcher*, 2 De G. J. & Sm. 194; *Morris* v. *Harrison*, Colles, 157; *Willis* v. *Jernegan*, 2 Atk. 252. See on this defence in general, Beames' Pleas in Equity, 222, and Mitford, 302, edit. 5. A verbal account and a receipt in full is not equivalent to a stated account, *Walker* v. *Consett*, Forrest, 157.

(*f*) *Sim* v. *Sim*, 11 Ir. Ch. 310.

(*g*) See *Clements* v. *Bowes*, 1 Drew. 692.

(*h*) *Irvine* v. *Young*, 1 Sim. & Stu. 333.

principle on which accounts have been kept may have been acquiesced in, the items may not (*i*).

Impeaching a settled account on the ground of fraud and mistake.

A settled account may be impeached either wholly or in part on the ground of fraud or mistake. If there be fraud, or if any mistake affects the whole account, the whole will be opened, and a new account will be directed to be taken, without reference to that which has been stated (*k*); but if there be no fraud, and if no mistake affecting the whole account can be shown, but the correctness of some of the items in it is, nevertheless, disputed, the account already stated will not be treated as non-existing, but will be acted upon as correct, save so far as the party dissatisfied with any item can show it to be erroneous (*l*). In a case of fraud, an account will be opened *in toto*, even after the lapse of a considerable time (*m*); but if no fraud be proved, an account which has been long settled will not be re-opened *in toto*; the utmost which the Court will then do will be to give leave to surcharge and falsify (*n*); and there are cases in which, in consequence of lapse of time, the Court will do no more than itself rectify particular items, instead of giving leave to surcharge or falsify generally (*o*). Moreover, the mere fact that items are treated in an improper way, or are improperly omitted, is not of itself sufficient to induce the Court to open a settled account; for if the items in question were known to the parties, and there be no fraud or undue influence proved, the Court will infer that the partners agreed to treat the items as they in fact did treat them (*p*). But an item omitted by mutual mistake will be set right (*q*).

(*i*) See *Mosse* v. *Salt*, 32 Beav. 269; *Clancarty* v. *Latouche*, 1 Ball & Beatty, 420. Compare *Hunter* v. *Belcher*, 2 De G. J. & Sm. 194.

(*k*) *Williamson* v. *Barbour*, 9 Ch. D. 529; *Gething* v. *Keighley*, ib. 547; *Clarke* v. *Tipping*, 9 Beav. 284; *Wharton* v. *May*, 5 Ves. 68; *Beaumont* v. *Boultbee*, ib. 485, and 7 Ves. 599; *Allfrey* v. *Allfrey*, 1 Mac. & G. 87; *Coleman* v. *Mellersh*, 2 ib. 309.

(*l*) *Holgate* v. *Shutt*, 27 Ch. D. 111, and 28 ib. 111; *Gething* v. *Keighley*, 9 ib. 547; *Pitt* v. *Cholmondeley*, 2 Ves. S. 565; *Vernon* v. *Vawdry*, 2 Atk. 119.

(*m*) *Williamson* v. *Barbour*, 9 Ch. D. 529; *Allfrey* v. *Allfrey*, 1 Mac. & G. 87; *Stainton* v. *The Carron Co.*, 24 Beav. 346. See *Vernon* v. *Vawdry*, 2 Atk. 119; *Beaumont* v. *Boultbee*, 5 Ves. 485.

(*n*) See *Gething* v. *Keighley*, 9 Ch. D. 547; *Millar* v. *Craig*, 6 Beav. 433; *Brownell* v. *Brownell*, 2 Bro. C. C. 61, and 1 Mac. & G. 94.

(*o*) See *Twogood* v. *Swanston*, 6 Ves. 485; *Maund* v. *Allies*, 5 Jur. 860.

(*p*) See *Maund* v. *Allies*, 5 Jur. 860, L. C.; *Laing* v. *Campbell*, 36 Beav. 3, where bad debts were treated as good.

(*q*) *Pritt* v. *Clay*, 6 Beav. 503.

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If a settled account is impeached for errors, particular errors must be stated and proved (*r*); and the same rule holds where the account is settled, "errors excepted" (*s*).

Mistakes of law.

In surcharging and falsifying, errors of law, as well as errors of fact, may be set right (*t*); and where leave is given to one party to surcharge and falsify, similar leave is thereby also accorded to his opponent (*u*).

Accounts stated on the death of a partner.

On the retirement or death of a partner, it is usual for an account to be stated between him or his representatives on the one hand, and the continuing partners on the other, and for mutual releases to be given. Afterwards attempts are occasionally made to open the accounts thus stated, and to set aside the releases, and to have a new account taken, and a fresh settlement of the partnership affairs. In such cases as these, before the settled accounts can be opened, the release must be set aside (*x*). Whether this can be done or not, depends upon circumstances which will be found discussed under the title rescission of contract (*y*).

In taking accounts under an ordinary judgment, settled accounts are never disturbed unless specially directed so to be (*z*).

4. Award.

4. *Award.*—Another defence to an action for an account is, that the matters in difference between the partners have been settled by arbitration.

Agreements to refer to arbitration.

A mere agreement that the matters in question should be referred, has frequently been held to be no defence to an action in respect of them (*a*). But if those matters have actually been disposed of by the award of an arbitrator, they cannot afterwards be made the foundation of any action be-

(*r*) *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1; *Dawson* v. *Dawson*, 1 Atk. 1; *Taylor* v. *Haylin*, 2 Bro. C. C. 310; *Kinsman* v. *Barker*, 14 Ves. 579. See *Whyte* v. *Ahrens*, 26 Ch. D. 717.

(*s*) *Johnston* v. *Curtis*, 2 Bro. C. C. 311, note.

(*t*) *Roberts* v. *Kuffin*, 2 Atk. 112; and see *Daniell* v. *Sinclair*, 6 App. Ca. 181.

(*u*) 1 Madd. Ch. 144, where it is said to have been so held by V.-C. Leach in *Anon.*, 6 March, 1821.

(*x*) See *Millar* v. *Craig*, 6 Beav. 433; *Fowler* v. *Wyatt*, 24 Beav. 232; and see *Parker* v. *Bloxham*, 20 Beav. 295.

(*y*) *Ante*, p. 482 *et seq.*

(*z*) See *Holgate* v. *Shutt*, 27 Ch. D. 111, and 28 ib. 111; *Newen* v. *Wetten*, 31 Beav. 315. But see *Milford* v. *Milford*, MacCl. & Y. 150.

(*a*) *Thompson* v. *Charnock*, 8 T. R. 139; *Michell* v. *Harris*, 4 Bro. C. C. 312. See *ante*, p. 451 *et seq.*

Award.

ween the parties on whom the award is binding (*b*). But an award will not avail as a defence to the action if the account sought by it is different from that to which the award applies (*c*). So an award on a reference of all matters in difference is no defence to an action for an account of monies received after the making of the award, and not dealt with by it, owing to a mistake on the part of the arbitrator. Thus, in *Spencer* v. *Spencer* (*d*), the partners on a dissolution referred all matters in difference to arbitration. The arbitrator awarded that one of the partners should get in the outstanding debts, which were estimated by the arbitrator at a certain amount. The award was acted on, but it appeared that the debts ultimately got in amounted to more than the sum at which they had been estimated. One of the partners claimed a share of the difference between the estimated and the actual amount of these debts, and as it was plain that the award had proceeded on a mistake, an account was directed, notwithstanding all matters in difference had been referred.

Spencer v. Spencer.

With respect to agreements to refer, an important enactment is contained in the Common law procedure act, 1854, § 11, as has been already pointed out (*e*).

5. Payment.

5. *Payment, and accord and satisfaction.*—Payment, *per se*, is not a defence to an action for an account; for the subject of such an action is to ascertain how much is or was payable. But payment of a sum of money and acceptance of it in lieu of all demands, is equivalent to accord and satisfaction, which is as much a defence to an action for an account as is a release (*f*).

Accord and satisfaction.

With respect to accord and satisfaction, it is to be observed that there must be no uncertainty in the agreement relied on as an answer to the action for an account, and that it must be shown that such agreement has been performed; for in the performance lies the satisfaction (*g*). On these grounds the

(*b*) *Tittenson* v. *Peat*, 3 Atk. 529; *Routh* v. *Peach*, 2 Anst. 519, and 3 b. 637.

(*c*) As in *Farrington* v. *Chute*, 1 Vern. 72.

(*d*) 2 Y. & J. 249.

(*e*) *Ante*, p. 452.

(*f*) See Bac. Ab. Accompt E.; Vin. Ab. Account N.; *Brown* v. *Perkins*, 1 Ha. 564. But see Com. Dig. Accompt E. 6, pl. 8.

(*g*) Com. Dig. Accord (B. 3) and (B. 4).

Brown *v.* Perkins.

late Vice-Chancellor Wigram, in a suit for an account by the executors of a deceased partner against the surviving partner, overruled a plea that it was agreed between the defendant and the deceased that all accounts between them, and all claims of the deceased in respect of the partnership, should be waived; and that in consideration thereof the deceased should be permitted to carry on business alone, without any further question or dispute by the defendant, which the deceased accordingly did (*h*). However, if an agreement to waive all accounts is entered into, and is founded on a sufficient consideration, and is free from all taint or fraud and undue influence, the parties to it will be precluded from suing each other in respect of the accounts so agreed to be waived (*i*).

Waiver.

6. Release.

6. *Release.*—A release is a good defence to an action for an account (*k*). But where the release has been executed on the faith of the correctness of certain accounts, which are afterwards ascertained to be incorrect, the release will be set aside, and a fresh account will be ordered (*l*), unless the parties clearly intended to abide by the accounts, whether correct or not. A release, moreover, can, of course, be set aside for fraud. A release, to be effectual as such, must be under seal. A release not under seal is regarded as a stated account (*m*).

(c) Of judgments for a partnership account.

Judgments for account.

A judgment for a partnership account in its simplest form is to this effect: "Let an account be taken of the partnership dealings and transactions between the plaintiff and the defendant from ——. And let what upon taking the said account shall be certified to be due from either of the said parties to the other of them, be paid by the party from whom to the

(*h*) *Brown* v. *Perkins*, 1 Ha. 564.

(*i*) See *Sewell* v. *Bridge*, 1 Ves. Sen. 297. Compare the last case.

(*k*) See Mitford, Pl. 304, ed. 5. As to form of plea, see *Brooks* v. *Sutton*, 5 Eq. 361.

(*l*) See, for example, *Pritt* v. *Clay*, 6 Beav. 503; *Wedderburn* v. *Wedderburn*, 2 Keen, 722, and 4 M. & Cr. 41; *Millar* v. *Craig*, 6 Beav. 433, and see *Phelps* v. *Sproule*, 1 M. & K. 231, and see *ante*, account stated, p. 512.

(*m*) Mitf. Pl. 307, ed. 5. See, as to agreements to waive accounts, *ante*, notes (*h*) and (*i*).

party to whom the same shall be certified to be due. Liberty to apply" (*n*).

Costs.

In actions for an account of partnership dealings and transactions, the ordinary rule formerly was to give no costs up to the decree directing the account; nor was this rule departed from except in cases of gross misconduct on the part of the defendants (*o*). But lately the rule has been to pay the costs of an action for dissolution from the commencement out of the partnership assets unless there is some good reason to the contrary (*p*). But where the action is really instituted to try some disputed right, the unsuccessful litigant will be ordered to pay the costs up to the trial of the action (*q*). The costs of taking the accounts, &c., directed at the hearing are, although disputed, usually defrayed out of the partnership assets, and,

(*n*) Seton on Decrees, 1197, ed. 4, where several other useful forms will be found given and referred to. The reports of the following cases also contain useful precedents:— *Binney* v. *Mutrie*, 12 App. Ca. 165; *Benningfield* v. *Baxter*, ib. 181, as to the application of surplus assets; *Travis* v. *Milne*, 9 Ha. 157, decree against executors of a deceased partner who had traded with his assets; *Whetham* v. *Davey*, 30 Ch. D. 580, account at instance of a mortgagee of a partner's share; *Devaynes* v. *Noble*, 1 Mer. 530, account where one firm succeeded another; *Wedderburn* v. *Wedderburn*, 2 Keen, 752, account where one firm succeeded another, and the capital of a deceased partner was continued in trade; *Cook* v. *Collingridge*, Jac. 623, and more fully in 27 Beav. 456, *note*, sale of a testator's share set aside and account of subsequent profits and good-will; *Crawshay* v. *Collins*, 15 Ves. 230, and 2 Russ. 347, account of subsequent profits; *Millar* v. *Craig*, 6 Beav. 442, setting aside a release and opening accounts; *Fereday* v. *Wightwick*, Taml. 262, declaration that property acquired by one partner was partnership property, and an account accordingly; *Wilson* v. *Greenwood*, 1 Swanst. 483, sale, receiver, and account; *Blisset* v. *Daniel*, 10 Ha. 538, decree restoring a partner wrongfully expelled; *England* v. *Curling*, 8 Beav. 140, specific performance of agreement for a partnership; *Pillans* v. *Harkness*, Colles, 442, decree relieving a person who had been induced to become a partner by fraudulent representations; *Evans* v. *Coventry*, 8 De G. M. & G. 835, winding up insurance society, account against directors for breaches of trust.

(*o*) See *Hawkins* v. *Parsons*, 8 Jur. N. S. 452; *Parsons* v. *Hayward*, 4 De G. F. & J. 474.

(*p*) *Hamer* v. *Giles*, 11 Ch. D. 942, and see note (*s*), *infra*.

(*q*) *Hamer* v. *Giles*, 11 Ch. D. 942; *Warner* v. *Smith*, 9 Jur. N. S. 169. See, also, *Norton* v. *Russell*, 19 Eq. 343, where a surviving partner refused an account to the executor of his deceased co-partner. See, as to mutual companies, *Harvey* v. *Beckwith*, 10 Jur. N. S. 577.

if necessary, by a contribution between the partners (*r*). But the partnership debts and liabilities including sums due from the firm to the partners in respect of advances or the like must be paid out of the assets in priority to the costs (*s*).

Mode of taking the accounts.

The method of taking a partnership account under a judgment in the usual form is as follows :—

1. Ascertain how the firm stands as regards non-partners.

2. Ascertain what each partner is entitled to charge in account with his co-partners ; remembering, in the words of Lord Hardwicke, that "each is entitled to be allowed as against the other, everything he has advanced or brought in as a partnership transaction, and to charge the other in the account with what that other has not brought in, or has taken out more than he ought (*t*).

3. Apportion between the partners all profits to be divided or losses to be made good ; and ascertain what, if anything, each partner must pay to the others, in order that all cross claims may be settled.

Matters involved in taking the account.

In order, therefore, to take a partnership account, it is necessary to distinguish joint estate from separate estate ; joint debts from separate debts ; and to determine what gains and what losses are to be placed to the joint account of all the partners, or to the separate accounts of some or one of them exclusively. The principles upon which this is to be done have been explained in previous chapters. Referring the reader, therefore, to them, and reminding him that, in taking accounts between partners, attention must be paid, not only to the terms of the partnership articles, but also to the manner in which they have been acted on by the partners (*u*), there re-

(*r*) See the next note, and *Butcher* v. *Pooler*, 24 Ch. D. 273. This rule was followed as to the whole costs where the action was referred under § 11 of the Com. Law Proc. Act, 1854 ; *Newton* v. *Taylor*, 19 Eq. 14.

(*s*) *Austin* v. *Jackson*, 11 Ch. D. 942, *note* ; *Hamer* v. *Giles*, ib. 942 ; *Potter* v. *Jackson*, 13 ib. 845.

(*t*) *West* v. *Skip*, 1 Ves. S. 242. The rule in *Clayton's case*, respecting the appropriation of payments applies to partners *inter se* as well as to other persons. See *Toulmin* v. *Copland*, 3 Y. & C. Ex. 625, and 7 Cl. & Fin. 350.

(*u*) See *ante*, pp. 408, 432, and *Watney* v. *Wells*, 2 Ch. 250. It is said a partner is not to be charged as such with what he might have received, without his wilful default, *Rowe* v. *Wood*, 2 J. & W. 556, but *quære* whether a surviving partner could not be made so to account, as

mains but little to add on the present subject, except as regards just allowances, the period over which the account is to extend, and the evidence upon which it is to be taken.

With respect to just allowances.

Just allowances.

Just allowances are made, although the judgment is silent as to them (*x*); and when a partnership account is ordered, it is not usual for the Court to determine beforehand what are, and what are not, just allowances. That is determined on taking the account; and, if necessary, the order will direct the chief clerk to state the facts and reasons upon which he shall adjudge any allowances to be just allowances (*y*). What ought to be so allowed must be determined by the articles of partnership, and by the principles discussed in a preceding chapter (*z*).

With respect to the period over which an account is to extend.

This can only be determined by ascertaining (1) the time from which it is to begin, and (2) the time at which it is to cease.

1. Time from which the account is to be taken.

The time from which the account is to begin, will, in a general account of partnership dealings and transactions, be the commencement of the partnership, unless some account has since that time been settled by the partners, in which case the last settled account will be the point of departure (*a*). If there has been an account settled so as to be binding on the parties, such account will not be re-opened (*b*). This used to be provided for in the decree by the insertion of the clause, "And if, in taking the said account, it shall appear that any

he alone can get in the assets of the firm. See, also, *Bury* v. *Allen*, 1 Coll. 604.

(*x*) See Ord. xxxiii. r. 8.

(*y*) See *Crawshay* v. *Collins*, 2 Russ. 347; *Brown* v. *De Tastet*, Jac. 294, 298, and 299; *Cook* v. *Collingridge*, Jac. 623, 625; *Wedderburn* v. *Wedderburn*, 2 Keen, 753.

(*z*) *Ante*, p. 380 *et seq.*

(*a*) See *Cook* v. *Collingridge*, Jac. 624; *Beak* v. *Beak*, Rep. Temp. Finch. 190. An incoming partner has no right to profits made before he became a partner, unless there is an agreement to that effect. *Gordon* v. *Rutherford*, T. & R. 373. See, as to the Statute of Limitations, *ante*, p. 508 *et seq.*

(*b*) See *ante*, p. 512.

account has been settled and agreed upon between the parties up to any given time, the same is not to be disturbed (*c*). It is not, however, now usual to insert these words, it not being the practice to disturb settled accounts, unless there is some special direction to that effect (*d*).

Dealings anterior to commencement of partnership.

Where partners have had dealings together preparatory to the commencement of their partnership, these dealings cannot be excluded from consideration in taking the partnership accounts. As observed by Lord Langdale in *Cruikshank* v. *McVicar* (*e*):

> "Some things must be done by way of preparation for or introduction to the real transactions of the partnership business. Again, when the partnership business is, in one sense, at an end, still you have not therefore put an end to the joint transactions; they must necessarily be carried on for the purpose of winding up the concern and everything belonging to it. So that when you speak of partnership dealings and transactions you are not to exclude from your consideration those transactions and matters which are necessary by way of introduction or preparation for a partnership dealing, nor are you to exclude those which afterwards follow for the purpose of winding up the concerns of the partnership."

2. Time up to which the account is to be taken.

The time at which an account of partnership dealings and transactions is to stop will, naturally, be the date of the dissolution of the firm (*f*). Not that no account is to be taken of what occurs after that date; for some time or other must elapse between the dissolution and the final winding up of the affairs of the concern, and such time cannot in fairness to any one be excluded from consideration (*g*). Notwithstanding dissolution, a partnership is deemed to continue so far as may be necessary for the winding up of its affairs (*h*); and an account of partnership dealings and transactions, although in one sense it stops at the date at which the partnership is dissolved, must still be kept open for the purpose of debiting and crediting the proper

(*c*) Seton, 276, ed. 2.

(*d*) See *Holgate* v. *Shutt*, 27 Ch. D. 111, and 28 ib. 111; *Newen* v. *Wetten*, 31 Beav. 315. Compare *Milford* v. *Milford*, MacCl. & Y. 150.

(*e*) 8 Beav. 116.

(*f*) See, accordingly, *Beak* v. *Beak*, Finch, 191, a case of dissolution by death; *Jones* v. *Noy*, 2 M. & K. 125, a case of dissolution by decree on the ground of lunacy.

(*g*) See *per* Lord Eldon in *Crawshay* v. *Collins*, 2 Russ. 345; *Hale* v. *Hale*, 4 Beav. 375.

(*h*) See, as to this, *ante*, p. 217 *et seq.*

parties with the monies payable by or to them in respect of fresh transactions incidental to the winding up, as well as in respect of old transactions engaged in prior to the dissolution (*i*).

Subsequent profits when a dead or retired partner's capital has been left in the concern.

Moreover, upon the retirement, bankruptcy or death of a partner, it often happens that the continuing or surviving partner carries on the partnership business without coming to any settlement of the partnership accounts, and without paying out the share of the late partner. When this is done, questions of great difficulty arise which it is now proposed to investigate.

Account of profits subsequent to dissolution.

General principles.

Before adverting to the decisions which define and illustrate the right of a late partner, or of his representatives, to an account of the profits made by his continuing or surviving partners by the use of his capital in their business, it will be useful to consider the principles applicable to a more abstract question, which may be put thus—If a person trades with property which does not belong to him, what are the rights of the owner against him in respect of the profit he has made?

1. Where capital is lent at interest.

First, let us suppose that the property is used in trade by agreement with the owner: then the agreement will regulate the rights of the owner. Consequently, if a partner agrees that when he dies or retires his capital shall remain in the business at interest, those who carry on that business will be accountable for the capital and interest, and nothing more (*k*). Further, if executors or trustees lend trust money to a stranger at interest, the obligation of the borrower is limited to repayment of the money lent with interest; and it is immaterial whether he has employed the money in trade or not, and whether the money was lent to him properly or improperly (*l*).

(*i*) See *Willett* v. *Blanford*, 1 Ha. 270; and as to the difference between the accounts before and after the date of dissolution, see *Watney* v. *Wells*, 2 Ch. 250. See, also, *Booth* v. *Parks*, 1 Moll. 465, and *ante*, pp. 402, 420.

(*k*) *Vyse* v. *Foster*, L. R. 7 H. L. 318, and 8 Ch. 309, where one of the surviving partners was an executor of the deceased.

(*l*) See *Stroud* v. *Gwyer*, 28 Beav. 130, approved in *Vyse* v. *Foster*, 8 Ch. 309, *infra*, p. 534.

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But a loan by A. to B. must not be confounded with capital brought by A. into a firm of A. and B. (*m*).

2. Where capital is wrongfully employed in trade by persons who are not trustees.

Next, let us suppose that the property is wrongfully used in trade, without any agreement express or tacit with the owner; and let us suppose that there is no trust between the trader and the owner. The trader's liability in this case will be to restore the property, and to make to the owner proper compensation for its detention. But what is proper compensation? Is it interest, or the profits made by the trader by the use of the property in question? or the profits which the owner would (probably) have made if he had had the property itself? The profits which the owner might have made can only be guessed at, and this is a sufficient reason for rejecting these profits as a measure of compensation. On the other hand, to limit the compensation to interest (at the accustomed rate) would frequently enable the wrongdoer to profit by his own wrong, and be an inadequate compensation to the owner. It may, therefore, be necessary to give the owner the profits made by the trader by the use of the property in question, after making the trader all just allowances including a fair remuneration for his trouble. To do so may moreover be justified upon the ground that the profits are accretions to the property which has yielded them, and ought to belong to the owner of such property, in accordance with the maxim, *accessorium sequitur suum principale* (*n*). At the same time it may not be always right to restrict the owner's compensation to the profits made by the use of his property; for it may happen that it has made no profit, or less profit than interest at the current rate (*o*). Compensation to the owner being the object in view, it would be only fair to give him the option to take interest or the profits made by the use of his property (*p*).

3. Where capital is

Now let us suppose that the trader is a trustee of the pro-

(*m*) See *Treacle* v. *Milne*, 9 Ha. 141, and *Fletcher* v. *Bealey*, 8 Ch. 223, note, *infra*, p. 530.

(*n*) See *Yates* v. *Finch*, 13 Ch. D. 839; Sir Sam. Romilly's argument in 15 Ves. 224; Sir T. Plumer in 1 Jac. & W. 132 and 133. See, also, *per* Romilly, M. R., in 15 Beav. 392, and 22 Beav. 100.

(*o*) As in *Booth* v. *Parkes*, Beatty, 444.

(*p*) See acc. *infra*, p. 528; but he cannot have both, see *Heathcote* v. *Hulme*, 1 Jac. & W. 122.

perty, and that he employs it in trade contrary to his trust. The reasons for charging him with interest, or the profits made by the property, at the option of its owner, are as applicable to this case as to that last investigated; but there is in this case an additional reason for so charging him, for it is a well-established rule that no trustee shall himself derive profit from the use of the trust property (*q*).

wrongfully employed in trade by a trustee.

There remains for consideration the mixed and difficult case in which a trustee has improperly employed the trust property in a trade carried on by himself in partnership with others who are not trustees. The liability of the trustee in this case to be charged (at the option of the *cestui que trust*) with interest or with the profits which he (the trustee) has derived from the use of the trust property is well established (*r*); but it has sometimes been considered that he ought to be charged with all the profits made by the firm by means of the trust property. This view is apparently based upon the ground that the profits are accretions to the trust property; and that the trustee is as much liable for them as for the property itself; and that he is not discharged from this liability by the circumstance that he has divided the profits with his co-partners. But, plausible as this view is, it must be remembered that in the case now supposed the profits have not all been earned or received by the trustee, but by himself and others, and that he is not in a position to make them refund their shares of the profits yielded by the trust property. It would therefore be highly unjust to make the trustee accountable for more than his own share of such profits; and this view has been adopted by the courts of appeal both in England and Scotland (*s*).

4. Mixed cases—constructive trusts.

a. Liability of the trustee sharing profits.

(*q*) See, as to the liability of the trustee, *Docker* v. *Somes*, 2 M. & K. 655.

(*r*) See *Jones* v. *Foxall*, 15 Beav. 388, where the trustee was charged with compound interest at 5 per cent. See Lord Selborne's observations on this case in *Vyse* v. *Foster*, L. R. 7 H. L. 346.

(*s*) See *Vyse* v. *Foster*, L. R. 7 H. L. 318, and 8 Ch. 309; *Laird* v. *Chisholm*, 30 Scottish Jur. 582. In both of these cases the trustees only were sued. See, also, *Jones* v. *Foxall*, 15 Beav. 388, p. 395; *Palmer* v. *Mitchell*, 2 M. & K. 672. Whether the case would be different if all the other partners were parties is doubtful. See *Vyse* v. *Foster*, *ubi supra*. See a thoughtful article on this subject in The Law Quarterly Review, 1887, p. 211.

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b. Liability of trustee not sharing profits.

The same considerations lead to the conclusion that a co-trustee who is not himself a member of the firm deriving profit from the use of the trust money, and who consequently does not himself derive any profit from that use, is not accountable for any of the profits yielded by the trust property (*t*).

c. Liability of partners who are not trustees.

Lastly, we have to consider the position of the partners who are not trustees, but who have shared the profits derived from the use of the trust property. With respect to them, the first thing to ascertain is whether they are personally implicated in any breach of trust; for if not, they are under no liability in respect of the profits in question—indeed, they may not even be liable to make good the trust money (*u*). But if they have traded with the trust money knowing that its employment in trade was a breach of trust, they incur the same liabilities in respect of it as if they were themselves trustees. Consequently they become jointly and severally liable as well for the trust property itself as for the profits which they have made by it (*x*). But this liability cannot be enforced except in an action to which they are all parties (*y*). It has, indeed, been doubted whether there is any joint and several liability as regards profits, and whether the non-trustee partners are liable for more than the trust property and interest (*z*).

Practical difficulty in carrying out the foregoing principles.

Assuming that a person is entitled to an account of profits made by the use of his property in trade, it is obviously often extremely difficult to ascertain these profits. To take the ordinary case of surviving partners continuing to trade with the capital of a deceased partner, great difficulty will be found in arriving at the share of profits to which the executors of the deceased are entitled.

It is very easy to say they can be calculated by the rule of three—as the whole capital is to the whole profits, so is the

(*t*) See *Vyse* v. *Foster*, *infra*, p. 534.

(*u*) *Ante*, p. 160.

(*x*) See, accordingly, *Flockton* v. *Bunning*, 8 Ch. 323, note, *infra*, p. 530.

(*y*) See *Vyse* v. *Foster*, and *Laird* v. *Chisholm*, *ubi supra*; *Simpson* v. *Chapman*, 4 De G. M. & G. 174, *per* Turner, L. J. Compare *Brown* v. *De Tastet*, Jac. 284; *Macdonald* v. *Richardson*, 1 Giff. 81; *Bowes* v. *City of Toronto*, 11 Moore, P. C. 463.

(*z*) See *Vyse* v. *Foster*, *infra*, p. 534; *Stroud* v. *Gwyer*, 28 Beav. 130; *Macdonald* v. *Richardson*, 1 Giff. 88. But in *Flockton* v. *Bunning*, 8 Ch. 323, note, *infra*, p. 530, the liability was treated as perfectly clear.

late partner's share in the capital to his share of the profits—but this assumes that the profits in question have been made by capital only. Profits, and very large profits, may be made by skill, and an extensive connection, with little or no capital; and even if there be capital, the profits may be attributable less to it than to other matters, and it may be impossible to determine with any precision the extent to which the capital has contributed to the realisation of the profits obtained (*a*). Special inquiries on this subject, therefore, are almost always necessary, and if it can be shown that, having regard to the nature of the business or other circumstances, the profits which have been made cannot be justly attributed to the use of the capital or assets of the late partner, his *primâ facie* right to share such profits will be effectually rebutted.

Willett v. Blanford.

The extent of the liability to account for subsequent profits was elaborately discussed by the late V.-C. Wigram in *Willett* v. *Blanford* (*b*), and the conclusion arrived at by him was, that no general rule could be laid down upon the subject, and that every case must depend on its own circumstances. "The nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the late partnership and the deceased partner at the time of his death, and the conduct of the parties after his death, may materially affect the rights of the parties." This conclusion of the Vice-Chancellor was entirely in accordance with previous decisions (*c*), and has been approved by subsequent judges; and in conformity therewith several cases have since been decided, in which profits acquired after the death of a partner were held to belong wholly to those by whose labour they had been made. An element of uncertainty is thus introduced into an already difficult and complicated branch of law, and renders it extremely embarrassing; but it is hoped that the foregoing attempt to explain its principles may tend to introduce more certainty in their future application.

(*a*) This difficulty was felt very strongly in *Featherstonhaugh* v. *Turner*, 25 Beav. 382, noticed *infra*, p. 536.

(*b*) 1 Ha. 253.

(*c*) See in particular Lord Eldon's observations on *Crawshay* v. *Collins*, in Jac. pp. 622 and 297, and 2 Russ. 330.

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Passing now to the decisions, to which the foregoing observations are intended to serve as an introduction, the right to an account of profits subsequent to a dissolution will be found distinctly laid down in the following cases.

Bankruptcy. Crawshay *v.* Collins.

The first case of importance on the subject is *Crawshay* v. *Collins* (*d*). There one partner had become bankrupt, and the solvent partners had carried on the business without paying out the bankrupt's share of the assets, and an inquiry was directed with a view to ascertain whether profits made subsequently to the bankruptcy were made by the application of the funds which then constituted the capital of the concern (*e*), or by the application of any other, and what funds; and the master was directed to distinguish between capital and stock in trade (*f*). The object of this inquiry was to ascertain whether the profits made after the dissolution were actually made by the application of the funds that belonged to the bankrupt as a member of the partnership (*g*). And it appearing that such profits were made, it was held by Lord Eldon, and afterwards by Lord Lyndhurst (on a re-hearing), that the assignees had a right to a share of these profits, and that the account could not stop until the claims of the assignees were satisfied. The bankrupt was originally entitled to three-eighths of the partnership assets, and although he was indebted to the firm, so that the sum actually payable to him was less than three-eighths of the net assets of the firm, and although the continuing partners had brought in a large additional capital since the bankruptcy, still the assignees were held entitled to be credited throughout with three-eighths of the profits, being debited with what the bankrupt owed. The decree in this important case declared that the three-eighth parts or shares of the bankrupt in the partnership ought to be considered as continuing notwithstanding, and after, his bankruptcy; and

(*d*) 15 Ves. 218; 1 J. & W. 267; and 2 Russ. 325. The decision in 15 Ves. 218, was afterwards said by Lord Eldon not to have gone to the extent ordinarily supposed. See Jac. 296 and 622, and 2 Russ. 330. *Brown* v. *Vidler*, cited in 15 Ves. 223, and 2 Russ. 340, is an earlier case in point. See, too, *Brown* v. *Litton*, 1 P. W. 141, and 10 Mod. 20; *Hammond* v. *Douglas*, 5 Ves. 539.

(*e*) 15 Ves. 218.

(*f*) 1 J. & W. 267.

(*g*) 2 Russ. 337.

that the assignees were entitled to three-eighth parts of the profits which had been already reported to have been made; and three-eighth parts of such further profits as (on taking the further accounts thereby directed) should appear to have been made (*h*).

Death.

So, in *Brown* v. *De Tastet* (*i*), where one partner died and the survivor carried on the partnership business, without accounting for the share of the deceased to his administratrix, an account was directed at the suit of the administratrix, not only of the dealings and transactions of the partners up to the death of the deceased partner, but also of the property of the deceased in the hands of the surviving partner, and of all profits and gains made by him by means of such property.

Brown *v.* De Tastet.

Yates v. Finn.

Yates v. *Finn* (*k*) is another case of the same sort; and there the surviving partner was decreed to account for the profits made by means of the capital of the deceased partner, but was allowed a proper sum for managing the business.

Other instances

The rule established in these cases has been applied in a variety of instances; *e. g.*, where a managing partner had continued the business after the period fixed for the dissolution and winding up of the partnership (*l*); where a partner had become lunatic and the firm had been dissolved, but the business had been continued by the other partners, and they had not paid out the capital of the lunatic partner (*m*); where partners had agreed to dissolve and to have the partnership business wound up, and its assets got in and converted by a third person, and one of the partners nevertheless carried on the business in the meantime for his own benefit (*n*); where a mining partnership had been dissolved, but one of the partners had obtained a renewed lease of the mine, and had continued to work it for his own benefit (*o*).

(*h*) 2 Russ. 347.

(*i*) Jac. 284. It is said in 2 M. & K. 658, that this case was affirmed by the House of Lords, and after all to have been abandoned by the plaintiff, who found it impossible to work out the decree. See, too, *Featherstonhaugh* v. *Turner*, 25 Beav. 382; *Smith* v. *Everitt*, 27 ib. 446; *Booth* v. *Parks*, 1 Moll. 465, and Beatty, 444.

(*k*) 13 Ch. D. 839.

(*l*) *Parsons* v. *Hayward*, 31 Beav. 199, affirmed on appeal, 4 De G. F. & J. 474.

(*m*) *Mellersh* v. *Keen*, 27 Beav. 236.

(*n*) *Turner* v. *Major*, 3 Giff. 442.

(*o*) *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298. See, too, *Clements* v. *Hall*, 2 De G. & J. 173.

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Option to take interest or profits.

In the foregoing cases it will be observed there was no relation of trustee and *cestui que trust* (as distinguished from that of late partnership) subsisting between the persons who made the profits and those who were held entitled to share them. But even where there is no true relation of trustee and *cestui que trust*, partners continuing to carry on business without coming to an account with their late partner, or those who represent him, are liable to be charged either with the profits made by the use of his capital, or with interest on it at 5*l*. per cent., at the option of those to whom such capital belongs (*p*); but in taking an account of subsequent profits, the partner by whose exertions they have been made is usually allowed compensation for his trouble (*q*), unless he is, in the proper sense of the word, a trustee, and guilty of a breach of trust, when no such compensation is allowed (*r*).

Account of subsequent profits against executors who are surviving partners.

The rights of the legatees and next of kin of a deceased partner against his executors where they are themselves surviving partners or have themselves become partners since his death, are illustrated by the following decisions.

Cook *v.* Collingridge.

In *Cook* v. *Collingridge* (*s*), the executors of a deceased partner sold their testator's share to the surviving partners, who resold it to one of the executors. The sale was set aside at the instance of a legatee, and an account of profits made subsequently to the death of the deceased partner was decreed, although the money paid for the testator's share was not continued in the business.

Townend *v.* Townend.

In *Townend* v. *Townend* (*t*), three brothers, A., B., C., were in partnership, under articles by which it was provided that the capital of the partners should not be withdrawn until the

(*p*) *Booth* v. *Parks*, 1 Moll. 465, and Beatty, 444. See, also, *Clements* v. *Hall*, 2 De G. & J. 186; *Toulmin* v. *Copland*, 2 Ph. 711, reversing S. C., 4 Ha. 41.

(*q*) *Yates* v. *Finn*, 13 Ch. D. 839; *Brown* v. *De Tastet*, Jac. 284. See, also, ib. 623; *Featherstonhaugh* v. *Turner*, 25 Beav. 382; *Mellersh* v. *Keen*, 27 ib. 242.

(*r*) *Stocken* v. *Dawson*, 6 Beav. 371, and 9 ib. 247; *Burden* v. *Burden*, 1 V. & B. 170. See, however, *Cook* v. *Collingridge*, Jac. 622, 623.

(*s*) Jac. 607. See the decree in 27 Beav. 456. *Stocken* v. *Dawson*, 9 Beav. 239, and on appeal 17 L. J. Ch. 282, was a somewhat similar case.

(*t*) 1 Giff. 201.

expiration of seven years from that date; that in case of the death of one of the partners within that term, a valuation of his share should be made, and that the surviving partners should pay to his representatives the amount of such valuation within three years from the said term of seven years, and in the meantime give sufficient security for the same by a mortgage of a competent part of the partnership property. It was also provided that it should not be lawful for the representatives to commence any action for recovering payment of the share of the deceased, until the end of three years after the expiration of the term of ten years, nor to claim any participation in the profits made after the day up to which the valuation was made; the expressed intention being that the representatives of the partner dying should take 5*l.* per cent. on the value of the share in lieu of profits. It was further provided that nothing should prejudice the right of the representatives within the term of seven years, to take any proceedings in order to obtain a fair valuation, or to obtain and enforce the mortgage security. In April, 1844, A. died, having by will devised his real and personal estate to B., C., and D. upon trust, to raise the sum of 12,000*l.* and invest the same in government or real security, and apply the proceeds towards the maintenance and education of the plaintiff, his then infant daughter, and accumulate the surplus at compound interest; and upon his daughter attaining twenty-one, to pay the accumulations to her, and to stand possessed of the capital on trust to pay her the proceeds during her life. The testator's estate consisted almost entirely of his share in the partnership. In December, 1844, a valuation was made, by which the testator's share was ascertained to be 20,000*l.* and upwards. In June, 1853, being more than ten years from the date of the articles, certain hereditaments, consisting of freeholds, leaseholds, and machinery (part of the partnership assets) were mortgaged by B. to C. and D., as a security for the 12,000*l.* (*u*). The plaintiff came of age in 1857, and in 1858, B. and C. rendered to her an account of the trust funds, in which they debited her with various items for maintenance and education, with 5*l.* per

(*u*) The property, so far as it could be regarded as an authorised security, was not an adequate security for 12,000*l.*

cent. interest thereon, and credited her with the sum of 12,000*l.* and interest at 5*l.* per cent. with yearly rests, up to the 1st May, 1853, and thenceforth with interest at 4*l.* per cent. with yearly rests. The plaintiff, however, insisted that the 12,000*l.* had been continued in the partnership business, and she filed a bill against B., C., and D. for an account of the profits made in the partnership business on the sum of 12,000*l.* from the testator's death, and for payment of what should be found due to the plaintiff, alleging that the mortgage was an improper security. The Court held, 1, That the plaintiff was entitled to an account of the legacy of 12,000*l.*, with interest at 5*l.* per cent. from one year after the testator's death up to the 1st January, 1849 (ten years from the date of the articles), and with compound interest on the surplus, after allowing for sums expended for her maintenance and education; 2, that the plaintiff was entitled to an account of the profits made by the partners from the 1st January, 1849, on the balance found due for the principal at that date, with interest at 5*l.* per cent. and annual rests; 3, that she was entitled to a decree for payment of what should be so found due; and, 4, that the entry of the sum of 12,000*l.* in the account furnished by B. and C. must be taken as conclusive against them that they had such a sum in their hands. It was considered that the mortgage had not the effect of withdrawing the 12,000*l.* from the business: it was part of a plan for keeping the money in the business; and the 12,000*l.* ought not to have been left on the security of property from which the trustees ought to have recovered it.

Macdonald *v.* Richardson.

In *Macdonald* v. *Richardson* (*x*), a partner died, leaving his co-partner and another person his executors, and the co-partner executor afterwards took other persons into partnership with him. The testator's assets having been kept in the business, the legatees filed a bill against the executors, and them only, claiming an account of profits since their testator's death; and a decree was made in their favour (*y*).

Flockton *v.* Bunning.

In *Flockton* v. *Bunning* (*z*), a partner died, leaving his wife

(*x*) 1 Giff. 81. See, also, *Docker* v. *Somes*, 2 M. & K. 655.

(*y*) It is not quite clear whether the executor, who was a partner, was ordered to account for more profits than he received or not.

(*z*) 8 Ch. 323, note. The writer was counsel for the appellants, and

his executrix, and having directed her to get in his estate and invest it for the benefit of herself and children. She wound up the partnership in which her husband was engaged, but continued to carry on the business with his capital, in partnership with other persons, who knew that in so doing she and they were committing a breach of trust (*a*). A bill was filed by some of the children against her and her co-partners, seeking to make them jointly and severally liable for the trust estate employed in the business, and for the profits made by its use; and a decree to that effect was made and was affirmed on an appeal by the wife's partners. This case was decided on the principle that the wife's partners were clearly implicated in the breach of trust committed by her, and were jointly and severally responsible with her for the trust estate and all the profits made thereby. The widow's capital was trust property; there was no loan as in *Stroud* v. *Gwyer* (*b*), but the widow's capital became part of the capital of the firm; and she and her co-partners wrongfully traded with it (*c*). Both L. J. Wood and the L. J. Selwyn agreed that a mere loan, although in breach of trust, would not involve liability to account for profits, but that trust property which was traded with by a trustee in partnership with others, could not be regarded as a loan (*d*).

Option in these cases.

The right of the *cestui que trust* against his trustee in these cases is to an account of profits made by him by the use of the trust property, or at the option of the *cestui que trust* to simple interest at 5*l.* per cent. (*e*); or in special cases to compound interest (*f*).

this statement of the case was written from the short-hand writer's notes of the judgment.

(*a*) In fact, she agreed to indemnify them against the consequences.

(*b*) 28 Beav. 130, *ante*, p. 521.

(*c*) Compare this case with *Vyse* v. *Foster*, L. R. 7 H. L. 318, and 8 Ch. 309, noticed *infra*, p. 534.

(*d*) See, also, as to this, *Travis* v. *Milne*, 9 Ha. 141, where, however, interest only was ordered to be paid.

(*e*) *Heathcote* v. *Hulme*, 1 Jac. & W. 122.

(*f*) If the trustee's duty is to call in the money and accumulate the income, he will be charged with compound interest; there may possibly be other grounds for so charging him. See *Jones* v. *Foxall*, 15 Beav. 388; *Williams* v. *Powell*, ib. 461, and Lord Selborne's observations in *Vyse* v. *Foster*, L. R. 7 H. L. 346.

The next class of cases which it is necessary to notice, is that in which surviving or continuing partners were held not liable to account for profits made after dissolution.

Simpson *v.* Chapman.

The first of these was *Simpson* v. *Chapman* (*g*). There three persons were partners as bankers. The bank was in such good credit as to render no capital necessary for the purpose of carrying it on. One of the partners died, leaving his son one of the surviving partners, and a third person, his executors. At the time of his death the assets of the bank exceeded its liabilities. The estate of the deceased was a creditor of the bank to the extent of his share, viz., one-third of its net assets but there was a much larger sum owing from his estate to the bank on his overdrawn private account. The son, being also an executor of the deceased, was admitted as a partner in the bank, and the business was carried on by the son and surviving partners, but the amount of the deceased's share in the business was never paid out, or separated from the monies of the bank. Considerable profits were made by the new partnership and of these the son, as partner, received his share. A suit was instituted for the administration of the estate of the deceased, but to such suit the executors alone were defendants and a decree was made charging the son, and the surviving partner, who was an executor, in respect of the profits of the bank from the death of the deceased, paid to the son, so far as such profits had accrued from the assets of the deceased employed in the partnership. This part of the decree was appealed from and reversed, and one of the grounds for the reversal was, that the profits acquired after the death of the deceased could not be attributed to the use made of his capital. If the debt due from him to the bank were omitted from its assets, the bank was at his death insolvent. The deceased had no capital in it in the ordinary sense of the word, and all the profits which had accrued were attributable to the connection and reputation of the bank. It was urged that the son who had received one-third of the profits, and who could not distinguish how much of them was attributable to his character

(*g*) 4 De G. M. & G. 154. This case is the more important as the non-liability to account for subsequent profits was decided on the hearing of the cause.

of executor, and how much belonged to him in his individual character as partner, ought to be charged with the whole. But it was held that this principle did not apply, inasmuch as he did not carry on the business as an executor, but in his own separate and individual right, conceiving that he was entitled so to carry it on.

Wedderburn v. Wedderburn.

Another case of the same class was *Wedderburn* v. *Wedderburn* (*h*). There three persons were partners as merchants; one died, leaving the other two and his widow his executors. The surviving partners alone proved the will, and they drew up an account of the partnership assets and credited the estate of the deceased with a certain sum as his share in the concern, but this share was never separated from the assets of the continuing firm. Several changes afterwards took place in the new firm, and then a suit was instituted by persons interested in the estate of the deceased partner, against the executors and surviving partners of the deceased, praying for an account of his estate, and for an account of the gains and profits made by carrying on the partnership after his death. A decree was made directing an account of the personal estate of the deceased partner; and of the dealings and transactions of the firm up to his death; and of what at that time was the value of his interest in the concern; and of the profits of the trade carried on by the succeeding firms; and of the monies which were from time to time taken out of the concern, and applied on account of the estate of the deceased; and of the amount of capital from time to time employed in the said firms respectively (*i*). It appeared that at the death of the deceased the assets of the firm consisted almost entirely of debts due to it; that it was impossible, except at a great sacrifice, to get in these debts in a short time; that if an attempt had been made to wind up the affairs of the concern at the death of the deceased, the assets of the firm would not have sufficed to discharge its liabilities; and that the ultimate solvency of the firm was attributable to the cautious and prudent conduct of the surviving partners, and to their having, from time to time, provided large sums of money to meet

(*h*) 2 Keen, 722; 4 M. & Cr. 41; and 22 Beav. 84.

(*i*) 2 Keen, 752.

pressing liabilities (*k*). It thus, in fact, appeared that the profits made since the death of the deceased were made by the credit and connection of the house, and by the reputation, skill, and ability of the surviving and later partners, and were not attributable to the surplus assets of the firm in which the deceased had a share. It further appeared that the share of the deceased had been preserved entirely by the prudent management of the executors, and would have been certainly reduced to nothing if they had wound up the affairs of the house in the ordinary way, or had thrown the estate of the deceased into Chancery. Under all the circumstances of the case it was therefore held that as by the partnership articles the plaintiffs had no interest in the good-will of the concern, they were not entitled to participate in the profits made by the successive firms, so far as those profits were attributable to the good-will and connection in trade of the old firm; and that their share in any profits attributable to any other source was covered by interest on the amount at which the share of the deceased had been valued.

Vyse *v.* Foster.

Lastly, in *Vyse* v. *Foster* (*l*), the partnership articles provided that on the death of a partner the amount of his share should be ascertained and be paid out with interest, by instalments, running over two years. A partner died leaving three executors, one of whom was a surviving partner. The share of the deceased was ascertained; it was not, however, paid out at the end of two years, but was kept in the business, which was carried on for many years, first by one and then by two of the executors, with other persons. The continuing firms paid interest on the capital of the deceased partner, and all the persons beneficially interested in his estate, except the plaintiff, acquiesced in this arrangement. The plaintiff, soon after coming of age, demanded her share of the estate of the deceased, and also the profits made by its employment in the business. The firm paid her the principal sum due to her, with compound interest, at 5*l.* per cent., but declined to account

(*k*) See 22 Beav. 84.

(*l*) 8 Ch. 309, and L. R. 7 H. L. Ca. 318. The case came again before the court as to the mode of ascertaining the amount due to the deceased, see 10 Ch. 236. See the Law Quarterly Review for 1887, p. 211.

to her for any profits. She thereupon filed a bill against the executors, and them alone, for an account of the profits. A decree was made in her favour, and the defendants were declared liable for all the profits made by the successive firms, by the use of her share of the deceased partner's estate. The court of appeal, however, reversed this decision, and held that although there had been technically a breach of trust in not paying out the capital of the deceased partner as provided by the partnership articles, still the plaintiff could not possibly be entitled to charge the defendants in the suit, as constituted, with more profits than they had themselves received; and as the evidence showed that they had acted throughout with perfect fairness, the court of appeal refused even an account of these profits, and held that under all the circumstances of the case the plaintiff was only entitled to her share of the testator's estate, with the compound interest at 5*l.* per cent. which had been offered to her. The decision in this case is extremely important, as it decided, 1, that the clause in the partnership articles was binding both on the executors of the deceased partner and on the surviving partners, although one of them was also an executor; 2, that the amount due to the estate of the deceased was in effect a loan to the survivors, and its non-payment at the time and in manner prescribed by the articles of partnership did not entitle the plaintiff to any profits, but only to interest; 3, that even if the plaintiff's claim to profits could have been sustained, the executor who was not a partner would not have been liable for such profits; and 4, that the executors who were partners would not have been liable for more profits than they respectively themselves received (*m*).

Observations on the foregoing cases.

The law upon the subject under consideration is still in an unsettled state. Undoubtedly a person ought not to be permitted to retain for his own use, gains acquired by the unlawful employment of another's property; and it would certainly not be conducive to justice if there were no power to compel a discovery of the amount of the gains so made, and payment

(*m*) See, as to this, *Flockton* v. *Bunning*, 8 Ch. 323, note, *ante*, p. 530, and the observations of Lord Cairns in L. R. 7 H. L. 333, 4.

of that amount by the wrong-doer (*n*). At the same time, owing to the extreme difficulty of taking an account of subsequent profits, so far as they are attributable only to one particular source, the tendency of the courts in modern times appears to be rather in favour of not exercising than of exercising the power alluded to, except in cases of gross fraud or breach of trust (*o*). In such cases, however, the Court will exert itself to the utmost, and the efforts which it will make in order to prevent persons from deriving advantage from their own wrong, cannot be better illustrated than by the case of *Featherstonhaugh* v. *Turner* (*p*). The profits of the partnership business there arose entirely from the skill and reputation of the partners, who were medical gentlemen. In order to ascertain the share of the deceased in the profits made after his death by the surviving partner, an inquiry was directed whether any and what profits made since the death of the deceased were attributable to or derived from persons who had become customers by reason of the deceased having been a partner, and it was considered that the surviving partner was liable to pay what might be found due on taking that account, after deducting a liberal allowance to him for his time, knowledge, and expenses in realising the profits in question.

Featherstonhaugh *v.* Turner.

With respect to the evidence upon which the accounts are to be taken.

Evidence on which accounts are taken.

As regards the partnership books. These being accessible to all the partners, and being kept more or less under the surveillance of them all, are *primâ facie* evidence against each of them, and, therefore, also for any of them against the others (*q*). But entries made by one partner without the knowledge of the other do not prejudice the latter as between

(*n*) See the admirable judgment of Lord Brougham in *Docker* v. *Somes*, 2 M. & K. 672.

(*o*) Judgments for an account of profits after dissolution are fearfully oppressive; and the writer is not aware of any instance in which such a judgment has been worked out and has resulted beneficially to the person in whose favour it was made.

(*p*) 25 Beav. 382.

(*q*) See *Lodge* v. *Prichard*, 3 De G. M. & G. 906, and *Smith* v. *The Duke of Chandos*, 2 Atk. 158, and Barn. 412. But see the observations of L. J. Turner, in *Stewart's case*, 1 Ch. 587.

himself and his co-partner (*r*); and where a surviving partner drew up an account which he furnished to the executors of his late partner, it was held that such account was admissible against the partner who furnished it, and that the executors were not bound, by using it against him, to admit its correctness throughout (*s*).

Special directions on this subject.

Where, in consequence of the loss of books and documents, an account cannot be taken in the usual way, special directions will be given as to the mode in which the accounts shall be taken and vouched. The power to give such a direction is expressly conferred by Ord. XXXIII., r. 3 (*t*).

Production of books, &c.

The judgment for an account usually directs that all parties shall produce on oath all books and papers in their custody relating to the taking of the accounts. If any partner has kept accounts relating to the partnership in private books of his own, he must produce such books; for he should have kept his private accounts elsewhere, if he did not want them to be seen (*u*). After a dissolution new books are generally opened; but if they relate to the accounts which have to be taken, they must be produced (*x*); and even if a partner not before the Court, objects to their production, it is by no means clear that his objection will prevail (*y*). As between partners

(*r*) *Hutcheson* v. *Smith*, 5 Ir. Eq. 117. See, also, *Reeve* v. *Whitmore*, 2 Dr. & Sm. 446, where it was held that although books kept by a person may be used against him as showing what he has received, he is not entitled to use them in his own favour to show what he has paid.

(*s*) *Morehouse* v. *Newton*, 3 De G. & Sm. 207.

(*t*) This rule was framed on 15 & 16 Vict. c. 86, § 54, repealed by 46 & 47 Vict. c. 49, § 3. See, as to the old practice, *Rowley* v. *Adams*, 7 Beav. 395; *Millar* v. *Craig*, 6 ib. 444; *Turner* v. *Corney*, 5 ib. 515; *Adley* v. *The Whitstable Co.*, 17 Ves. 327. See the decree in *Stainton* v. *The Carron Co.*, 24 Beav. 363. Special directions were only given when necessary. See *Lodge* v. *Prichard*, 3 De G. Mac. & G. 906; *Ewart* v. *Williams*, 7 ib. 68. The Bankers' Books Evidence Act, 42 & 43 Vict. c. 11, facilitates the procuring of evidence. See on it, *Harding* v. *Williams*, 14 Ch. D. 197 (which query); *Re Marshfield*, 32 Ch. D. 499, which was varied on appeal; *Arnott* v. *Hayes*, 36 Ch. D. 731.

(*u*) *Pickering* v. *Pickering*, 25 Ch. D. 247; *Toulmin* v. *Copland*, 3 Y. & C. Ex. 655; *Freeman* v. *Fairlie*, 3 Mer. 43. Liberty will be given to seal up those parts which are sworn not to relate to the matters in question in the suit, *ante*, p. 507.

(*x*) *Hue* v. *Richards*, 2 Beav. 305. See the last note.

(*y*) See *Freeman* v. *Fairlie*, 3 Mer. 43. But see *ante*, p. 503.

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and their representatives, material documents must be produced, though they may be privileged as between them and other persons (*z*).

Consequence of non-production.

If a partner has books or accounts in his possession, and he will not produce them, an account may, nevertheless, be arrived at by presuming everything against him. Thus, in a case where an account was directed at the suit of the representatives of a deceased partner against the surviving partner, and the latter would not produce the books necessary to enable the Master to take the accounts, the Master estimated the net profits at 10*l.* per cent. on the capital employed, and the Court, on exceptions to his report, confirmed it, adding that if he had set the net profits down at 20*l.* per cent. his report would have been equally confirmed (*a*).

Accountants.

The Court has power to employ professional accountants to assist it in taking accounts, and the Court may act on their report (*b*).

2. *Of injunctions.*

Injunctions and receivers.

In order to prevent a partner from acting contrary to the agreement into which he may have entered with his co-partners, or contrary to the good faith which, independently of any agreement, is to be observed by one partner towards his co-partner, it is sometimes necessary for a Court to interfere either by granting an *injunction* against the partner complained of, or by taking the affairs of the partnership out of the hands of all the partners, and entrusting them to a *receiver* or *receiver and manager* of its own appointment.

These two modes of interference require to be considered separately; for they are not had recourse to indiscriminately. The appointment of a receiver, it is true, always operates as an injunction, for the Court will not suffer its officer to be inter-

(*z*) See *Brown* v. *Perkins*, 2 Ha. 540, where the exclusion of professional confidence was set up.

(*a*) *Walmsley* v. *Walmsley*, 3 Jo. & Lat. 556; and see *Gray* v. *Haig*, 20 Beav. 219.

(*b*) See Jud. Act, 1873, § 56, 57, and Ord. xxxiii. r. 2; xl. r. 10; lv. r. 19; and see *Hill* v. *King*, 1 N. R. 341, L. C.; *Ford* v. *Tynte*, 2 De G. J. & Sm. 127; *Re London, Birmingham, and Bucks. Rail. Co.*, 6 W. R. 141. As to production to accountants, &c., see *ante*, p. 504.

fered with by any one (*c*); but it by no means follows that because the Court will not take the affairs of a partnership into its own hands, it will not restrain some one or more of the partners from doing what may be complained of (*d*).

Injunction granted though no dissolution is sought.

Whatever doubt there may formerly have been upon the subject, it is clear that an injunction will not be refused simply because no dissolution of partnership is sought (*e*). Where a partner who had been suffering from temporary insanity had recovered, but was excluded by his co-partners from the management of the affairs of the partnership, the Court restored him to his position in the firm by granting an injunction restraining the other partners from preventing him from transacting the business of the partnership (*f*).

Restoring excluded partner.

Restraining improper acts. England *v.* Curling.

Again, in *England* v. *Curling* (*g*), a partnership had been entered into, for a term of years which had not expired. One of the partners insisted on a dissolution and retired from the partnership, and entered into another partnership, which assumed the name of the old firm, opened the letters addressed to it, and circulated notices of its dissolution. But on a bill filed by the continuing partners of the old firm against their co-partner and the other members of the new firm, the Court granted an injunction restraining the retired co-partner from carrying on business with his new partners or any other persons except his old co-partners, until the expiration of the term; and restraining his new partners from carrying on business with him, or otherwise, in the name of the old firm, and from receiving or opening letters addressed to it, and from interfering with its property; and restraining the retired partner from publishing or circulating any notice of the dissolution of the old firm, before the expiration of the term for which it had been entered into.

(*c*) See *Helmore* v. *Smith* (No. 2), 35 Ch. D. 449. However, the Court will often grant an injunction as well as a receiver, to mark its sense of the impropriety of the conduct of those it specially restrains, see *per* V.-C. Kindersley, in *Evans* v. *Coventry*, 3 Drew. 82.

(*d*) See *Hall* v. *Hall*, 3 Mac. & G. 85.

(*e*) See Jud. Act, 1873, § 25, cl. 8, in addition to the cases below.

(*f*) *Anon.*, *Z.* v. *X.*, 2 K. & J. 441.

(*g*) 8 Beav. 129. See, too, *Warder* v. *Stilwell*, 3 Jur. N. S. 9.

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Hall v. Hall.

So in *Hall* v. *Hall* (*h*), a partnership for twenty-one years, determinable on twelve months' notice by either party (*i*), was entered into by the plaintiff and the defendant: disputes arose, and the defendant wholly excluded the plaintiff from the partnership business. The plaintiff filed a bill praying that the articles might be performed, and, amongst other things, for an injunction, but not for a dissolution. An injunction was granted, restraining the defendant from applying any of the monies and effects of the co-partnership, otherwise than in the ordinary course of business, and from obstructing or interfering with the plaintiff in the exercise or enjoyment of his rights under the partnership articles.

Clements v. Norris.

Again, in *Clements* v. *Norris* (*k*), a partner who insisted on carrying on a branch of the partnership business against the will of his co-partner was restrained from so doing. The lease of the place of business had expired and the plaintiff declined to renew it or to concur in taking any other place.

Where one partner seeks to drive the others to a dissolution.

These authorities show that where a partnership is not determinable at will, those partners who are desirous of carrying on the business in the proper way will be protected by the Court from the unwarranted acts of a co-partner, whose only object may be to force the others to submit to him or to agree to a dissolution (*l*).

Injunction where the partnership is determinable at will.

Where the partnership is determinable at will, there is, it is said, more difficulty in interfering if a dissolution is not sought; for, supposing the Court to interfere, the defendant may immediately dissolve the partnership (*m*). But supposing him to do so, an injunction will not necessarily be futile, inasmuch as so long as it continues in force, the defendant is rendered powerless for evil, and a notice by him to dissolve the partnership cannot, *per se*, operate as a dissolution of the injunction. In *Glassington* v. *Thwaites* (*n*), the plaintiff, who was one of the proprietors of the Morning Herald, obtained an

Glassington v. Thwaites.

(*h*) 12 Beav. 414, 20 ib. 139, and 3 Mac. & G. 79. See, also, *Blisset* v. *Daniel*, 10 Ha. 493.

(*i*) See 20 Beav. 139.

(*k*) 8 Ch. D. 129.

(*l*) See, too, *Fairthorne* v. *Weston*, 3 Hare, 387.

(*m*) See *Peacock* v. *Peacock*, 16 Ves. 49; *Miles* v. *Thomas*, 9 Sim. 606.

(*n*) 1 Sim. & Stu. 124.

injunction restraining his co-partners who were also proprietors of the English Chronicle (in which, however, the plaintiff had no interest), from publishing in the latter paper any information obtained at the expense of the former until it should have been first published in the Morning Herald. So in *Morris* v. *Colman* (*o*), one of the proprietors of the Haymarket Theatre was restrained from acting contrary to the articles of partnership, by writing plays for other theatres. Again, where a partner had agreed not to sell his share without first offering it to the other partners, an injunction to restrain a sale was granted (*p*). It does not appear from the reports of these cases whether the partnerships were partnerships at will or not; but supposing them to have been merely partnerships at will, it is clear that the injunctions were far from valueless.

Morris *v.* Colman.

Homfray *v.* Fothergill.

Injunction in actions for dissolution.

In an action instituted for the purpose of having a partnership dissolved, or of having an account taken after a partnership has been dissolved, it has never been doubted that an injunction will be granted to restrain one of the partners from doing any act which will impede the winding up of the concern (*q*). For example, one partner will be restrained from carrying on the concern for any other purpose than winding up (*r*); from damaging the value of the good-will if it ought to be sold for the benefit of all (*s*); from getting in the assets if he is likely to misapply them (*t*); a surviving partner will be restrained from improperly ejecting the representatives of his deceased co-partner (*u*): and they, on the other hand, will be restrained from making any improper use of partnership property, the legal estate of which may happen to be in them (*x*).

(*o*) 18 Ves. 437.

(*p*) *Homfray* v. *Fothergill*, 1 Eq. 567.

(*q*) A person who only shares profits is by no means necessarily in the same position as a partner in these respects, see *Walker* v. *Hirsch*, 27 Ch. D. 460.

(*r*) See *De Tastet* v. *Bordenave*, Jac. 516.

(*s*) *Turner* v. *Major*, 3 Giff. 442; *Bradbury* v. *Dickens*, 27 Beav. 53. In the last case the defendant was advertising the discontinuance of a partnership periodical of which he was the editor.

(*t*) *O'Brien* v. *Cooke*, Ir. Rep. 5 Eq. 51; there the plaintiff was allowed to get them in, indemnifying the defendant against costs, &c.

(*u*) *Elliot* v. *Brown*, 3 Swanst. 489, n.; *Hawkins* v. *Hawkins*, 4 Jur. N. S. 1045.

(*x*) *Alder* v. *Fouracre*, 3 Swanst. 489.

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So a surviving partner will be restrained from disposing of or getting in the partnership assets, if he has already been guilty of breaches of trust with reference to them (*y*). But a surviving partner will not be restrained from continuing to carry on business in the name of himself and his deceased co-partner unless so to do is contrary to his own agreement, or the goodwill is a saleable asset of the firm (*z*). Again, in an action for a dissolution, a partner will be restrained from improperly interfering with or obstructing the partnership business (*a*); from drawing, accepting, or endorsing bills of exchange in the partnership name for other than partnership purposes (*b*); from getting in debts owing to the firm (*c*); from withholding the partnership books (*d*); and generally on a dissolution one partner will be restrained from injuring the property of the firm (*e*).

Injunction to protect partners from the representatives of a co-partner.

So the Court will interfere by injunction to protect partners from the interference of persons claiming the share of a late co-partner, by reason of his death, or bankruptcy, or under an execution (*f*).

Injunction to enforce special agreements.

So after a dissolution the Court constantly interferes by injunction to restrain breaches of special agreements entered into between the partners; such for example as agreements

(*y*) *Hartz* v. *Schrader*, 8 Ves. 317.

(*z*) See on this subject, *ante*, pp. 437, 448.

(*a*) *Smith* v. *Jeyes*, 4 Beav. 503; *Charlton* v. *Poulter*, 19 Ves. 148, n.

(*b*) *Williams* v. *Bingley*, 2 Vern. 278, note, and Coll. Part. 233; *Jervis* v. *White*, 7 Ves. 412; *Hood* v. *Aston*, 1 Russ. 412. In the two last cases, the injunction restrained *malâ fide* indorsees for value from parting with or negotiating the securities.

(*c*) *Read* v. *Bowers*, 4 Bro. C. C. 441.

(*d*) *Taylor* v. *Davis*, 3 Beav. 388, note; *Greatrex* v. *Greatrex*, 1 De G. & Sm. 692; *Charlton* v. *Poulter*, 19 Ves. 148, n.

(*e*) See *Marshall* v. *Watson*, 25 Beav. 501, where an injunction to restrain a partner from publishing the accounts of the firm, was under special circumstances refused. See, also, as to making slanderous statements and diverting letters, *Hermann Loog* v. *Bean*, 26 Ch. D. 306, a case of agency, but applicable to partnerships.

(*f*) See as to assignees in bankruptcy, *Allen* v. *Kilbre*, 4 Madd. 464; *Fraser* v. *Kershaw*, 2 K. & J. 496; *Davidson* v. *Napier*, 1 Sim. 297; *Freeland* v. *Stansfeld*, 2 Sm. & G. 479. As to sheriffs, *Bevan* v. *Lewis*, 1 Sim. 376; *Newell* v. *Townsend*, 6 ib. 419, and *ante*, p. 356 *et seq.* As to executors, *Phillips* v. *Atkinson*, 2 Bro. C. C. 272.

not to carry on business (*g*), not to get in debts of the firm (*h*), not to divulge a trade secret (*i*). So, if a partner retires, and assigns his interest in the partnership, and in the good-will thereof, to the continuing partners, he will be restrained from recommencing or carrying on business in such a way as to lead people to suppose that he is the successor of or still connected with the old firm (*k*).

Injunction to restrain actions on the ground of unsettled accounts.

Although injunctions to restrain actions are now abolished, it may be useful to observe that where surviving partners gave the executors of their late partner a bond for the amount of his share, the amount of which had not been ascertained, an action on the bond was stayed on its being shown that if the partnership accounts were taken it would appear that the surviving partners had already paid too much (*l*). But an action for the balance of a settled account would not be restrained merely because there were other unsettled accounts between the parties (*m*); nor would a court of equity interfere to prevent a shareholder of a company who was a creditor of that company from executing a judgment obtained against it by him as creditor (*n*).

Injunction in case of misconduct.

Before leaving this subject, it is necessary to make a few observations on the kind of misconduct which will induce the Court to grant an injunction against one partner at the suit of another. Mere squabbles and improprieties, arising from infirmities of temper, are not considered sufficient ground for an injunction (*o*); but if one partner excludes his co-partner from his rightful interference in the management of the partnership affairs, or if he persists in acting in violation of the

(*g*) *Whittaker* v. *Howe*, 3 Beav. 383.

(*h*) *Davis* v. *Amer*, 3 Drew. 64.

(*i*) *Morison* v. *Moat*, 9 Ha. 241.

(*k*) *Churton* v. *Douglas*, Johns. 174, *ante*, p. 441. See, also, *Hookham* v. *Pottage*, 8 Ch. 91, and *Hermann Loog* v. *Bean*, 26 Ch. D. 306, as to making injurious statements.

(*l*) *Jackson* v. *Sedgwick*, 1 Swanst. 460. See, also, *Gold* v. *Canham*, 1 Ch. Ca. 311, and 2 Swanst. 325, note.

(*m*) See *Preston* v. *Strutton*, 1 Ans. 50, and *Rawson* v. *Samuel*, Cr. & Ph. 172.

(*n*) *Rheam* v. *Smith*, 2 Ph. 726; *Hardinge* v. *Webster*, 1 Dr. & Sm. 101; and see *Hammond* v. *Ward*, 3 Drew. 103.

(*o*) See *Marshall* v. *Colman*, 2 J. & W. 266; *Smith* v. *Jeyes*, 4 Beav. 503; *Lawson* v. *Morgan*, 1 Price, 307; *Cofton* v. *Horner*, 5 Price, 537; *Warder* v. *Stilwell*, 3 Jur. N. S. 9.

partnership articles on any point of importance, or so grossly misconducts himself as to render it impossible for the business to be carried on in a proper manner, the Court will interfere for the protection of the other partners (*p*). Where, however, the partner complained of has by agreement been constituted the active managing partner, the Court will not interfere with him unless a strong case be made out against him (*q*); nor will the Court restrain a partner from acting as such, merely because if he is known so to do, the confidence placed in the firm by the public will be shaken (*r*).

Partner applying for injunction must come with clean hands.

It need scarcely be observed that a partner who seeks an injunction against his co-partner must himself be able and willing to perform his own part of any agreement which he seeks to restrain his co-partner from breaking (*s*); and the plaintiff's own misconduct may be a complete bar to his application, however wrong the defendant's conduct may have been (*t*). As stated by Lord Eldon in *Const* v. *Harris*, a partner who complains that his co-partners do not do their duty to him, must be ready at all times, and offer to do his duty to them (*u*).

Injunction to restrain holding out.

In consequence of the liability which attaches to a person who holds himself out as a partner with others, and of the danger run by a person who is held out as a partner with others, even although it may not be with his consent, a Court will, it seems, interfere and restrain a person from holding out another as partner with him, without the authority of that other (*x*).

(*p*) See *post*, book iv. ch. 1, § 2. In *Anderson* v. *Wallace*, 2 Moll. 540, one of several partners who horsed a mail coach was restrained from horsing it on the ground that he did it so badly as to imperil the business of the concern.

(*q*) See *Lawson* v. *Morgan*, 1 Price, 303; *Waters* v. *Taylor*, 15 Ves. 10. See, also, *Walker* v. *Hirsch*, 27 Ch. D. 460.

(*r*) *Anon.*, 2 K. & J. 441.

(*s*) *Smith* v. *Fromont*, 2 Swanst. 330.

(*t*) *Littlewood* v. *Caldwell*, 11 Price, 97 where an injunction was refused, because the plaintiff had taken away the partnership books.

(*u*) *Const* v. *Harris*, T. & R. 524.

(*x*) See *Routh* v. *Webster*, 10 Beav. 561; *Bullock* v. *Chapman*, 2 De G. & Sm. 211; *Troughton* v. *Hunter*, 18 Beav. 470. Compare *Banks* v. *Gibson*, 34 Beav. 566. In *Dixon* v. *Holden*, 7 Eq. 488, an injunction was granted to restrain the publication of a statement that the plaintiff was a member of a bankrupt firm.

3. *Of receivers.*

Object of having a receiver, and manager.

The object of having a receiver appointed by the Court is to place the partnership assets under the protection of the Court, and to prevent everybody, except the officer of the Court, from in any way intermeddling with them. The object of having a manager is to have the partnership business carried on under the direction of the Court; a receiver, unless he is also appointed manager, has no power to carry on the business.

Receivers in actions not seeking a dissolution.

Courts of Justice are by no means anxious to take upon themselves the management of a partnership business, and they will, it is said, never do so, save with a view to a dissolution or final winding up of the affairs of the concern. In the well-known case of *Const* v. *Harris* (*y*), Lord Eldon intimated that a receiver might be appointed in a suit where a decree could be made for carrying on the concern according to some specific agreement between the parties, as well as in a suit for a dissolution and winding up; and in that very case a receiver was appointed, although no dissolution was prayed by the bill. The receiver there appointed was, however, in no sense a manager, but merely a person nominated to receive money coming in from certain quarters, and to apply it in the manner agreed upon in the partnership articles. If the appointment of a receiver does not involve the appointment of a manager, *Const* v. *Harris* is a clear authority to show that a receiver may be obtained in an action not seeking a dissolution of the partnership; the later cases are not opposed to this. But the writer is not aware of any instance in which an action or suit has been instituted for the purpose of continuing a partnership, and in which the Court has appointed a receiver and manager; and in *Hall* v. *Hall* (*z*) Lord Cottenham decided that in such a suit no such appointment could be made. *Roberts* v. *Eberhardt* (*a*) is to the same effect. There the

Const v. Harris.

Receiver and manager.

Roberts v. Eberhardt.

(*y*) Turn. & R. 517. See, further, as to managers as distinguished from receivers, *Gardner* v. *Lond. Chat. and Dover Rail. Co.*, 2 Ch. 201; *Re Manchester and Milford Rail. Co.*, 14 Ch. D. 653.

(*z*) 3 Mac. & G. 79.

(*a*) Kay, 148.

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plaintiff and the defendants were partners in a colliery, the plaintiff being the managing partner. Disputes arose between the plaintiff and the defendant, and the former filed a bill for an account and a receiver, but did not ask for a dissolution. The Vice-Chancellor, on a motion by the plaintiff for a receiver, refused the motion on the ground that the object of the suit was to ensure a continuance of the partnership, and not to bring it to a close. As was said by Lord Eldon, the Court will not, by appointing receivers, take upon itself the management of every trade in the kingdom: nor will it take upon itself the management of *any* partnership business, save with a view to its final winding up (*b*).

The Judicature Act, 1873, s. 25, cl. 8, may perhaps render it easier than formerly to obtain a receiver in partnership actions; but this has not yet been decided.

Receiver not refused because no dissolution is prayed.

It is not, however, necessary, in order to induce the Court to interfere, that the plaintiff should in his action expressly ask for a dissolution: for the Court will entertain an application for a receiver if the object of the action is to wind up the partnership affairs, and the appointment of a receiver and manager is sought with that view. Thus, in *Sheppard* v. *Oxenford* (*c*), which has been already referred to, the Court granted an injunction and appointed a receiver and manager (*d*). No dissolution was expressly asked for, but the whole object of the suit evidently was to wind up the company, and have its assets applied in liquidation of its liabilities.

Sheppard *v.* Oxenford.

Evans *v.* Coventry.

Again, in *Evans* v. *Coventry* (*e*), the members of two societies, or rather it would seem of one society, having two branches of

(*b*) See *Goodman* v. *Whitcomb*, 1 Jac. & W. 589; *Harrison* v. *Armitage*, 4 Madd. 143; *Hall* v. *Hall*, 3 Mac. & G. 79; *Smith* v. *Jeyes*, 4 Beav. 503; *Waters* v. *Taylor*, 15 Ves. 10; *Oliver* v. *Hamilton*, 2 Anstr. 453. In *Morris* v. *Colman*, 18 Ves. 438, there was a reference for the appointment of a manager.

(*c*) 1 K. & J. 491, *ante*, pp. 499, 500.

(*d*) A receiver and manager was appointed in this country, and the defendant, who had gone to the Brazils after the bill had been filed, was appointed receiver and manager out there.

(*e*) 5 De G. M. & G. 911, reversing S. C., 3 Drew. 75. It does not appear very distinctly what the manager, as distinguished from the receiver, was expected to do. The Vice-Chancellor refused the motion mainly upon the ground that he could not take upon himself the management of such societies, even until the hearing of the cause. The Court of Appeal did not allude to this.

business, viz., a loan branch, and an insurance branch, filed a bill for the purpose of having the funds of the societies made good by the defaulting directors, and of having the accounts investigated, the affairs of the societies wound up if necessary, and their assets in the meantime protected by the appointment of a manager and receiver. It was proved that some of the funds had already been made away with by the secretary; and a manager and receiver was appointed to protect what remained until the hearing of the cause, upon the ground that the plaintiffs had an interest in the funds in question, and that those funds were in danger of being lost.

Difference between granting an injunction and appointing a receiver.

It has been already remarked, that in granting or refusing an order for a receiver the Court does not act on the same principles as when it grants or refuses an order for an injunction; it being one thing to manage the affairs of a partnership oneself, and another to prevent a person who has already misconducted himself from interfering further with the partnership concerns (*f*). Another reason for drawing a distinction between an injunction and a receiver is, that whilst an injunction excludes only the person against whom it is granted, the appointment of a receiver excludes *all* the partners from taking part in the management of the concern. It, therefore, does not follow that because the Court will grant an injunction, it will also appoint a receiver; nor that because it refuses to appoint a receiver, it will also decline to interfere by injunction (*g*).

Right to a receiver.

In considering the right to the appointment of a receiver in actions for a dissolution or winding up, it is necessary to distinguish cases in which there is a contest between partners, or late partners, from those in which the contest is between partners or late partners on the one side, and non-partners on the other.

1. As between partners.

Where one partner seeks to have a receiver appointed against his co-partners, the first thing to ascertain is, whether the partnership between them is still subsisting, or has been already dissolved; for if it is still subsisting no receiver will be appointed unless some special grounds for the appointment

(*f*) See *Hall* v. *Hall*, 3 Mac. & G. 85; and *ante*, p. 539.

(*g*) Although an injunction was granted, a receiver was refused, in *Read* v. *Bowers*, 4 Bro. C. C. 441; *Hartz* v. *Schrader*, 8 Ves. 317; *Hall* v. *Hall*, 12 Beav. 414, and 3 Mac. & G. 79.

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After a dissolution.

can be shown (*h*), or unless it is plain that an order for a dissolution will be made (*i*); whilst if the partnership is already dissolved, the Court usually appoints a receiver, almost as a matter of course (*k*). In the case supposed, the common property has to be applied in paying the partnership debts, and has to be divided amongst the partners; and each partner has as much right as the others to wind up the partnership affairs. Their position is, therefore, essentially different from that of mere co-owners, between whom courts decline to interfere by appointing a receiver, except under special circumstances (*l*).

2. As between partners and non-partners.

When the contest as to a receiver arises between a partner on the one hand, and the executors, administrators, or assigns of a late co-partner on the other, the first thing to be considered is, whether the person sought to be excluded from interference is a partner or not. For whilst the Court is reluctant to exclude a partner from the management of the partnership affairs, it will readily interfere to prevent other persons from intermeddling therewith. The reason given for this is, that each partner is at the outset trusted by his co-partners, and has confidence reposed by them in him; and until it can be shown that he ought not to be allowed to take part any longer in the management of the partnership affairs, the Court will not interfere with him. But this reasoning has no application to persons who acquire an interest in the partnership assets by events over which the partners have no control, *e.g.*, the death or bankruptcy of one of the members of the firm. Whilst, therefore, even in an action for a dissolution, or winding up, a receiver will not be granted against a member of the firm at the instance of the executors, administrators, or assigns of a late partner, unless some special grounds for the interference of the Court can be established (*m*); it is a matter

(*h*) See *infra*, p. 550.

(*i*) *Goodman* v. *Whitcomb*, 1 Jac. & W. 592.

(*k*) See the last note, and *Thomson* v. *Anderson*, 9 Eq. 533; *Sargant* v. *Read*, 1 Ch. D. 600, where both plaintiff and defendant applied for a receiver. But see *per* Lord Eldon in *Harding* v. *Glover*, 18 Ves. 281, in which he disavowed the principle that a dissolution was a sufficient ground for a receiver.

(*l*) See *ante*, p. 56 *et seq.*

(*m*) *Collins* v. *Young*, 1 Macqueen, 385, and see *Harding* v. *Glover*, 18 Ves. 281; *Kershaw* v. *Matthews*,

of course to appoint a receiver where all the partners are dead, and an action is pending between their representatives (*n*); or where such appointment is sought by a partner against the representatives of his late co-partner (*o*). *Fraser* v. *Kershaw* (*p*) is a good illustration of this doctrine. There one partner had become bankrupt; the share of the other partner had been taken in execution under a *fi. fa.* for a separate debt, and had been assigned to his creditor by the sheriff. The creditor, as the assignee from the sheriff of all the share and interest of the non-bankrupt partner, claimed the right of winding up the affairs of the partnership, and to exclude the assignees of the bankrupt partner from interfering. But on a bill filed by them against the judgment creditor, the Court granted an injunction, and appointed a receiver, holding that the right of the non-bankrupt partner to wind up the affairs of the partnership was personal to himself, and was incapable of transfer, and did not, therefore, pass with his share and interest in the partnership assets (*q*).

Fraser v. Kershaw.

Influence of the number of partners on the appointment of a receiver.

In those cases in which special grounds for the appointment of a receiver must be shown, it follows that in a firm of several members there is more difficulty in obtaining a receiver than in a firm of two. For the appointment of a receiver, operating in fact as an injunction against *all* the members, there must be some ground for excluding all who oppose the application. If the object is to exclude some or one only from intermeddling, the appropriate remedy is rather by an injunction than by a receiver (*r*).

Defendant now entitled to a receiver.

Before the Judicature acts it was not the practice to appoint a receiver at the instance of a defendant before decree (*s*). If

2 Russ. 62; *Kennedy* v. *Lee*, 3 Mer. 448; *Lawson* v. *Morgan*, 1 Price, 303. For similar reasons the Court of Probate will not appoint a receiver *pendente lite* against a surviving partner unless under very special circumstances. *Horrell* v. *Witts*, L. R. 1 Pr. & Div. 103.

(*n*) *Philips* v. *Atkinson*, 2 Bro. C. C. 272.

(*o*) *Freeland* v. *Stansfeld*, 2 Sm. & G. 479.

(*p*) 2 K. & J. 496.

(*q*) See, too, *Candler* v. *Candler*, Jac. 225, where a receiver was granted against the assignee of partnership debts.

(*r*) See *Hall* v. *Hall*, 3 Mac. & G. 79.

(*s*) *Robinson* v. *Hadley*, 11 Beav. 614.

he desired to apply for a receiver before decree, he had to file a cross bill. But this is now unnecessary (*t*).

Grounds for the appointment of a receiver against a partner.

The grounds on which the Court is usually asked to appoint a receiver before dissolution, are either because, by agreement, the partners have divested themselves more or less of their right to wind up the affairs of the concern; or because, by misconduct, the right of personal intervention has been forfeited, and the partnership funds are in danger of being lost.

Agreement.

Davis *v.* Amer.

As an illustration of an appointment of a receiver, grounded on an express agreement, reference may be made to *Davis* v. *Amer* (*u*). There the plaintiff and the defendant, on dissolving partnership, appointed a stranger to get in the assets of the firm, and agreed not to interfere with him. After this agreement had been partially acted on, one of the partners died, and disputes arising between the executors of the deceased partner and the surviving partner, the latter proceeded to get in the debts of the firm, in violation of the agreement. On a bill filed by the executors of the deceased partner for an account, and for an injunction and a receiver, the Court, on motion, appointed a receiver, but declined to grant an express injunction, on the ground that there was no sufficient impropriety of conduct on the part of the defendant to render such an order necessary (*x*).

Misconduct.

With respect to misconduct, the observations which have been already made on this head, when speaking of injunctions, might be here repeated (*y*). If the partnership is not yet dissolved (*z*), there must be something more than a partnership squabble; the due winding up of the affairs of the concern must be endangered to induce the Court to appoint a receiver of its assets; and non-co-operation of one partner, whereby the whole responsibility of management is thrown on his co-partner, is not sufficient (*a*).

(*t*) See Ord. xix. r. 3, and Ord. l. r. 6. *Sargant* v. *Read*, 1 Ch. D. 600.

(*u*) 3 Drew. 64. See, too, *Turner* v. *Major*, 3 Giff. 442, a somewhat similar case. No receiver, however, appears to have been appointed. An injunction was sufficient.

(*x*) See *ante*, p. 539, note (*c*).

(*y*) *Ante*, p. 543.

(*z*) See *ante*, p. 548, as to dissolved partnerships.

(*a*) See *Roberts* v. *Eberhardt*, Kay, 148, and *Rowe* v. *Wood*, 2 J. & W. 556, where one partner declined to advance more money to work a mine.

Receiver appointed.

Where, however, a partner has so misconducted himself as to show that he is no longer to be trusted, as, for example, if one partner colludes with the debtors of the firm, and allows them to delay paying their debts (*b*); or carries on trade on his own account with the partnership property (*c*); or, the partnership property being abroad, runs off in order to do what he likes with it there (*d*); or, if a surviving partner insists on carrying on the business, and employing therein the assets of his deceased partner (*e*); or if there is such mis-management as endangers the whole concern (*f*); or if the persons having the control of the partnership assets have already made away with some of them (*g*); in all these cases the Court will interfere by appointing a receiver (*h*).

Effect of fraud by a partner.

Again, the reluctance of the Court in appointing a receiver against a partner, being based on the confidence originally reposed in him, that reluctance disappears if it can be shown that such confidence was originally misplaced. Therefore, where a defendant, by false and fraudulent representations, induced the plaintiff to enter into partnership with him, and the plaintiff soon afterwards filed a bill, praying that the partnership might be declared void, and for a receiver, the Court on motion ordered that a receiver should be appointed (*i*).

Effect of excluding a partner.

Moreover, even although there be no misconduct jeopardising the partnership assets, the Court will appoint a receiver if the defendant wrongfully excludes his co-partner from the management of the partnership affairs (*k*). This doctrine is acted on where the defendant unsuccessfully contends that the plaintiff is not a partner (*l*), or that he has no interest in the partnership assets (*m*).

(*b*) *Estwick* v. *Conningsby*, 1 Vern. 118.

(*c*) *Harding* v. *Glover*, 18 Ves. 281.

(*d*) *Sheppard* v. *Oxenford*, 1 K. & J. 491.

(*e*) *Madgwick* v. *Wimble*, 6 Beav. 495.

(*f*) See *De Tastet* v. *Bordieu*, cited in a note in 2 Bro. C. C. 272; but see *Const* v. *Harris*, T. & R. 524.

(*g*) *Evans* v. *Coventry*, 5 De G. M. & G. 911.

(*h*) See *Smith* v. *Jeyes*, 4 Beav. 503.

(*i*) See *Ex parte Broome*, 1 Rose, 69.

(*k*) See *Wilson* v. *Greenwood*, 1 Swanst. 481; and *Goodman* v. *Whitcomb*, 1 J. & W. 589.

(*l*) *Peacock* v. *Peacock*, 16 Ves. 49; *Blakeney* v. *Dufaur*, 15 Beav. 40.

(*m*) *Wilson* v. *Greenwood*, 1 Swanst. 471, where the plaintiffs were the

Disputed partnership.

Where a partnership is alleged on the one side and denied on the other, and a motion is made for a receiver, the Court usually declines to appoint a receiver until that question is determined (*n*).

Illegality of partnership.

Some difficulty occurs where the defendant relies on illegality as a defence to the action against him. If the illegality is established, the Court cannot, it is conceived, interfere. But if a receiver is applied for before the trial of the action, and the Court is not satisfied that no relief can ultimately be given, it will appoint a receiver to protect the property *pendente lite*, and the character of the defence will go far to remove any scruples the Court might otherwise have in interfering. Thus, in *Hale* v. *Hale* (*o*), the plaintiff and the defendant had carried on the business of brewers for many years in partnership together. The plaintiff filed a bill for a dissolution, and the defendant then denied the plaintiff's right to any account or relief whatever, on the ground that the partnership was illegal. Having thus set the plaintiff at defiance, and claimed the whole property himself, Lord Langdale, on that ground alone, appointed a receiver and manager, although the plaintiff was only a dormant partner, and the defendant's management of the business was in no way complained of.

Hale v. Hale.

Receivers of mines.

In mining partnerships a receiver will be appointed or refused upon the same principles as in other partnerships. Accordingly, if no dissolution or winding up is sought, a receiver and manager will not be appointed (*p*); but with a view to a dissolution or winding up, a receiver and manager will be appointed, if there are any such grounds for the appointment as are sufficient in other cases (*q*); or if the partners

assignees of a bankrupt partner. See, too, *Clegg* v. *Fishwick*, 1 Mac. & G. 294, where the plaintiff was the administratrix of a deceased partner.

(*n*) *Peacock* v. *Peacock*, 16 Ves. 49; *Chapman* v. *Beach*, 1 J. & W. 594; *Fairburn* v. *Pearson*, 2 Mac. & G. 144. See *Rock* v. *Mathews*, 2 De G. & Sm. 227, as to the conclusiveness, upon a motion for a receiver, of an answer denying the partnership alleged by the bill.

(*o*) 4 Beav. 369. See, too, *Sheppard* v. *Oxenford*, 1 K. & J. 491, where a receiver was appointed although the legality of the partnership was denied.

(*p*) *Roberts* v. *Eberhardt*, Kay, 148; and see *Rowlands* v. *Evans*, and *Williams* v. *Rowlands*, 30 Beav. 302, noticed below.

(*q*) *Sheppard* v. *Oxenford*, 1 K. & J. 491, where there was no prayer for a dissolution.

cannot agree as to the proper mode of working the mines until they are sold (*r*). In *Rowe* v. *Wood* (*s*), indeed, a receiver was refused, although one of the partners excluded the other from interfering with the mine; but this was a peculiar case, for the partner complained of was not only a partner, but also a mortgagee in possession, and his mortgage debt was still unsatisfied. Again, in *Norway* v. *Rowe* (*t*), although the plaintiff was excluded, a receiver was refused on the ground of his laches, he having been excluded for some time, and having taken no steps to assert his rights until the mine proved profitable (*u*).

Rowe *v.* Wood.

Norway *v.* Rowe.

Lunacy.

In *Rowlands* v. *Evans*, and *Williams* v. *Rowlands* (*x*), it was held that a manager could not be appointed to carry on a mine for the benefit of a lunatic partner. The Court ordered a sale, and appointed an interim manager only.

Rowlands *v.* Evans.

Appointment of partner to be receiver.

If the Court, on being applied to for the appointment of a receiver, thinks that a proper case for such appointment is made, and the partner actually carrying on the business has not been guilty of such misconduct as to have rendered it unsafe to trust him, the Court generally appoints him receiver and manager without salary (*y*). It is usual, however, to require him to give security duly to manage the partnership affairs, and to account for money received by him (*z*). In other cases the appointment of a receiver is referred by the judge to his chief clerk, and leave is frequently given for each partner to propose himself. A partner who is appointed receiver becomes the officer of the Court, and must act and be respected accordingly.

Order appointing receiver.

The order appointing a receiver usually directs the partners

(*r*) *Jefferys* v. *Smith*, 1 J. & W. 298; *Lees* v. *Jones*, 3 Jur. N. S. 954. In this last case will be found a discussion as to what ought to be done if the mine is held on a lease, and cannot be sold without the lessor's consent, which is refused.

(*s*) 2 J. & W. 553.

(*t*) 19 Ves. 159.

(*u*) See further on this matter, *ante*, p. 466 *et seq.*

(*x*) 30 Beav. 302.

(*y*) This was done in *Wilson* v. *Greenwood*, 1 Swanst. 471; *Blakeney* v. *Dufaur*, 15 Beav. 40. See *Sargant* v. *Read*, 1 Ch. D. 600, where one of the plaintiffs, being senior partner, had liberty to propose himself, although it was urged that he would thereby obtain an unfair advantage as regarded the goodwill.

(*z*) See the previous note.

to deliver up to him all the effects of the partnership, and all securities in their hands, for the outstanding personal estate, together with all books and papers relating thereto. The receiver is directed to get in the debts of the firm, and he is, if necessary, empowered to bring actions with the approbation of the judge; he is directed to pay the partnership debts, and to pass his accounts, and to pay balances in his hands into court (*a*).

With respect to the partnership books and papers, an order for their delivery will not be made if there is no necessity for it, or if it would occasion inconvenience. For example, in *Dacie* v. *John* (*b*), the Court declined to order a solicitor, who was the managing partner of a firm, to deliver up its books and documents to the receiver: for the receiver had free access to them all, and nothing more was considered necessary.

Dacie *v.* John.

Interfering with receiver.

A receiver is an officer of the Court, and any interference with him, or with property under his protection, amounts to a contempt of Court, and is punishable accordingly (*c*). If a judgment creditor desires to levy execution on property in the custody of the receiver, special application should be made to the Court in the action in which the receiver was appointed, and the Court will direct the receiver to pay the judgment debt or make such other order as may be just (*d*).

(*a*) See forms of order in Seton on Decrees, 414, ed. 4; *Wilson* v. *Greenwood*, 1 Swanst. 484; *Whitley* v. *Lowe*, 4 Jur. N. S. 815. The receiver here was appointed without opposition; see 4 Jur. N. S. 197, S. C.

(*b*) McClel. 206.

(*c*) See *Lane* v. *Sterne*, 3 Giff. 629, where a sheriff seized partnership property in the custody of a receiver; *Helmore* v. *Smith* (No. 2), 35 Ch. D. 449, where the interference was by advertisement. When an order for a receiver is made, a person is sometimes immediately put into possession; but until he is actually approved as receiver by the Court, strangers to the action in which he is appointed are not guilty of contempt of court if they interfere with him. See *Defries* v. *Creed*, 6 N. R. 17.

(*d*) *Kewney* v. *Attrill*, 34 Ch. D. 345. See, as to interpleader at the instance of the sheriff, *ante*, pp. 358, note (*q*), and 362.

4. *Of the sale of partnership property under the order of the Court.*

Conversion of partnership property.

It has been already seen, that in the absence of a special agreement to the contrary, the right of each partner (*e*) on a dissolution, is to have the partnership property converted into money by a *sale* (*f*): even although a sale may not be necessary for the payment of debts (*g*). This mode of ascertaining the value of the partnership effects is adopted by Courts, unless some other course can be followed consistently with the agreement between the partners. And even where the partners have provided that their shares shall be ascertained in some other way, still, if owing to any circumstance their agreement in this respect cannot be carried out, or if their agreement does not extend to the event which has in fact arisen, realisation of the property by a sale is the only alternative which a Court can adopt (*h*).

Agreements to avoid sale which cannot be carried out.

Agreement for equal division.

Cook *v.* Collingridge.

Thus in *Cook* v. *Collingridge* (*i*), where the partners had agreed that on the expiration of the partnership the stock in trade should be divided between the partners, it was held that as this could not be literally carried into effect, there must be a sale and a division of the proceeds.

Agreement to take at valuation.

Wilson *v.* Greenwood.

So, if on the death of a partner an option is given to a third party, *e.g.*, his son or executor, to take his share at a valuation, and this is not done, a sale will be ordered (*k*). Again, in a case where the articles had provided that on a dissolution by

(*e*) A person paid by a share of profits has no right to have them ascertained by a sale. See *Rishton* v. *Grissell*, 5 Eq. 326; *Walker* v. *Hirsch*, 27 Ch. D. 460. *Pawsey* v. *Armstrong*, 18 Ch. D. 698, went too far. See the last case.

(*f*) *Burdon* v. *Barkus*, 3 Giff. 412, and on appeal, 4 De G. F. & J. 42, where a purchase by one partner at a valuation was insisted on; *Rowlands* v. *Evans*, and *Williams* v. *Rowlands*, 30 Beav. 302, a case of lunacy. See, also, *Crawshay* v. *Collins*, 15 Ves. 227; *Crawshay* v. *Maule*, 1 Swanst. 495; *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Hale* v. *Hale*, 4 Beav. 375. See *infra*, p. 558, as to unsaleable assets and pending contracts.

(*g*) See *Wild* v. *Milne*, 26 Beav. 504.

(*h*) But see *Syers* v. *Syers*, 1 App. Ca. 174, *infra*, p. 556.

(*i*) Jac. 607, and see *Rigden* v. *Pierce*, 6 Madd. 353.

(*k*) See *Downs* v. *Collins*, 6 Ha. 418; *Kershaw* v. *Matthews*, 2 Russ. 62; and *Madgwick* v. *Wimble*, 6 Beav. 495.

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the death of a partner his share should be taken by the survivors at a valuation, and they had afterwards agreed that in the event of a dissolution by bankruptcy, the same course should be followed as in the event of a dissolution by death, it was held that this last agreement not being under the circumstances binding on the assignees, the partnership property and effects ought to be sold (*l*).

On the other hand, if the articles of partnership can be carried out in their spirit, and if a sale is inconsistent with them, then the rule in question will not apply, as for example in those cases already noticed (*m*), in which it has been agreed that a deceased partner's share shall be ascertained by valuation, or from the last signed account. Moreover, in *Syers* v. *Syers* (*n*), it was held by the House of Lords that in the case then before it, the Court could, in its discretion, either order the sale of the undertaking as a going concern or approve of the purchase by one partner of the share of his co-partner (*n*).

Syers *v.* Syers.

The rule as to selling partnership property is merely adopted in order that justice may be done to all parties, when no other course has been or can be agreed upon. It is not an arbitrary rule, inflexibly applied in all cases whether it is necessary or not; and although, if one partner or his representatives insist on a sale, the Court may not be able to refuse to enforce that right (*o*), still the Court is always inclined to accede to any other mode of settlement which may be fair and just between the partners. In a case where one partner had become lunatic, and a decree for a dissolution had been obtained on that ground, and an offer was made by the other partners to pay a sum of money as the lunatic's share, the Court referred it to the Master to inquire whether it would be for the benefit of the lunatic that such offer should be accepted; and on the Master reporting in the affirmative, the Court ordered that the offer

No sale where there is an agreement to the contrary which can be acted on.

Sale not decreed although one partner was lunatic.

Leaf *v.* Coles.

(*l*) *Wilson* v. *Greenwood*, 1 Swanst. 471.

(*m*) See *ante*, p. 429, *et seq.*

(*n*) 1 App. Ca. 174. The agreement between the partners was probably not intended to create a partnership but a loan (see *ante*, book i. ch. 1, § 2); and qu. whether the discretion alluded to exists in all cases? But why should it not? its exercise would often be most beneficial.

(*o*) *Wild* v. *Milne*, 26 Beav. 504, and *Rowlands* v. *Evans*, 30 Beav. 302.

should be accepted, thereby dispensing with a sale and winding up in the ordinary way (*p*). So, if one partner is an infant, and it appears that it will be for his benefit that the whole property shall be sold to one or more of the partners who are desirous of buying it, and the other partners consent, the Court will sanction a sale accordingly (*q*). But although it may be for the benefit of an infant or lunatic partner that his share should be sold, yet if the other partners insist on the sale of the whole property they are entitled to such a sale (*r*).

Mining partnership.

Co-owners of land, whether mineral or not, are entitled to a partition and not a sale, except in the cases specified in the Partition Acts, 1868 and 1876: and even although they may be partners in the profits arising from the land, still if the land itself is not partnership property, one co-owner is not entitled to have it sold against the wishes of the others, except under those statutes (*s*). But if land or a mine is partnership property, the right of each partner is to have it sold; and a partition can only be decreed by consent (*t*).

Mode of selling.

The sale to which each partner has a right is a sale to the highest bidder (*u*). But with a view to do as little injustice as possible, when the Court orders a sale it will, if necessary, direct an inquiry as to the proper mode of selling (*x*); and whether it will be for the benefit of all parties that there should be an immediate sale, or that the concern should be carried on for the purpose only of winding up its affairs: and if the latter is the case, the Court will give any of the parties

(*p*) *Leaf* v. *Coles*, 1 De G. & M. G. 171. See, too, *Prentice* v. *Prentice*, 10 Ha. App. 22.

(*q*) *Crawshay* v. *Maule*, 1 Swanst. 530.

(*r*) *Rowlands* v. *Evans*, and *Williams* v. *Rowlands*, 30 Beav. 302.

(*s*) See *ante*, p. 56.

(*t*) *Wild* v. *Milne*, 26 Beav. 504; and see *Burdon* v. *Barkus*, 4 De G. F. & J. 42, and *Rowlands* v. *Evans*, 30 Beav. 302. As to mines not saleable without the consent of the landlord, see *Lees* v. *Jones*, 3 Jur. N. S. 954; and as to unsaleable but valuable assets, *infra*, note (*d*).

(*u*) No partner has a right to buy or to compel his co-partners to buy at a valuation unless there is some agreement to that effect, *Burdon* v. *Barkus*, 4 De G. F. & J. 42, and other cases cited *ante*, p. 555, note (*f*).

(*x*) As in *Wilson* v. *Greenwood*, 1 Swanst. 484; *Cook* v. *Collingridge*, Jac. 624. See, also, *Syers* v. *Syers*, 1 App. Ca. 174, where an inquiry was directed as to the value of the plaintiff's interest.

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liberty to propose himself as manager until a sale (*y*). In *Rowlands* v. *Evans* (*z*), partnership property was ordered to be sold, as a going concern, by a disinterested person, with liberty to all parties to bid; and an interim receiver and manager was appointed.

Rowlands *v.* Evans.

Conduct of sale and leave to bid.

The Court is extremely reluctant to give parties who have the conduct of a sale liberty to bid at it; and the conduct of a sale in an action usually belongs to the plaintiff; if, therefore, he desires to bid, some arrangement has generally to be made respecting the conduct of the sale. Other parties interested have seldom any difficulty in obtaining liberty to bid (*a*). Where the Court has given the conduct of the sale to any person, the Court will not allow him to be interfered with (*b*).

Sale of good-will.

In selling the good-will of a going concern, the book debts and business ought to be sold in one lot, and the purchaser ought to be informed, if the facts be so, that the sellers are entitled to carry on business in competition with him (*c*).

Unsaleable but valuable assets.

If one of the partners holds an appointment which is not saleable, but the profits of which are by agreement to be accounted for by him to the partnership, the partner holding the appointment will be debited with its value; for that is the only mode in which, upon a dissolution, such a source of gain can be dealt with (*d*). The same principle applies to other unsaleable but valuable assets, to which one partner has no exclusive right (*e*).

Pending contracts.

But if the object of the partnership is to carry out a certain contract which is unfinished when the partnership is dissolved, the Court will not necessarily order the benefit of it to be sold; nor order the share of a partner in it at the time of dissolution to be ascertained by valuation; but will leave the partners to

(*y*) *Crawshay* v. *Maule*, 1 Swanst. 529; *Waters* v. *Taylor*, 2 V. & B. 306. See, too, *Wild* v. *Milne*, 26 Beav. 504.

(*z*) *Rowlands* v. *Evans*, and *Williams* v. *Rowlands*, 30 Beav. 302. So in *Pawsey* v. *Armstrong*, 18 Ch. D. 698.

(*a*) See, on this subject, Seton on Decrees, 1396, ed. 4.

(*b*) *Dean* v. *Wilson*, 10 Ch. D. 136.

(*c*) See *Johnson* v. *Helleley*, 34 Beav. 63, and 2 De G. J. & Sm. 446.

(*d*) See *Smith* v. *Mules*, 9 Ha. 572; *Ambler* v. *Bolton*, 14 Eq. 427.

(*e*) Ibid. See *ante*, note (*t*).

complete the contract, and will postpone the ultimate account until its completion (*f*).

Sale before trial.

Although it is not usual for the Court to direct a sale before the trial of the action, still, if circumstances require it, an order for a sale will be made on motion, even although the partnership has not been previously dissolved (*g*).

SECTION VII.—OTHER MISCELLANEOUS ACTIONS.

1. *Between persons who have agreed to become partners.*

Action on agreements for partnerships.

If a person agrees to become a partner, and he breaks his agreement, an action for damages will lie against him; and any premium he may have agreed to pay may be recovered (*h*); and it is no defence that the defendant has discovered that the plaintiff is a person with whom a partnership is undesirable (*i*). So, if a member of a firm agrees to introduce a stranger, an action lies at the suit of the latter against the former for a breach of this agreement, although it may have been made without the knowledge of the other members of the firm, and they may decline to recognise it (*j*).

(*f*) See *McClean* v. *Kennard*, 9 Ch. 336, where the surviving partners urged that this would not be fair, as they might have to find all the capital to complete the contract.

(*g*) *Bailey* v. *Ford*, 13 Sim. 495; *Crawshay* v. *Maule*, 1 Swanst. 506, 523, 524, and 529; *Wilson* v. *Greenwood*, 1 Swanst. 483. See, also, *Hargreaves* v. *Hall*, 11 Eq. 415, the order of July 22, 1869.

(*h*) *Walker* v. *Harris*, 1 Anst. 245; *Gale* v. *Leekie*, 2 Stark. 107. In *Figes* v. *Cutler*, 3 Stark. N. P. C. 139, it was held that an action for breach of an agreement to become a partner, could not be supported without proof of the terms of the intended partnership. See, also, *Morrow* v. *Saunders*, 1 Brod. & Bing. 318. But see *McNeill* v. *Reid*, 9 Bing. 68.

(*i*) *Andrewes* v. *Garstin*, 10 C. B. N. S. 444, where the defendant pleaded that since the agreement was entered into he had discovered that the plaintiff had been guilty of fraud and dishonesty towards a former partner.

(*j*) *McNeill* v. *Reid*, 9 Bing. 68.

2. *Actions between partners.*

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The Judicature acts and rules have materially altered the law relating to actions between partners. Formerly no action at law could be maintained by one partner against another if it in any way involved taking a partnership account; for although the right to an account was a legal right, the old action of account, at least between partners, had long become obsolete, and courts of law had no machinery enabling them to do justice in matters of account (*k*). Hence it became settled that actions involving accounts between partners could not be sustained. The Judicature acts and rules have, however, abolished this rule; and the present state of the law on this subject appears to be as follows:—

Actions relating to real property.

First as regards real property.—The equitable as well as the legal ownership must be regarded; and no partner can eject or expel his co-partners from land in which he may have the legal estate, but of which he is a trustee for the firm, nor can he maintain an action against his co-partners for coming on such land. On the other hand, they can restrain him from excluding them therefrom (*l*). Whether the relation of trustee and *cestuis que trustent* exists, depends upon whether the property is partnership property or not, upon whether the partnership is dissolved or not, and upon whether, if dissolved, the property is a partnership asset in which all the partners are still interested.

Actions relating to goods.

Secondly as regards personal property.—Partners are tenants in common or joint tenants of the goods and chattels belonging to the firm; but one partner has no right to take possession of

(*k*) No instance of an old common law action of account brought by one partner against another, is known to the writer. The old action of account is obsolete, although there have been a few instances of it in modern times between tenants in common of real property. See *Baxter* v. *Hozier*, 5 Bing. N. C. 288; *Sturton* v. *Richardson*, 13 M. & W. 17; *Beer* v. *Beer*, 12 C. B. 60; *Henderson* v. *Eason*, 17 Q. B. 701; reversing *Eason* v. *Henderson*, 12 ib. 986.

(*l*) As to the old law, see *infra*, the note at the end of this section, and as to injunctions in such cases, *ante*, p. 541.

them and to exclude his co-partners from them; and he can, it is apprehended, be restrained from doing so (*m*).

Thirdly, as regards actions for money demands or damages. The three following rules may be taken as guides:— Actions for damages, &c.

1. An action for damages may be maintained by one partner against another in all those cases in which such an action might have been maintained before the Judicature acts; provided the action would not have been restrained by a court of equity.

2. Any action which would have been so restrained cannot be supported.

3. An action may be maintained by one partner against another for any money demand which before the Judicature acts could have been made the subject of a suit for an account (*n*).

Practically, the important questions which will arise under the new procedure are reduced to the following:—

1. When can an action be maintained between partners without taking a general account of all the partnership dealings and transactions?

2. When will such an account be ordered without a dissolution of the firm?

The second of these questions has been already considered (*o*). The first, which has also been alluded to (*p*), can only be answered generally by saying that each case must depend upon its own circumstances, and upon whether justice can really be done without taking such an account (*q*). But there appears to be no reason why an action should not be brought to have some disputed item in an account settled, and why a declaratory judgment should not be pronounced settling that dispute without going further, unless it should become necessary to do so.

(*m*) As to the old law, see the note at the end of this section.

(*n*) A transfer to the Chancery Division may become necessary in some of these cases. See *ante*, p. 458.

(*o*) *Ante*, p. 494 *et seq.*

(*p*) Ibid.

(*q*) On this head the old cases referred to *infra*, p. 564, as illustrating the 6th rule, will still be useful. See, also, *ante*, p. 494.

NOTE ON THE LAW AS IT STOOD BEFORE THE JUDICATURE ACTS.

Bk. III. Chap. 10. Sect. 7.

Although the law relating to actions at law between partners has been completely altered, a summary of it may still be useful for reference, and is accordingly here appended.

When an action would lie.

1. Ejectment and trespass by one partner against another.

First.—As regards real property. In an action of ejectment a plea on equitable grounds was not allowed (*r*). Hence, if a firm was in the occupation of land, the legal estate in which was in one of the partners only, he could at law eject his co-partners (*s*); and if the firm had been dissolved no notice to quit was necessary before ejectment (*t*), or trespass (*u*), was brought against them. The equitable doctrine that a partnership, although dissolved, subsists for the purpose of winding up its affairs, afforded no defence at law to such an action (*x*). If the legal estate was in all the partners, and one partner actually excluded the others, from the land legally belonging to all, ejectment would lie (*y*); and if one utterly destroyed the common property, an action for damages might be sustained (*z*); but for injuries not amounting to the utter exclusion by one partner of the others, an action it seems did not lie (*a*).

2. Trover by one partner against another.

Secondly.—As regards personal property. If one of several joint tenants or tenants in common, was in exclusive possession of the common property he had a right so to continue if he could, and no action against him would lie at the suit of his co-tenant (*b*). But if one tenant in common or joint tenant destroyed (*c*), or as it seems sold (*d*), the common property, he might be sued at law by his co-tenant. In the case of a sale, however, the purchaser could not be made to restore the property, for he at all events acquired the interest of the vendor, and became therefore tenant in common with the other owners, and could not be sued by them at law (*e*).

(*r*) *Neave* v. *Avery*, 16 C. B. 328.

(*s*) *Francis* v. *Doe*, 4 M. & W. 331; *Smith* v. *Howth*, 10 Ir. Com. Law Rep. 125.

(*t*) *Doe* v. *Bluck*, 8 C. & P. 464.

(*u*) *Benham* v. *Gray*, 5 C. B. 138.

(*x*) See the last case.

(*y*) See *Peaceable* v. *Read*, 1 East, 568; *Doe* v. *Horn*, 3 M. & W. 333, and 5 ib. 564.

(*z*) See *Cubitt* v. *Porter*, 8 B. & C. 257; *Stedman* v. *Smith*, 8 E. & B. 1.

(*a*) But see *Martyn* v. *Knowllys*, 8 T. R. 146; *Stedman* v. *Smith*, 8 E. & B. 1.

(*b*) See 2 Wms. Saund. 47, *o.* *Foster* v. *Crabb*, 12 C. B. 136 *Holliday* v. *Camsell*, 1 Tr. 658 *Fennings* v. *Grenville*, 1 Taunt. 241.

(*c*) *Barnardiston* v. *Chapman*, cited in 4 East, 121, and Bull. N. P. 34-5; 2 Wms. Saund. 47, *o.*

(*d*) *Mayhew* v. *Herrick*, 7 C. B. 247; *Barton* v. *Williams*, 5 B. & A. 395; *Williams* v. *Barton*, 3 Bing. 139.

(*e*) *Fox* v. *Hanbury*, Cowp. 445 and other cases of that class.

If, on a dissolution of partnership, the partnership property had been divided in specie amongst the partners, each might recover what had been allotted to him, for as to that he had become sole owner (*f*); and if the dissolution and the division of the property were made by deed, each partner was precluded from denying that any division had in fact been made, or that the previously existing tenancy in common had not been determined, and each therefore was entitled to recover what the deed declared to be his (*g*).

Trover after division of property.

Thirdly.—An action for damages for the breach of an express agreement entered into by one partner with another would lie, if the damages when recovered would have belonged to the plaintiff alone. Thus where a partner retired, and he covenanted with his co-partners not to carry on business within certain limits, or they covenanted to indemnify him against the debts of the firm, actions for damages occasioned by breaches of these covenants would clearly lie (*h*). So, if a partnership was entered into for a definite time, and one partner was turned out by his co-partners before that time had expired, he could sue them for this breach by them of their agreement, and recover damages for the injury he had sustained (*i*); so an action might be maintained for not rendering accounts and dividing profits (*k*); for a penalty stipulated to be paid in case of a breach of agreement (*l*); for rent covenanted to be paid (*m*); for not indemnifying the plaintiff against a debt (*n*); for not putting the plaintiff in funds to enable him to defray expenses as agreed (*o*).

3. Action for breach of express contract by one partner against another.

Fourthly.—If a person agreed to become a partner with others and to furnish a certain amount of capital, and he made default, they could sue him at law for damages, although he as well as they were to have had an interest in what he undertook to furnish (*p*).

4. Action for not furnishing capital.

(*f*) See *Jackson* v. *Stopherd*, 2 Cr. & M. 361; and *Wiles* v. *Woodward*, 5 Ex. 557.

(*g*) Ibid.

(*h*) *Leighton* v. *Wales*, 3 M. & W. 545; *White* v. *Ansdell*, Tyr. & Gr. 785. *Barker* v. *Allan*, 5 H. & N. 61, is an instance of a successful action by a shareholder against directors who had agreed to indemnify him against calls. See, too, *Haddon* v. *Ayers*, 1 E. & E. 118.

(*i*) See *Greenham* v. *Gray*, 4 Ir. Com. Law Rep. 501.

(*k*) *Owston* v. *Ogle*, 13 East, 538; and see *Stavers* v. *Curling*, 3 Bing. N. C. 355.

(*l*) *Radenhurst* v. *Bates*, 3 Bing. 463.

(*m*) *Bedford* v. *Brutton*, 1 Bing. N. C. 399.

(*n*) *Want* v. *Reece*, 1 Bing. 18.

(*o*) *Brown* v. *Tapscott*, 6 M. & W. 119.

(*p*) *Hesketh* v. *Blanchard*, 4 East, 144; *Venning* v. *Leckie*, 13 East, 7; *Gale* v. *Leckie*, 2 Stark. 107. *Hesketh* v. *Blanchard* gave rise to much controversy (see in *Stocker* v. *Brocklebank*, 3 Mac. & G. 265; *Rawlinson* v. *Clarke*, 15 M. & W. 298; Collyer on Part. p. 60), not indeed, with reference to the question decided, but with reference to an opinion expressed by Lord Ellenborough, that no partnership existed between Robertson and the plaintiff, except as regards third parties. Having regard to the decisions relating to partnerships in profits, it is difficult to assent to this opinion; but the case was unimpeachable as regards

for money placed in defendant's hands for a particular purpose.

So, if one partner paid money of his own to his co-partner, in order that it might be applied by him for some specified partnership purpose, and it was received for that purpose and no other, and was misapplied, an action lay for the recovery of such money; for, *ex hypothesi*, it never was the money of the firm, and the duty of the partner who received that money was either to apply it as agreed, or to return it intact (*e*).

Actions for money paid under mistake as to accounts;

So a purchaser of a partner's share at a price calculated on the profits, could recover the amount which he had overpaid in ignorance of the real state of the accounts (*f*).

on agreement to indemnify:

Again, if, in respect of some particular transaction, one partner had expressly agreed to indemnify another, and had not done so, an action might be brought by the latter against the former, inasmuch as the right to be indemnified had, by agreement, been made independent of all other questions between the partners (*g*). Therefore, where one partner in his own name accepted a bill for a partnership debt, on the faith of a promise by one of the other partners that he would provide funds to pay the bill, and the acceptor was nevertheless compelled to pay it, he was held entitled to recover the whole amount from the other partner (*h*).

for contribution in respect of a particular loss; Sedgwick *v.* Daniell.

Further, if some of a number of partners gave their promissory note for better securing payment of a debt owing by them and their co-partners, and one of the makers of the note was compelled to pay the whole amount of it, he was entitled to sue each of the other makers of the note for his proportion of the sum so paid. For, in the case supposed, the right to contribution arose in respect of a matter not involved in the general account, and did not depend upon the circumstance that the makers of the note were partners. This was decided by the Court of Exchequer in *Sedgwick* v. *Daniell* (*i*).

for contribution when one has paid more than his share of a debt of the firm.

However, the decisions did not go the length of allowing one partner who had been compelled to pay the whole of a partnership debt to sue his co-partners at law for contribution, in the absence of special circumstances (*k*).

But if one of several projectors of a company was compelled to pay a debt owing by them all, he could obtain contribution from them by an action at law, although there were unsettled accounts between him and them (*l*).

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that one of two sub-partners might prove against the other's estate for half of the profits received by him in respect of his share in the principal firm. Compare *Bovill* v. *Hammond*, 6 B. & C. 149.

(*e*) See *Wright* v. *Hunter*, 1 East, 20.

(*f*) *Townsend* v. *Crowdy*, 8 C. B. N. S. 477.

(*g*) *Coffee* v. *Brian*, 3 Bing. 54; see, too, *Wilson* v. *Cutting*, 10 Bing. 436; *Brown* v. *Tapscott*, 6 M. & W. 119.

(*h*) *Coffee* v. *Brian*, 3 Bing. 54.

(*i*) *Sedgwick* v. *Daniell*, 2 H. & N. 319.

(*k*) *Sadler* v. *Nixon*, 5 B. & Ad. 936. See, too, *Batard* v. *Hawes*, 2 E. & B. 287; *Helme* v. *Smith*, 7 Bing. 713; and *Pearson* v. *Skelton*, 1 M. & W. 504; and compare *Wooley* v. *Batte*, 2 C. & P. 417; *Osborne* v. *Harpur*, 1 Smith, 411.

(*l*) *Batard* v. *Hawes*, 2 E. & B. 287; *Boulter* v. *Peplow*, 9 C. B. 493.

When an action would not lie.

It is clear from the cases referred to in the last few pages, that there was no such rule as that one partner could not sue another at law, in respect of a debt arising out of a partnership transaction, and that this circumstance alone afforded no reason why an action should not be brought by one partner against another (*m*). Except, however, in an action of account, it was a general rule that between partners, whether they were so in general or for a particular transaction only, no account could be taken at law (*n*); nor (except in an action of account) could one partner sue another at law, unless the cause of action was so distinct from the partnership accounts as not to involve their consideration (*o*); nor unless the plaintiff if he recovered would be justified in keeping what he might get without afterwards having to account to his co-partners for any part of it (*p*). Hence one partner could not sue another at law for work and labour done for the firm, and therefore on account as well of the plaintiff as of the defendant (*q*); nor for money had and received for the firm, for it must be properly shared between the parties to the action (*r*); nor for money paid to the use of the defendant, if the question whether he ought to repay it or not turned on the state of the partnership accounts (*s*); nor for money lent to the firm of which the plaintiff was himself a member, for the advance only formed an item in the partnership account (*t*); nor on a bill or note drawn, accepted, or endorsed in such a manner as to bind the firm jointly and not its members severally also, for in such a case not only must the plaintiff as one of the firm have contributed to payment of the instrument, but he ought also to have been a defendant to the action (*u*). For similar reasons,

General rule that one partner cannot sue another at law; in respect of any matter involving the partnership account.

(*m*) See *Worrall* v. *Grayson*, 1 M. & W. 166.

(*n*) *Bovill* v. *Hammond*, 6 B. & C. 151; and see *Scott* v. *McIntosh*, 2 Camp. 238.

(*o*) Ibid.; and see the cases in the six following notes. This rule was held to prevent the *cestui que trust* of a partner from suing the other partners. See *Goddard* v. *Hodges*, 1 Cr. & M. 33. *Sed quære.* The same rule would probably have prevented a person entitled to a share of profits from suing at law for them where they had not been ascertained.

(*p*) *Milburn* v. *Codd*, 7 B. & C. 421; *Bedford* v. *Brutton*, 1 Bing. N. C. 405; *Caldicott* v. *Griffiths*, 8 Ex. 898.

(*q*) *Goddard* v. *Hodges*, 1 Cr. & M. 33; *Holmes* v. *Higgins*, 1 B. & C. 74; *Milburn* v. *Codd*, 7 B. & C. 419; *Lucas* v. *Beach*, 1 Man. & Gr. 417.

(*r*) *Bovill* v. *Hammond*, 6 B. & C. 149; *Smith* v. *Barrow*, 2 T. R. 476; *Fromont* v. *Coupland*, 2 Bing. 170. See, too, *Lewis* v. *Edwards*, 7 M. & W. 300; *Thomas* v. *Thomas*, 5 Ex. 28.

(*s*) *Robson* v. *Curtis*, 1 Stark. 78. But see *Townsend* v. *Crowdy*, 8 C. B. N. S. 477, noticed *ante*, p. 566.

(*t*) *Perring* v. *Hone*, 4 Bing. 28; *Colley* v. *Smith*, 2 Moo. & Rob. 96.

(*u*) See *Neale* v. *Turton*, 4 Bing. 149; *Mainwaring* v. *Newman*, 2 Bos. & P. 120; *Teague* v. *Hubbard*, 8 B. & C. 345, and 2 Man. & Ry. 369; *Tibaldi* v. *Ellerman*, 6 Dowl. & L. 71.

Bk. III. Chap. 10. Sect. 7.

if partners became indebted to a third person who died, and appointed one of them his executor, this one could not even as executor sue his co-partners for the debt due to the deceased (*x*); and if there were two firms with a partner common to both, one firm could not sue the other at law (*y*); neither was there any mode by which at law one partner could sue the *firm* or be sued by it (*z*). But upon a joint and several promissory note, a partner might be sued by his co-partners or by a firm of which they were members (*a*).

Actions for recovery of partnership goods, &c.

Again, as one tenant in common of personalty could not sue his co-tenant for the recovery of that property, it follows that one partner could not, by action at law, obtain from his co-partner property of the firm wrongfully detained by him (*b*).

Actions for improper sale.

Mayhew *v.* Herrick.

Barton *v.* Williams.

It was not, however, so clear that if one partner wrongfully sold property of the firm, his co-partner could not sue him at law, either for the wrongful conversion or for a share of the produce of the sale. For although the older decisions were opposed to any such right (*c*), it was held in *Mayhew* v. *Herrick* (*d*), that a sheriff who, under a *fi. fa.* against one partner, sold goods of the firm, was answerable at law to the assignees of the other partner for one-half of the proceeds of the sale; and it was previously held, in *Barton* v. *Williams* (*e*), that a sale by one tenant in common of the common property gave the other a right to sue him at law for a wrongful conversion (*f*). The question, therefore, whether if one partner wrongfully sold the goods of the firm, he could or could not be sued at law by his co-partners, seems to have turned on whether their demand in respect of this wrongful sale could or could not be regarded as independent of any question of account, so as to bring the case within the exception already noticed.

Moreover, a partner could not maintain an action on a bill of exchange

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(*x*) *Moffatt* v. *Van Millingen*, cited, 2 Bos. & P. 124.

(*y*) *Perring* v. *Hone*, 2 Car. & P. 401, and 4 Bing. 28; *Mainwaring* v. *Newman*, 2 Bos. & P. 120; *Bosanquet* v. *Wray*, 6 Taunt. 597; *Jacaud* v. *French*, 12 East, 317.

(*z*) See, in addition to the cases cited in the last note, *De Tastet* v. *Shaw*, 1 B. & A. 664, and *Richardson* v. *The Bank of England*, 4 M. & Cr. 171, 172, *per* Lord Cottenham.

(*a*) See *Beecham* v. *Smith*, E. B. & E. 442, and *ante*, p. 565.

(*b*) See *Fox* v. *Hanbury*, Cowp. 445. In *Sharp* v. *Warren*, 6 Price, 131, it was, however, held that the steward of a friendly society was entitled to recover, at law, a box of money belonging to the society, but run off with by one of its members.

(*c*) *Graves* v. *Sawcer*, Sir T. Raym. 15.

(*d*) 7 C. B. 229. See, too, *Buckley* v. *Barber*, 6 Ex. 164; and compare *Morgan* v. *Marquis*, 9 Ex. 145.

(*e*) 5 B. & A. 395, affirmed on appeal, *Williams* v. *Barton*, 3 Bing. 139. See, too, *Farrar* v. *Beswick*, 1 M. & W. 682.

(*f*) Agreed to by Maule, J., in *Mayhew* v. *Herrick*, 7 C. B. 247; and by Wood, V.-C., in *Fraser* v. *Kershaw*, 2 K. & J. 500; but see *per* Coltman, J., 7 C. B. 246, and *Jacobs* v. *Seward*, L. R. 5 H. L. 464.

drawn by himself on a firm of which he was a member (*g*), and this rule applied to all unincorporated companies.

Actions between two firms with a common partner.

Nor could an action be brought by one firm against another firm where one or more persons were partners in both firms (*h*). Even where the common partner was dead, the one firm could not sue the other in respect of contracts entered into between the two firms when he was a partner in each of them; for no legal contract could subsist between a person and those connected with him on the one side, and himself and others connected with him on the other side (*i*).

Fox v. Hanbury. Trover.

Fox v. *Hanbury* (*k*) was the leading authority for the rule that one partner could not sue another at law on the ground that the other detained, and used for his own exclusive purposes, personal property belonging to the firm; and for the further rule that if one partner sold such property, neither the other partners nor their assignees in bankruptcy could maintain an action against the purchaser in respect of his detention of the goods purchased (*l*).

Action for share of surplus on dissolution.

Where a partnership had been dissolved, and the winding up of its affairs had been entrusted to one or two individuals, and they had taken upon themselves the duty of getting in the assets, and paying the debts, and dividing the surplus, they could not, under ordinary circumstances, be compelled by proceedings at law to pay over that surplus to those entitled to it (*m*). If, indeed, the accounts had all been taken, and the net balance payable to any particular partner had been ascertained, and if such balance clearly ought to be paid over at once, then an action for it might be brought (*n*); but in other cases recourse must have been had to a court of equity.

(*g*) *Neale* v. *Turton*, 4 Bing. 149. See, too, *Teague* v. *Hubbard*, 8 B. & C. 345, and 2 Man. & Ry. 369.

(*h*) See *Moffat* v. *Van Millingen*, 2 Bos. & P. 124, note; *Mainwaring* v. *Newman*, ib. 120; *Perring* v. *Hone*, 2 C. & P. 401, and 4 Bing. 28; *Jacaud* v. *French*, 12 East, 317; *De Tastet* v. *Shaw*, 1 B. & A. 664.

(*i*) *Bosanquet* v. *Wray*, 6 Taunt. 597.

(*k*) Cowp. 445. This case was always followed with approbation. See *Smith* v. *Stokes*, 1 East, 363; *Smith* v. *Oriell*, ib. 368; *Harvey* v. *Crickett*, 5 M. & S. 336; *Buckley* v. *Barber*, 6 Ex. 164; *Harper* v. *Godsell*, L. R. 5 Q. B. 422.

(*l*) It seems from *Morgan* v. *Marquis*, 9 Ex. 145, that if a solvent partner sells goods of the firm, the purchaser, if he afterwards sells the goods, cannot be compelled to hand over any part of the proceeds to the trustee of the insolvent partners. Compare this with *Mayhew* v. *Herrick*, 7 C. B. 229, and *Buckley* v. *Barber*, 6 Ex. 164.

(*m*) *Lyon* v. *Haynes*, 5 Man. & Gr. 504, and see *Lewis* v. *Edwards*, 7 M. & W. 300, as to a receiver suing for money withheld from him by those who agreed that he should receive and distribute it.

(*n*) See *ante*, p. 564.

BOOK IV.

OF THE DISSOLUTION AND WINDING-UP OF PARTNERSHIPS

CHAPTER I.

CAUSES OF DISSOLUTION.

Bk. IV. Chap. 1.

THE right to rescind a partnership for fraud has been already considered (*a*). A partnership, however, which is incapable of being repudiated by any of its members, may be terminated by a variety of events. Disregarding (as not requiring special notice) mutual consent on the part of all the partners, and such events, if any, as by the partnership articles may be specially made grounds of dissolution, the causes of a dissolution of an ordinary partnership may be reduced to the following, viz. :—

1. The will of any partner.
2. The impossibility of going on; in consequence of
   - (*a.*) The hopeless state of the partnership business.
   - (*b.*) Insanity.
   - (*c.*) Misconduct.
3. The transfer of a partner's interest.
4. The occurrence of some event which renders the partnership illegal.
5. Death.
6. Bankruptcy.

The consequences of death and bankruptcy will be considered in subsequent chapters; in the present chapter the other four events will be dealt with.

(*a*) *Ante*, p. 482.

SECTION I.—WILL OF ANY PARTNER.

1. *Right to dissolve.*

Any member of an ordinary partnership, the duration of which is indefinite, may dissolve it at any moment he pleases, and the partnership will then be deemed to continue only so far as may be necessary for the purposes of winding up its then pending affairs (*b*). This rule applies to ordinary mining partnerships (*c*); and as well where there are many as where there are only a few partners (*d*). It also applies although one of the partners to whom the notice is given may be a lunatic (*e*).

But it is apprehended that the Court will restrain an immediate dissolution and sale of the partnership property, if it appears that irreparable mischief will ensue from such a proceeding (*f*).

But although a partnership at will may be dissolved by any partner, it by no means follows that he can retain a premium which his co-partner may have paid him, or secure for his own benefit other advantages which he may desire (*g*).

Form of notice.

A notice that the partnership shall be dissolved must, to be effectual, be explicit, and be communicated to all the partners (*h*). The notice may be prospective (*i*). A proposal to

(*b*) *Peacock* v. *Peacock*, 16 Ves. 50; *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Crawshay* v. *Maule*, 1 Swanst. 508; *Ex parte Nokes*, cited 1 Mont. Part. 108 n. The Scottish law is the same: see *Marshall* v. *Marshall*, 3 Ross, L. C. on Com. Law, 611.

(*c*) *Lees* v. *Jones*, 3 Jur. N. S. 954, but not, it is conceived, if carried on on the cost-book principle.

(*d*) *Miles* v. *Thomas*, 9 Sim. 606.

(*e*) But in such a case the dissolution cannot be carried out without having recourse to an action. See *Mellersh* v. *Keen*, 27 Beav. 236.

(*f*) See *Chavany* v. *Van Sommer*, 3 Woodd. Lect. 416, note, and 1 Swanst. 512, note, and *Blisset* v. *Daniel*, 10 Ha. 493. See also *Neilson* v. *Mossend Iron Co.*, 11 App. Ca. 298, a Scotch case. By the civil law a dissolution made *malâ fide*, and at an unseasonable time, is not allowed. See Pothier, Partn. § 150.

(*g*) As to the premium, see *ante*, p. 64, and as to retaining the benefit of a renewed lease, *Clegg* v. *Edmondson*, 8 De G. Mc. & G. 787.

(*h*) *Van Sandau* v. *Moore*, 1 Russ. 463; *Wheeler* v. *Van Wart*, 9 Sim. 193, and 2 Jur. 252, where the notice was left at the office; *Parsons* v. *Hayward*, 31 Beav. 199, and 4 De G. F. & J. 474.

(*i*) *Mellersh* v. *Keen*, 27 Beav. 236.

dissolve on terms which are not accepted, does not amount to a dissolution (*k*). Nor does a notice that a partner's share has been forfeited; for by such notice it is not intended that the partnership shall be considered as dissolved as to all the partners, but only that the one partner shall have no further interest in it (*l*). An answer to a bill in chancery has been held sufficient notice (*m*).

Where partnership is constituted by deed.

It has never been determined that a partnership constituted by deed can only be dissolved either by deed or by operation of law: and it is apprehended that no deed is requisite. In

Doe *v.* Miles.

Doe v. *Miles* (*n*) the question was raised; but as the partners had all signed a notice advertising a dissolution, Lord Ellenborough presumed that it had been effected with all due solemnity. It is clear from the report that there was, in fact, no deed of dissolution, but there may have been in the articles some clause providing for a dissolution otherwise than by deed.

Dissolution inferred.

A dissolution of a partnership at will may be inferred from circumstances, *e.g.*, a quarrel, although no notice to dissolve may have been given (*o*).

Withdrawal of notice.

A notice once given cannot be withdrawn without consent (*p*).

Time from which dissolution dates.

If a partnership is a partnership at will, and a member brings an action for dissolution without any previous notice, the writ is treated as notice to dissolve and the dissolution will date from its service. In other cases of dissolution by notice the dissolution will date from the day the notice was given, or from the time mentioned in it for dissolution, as the case may be (*q*).

(*k*) *Hall* v. *Hall*, 12 Beav. 414.

(*l*) See *Hart* v. *Clarke*, 6 De G. M. & G. 232.

(*m*) *Syers* v. *Syers*, 1 App. Ca. 174.

(*n*) 4 Camp. 373, and 1 Stark. 181. In *Hutchinson* v. *Whitfield*, Hayes (Ir. Ex.), 78, it was agreed that the partnership should be dissolved by deed only; but it was held that an award dissolving the partnership was valid, the submission being under seal.

(*o*) *Pearce* v. *Lindsay*, 3 De G. J. & Sm. 139.

(*p*) *Jones* v. *Lloyd*, 18 Eq. 265.

(*q*) See *Robertson* v. *Lockie*, 15 Sim. 285; *Bagshaw* v. *Parker*, 10 Beav. 532; *Mellersh* v. *Keen*, 27 Beav. 236.

2. *Of the right to retire.*

Right of partner to retire from firm.

Subject to a qualification which will be presently mentioned, a member of an ordinary firm can surrender his share and interest in the firm to his co-partners, or any of them, upon any terms to which he and they may all agree. But there is only one method by which a partner can retire from a firm without the consent of his co-partners, and that is, by dissolving the firm. In order to avoid the necessity of a general dissolution when a partner may wish to retire, special provisions are frequently introduced into partnership articles; but it is not unfrequently found that, owing to unforeseen circumstances, these provisions cannot be carried into effect; and when that is the case, a dissolution, with its usual consequences, must take place if a partner is to retire otherwise than by the consent of his co-partners (*r*).

Right to retire from insolvent firm.

The qualification above alluded to has relation to a partner's retirement from an insolvent firm. A partner desirous of retiring from an insolvent firm, is at perfect liberty to sell his interest in it for any sum the continuing partners think proper to give him; and a sale by him to them cannot be set aside or impeached as a fraud upon the creditors of the firm unless there be clear evidence *aliunde* of such fraud (*s*). At the same time, the present share of a partner in an insolvent firm (*t*) is obviously less than nothing, whatever may be the amount of the capital brought in by him. Consequently a partner who retires from an insolvent firm and withdraws from it a sum of money which he is pleased to call his share, is defrauding the creditors of the firm; and such a transaction cannot stand, and may be impeached by the trustee in bankruptcy of the

(*r*) See *Cook* v. *Collingridge*, Jac. 607; *Kershaw* v. *Matthews*, 2 Russ. 62; *Madgwick* v. *Wimble*, 6 Beav. 495; *Downs* v. *Collins*, 6 Ha. 418. Compare *Simmons* v. *Leonard*, 3 Ha. 581; *Pettyt* v. *Janeson*, 6 Madd. 146.

(*s*) See *Ex parte Peake*, 1 Madd. 346; *Parker* v. *Ramsbottom*, 3 B. & C. 257; *Ex parte Birch*, 2 Ves. J. 260, note; *Ex parte Carpenter*, Mont. & McAr. 1.

(*t*) An insolvent firm is one in which the joint assets are less than the joint liabilities. Such a firm is insolvent whatever the wealth of the individual partners composing it may be, see Mont. & McAr. p. 5.

continuing firm (*u*). To proceedings instituted by the trustee to impeach such a transaction, it is no answer to say, that the bankrupts themselves were bound by it; for the trustee represents the creditors, and can impeach any transaction which is a fraud as against them, although the bankrupts themselves might not be in a position to do so (*x*). Upon similar grounds, if a partner relinquishes his share in a partnership to his co-partners, upon such terms and under such circumstances as to render that relinquishment a fraud upon his creditors, and he then becomes bankrupt, his trustee will be entitled to rescind the transaction.

General rules as to retiring.

Laying aside, however, all such considerations as these, it may be said—

1. That it is competent for a partner to retire with the consent of his co-partners at any time and upon any terms;

2. That it is competent for him to retire without their consent by dissolving the firm, if he is in a position to dissolve it.

3. That it is not competent for a partner to retire from a partnership which he cannot dissolve, and from which his co-partners are not willing that he should retire.

3. *Of the right to expel.*

Right to expel a partner.

In the absence of an express agreement to that effect, there is no right on the part of any of the members of an ordinary partnership to expel any other member. Nor, in the absence of express agreement, can any of the members of an ordinary partnership forfeit the share of any other member, or compel him to quit the firm on taking what is due to him. As there is no method, except a dissolution, by which a partner can retire against the will of his co-partners, so there is no method except a dissolution by which one partner can be got rid of against his own will (*y*).

(*u*) See *Anderson* v. *Maltby*, 4 Bro. C. C. 423, and 2 Ves. J. 244; *Re Kemptner*, 8 Eq. 286; and *ante*, p. 338.

(*x*) Ib., and see *Billiter* v. *Young*, 6 E. & B. 40; *Tyrrell* v. *Hope*, 2 Atk. 562.

(*y*) See *Hart* v. *Clarke*, 6 De G. M. & G. 232, and on appeal, *Clarke* v. *Hart*, 6 H. L. C. 633; *Crawshay* v. *Collins*, 15 Ves. 226; *Featherstonhaugh* v. *Fenwick*, 17 ib. 309.

Driving a partner to a dissolution.

The consequence of this is, that when partners disagree and cannot dissolve except with the concurrence of all, it is not unusual for some of them so to conduct themselves towards another as, if possible, to drive him to agree to a dissolution. But it need hardly be said that a scheme of this kind will, if possible, be frustrated; and redress may be obtained in such a case without dissolving the partnership (*z*).

Exercise of powers of expulsion.

With a view to facilitate the removal of a partner who misconducts himself, it is not unfrequently agreed that a power to expel shall be exerciseable in certain events and under certain restrictions. These expulsion clauses, as they are termed, have been already alluded to in the chapter on the construction of partnership agreements; but it may be observed in passing, that such clauses are always construed strictly, and that no expulsion under them will be effectual unless the expelling partners have acted with perfect good faith (*a*).

SECTION II.—IMPOSSIBILITY OF GOING ON.

Impossibility of going on.

Even if the duration of the partnership is defined, circumstances may arise giving a partner a right to have the partnership dissolved before the expiration of the time for which it was originally agreed to last. But there must be some special circumstance to justify a dissolution of a partnership before the term for which it was entered into has expired (*b*). Any circumstance, however, which renders the continuance of the partnership, or the attainment of the common end with a view to which it was entered into, practically impossible, would seem upon principle to warrant a dissolution (*c*). The particular circumstances which have given rise to litigation, and upon which partnerships have been judicially dissolved, are:—

(*z*) See *Fairthorne* v. *Weston*, 3 Ha. 387; and *ante*, p. 497.

(*a*) See *Blisset* v. *Daniel*, 10 Ha. 493; *Wood* v. *Woad*, L. R. 9 Ex. 190; *Steuart* v. *Gladstone*, 10 Ch. D. 626; *Russell* v. *Russell*, 14 ib. 471; *ante*, p. 426, &c.

(*b*) See *Warner* v. *Cunningham*, 3 Dow. 76.

(*c*) See *Harrison* v. *Tennant*, 21 Beav. 482; *Electric Telegraph Co. of Ireland*, 22 Beav. 471.

1. The hopeless state of the partnership business;
2. The confirmed lunacy of one of the partners; and
3. Misconduct on the part of one or more of the members of the firm, and the destruction of mutual confidence.

Each of these grounds of dissolution requires to be more fully noticed.

1. *As to the hopeless state of the partnership business.*

1. Insolvency.

Baring *v.* Dix.

In *Baring* v. *Dix* (*d*) a partnership was formed between three persons for the purpose of spinning cotton under a certain patent. The patented invention proved a failure, and two of the partners thereupon desired to wind up the affairs of the partnership and to sell its mills, but this was opposed by the other partner. However, on a bill filed against him the Court referred it to the Master to inquire and state whether the partnership business could be carried on according to the true intent and meaning of the articles of co-partnership, and declared that, on a report in the negative, a decree would be made for a dissolution of the partnership and a sale of its property. It does not appear in this case whether the partnership had been entered into for a definite time or not, nor whether the capital of the firm had been expended or not.

Loss of capital.

Jennings *v.* Baddeley.

In a more recent and more important case, however, the Court recognised the fact that expectation of profit is implied in every partnership, and held that, if a partnership is entered into for a term of years, and the capital originally agreed to be furnished has been all spent, and some of the partners are unable or unwilling to advance more money, and at the same time the concern cannot go on except at a loss unless they do, the partnership will be dissolved (*e*). Under such circumstances as these it is unimportant whether the concern is already embarrassed or not. After everything has been done which was agreed to be done, and certain loss is the only result of going

(*d*) 1 Cox, 213.

(*e*) *Jennings* v. *Baddeley*, 3 K. & J. 78, a case of a mine. See also *Wilson* v. *Church*, 13 Ch. D. 1, and S. C., under the name of *National Bolivian Navigation Co.* v. *Wilson*, 5 App. Ca. 176.

on, any partner is entitled to have the concern dissolved, although he may have agreed that the partnership should continue for some definite time and that time has not yet expired (*f*).

If, in a case of this description, the firm is already insolvent and becomes more and more so every day, the Court will interfere on motion, and appoint a person to sell the business and wind up the affairs of the partnership, although it is not usual to grant such relief until the hearing of the cause (*g*).

Bankruptcy.

If a firm of partners, or even any one member of the firm, is adjudged bankrupt, the firm is dissolved; not only because it is impossible for the business of the firm to be carried on, but because there is a transfer of each bankrupt's interest to his trustee (*h*).

2. *As to the Insanity of one of the Partners.*

2. Lunacy.

The lunacy of a partner does not itself dissolve the firm; but the confirmed lunacy of an active partner is sufficient to induce the Court to order a dissolution, not only for the purpose of protecting the lunatic (*i*), but also for the purpose of relieving his co-partners from the difficult position in which the lunacy places them (*k*). In a leading case on this subject, two persons agreed to become partners as solicitors for twelve years; one of them became lunatic before the twelve years were out, and subsequently died. His co-partner continued to carry on the business for some time; but he eventually sold it; and it was held, that the legal personal representative of the lunatic was entitled to a share of the profits up to the time of the sale (*l*). In delivering judgment the Court observed:

Jones *v.* Noy.

"It is clear upon principle that the complete incapacity of a party to an agreement to perform that which was a condition of the agreement is a

(*f*) Ibid.

(*g*) *Bailey* v. *Ford*, 13 Sim. 495.

(*h*) See *post*, p. 583, under the head Transfer of Interest.

(*i*) *Jones* v. *Lloyd*, 18 Eq. 265.

(*k*) See *Sayer* v. *Bennet*, 1 Cox, 107; *Wrexham* v. *Hudleston*, 1 Sw. 514, note; *Jones* v. *Noy*, 2 M. & K. 125; *Sadler* v. *Lee*, 6 Beav. 324; *Leaf* v. *Coles*, 1 De G. M. & G. 171; *Anon.*, 2 K. & J. 441; and Lord Eldon's observations in *Waters* v. *Taylor*, 2 V. & B. 303.

(*l*) *Jones* v. *Noy*, 2 M. & K. 125.

ground for determining the contract. The insanity of a partner is a ground for the dissolution of the partnership, because it is immediate incapacity; but it may not in the result prove to be a ground of dissolution, for the partner may recover from his malady. When a partner therefore is affected with insanity, the continuing partner may, if he think fit, make it a ground of dissolution, but in that case I consider with Lord Kenyon, that in order to make it a ground of dissolution he must obtain a decree of the Court. If he does not apply to the Court for a decree of dissolution, it is to be considered that he is willing to wait to see whether the incapacity of his partner may not prove merely temporary. If he carry on the partnership business in the expectation that his partner may recover from his insanity, so long as he continues the business with that expectation or hope, there can be no dissolution."

Rowlands *v.* Evans, and Williams *v.* Rowlands.

In *Rowlands* v. *Evans* and *Williams* v. *Rowlands* (*m*), one of three partners in a mine had become lunatic and committees of his estate had been appointed. A bill was filed by one of the sane partners for a dissolution; and a cross bill was filed by the committees of the lunatic, for the appointment of a manager, on the ground that the affairs of the partnership could be carried on advantageously to all parties, notwithstanding the lunacy. There was evidence to show that this was true; but the Master of the Rolls held that the partnership must be dissolved, and that the Court could not appoint a manager to carry on the concern for the benefit of the lunatic's estate. The partnership property was ordered to be sold as a going concern, with liberty to all parties to bid, and a receiver and manager was appointed until the sale.

Evidence of lunacy.

In order to induce the Court to order a dissolution on the ground of the insanity of one of the partners, the Court must be satisfied by clear evidence that the insanity exists and is incurable (*n*); a temporary illness is not sufficient (*o*); and notwithstanding strong evidence as to the past, the Court requires to be convinced that the insanity exists at the time its interference is called for, and it will therefore, if necessary,

(*m*) 30 Beav. 302. In the same case, it was held that the committees could not exercise an option which the lunatic had of buying the share of one of his co-partners. The right of pre-emption had accrued to the lunatic before his lunacy, and that event occurred before the time for exercising the option had expired.

(*n*) See *Kirby* v. *Carr*, 3 Y. & C. Ex. 184; *Anon.*, 2 K. & J. 441.

(*o*) See the last note, and *Whitwell* v. *Arthur*, 35 Beav. 140; *Huddleston's case*, cited 2 Ves. sen. 34 and *Sayer* v. *Bennet*, 1 Cox, 107.

before making an order, direct an inquiry whether the alleged lunatic is in such a state of mind as to be able to conduct the business of the firm in partnership with the other members, according to the articles of partnership (*p*). But no such inquiry is necessary where the partner is a lunatic and so found by inquisition (*q*).

A lunatic partner not so found by inquisition is entitled to bring an action (by a next friend) for a dissolution, but it is doubtful whether the partnership can be completely wound up in the absence of a committee (*r*).

Date of dissolution.

In ordering a dissolution of a partnership, not at will, on the ground of insanity, the Court declares the partnership dissolved as from the date of the judgment, and not from a prior day (*s*). But if the articles of partnership authorise a dissolution and the partnership has been dissolved under the articles,—which may be done notwithstanding the insanity of one of the partners (*t*),—the dissolution must date from the time at which the partnership was so dissolved, and not from the date of the judgment (*u*). Where a partnership is at will, and notice to dissolve has been given, the dissolution will be ordered as from the time fixed by the notice (*x*). It was probably on the ground that a partnership at will is determinable on notice, that in *Kirby* v. *Carr* (*y*) the dissolution was decreed as from the filing of the bill, no previous notice having been given.

Kirby *v.* Carr.

Costs.

When the Court dissolves a partnership on the ground of insanity, it directs the costs to be paid out of the partnership assets (*z*).

Lunacy regulation act.

By the Lunacy regulation act, 16 & 17 Vict. c. 70, § 123,

(*p*) See *Anon.*, 2 K. & J. 441; *Kirby* v. *Carr*, 3 Y. & C. Ex. 184, and *Sayer* v. *Bennet*, 1 Cox, 107, in which two last cases the partnership was a partnership at will.

(*q*) *Milne* v. *Bartlet*, 3 Jur. 358.

(*r*) *Jones* v. *Lloyd*, 18 Eq. 265.

(*s*) *Besch* v. *Frolich*, 1 Ph. 172. In *Sander* v. *Sander*, 2 Coll. 276, and *Jones* v. *Welch*, 1 K. & J. 765, the dissolution was also from the date of the decree, but the reports do not show whether the partnerships were at will or not.

(*t*) *Robertson* v. *Lockie*, 15 Sim. 285; and see *Mellersh* v. *Keen*, 27 Beav. 236.

(*u*) See *Robertson* v. *Lockie*, 15 Sim. 285; *Bagshaw* v. *Parker*, 10 Beav. 532.

(*x*) *Mellersh* v. *Keen*, 27 Beav. 236.

(*y*) 3 Y. & C. Ex. 184. See, also, *Shepherd* v. *Allen*, 33 Beav. 577.

(*z*) *Jones* v. *Welch*, 1 K. & J. 765.

Bk. IV. Chap. 1. Sect. 2.

it is enacted that, "where a person, being a member of a co-partnership firm, becomes lunatic, the Lord Chancellor may, by order made on the application of the partner or partners of the lunatic, or of such other person or persons as the Lord Chancellor shall think entitled to require the same, dissolve the partnership; and thereupon, or upon a dissolution of the partnership by decree of the Court of Chancery, or otherwise by due course of law, the committee of the estate, in the name and on behalf of the lunatic, may join and concur with such other person or persons in disposing of the partnership property, as well real as personal, to such persons, upon such terms, and in such manner, and may and shall execute and do such conveyances and things for effectuating this present provision, and apply the monies payable to the lunatic in respect of his share and interest in the co-partnership, in such manner as the Lord Chancellor shall order."

3. *As to misconduct and destruction of mutual confidence.*

3. Misconduct.

The Court will dissolve a partnership on the ground that a partner so seriously misconducts himself as to render it impossible for his co-partners to continue to act with him (*a*). But it is not considered to be the duty of the Court to enter into partnership squabbles, and it will not dissolve a partnership on the ground of the ill-temper or misconduct of one or more of the partners, unless the others are in effect excluded from the concern (*b*); or unless the misconduct is of such a nature as utterly to destroy the mutual confidence which must subsist between partners if they are to continue to carry on their business together (*c*). Where a dissolution is sought on this latter ground, it would seem that the misconduct must be

(*a*) See *Smith* v. *Jeyes*, 4 Beav. 502; *Waters* v. *Taylor*, 2 V. & B. 299; *Charlton* v. *Poulter*, 19 Ves. 148, note.

(*b*) See *Goodman* v. *Whitcomb*, 1 Jac. & W. 589; *Marshall* v. *Colman*, 2 ib. 266; *Wray* v. *Hutchinson*, 2 M. & K. 235; *Roberts* v. *Eberhardt*, Kay, 148.

(*c*) See *Smith* v. *Jeyes*, 4 Beav. 502; *Harrison* v. *Tennant*, 21 Beav. 482; *Liardet* v. *Adams*, 1 Mont. Part. 112, note, where Lord Thurlow is reported to have said he did not see what degree of misconduct was to be held sufficient ground for dissolving a partnership.

such as to affect the business, not merely by shaking its credit in the eyes of the world, but by rendering it impossible for the partners to conduct their business together according to the agreement into which they have entered (*d*).

Degree of misconduct.

Most of the cases on this subject have come before the Court on a motion for an injunction to restrain a partner from acting improperly, and have been alluded to when the remedy by injunction was considered (*e*). It may, however, be usefully observed here that keeping erroneous accounts and not entering receipts (*f*), refusal to meet on matters of business (*g*), continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation (*h*), have been held sufficient to justify a dissolution. It is not necessary, in order to induce the Court to interfere, to show personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner. All that is necessary is to satisfy the Court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it. A strong illustration of this is afforded by *Harrison* v. *Tennant* (*i*). In that case three persons, A., B., and C., entered into partnership as solicitors for twenty-one years. A. and B. had been in practice as partners before the partnership of A., B., and C. commenced, and were sued in Chancery in respect of matters which had arisen in the course of such practice. In this suit A. was charged, after the formation of the firm A., B., and C., with gross misconduct and with fraud. B. and C. wished to have A.'s answer settled in consultation, but A. declined, made himself the sole solicitor on the record instead of the firm, and put in his answer without further consulting his co-partners. B. and C. filed a bill against A. for a dissolution, and sent

Harrison *v.* Tennant.

(*d*) See *Anon.*, 2 K. & J. 441, where a partner had attempted suicide.

(*e*) *Ante*, p. 538 *et seq.*

(*f*) *Cheeseman* v. *Price*, 35 Beav. 142.

(*g*) *De Berenger* v. *Hamel*, 7 Jur. Byth. 25, ed. 2.

(*h*) *Baxter* v. *West*, 1 Dr. & Sm. 173; *Watney* v. *Wells*, 30 Beav. 56; *Pease* v. *Hewitt*, 31 Beav. 22; *Leary* v. *Shout*, 33 Beav. 582.

(*i*) 21 Beav. 482.

circulars to their clients stating that they had taken steps to dissolve the partnership existing between themselves and A., in consequence of the grave charges made against him in the suit above referred to. A. resisted the application for a dissolution on the ground that he had not been guilty of any misconduct towards his co-partners in the business of the firm, nor of any breach of the articles of partnership. But a dissolution was decreed upon the broad principle that the mutual confidence reposed by all three partners in each other when the partnership was formed, had not unreasonably ceased; that it was impossible that the business could be conducted as originally contemplated; and that although, being gentlemen, no outbreak had occurred between them, yet an attempt to compel them to act as partners for the future would, as against them all, be to compel them to inflict irreparable injury upon each other. Again in *Essell* v. *Hayward* (*k*), it was held, that where one partner had become liable to a criminal prosecution by reason of his having been guilty of a fraudulent breach of trust, his co-partner had a right to have the partnership dissolved; and a notice to dissolve having been given by him the partnership was ordered to stand dissolved as from the date of the notice, although the partnership was not at will.

Essell *v.* Hayward.

Misconduct on part of partner seeking dissolution.

It must be borne in mind that the Court will never permit a partner, by misconducting himself and rendering it impossible for his partners to act in harmony with him, to obtain a dissolution on the ground of the impossibility so created by himself (*l*).

In order to facilitate a dissolution in the event of misconduct, a special clause is usually inserted in partnership articles. The effect of clauses of this description has been already adverted to (*m*).

When the Court dissolves a partnership on the ground of

(*k*) 30 Beav. 158.

(*l*) See *Harrison* v. *Tennant*, 21 Beav. 493, 494; *Fairthorne* v. *Weston*, 3 Ha. 387.

(*m*) *Ante*, p. 425; *Anderson* v. *Anderson*, 25 Beav. 190, would seem at first sight to throw some doubt on the efficacy of such clauses, where the misconduct complained of is not really of any importance. But the observations there made must be taken with reference to the facts before the Court.

misconduct the dissolution dates from the judgment, unless there are special grounds for ordering a dissolution as from some other date (*n*).

SECTION III.—TRANSFER OF INTEREST.

Transfer of interest.

In addition to the causes of dissolution already mentioned, there are certain other events which, where the contrary is not expressly provided by agreement between the partners, immediately put an end to the partnership, or at all events confer a right to have it dissolved. Whether the partnership is of definite or indefinite duration is unimportant (*o*); for the principle upon which a dissolution results from the events in question, is, that if no dissolution were to follow, new partners would be introduced without the consent of all the existing members of the firm (*p*). Any event which would produce this effect causes a dissolution *of the whole firm* (*q*). Upon this principle it is that, in the absence of an express agreement to the contrary, a partnership is dissolved by taking a partner's share in execution under a *fi. fa.* (*r*), by the transfer of his share by bankruptcy (*s*), or outlawry (*t*), and formerly in the case of a female partner, by her marriage (*u*).

Assignment of share.

The question whether an assignment by a member of an ordinary firm, of his share in it, dissolves it, or gives the other members a right to have it dissolved, has not been much considered in this country (*x*). Where the partnership is at will,

(*n*) *Lyon* v. *Tweddell*, 17 Ch. D. 529; *Besch* v. *Frolich*, 1 Ph. 172.

(*o*) *Crawford* v. *Hamilton*, 3 Mad. 251.

(*p*) See *Crawshay* v. *Maule*, 1 Swanst. 509.

(*q*) Collyer on Part. 72.

(*r*) *Ante*, Bk. III., c. 5, § 4.

(*s*) *Fox* v. *Hanbury*, 2 Cowp. 448; *Ex parte Williams*, 11 Ves. 5; *Ex parte Smith*, 5 Ves. 297.

(*t*) As to attainder and outlawry, see *ante*, p. 73. If a partner's share vests in the Crown it is said that the Crown by its prerogative becomes entitled to all the partnership property; Coll. on Part. 72, *sed quære*.

(*u*) *Nerot* v. *Burnand*, 4 Russ. 247, affd. 2 Bli. N. S. 215. See now the Married Women's Property Act, 1882.

(*x*) In *Heath* v. *Sansom*, 4 B. & Ad. 175, the assignment was by one partner to his co-partner; and in *Jefferys* v. *Smith*, 3 Russ. 158, the shares were transferable by the articles of partnership.

an assignment and notice thereof must, it is conceived, operate as a dissolution. But where the partnership is for a definite period, which is not expired, there is more difficulty in arriving at a correct conclusion. To hold that the assignment operates as a dissolution, renders it competent for a partner to do indirectly what he cannot do directly, viz., dissolve before the expiration of the time for which the partnership was entered into. On the other hand, to hold that the partnership continues, is not just to the assignor's co-partners. The assignment does not of itself create a partnership between them and the assignee (*y*); but it does deprive the assignor of all his interest in the concern, and his co-partners may fairly urge that they never contemplated a partnership with a person having no interest in it. It seems impossible therefore to deny their right to make the assignment a ground for dissolution. The right of the assignee, alone or with the assignor, to insist on a dissolution, against the will of the assignor's co-partners is much more doubtful, and has not been decided. In America such right is held to exist (*z*); but in that country it seems that contracts of partnership for a definite period are almost as easily dissolved as partnerships at will, which is certainly not the case here (*a*).

Creation of trust of share.

Whether an agreement by an ordinary partner to hold his share in the partnership in trust for other persons entitles his co-partners to dissolve the partnership has never been determined. Considering, however, the effect of notice to them of the existence of the trust, they would probably be held entitled to have the partnership dissolved in order to be relieved from their embarrassment. The *cestui que trust* clearly does not become a partner with the partners of his trustee (*b*).

(*y*) See *Jefferys* v. *Smith*, 3 Russ. 158.

(*z*) Story on Part. § 308; 3 Kent, Com. 59; *Marquand* v. *New York Manufac. Co.*, 17 Johns. 525.

(*a*) In *Glyn* v. *Hood*, 1 Giff. 328, and 1 De G. F. & J. 334; *Pinkett* v. *Wright*, 2 Ha. 120; *Murray* v. *Pinkett*, 12 Cl. & Fin. 764; and *Jefferys* v. *Smith*, 3 Russ. 158, some observations on the rights of an assignee of a share will be found, but they do not touch the question alluded to in the text.

(*b*) See *Jefferys* v. *Smith*, 3 Russ. 158; *Newry Rail. Co.* v. *Moss*, 14 Beav. 64; *Bugg's case*, 2 Dr. & Sm. 452. *Goddard* v. *Hodges*, 1 Cr. & M. 33, is the other way; but as to this, see *ante*, p. 28, note (*p*).

SECTION IV.—THE OCCURRENCE OF SOME EVENT WHICH RENDERS THE CONTINUANCE OF THE PARTNERSHIP ILLEGAL.

Upon principle, it is apprehended that if, by any change in the law, it becomes illegal to carry on a business, every partnership formed before the making the law for the purpose of carrying on that business, must be taken to have been dissolved by the law in question. So if, the law remaining unchanged, some event happens which renders it illegal for the members of a firm to continue to carry on their business in partnership, such event dissolves the firm. For example, if a partnership exists between two persons residing and carrying on trade in different countries, and war between those countries is proclaimed, a stop is thereby put to further intercourse between the partners, and the partnership subsisting between them is consequently dissolved (*c*).

War.

(*c*) Story on Part. § 315 *et seq.* and *Grimwold* v. *Waddington*, 16 Johns. 438 (Amer.) there cited. See also, *ante*, pp. 72, 92.

CHAPTER II.

CONSEQUENCES OF DISSOLUTION.

Bk. IV. Chap. 2.

Winding up of partnerships.

In order to wind up the affairs of a dissolved partnership, it is necessary first to pay its debts; secondly, to settle all questions of account between the partners; and, thirdly, to divide the unexhausted assets (if any) between the partners in proper proportions; or, if the assets are insufficient for these purposes, then to make up the deficiency by a proper contribution between the partners. This can be done by the partners themselves, or their representatives (*d*); but if disputes arise then recourse must almost always be had to the Chancery Division of the High Court, for it is under its superintendence only that the assets of a partnership can be properly sold and applied, that the partnership accounts can be satisfactorily taken, and that contribution can be enforced (*e*).

Consequences of dissolution.

The consequences of a dissolution of partnership, both as regards creditors and as regards the partners themselves, have been pointed out in earlier parts of the treatise, and only require to be shortly recapitulated.

1. As regards creditors.

I. *As regards the creditors of the firm*, it has been seen—

1. That a dissolution of partnership, whether general or partial, does not discharge any of the partners from liabilities incurred by them previously to the time of dissolution (*f*).

2. That in order that a member of a firm, wholly or partially dissolved, may be freed from his liability to a person who was a creditor of the firm at the time of its dissolution, such creditor must either have been paid, or satisfied, or must have accepted some fresh obligation in lieu of that which existed when the firm was dissolved (*g*).

(*d*) See *Lyon* v. *Haynes*, 5 Man. & Gr. 505, where a banking company governed by 7 Geo. 4, c. 46, had been voluntarily dissolved.

(*e*) See Bk. III., c. 10, § 6.

(*f*) *Ante*, p. 223 *et seq.*

(*g*) Ibid.

3. That (except in a few special cases) (*h*) notice of dissolution or retirement is requisite to determine the responsibility of each partner in respect of such future acts of his late co-partners, as would be imputable to the firm if no change in it had taken place (*i*).

4. That notice of dissolution generally, as by advertisement, is not sufficient to affect an old customer, unless it can be brought to his knowledge (*k*).

5. That notice of dissolution, is notice that the former partners are no longer each other's agents as before (*l*).

6. That after dissolution and notice, partners cease to be responsible for the future acts of each other (*m*), unless they continue to hold themselves out as partners, in which case the notice is of no avail (*n*).

II. *As regards the partners themselves.* Upon the dissolution of a partnership, and in the absence of any agreement to the contrary, it has been seen— 2. As regards the partners.

1. That each partner has a right to have the partnership assets applied in liquidation of the partnership debts, and to have the surplus assets divided (*o*).

2. That the right of each partner is to insist on a sale of the partnership assets; there being in the absence of special circumstances, no right in any partner to have the value of his own or of any co-partner's share determined by valuation, or to have the partnership property, or any portion of it, divided in specie (*p*).

3. That each partner has a right to insist that nothing further shall be done, save with a view to wind up the concern (*q*).

4. That, for the purposes of winding up, the partnership is deemed to continue (*r*); the good faith and honourable conduct due from every partner to his co-partners during the continuance of the partnership, being equally due so long as its affairs

(*h*) *Ante*, p. 210 *et seq.*
(*i*) Ibid.
(*k*) *Ante*, p. 221.
(*l*) *Ante*, pp. 210, 213.
(*m*) Ibid.
(*n*) *Ante*, p. 216.
(*o*) *Ex parte Ruffin*, 6 Ves. 127.
(*p*) *Ante*, p. 555.
(*q*) *Wilson* v. *Greenwood*, 1 Swanst. 481; *Crawshay* v. *Maule*, ib. 507; *Ex parte Williams*, 11 Ves. 3.
(*r*) See *ante*, p. 217.

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remain unsettled (*s*); and that which was partnership property before, continuing to be so for the purpose of dissolution, as the rights of the partners require (*t*).

5. That the right on a dissolution to wind up the partnership affairs, *i.e.*, to get in its credits, convert its assets into money, pay its debts, and divide the residue, belongs as much to one of the late partners as to another; and if they cannot agree amongst themselves, recourse must be had to the Court, which will, if necessary, appoint a receiver, direct a sale of the assets and payment of the partnership debts, and restrain a partner from interfering with the proper winding up of the partnership (*u*).

6. That the right to wind up the affairs of a dissolved partnership is, however, personal to the members of the late firm; and that, therefore, on the death or bankruptcy of one of them, his executors or trustees will not be permitted to take the management of the affairs of the partnership out of the hands of the other partners (*x*).

7. That if the partnership assets are insufficient to pay the partnership debts, the deficiency must be made good by the partners in proportion to their respective shares (*y*).

8. That after a partnership has been dissolved, any one of the late partners has a right to have that dissolution duly notified, so that a stop may be put to the power of his co-partners to bind him (*z*). It seems that he has also a right to restrain them from carrying on business under the old name, if such name is or includes his own, and if he has not assigned his interest in the goodwill to them; for although their continued use of the old name, even with his knowledge, is not of itself sufficient to render him liable, by virtue of the doctrine of holding out (*a*), such use undoubtedly exposes him to the

(*s*) *Ante*, p. 303.

(*t*) See *Ex parte Williams*, 11 Ves. 5 and 6; *Crawshay* v. *Collins*, 2 Russ. 342, 343; *Nerot* v. *Burnand*, 4 Russ. 247; *Payne* v. *Hornby*, 25 Beav. 280. See, too, *Ex parte Trueman*, 1 D. & Ch. 464, as to partnership books.

(*u*) See *ante*, Bk. III. ch. 10, § 6.

(*x*) *Allen* v. *Kilbre*, 4 Madd. 464; *Ex parte Finch*, 1 D. & Ch. 274; *Fraser* v. *Kershaw*, 2 K. & J. 496.

(*y*) See *ante*, p. 401.

(*z*) *Hendry* v. *Turner*, 32 Ch. D. 355; *Troughton* v. *Hunter*, 18 Beav. 470.

(*a*) *Newsome* v. *Coles*, 2 Camp. 617.

risk of having actions brought against him as if he still belonged to the firm, and in the case supposed his co-partners have no right to expose him to that risk (*b*).

9. That each partner has a right to commence a new business in the old line, and in the old neighbourhood; either alone, or in partnership with other people (*c*).

Matters involved in the winding up of a partnership.

Such, in general terms, are the consequences of dissolution. In order, however, to obtain a complete view of these consequences, it is necessary to attend to the principles upon which premiums are apportioned, and partnership accounts are taken; to the distinction between the joint estate of the firm, and the separate estates of the partners composing it; to the doctrines of contribution and indemnity; to the rules which relate to appointing a receiver and granting an injunction; and lastly, to the special agreements, if any, into which the partners may have entered. All these matters were discussed in the third book, and it is not necessary further to allude to them. But the complicated questions which arise in the event of a dissolution by death or bankruptcy, have necessarily been reserved for separate examination, and they will form the subject of the next two chapters of the present book.

(*b*) See *ante*, p. 544.

(*c*) See, as to this, *ante*, pp. 436, 437.

CHAPTER III.

OF DEATH AND ITS CONSEQUENCES.

Bk. IV. Chap. 3. Sect. 1.

THE consequences of the death of a member of a partnership will be most conveniently pointed out in the course of an examination of the position of the surviving members, and of the executors of the deceased member—

1. As between themselves;
2. As regards the creditors of the firm; and
3. As regards the separate creditors and legatees of the deceased.

SECTION I.—CONSEQUENCES AS REGARDS THE SURVIVING PARTNERS AND THE EXECUTORS OF THE DECEASED.

Death of a partner dissolves the firm.

The death of any one member of a firm operates as a dissolution thereof as between all the members, unless there is some agreement to the contrary (*a*). This is obviously reasonable, for by the death of one of the members it is no longer possible to adhere to the original contract, the essence of which is (in the case supposed), that all the parties to it shall be alive. The mere fact that the partnership was entered into for a definite term of years, which was unexpired when the death occurred, is not sufficient to prevent a dissolution by such death (*b*).

Executors of deceased do not become partners.

Unless all the partners have agreed to the contrary, when one of them dies, his executors have no right to become

(*a*) See *Pearce* v. *Chamberlain*, 2 Ves. sen. 33; *Crawford* v. *Hamilton*, 4 Madd. 251; *Crawshay* v. *Maule*, 1 Swanst. 509; *Vulliamy* v. *Noble*, 3 Mer. 614; *Crosbie* v. *Guion*, 23 Beav. 518.

(*b*) *Crawford* v. *Hamilton*, 3 Madd. 251.

partners with the surviving partners (*c*); nor to interfere with the partnership business; but the executors of the deceased represent him for all purposes of account, and, unless restrained by special agreement, they have the power, by bringing an action, to have the affairs of the partnership wound up in a manner which is generally ruinous to the other partners.

Jus accrescendi, &c.

The maxim *jus accrescendi inter mercatores locum non habet*, has been already examined, and need not be again noticed (*d*).

Position of surviving partners.

On the death of a partner the surviving members of the firm are the proper persons to get in and pay its debts (*e*). But the debts they get in must be placed to the debit of the late firm, and the debts they pay must be placed to its credit. Whilst, therefore, the executors of the deceased partner are entitled to treat payments made to the survivors by a debtor to the old firm, as made in respect of his debt to it (*f*), the survivors have a right, if they pay more than their share of the debts of the old firm, to be reimbursed out of the estate of their deceased copartner (*g*). They are creditors against that estate for what may be due to them, from their deceased partner, on taking the partnership accounts, and they may as creditors bring an action for the administration of his estate (*h*). If he has no legal personal representative, the Probate Division of the High Court will grant a limited administration to a nominee of the surviving partners, so as to enable them to institute proceedings to have the partnership accounts properly taken (*i*).

Actions by surviving partners against the executors of a deceased partner.

A surviving partner, if a creditor of the deceased, may sue either in that character for a common administration judgment, or, in the character of a partner, for a judgment for a partnership account, and for payment of what is due on that account;

(*c*) *Pearce* v. *Chamberlain*, 2 Ves. S. 33.

(*d*) *Ante*, p. 340.

(*e*) *Ante*, p. 288.

(*f*) *Lees* v. *Laforest*, 14 Beav. 250.

(*g*) *Musson* v. *May*, 3 V. & B. 194.

(*h*) See *Robinson* v. *Alexander*, 2 Cl. & Fin. 717; *Addis* v. *Knight*, 2 Mer. 119. If the deceased has pledged his real estate to his copartners for a debt due from him to them, they cannot enforce their security in the absence of his legal personal representative, *Scholefield* v. *Heafield*, 7 Sim. 667.

(*i*) *Cawthorn* v. *Chalie*, 2 Sim. & Stu. 127. The Court of Chancery would not in such a case appoint a person to represent the estate of the deceased. *Rowlands* v. *Evans*, 33 Beav. 202.

and if assets are not admitted, then for a judgment for the administration of the estate of the deceased. An action in the alternative may, it is conceived, now be sustained (*j*). The legal personal representative of the deceased must be a party if an account of his estate is sought. If there is no such representative, but the assets of the deceased or of the partnership are in danger, and the object of the plaintiff is to have them protected, he should confine his claim for relief accordingly, and not seek for an account (*k*).

No right to take the share of deceased at a valuation.

In the absence of an express agreement to that effect, the surviving partners have no right to take the share of the deceased partner at a valuation; nor to have it ascertained in any other manner than by a conversion of the partnership assets into money by a sale (*l*); nor have they any right of pre-emption (*m*). Even the good-will of the business, if saleable, must be sold for the benefit of the estate of the deceased; although the surviving partners are under no obligation to retire from business themselves, and cannot, it seems, be prevented from recommencing business together in the name of the old firm unless the goodwill has been sold (*n*).

Accounting for subsequent profits.

In ascertaining the share of the deceased, the surviving partners must not only bring into account the assets of the firm which actually existed at the time of his death, but also, whatever has been obtained by the employment of those assets up to the time of the closing of the account; for so long as profits are made by the employment of the capital of the deceased partner, so long must such profits be accounted for by the surviving partners (*o*). The executors of the deceased have, however, the option of taking interest at *5l.* per cent. (*p*).

Allowance for carrying on business.

On the other hand, the surviving partners are entitled, if they carry on the business for the benefit of the estate of the

(*j*) Ord. xvi. r. 7.

(*k*) *Rawlings* v. *Lambert*, 1 J. & H. 458. Under the new practice a claim for an account would probably be harmless.

(*l*) *Crawshay* v. *Collins*, 15 Ves. 226, 229; *Featherstonhaugh* v. *Fenwick*, 17 Ves. 308. See, as to unsaleable assets and pending contracts, *ante*, p. 558. And as to the discretion of the Court, *ante*, p. 556.

(*m*) *Brown* v. *Gellatly*, 31 Beav. 243.

(*n*) See *ante*, p. 436 *et seq.*

(*o*) See *ante*, p. 521 *et seq.*

(*p*) *Ante*, p. 528.

deceased partner, to an allowance for so doing; unless they are also his executors, in which case they can make no charge for their trouble (*q*).

Position of the executors of the deceased.

The right of the executors as against the surviving partners is, simply, to have the share of the deceased ascertained and paid; but this frequently cannot be done without a general sale and winding up of the partnership.

A *bonâ fide* sale, however, by the executors to the surviving partners, can generally be made with safety if no surviving partner is an executor (*r*). Where, however, a sale of the share of the deceased cannot be effected by private arrangement, the executors must enforce a general sale and winding up for their own safety, unless the persons interested in the estate of the deceased assent to the adoption of some other course. And even if they do, it must not be forgotten that the executors may not be able, without risk to themselves, to continue the share of the deceased in the business, and take the profits accruing in respect of it; for by sharing profits made after the death of the deceased, the executors, although they are only trustees for others, may become liable as partners with the surviving partners; and may therefore become liable to be adjudicated bankrupt and to be compelled personally to pay debts contracted in carrying on the business (*s*). The position of the executors of a deceased partner is, in fact, often one of considerable hardship and difficulty; if they insist on an immediate winding up of the firm, they may ruin those whom the deceased may have been most anxious to benefit; whilst if for their advantage the partnership is allowed to go on, the executors may run the risk of being ruined themselves.

Effect of making a co-partner an executor.

With a view to obviate this, it is not unusual for one partner to make his co-partner his executor; but the difficulty of the executor's position is thus rather increased than diminished; for his own personal interest as a surviving partner is brought

(*q*) Ibid.

(*r*) See *infra*, § 3. *Coburn* v. *Collins*, 35 Ch. D. 373, shows that the Bills of Sale Acts must not be overlooked in transactions of this kind.

(*s*) Formerly they always did incur this liability. See *Ex parte Holdsworth*, 1 M. D. & D. 475; *Wightman* v. *Townroe*, 1 M. & S. 412; *Ex parte Garland*, 10 Ves. 119. But see now *Holme* v. *Hammond*, L. R. 7 Ex. 218, noticed *ante*, p. 32.

into direct conflict with his duty as an executor. Everything therefore which he does is liable to question and misconstruction on the part of the persons beneficially entitled to the estate of the deceased; and he is practically much more fettered in the discharge of his duties, and in the exercise of his rights, than if he had not to act in the double character imposed upon him (*t*). This will appear in the section in which it is proposed to examine the rights of the separate creditors and legatees of the deceased against his executors and his surviving partners.

Actions for indemnifying executors.

Where a deceased partner's estate is administered under the order of the Court, his executors, if they act properly, are personally protected from all consequences, and no action can be sustained against them in respect of what they so do (*u*). If there are liabilities which will have to be met, the Court will order part of the assets to be set aside to meet them when they arise (*x*). But if the liabilities are remote and contingent, and may possibly never arise at all, the utmost that the executors can obtain in the shape of indemnity, in addition to that afforded by the orders of the Court itself, is a covenant from the testator's legatees or next of kin (*y*).

Succession duty.

No succession duty is payable by surviving partners on the death of a member of the firm, even although they may benefit thereby (*z*).

SECTION II.—CONSEQUENCES AS REGARDS JOINT CREDITORS.

1. *With reference to what occurred before death.*

Position of executors of deceased partner as regards creditors of the firm.

The position of the executors of a deceased partner, with reference to the creditors of the firm, has, to a considerable extent, been already ascertained. For it has been seen:—

(*t*) See some general remarks on this subject in *Hutton* v. *Rossiter*, 7 De G. M. & G. 12.

(*u*) *Waller* v. *Barrett*, 24 Beav. 413.

(*x*) *Fletcher* v. *Stevenson*, 3 Ha. 360; *Brewer* v. *Pocock*, 23 Beav. 310.

(*y*) See *Dean* v. *Allen*, 20 Beav. 1; *Waller* v. *Barrett*, 24 ib. 413; *Addams* v. *Ferick*, 26 Beav. 384; *Bennett* v. *Lytton*, 2 J. & H. 155.

(*z*) *Oldfield* v. *Preston*, 3 De G. F. & J. 398. Compare *Crossman* v. *The Queen*, 18 Q. B. D. 256.

1. That, notwithstanding the death of a partner, his estate is liable to the creditors of the firm; and not only in respect of debts contracted in his lifetime, in the ordinary way of business, but also in respect of debts arising from breaches of trust committed in his lifetime by himself, or his co-partners, and imputable to the firm (*a*);

2. That this liability cannot be got rid of by any arrangement between the executors of the deceased and the surviving partners; and that, notwithstanding subsequent dealings between the creditors and the surviving partners, the liability of the executors continues, until it can be shown that the creditors have abandoned their right to obtain payment from the estate of the deceased, or that their demands have, in fact, been paid or discharged (*b*).

3. That this liability does not extend to ordinary torts, for as to them *actio personalis moritur cum persona* (*c*).

Summary of cases.

These propositions have been already so fully illustrated in various portions of the present treatise, that it is unnecessary here to do more than collect the cases establishing them.

Estate of deceased discharged.

1. *Cases in which by death alone a partner's liability has been extinguished:—*

Sumner v. *Powell*, 2 Mer. 30, and Turn. & R. 423 (*ante*, p. 196).
Clarke v. *Bickers*, 14 Sim. 639 (*ante*, p. 196).
Wilmer v. *Currey*, 2 De G. & Sm. 347 (*ante*, p. 197).
Hill's case, 20 Eq. 585. Joint holders of shares.

Estate of deceased not discharged.

2. *Cases in which the estate of a deceased partner has been held liable* (*d*)*:—*

(*a*) *Ante*, p. 194 *et seq.*

(*b*) *Ante*, p. 239 *et seq.*

(*c*) *Ante*, p. 198 *et seq.* The Act 3 & 4 Wm. 4, c. 42, § 2, gives a remedy against the executors of a person who commits a tort within six months of his death, provided such tort affects the real or personal property of the person injured. See *Phillips* v. *Homfray*, 11 App. Ca. 466, and 24 Ch. D. 439. As to frauds, see *New Sombrero Phosphate Co.* v. *Erlanger*, 3 App. Ca. 1218, and 5 Ch. D. 73; *Peek* v. *Gurney*, L. R. 6 Ho. Lo. 377, and 13 Eq. 79; *Davidson* v. *Tulloch*, 3 McQu. 783; *Twycross* v. *Grant*, 4 C. P. D. 40; and as to slander of title to trade marks, *Hatchard* v. *Mège*, 18 Q. B. D. 771.

(*d*) See the celebrated judgment in *Devaynes* v. *Noble*, 1 Mer. 539, and 2 R. & M. 495.

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Liability in respect of contracts.

Beresford v. *Browning*, 20 Eq. 564 (*ante*, p. 194).
Lane v. *Williams*, 2 Vern. 292.
Simpson v. *Vaughan*, 2 Atk. 31.
Darwent v. *Walton*, ib. 510.
Clavering v. *Westley*, 3 P. W. 402.
Bishop v. *Church*, 2 Ves. S. 100 and 371 (*ante*, p. 194).
Jacomb v. *Harwood*, ib. 265.
Burn v. *Burn*, 3 Ves. 573 (*ante*, p. 195).
Thomas v. *Frazer*, 3 Ves. 399.
Orr v. *Chase*, 1 Mer. 729.
Harris v. *Farwell*, 13 Beav. 403.
Devaynes v. *Noble*, 1 Mer. 539, and 2 R. & M. 495.
Wilkinson v. *Henderson*, 1 M. & K. 583.
Thorpe v. *Jackson*, 2 Y. & C. Ex. 553.
Hills v. *McRae*, 9 Ha. 297.
Brett v. *Beckwith*, 3 Jur. N. S. 31, M. R. (*post*, p. 600).
Chectham v. *Crook*, McCl. & Y. 307.

Liability in respect of frauds and breaches of trust.

New Sombrero Phosphate Co. v. *Erlanger*, 5 Ch. D. 73, and 3 App. Ca. 1218.
Blair v. *Bromley*, 2 Ph. 354 (*ante*, p. 153).
Sadler v. *Lee*, 6 Beav. 324 (*ante*, p. 153).
Vulliamy v. *Noble*, 3 Mer. 619.
Devaynes v. *Noble*.
Clayton's case, 1 Mer. 576 (*ante*, pp. 152, 236).
Baring's case, ib. 612 (*ante*, p. 152).
Ward's case, ib. 624.

Estate of deceased not discharged by what has occurred since his death.

3. *Cases in which the estate of a deceased partner has been held liable, notwithstanding dealings between the creditors of the firm and the surviving partners :—*

Devaynes v. *Noble*.
Sleech's Case, 1 Mer. 539.
Clayton's case, ib. 579 (*ante*, pp. 152, 236).
Palmer's case, ib. 623.
Braithwaite v. *Britain*, 1 Keen, 206.
Winter v. *Innes*, 4 M. & Cr. 101 (a very important case).
Harris v. *Farwell*, 15 Beav. 31 (*ante*, p. 251).
Daniel v. *Cross*, 3 Ves. 277.
Jacomb v. *Harwood*, 2 Ves. S. 265.
Re Hodgson, 31 Ch. D. 177.

Estate of deceased discharged by what has occurred since his death.

4. *Cases in which the estate of a deceased partner has been held discharged by what has taken place between the creditor and the surviving partners :—*

By general dealings.

Oakeley v. *Pasheller*, 10 Bli. 548, and 4 Cl. & Fin. 207 (*ante*, p. 251).
Brown v. *Gordon*, 16 Beav. 302 (*ante*, p. 252).
Wilson v. *Lloyd*, 16 Eq. 60, which cannot, however, be relied on (see *ante*, pp. 239, 251).

By payment.

Devaynes v. *Noble*.
Clayton's case, 1 Mer. 572 (*ante*, p. 228).
Merriman v. *Ward*, 1 J. & H. 371. This case is important as showing that where a debt of a deceased partner has been discharged by the application of the rule in *Clayton's case*, it is not competent for his executors to revive such a debt against his estate.

Statute of Limitations.

The estate of a deceased partner may be discharged by the statute of limitations; and now, by the Mercantile law amendment act payments by the surviving partners will not keep alive the creditor's claim against the executors of the deceased (*e*). The effect in equity of such payments before the passing of the act in question was by no means clearly settled (*f*); but whatever doubt there may formerly have been upon the subject, it has been long settled that a creditor of the firm can proceed against the estate of a deceased partner, without first having recourse to the surviving partners, and without reference to the state of the accounts between them and the deceased (*g*). But it is necessary to make the surviving partners parties to the action, for they are interested in the issues raised between him and the executors (*h*).

Right of creditor of firm to be paid out of the estate of a deceased partner.

(*e*) 19 & 20 Vict. c. 97, § 14. See *Thompson* v. *Waithman*, 3 Drew. 628, which, although wrong as regards the retrospective operation of the act (*Jackson* v. *Woolley*, 8 E. & B. 778), is in other respects correct, *ante*, p. 263.

(*f*) Compare *Winter* v. *Innes*, 4 M. & Cr. 101, and *Braithwaite* v. *Britain*, 1 Keen, 206, with *Way* v. *Bassett*, 5 Ha. 55, and *Brown* v. *Gordon*, 16 Beav. 302. See, also, *ante*, pp. 261, 262.

(*g*) *Re Hodgson*, 31 Ch. D. 177; *Re McRae*, 25 ib. 16; *Wilkinson* v. *Henderson*, 1 M. & K. 582; *Devaynes* v. *Noble*, 2 R. & M. 495; *Thorpe* v. *Jackson*, 2 Y. & C. Ex. 553. See *ante*, p. 195.

(*h*) See, in addition to the cases in the last note, *Hills* v. *McRae*, 9 Ha. 297; *Devaynes* v. *Noble*, *Sleech's case*, 1 Mer. 539; *Stephenson* v. *Chiswell*, 3 Ves. 566. In *Rice* v. *Gordon*, 11 Beav. 265, one of the cases of this class, the debt due to the plaintiff arose out of a transaction in which he had engaged as surety.

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Creditor's suit for administration of deceased partner's estate.

But, as pointed out in an earlier chapter (Bk. II. c. 2, § 1), a creditor of the firm is not in the same position as a separate creditor as regards the estate of a deceased partner. A creditor of the firm, unless he is also a separate creditor of the deceased partner, is not entitled to the ordinary judgment for the administration of the estate of the deceased, and cannot compete with an ordinary separate creditor in the administration of such estate (*i*). The right of the creditor of the firm is to have the separate estate of the deceased ascertained and applied in payment of his separate debts and liabilities, and to have the surplus applied in payment of his joint liabilities (*k*). If an action has already been brought for the administration of the estate of the deceased, a creditor of the firm can obtain an order to the above effect without being compelled to bring a separate action himself (*l*). If necessary he can bring an action himself (*m*); but it is doubtful whether he can proceed by an originating summons in chambers (*n*).

Since the Judicature acts a creditor can, it is apprehended, sue both the surviving partners and the executors of the deceased partner, and obtain judgment against them all; the judgment against the executors being, however, of course limited to administration in due course unless assets are admitted. But to work out the judgment for administration, the action, if not brought in the Chancery Division, would have to be transferred to it.

Right of creditors of firm compared with the rights of the separate creditors of the deceased.

As will be seen hereafter, it is a rule in bankruptcy that the debts of a firm shall be paid out of the assets of the firm, and the separate debt of each partner out of his separate estate: and in administering the insolvent estate of a deceased partner

(*i*) *Re McRae*, 25 Ch. D. 16; *Re Hodgson*, 31 ib. 177; *Re Barnard*, 32 ib. 447; *Kendall* v. *Hamilton*, 4 App. Ca. 504, and 3 C. P. D. 403. Compare *Burn* v. *Burn*, 3 Ves. 573, where a bond creditor of the firm obtained a payment as if he had been a separate specialty creditor of the deceased, the bond being treated as joint and several.

(*k*) Ibid., see the decree in *Hills* v. *McRae*, 9 Ha. 297, and *infra*.

(*l*) *Cowell* v. *Sikes*, 2 Russ. 191; *Gray* v. *Chiswell*, 9 Ves. 118. In the former there was a petition, but this is now unnecessary.

(*m*) *Hills* v. *McRae*, 9 Ha. 297, is an instance of a claim; but claims are now abolished.

(*n*) *Re Barnard*, 32 Ch. D. 447; as to the conduct of proceedings where there are two actions, one by a joint, and another by a separate, creditor, see *Re McRae*, 25 Ch. D. 16.

the same rules have now to be adopted (*o*). Accordingly the separate estate of a deceased partner must be applied in payment of all principal and interest due to his separate creditors before any part of such estate can be touched by the creditors of the firm (*p*); and this rule applies even although the surviving partners may be bankrupt (*q*). If, indeed, there is not and never was, since the death of the deceased, any joint estate whatever, and no solvent partner, it seems that the joint creditors may rank *pari passu* with the separate creditors of the deceased, against his separate estate (*r*).

Again, the rule which in bankruptcy precludes one partner from proving against the separate estate of his co-partner, whilst the joint debts are unpaid, also applies in administering the estate of a deceased partner (*s*).

Share in firm not available for separate creditors till joint creditors are paid.

The separate estate thus primarily liable to the separate creditors of the deceased, does not include his share in the partnership assets; for he has no share in those assets, except subject to the payment of the debts of the firm. Whilst, therefore, the separate creditors of the deceased are entitled to be first paid out of his separate estate, the creditors of the firm are entitled to be first paid out of its assets, and, consequently, to be paid in full before the share of the deceased in those assets becomes available for the payment of his separate creditors (*t*).

Action by joint creditors.

Actions by creditors of the firm to obtain payment out of the

(*o*) Jud. Act, 1875, § 10. Even before, they were adopted to some extent. See *Lodge* v. *Prichard*, 1 De G. J. & Sm. 610.

(*p*) See *Lodge* v. *Prichard*, 1 De G. J. & Sm. 610, and 4 Giff. 294; *Whittingstall* v. *Grover*, 10 W. R. 53; *Gray* v. *Chiswell*, 9 Ves. 118; *Addis* v. *Knight*, 2 Mer. 117; *Croft* v. *Pyke*, 3 P. W. 182. As to interest after the administration order, see *Ex parte Findlay*, 17 Ch. D. 334, and § 10 of the Jud. Act, 1875.

(*q*) *Lodge* v. *Prichard*, and *Whittingstall* v. *Grover*, *ubi sup.* See, as to winding up the estate of a deceased partner in bankruptcy, where the surviving partners are bankrupt, *Ex parte Gordon*, 8 Ch. 555; *Morley* v. *White*, ib. 214.

(*r*) See *Cowell* v. *Sikes*, 2 Russ. 191; and *Lodge* v. *Prichard*, *ubi sup.* *Qu.* if the Jud. Act, § 10, has introduced the other exceptions recognised in bankruptcy in cases of fraud and distinct trades, see *infra*, Bk. IV. c. 4, § 4.

(*s*) *Lacey* v. *Hill*, 8 Ch. 441. Compare *Ex parte Topping*, 4 De G. J. & Sm. 551.

(*t*) See *Ridgway* v. *Clare*, 19 Beav. 111; *Hills* v. *McRae*, 9 Ha. 297.

Bk. IV. Chap. 3. Sect. 2.

Brett *v.* Beckwith.

assets of a deceased partner, are well illustrated by *Brett* v. *Beckwith* (*u*). In that case there had been two partners, Young and Beckwith. Beckwith was dead, and Young was bankrupt. A bill was filed by the creditor of the late firm against the executors of Beckwith and the assignees of Young, praying for a declaration that Beckwith's real and personal estate was liable in equity, after satisfying his separate debts, to the joint debts of the firm; for an account of such debts at Beckwith's death; for an account of the joint assets received by his executors and Young's assignees; for an account of Beckwith's separate debts; that his real and personal estate might be applied, first in payment of his separate debts, and then in payment of the joint debts; and that a receiver might be appointed to get in the outstanding joint assets. The Court held that the plaintiff was clearly entitled, as a creditor of Beckwith, to have his estate fully administered; and for that purpose to have an account taken of his separate estate; and to have the accounts between Beckwith's executors and Young's assignees also taken, in order to ascertain of what the joint estate consisted; and a decree was accordingly made for taking such accounts.

Judgment in action by creditors of firm against the executor of a deceased partner.

When a creditor of the firm proceeds against the assets of a deceased partner, the form of the judgment which is given is in substance as follows (*x*):—

1. It is declared that all persons who are creditors of the deceased, are entitled to the benefit of the judgment.

2. It is declared that the surplus of the estate of the deceased, after satisfying his funeral and testamentary expenses and separate debts, was liable at the time of his death to the joint debts of the firm, but without prejudice to the liability of the surviving partner, as between himself and the estate of the deceased.

3. An account is directed to be taken of the funeral and testamentary expenses and separate debts of the deceased, and of the debts of the firm. If the surviving partner is not a party to the action, liberty is given him to attend in the prosecution of this last inquiry.

(*u*) 3 Jur. N. S. 31.

(*x*) See *Hills* v. *McRae*, 9 Ha. 297; *Harris* v. *Farwell*, 13 Beav. 407; *Rice* v. *Gordon*, 11 Beav. 271.

4. An account is directed to be taken of the personal estate of the deceased.

5. It is ordered that his personal estate be applied, in the first instance, in the payment of his separate debts and funeral expenses, in a due course of administration, and then in payment of the debts of the firm.

6. And if the personal estate of the deceased is insufficient for the purposes of the action, inquiries are ordered to be made for the purpose of ascertaining the real estate to which the deceased was entitled.

The judgment will, if necessary, direct inquiries whether the creditors of the firm continued to deal with the surviving partners, and what sums have been paid by them to such creditors, and whether the creditors have, by their dealings with the surviving partners, released the estate of the deceased from the payment of their respective debts (*y*).

Additional inquiries will be directed if necessary, and as the necessity for them appears (*z*).

No directions are usually given for the purpose of keeping distinct the joint and the separate estates; but, if necessary, it is conceived that such directions would be given in order that the principles upon which the judgment is framed might be properly carried out (*a*).

Ridgway v. Clare.

In *Ridgway* v. *Clare* (*b*) two partners, A. and B., had died. A suit was instituted by a separate creditor of A. for the administration of his estate; a suit was also instituted by a separate creditor of B. for the administration of his estate; a third suit was instituted by a joint creditor of A. and B. for payment of a debt due from both out of both their estates; and a fourth suit was instituted by the representatives of A. against the representatives of B. for taking the accounts of the partnership. The plaintiff in the third suit was found to be a creditor

(*y*) See the decree in *Devaynes* v. *Noble*, 1 Mer. 530, and in *Fisher* v. *Farrington*, Seton on Decrees, ed. 4, p. 1210.

(*z*) *Barber* v. *Mackrell*, 12 Ch. D. 534, as to money fraudulently withdrawn by one partner from the assets of the firm.

(*a*) See *Rice* v. *Gordon*, 11 Beav. 271; *Ridgway* v. *Clare*, 19 Beav. 111; *Woolley* v. *Gordon*, Taml. 11; *Paynter* v. *Houston*, 3 Mer. 297.

(*b*) *Ridgway* v. *Clare*, 19 Beav. 111.

of both A. and B., but he was held by the Master not to be entitled to rank as a separate creditor of A. On an appeal from the decision of the Master, the Court thought it desirable that the separate creditors should be ascertained, but reserved the question whether the joint creditor was or was not entitled to rank as one of A.'s separate creditors. The judgment, however, is instructive, as it states the manner in which the Court administers the assets of a deceased partner, and pays each class of creditors. It appears that when there are assets sufficient to pay all the creditors, the estate of the deceased forms one fund, out of which the joint and separate creditors are paid *pari passu;* but that they, and the funds for their payment, are distinguished when the assets are in any way deficient.

Secured creditors.

A creditor who holds a security, cannot retain his security and prove for his whole debt, nor realise his security and prove for more than the balance then remaining due to him; if he proves for his whole debt he must give up his security as in bankruptcy. The rule in chancery was formerly otherwise (*c*). This, however, was altered by the Judicature Act, 1875 (*d*).

Creditors' right to proceed both against the survivors and against the estate of the deceased,

The creditors of a partnership having, on the death of one of the partners, a right to obtain payment from the surviving partners, and out of the assets of the deceased partner, the question arises whether the creditors can enforce both these rights, or whether they can only avail themselves of one of them.

Before the Judicature Acts.

Before the Judicature Acts, if the creditors proceeded at law against the surviving partners, but did not obtain satisfaction, they could afterwards proceed in equity against the estate of the deceased partner (*e*). So if the surviving partners became bankrupt, and the creditors of the firm proved against their estate and received a dividend, they might nevertheless afterwards proceed against the estate of the deceased (*f*). Again,

(*c*) *Bonser* v. *Cox*, 6 Beav. 84; *Mason* v. *Bogg*, 2 M. & Cr. 443; *Kellock's case*, 3 Ch. 769.

(*d*) § 10; the act only applies to the estates of persons dying after its commencement.

(*e*) *Jacomb* v. *Harwood*, 2 Ves. S. 265.

(*f*) *Heath* v. *Percival*, 1 P. W 682; *Devaynes* v. *Noble* (*Sleech's case*), 1 Mer. 539.

as the creditors of the firm could not in equity obtain any decree for payment by the surviving partners, but only a decree for payment out of the assets of the deceased partner, there was no reason why, even after a decree for the administration of the estate of the deceased, the creditors in question should not also proceed at law against the surviving partners. If, however, it could be shown that injustice would be produced by allowing the creditor to pursue both his remedies at once, the Court would perhaps have compelled him to elect between them, or have restrained him from proceeding at law (*g*).

Since the Judicature Acts.

The Judicature Acts have so far altered the practice as to allow one action to be brought against the surviving partners and the legal personal representatives of the deceased; and the creditor will practically obtain payment from the survivors or the estate as may be most convenient; but if the estate of the deceased is not sufficient to pay his separate creditors, the creditors of the firm will not be able to compete with them, but will have to look to the surviving partners (*h*). A judgment, however, against the surviving partners is no bar to an action against the executors of a deceased partner; nor is a judgment against the latter a bar to an action against the former (*i*), unless the personal liability of the surviving partners was sought to be enforced in the action against the executors.

One action against the executors of several deceased partners.

If more than one partner is dead, a creditor of the firm may, in one action obtain a judgment against the estates of all of the deceased partners.

Brown *v.* Douglas.

In a case before the late Vice-Chancellor Shadwell there was a partnership of seven persons, A., B., C., &c., and another partnership, A. and B., composed of two of the members of the first. A. and C. were dead. The surviving partners were bankrupt. The plaintiff, who was a creditor of both firms,

(*g*) See, as to the considerations which guided the Court, *Ex parte Kendall*, 17 Ves. 525 and 526. If one partner becomes bankrupt, and a creditor of the firm proves against his estate, he cannot afterwards sue the bankrupt and his co-partners jointly. See *Bradley* v. *Millar*, 1 Rose, 273. The subject of election in bankruptcy will be examined hereafter.

(*h*) See *ante*, p. 598, and Jud. Act, 1875, § 10.

(*i*) *Re Hodgson*, 31 Ch. D. 177; *Jacomb* v. *Harwood*, 2 Ves. S. 265; *Liverpool Borough Bank* v. *Walker*, 4 De G. & J. 24. See *ante*, Bk. II. c. 2, § 1.

filed a bill on behalf of himself and all other the creditors of A., and on behalf of himself and all other the creditors of C., against the real and personal representatives of A., the personal representatives of C., and the assignees of the bankrupts. The bill prayed that an account might be taken of what was due from A. and C. respectively to the plaintiff, and their other joint and separate creditors, and of the personal estates of A. and C., and of the real estate of A., and that the personal estates of A. and C. and the real estate of A. might be applied in payment of their respective debts, as well joint as separate. This bill was demurred to on the ground of multifariousness, but the Vice-Chancellor overruled the demurrer, and held the frame of the suit to be proper in point of form (*k*).

2. *With reference to what has occurred since death.*

Having now examined the position of the executors of a deceased partner, with reference to the creditors of the firm, and in respect of debts existing at the time of the death of the deceased, it is proposed to consider the liability of the assets of the deceased, and of his executors, in respect of what may have taken place since his death.

Personal liability of executors.

With respect to the executors themselves, it is clear that if the executor of a deceased partner carries on the partnership business, the executor becomes personally liable to third parties as if he were a partner in his own right (*l*); and if the executor accepts or indorses bills of exchange or promissory notes either in his own name as executor (*m*), or in the name in which the deceased carried on business (*n*), the executor will be personally liable to be sued on such bills or notes. Whether

(*k*) See *Brown* v. *Douglas*, 11 Sim. 283; *Brown* v. *Weatherby*, 12 Sim. 6. Since the Judicature acts it is a mere question of convenience whether there shall be one action or more. See Ord. XVI. rr. 4, 16, and Ord. XVIII. rr. 1 and 6.

(*l*) See *Wightman* v. *Townroe*, 1 M. & S. 412; *Labouchere* v. *Tupper*, 11 Moo. P. C. 198; *Ex parte Garland*, 10 Ves. 119; *Ex parte Holdsworth*, 1 M. D. & D. 475. As to his liability to creditors by merely sharing profits with the surviving partners, see *Holme* v. *Hammond*, L. R. 7 Ex. 218, *ante*, p. 32. See as to the executors of sole traders, *Re Evans*, 34 Ch. D. 597.

(*m*) *Liverpool Borough Bank* v. *Walker*, 4 De G. & J. 24.

(*n*) *Lucas* v. *Williams*, 3 Giff. 150.

in such cases the executor is entitled to be indemnified out of the assets of the deceased is altogether another question; and depends upon whether the executor has carried on the business pursuant to the will of the deceased, or the directions of those beneficially interested in his estate.

Liability of estate of deceased partner for what occurs after his death.

With respect to the direct liability of the assets of the deceased to creditors, it may be taken as a general proposition, that the estate of a deceased partner is not liable to third parties for what may be done after his decease by the surviving partners; and on that ground it has been held that they cannot be restrained at the suit of the executors of the deceased from continuing to carry on the business of the late firm in the old name (*o*).

Devaynes *v.* Noble.

In the great case of *Devaynes* v. *Noble* (*p*), some bills deposited with a firm of bankers were, after the death of one of the partners, misapplied by the surviving partners, and an attempt was made to obtain out of the estate of the deceased the value of the bills so misapplied. But the attempt was not successful; Sir Wm. Grant observing—

"If there be no remedy at law against the executors of Mr. Devaynes, I am at a loss to understand the equity on which this Court is to interpose to make good the loss against Mr. Devaynes' estate. It has not been incurred by anything that he did or neglected to do. The bills were safely kept as long as he had anything to do with them. From the act of placing them in the custody of a partnership, it followed that upon the death of one of the partners they would fall into the possession of the surviving partners. Mr. Houlton himself, therefore, has virtually placed them there. Mr. Devaynes' executors could not take them away; Mr. Devaynes could not direct his executors to take them away; and though Mr. Devaynes has neither been personally instrumental in the loss, nor personally benefited by it, nor could have prevented it, yet it is contended that it is upon his estate the loss ought to be thrown, and that by a court of equity. I apprehend, however, that it would be the reverse of equity to throw the loss on his estate in such a case as the present. It might be as well contended that if they had thrown the bills into the fire, or lost them by negligence, Mr. Devaynes would be responsible for such act or negligence. He had no more to do with the sale of the bills than he would have had to do with a loss occasioned by such means as these."

(*o*) *Webster* v. *Webster*, 3 Swanst. 490, note. But see as to selling goodwill, *ante*, p. 443.

(*p*) *Houlton's case*, *Johnes's case*, and *Brice's case*, 1 Mer. 616, &c. See, too, *Vulliamy* v. *Noble*, 3 Mer. 614.

Liability of the assets for the acts of the executor.

Moreover, although an executor has power to dispose of the assets of the deceased, and to keep alive demands against them which would otherwise become barred by the statute of limitations, still the acts of an executor, to whatever extent they may render him personally liable, do not impose liability on the assets of the deceased, unless those acts have been properly performed by the executor in the execution of his duty as executor. At the same time, there are certain acts which, if done by an executor, impose liability on the assets of the deceased (*q*); and, therefore, if a partner appoints a co-partner his executor, and dies, and the executor continues to carry on the business, it is possible that some of his acts, attributed to him, not as partner but as executor, may render the assets of the deceased liable for what may have occurred since his death (*r*). But this is quite an exceptional case (*s*).

Effect of employment of assets in the business of the firm.

If an executor of a deceased partner carries on the partnership business pursuant to directions contained in the will of his testator, the executor will, as already pointed out, render himself personally liable for debts contracted in so doing, but he will be entitled to indemnity in respect thereof out of the estate of the deceased (*t*); and consequently if a deceased partner has himself directed his assets or any part thereof to be employed in carrying on the partnership business, so much of them as are directed to be employed, are liable to make good the debts contracted during their employment. For these reasons, and to this extent, therefore, his estate will be applicable to the liquidation of the demands of those who have become creditors of the partnership after his decease. But it must not be supposed that a creditor of an executor or trustee can always stand in his place to the extent to which he is entitled to be indemnified out of the trust estate. *Primâ facie* a creditor must look for payment to his legal debtor, and the fact that the latter is entitled to be indemnified by some one

(*q*) See Williams on Executors, vol. ii. 1798, ed. 8.

(*r*) See *Vulliamy* v. *Noble*, 3 Mer. 614.

(*s*) See *Re Evans*, 34 Ch. D. 597; *Strickland* v. *Symons*, 26 ib. 245; *Re Johnson*, 15 ib. 548; *Farhall* v. *Farhall*, 7 Ch. 123; *Owen* v. *Delamere*, 15 Eq. 134.

(*t*) *Labouchere* v. *Tupper*, 11 Moore, P. C. 198, and the cases in the following notes.

else, or out of some estate, does not confer any additional right on the creditor. To avail the creditor something more is necessary, viz., the existence of a trust fund expressly devoted to carrying on the business in respect of which the debt to the creditor has been contracted (*u*).

Strickland v. Symons.

In *Strickland* v. *Symons* (*x*), a lunatic asylum was vested in the defendant on trust for sale. He carried it on for a time and then sold it for a large sum of money. The plaintiff had supplied the defendant with goods for the use of the asylum, and not being able to obtain payment from the defendant the plaintiff brought an action for payment out of the trust estate. But he was held not entitled to such payment, there being no particular trust estate appropriated for the purpose of carrying on the asylum.

Re Evans.

In *Re Evans* (*y*), the widow and administratrix of a deceased builder carried on his business, and in so doing contracted debts to the plaintiff. The plaintiff obtained judgment against her and sought to obtain payment out of the proceeds of the sale of the goods which she had bought, but which proceeds, as between her and the estate, were assets of the deceased. It was held that the plaintiff was not entitled to any such relief. The plaintiff was declared entitled to a lien on the beneficial interest of the widow in the estate of the deceased. This was the utmost he could be entitled to; and the Court of Appeal carefully refrained from deciding whether he was entitled to so much.

Trust to carry on business.

If, however, there is a trust fund specially appropriated to carrying on a particular business, and the trustee in carrying it on contracts debts, the creditors are entitled, not indeed to payment out of the fund as *cestuis que trustent*, but to stand in the place of the trustee, and to obtain out of the fund what, if anything, may be payable to him by way of indemnity. But if he is a defaulting trustee the creditors can obtain nothing out of the trust fund until he has made good what he owes it. The most recent case on this subject is *Re Johnson* (*z*), in which

(*u*) See, in addition to the cases cited below, the American authorities, *Jones* v. *Walker*, 13 Otto, 444; *Smith* v. *Ayres*, 101 U. S. 320.

(*x*) 26 Ch. D. 245, and 22 ib. 666.

(*y*) *Re Evans*, 34 Ch. D. 556. Observe that the plaintiff had not seized the goods under a fi. fa.

(*z*) *Re Johnson*, 15 Ch. D. 548.

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the previous authorities were reviewed by Jessel, M. R., and in which the right of the creditors to the extent above stated but no further is clearly enunciated.

Proof by the executor in the event of bankruptcy.

Most of the other cases which have occurred upon this subject, have arisen where an executor, having continued in business with a surviving partner, and having become bankrupt with him, has endeavoured to withdraw from the joint estate the assets of the deceased employed in the trade. In such cases, the executor has been held entitled to prove for the value of the assets which he embarked in the business without authority, such assets being in substance an unauthorised loan of trust money; but he has been held not entitled to prove as against joint creditors for the value of those assets which his testator authorised to be so continued in the business.

Ex parte Garland.

In *Ex parte Garland* (*a*), a miller and farmer made a will whereby he directed his wife to carry on his business, and that for the purpose of enabling her to carry it on, any sum not exceeding 600*l.* should be advanced to her by his trustees. He also directed his wife to give her notes of hand for what might be advanced, and for the value of the stock, crops, and effects, in his business. He appointed his wife and the trustees before alluded to his executors. After his death, his widow carried on the business, the stock, crops, and effects in which were valued at 1351*l.* 5*s.* 0*d.* She also received 600*l.* from the trustees for the purpose of enabling her to carry on the business, and for these two sums she gave them her promissory notes. She also became indebted to the estate of the testator in a further sum of 768*l.* 12*s.* 4*d.* She then became bankrupt, and an attempt was made to prove as debts due from her to the estate of the deceased, the three sums of 1351*l.* 5*s.* 0*d.*, 600*l.*, and 768*l.* 12*s.* 4*d.* But it was held by Lord Eldon, that although the last sum might, the two first could not be proved against her estate; for they represented property which the deceased had authorised to be embarked in trade, and which was therefore answerable to the creditors of the trade (*b*).

(*a*) 10 Ves. 110. See, also, *Ex parte Butterfield*, De G. 570, and other cases of that class, noticed hereafter under the head Bankruptcy. See, also, the Irish case, *Hall* v. *Fennell*, Ir. Rep. 9 Eq. 406, and on appeal, ib. 615.

(*b*) See for other illustrations of

It follows from the cases cited above that where a trust fund is appropriated to carrying on a business, the creditors of those who carry it on are better off than the creditors of ordinary partners, inasmuch as these last have nothing to look to except the property of the partners; whereas, in the case supposed, the creditors have not only the personal security of the executors and trustees who carry on the business, but also a right to stand in their place to the extent to which they are entitled to indemnity (*c*) out of the assets of the deceased.

Creditors before death preferred to subsequent creditors.

The liability of the estate of a deceased partner to persons who become creditors after his decease, is subject to its liability to those who were his creditors at his decease. These last must first be paid; and although, as in such a case as *Ex parte Garland*, they might not be able to follow the assets of the deceased into the hands of the trustee in bankruptcy, yet, in administering the estate of a person whose assets have been employed in trade in pursuance of directions contained in his will, the creditors who have become such since his decease cannot compete with his other creditors (*d*).

Amount of estate liable where assets are directed to be continued in the business.

It has at various times been contended that when a testator directs a trade or business to be carried on after his decease, he thereby subjects *all* his assets to the payment of debts incurred in the course of carrying it on; and a decision by Lord Kenyon (*e*) has been supposed to warrant such contention. It is now, however, clearly settled, that the extent of the liability of the testator's estate does not exceed the amount authorised by him to be employed in the trade or business directed by him to be carried on (*f*); and it is generally admitted that the decision of Lord Kenyon is not inconsistent with this doctrine (*g*).

the same doctrine, *Ex parte Richardson*, Buck. 202 & 3 Mad. 138; *Thompson* v. *Andrews*, 1 M. & K. 116; *Cutbush* v. *Cutbush*, 1 Beav. 184; *Scott* v. *Izon*, 34 Beav. 434. In this last case it was attempted to make an executor responsible for not having proved, but the attempt failed, owing mainly to lapse of time and the impossibility of taking the necessary accounts.

(*c*) See *Re Johnson*, 15 Ch. D. 548.

(*d*) See *Cutbush* v. *Cutbush*, 1 Beav. 184.

(*e*) *Hankey* v. *Hammock*, Buck. 210, and 3 Madd. 148.

(*f*) See the cases in the last three notes, and *Strickland* v. *Symons*, 26 Ch. D. 245; *Re Johnson*, ib. 548; *Owen* v. *Delamere*, 15 Eq. 139; *McNeillie* v. *Acton*, 4 De G. M. & G. 744.

(*g*) See the observations of Turner, L. J., in 4 De G. M. & G. 744.

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Effect of general direction to carry on trade.

It becomes therefore a matter of considerable importance, not only to executors but to creditors, to ascertain what a testator who directs his trade or business to be carried on has authorised to be employed in carrying it on. This must, of course, depend on the terms of his will; but it has been held that a general direction to carry on a business in which the testator was engaged at the time of his death, does not authorise the employment, for the purposes of that business, of more of his assets than are embarked therein when he dies (*h*). It has also been held, that a bequest by a person of money upon trust to allow it to remain in the concern of which he is a partner, does not necessarily empower the trustees to trade with that money; for the context may show that all the testator meant was that the sum in question should not be called in, but be allowed to remain outstanding as a loan to the surviving partners (*i*). It has also been held that a trust to sell a business is not for this purpose equivalent to a trust to carry it on until sale (*k*).

SECTION III.—CONSEQUENCES AS REGARDS THE SEPARATE CREDITORS, LEGATEES, AND NEXT OF KIN OF THE DECEASED.

In considering the consequences of the death of a partner as regards his separate creditors, and his legatees, or next of kin, it will be convenient, first of all, to examine their rights under ordinary circumstances, and then to advert to the complicated questions which arise when the assets of the deceased, instead of being realised, are allowed by his executors to be employed in the business carried on by the firm to which he belonged, and when shares are specifically bequeathed.

1. *Rights of separate creditors and legatees generally.*

Legatees, &c., of deceased partner must look to his executor.

Under ordinary circumstances, the separate creditors, legatees, and next of kin of a deceased partner, must look for

(*h*) See *McNeillie* v. *Acton*, 4 De G. M. & G. 744, where further capital was required. See, also, *Re Cameron*, 26 Ch. D. 19.

(*i*) See *Travis* v. *Milne*, 9 Ha. 141.

(*k*) *Strickland* v. *Symons*, 26 Ch. D. 245, *ante*, p. 607.

payment of what is due to them out of his assets, to his legal personal representative, and to him alone (*l*). The executors are, under ordinary circumstances, the only persons who have a right to call upon the surviving partners for an account; and of this right they do not divest themselves by a sale and assignment of the share of the deceased; for the effect of such sale and assignment is only to make the executors trustees for the purchaser (*m*).

A leading case illustrating the doctrine that the executors of a deceased partner are, under ordinary circumstances, the only persons entitled to require an account from the surviving partners, is *Stainton* v. *The Carron Company* (*n*). There a bill was filed by the residuary legatees of a person who had been the agent of and a shareholder in a company, against his executors and other persons interested in the will of the deceased, and against the company. The bill charged that the executors, as agents, managers and shareholders, had interests conflicting with their duties as executors and trustees; and the bill prayed (amongst other things) that the company might transfer the testator's shares to his executors, and that an account might be taken of what was due from the company to his estate, and for payment to the executors of the amount to be found due. The company and one of the executors demurred, and their demurrers were allowed. In delivering judgment the Master of the Rolls thus summed up the effect of the cases on this subject:—

Stainton v. The Carron Company.

"The persons interested in the estate of the testator, not being the legal personal representatives, will not be allowed to sue persons possessed of assets belonging to the testator, unless it is satisfactorily made out that there exist assets which might be recovered, and which, but for such suit, would probably be lost to the estate." And again: "To support such a bill as this it is not sufficient to prove, that it may be an unpleasant duty to the executors and trustees to take the necessary steps for protecting the property entrusted to them. It is not sufficient to show that it will be for their interest not to take such steps; it is necessary to show, that they prefer their

(*l*) *Alsager* v. *Rowley*, 6 Ves. 748; *Saunders* v. *Druce*, 3 Drew. 140. If there is no person who in this country represents the deceased, a representative will be appointed. See *Maclean* v. *Dawson*, 5 Jur. N. S. 1091.

(*m*) *Clegg* v. *Fishwick*, 1 Mac. & G. 294.

(*n*) 18 Beav. 146.

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interest to their duty, and that they intend to neglect the performance of the obligation incidental to the office imposed upon them by the testator, and which they have undertaken to perform."

Wilful default.

The executors, it may be observed, have, in ordinary cases, a personal interest in getting in the assets of the deceased; for, if they wilfully neglect so to do, they will be made to account for the assets, although they may not actually have received them (*o*).

Taking partnership account in action against executor alone.

It must not, however, be supposed that in an action against the executor of a deceased partner by a separate creditor, legatee, or next of kin, no account of the deceased partner's share in the partnership can be ordered or taken; for it is the common course in such an action to direct an inquiry as to what is due to the estate of the deceased in respect of such share (*p*). But in such an action no judgment can be given against the surviving partners for payment of what is due on the account; the executors must, if necessary, take proceedings against them to obtain such payment (*q*).

It seems that, under an ordinary judgment for the administration of the estate of a deceased partner, the partnership accounts will not be gone into, unless the Court specially directs some inquiry to be made with reference to the share of the deceased (*r*). But it is difficult to see how any account of his personal estate can be taken without such an inquiry; and it has been decided more than once, that if the surviving partners seek to obtain payment of a balance from the estate of the deceased on the partnership accounts, these accounts must be taken, although no special direction as to them may be contained in the judgment (*s*). The costs of an administra-

(*o*) See, as to charging the executor of a partner with wilful default, *Grayburn* v. *Clarkson*, 3 Ch. 605; *Sculthorpe* v. *Tipper*, 13 Eq. 232; *Ward* v. *Ward*, 2 H. L. C. 777, and *Rowley* v. *Adams*, ib. 726, and 7 Beav. 395; *Kirkman* v. *Booth*, 11 Beav. 273.

(*p*) As in *MacDonald* v. *Richardson*, 1 Giff. 81. See, also, *Pointon* v. *Pointon*, 12 Eq. 547, where the only surviving partner was an executor and trustee.

(*q*) Ord. xvi. r. 48, &c., and Ord. xviii. do not apparently apply to such a case.

(*r*) See the next note.

(*s*) See *Paynter* v. *Houston*, 3 Mer. 297; *Baker* v. *Martin*, 5 Sim. 380; *Woolley* v. *Gordon*, Taml. 11.

tion action brought by a separate creditor are paid in priority to joint creditors (*t*).

Cases in which the legatees, &c., of a deceased partner have a right to an account from the surviving partners.

Notwithstanding, however, the general rule that the separate creditors, legatees, or next of kin of a deceased partner have no *locus standi* against the surviving partners, this rule is by no means without its exceptions. Indeed there are cases to be met with, which apparently warrant the inference, that surviving partners may always be sued along with the executor or administrator of the deceased (*u*). But the authority of these cases has recently been called in question, and the better opinion now is that some special circumstances are necessary to justify such a course (*x*). The special circumstances which have been held sufficient are, collusion between the executors and the surviving partners (*y*); refusal by the former to compel the latter to come to an account (*z*); dealings which may have precluded the executors from themselves obtaining any account (*a*); the fact that the executors are themselves partners and liable therefore to account as partners to themselves as executors (*b*): and generally, where the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution, by the executors, of the rights of the persons interested in the estate of the deceased, against the surviving partners, there it has been said, an action may be instituted by those persons against the executors and the surviving partners (*c*).

Accounts settled

If the surviving partners and the executors are different

(*t*) *Re McRea*, 32 Ch. D. 613.

(*u*) See *Newland* v. *Champion*, 1 Ves. S. 106, and 2 Coll. 46; *Bowsher* v. *Watkins*, 1 R. & M. 277.

(*x*) See *Yeatman* v. *Yeatman*, 7 Ch. D. 210; *Davies* v. *Davies*, 2 Keen, 534; *Law* v. *Law*, 2 Coll. 41; *Travis* v. *Milne*, 9 Ha. 141; *Stainton* v. *The Carron Co.*, 18 Beav. 146.

(*y*) *Doran* v. *Simpson*, 4 Ves. 651; *Gedge* v. *Traill*, 1 R. & M. 281, note; *Alsager* v. *Rowley*, 6 Ves. 748.

(*z*) *Burroughs* v. *Elton*, 11 Ves. 29; the prayer of the bill in this case may be usefully referred to, but see *Yeatman* v. *Yeatman*, 7 Ch. D. 210, where refusal was held not to be a sufficient ground.

(*a*) *Law* v. *Law*, 2 Coll. 41, and on appeal, 11 Jur. 463; *Braithwaite* v. *Britain*, 1 Keen, 206.

(*b*) *Beningfield* v. *Baxter*, 12 App. Ca. 167; *Cropper* v. *Knapman*, 2 Y. & C. Ex. 338; *Travis* v. *Milne*, 9 Ha. 141; and see as to continuing the deceased's assets in the business, *post*, p. 614.

(*c*) *Travis* v. *Milne*, 9 Ha. 150. As to discovery by the surviving partners, see *Leigh* v. *Birch*, 32 Beav. 399, and Ord. xxxi. r. 7.

between surviving partners and the executors of a deceased partner.

persons, and they have *bonâ fide* come to an account respecting the partnership affairs, and have settled such account as a final account, the account thus settled is binding, as between the surviving partners and the persons interested in the estate of the deceased partner, and cannot be impeached, save on the ground of fraud (*d*).

Where executors are personally interested.

But arrangements made between executors and surviving partners for the benefit of the executors individually are always liable to suspicion; and if the executors are themselves the surviving partners, or some of them, it becomes exceedingly difficult to make any arrangement which will be binding on the persons interested in the estate of the deceased; for even if any arrangement is assented to by such persons, it will be liable to be successfully disputed, on any of those numerous grounds which are held to invalidate arrangements between trustees and their *cestuis que trustent*, and by which trustees do, or may, obtain a benefit at the expense of the trust estate.

Wedderburn *v.* Wedderburn.

A remarkable instance of this is afforded by the case of *Wedderburn* v. *Wedderburn* (*e*), where an account of a deceased partner's estate was directed, at the suit of the persons beneficially interested therein, although thirty years had elapsed since his death, and several changes had taken place in the firm, and releases had been given to the executors by their *cestuis que trustent* (*f*).

2. *Rights of separate creditors and legatees when the share of the deceased is not got in.*

Rights of legatees, &c., when the assets of the deceased partner are continued in the business.

Executors, unless authorised by their testator so to do, ought not to leave his assets outstanding in the trade or business in which he was engaged when he died. It has been laid down as a rule without exception, that to authorise executors to carry on a trade, or to permit it to be carried on with the property of a testator held by them in trust, there

(*d*) *Davies* v. *Davies*, 2 Keen, 534; *Smith* v. *Everett*, 27 Beav. 446. See the Conveyancing Act, 1881, § 37.

(*e*) 2 Keen, 722, and 4 M. & Cr. 41, noticed *ante*, p. 533.

(*f*) See *Beningfield* v. *Baxter*, 12 App. Ca. 167, and the other cases as to profits accruing since death, *ante*, p. 528.

ought to be the most distinct and positive authority and direction given by the testator for that purpose (*g*). A bequest of his share and interest in the partnership to one person for life, and then to another, does not, without more, warrant the trustees of his will in keeping such share and interest unconverted into money; and it is therefore their duty to realise it, and invest what they receive for the benefit of the legatees (*h*).

Option between interest and profits.

If a testator's capital is left in the business as a loan to the surviving partners, they are only liable to pay interest on it, even although they do not pay it off when they ought (*i*); but where an executor improperly employs the assets of the testator in a business carried on by himself, he is chargeable, at the option of the persons beneficially interested in the estate of the deceased, either with the sum employed and interest thereon at 5*l.* per cent., or with the sum employed and the profits made by its employment (*k*). And such persons are not deprived of this option by the circumstance that it will be difficult and expensive to ascertain what part of the profits has arisen from the employment of the assets of the deceased; for whatever difficulty may exist is attributable to the conduct of the executor himself, and cannot therefore be effectually urged by him as a reason why no account of profits should be taken (*l*). The *cestuis que trustent* are moreover entitled to compound interest if the duty of the executors is to call in their testator's capital, and invest it and accumulate the income (*m*); but they are not entitled to profits for part of the time and to interest for

(*g*) *Kirkman* v. *Booth*, 11 Beav. 273. A power to executors named in a will to carry on a business does not justify an administrator in so doing if all the executors renounce. *Lambert* v. *Rendle*, 3 New R. 247.

(*h*) *Re Chancellor*, 26 Ch. D. 42; *Kirkman* v. *Booth*, 11 Beav. 273. See *Skirving* v. *Williams*, 24 ib. 275, and as to specific legacies of shares, *infra*, p. 619.

(*i*) See *Vyse* v. *Foster*, L. R. 7 H. L. 318, and 8 Ch. 300, noticed *ante*, p. 534, and see *infra*.

(*k*) See *Docker* v. *Somes*, 2 M. & K. 655; *Palmer* v. *Mitchell*, ib. 672, note; *Heathcote* v. *Hulme*, 1 J. & W. 122.

(*l*) *Docker* v. *Somes*, 2 M. & K. 655; *Townend* v. *Townend*, 1 Giff. 201; *Flockton* v. *Bunning*, 8 Ch. 323, note, *ante*, p. 530.

(*m*) See *Jones* v. *Foxall*, 15 Beav. 388; *Williams* v. *Powell*, ib. 461. Possibly, also, in some other cases. See the observations in *Vyse* v. *Foster*, L. R. 7 H. L. 346.

the rest, unless there has been some intervening settlement of account (*n*), or other special circumstance (*o*).

Profits made since death.

It follows from the doctrine above stated, and from the principles which were explained when treating of judgments for an account (*p*), that if one of two partners makes the other his executor, and dies, the surviving partner must, under ordinary circumstances, not only account to the estate of the deceased for what may be due, in respect of the testator's share in the partnership at his death (*q*), but also for the profits made by him since his death, by the employment of his capital in the business carried on by the late firm (*r*). Moreover it is immaterial whether such business has been continued by the surviving partner alone, or by him and others in partnership with him; for the obligation of the executor thus to account, is founded on a breach of trust committed by him, for which he is liable at all events to the extent to which he has benefited by it, whether other persons are also liable or not; and being founded on a breach of trust, an action in respect of it may be sustained against the executor alone, though he may only be one of several, by whom the profits have been made (*s*).

The cases illustrating the right of legatees to an account of profits made since their testator's death where the executors have continued his assets in the business in which he was a partner have been already adverted to at considerable length (*t*). The following classified list of them is inserted here for reference.

1. *Account of subsequent profits decreed.*

A. Executors against surviving partners.

Yates v. *Finn*, 13 Ch. D. 839 (*ante*, p. 527.)
Brown v. *De Tastet*, Jac. 284 (*ante*, p. 527.)
Booth v. *Parks*, 1 Moll. 465, and Beatty, 444.
Featherstonhaugh v. *Turner*, 25 Beav. 382.
Smith v. *Everett*, 27 Beav. 446.

(*n*) *Heathcote* v. *Hulme*, 1 J. & W. 122.

(*o*) As in *Townend* v. *Townend*, 1 Giff. 201, noticed *ante*, p. 528.

(*p*) *Ante*, p. 516 *et seq.*

(*q*) See the cases cited, *infra*, pp. 616, 617.

(*r*) *Phillips* v. *Phillips*, Finch, 410.

(*s*) See *ante*, p. 523.

(*t*) *Ante*, p. 521 *et seq.*

B. Legatees against executors who were not partners, but who continued his assets in his business.

Heathcote v. *Hulme*, 1 J. & W. 122.
Docker v. *Somes*, 2 M. & K. 654.
Palmer v. *Mitchell*, 2 M. & K. 672, note.

C. Legatees against executors who were surviving partners or who became partners.

Cook v. *Collingridge*, Jac. 607 (*ante*, p. 528).
Stocken v. *Dawson*, 9 Beav. 239, and on appeal, 27 L. J. Ch. 282.
Wedderburn v. *Wedderburn*, 2 Keen, 722, and 4 M. & Cr. 41 (*ante*, p. 533).
Townend v. *Townend*, 1 Giff. 201 (*ante*, p. 528).
Macdonald v. *Richardson*, 1 Giff. 81 (*ante*, p. 530).
Willett v. *Blanford*, 1 Ha. 253 (*ante*, p. 525). In this case accounts of subsequent profits were directed without prejudice to any question.
Flockton v. *Bunning*, 8 Ch. 323, note (*ante*, p. 530).

2. *Account of subsequent profits refused.*

A. Executor against surviving partner.

Knox v. *Gye*, L. R. 5 H. L. 656, the statute of limitations being a bar.

B. Legatee against executors, one of whom was a surviving partner, and the other of whom had become a partner.

Simpson v. *Chapman*, 4 De G. M. & G. 154 (*ante*, p. 532).
Vyse v. *Foster*, L. R. 7 H. L. 318, and 8 Ch. 300 (*ante*, p. 534).
See, also, *Wedderburn* v. *Wedderburn*, 22 Beav. 84, and *Willett* v. *Blanford*, 1 Ha. 253 (*ante*, pp. 533 and 525).

Liability of surviving partners for assets improperly continued in the business.

Upon the principle that every one concerned in a breach of trust with notice of the trust is answerable for such breach, it follows that if a partner dies, and his surviving partners allow his assets to remain in their business, with the knowledge that to suffer them so to remain is a breach of trust on the part of the executors, the surviving partners will be themselves responsible to the separate creditors, legatees, or next of kin of the deceased, for any loss which may be thereby sustained (*u*).

(*u*) See *Wilson* v. *Moore*, 1 M. & K. 127 and 337; *Booth* v. *Booth*, 1 Beav. 125, and compare *Ex parte Barnewall*, 6 De G. M. & G. 801.

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And further, inasmuch as it is, *primâ facie*, a breach of trust for executors to allow the assets of the deceased to remain in the business carried on by him at his death, surviving partners who knowingly carry on the business with assets of the deceased thus left in their hands will be answerable for such assets, unless they can show that no breach of trust was in fact committed (*x*). Their liability to account for profits has already been considered (*y*).

Loans by executors.

Where, however, the surviving partners and the executors are different persons, and the executors distinctly lend part of their testator's assets to his surviving partners, the latter are only liable to pay interest for it, at the rate agreed upon with the executors. In such a case the legatees are not entitled to a share of the profits made by means of the money lent, although in lending it the executors may have been guilty of a breach of trust, and the borrowers may have known that the money belonged to the deceased (*z*). *A fortiori*, if the executors are authorised to lend part of the assets of the deceased to his surviving partners, they will not be accountable for the profits they may make by the employment in their trade of money lent to them by the executors in pursuance of their authority (*a*): nor, in such a case as is now supposed, will the executors be responsible for the money if lost, if they took such security for its repayment as, having regard to the will of the testator, it was their duty to take (*b*).

Executor becoming a partner.

It sometimes happens that the executor of a deceased partner is taken into partnership by the surviving partners, and a question then arises whether the profits received by the executor as partner belong to him personally, or to the estate which he represents. This must depend on the circumstances under which the executor became a partner. If he became a partner

(*x*) *Travis* v. *Milne*, 9 Ha. 141.

(*y*) *Flockton* v. *Bunning*, *ante*, p. 530.

(*z*) See *Stroud* v. *Gwyer*, 28 Beav. 130; *Flockton* v. *Bunning*, 8 Ch. 323, note, and *ante*, p. 530; 44 & 45 Vict. c. 41, § 37.

(*a*) *Parker* v. *Bloxham*, 20 Beav. 295; *Vyse* v. *Foster*, L. R. 7 H. L. 318, and 8 Ch. 300, *ante*, p. 534, where the testator's capital was not got in at the time appointed, and one of the executors was a surviving partner.

(*b*) *Paddon* v. *Richardson*, 7 De G. M. & G. 563.

in his representative character, or, as in *Cook* v. *Collingridge* (*c*), under circumstances entitling the legatees to treat him still as their trustee, he must account for any profits which he may have obtained as a partner. On the other hand, if, as in *Simpson* v. *Chapman* (*d*), he became a partner not in his representative character, nor under such circumstances as those above mentioned, the profits accruing to him as a partner will be his own, and not form part of the assets for which he must account as executor.

3. *Specific bequests of shares.*

Legacy of a share in a partnership.

A specific bequest by a partner of his share in the partnership clearly does not entitle the legatee to become a partner himself unless there is some agreement to that effect binding upon the surviving partners. The right of the legatee is simply to be paid the amount due to the testator at the time of his death in respect of his share (*e*) ; and also, under the circumstances and subject to the qualifications already noticed (*f*), to receive a proportion of the profits made since the testator's death. As between the legatee, however, and the executor, the legatee is entitled to have the share kept in the business, subject only to the superior right of the executor to sell the testator's personal estate for the payment of debts (*g*).

A bequest of a partner's capital has been held to include what was due to him in respect of advances (*h*).

Legatee of goodwill.

It has been held that the legatee of a deceased partner's share in the goodwill of the partnership business could not sue the surviving partners for a sale of the goodwill and payment of his share, although the bequest had been assented to by the executors (*i*). This case was somewhat peculiar, as in

(*c*) Jac. 607, *ante*, p. 528.

(*d*) 4 De G. M. & G. 154, *ante*, p. 532.

(*e*) *Farquhar* v. *Hadden*, 7 Ch. 1.

(*f*) *Ante*, p. 616.

(*g*) See *Fryer* v. *Ward*, 31 Beav. 602, where the legatee had an option.

(*h*) *Bevan* v. *A.-G.*, 4 Giff. 361. A bequest of the use of capital employed in trade gives an absolute interest in it, see *Terry* v. *Terry*, 33 Beav. 232.

(*i*) *Robertson* v. *Quiddington*, 28 Beav. 529.

...ment the surviving partner was entitled to everything which gave a saleable value to the goodwill [...].

A specific bequest of a share in a partnership will be adeemed if the testator, after he has made his will, leaves the firm and receives his share; but so long as he remains a partner, there will be no ademption, although by some agreement subsequent to the date of the will the amount of his share may have been varied [...]. Even where he has, since he made his will, acquired the whole business, his will may include the whole [...].

A legatee is also entitled to receive, out of the estate of his testator, any part of the borrowing which [...] for him by the testator, until the legatee has paid all his own obligations in the shape of debts owing to the testator's estate. This principle is strongly illustrated by [...]. There a father who had advanced money to a firm in which his son was a partner, had during bankruptcy part of his pecuniary estate to the son. The father's executors were held entitled to retain the whole amount of the partnership debt out of the son's share of the residue, although the debt was barred by the statute of limitations when the father died.

When a share in a partnership is bequeathed in settled in trust for one person for life and afterwards to another, the first question which arises is whether the tenant for life is entitled to have the share kept unconverted, or whether it ought to be converted into money and invested pursuant to the well-known doctrine laid down in [...]. This [...] depends on the terms of the will; but its language must be [...] to entitle the tenant for life to have the share kept unconverted [...].

A specific legatee of a share in a partnership is entitled to all ordinary profits [...] after the testator's death [...];

[...] See on this subject [...]

[...] See [...] Ch. D. [...] and [...] p. 671 [...] 7. See, also, [...] Ch. D. [...]

[...] [...] 3 Coll. [...] De G. & [...] 12 Eq. [...] 1 Eq. 188.

unless although declared after his death they were earned and ought to have been declared before (*r*). But profits declared before a testator's death (*s*), or declared afterwards when they were earned and ought to have been declared before (*t*), *primâ facie* form part of his general estate, and do not pass to the specific legatee of the share: and the same rule applies to dividends declared before his death, but the actual payment of which is postponed until afterwards (*u*). Losses must not be thrown on capital so as to benefit a tenant for life at the expense of the remainderman (*x*).

Apportionment of profits.

The profits of an ordinary partnership are not within the Apportionment act, 1870, 33 & 34 Vict. c. 35 (*y*), although dividends of companies are within it (*z*).

(*r*) *Browne* v. *Collins*, 12 Eq. 586. But see *Ibbotson* v. *Elam*, 1 Eq. 188.

(*s*) See the next two notes.

(*t*) *Browne* v. *Collins*, 12 Eq. 586.

(*u*) *De Gendre* v. *Kent*, 4 Eq. 283; *Lock* v. *Venables*, 27 Beav. 598; *Wright* v. *Tuckett*, 1 J. & H. 266. Compare *Clive* v. *Clive*, Kay, 600, which turned on the special wording of the company's deed of settlement. See as to bonuses, *Bouch* v. *Sproule*, 12 App. Ca. 385, reversing 29 Ch. D. 635.

(*x*) See *Upton* v. *Brown*, 26 Ch. D. 588; *Gow* v. *Forster*, ib. 672.

(*y*) *Re Cox's Trusts*, 9 Ch. D. 159; *Jones* v. *Ogle*, 8 Ch. 192. See before the Act, *Ibbotson* v. *Elam*, 1 Eq. 188; *Browne* v. *Collins*, 12 Eq. 586; *Johnston* v. *Moore*, 27 L. J. Ch. 453.

(*z*) *Re Griffith*, 12 Ch. D. 655.

CHAPTER IV.

OF BANKRUPTCY.

PRELIMINARY OBSERVATIONS.

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Bankruptcy of partners and partnerships.

PARTNERS may become bankrupt, either individually or collectively; and in some respects a division of the present branch of the law into two parts, relating, the one to the bankruptcy of an individual partner, and the other to the bankruptcy of a firm, would be as convenient as it would be simple. But the causes and consequences of the bankruptcy of an individual partner, and the causes and consequences of the bankruptcy of a firm of partners, are in so many respects the same, that to consider them twice over would lead to useless repetition. With a view to avoid this, it is proposed in the present chapter to treat of the bankruptcy of partners and partnerships under heads applicable to both, and to point out under each head those differences between the two which are of practical importance.

Present bankruptcy law.

The present law of bankruptcy is based on the Bankruptcy act, 1883 (46 & 47 Vict. c. 52), and the rules and orders of Oct. 1886, promulgated under its authority. The act does not extend to Scotland or Ireland except where expressly provided (*a*). All the older bankruptcy acts are repealed (*b*), and a new system of law has been substituted for them, based on the pre-existing law, and to a great extent preserving its principles and the practice under it (*c*); but at the same time modifying it in many important respects, and rendering it

(*a*) 46 & 47 Vict. c. 52, § 2.
(*b*) Ibid. § 169.
(*c*) Bank. Rules, 1886, r. 353.

necessary in all cases to examine the new enactments before relying on earlier decisions (*d*).

The statute does not apply to incorporated companies (§ 123); but it does to unincorporated companies empowered to sue and be sued by public officers (*e*).

Firms may proceed and be proceeded against in their mercantile names; but this rule does not apply to adjudications of bankruptcy (*f*).

The statute enacts:—

Proceedings in partnership name.

§ 115. Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm, but in such case the Court may, on application by any person interested, order the names of the persons who are partners in such firm or the name of such person to be disclosed in such manner, and verified on oath, or otherwise as the Court may direct (*g*).

And the Bankruptcy Rules 1886, contain the following further provisions on this subject:—

Attestation of firm signature.

259. Where any notice, declaration, petition, or other document requiring attestation is signed by a firm of creditors or debtors in the firm name, the partner signing for the firm shall add also his own signature, *e.g.* "Brown & Co. by James Green, a partner in the said firm."

Service on firm.

260. Any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served, at the principal place of business of the firm in England, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there.

Debtors' petition by firm.

261. Where a firm of debtors file a declaration of inability to pay their debts or bankruptcy petition the same shall contain the names in full of the individual partners, and if such declaration or petition is signed in the firm name the declaration or petition shall be accompanied by an affidavit made by the partner who signs the declaration or petition, showing that all the partners concur in the filing of the same.

Receiving order against firm.

262. A receiving order made against a firm shall operate as if it were a receiving order made against each of the persons who at the date of the order is a partner in that firm.

Statement of affairs.

263. In cases of partnership the debtors shall submit a statement of their partnership affairs, and each debtor shall submit a statement of his separate affairs.

Adjudication against partners.

264. No order of adjudication shall be made against a firm in the firm name, but it shall be made against the partners individually.

(*d*) See *Ex parte Griffith*, 23 Ch. D. 69.

(*e*) See Bank. Rules, 1886, r. 258.

(*f*) See Bank. Rules, 1886, r. 264, *infra*.

(*g*) This section does not apply to

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Power of one partner to act for firm.

The power of one partner to act for the firm extends to proceedings in bankruptcy (*h*).

One partner only need sign a petition by the firm for adjudication of bankruptcy against a debtor to it (*i*). So, one partner may prove a debt owing to the firm, and vote on behalf of the firm at meetings of creditors (*k*); and, notwithstanding the general rule prohibiting one partner from binding the firm by deed, it has been decided that one partner may, by a power of attorney executed by him alone, authorise a third person to represent the firm in the above matters, and to prove and vote on its behalf accordingly (*l*). One partner could under the old law bind the firm by signing the certificate of its bankrupt debtor (*m*).

Disabilities.

On the other hand the Bankruptcy act, 1883, prohibits the partner of a trustee from voting on questions relating to his remuneration (§ 88); nor can the partner of the registrar, official receiver or other officer, do for him what he is prohibited by the act from doing himself (§ 116 (2)); nor can any one vote for any remuneration to his partner any more than to himself (sched. 1, r. 26); nor can an affidavit be sworn before the partner of a solicitor before whom it could not be sworn (Bankruptcy Rules, 1886, r. 56 (2)).

Distinctions between traders and non-traders.

Under the present law all persons capable of contracting debts, whether traders or non-traders, can be adjudicated bankrupt (*n*). The differences formerly existing between these two classes of debtors are no longer important; except that the

firms dissolved before the proceedings are taken, see *Ex parte Young*, 19 Ch. D. 124.

(*h*) 46 & 47 Vict. c. 52, § 148.

(*i*) Bank. Rules, 1886, r. 259, &c., and form 10, note. See *Brickland* v. *Newsome*, 1 Camp. 474, S. C., sub nomine *Buckland* v. *Newsame*, 1 Taunt. 477.

(*k*) *Ex parte Mitchell*, 14 Ves. 597.

(*l*) *Ex parte Mitchell*, 14 Ves. 597, and *Ex parte Hodgkinson*, 19 Ves. 291-298.

(*m*) *Ex parte Hall*, 17 Ves. 62; *Ex parte Fife*, 2 M. & A. 577.

(*n*) 46 & 47 Vict. c. 52, § 4. Persons having privilege of Parliament are not exempt, § 32. As to aliens, see § 6 (1) (*d*), *Ex parte Crispin*, 8 Ch. 374, and as to foreign members of English firms, *Ex parte Blain*, 12 Ch. D. 522. As to married women, § 152, and 45 & 46 Vict. c. 75, § 1, cl. 5; *Ex parte Coulson*, 20 Q. B. D. 249; *Re Grissell*, 12 Ch. D. 484. As to infants, see *Ex parte Jones*, 18 Ch. D. 109. As to lunatics, § 148; Bank. Rules, 1886, r. 271; *Re Lee*, 23 Ch. D. 216; *Re James*, 12 Q. B. D. 332; *Ex parte Cahen*, 10 Ch. D. 183, which, however, was on the Act of 1869.

doctrines of reputed ownership are confined to traders and persons in business (*o*).

Petition for receiving order.

In order that a debtor may be adjudicated bankrupt, he must have committed an act of bankruptcy, and he himself or some creditor must petition for a receiving order against him (*p*).

It is not the object of the present treatise to expound the law of bankruptcy, except so far as it is a branch of the law of partnership; and having made the foregoing general observations, it is proposed to advert only to those matters which relate more particularly to partners; the reader being referred to works on bankruptcy for further information on this subject.

SECTION I.—ADJUDICATIONS OF BANKRUPTCY AGAINST PARTNERS.

1. *As to acts of bankruptcy.*

Acts of bankruptcy.

Nothing is an act of bankruptcy which is not declared to be so by statute (*q*). Moreover an act of bankruptcy is a personal act or default, and is not to be imputed to any one on the ground of agency (*r*). Consequently an act of bankruptcy committed by one partner cannot be regarded as an act of bankruptcy committed by the firm (*s*).

The acts or defaults which are acts of bankruptcy are stated in the Bankruptcy Act, 1883, § 4, which is as follows:—

§ 4.—(1.) A debtor commits an act of bankruptcy in each of the following cases:—

(*a.*) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally:

(*b.*) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof:

(*o*) 46 & 47 Vict. c. 52, § 44 (3). As to persons who have ceased to trade, see *Dawe* v. *Vergara*, 11 Q. B. D. 241, but note this was not a decision on this enactment.

(*p*) 46 & 47 Vict. c. 52, § 5, and forms 4 and 10 to rules of 1886.

(*q*) See 15 Ves. 462, and 17 ib. 198.

(*r*) *Ex parte Blain*, 12 Ch. D. 522, and see *infra*.

(*s*) Ibid.

however, it is only proposed to notice those which relate to fraudulent transfers of property.

A transfer of property is not an act of bankruptcy, unless it is intended to pass the ownership in the thing transferred; a mere removal of property is not an act of bankruptcy (*z*).

Notwithstanding the omission from clause (*b*) of § 4 of the words "with intent to defeat or delay his creditors," the fraud referred to is a fraud upon creditors, and not upon other persons (*a*); and such fraud must be proved as a matter of fact. But it seems to be settled that where a person without any actual fraud conveys all his property to secure a past debt, he commits an act of bankruptcy (*b*). As the necessary consequence of such a conveyance is to defeat or delay creditors, it is said that an intent to defeat or delay them must be inferred; and that such a conveyance must be fraudulent, or must at all events be treated as if it were fraudulent. This reasoning is not altogether satisfactory (*c*). It is, however, probably safe to say that under the present law, as under the previous statutes, a conveyance or assignment by a debtor of all, or substantially all (*d*), his property, either in satisfaction of (*e*), or as a security for (*f*) a debt previously contracted, is an act of bankruptcy, unless made pursuant to an agreement entered into when the debt was contracted (*g*); although the conveyance or assign-

(*z*) *Isitt* v. *Beeston*, L. R. 4 Ex. 159.

(*a*) *Re Wood*, 7 Ch. 302; *Ex parte Cohen*, ib. 20.

(*b*) Ibid.

(*c*) See *Ex parte Mercer*, 17 Q. B. D. 290, where *Freeman* v. *Pope*, 5 Ch. 538, is observed upon.

(*d*) *Re Wood*, 7 Ch. 302; *Ex parte Hawker*, ib. 214; *Ex parte Cohen*, ib. 20; *Ex parte Foxley*, 3 Ch. 515; *Ex parte Bailey*, 3 De G. M. & G. 534; *Ex parte Bland*, 6 ib. 757; *Stanger* v. *Wilkins*, 19 Beav. 626. Compare *Smith* v. *Timms*, 1 H. & C. 849, where it was held that a *bonâ fide* assignment by a trader of all his property, with a small but not a colourable exception, was not an act of bankruptcy. See, also, *Young* v. *Waud*, 8 Ex. 221, where the assignment was upheld, though, if enforced, it would have stopped the assignor's trade.

(*e*) *Sibert* v. *Spooner*, 1 M. & W. 714.

(*f*) *Ex parte Payne*, 11 Ch. D. 539, where there was forbearance; *Re Wood*, 7 Ch. 302; *Ex parte Cohen*, ib. 20; *Ex parte Hawker*, ib. 214; *Lindon* v. *Sharp*, 6 Man. & Gr. 895; *Oriental Banking Co.* v. *Coleman*, 3 Giff. 11; *Turner* v. *Hardcastle*, 11 C. B. N. S. 683.

(*g*) *Ex parte Izard*, 9 Ch. 271. If the agreement is not to take effect

ment is made *bonâ fide* and under pressure from the creditor (*h*); and although the creditor does not know that he is taking all his debtor's property (*i*). A conveyance or assignment of part only of a debtor's property is also an act of bankruptcy if it is void under § 48 as amounting to a fraudulent preference (*k*). That section is as follows:—

Avoidance of preferences in certain cases.

§ 48.—(1.) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy (*l*).

(2.) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.

This section does not avoid as a fraudulent preference a conveyance or transfer of property unless three things concur, viz.:—1. The conveyance, &c., must be made by a person unable to pay his debts as they become due; 2nd. It must be made with a view of giving a creditor a preference over others; 3rdly. It must be made within three months of the bankruptcy petition. As regards the second requisite, a conveyance, &c., made spontaneously by the debtor and without any demand or pressure from the creditor, or even in willing compliance with such a demand, is deemed to be made with a view of giving a

until the debtor gets into difficulties, the agreement will not protect the transaction, see *Ex parte Fisher*, 7 Ch. 636; *Ex parte Burton*, 13 Ch. D. 102; *Ex parte Kilner*, ib. 245; *Ex parte Bolland*, 8 ib. 230.

(*h*) *Re Wood*, 7 Ch. 302; *Jones* v. *Harber*, L. R. 6 Q. B. 77; *Woodhouse* v. *Murray*, L. R. 4 Q. B. 27; *Newton* v. *Chantler*, 7 East, 138; *Smith* v. *Cannan*, 2 E. & B. 35; *Leake* v. *Young*, 5 ib. 955; *Stanger* v. *Wilkins*, 19 Beav. 626.

(*i*) *Smith* v. *Cannan*, 2 E. & B. 35.

(*k*) See § 4 (*c*), which settles the point raised in *Ex parte Halliday*, 8 Ch. 283, and *Ex parte Norton*, 16 Eq. 397.

(*l*) N.B.—The section does not enable other persons to invalidate such transactions, *Willmott* v. *London Celluloid Co.*, 31 Ch. D. 425, and 34 ib. 147; *Ex parte Cooper*, 10 Ch. 510.

preference (*m*), unless the evidence shows that it was made with some other view (*n*). And even if there is pressure a conveyance or payment to a class of creditors, or to a trustee for them, is within the section (*o*).

Sales, &c., for present consideration.

On the other hand, a sale or mortgage by a debtor of all his property for a present advance, made *bonâ fide* to enable him to carry on his business, is not an act of bankruptcy (*p*); although the purchaser may be a creditor and may only pay the difference between the purchase-money and what is owing to him (*q*). So the *bonâ fide* giving security for present or future advances agreed to be made (*r*), or for any other advantage, *e.g.*, an agreement to give time (*s*), is not an act of bankruptcy, although the security may comprise all the borrower's property (*t*), and cover an antecedent debt (*u*). Still less does

(*m*) See on this section *Ex parte Griffith*, 23 Ch. D. 69; *Ex parte Hill*, ib. 695; *Ex parte Pearson*, 8 Ch. 667; *Ex parte Topham*, ib. 614; *Ex parte Bolland*, 7 Ch. 24; *Ex parte Tempest*, 6 Ch. 70, affirming *Ex parte Craven*, 10 Eq. 648, as to the distinction between acts which are voidable on the ground of fraudulent preference, and acts which are avoided by reason of the relation back of the trustee's title. *Marks* v. *Feldman*, L. R. 5 Q. B. 275.

(*n*) See *Ex parte Taylor*, 18 Q. B. D. 295, where the object was to avoid a criminal prosecution. See, also, *Ex parte Mercer*, 17 ib. 290.

(*o*) *Ex parte Saffery*, 4 Ch. D. 555, affirmed 3 App. Ca. 213, *sub nom. Tomkins* v. *Saffery*.

(*p*) *Ex parte Reed* and *Steel*, 14 Eq. 586; *Baxter* v. *Pritchard*, 1 A. & E. 456; *Lee* v. *Hart*, 11 Ex. 880, and 10 Ex. 555. In each of these cases the seller contemplated bankruptcy, but the purchaser acted *bonâ fide*. See, as to mortgages, *Re Colemere*, 1 Ch. 128.

(*q*) *Ex parte Norton*, 16 Eq. 397; *Bell* v. *Simpson*, 2 H. & N. 410; *Pennell* v. *Dawson*, 18 C. B. 355; *Pennell* v. *Reynolds*, 11 ib. N. S. 709. Compare *Graham* v. *Chapman*, 12 C. B. 85, where the advance was itself included in the assignments. This case, however, cannot now be relied upon. See the above cases, and *Lomax* v. *Buxton*, L. R. 6 C. P. 107.

(*r*) *Ex parte Dann*, 17 Ch. D. 26; *Ex parte Wilkinson*, 22 ib. 788.

(*s*) As in *Philps* v. *Hornstedt*, 1 Ex. D. 62, affirming S. C., L. R. 8 Ex. 26. Compare *Ex parte Wood*, 10 Ch. D. 313; *Woodhouse* v. *Murray*, L. R. 4 Q. B. 27.

(*t*) *Hutton* v. *Crutwell*, 1 E. & B. 15; *Bittlestone* v. *Cooke*, 6 E. & B. 296; *Harris* v. *Rickett*, 4 H. & N. 1. But see *Ex parte Sparrow*, 2 De G. M. & G. 907. A *bonâ fide* mortgage of part of a trader's property is clearly not an act of bankruptcy, see *Mather* v. *Fraser*, 2 K. & J. 536.

(*u*) *Ex parte Izard*, 9 Ch. 271; *Ex parte Hodgkin*, 20 Eq. 746; *Allen* v. *Bonnett*, 5 Ch. 577; *Pennell* v. *Reynolds*, 11 C. B. N. S. 709; *Shrubsole* v. *Sussams*, 16 ib. 452. Compare *Ex parte Fisher*, 7 Ch. 636, where the present advance was made to obtain security for a past debt.

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a person commit an act of bankruptcy by *bonâ fide* conveying or assigning part of his property in payment of, or as a security for, a debt in respect of which he is being pressed (*x*); and notwithstanding § 4, cl. 1 (*a*) it is apprehended that a *bonâ fide* assignment of part of his property upon trust for sale and payment of all his debts is not an act of bankruptcy (*y*).

Protected transactions.

In connection with this subject it is important to observe the clause at the end of § 48, protecting persons making title in good faith and for valuable consideration through a creditor of the bankrupt (*z*), and also § 49, which relates to dealings with the bankrupt himself without notice of any act of bankruptcy. This section will be referred to more at length hereafter (*infra*, s. 2). This protecting clause applies to the unsolicited payment of a debt if the creditor accepts payment *bonâ fide* in the ordinary course of business, and in ignorance of any available act of bankruptcy of his debtor (*a*). *A fortiori* the clause applies to a return under pressure of goods not paid for (*b*).

Fraudulent preference by trustees.

Moreover, a debtor who is a trustee and who gives to his *cestui que trust*, or sets apart for him that which in equity is his, does not commit an act of bankruptcy; and although the gift or setting apart may have been made in immediate contemplation of bankruptcy, it cannot be deemed a fraudulent preference (*c*).

Effect of lapse of three months after the conveyance.

In order that a conveyance or assignment may be an act of bankruptcy, it must be made within three months before

(*x*) *Ex parte Craven*, 10 Eq. 648, and under the name *Ex parte Tempest*, 6 Ch. 70; *Ex parte Bolland*, 7 Ch. 24; *Crosby* v. *Crouch*, 11 East, 256; *Young* v. *Waud*, 8 Ex. 221; *Hale* v. *Allnutt*, 18 C. B. 505; *Strachan* v. *Barton*, 11 Ex. 647, where the debt had not been payable. See, too, *Belcher* v. *Prittie*, 10 Bing. 408; *Bannatyne* v. *Leader*, 10 Sim. 350; *Johnson* v. *Fesenmeyer*, 25 Beav. 88, and 3 De G. & J. 13.

(*y*) *Bannatyne* v. *Leader*, 10 Sim. 350; *Berney* v. *Davison*, 1 Brod. & B. 408; *Berney* v. *Vyner*, ib. 482. But an attempt to prefer some creditors to others is clearly void, *Ex parte Saffery*, 4 Ch. D. 555, and 3 App. Ca. 213.

(*z*) *Ante*, p. 628.

(*a*) See under the old law, *Butcher* v. *Stead*, L. R. 7 H. L. 839; *Ex parte Hodgkin*, 20 Eq. 746.

(*b*) *Ex parte Topham*, 8 Ch. 614; *Ex parte Blackburn*, 12 Eq. 358.

(*c*) See *Ex parte Taylor*, 18 Q. B. D. 295; *Ex parte Kelly & Co.*, 11 Ch. D. 306; *Edwards* v. *Glyn*, 2 E. & E. 29; *Sinclair* v. *Wilson*, 20 Beav. 324 *Gardner* v. *Rowe*, 2 Sim. & Stu. 346.

the presentation of the petition (*d*). But although more than three months may have elapsed since an assignment was made, it may be impeached for fraud under the statute of 13 Eliz. c. 5 (*e*); or be invalidated by the relation back of the title of the trustees (*f*).

Conveyances, &c., by partners.

The foregoing doctrines are of considerable importance to partners; for even if an assignment is intended to be executed by all the partners, and it is in fact executed by one of them only, still its execution by that one may be an act of bankruptcy on his part (*g*). Moreover, if all the partners execute the deed, and one of them only becomes bankrupt, the deed is avoided as to all of them (*h*). Again, if partners assign all their property to a person who undertakes to pay their debts, they thereby commit an act of bankruptcy (*i*). So, if partners have resolved to stop payment, and they give cheques to particular creditors with a view to prefer them, that amounts to a fraudulent preference and an act of bankruptcy on the part of the firm (*k*); unless the payments are protected under § 49 already noticed.

Conveyance by one partner in trust for creditors of firm.

But a conveyance by one partner of all his separate property to a trustee, upon trust for sale and payment of the debts of the firm, is not an act of bankruptcy if made *bonâ fide* for the purpose of relieving the firm from its difficulties, and of enabling it to carry on its business, and if it is not made for the purpose of, and has not in fact the effect of, defrauding the separate creditors of the assignor (*l*). And it is apprehended

(*d*) § 6 (*c*).

(*e*) See, as to this, *Ex parte Chaplin*, 26 Ch. D. 319; *Ex parte Games*, 12 Ch. D. 314; *Allen* v. *Bonnett*, 5 Ch. 577; *Marks* v. *Feldman*, L. R. 5 Q. B. 275; *Jones* v. *Harber*, L. R. 6 Q. B. 77; *Hassel* v. *Simpson*, 1 Bro. C. C. 99, better reported in 1 Dougl. 89, note, under the name of *Hassells* v. *Simpson; Pulling* v. *Tucker*, 4 B. & A. 382; *Ex parte Sparrow*, 2 De G. M. & G. 907; *Ex parte Taylor*, 5 ib. 392; *Oswald* v. *Thompson*, 2 Ex. 215; *Ex parte Thomas*, De G. 612; *Ex parte Jackson*, ib. 609.

(*f*) Under § 43 of the act. See *infra*, § 2.

(*g*) See *Bowker* v. *Burdekin*, 11 M. & W. 128.

(*h*) See *Ex parte Addison*, 3 Mon. & A. 434.

(*i*) *Ex parte Zwilchenbart*, 3 M. D. & D. 671. See, too, *Turquand* v. *Vanderplank*, 10 M. & W. 180.

(*k*) *Ex parte Simpson*, De Gex, 9; *Bevan* v. *Nunn*, 9 Bing. 107.

(*l*) *Abbott* v. *Burbage*, 2 Bing. N. C. 444; and see *Berney* v. *Davison*, 1 Brod. & B. 408, and *Berney* v. *Viner*, ib. 482, and the next note.

that a conveyance by a firm of all its joint estate would not be an act of bankruptcy if the separate creditors of the partners were not prejudiced (*m*). But a mortgage of joint estate in favour of separate creditors will be a fraud on the joint creditors, and therefore an act of bankruptcy if the joint estate is insolvent (*n*); and a mortgage by a partner of his separate estate in favour of joint creditors would, it is apprehended, be equally invalid if it prejudiced his separate creditors.

Conveyances from one partner to another.

An ordinary conveyance or assignment by one partner to another is not (with reference to the present subject) distinguishable from any other conveyance or assignment. But as each partner has a lien on the partnership property for what is due from the firm to him as a partner, it has been held that a *bonâ fide* assignment by one partner of all his share and interest in the partnership assets to his co-partner, upon trust, first, to pay the partnership debts, secondly, to retain what is due to himself from the firm, and thirdly, to divide the surplus between the partners, does not constitute an act of bankruptcy on the part of the assignor, although he may have had little other property than that comprised in the assignment (*o*). Such an assignment does not, in fact, do more than enable the assignee to work out the lien which he had previously to, and independently of, the assignment, and is not within the words of § 4, cl. 1 (*a*).

Rules as to joint adjudications.

In order to sustain a joint adjudication against two or more persons, it is necessary that some act of bankruptcy shall have been committed by each of them (*p*). But it is not requisite that they should all have committed an act of bankruptcy of the same kind. Thus, it will be sufficient if one has departed the realm with intent to defraud his creditors, and another has kept his house to avoid them, and a third has lain in gaol for debt, and so on (*q*). But if a joint act of bankruptcy is relied

(*m*) See as to this, § 4, cl. 1 (*a*), and *Ex parte Saffery*, 4 Ch. D. 555.

(*n*) *Ex parte Snowball*, 7 Ch. 534.

(*o*) See *Payne* v. *Hornby*, 25 Beav. 280, where the assignor was a surviving partner, and the assignee the executor of his deceased partner.

(*p*) *Beasley* v. *Beasley*, 1 Atk. 97; *Mills* v. *Bennett*, 2 M. & S. 556; *Allen* v. *Hartley*, 4 Doug. 20; *Dutton* v. *Morrison*, 17 Ves. 193; *Hogg* v. *Bridges*, 8 Taunt. 200.

(*q*) Watson on Part. 248.

upon, all the partners must be proved to have concurred in it (*r*).

Act of bankruptcy committed by one partner only.

An act of bankruptcy committed by one partner will not amount to an act of bankruptcy on the part of his co-partners, unless it can be shown to have been, in point of fact, their act as well as his. The case of *Mills* v. *Bennett* (*s*) is a strong instance of this; there one of three bankers resided at the bank, and alone conducted the business of the firm, his co-partners residing at a distance. The resident and acting partner absented himself from the bank, shut it up, and stopped payment, and it was held that this was not sufficient to support a joint adjudication against the three partners.

Mills v. Bennett.

Time of commission of the act of bankruptcy.

In order to support a joint adjudication against all the members of a firm, each must have committed an act of bankruptcy during the continuance of a joint debt (*t*).

Dormant partners.

A dormant partner may be either included in an adjudication against the firm (*u*), or be adjudged bankrupt on a petition against him separately (*x*). The same, it is apprehended, is true of nominal partners (*y*).

2. *The petitioning creditor's debt.*

Who may petition.

The petitioning creditor may be an ordinary individual, or a company empowered to sue and be sued by a public officer (*z*), or a corporation (*a*), *e.g.*, a registered company (*b*).

An unincorporated company may petition against one of its shareholders (*c*). So the trustee of a friendly society may

(*r*) See the cases in the next note.

(*s*) 2 M. & S. 556. See, too, *Ex parte Blain*, 12 Ch. D. 522; *Ex parte Mavor*, 19 Ves. 543; *Ex parte Addison*, 3 De G. & S. 580.

(*t*) See *Ex parte Bamford*, 15 Ves. 449; *Ex parte Dewdney*, ib. 495.

(*u*) As in *Ex parte Lodge* and *Fendal*, 1 Ves. J. 166.

(*x*) As in *Ex parte Hamper*, 17 Ves. 403.

(*y*) *Ex parte Marton*, 1 M. D. & D. 252, is an example of an adjudication against a firm of two, one of whom was only liable to third persons, in consequence of his having held himself out as a partner.

(*z*) Bank. Rules, 1886, rule 258. As to the old law, see *Guthrie* v. *Fisk*, 3 B. & C. 178. As to the mode of describing him, see *Ex parte Torkington*, 9 Ch. 298.

(*a*) 46 & 47 Vict. c. 52, § 168, "Person." *Ex parte Collins*, De Gex, 381; *Ex parte Sneyds*, 1 Moll. 261.

(*b*) *Re Culthrop*, 3 Ch. 252.

(*c*) See *Ex parte Hall*, Mon. & Ch. 365.

petition against a member, in respect of a debt owing by the member to the society (*d*).

If a single individual petitions, the debt in respect of which he petitions must be owing to him solely, and not to him and others jointly (*e*). When, however, a firm petitions, the petition need only be signed by one of the partners (*f*). If one member of a firm is bankrupt his trustee should be a co-petitioner with the solvent partners (*g*).

Amount of petitioning creditor's debt.

The amount of the debt due to the petitioning creditor or creditors must be 50*l.* at least (*h*); and if the debt is secured, the security must be given up, or its value must be estimated and deducted, and the petitioner must give it up, if required, at its estimated value (*i*). A debt, however, of 50*l.* bought up for less than that sum is sufficient in amount (*k*).

Nature of debt.

By the Bankruptcy Act, 1883, § 6, cl. 1 (*b*), the petitioning creditor's debt must be a liquidated sum payable either immediately or at some certain future time.

A debt proved under a former bankruptcy will support a second adjudication, the object of which is to impeach transactions not impeachable under the first (*l*).

Circumstances which preclude a creditor from petitioning.

Even where a person is a creditor to a sufficient amount, where his debt has accrued at the proper time, and where the debtor has committed an act of bankruptcy, there may be circumstances which preclude the creditor from obtaining adjudication against his debtor. For example, the creditor may be an alien enemy, as where, though a British subject, he is residing and trading in an enemy's country without license (*m*); or, the creditor may rely on an act of bankruptcy, to which he has himself been privy, as where the debtor has assigned all his property in trust for his creditors, and the petitioner is a creditor who is bound by such as-

(*d*) *Hope* v. *Mack*, 10 Ex. 829.

(*e*) *Buckland* v. *Nursame*, 1 Taunt. 477.

(*f*) 46 & 47 Vict. c. 52, § 115, and form 10 in Sched. to the Bank. Rules, 1886, and as to the affidavit in support, see rules 149 to 151, and form 12.

(*g*) *Ex parte Owen*, 13 Q. B. D. 113.

(*h*) 46 & 47 Vict. c. 52, § 6 (1, *a*).

(*i*) Ib. § 6 (2).

(*k*) *Doe* v. *Ingelby*, 14 M. & W. 91.

(*l*) *Ex parte Wieland*, 5 Ch. 486.

(*m*) *McConnell* v. *Hector*, 3 Bos. & P. 113.

signment (*n*); in such cases as these, an adjudication at his instance cannot be supported.

Petition by one partner against another.

A partner who is a creditor of his co-partner, may petition for, and obtain a receiving order against his co-partner (*o*). This is clear, from many cases, of which *Ex parte Notley* (*p*) may be taken as a type. There the petitioning creditor had lent the bankrupt a sum of money upon the terms of receiving interest at 5*l.* per cent., and a share in the net profits of the bankrupt's business, so long as the principal remained unpaid; repayment of the principal and interest was secured by a bond and a judgment. The principal so lent, together with some arrears of interest thereon, constituted the petitioning creditor's debt, and it was held sufficient; for although the borrower and the lender were liable to strangers as if they were partners, the debt in question had nothing to do with the partnership accounts, and might have been recovered by action at law. Again, in *Ex parte Richardson* (*q*), two brothers, *Henry* and *William*, had been partners, and had dissolved partnership. On the dissolution, the accounts were taken, and the firm was found debtor to *William* in 1000*l.* and upwards. *Henry* continued the business, without paying off what was due to his brother, and borrowed from him from time to time other monies, which were placed to *William's* credit in his account with the late firm. *William* petitioned for an adjudication against *Henry*, and was held to have a sufficient debt (*r*).

Ex parte Notley.

Ex parte Richardson.

But, in order that a debt may be sufficient to support a petition for a receiving order, the debt must be one to which there is no equitable defence. This was so under the previous statutes, as is shown by *Ex parte Gray* (*s*), where the petitioner was not the creditor partner himself, but his trustee. *Hodges*

Ex parte Gray.

(*n*) *Ex parte Payne*, De Gex, 534.

(*o*) See, in addition to the cases noticed in the text, *Windham* v. *Paterson*, 2 Rose, 466; *Ex parte Nokes*, and *Ex parte Maberley*, 1 Mont. on Part., note N., p. 62.

(*p*) 1 Mon. & Ayr. 46.

(*q*) 3 D. & Ch. 244.

(*r*) In this case there was a sufficient debt irrespectively of the balance found due to *William* on the dissolution, but the brothers treated the loans made subsequently as if made to the late firm.

(*s*) 2 Mon. & A. 233. See, also, *Ex parte Page*, 1 Gl. & Jam. 100; *Hope* v. *Meek*, 10 Ex. 842.

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and *Gray* were partners. *Hodges* had brought in 1000*l.* as his share of the partnership capital, and had lent *Gray* 1000*l.*, which he brought in as his share. *Gray* had covenanted with *Hodges* to repay him this sum with interest; and, as a further security, *Gray* had executed a mortgage to a trustee for *Hodges*, and had covenanted with the trustee to pay him the same sum, with interest. *Hodges* had filed a bill for a dissolution of partnership, and for an account. His trustee then petitioned for, and obtained an adjudication of bankruptcy against *Gray*; but the adjudication was annulled, on the ground that *Hodges*, having filed a bill for an account, would not have been allowed to sue for the 1000*l.* at law, and that his trustee was in no better position than himself.

Improper petitions by one partner against his co-partner.

In connection with this subject, it may be observed that under the older statutes, although one partner might have obtained an adjudication of bankruptcy against his co-partner, still, if it appeared that the real object of the petitioner was to dissolve the partnership, and that an adjudication of bankruptcy was not required for any other purpose, the adjudication would be annulled (*t*). So it would if it had been obtained on the petition of a creditor acting at the instigation of one of the partners; and whether the adjudication was against the whole firm, or one only of its members, was immaterial (*u*). It is apprehended that under the Bankruptcy Act, 1883, the Court will also dismiss a petition or annul a receiving order on similar grounds (*x*).

(*t*) *Ex parte Christie*, Mont. & Bl. 314; *Ex parte Browne*, 1 Rose, 151; *Ex parte Johnson*, 2 M. D. & D. 678; *Ex parte Phipps*, 3 ib. 505. But see *Ex parte Upfill*, 1 Ch. 439.

(*u*) See, in addition to the cases just cited, *Ex parte Hall*, 3 Deac. 405; *Ex parte Bourne*, 2 Gl. & J. 137; *Ex parte Harcourt*, 2 Rose, 214, 215; *Ex parte Gallimore*, ib. 434. In *Ex parte Nash*, 12 Jur. 494, *Ex parte Parkes*, 3 Deac. 31, and *Ex parte Wilbran*, alias *Wilbeam*, 5 Madd. 1, and Buck, 459, the Court refused to supersede the commission, not being satisfied that it had been obtained with an improper object. See, also, *Ex parte Upfill*, 1 Ch. 439.

(*x*) See *Ex parte Griffin*, 12 Ch. D. 480; *Ex parte Harper*, 20 ib. 685. As to annulling on equitable grounds, see *Ex parte Claxton*, 7 Ch. 532; and as to injunctions to restrain proceedings in bankruptcy, see *Attwood* v. *Banks*, 2 Beav. 192; *Perry* v. *Walker*, 1 Y. & C. C. 672; *Pim* v. *Wilson*, 2 Ph. 653.

3. *Of joint and separate adjudications.*

Joint debt will support a separate adjudication.

A debt owing by one partner only will not support a joint adjudication against him and his co-partners (*y*); but, a debt owing by all the partners of a firm is sufficient to support an adjudication against any one or more of them (*z*); and probably, a debt owing by several persons jointly will support an adjudication against any one or more of them, although they may not be all the members of a firm, or indeed partners at all (*a*).

Where a receiving order is made against a firm, the joint and separate creditors are collectively convened to the first meeting of creditors (*b*). The trustee appointed by the joint creditors is the trustee of the separate estates (*c*). If two or more members of a firm constitute a separate and independent firm, the creditors of such firm are deemed to be a separate set of creditors, and are on the same footing as the separate creditors of any individual member of the firm (*d*).

Partners who may be adjudicated bankrupt.

Partners who are dormant or who are nominal merely, may be adjudicated bankrupt (*e*). But there seems to be a difficulty in supporting a joint adjudication against several partners, one of whom is dormant and is only entitled to a share of the profits; for in such a case there is no joint property to administer (*f*). Where all the partners save one are dead, the survivor can be made bankrupt; and although all the joint property may in one sense be vested in him by survivorship, a petition filed against him alone before his co-partners died, will not be superseded in favour of a petition filed against him alone since their death (*g*).

(*y*) See *Ex parte Clarke*, 1 D. & C. 544.

(*z*) 46 & 47 Vict. c. 52, § 110. See, as to members of companies empowered to sue and be sued by public officers, *Davison* v. *Farmer*, 6 Ex. 242, overruling *Ex parte Wood*, 1 M. D. & D. 92.

(*a*) See *Ex parte Chambers*, 2 M. & A. 440.

(*b*) Bank. Rules, 1886, r. 265.

(*c*) Ib. r. 268.

(*d*) Ib. r. 269.

(*e*) See *Ex parte Matthews*, 3 V. & B. 125; *Ex parte Hamper*, 17 Ves. 403. Dormant partners *may* be omitted, see *Ex parte Benfield*, 5 Ves. 424.

(*f*) See *Ex parte Hamper*, 17 Ves. 403.

(*g*) *Ex parte Smith*, 5 Ves. 295.

Effect of death of a partner.

Where a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings are continued as if he were alive, unless the Court otherwise orders (*h*); and if, after the filing of a petition against several persons, one of them dies, an adjudication may be made against the survivors; or if an adjudication has already been made against them and the deceased, it will be amended (*i*).

Cases of two firms with common partners.

Where there are two distinct firms, a major and a minor firm, a creditor of the latter only may obtain a joint adjudication against all the persons who compose it; although their co-partners in the major firm cannot be included in the same adjudication (*j*). If, however, the major firm is adjudicated bankrupt, this involves the bankruptcy of the minor firm; and its creditors can, therefore, obtain payment of their debts under the adjudication against the major firm, although they could not have procured such adjudication (*k*).

Concurrent adjudications.

Formerly it was the practice for the creditor of a firm of several partners to take out separate commissions against each partner, as well as a joint commission against the whole firm; the object being to distribute the assets of the firm under the joint commission, and the separate assets of each partner under the separate commission issued against him (*l*). The modern practice, however, is different; for now, under a joint adjudication against a firm, not only are the assets of the firm distributed amongst its joint creditors, but the separate assets of each partner are also distributed amongst his own separate creditors (*m*). Under a joint adjudication, therefore, everything can be done as fully and effectually as under separate adjudications against all the members; and more can be done

(*h*) 46 & 47 Vict. c. 52, § 108. This does not apply to debtors who die before they are served, *Ex parte Hill and Hymans*, 19 Q. B. D. 538.

(*i*) See *Ex parte Hall*, De Gex, 332.

(*j*) *Ex parte Chambers*, 2 Mont. & A. 440, and *Bernasconi* v. *Fairbrother*, ib. 441; see ib. 472.

(*k*) *Ex parte Worthington*, 3 Madd. 26. See Bank. Rules, 1886, r. 269.

(*l*) See Cooke's Bank. Law, 13 and 14, 8th ed. *Qu.*, how this could be done consistently with the doctrine that a person once made bankrupt cannot, until he has obtained his certificate, be made bankrupt again? See, on this subject, 1 Mont. Part. notes K. & 2 B. pp. 44 and 100, of the appendix.

(*m*) The bankruptcy of a firm is in fact the bankruptcy of the individuals composing it; see *Graham* v. *Mulcaster*, 4 Bing. 115; *Stonehouse* v. *De Silva*, 3 Camp. 399.

than under separate adjudications against some only of them. For these, amongst other reasons, a joint creditor seldom or never now thinks of petitioning for separate adjudications against all the partners. If he is desirous of making them all bankrupt, he petitions for a joint adjudication against the firm (*n*).

Several adjudications against same person.

It used to be considered that a person who had been once made bankrupt was incapable of being made bankrupt again unless he had obtained a certificate; and that a second adjudication against him was utterly void (*o*). But the correctness of this view has been since denied; and it has been decided that the trustees under a second adjudication against an uncertificated bankrupt are entitled to recover property acquired by him since the first adjudication (*p*). It is, however, obvious that inasmuch as all the property of a bankrupt, until he has obtained his order of discharge, may be acquired by his trustee for the benefit of his creditors, a second adjudication against him is generally of little, if any, use if the trustee in the first bankruptcy interferes (*q*). But this observation does not apply to the case of a partner; for in general it is much more expeditious, cheap, and otherwise advantageous to wind up the affairs of partners under a joint adjudication against the firm, than under one or more separate adjudications against the members thereof individually. Consequently joint are regarded

Joint adjudication after a separate one.

(*n*) In *Ex parte Gardner*, 1 V. & B. 77, a creditor of a firm obtained separate adjudications against all the partners, but Lord Eldon evidently disapproved of that course. But see *Ex parte Duncan*, 1 Mon. D. & D. 149, and *Ex parte Burdikin*, 2 ib. 187.

(*o*) *Ex parte Crew*, 16 Ves. 237; *Nelson* v. *Cherrell*, 7 Bing. 663; *Phillips* v. *Hopwood*, 1 B. & Ad. 619; *Martin* v. *O'Hara*, Cowp. 823; *Ex parte Proudfoot*, 1 Atk. 251; *Ex parte Brown, and Ex parte Munton*, 1 V. & B. 60; *Till* v. *Wilson*, 7 B. & C. 690; *Fowler* v. *Coster*, 10 ib. 427; and see *Ex parte Chambers*, 3 M. & A. 294, and a note to *Ex parte Welsh*, Mont. 280, where all the cases on the subject will be found collected. See, too, 1 Mont. Part. note K. p. 44, and 2 B. p. 100. If there are two commissions, and the first has never been acted on, the second is valid; see *Warner* v. *Barber*, 8 Taunt. 176.

(*p*) *Ex parte Watson*, 12 Ch. D. 380; *Morgan* v. *Knight*, 15 C. B. N. S. 669. See, also, *Ex parte Dewhurst*, 7 Ch. 185.

(*q*) As to the relative rights of the first and second sets of trustees, see *Ex parte Ford*, 1 Ch. D. 521; *Ex parte Caughey*, 4 Ch. D. 533; *Ex parte Watson*, 12 ib. 380.

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Annulling adjudication.

with more favour than separate adjudications; and if a separate adjudication has been obtained against a partner, and a joint adjudication is afterwards obtained against the firm to which he belongs, the Courts will give effect to the latter adjudication, and annul the former, unless injustice will result from so doing. This course was first adopted by Lord Thurlow in *Ex parte Hardcastle* (*r*), and the advantages of a more extensive adjudication over a less extensive one were so great, that it became quite a matter of course to annul separate adjudications against individual partners where a valid joint adjudication against the firm had been also obtained (*s*). But if the joint adjudication was invalid, *e.g.*, owing to the insufficiency of the petitioning creditor's debt, or of the evidence showing acts of bankruptcy by all the persons included in it, or if there was no joint estate worth mentioning, a prior separate adjudication would not be annulled (*t*). Moreover, although as a rule, a separate adjudication would be annulled in order that a subsequent joint adjudication might be proceeded with, this was only because, as a rule, it was most to the advantage of creditors that this course should be taken. The Courts would, in their discretion, support whichever of several adjudications allowed most complete justice to be done, and annul all the others (*u*); and instances are not wanting in which joint adjudications have been annulled, and separate adjudications allowed to proceed (*x*). In *Re O'Reardon* one of two partners was adjudicated bankrupt in England and the other was adjudicated bankrupt in Ireland; both were then jointly adjudicated bank-

Re O'Reardon.

(*r*) 1 Cox, 397.

(*s*) *Ex parte Pemberton*, 1 M. D. & D. 190. The cases in which joint commissions have been upheld, and separate ones superseded, are very numerous. The following are those most usually referred to:—*Ex parte Brown*, 1 V. & B. 60; *Ex parte Rawson*, 1 V. & B. 160; S. C., *Ex parte Masson*, 1 Rose, 159; *Ex parte Smith*, 1 Gl. & J. 256; *Ex parte Patchelor*, 2 Rose, 26; *Ex parte Burdikin*, 2 M. D. & D. 187; *Ex parte Digby*, 1 Deac. 347. As to consolidating the proceedings under petitions for joint and separate adjudications respectively, see *Ex parte Mackenzie*, 20 Eq. 758.

(*t*) *Ex parte Roberts*, 1 Madd. 72; *Re Beale*, 2 Dru. & War. 566; *Ex parte Rennick*, 12 Jur. 996.

(*u*) *Ex parte Crew*, 16 Ves. 237; *Ex parte Rawson*, 1 V. & B. 163; *Ex parte Cridland*, 2 Rose, 164.

(*x*) *Ex parte Rowlandson*, 1 Rose, 89; and see *Ex parte Cutten*, Buck, 68; *Ex parte Hamper*, 17 Ves. 403. See, too, the last note but one.

rupt in Ireland: most of the joint creditors, and a considerable part of the joint estate were in England. The Court in England declined to order the joint assets to be remitted to Ireland for distribution there (*y*).

Bankrupt firms with common partners.

Again, where two firms having a common partner were both adjudged bankrupt, in which case the common partner was adjudged bankrupt twice over, the latest of the adjudications was superseded as to him (*z*). It was at one time doubted whether this could be done (*a*); but that doubt was long ago removed, and there is a case in which an unwilling purchaser was compelled to take an estate, the title to which depended on this very point (*aa*).

Supporting one adjudication by proceedings in another.

Where a separate adjudication had been made, and a joint adjudication was afterwards petitioned for, but there was no sufficient evidence to support it without having recourse to what had been proved in the matter of the separate adjudication, use was made of what had been so proved, and the evidence given in support of the separate adjudication was ordered to be produced in order that a joint adjudication might be made (*b*). When a separate adjudication against one partner was annulled in favour of a joint adjudication against him and his co-partners, it was usually expressly declared in the annulling order (*c*) that all sales under the first bankruptcy should be confirmed and carried into execution by the assignees under the second; that the proofs of debts under the first should be considered as if they had been made under the second (*d*); that all creditors should be admitted to prove under the second bankruptcy; that distinct accounts of the joint and separate estates should be kept; that the assignees in the first bankruptcy should account to those in the second for assets possessed under the first, and should allow actions to

(*y*) *Re O'Reardon*, 9 Ch. 74.

(*z*) *Ex parte Coleman*, Mon. & McAr. 15; *Ex parte Bygrave*, 2 Gl. & Jam. 391.

(*a*) *Ex parte Burlton*, 2 Gl. & Jam. 344.

(*aa*) *Burlton* v. *Wall*, Tam. 113.

(*b*) *Ex parte Sharp*, 2 Mon. D. & D. 350; *Ex parte Harrison*, 2 Gl. & J. 135. *Ex parte Burdekin*, 1 Deac. 57, is, however, opposed to these.

(*c*) See the precedents in *Ex parte Mason or Rawson*, 1 Rose, 428; *Re Colbeck*, Buck, 54; *Ex parte Digby*, 1 Deac. 347; *Ex parte Ravenscroft*, 4 ib. 172.

(*d*) See *Ex parte Bateson*, 1 M. D. & D. 500.

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be brought in their names by the assignees under the second bankruptcy.

Costs of annulling.

The costs of annulling a separate, in order to give effect to a joint, adjudication, were usually borne by the joint estate (*e*).

Annulling after certificate.

The fact that the bankrupt had obtained his order of discharge under an adjudication did not prevent such adjudication from being annulled (*f*).

Staying proceedings instead of annulling.

Where, in consequence of what had been done under an adjudication, it was inexpedient to annul it, the practice was not to annul, but to impound it, and to stay all further proceedings under it (*g*).

Legality of annulling one adjudication to give effect to another.

The power to annul a prior adjudication, and to give effect to a subsequent one, was not so clearly established at law as it was in bankruptcy and in equity (*h*). Hence, an injunction to restrain the production at law of evidence to show the existence of the annulled bankruptcy, would, if necessary, be granted (*i*). However, in one case where an action was brought by assignees, and a verdict was obtained by them, but a petition for superseding their commission was pending, the Court of King's Bench, on the application of the defendant, stayed execution, and ordered that the amount recovered should be paid into Court (*k*).

Modern practice.

It has been considered desirable thus to refer to the former practice, because, although the Bankruptcy act, 1883, does not contain any express provision for annulling or superseding

(*e*) *Ex parte Duncan*, 1 M. D. & D. 149; *Ex parte Burdikin*, ib. 156; *Ex parte Sharp*, 2 ib. 531; *Ex parte Peat*, ib. 788. See, too, *Ex parte Morris*, 10 Jur. 1018, where an invalid adjudication against three persons was annulled to give effect to a subsequent adjudication against two of them.

(*f*) *Ex parte Cutten*, Buck, 68; *Ex parte Rowlandson*, 1 Rose, 89; *Ex parte Gillam*, 2 Cox, 193; *Ex parte Poole*, ib. 227.

(*g*) See *Ex parte Tobin*, 1 V. & B. 308; *Ex parte Rowlandson*, 1 Rose, 416; *Re Colbeck*, Buck, 54; *Ex parte Digby*, 1 Deac. 347; *Ex parte Ravenscroft*, 4 Deac. 172; *Ex parte Lister*, 3 ib. 516.

(*h*) *Butt* v. *Bilke*, 4 Price, 241; and 2 Rose, 171 note, and see Lord Eldon's observations in *Ex parte Lees*, 16 Ves. 472, and in *Ex parte Cridland*, 2 Rose, 167; and see 1 Mont. Part. 51 and 52, notes.

(*i*) *Ex parte Thompson*, 1 Rose, 285. The fact that an adjudication has been annulled, can now, it is apprehended, be set up as a defence without difficulty.

(*k*) *Hodgkinson* v. *Travers*, 1 B. & C. 257.

a separate in favour of a joint adjudication, circumstances may arise which render such a proceeding desirable; and as the old practice is preserved, the previously established rules on this subject will probably not be disregarded (*l*).

Grounds for annulling an adjudication.

Under the Bankruptcy act, 1883, an adjudication may be annulled if the Court is of opinion that the debtor ought not to have been adjudged bankrupt, or if his debts have been paid in full (*m*); but no other gound for annulling an adjudication is expressly mentioned. But the general power to stay and consolidate proceedings is probably sufficient for most if not all practical purposes (*n*).

The consequences of annulling an adjudication are stated in § 35 (2) to be as follows:—

Consequences of annulling of adjudication;

§ 35.—(2.) Where an adjudication is annulled under this section all sales and dispositions of property and payments duly made, and all acts theretofore done, by the official receiver, trustee, or other person acting under their authority, or by the Court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the Court may appoint, or in default of any such appointment revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the Court may declare by order (*o*).

By the Bankruptcy act, 1883, § 106, it is enacted that

Consolidation of proceedings.

Where two or more bankruptcy petitions are presented against the same debtor or against joint debtors, the Court may consolidate the proceedings, or any of them, on such terms as the Court thinks fit.

It is therefore to be inferred that, under the present as under the old law, if separate adjudications are obtained

(*l*) See Bank. Rules, 1886, r. 353; *Ex parte Claxton*, 7 Ch. 532, and *infra*, p. 666.

(*m*) 46 & 47 Vict. c. 52, § 35.

(*n*) See §§ 106, 109; and as to annulling an adjudication obtained *mald fide* to dissolve a partnership, see *ante*, p. 636.

(*o*) See, on the corresponding section of the Act of 1869, *West* v. *Baker*, 1 Ex. D. 44; *Bailey* v. *Johnson*, L. R. 7 Ex. 263, and 6 ib. 269. Under the old law the effect of annulling an adjudication depended upon the cause for which it was annulled. If annulled upon the ground that it ought never to have been made, then, speaking generally, everything done under it was invalid; but if annulled upon some other ground, then the annulment had no retrospective effect. See *Smallcombe* v. *Olivier*, 13 M. & W. 77; and Buck, 260, in the note. Compare *Ex parte Milner*, 19 Ves. 204; *Gould* v. *Shoyer*, 6 Bing. 738.

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against all the members of a firm, the separate adjudications may be consolidated and prosecuted as if there were a joint adjudication (*p*); and if there is also a joint adjudication, an order may be obtained consolidating them all, and staying further proceedings under the separate adjudications (*q*). So, if two firms are separately adjudged bankrupt, the two adjudications will be consolidated and prosecuted as one, if so to do will be for the benefit of the creditors of both firms (*r*).

By the Bankruptcy act, 1883, it is also enacted by § 112 that

Property of partners to be vested in same trustee.

§ 112. Where a receiving order has been made on a bankruptcy petition against or by one member of a partnership, any other bankruptcy petition against or by a member of the same partnership shall be filed in or transferred to the Court in which the first-mentioned petition is in course of prosecution, and, unless the Court otherwise directs, the same trustee or receiver shall be appointed as may have been appointed in respect of the property of the first-mentioned member of the partnership, and the Court may give such directions for consolidating the proceedings under the petitions as it thinks just.

Under this section it would probably be held, as it was under the older law, that if there is a separate adjudication against one partner, and a joint adjudication against his copartners, either with him or without him, the joint adjudication will be ordered to be prosecuted with the separate adjudication (*s*).

4. *Choice of trustee.*

Separate creditors cannot vote in the choice of a trustee under a joint adjudication (*t*); but joint creditors are entitled

(*p*) *Re Gowar*, 1 M. D. & D. 1.

(*q*) *Ex parte Lister*, Mon. & Ch. 260; *Ex parte Mackenzie*, 20 Eq. 758.

(*r*) See in *Harris* v. *Farwell*, 13 Beav. 403; *Ex parte Grylls*, 12 Jur. 171, a firm trading in one district was adjudicated bankrupt in another where one of the partners resided. The proceedings were removed from the latter to the former district.

(*s*) See *Ex parte Mackenzie*, 20 Eq. 758; *Ex parte Green*, 3 De G. & J. 50; *Ex parte Haines*, ib. 58; *Re Simmons*, 2 M. D. & D. 603. See, also, the last note.

(*t*) *Ex parte Parr*, 18 Ves. 65; *Ex parte Jepson*, 19 Ves. 224; *Ex parte Hamer*, 1 Rose, 321. These cases were all decided long before the passing of the present Bankrupt act, but they are generally understood to be in accordance with the present state of the law.

to vote in the choice of a trustee under a separate adjudication (*u*).

Effect of annulling adjudication.

If a separate is annulled in favour of a joint adjudication, the separate creditors lose their right to vote in the choice of a trustee; but this has been decided not to be a sufficient reason for preserving the first adjudication (*x*).

Upon a joint adjudication against a firm the trustee appointed by the joint creditors is the trustee of the separate estates. But each set of separate creditors may appoint its own committee of inspection; in default of such appointment the committee (if any) appointed by the joint creditors is deemed to be appointed by the separate creditors also. See Bank. Rules, 1886, r. 268.

Appointment of inspectors to protect the separate creditors.

Under the old practice, where there was a joint adjudication, and assignees had been chosen by the joint creditors (*y*), and the separate creditors of one of the bankrupts could show that their interests required it, they were allowed to appoint an inspector of the separate estate of the bankrupt in question; and the inspector appointed was empowered to collect, and get in, such separate estate, and to use the names of the assignees for that purpose, indemnifying them against the costs of proceedings taken in their names; he was also directed to pay what he received into such bank as the separate creditors might select; and was authorised to inspect, and take copies of, all books and documents in the possession of the assignees, and relating to the separate estate (*z*). The costs of obtaining an

(*u*) 46 & 47 Vict. c. 52, Sched. 1, § 13. A firm may vote by any of its members, 46 & 47 Vict. c. 52, § 148. A corporation votes by an officer appointed under its common seal, ib. Companies empowered to sue by public officers vote by them or by attorneys appointed by them, see Bank. Rules, 1886, r. 245, and forms, and r. 258; *Ex parte Ackroyd*, 1 M. D. & D. 555; and the appointment of the attorney need not be under seal, *Naylor* v. *Mortimore*, 17 C. B. N. S. 207.

(*x*) See *Ex parte Pachelor*, 2 Rose, 26.

(*y*) *Re Daintry*, 2 M. D. & D. 257, shows that leave to appoint an inspector would not be granted before the assignees were chosen; and *Ex parte Holford*, ib. 485, shows that liberty to appoint an inspector would not be refused simply because there was no imputation against the assignees.

(*z*) See *Ex parte Wright*, 2 M. D. & D. 434; *Ex parte Wilson*, 1 ib. 310; *Ex parte Dawson*, 3 D. & C. 12; *Ex parte Batson*, 1 Gl. & J. 269; *Ex parte Miles*, 2 Rose, 68; *Ex parte Basarro*, 1 ib. 266.

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order for liberty to choose an inspector, and also the costs, charges, and expenses, properly incurred by him in the execution of his duties, were borne by the estate to protect which he was appointed (*a*). A similar course was pursued where there was no joint adjudication, but where the joint creditors had appointed the assignees, and the interests of the separate creditors required protection (*b*).

The present rule 268 will, however, probably render it unnecessary to have recourse to this practice except under very special circumstances.

SECTION II.—THE PROPERTY WHICH VESTS IN THE TRUSTEE, AND THE CONSEQUENCES OF SUCH VESTING.

1. *Generally.*

Property vesting in trustee.

Speaking generally, it may be said, that when a person is adjudicated bankrupt, all property, both real and personal, to which he is then beneficially entitled, or to which he becomes beneficially entitled before he obtains his order of discharge, vests in his trustee, for the benefit of his creditors (*c*).

Property vesting in the trustee of a bankrupt firm.

When a firm of partners is adjudicated bankrupt, or when a joint adjudication is made against two or more partners, all the joint property of the bankrupts, as well as all the separate property of each of them, vests in the trustee (*d*). Moreover, their joint property vests in the trustee, as joint property, and without reference to the equality or inequality of the bankrupts' shares therein (*e*).

Before the Judicature acts, when each of the members of a firm was separately adjudged bankrupt, the trustees of them all, could not recover, in one action, debts due to the firm, and

(*a*) *Ex parte Holford*, 2 M. D. & D. 485, and see the cases in the last note.

(*b*) *Ex parte Melbourne*, 6 Ch. 835.

(*c*) 46 & 47 Vict. c. 52, §§ 20 (1), 44, 54.

(*d*) Bank. Rules, 1886, r. 268; *Ex parte Cook*, 2 P. W. 500; *Hague* v. *Rolleston*, 4 Burr. 2176; *Bolton* v. *Puller*, 1 Bos. & P. 539; *Graham* v. *Muleaster*, 4 Bing. 115. So under the Indian Insolvency act, 11 & 12 Vict. c. 21, *Brown* v. *Carbery*, 16 C. B. N. S. 2.

(*e*) *Ex parte Hunter*, 2 Rose, 382.

also debts due to the partners separately. The trustee of each partner must have sued alone for the recovery of debts due to him only (*f*). But probably it would be held otherwise now if expedient (*g*).

Property vesting in trustee of bankrupt partner.

When one of several partners is adjudicated bankrupt his trustee becomes entitled to all his separate property, and to all his interest in the joint property (*h*); but subject to the qualification alluded to below (p. 653), the trustee can claim no more than the bankrupt himself would have been entitled to, had he not become bankrupt; and every lien available for his copartners against him is equally available for them against his trustee (*i*). Consequently the trustee can claim nothing as the bankrupt's share until all the joint creditors have been paid (*k*), and the partnership accounts have been duly taken and adjusted (*l*). On the other hand, the solvent partners have no right to insist on taking the partnership assets to themselves, and to pay the trustee the estimated value of the bankrupt's share; for the right of the trustee against them, as well as their right against the trustee, is to have an account, and a sale and distribution (*m*). In one case it was even decided, that a stipulation in the articles of partnership to the effect that, on the bankruptcy of one of the partners, his share should be taken by the others at a valuation, was not binding on the assignees (*n*); but the circumstances of the case were somewhat peculiar; and there seems no reason why such a stipulation should necessarily be ineffectual.

(*f*) See *Hancock* v. *Haywood*, 3 T. R. 433; and as to the declaration in an action by several sets of assignees for the recovery of a joint debt, see *Ray* v. *Davies*, 8 Taunt. 134.

(*g*) See Jud. Rules, 1883, Ord. xvi. rr. 1, 4, 6; and Ord. xviii. rr. 1, 3, 6.

(*h*) The trustee can, with the leave of the Court, sue for a joint debt in the names of the trustee and of the bankrupt's partner, 46 & 47 Vict. c. 52, § 113.

(*i*) See *Anon.*, 3 Salk. 61, and 12 Mod. 446; *Fox* v. *Hanbury*, Cowp. 445; *West* v. *Skip*, 1 Ves. S. 239; *Bolton* v. *Puller*, 1 Bos. & P. 548; 1 Mont. Part., note P., p. 66.

(*k*) *Taylor* v. *Fields*, 4 Ves. 396; *Holderness* v. *Shackels*, 8 B. & C. 612; *Richardson* v. *Gooding*, 2 Vern. 293; *Ex parte Terrell*, Buck, 345; *Gross* v. *Dusfresnay*, 2 Eq. Ab. 110, pl. 5.

(*l*) See *West* v. *Skip*, 1 Ves. S. 239, 456.

(*m*) *Crawshay* v. *Collins*, 15 Ves. 229; *Wilson* v. *Greenwood*, 1 Swanst. 471.

(*n*) *Wilson* v. *Greenwood*, 1 Swanst. 471.

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Whitmore v. Mason.

In *Whitmore* v. *Mason* (*o*), partnership articles contained a provision that, on the bankruptcy of a partner, an account should be taken and a valution made of his share and interest in the partnership property, with the exception of a particular lease. It was held that this exception was void, as against the assignees of a partner who had become bankrupt, and that they were entitled to his share in the lease. The provision as to valuing the bankrupt's share was not sought to be avoided by the assignees.

Profits accruing subsequently to bankruptcy.

Upon principles which have already been discussed, the trustee of a bankrupt partner is entitled to an account, not only of the assets as they stood at the time of the dissolution of the firm, but also of the profits subsequently made by the employment of the bankrupt's capital in the partnership business (*p*).

Right of trustee to account from the executors of a deceased partner.

Where there is a firm of two partners, and one partner dies, and the other becomes bankrupt, the trustee of the latter is entitled to maintain an action on behalf of himself and all the other creditors of the deceased against his executors, for the administration of his estate, and for payment of what may be due therefrom to his surviving partner (*q*).

Trustee does not become partner.

The trustee, it will be observed, does not become a co-partner with the solvent partners. Like purchasers from the sheriff under an execution against one partner, the trustee and the solvent partners become tenants in common of the real and personal property belonging to the firm (*r*). Moreover, as the sheriff, in the case of an execution against one partner, is entitled to seize the whole of the partnership property, so the

(*o*) 2 J. & H. 204.

(*p*) See *ante*, p. 526, *Crawshay* v. *Collins*, 15 Ves. 218, 1 J. & W. 267, and 2 Russ. 325; *Smith* v. *De Silva*, Cowp. 469. This last case seems at first sight to be opposed to the existence of that lien which is above stated to be available against the trustee. But the question before the Court was simply whether the assignees had a right to share profits accruing since the bankruptcy, and Lord Mansfield very properly held that they had. His judgment certainly shows that he considered the assignees were entitled to those profits without paying what was due from the bankrupt to his co-partners; but on this point the case cannot, it is conceived, be supported. See 8 B. & C. 618.

(*q*) See *Addis* v. *Knight*, 2 Mer. 119.

(*r*) See *Fox* v. *Hanbury*, Cowp. 445.

messenger of the Court in Bankruptcy, in the case of an adjudication against one partner, is in strictness entitled to put a person in possession of the whole of the property of the firm. This, however, is seldom done, as the solvent partners, either by consent, or through the intervention of the Court, make arrangements for securing to the trustee payment of the bankrupt's share in the assets of the firm (*s*).

Bankruptcy a cause of dissolution.

When one partner only is adjudged bankrupt, the *firm* is thereby nevertheless dissolved (*t*). If it were not, the solvent partners would have forced upon them as co-partners, persons with whom they had never agreed to be in partnership; a result which would be contrary to the fundamental principle that partnership cannot subsist between any persons save by the mutual consent of them all. The bankruptcy of one partner, moreover, dissolves the firm, not only as to him, but as to all the other co-partners, *inter se* (*u*); for, in the first place, a partnership, being a mere assemblage of persons bound together by contract, loses its identity, as much by the bankruptcy, as by the death, of one of those persons; and in the next place, such is the law of this country, that the share of a bankrupt partner cannot be ascertained, save by taking the accounts of the whole firm, and distributing its clear assets amongst the solvent partners and the trustee of the bankrupt partner.

Jurisdiction of Court of Bankruptcy to ascertain share.

As on the bankruptcy of one only of several partners the joint assets do not vest in his trustee, an action in the Chancery Division to ascertain the share of the bankrupt was formerly necessary (*x*); but now the Court in Bankruptcy can itself ascertain such share (*y*).

Rule as to companies.

The doctrine that on the bankruptcy of one member of a firm the whole firm is dissolved, is not, it seems, applicable to

(*s*) A sale of the share to them need not be by auction, *Re Motion*, 9 Ch. 192.

(*t*) *Fox* v. *Hanbury*, Cowp. 448; *Ex parte Smith*, 5 Ves. 297, 1 Mont. Part., note E., p. 22.

(*u*) See *Hague* v. *Rolleston*, 4 Burr. 2174; *Fox* v. *Hanbury*, Cowp. 448; *Crawshay* v. *Collins*, 15 Ves. 228.

(*x*) See *Re Motion*, 9 Ch. 192; *Morley* v. *White*, 8 Ch. 214; *Ex parte Gordon*, ib. 555; *Ex parte Rumboll*, 6 Ch. 842; *Ex parte Anderson*, 5 Ch. 473; *Ex parte Sheriff of Middlesex*, 12 Eq. 207.

(*y*) See 46 & 47 Vict. c. 52, §§ 93 and 102, but as to County Courts, see the § 102.

mining partnerships (*z*); and although the bankruptcy of a shareholder in an unincorporated company with transferable shares may dissolve the company as to him (*a*), it is conceived that such bankruptcy does not dissolve it as to the other shareholders *inter se*.

2. *Property divisible amongst the creditors.*

It is not proposed in the present treatise to enter minutely into the details of the law respecting the property which, in the event of bankruptcy, vests in the trustee, or may be made available by him for the benefit of the creditors; it will be sufficient to call attention to the short effect of the Bankruptcy act, 1883, on this subject and then to allude to the complicated questions which arise from the doctrines of set-off and mutual credit, the relation back of the title of the trustee and of reputed ownership.

Property vesting in trustee.

On adjudication the property of a bankrupt vests in the trustee (*b*), *i. e.*, the official receiver, until a trustee is appointed, and in the trustee when appointed (*c*). The title of the trustee relates back to the act of bankruptcy on which the receiving order is made; or to the earliest act of bankruptcy committed within three months before the presentation of the petition (*d*). Until adjudication the property of a bankrupt continues vested in him, subject to be divested retrospectively upon adjudication. But the moment a receiving order is made the official receiver's powers and duties as a receiver commence (*e*), so that the debtor cannot properly deal with his property, although it is not yet divested from him.

The property which on adjudication vests in the trustee is enumerated in §§ 44 and 168 of the act. It includes:—

1. All the bankrupt's property, both real and personal, except his tools, clothes and bedding to the value of 20*l.*;

(*z*) *Ex parte Broadbent*, 1 Mont. & A. 638; *Bentley* v. *Bates*, 4 Y. & C. Ex. 190. *Sed quære* if the mine is a partnership asset.

(*a*) *Greenshield's case*, 5 De G. & S. 599.

(*b*) 46 & 47 Vict. c. 52, §§ 54 and 20 (1).

(*c*) § 54 (1, 2, 3).

(*d*) § 43.

(*e*) § 9.

2. The right to exercise all powers which he could (but for his bankruptcy) exercise for his own benefit, except the right to nominate to a vacant living;

3. All goods in his possession, order or disposition in his trade or business as reputed owner and by the consent and permission of the true owner. Trade debts are goods within the meaning of this rule, but no other choses in action are so.

Onerous property vests in the trustee (*ee*); but may be disclaimed by him in writing within three months after the first appointment of a trustee (*f*).

Lands.

Ordinary freehold estates, to which the bankrupt is entitled for life, or in fee, vest in his trustee, subject to such mortgages or charges as may affect them (*g*). Lands of which a bankrupt is seised in tail, do not, strictly speaking, vest in his trustee; but such lands may be disposed of for the benefit of his creditors (*h*); and a similar observation applies to the bankrupt's copyhold property (*i*).

Chattels.

The personal property of a bankrupt, including all trade debts owing to him, also vests in his trustee (*k*), subject to such charges and incumbrances (*l*) as exist thereon. But this is qualified by the doctrine that, if the bankrupt is in trade or business, his goods and chattels, if allowed by the person to whom they are pledged to remain in the bankrupt's possession, will, by virtue of the doctrines of reputed ownership, be distributable as part of the bankrupt's estate, as if they were his absolutely (*m*).

(*ee*) § 44.

(*f*) § 55.

(*g*) Where land is devised to a trader charged with a sum of money which is allowed to remain on the security of the land, his trustee can only claim the land subject to the charge. See *Ex parte Forster*, 1 M. D. & D. 418, and 2 ib. 177, under the name *Hudson* v. *Forster*. See, too, *Ex parte Barff*, De Gex, 613.

(*h*) 46 & 47 Vict. c. 52, § 56, cl. 5.

(*i*) § 50, cl. 4.

(*k*) §§ 44, 54, and 168. Debts owing to the bankrupt by a person to whom he is indebted, are subject to set-off, as will be seen hereafter. As to how far the trustee is bound by contracts entitling others to use the bankrupt's goods, see *Ex parte Barter*, 26 Ch. D. 510.

(*l*) The Bills of Sale act must be borne in mind, but it has no special bearing on partners. A bill of sale given by two partners, one of whom only became bankrupt, was held void as to his interest only, in *Ex parte Brown*, 9 Ch. D. 389.

(*m*) See *Jones* v. *Gibbons*, 9 Ves. 407, and see *infra*.

The trustee is also entitled to the benefit of contracts made with the bankrupt for valuable consideration (*n*).

Where chattels purchased by the bankrupt have actually come to his possession, they pass to his trustee, although he may not have paid for them; but if they have not come to his possession, the seller can retain them, or stop the delivery of them until their price is paid (*o*).

Books of account.

No person is entitled as against the trustee to withhold possession of the books of account of the bankrupt, or to claim any lien thereon (*p*).

Debts, goodwill, &c.

The trustee may sell the goodwill of the business of the bankrupt, and the book debts due or growing due to him, and may transfer the same to any person or company (*q*).

Shares.

Shares belonging to the bankrupt vest in his trustee (*r*); but he may sell them (*s*), or disclaim them (*t*) without becoming a shareholder himself. But he has a right to have them registered in his own name (*u*), unless the company's regulations contain some clause inconsistent with such right (*x*).

Trust property.

Property held by the bankrupt in trust for any other person does not vest in the bankrupt's trustee (*y*). Consequently, if a debtor assigns a debt before he becomes bankrupt, an action for the recovery of that debt must be brought in his name, or in the name of the person to whom it has been assigned, as the case may be (*z*). The trustee has no interest in such a debt,

(*n*) See *Beckham* v. *Drake*, 2 H. L. C. 579; *Valpy* v. *Oakeley*, 16 Q. B. 941; *Whitmore* v. *Gilmour*, 12 M. & W. 808.

(*o*) See, as to stoppage in transitu, *Lickbarrow* v. *Mason*, 1 Sm. L. C.

(*p*) Bank. Rules, 1886, r. 349. The trustee of one bankrupt partner cannot take the books from the solvent co-partners, *Ex parte Finch*, 1 D. & Ch. 274.

(*q*) 46 & 47 Vict. c. 52, § 56 (1); *Kitson* v. *Hardwick*, L. R. 7 C. P. 473; as to a sale of the share of a bankrupt partner, see *Re Motion*, 9 Ch. 192. As to sale of goodwill, *Walker* v. *Mottram*, 19 Ch. D. 355.

(*r*) Ib. §§ 44, 54, and 168.

(*s*) Ib. § 50, cl. 3.

(*t*) Ib. § 55.

(*u*) *Re Bentham Mills Spinning Co.*, 11 Ch. D. 900, where the bankrupt was indebted to the company.

(*x*) *Ex parte Harrison*, 28 Ch. D. 363.

(*y*) 46 & 47 Vict. c. 52, § 44, cl. 1. *Joy* v. *Campbell*, 1 Sch. & Lef. 328; *Pinkett* v. *Wright*, 2 Ha. 120. See, as to reputed ownership, *infra*, and as to the effect of an equitable assignment, *Burn* v. *Carvalho*, 4 M. & Cr. 690.

(*z*) *Winch* v. *Keeley*, 1 T. R. 619;

and cannot sue for it (*a*). It has been already observed, that a debtor who, in contemplation of bankruptcy, restores to, or sets apart for his *cestui que trust* that which is vested in himself merely as a trustee, does not commit an act of fraudulent preference (*b*); and if a bankrupt has had property entrusted to him for a particular purpose, his trustee must apply it to that purpose (*c*); and if, being unable to accomplish it, the bankrupt has returned the property, his trustee cannot recover it (*d*).

Trustee stands in the place of the bankrupt.

It is not unusually said that the trustee represents the bankrupt, and has no more extensive rights against third persons, than the bankrupt himself would have had if he had continued solvent: but this proposition is much too general. It cannot be relied upon as regards property affected by the doctrines of reputed ownership, nor as regards acts done by the bankrupt since the commission by him of an act of bankruptcy, nor, as regards acts which, though binding on him, are fraudulent or void as against his creditors (*e*). Except, however, as regards such matters, the rule holds good; and its consequences are important, especially with respect to bankrupt trustees and bankrupt partners.

Transactions void as against trustee.

The Bankruptcy act, 1883, avoids as against the trustee :—

1. All fraudulent preferences (*f*); but there is an exception in favour of purchasers for value without notice (*g*).

Boddington v. *Castelli*, 1 E. & B. 879, affirming *Castelli* v. *Boddington*, ib. 66. Whether the assignee of the debt can sue depends on the application of the Jud. Act, 1873, § 25, cl. 6.

(*a*) *Carpenter* v. *Marnell*, 3 Bos. & P. 40.

(*b*) *Ante*, p. 630.

(*c*) See the authorities referred to *infra* § 4 in connection with the subject of secured bills, and *Ex parte Waring*. See also *Ex parte Carrick*, 2 De G. & J. 208; *Ex parte Gledstanes*, 3 M. D. & D. 109; *Ex parte Mackey*, 2 ib. 136; *Ex parte Glyn*, 1 ib. 25; *Ex parte Brown*, 3 M. & A. 471. And see, as to a creditor's right of appropriating securities to one debt rather than to another, *Ex parte Johnson*, 3 De G. M. & G. 218, and the cases above cited.

(*d*) *Edwards* v. *Glyn*, 2 E. & E. 29; *Toovey* v. *Milne*, 2 B. & A. 683; *Moore* v. *Barthrop*, 1 B. & C. 5. See *ante*, p. 630.

(*e*) See, as to this, *Anderson* v. *Maltby*, 2 Ves. J. 255; *Billiter* v. *Young*, 6 E. & B. 40. See, also, *Ex parte Barter*, 26 Ch. D. 510, as to the trustee not being bound by a contract enabling a third person to use the bankrupt's goods to complete a contract entered into by him.

(*f*) § 48, *ante*, p. 628.

(*g*) Ibid.

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2. All voluntary settlements or dispositions of property made within two years before the bankruptcy; or even if made within ten years before, unless the parties claiming the property can prove that the settlor, &c., had other assets sufficient to enable him to pay his debts (*h*), and that his interest in the property in question passed to the trustee or grantee thereof (*i*).

3. Covenants to settle after-acquired property in which the debtor had no vested or contingent interest and which does not come to him through his wife (*k*).

Executions.

The statute further enables the trustee in certain cases to obtain the benefit of executions against debtors who are adjudicated bankrupt (*l*).

Protected transactions.

On the other hand the statute contains an important provision (*m*) for the protection of persons *bonâ fide* dealing with a person liable to be adjudicated bankrupt, and having no notice of any act of bankruptcy committed by him. This provision, however, does not protect any transaction avoided by §§ 45, 47 or 48.

3. *Of set-off and mutual credit.*

Mutual credits.

With respect to debts owing to a bankrupt by persons to whom he is indebted, the balance only is regarded as payable to or by his estate. This equitable doctrine rests upon a statutory enactment (*n*), which allows debts to be set off against each other in many cases in which they could not be set off had no bankruptcy intervened (*o*). The enactment which now regulates this subject is as follows (*p*):—

(*h*) See *Ex parte Mercer*, 17 Q. B. D. 290; *Ex parte Russell*, 19 Ch. D. 588; *Re Ridler*, 22 ib. 74.

(*i*) § 47 (1) and (3), much abridged, *Ex parte Todd*, 19 Q. B. D. 186; and see § 29.

(*k*) § 47 (2), and see § 29.

(*l*) § 46, set out *infra*, p. 675.

(*m*) § 49, set out *infra*, p. 664.

(*n*) It was, however, recognised before the mutual credit clause found its way into the Bankruptcy acts. See *Anon.*, 1 Mod. 215; *Chapman* v. *Derby*, 2 Vern. 117.

(*o*) See *Ex parte Stephens*, 11 Ves. 24.

(*p*) 46 & 47 Vict. c. 52, § 38. The section does not apply to debts due to or from a firm if one member only is bankrupt, *Lon., Bombay, and Med. Bank* v. *Narraway*, 15 Eq. 93, nor to actions brought by bankrupts as trustees for other persons. *De Mattos* v. *Saunders*, L. R. 7 C. P. 570.

Mutual credit and set-off.

§ 38. Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor, and available against him.

Tendency to allow rather than disallow set-off.

The above clause is evidently framed with a view to prevent the great injustice which would arise if a person who was the creditor of a bankrupt on one account and his debtor on the other, were compelled to pay twenty shillings in the pound on what he owed to the bankrupt, and to receive less than twenty shillings in the pound on what the bankrupt owed him. There is, therefore, a strong tendency to construe the clause in question extensively rather than restrictively, or, in other words, to favour the setting off of cross demands by and against bankrupts (*q*); at the same time the courts cannot carry the doctrines of set-off further than the language and spirit of the enactment warrant, and some of the earlier cases on the subject have been considered as having gone too far (*r*).

French v. Fenn.

The general doctrine is well illustrated by *French* v. *Fenn*, and *Easum* v. *Cato*. In *French* v. *Fenn* (*s*), the defendant purchased a row of pearls, and agreed with one Cox to give him one-third of the profits to arise from a sale of them. Cox became bankrupt, and *afterwards* the defendant sold the pearls, and Cox's assignees demanded one-third of the profits of the sale, declining to allow the defendant to set off a debt due from Cox to him at the time of the bankruptcy; but it was decided that such set-off ought to be allowed. The Court held that there was a great distinction between mutual debts and mutual credits, and that, although the defendant was not indebted to Cox at the time of his bankruptcy, inasmuch as the pearls had

(*q*) See *Ryall* v. *Rowles*, 1 Ves. S. 375.

(*r*) This is particularly the case with *Ex parte Deeze*, 1 Atk. 228, and *Ex parte Quintin*, 3 Ves. 248.

(*s*) 3 Doug. 257, and Cooke's Bank. Law, 565 (ed. 8).

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not then been sold, there was a clear case of mutual credit justifying the set-off.

Easum v. Cato.

Easum v. *Cato* (*t*) goes even further than the last case. There the bankrupts shipped goods for sale in the name of *Cato*, to whom they were indebted; *Cato* assented to the use of his name, and he received the proceeds of the sale; he was sued for these proceeds by the assignees, and was held entitled to set off against them what was owing to him by the bankrupts, although the goods were in no sense his.

Young v. Bank of Bengal.

The authority of these cases has been sometimes thought to be shaken by *Young* v. *The Bank of Bengal* (*u*). There the Privy Council held that bankers with whom notes of the East India Company had been deposited as a security for a loan, and who were empowered to sell the notes if the loan was not paid, were not entitled, after their debtor had become bankrupt, to set off the proceeds of the sale of the notes against a debt owing by the bankrupt to them unconnected with the loan in question, and arising from the discount by the bankers of the bankrupt's paper before such loan was made. In this case, however, not only had the notes deposited with the bankers not been sold by them before the bankruptcy, but the bankers were, in truth, precluded by their own agreement from holding the deposited paper for any other purpose than as a security for the loan to which it was specially appropriated. *Young* v. *The Bank of Bengal*, therefore, merely shows that even if the deposited notes could be treated as cash, yet the right to set off cross money demands under the mutual credit clause only exists where there is no agreement inconsistent with the exercise of such right (*x*).

(*t*) 5 B. & A. 861.

(*u*) 1 Deac. 622. See, on this case, *Alsager* v. *Currie*, 12 M. & W. 751.

(*x*) *Ex parte Flint*, 1 Swanst. 30; *Key* v. *Flint*, 8 Taunt. 21; *Thomas* v. *Da Costa*, 8 Taunt. 345, and *Buchanan* v. *Findlay*, 9 B. & C. 738, also illustrate this doctrine. See, too, *Hill* v. *Smith*, 12 M. & W. 618. See, further, as to general liens and to their not attaching to particular securities, *Re Bowes*, 33 Ch. D. 586; *Brandao* v. *Barnett*, 1 Man. & Gr. 908; 6 ib. 630; and 12 Cl. & Fin. 787; *Bock* v. *Gorrissen*, 2 De G. F. & J. 434; *Jones* v. *Peppercorne*, Johns. 430; *Olive* v. *Smith*, 5 Taunt. 56; and as to liens on funds appropriated to the payment of particular bills, see *Inman* v. *Clare*, Johns. 769; *Jeffryes* v. *Agra and Masterman's Bank*, 2 Eq. 674.

Set-off allowed independently of intention.

It has, however, long been established that mutual credit within the meaning of the Bankruptcy acts may exist independently of any intention to create a right of set-off. For example, if A. sells goods to B., and B. obtains from third parties an acceptance of A.'s without his knowledge, A.'s claim against B. for the goods sold, and B.'s claim against A. on the bill, may be set off on A.'s bankruptcy, although the acceptance has not fallen due (*y*).

Cases of bills returned dishonoured.

Moreover, the mutual credit clause applies, although the demand of the bankrupt may not have been continuous from the time when it accrued to the time of the bankruptcy. This is often the case when the bankrupt's claim rests on a bill of exchange which he has indorsed away, but which after his bankruptcy is returned dishonoured. Thus in *Bolland* v. *Nash* (*z*), A. accepted a bill for advances made to him by his bankers, and they indorsed the bill to a third person for value and became bankrupts. The indorsee was himself indebted to the bankers; and he having required A. to pay the bill, which A. refused to do, and having then set the debts due to himself from the bankers and to them from himself against each other, returned the bill to the assignees. They then sued A. upon it, but it was held that he was entitled to set off the balance due from the bankers to him on his account with them at the time of their bankruptcy, although at that time they did not hold his bill.

Bolland *v.* Nash.

Debts not yet due

It is also established that demands by and against a bankrupt may be set off, although they may not have become enforceable previously to his bankruptcy; *e.g.*, where bills have been accepted but have not become due (*a*); where calls have become due since the bankruptcy (*b*).

It may also be observed that simple contract debts may be

(*y*) *Hankey* v. *Smith*, 3 T. R. 507. See, also, *Bailey* v. *Johnson*, L. R. 6 Ex. 279, and 7 Ex. 263, for another but different example turning on §§ 39 and 81 of the Bank. act, 1869.

(*z*) 8 B. & C. 105. See, too, *Ex parte Staddon*, 3 M. D. & D. 256, noticed *infra*, p. 662; and *Ex parte Huckey*, 1 Madd. 577.

(*a*) *Ex parte Wagstaff*, 13 Ves. 65; *Ex parte Boyle*, Cooke's Bank. L. 571 (ed. 8); *Sheldon* v. *Rothschild*, 8 Taunt. 156.

(*b*) *Carralli and Haggard's claim*, 4 Ch. 174; *Re Duckworth*, 2 Ch. 578; *Ex parte Strang*, 5 Ch. 492.

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set off against specialty debts, and *vice versâ* (*c*); that where damages are proveable they may be set off against debts (*d*); and that a secured creditor who owes money to the bankrupt has a right to set off what he owes from the amount due to him on his security and to treat the security as a security for the balance (*e*).

Rules as to set off in cases of bankruptcy.

In order, however, that cross demands may be set off against each other under the mutual credit clause, it is necessary—

1. That both demands shall be money demands, and that the sum sought to be set off against the trustees shall be proveable against the bankrupt's estate;

2. That the demands shall be mutual;

3. That the demands against the bankrupt shall have arisen before the demandant had notice of the commission of an act of bankruptcy.

1. The cross-demands must be money demands.

Rose *v.* Hart.

First, as to the nature of the demands.—It was held in the well-known case of *Rose* v. *Hart* (*f*) that a fuller, who was sued by the assignees of a bankrupt for the recovery of cloths sent to be dressed, could not retain the goods until he was paid all moneys owing by the bankrupt for services previously rendered him. The assignees' demand was not in substance a money demand at all; they claimed the goods; and against such a claim it was decided that the fuller could only oppose his lien for what was due in respect of his work on those goods (*g*).

The doctrine thus established in *Rose* v. *Hart*, viz., that by mutual credits are meant credits which from their nature must, or at all events probably will, terminate in debts (*i.e.*, money demands), has ever since been recognised as correct; and applies to the expression mutual dealings (*h*) in the Bankruptcy act, 1883.

(*c*) *Lanesborough* v. *Jones*, 1 P. W. 325.

(*d*) *Mersey Steel and Iron Co.* v. *Naylor & Co.*, 9 App. Ca. 438, and 9 Q. B. D. 648; *Peat* v. *Jones*, 8 Q. B. D. 147. See as to value of tillages and rent, *Alloway* v. *Steere*, 10 Q. B. D. 22.

(*e*) *Ex parte Barnett*, 9 Ch. 293.

(*f*) 8 Taunt. 499, and 2 Sm. L. C., following *Ex parte Ockenden*, 1 Atk. 235, and correcting *Ex parte Deeze*, 1 Atk. 228, and *Ex parte Prescot*, ib. 230.

(*g*) If the defendant had sold the goods, and the assignees had sued for the money produced by their sale, the result would, it is conceived, have been the same. See *Ex parte Ross*, Buck, 125.

(*h*) See *Eberle's Hotels Co.* v. *Jonas*,

2. The cross demands must be mutual. Forster v. Smith.

Secondly, as to the mutuality of the demands.—Cross demands cannot be set off against each other, unless they exist in favour of and against the same persons in the same rights. In *Forster* v. *Smith* (*i*), Wilson & Co. were on the one hand indebted to their bankers, and were on the other hand their creditors in respect of three parcels of bank notes. One of these parcels belonged to Wilson & Co.; another parcel also belonged to them, but only as a security for debts owing to them by third persons; the third parcel was held by Wilson & Co. merely as trustees. On the bankruptcy of the bankers it was held that Wilson & Co. were entitled to set off against their debt to the bankers the amount of the two first parcels of notes, but not the amount of the third.

Other cases may be referred to as authorities for the proposition that a debt owing by a person in his individual capacity cannot, in bankruptcy, be set off against a debt owing to him as trustee (*k*).

Case where one partner only is bankrupt.

It was at one time thought that in an action by the assignees of a bankrupt the defendant could not set off a debt due to him from the bankrupt; as although the assignees might sue him he could not sue them (*l*). But this notion has long been deservedly exploded (*m*). But before the Judicature acts if some only of the members of a firm were bankrupt, and the trustees of the bankrupt partners, together with the solvent partners, joined in an action for the recovery of a debt due to the firm, the defendant could not set off a debt due from the firm to him (*n*). But now it is apprehended this could be done (*o*).

8 Q. B. D. 459; *Ex parte Bolland*, 3 Ch. D. 225; *Ex parte Price*, 10 Ch. 648, where a liquidator of a company proved for a debt due to it, and the trustee was held not entitled to deduct the estimated value of a current policy issued by the company.

(*i*) 12 M. & W. 191.

(*k*) See *Ex parte Morier*, 12 Ch. D. 491; *Ex parte Kingston*, 6 Ch. 32; *Bailey* v. *Finch*, L. R. 7 Q. B. 34, where the executor was himself residuary legatee, and a set-off was allowed; *Fair* v. *McIver*, 16 East, 130; *Boyd* v. *Mangles*, 16 M. & W. 337; *Watts* v. *Christie*, 11 Beav. 546.

(*l*) *Ryall* v. *Larkin*, 1 Wils. 155, and Bull, N. P. 181.

(*m*) See *Ridout* v. *Brough*, Cowp. 133.

(*n*) *Staniforth* v. *Fellowes*, 1 Marsh. 184; *Thomason* v. *Frere*, 10 East, 418.

(*o*) See *ante*, book ii. ch. 3, § 2.

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Joint debts cannot be set off against separate debts.

The doctrine of mutuality is of especial importance to partners; for from it, it follows that a demand against a firm cannot be set off against a cross demand of some or one only of its members, and that a demand by one or more partners cannot be met by setting off a cross demand against a firm consisting of him or them and others. This rule is as clearly established in bankruptcy as it was at law and in equity, when the rights of solvent persons only were under consideration (*p*).

Watts *v.* Christie.

In *Watts* v. *Christie* (*q*), bankers were indebted to A. on his separate account, but were creditors of A. & Co. on their joint account. Whilst the bankers were in difficulties, but before they committed any act of bankruptcy, A. assigned what was due to him on his separate account to A. & Co., and directed the bankers to transfer what was standing to his credit, to the credit of A. & Co. This, however, was not done. On the bankruptcy of the bankers it was held that A. & Co. could not set off what was due from them to the bankers against what was due from the bankers to A.

Other illustrations of same principle.

Again, if A. and B. are partners, and C. is indebted to them, and A. and B. dissolve partnership, and its business is continued by B. and he becomes indebted to C. who is afterwards adjudged bankrupt; B. cannot set off his separate debt to C. against the debt due from C. to the late firm of A. and B. (*r*).

These principles apply where one partner only is bankrupt, and his separate estate is more than sufficient to pay his separate debts. Even in such a case a debt due to him and the solvent partners jointly cannot be set off against a debt due by him alone (*s*).

Moreover, where A., B. and C. are jointly indebted to D., who is himself indebted to A., B. and C. separately and on several accounts, D.'s separate demands against A., B. and C.

(*p*) *Ex parte Morier*, 12 Ch. D. 491; *Ex parte Soames*, 3 D. & C. 320; *Ex parte Twogood*, 11 Ves. 517; *Lanesborough* v. *Jones*, 1 P. W. 325.

(*q*) 11 Beav. 546.

(*r*) *Ex parte Ross*, Buck, 125. The marginal note in this case is apt to mislead.

(*s*) *Ex parte Twogood*, 11 Ves. 517. *Ex parte Quintin*, 3 Ves. 248, is opposed to this, but cannot now be considered law. Neither can *Ex parte Edwards*, 1 Atk. 100, be relied upon.

respectively cannot be met by setting off their respective proportions of the debt owing by them jointly to D. (*t*).

James v. Kynnier.

In connection with this subject it is necessary to advert to *James* v. *Kynnier* (*u*). There A. and B. were jointly indebted to C., who required payment, or to be accommodated with a loan to the amount due to him. A. thereupon lent C. the amount due to him, and received his promissory note for it. C. became bankrupt, and it was held that the debt due from A. and B. had in fact been paid by A., and that both the promissory note given by C. and the security given to C. by A. and B., ought to be given up to be cancelled. The case is one rather of payment than of set off, and cannot be considered as opposed in principle to the rule that a joint debt cannot be set off against a separate debt, and *vice versâ*.

Agreements to set off joint against separate debts.

It is hardly necessary to observe that an agreement to the effect that a joint shall be set off against a separate debt, or *vice versâ*, is perfectly valid, and if duly entered into will be binding, notwithstanding the subsequent bankruptcy of the parties (*x*). So, if parties choose to agree that demands which they would otherwise be entitled to set off shall be kept separate and distinct, and then bankruptcy ensues, the agreement will nevertheless be binding upon them, as has already been seen (*y*).

Application of doctrines of set off to sureties.

It remains to notice the application of the doctrine of mutuality of credit to the case of sureties. Where there are cross claims between a creditor and his principal debtor, capable of being set off against each other, the surety of the debtor can in bankruptcy insist that these claims shall be set against each other, so that he may be exonerated if possible (*z*).

Ex parte Stephens.

A very remarkable extension of this principle was made in *Ex parte Stephens* (*a*). In that case a lady was a creditor of her

(*t*) *Ex parte Christie*, 10 Ves. 105.

(*u*) 5 Ves. 108.

(*x*) In *Kinnerley* v. *Hossack*, 2 Taunt. 170, there was such an agreement. See, too, *Vulliamy* v. *Noble*, 3 Mer. 618, where the agreement was inferred from past dealings.

(*y*) See acc. *Ex parte Flint*, 1 Swanst. 30, and *Young* v. *Bank of Bengal*, 1 Deac. 622, noticed *ante*, p. 656.

(*z*) *Ex parte Hanson*, 12 Ves. 346, and 18 ib. 232. The equitable doctrines of marshalling apply in bankruptcy, see *infra*, § 4; *Ex parte Salting*, 25 Ch. D. 148; *Ex parte Alston*, 4 Ch. 168.

(*a*) 11 Ves. 24. The circumstances

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bankers, although she did not know it, and she as surety for her brother joined him in a joint and several note to secure repayment of 1000*l.* lent him by the bankers. The bankers became bankrupt, and the assignees sued the brother alone upon the note; but Lord Eldon, upon the petition of the brother and the sister, stayed the action, and ordered that the money due on the note by the brother and his sister as his surety should be set off against the money owing by the bankrupts to the sister alone (*b*).

Ex parte Staddon.

Again, in *Ex parte Staddon* (*c*), bankers advanced to a customer, A., 500*l.* on the security of his promissory note, and deposited this note and others with B. & Co. as a security for advances made by them. The bankers became bankrupt. At the time of their bankruptcy, A. was the holder of their notes to the amount of 520*l.*, and B. & Co. had in their hands securities of the bankrupts more than sufficient to cover what was due from them for advances made to them by B. & Co. B. & Co. compelled A. to pay his promissory note, he being ignorant of the dealings between them and the bankers.

Subsequently, B. & Co., having been paid all that was due to them from the bankrupts, delivered up to the assignees the securities in their hands. It was held, that as between A. and the bankers, A. was entitled, first, to be repaid what he had paid to B. & Co. as their surety, and secondly, to set off against what was due from him to the assignees on his promissory note, the amount due to him from the bankrupts in respect of their notes in his hands.

3. Demands arising after notice of an act of bankruptcy cannot be set off.

Thirdly, as to the notice of the act of bankruptcy.—The language of the mutual credit clause precludes setting off a demand accruing against a bankrupt by reason of anything done after notice of an act of bankruptcy committed by him

of this case were peculiar. A gross fraud had been committed by the bankers on the sister, by inducing her to believe that they had bought stock for her as requested, when in point of fact they had done no such thing, but had applied her money to their own use.

(*b*) See, too, *Vulliamy* v. *Noble*, 3 Mer. 621. See the observations of the M. R. on this case, and on *Ex parte Stephens* in *Middleton* v. *Pollock*, 20 Eq. 515.

(*c*) 3 M. D. & D. 256. Compare *Bolland* v. *Nash*, 8 B. & C. 105.

and available against him for adjudication (*d*). Therefore, although where bankers first stop payment and then commit an act of bankruptcy, a holder of their notes can set off such of them as came to his hands before the act of bankruptcy (*e*), he cannot set off those which came to his hands after that event, if he had notice of it (*f*). So, if a person commits an act of bankruptcy which is known to his bankers, and they nevertheless afterwards honour his drafts, they cannot set off the payments in respect of them, against the demand of the trustees for the balance standing to the credit of the bankrupt at the time the act of bankruptcy was committed (*g*).

Buying up bills of bankrupt.

With a view to avoid paying debts to trustees in bankruptcy, recourse is frequently had by the debtors of a failing person to the expedient of buying up his acceptances in order to set them off against the sums which the purchasers owe him. If a debtor obtains the acceptances of his creditors in this way for himself, and without notice of any act of bankruptcy, the debtor will be able to set off the full amount of the acceptances, however little he may have paid for their purchase (*h*); but it will be otherwise if he had notice of the act of bankruptcy (*i*); or if he has obtained the acceptances not *bonâ fide* to protect himself, but as a trustee for others, and in order to enable them to avail themselves of his right of set-off (*k*).

4. *Of the time from which the title of the trustee dates.*

Relation back of trustee's title.

Under the old law the title of the assignee of a person adjudicated bankrupt on a creditor's petition dated not from

(*d*) *Ante*, p. 655, *Elliott* v. *Turquand*, 7 App. Ca. 79; and see *Hawkins* v. *Penfold*, 2 Ves. S. 550; *Vernon* v. *Hankey*, 2 T. R. 113.

(*e*) *Hawkins* v. *Whitten*, 10 B. & C. 217; *Dickson* v. *Cass*, 1 B. & Ad. 343; *Forster* v. *Wilson*, 12 M. & W. 191.

(*f*) *Dickson* v. *Cass*, 1 B. & Ad. 343, where some only of the firm had committed acts of bankruptcy.

(*g*) *Vernon* v. *Hankey*, 2 T. R. 113, and 3 Bro. C. C. 313. See, too, *Kynaston* v. *Crouch*, 14 M. & W. 266; *Tamplin* v. *Diggins*, 2 Camp. 312.

(*h*) *Hawkins* v. *Whitten*, 10 B. & C. 217; *Dickson* v. *Cass*, 1 B. & Ad. 343.

(*i*) *Dickson* v. *Cass*, 1 B. & Ad. 343.

(*k*) *Lackington* v. *Combes*, 6 Bing. N. C. 71; *Fair* v. *McIver*, 16 East, 130.

the time of adjudication, but from a time anterior thereto, viz., from the time of the commission of the earliest act of bankruptcy subsequent to the accrual of the petitioning creditor's debt (*l*). As regards the bankrupt's personal property, whatever he was entitled to at that time or acquired subsequently (and before he obtained his certificate), became legally vested in his assignees; and as regards his real property, although the legal estate in it only vested in the assignees from the time of their appointment, still they could recover whatever might have been conveyed away by the bankrupt after the commission of any act of bankruptcy subsequent to the accrual of the petitioning creditor's debt (*m*). To this rule, however, certain important exceptions (known as protected transactions) were introduced by statute in favour of persons dealing with bankrupts *bonâ fide*, and without notice of any act of bankruptcy. The law upon this subject is now contained in the following enactments of the Bankruptcy act, 1883.

Relation back of trustee's title.

§ 43. The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition; but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor (*n*).

Protected transactions.

§ 49. Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment (*o*), and with respect to the avoidance of certain settlements (*p*), and preferences (*q*), nothing in this Act shall invalidate, in the case of a bankruptcy—

(*a.*) Any payment by the bankrupt to any of his creditors,

(*b.*) Any payment or delivery to the bankrupt,

(*l*) *Cooper* v. *Chitty*, 1 Burr. 20, and note thereto in 1 Sm. L. C.

(*m*) See 1 Griffith & Holmes' Bank. Law, 257, *et seq.*

(*n*) See *Allen* v. *Bonnett*, L. R. 5 Ch. 577. The title of the trustee may relate back to an act of bankruptcy committed before the passing of the Bankruptcy act, *Ex parte Snowball*, 7 Ch. 534.

(*o*) § 45, *infra*, p. 674.

(*p*) § 47, *ante*, p. 654.

(*q*) § 48, *ante*, p. 628.

(*c.*) Any conveyance or assignment by the bankrupt for valuable consideration,

(*d.*) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration,

Provided that both the following conditions are complied with, namely—

(1.) The payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order; and

(2.) The person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into, has not at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time (*r*).

These provisions are practically sufficient to protect all honest dealings and transactions with bankrupts without notice of any act of bankruptcy.

Notice. Notice of an act of bankruptcy within the meaning of these clauses is not confined to formal or even direct notice; a knowledge of facts from which an act of bankruptcy ought to be inferred is sufficient (*s*).

General rule applies, save in the above excepted cases. Notwithstanding the protection afforded by the above enactments to persons dealing with, or suing out execution against debtors, *bonâ fide*, and without notice of acts of bankruptcy committed by them, the old doctrine of relation applies as rigorously as ever, save in the excepted cases (*t*).

Acts of bankruptcy not excepted. As a rule that which is in itself an act of bankruptcy cannot be upheld as a *bonâ fide* payment, dealing, or transaction, within the meaning of the enactment above referred to (*u*). But an execution levied by seizure and sale is not invalid by reason only of its being an act of bankruptcy (*x*).

(*r*) A *bonâ fide* payment by an agent to his principal is not protected if the principal has committed an act of bankruptcy, and the agent knows it when he pays the money, *Ex parte Edwards*, 13 Q. B. D. 747. Compare *Re Sinclair*, 15 ib. 616.

(*s*) See *Ex parte Snowball*, 7 Ch. 534.

(*t*) See *Turquand* v. *Vanderplank*, 10 M. & W. 180; *Kynaston* v. *Crouch*, 14 M. & W. 266; *Cannan* v. *South Eastern Rail. Co.*, 7 Ex. 851. It applied under 7 & 8 Vict. c. 111, on the bankruptcy of companies, *Aitchison* v. *Lee*, 3 Drew. 637; Affd. 3 Jur. N. S. 95.

(*u*) See *Bevan* v. *Nunn*, 9 Bing. 107.

(*x*) 46 & 47 Vict. c. 52, § 46 (3). § 4 (*e*) makes the execution an act of bankruptcy.

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What is notice to a firm has been already alluded to (*y*).

Consequences to partners of doctrine of relation back.

The doctrine of relation back, with its exceptions, having been noticed in a general manner, it is proposed to examine its consequences as regards, first, bankrupt partners and persons dealing with them; secondly, solvent partners and persons dealing with them; and thirdly, creditors who have issued execution against the partnership assets.

(*a*) *Transactions with bankrupt partners.*

Bankruptcy of partners determines their power to deal with the property of the firm.

When a firm is adjudged bankrupt, it is necessarily dissolved, and the power of its members to carry on its business is thereby determined. Moreover, if there has been a joint act of bankruptcy committed by all the partners (*e.g.*, by a conveyance of all their property), the title of the trustee will relate back as against all the partners to that time. But if there has been no joint act of bankruptcy, but each of the partners has committed an act of bankruptcy at a different time from the others, then peculiar difficulties arise; for a certain time having elapsed between the first act of bankruptcy and the next, the *firm* cannot, during this time, be treated as if *it* had been bankrupt, but only as if one of its members had been so. The consequences, therefore, of an adjudication against a firm, where each member has committed a separate act of bankruptcy at a different time from the others, are, so far as regards transactions with strangers, the same as if there had been a succession of adjudications against each member separately (*z*). What these consequences are, it is now proposed to examine.

Bankruptcy of one partner determines his power to deal with assets.

It has been already pointed out that the bankruptcy of one partner dissolves the firm (*a*). Moreover, where one partner commits an act of bankruptcy, and is adjudged bankrupt, his power of trading and of acting in his own right in the

(*y*) *Ante*, pp. 141, *et seq.* If execution issues at the suit of several persons jointly, and one of them has notice of an act of bankruptcy committed by the execution debtor, such notice avoids the execution as against the trustee, *Edwards* v. *Cooper*, 11 Q. B. 33.

(*z*) See, accordingly, *Fox* v. *Hanbury*, Cowp. 445; *Edwards* v. *Hooper*, 11 M. & W. 363.

(*a*) *Ante*, p. 649.

disposition of the property of the partnership, is determined as from the date of the act of bankruptcy. Indeed, so far as he is concerned, he may be regarded as a sole trader whose power of dealing with property in his own right ceases on an act of bankruptcy (*b*). On this ground, amongst others, the assignees in *Hague* v. *Rolleston* (*c*), recovered from a creditor of a firm goods of the firm transferred to him by the bankrupt after he had committed an act of bankruptcy, for the purpose, apparently, of preferring him to other creditors. On the same ground, it was determined in *Thomason* v. *Frere* (*d*), that the indorsement of a partnership bill by two out of three partners, conferred no title on the indorsee, the indorsement having been made after the two indorsers had committed acts of bankruptcy (*e*). This case is very important, and is a clear authority for the proposition that when a partner becomes bankrupt, all his authorities to bind the firm by dealings in the ordinary course of business, are to be deemed as having been determined by the act of bankruptcy (*f*).

Hague *v.* Rolleston.

Thomason *v.* Frere.

This doctrine, however, must not be carried too far. It has already been seen that persons who hold themselves out as partners, are liable for the acts of each other done in the ordinary course of business, although they may have been done without authority. On this principle, it was held in *Lacy* v. *Woolcott* (*g*), that a solvent partner was liable to a *bonâ fide* holder of a bill fraudulently accepted in the name of the firm by a co-partner who had previously committed an act of bankruptcy. The case was distinguished from *Thomason* v. *Frere*

Lacy *v.* Woolcott

(*b*) See *per* Bayley, J., in *Harvey* v. *Crickett*, 5 M. & S. 341.

(*c*) 4 Burr. 2174. See, also, *Burt* v. *Moult*, 1 Cr. & M. 525, a similar case.

(*d*) 10 East, 418.

(*e*) See, accordingly, *Burt* v. *Moult*, 1 Cr. & M. 525. It is said that partnership bills ought in the case of the bankruptcy of one partner, to be endorsed by his trustee and the solvent partners, see *Abel* v. *Sutton*, 3 Esp. 108, and *Ramsbottom* v. *Lewis*, 1 Camp. 279. But it is clear that this is not necessary to enable a *bonâ fide* holder for value without notice to sue on the bill. See *Lacy* v. *Woolcott*, 2 D. & R. 458; *Ex parte Robinson*, 3 D. & Ch. 376, and C. P. Cooper, Ca. in Ch. temp. Brougham, 162.

(*f*) *A fortiori* is a bill given by him in the name of the firm for his separate debt invalid as against the payee, *Heilbut* v. *Nevill*, L. R. 4 C. P. 354, and 5 ib. 478.

(*g*) 2 D. & R. 458.

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(*z*) See, accordingly, *Fox* v. *Hanbury*, Cowp. 445; *Edwards* v. *Hooper*, 11 M. & W. 363.

(*a*) *Ante*, p. 649.

disposition of the property of the partnership, is determined as from the date of the act of bankruptcy. Indeed, so far as he is concerned, he may be regarded as a sole trader whose power of dealing with property in his own right ceases on an act of bankruptcy (*b*). On this ground, amongst others, the assignees in *Hague* v. *Rolleston* (*c*), recovered from a creditor of a firm goods of the firm transferred to him by the bankrupt after he had committed an act of bankruptcy, for the purpose, apparently, of preferring him to other creditors. On the same ground, it was determined in *Thomason* v. *Frere* (*d*), that the indorsement of a partnership bill by two out of three partners, conferred no title on the indorsee, the indorsement having been made after the two indorsers had committed acts of bankruptcy (*e*). This case is very important, and is a clear authority for the proposition that when a partner becomes bankrupt, all his authorities to bind the firm by dealings in the ordinary course of business, are to be deemed as having been determined by the act of bankruptcy (*f*).

Hague *v.* Rolleston.

Thomason *v.* Frere.

This doctrine, however, must not be carried too far. It has already been seen that persons who hold themselves out as partners, are liable for the acts of each other done in the ordinary course of business, although they may have been done without authority. On this principle, it was held in *Lacy* v. *Woolcott* (*g*), that a solvent partner was liable to a *bonâ fide* holder of a bill fraudulently accepted in the name of the firm by a co-partner who had previously committed an act of bankruptcy. The case was distinguished from *Thomason* v. *Frere*

Lacy *v.* Woolcott

(*b*) See *per* Bayley, J., in *Harvey* v. *Crickett*, 5 M. & S. 341.

(*c*) 4 Burr. 2174. See, also, *Burt* v. *Moult*, 1 Cr. & M. 525, a similar case.

(*d*) 10 East, 418.

(*e*) See, accordingly, *Burt* v. *Moult*, 1 Cr. & M. 525. It is said that partnership bills ought in the case of the bankruptcy of one partner, to be endorsed by his trustee and the solvent partners, see *Abel* v. *Sutton*, 3 Esp. 108, and *Ramsbottom* v. *Lewis*, 1 Camp. 279. But it is clear that this is not necessary to enable a *bonâ fide* holder for value without notice to sue on the bill. See *Lacy* v. *Woolcott*, 2 D. & R. 458; *Ex parte Robinson*, 3 D. & Ch. 376, and C. P. Cooper, Ca. in Ch. temp. Brougham, 162.

(*f*) *A fortiori* is a bill given by him in the name of the firm for his separate debt invalid as against the payee, *Heilbut* v. *Nevill*, L. R. 4 C. P. 354, and 5 ib. 478.

(*g*) 2 D. & R. 458.

deeds and documents belonging to the clients of the firm, a motion by the solvent partner for delivery to him of such deeds and documents was refused, upon the ground that, without the consent of the clients, the Court had no right to order their papers to be delivered to one partner only (*r*).

But they have a right to see them;

But although the trustee of one partner has no right to the custody of the partnership books, the solvent partners can be summoned before the Court, and be compelled to produce them, and to answer questions relative to the dealings of the bankrupt (*s*), although it may not even be alleged that there is anything due to him from the firm (*t*).

and to bring actions to recover partnership debts.

The trustee has power, with the leave of the Court, to bring actions in the names of himself and of the solvent partners; indemnifying the latter, however, against costs, if their names are used only for the sake of form, and they claim no benefit from the action (*u*). So the solvent partners may use the name of the trustee, upon indemnifying him if he declines to take any active part in the proceedings (*v*); but they may sue on contracts without joining the bankrupt (*w*).

Solvent partner will be appointed receiver.

If disputes as to the management of the partnership affairs arise between the trustee and the solvent partners, and there is no reason for distrusting the latter, the Court will appoint one of them receiver of the partnership property, directing him to give security, to pass his accounts, and to furnish the trustee with proper accounts, and to allow him at all reasonable times to inspect the partnership books (*x*).

Right to wind up the affairs

The power of the solvent partners to wind up the affairs of

(*r*) *Davidson* v. *Napier*, 1 Sim. 297. Surely the solvent partner had more right to them than the assignees.

(*s*) See 46 & 47 Vict. c. 52, § 27; Bank. Rules, 1886, rr. 69 and 70; *Ex parte Trueman*, 1 D. & C. 464.

(*t*) *Ex parte Levett*, 1 Gl. & J. 185.

(*u*) See 46 & 47 Vict. c. 52, § 113. See *Ex parte Wilson*, 2 Deac. 387, and 3 M. & A. 219, as to general orders authorising assignees to sue.

(*v*) *Ex parte Owen*, 13 Q. B. D. 113; *Whitehead* v. *Hughes*, 2 Cr. & M. 318, and 2 Dowl. Pr. Ca. 258, and 4 Tyr. 92.

(*w*) 46 & 47 Vict. c. 52, § 114.

(*x*) See *Ex parte Stoveld*, 1 Gl. & J. 303; *Freeland* v. *Stansfeld*, 2 Sm. & G. 479.

of the firm, personal to the solvent partners.

the partnership is, however, personal to themselves, and arises from the confidence originally placed in them by the bankrupt, and which is continued to be placed in them by the Court so long as there is no reason to the contrary. The right cannot be transferred; and therefore, where partnership goods were seized by the sheriff under an execution against a solvent partner, and the execution creditor purchased from the sheriff all the execution debtor's share and interest in the partnership, and then proceeded to sell the partnership effects, an injunction restraining such sale was granted by the Court of Chancery, at the suit of the assignees of the other partner, who was bankrupt (*y*).

If there is only one partner living in this country, his copartners being either dead or abroad, and he becomes bankrupt, the trustee in that case winds up the affairs of the partnership as well as the private affairs of the bankrupt (*z*).

Sales, &c., by solvent partners.

Notwithstanding the doctrine that by an adjudication of bankruptcy against one partner the firm is dissolved, and the trusteee of the bankrupt partner becomes tenant in common of the partnership effects with the solvent partners, they can sell the partnership goods and chattels, and the trustee of the bankrupt partner has no *locus standi* against a *bonâ fide* purchaser from them (*b*). In *Fox* v. *Hanbury* (*c*), the leading case on the subject, one of several partners became bankrupt; afterwards, partnership goods were *bonâ fide* sold to the defendant by the solvent partners, and after the sale the firm was adjudged bankrupt; the assignees of the firm sought to recover the goods from the purchaser, upon the ground that by the bankruptcy of one of the partners the firm was dissolved, and the solvent partners had no power afterwards to dispose of the partnership effects. Lord Mansfield, in a most carefully considered judgment, held that the action would not lie; and for two reasons, viz., first, upon the broad ground that, after a

Fox *v.* Hanbury.

(*y*) *Fraser* v. *Kershaw*, 2 K. & J. 496.

(*z*) See *Hankey* v. *Garratt*, 1 Ves. J. 236; *Everett* v. *Backhouse*, 10 Ves. 98; *Barker* v. *Goodair*, 11 Ves. 86; *Dutton* v. *Morrison*, 17 Ves. 210.

(*b*) *Sed quære* if they are only partners in the profits, see *Meyer* v. *Sharpe*, 5 Taunt. 74.

(*c*) Cowp. 445. See, also, *Smith* v. *Stokes*, 1 East, 363; *Smith* v. *Oriell*, 1 East, 368.

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partnership had been dissolved by the bankruptcy of one partner, persons who had dealt with the other partners without notice of the dissolution, acquired a right against the solvent partners and the assignees of the bankrupt partner; and secondly, upon the technical ground that the assignees could not claim to be more than tenants in common with the purchaser, and that *trover* would not lie at the suit of one tenant in common against his co-tenant, unless under very special circumstances.

Harvey *v.* Crickett.

In *Harvey* v. *Crickett* (*d*), which was not an action of *trover*, but *assumpsit for money had and received*, the plaintiffs, as assignees of a bankrupt partner, sought to recover from the defendant, creditors of the firm, money paid to them by the solvent partner after the act of bankruptcy; but it was held that the action would not lie; not, however, because the plaintiffs and the defendant were tenants in common, but because, notwithstanding the bankruptcy of one of the partners, the other was entitled to apply the partnership assets in payment of the partnership debts.

Morgan *v.* Marquis.

Again, in *Morgan* v. *Marquis* (*e*), the assignees of a bankrupt partner sought to recover from the agent of the firm monies received by him from the sale of goods effected by him after the bankruptcy, by the desire of the solvent partner; but it was held that the action would not lie, because it was competent for the solvent partner to deal with the property as he had done.

Principle and effect of foregoing cases.

These cases have been referred to thus in detail, in order to show that they rest on something more satisfactory than the technical doctrine that trover will not lie by one tenant in common against the other. Although this doctrine was, no doubt, sufficient for the decision of *Fox* v. *Hanbury*, *Smith* v. *Stokes*, and *Smith* v. *Oriell*, and was apparently thought by the Court of Exchequer, in *Buckley* v. *Barber* (*f*), to afford the

(*d*) 5 M. & S. 336. *Woodbridge* v. *Swann*, 4 B. & Ad. 633, and *Smith* v. *Goddart*, 3 Bos. & P. 465, are nearly similar cases, and in them there was notice of the bankruptcy.

(*e*) 9 Ex. 145. See, also, *Lewis* v. *White*, 2 N. R. 81, Ex., where the assignees sued an auctioneer in trover for partnership property sold by the orders of the solvent partners.

(*f*) 6 Ex. 182.

only reason by which those decisions could be justified, yet it is submitted that those cases, together with the others just referred to, are, in fact, authorities for the proposition that, notwithstanding the bankruptcy of one partner, the solvent partners can deal with the partnership property as if no bankruptcy had intervened, and can consequently confer a title, not only to an undivided share in, but to the whole of, any of the property which they assume to dispose of in the ordinary way of business, and to persons dealing with them *bonâ fide* (*g*).

Ex parte Robinson.

The case of *Ex parte Robinson* (*h*) goes the whole length of the doctrine here contended for. There A. and B. were partners. A. committed an act of bankruptcy, and afterwards B. accepted bills in the name of the firm, as a security for a previously contracted obligation. On the subsequent bankruptcy of B. it was held that the holders of these bills were entitled to prove against the joint estate of A. and B.; for, as between the firm and *bonâ fide* holders of the bills for value, B.'s authority to accept them for himself and co-partner, and for a partnership debt, could not be disputed.

Bill accepted in name of firm after its bankruptcy not bills of the firm for all purposes.

But although a bill accepted by one partner in the name of the firm, and after the bankruptcy of one of its members, is the bill of the firm, it is obviously a very different thing from the bill of a firm in which all the partners are solvent; and an agreement to exchange bills of a firm for something else, is not performed by the delivery of bills of the firm, after some or one of its members are bankrupt. This was the ground of decision in *Ex parte McGae* (*i*). There A., B. and C. were bankers; D., a customer of the bank, was in the habit of receiving bills from various people; and it was agreed between

Ex parte McGae.

(*g*) See, accordingly, *Fraser* v. *Kershaw*, 2 K. & J. 496. See, also, *Tupper* v. *Haythorne*, before Sir Wm. Grant, and reported in a note to Gow, N. P. Rep. 135. See further on this subject generally, note 2 M. at p. 133 of the Appendix to 1 Mont. Part.

(*h*) 3 D. & Ch. 376, and 1 Mon. & A. 18, reversing *Ex parte Ellis*, Mon. & Bl. 249. *Ramsbottom* v. *Duck*, 1 Mont. Part. App. note 2 M.; *Ramsbotham* v. *Cator*, 1 Stark. 228; *Ramsbottom* v. *Lewis*, 1 Camp. 279; and *Abel* v. *Sutton*, 3 Esp. 108, must be considered as overruled so far as they are inconsistent with the case in the text.

(*i*) 19 Ves. 606. See, too, *Jombart* v. *Woollett*, 2 M. & Cr. 389.

him and the bank, that he should indorse and pay the bills into the bank, and receive in exchange its notes. This agreement was acted on. A. and B. became bankrupt; but D., without knowledge of that fact, continued to pay in bills, and to receive the notes of the bank. Afterwards C. became bankrupt; a joint adjudication was made against A., B. and C. It was held that their assignees were bound to return to D. the bills paid by him since the bankruptcy of A. and B.; for although he had received notes for such bills, those notes were not such notes as he had stipulated for, and was entitled to: they were notes, not of A., B. and C., but, in substance, of C. and the assignees of A. and B.

Validity of acts of solvent partners not dependent on absence of notice of bankruptcy.

It will have been observed, that the validity of *bonâ fide* dealings of solvent partners after the bankruptcy of their co-partners, does not depend on the clause in the Bankruptcy act relating to *bonâ fide* dealings and transactions with bankrupts, without notice of any act of bankruptcy committed by them. That clause increases, but is not essential to the safety of persons *bonâ fide* dealing with partners who have committed no act of bankruptcy. *Harvey* v. *Crickett* (*k*) and *Woodbridge* v. *Swann* (*l*) are conclusive on this head.

(*c*) *Execution creditors.*

Conflicting rights of trustee and execution creditors.

Subject to the qualifications introduced by statute, the title of an execution creditor was always liable to be overridden by the commission of an act of bankruptcy on the part of the debtor, before the goods taken in execution were actually sold (*m*).

The statutory enactment now in force is 46 & 47 Vict. c. 52, §§ 45 and 46, which are as follows. It will be observed that there is no distinction between traders and non-traders.

Restriction of rights of creditor under execution or attachment.

§ 45. (1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the pre-

(*k*) 5 M. & S. 336; and *ante*, p. 672.

(*l*) 4 B. & Ad. 633.

(*m*) See *Cooper* v. *Chitty*, 1 Sm. L. C., and note there.

sentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

(2.) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver (n).

Duties of sheriff as to goods taken in execution.

§ 46. (1.) Where the goods of a debtor are taken in execution, and before the sale thereof notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods to the official receiver or trustee under the order, but the costs of the execution shall be a charge on the goods so delivered, and the official receiver or trustee may sell the goods or an adequate part thereof for the purpose of satisfying the charge.

(2.) Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding twenty pounds, the sheriff shall deduct the costs of the execution from the proceeds of sale, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him.

(3.) An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall in all cases acquire a good title to them against the trustee in bankruptcy.

The above clauses apply as well to cases where one partner is bankrupt, and the same partner is the execution debtor, as to those where all the partners are bankrupt, and all are execution debtors: it will also be probably held to apply where one partner only is bankrupt, and the execution is against the firm for a partnership debt (*o*); provided the Court is in a position to ensure a proper distribution of the assets of the firm amongst the creditors thereof. But if a firm carries on business, and has property abroad, and some of the partners are resident

Case where some partners are foreign.

(n) *Heathcote* v. *Livesley*, 19 Q. B. D. 285. See *Ex Hobson*, 33 Ch. D. 493, as to elegit. See as to protected seizures not being executions, *Ex parte Dickin*, 4 Ch. D. 534, and *Krehl* v. *Great Central Gas Co.*, L. R. 5 Ex. 289. A winding-up order followed by the appointment of an interim manager, was not an execution or attachment within the meaning of § 183 of the act of 1849, *Abraham* v. *Lee*, 3 Drew. 637, 654, &c.; Att. 3 Jur. N. S. 65.

(o) Following the analogy of the old law, see *Exeter* v. *Goodair*, 11 Ves. 78, and *Dutton* v. *Morrison*, 17 Ves. 210. See, too, *Ex Wait*, 1 J. & W. 619; *Anon.*, 12 Mod. 446.

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there, and a creditor has, by proceedings instituted abroad against the foreign house, taken its effects there in execution, he will not be interfered with by the courts here, at the instance of the trustee of a bankrupt member of the firm residing in this country (*p*). As the Court in such a case cannot ensure a proper distribution of the partnership assets amongst all the creditors of the firm, it will not deprive any of those creditors of the advantages which they may have obtained, and to which they are entitled by the laws of another country. If, however, the creditor has received more than the amount of his debt, he will be made to account to the trustee for the difference (*q*).

Right of trustee to part of proceeds of sale under execution.

Before the Judicature acts it was held that where A. and B. were partners, and A. committed an act of bankruptcy, and a separate creditor of B. took the partnership property in execution, and sold it, A.'s trustee, although not entitled to recover the property sold, or its value, was entitled to part of the proceeds of its sale; and in the absence of evidence to the contrary, to one-half of such proceeds (*r*). If, however, the trustee of a bankrupt firm sold its property, a creditor who had previously issued execution against that property for a separate debt of one of the partners, could not sue the trustees for that partner's share of the proceeds of the sale (*s*). The effect of the Judicature act on such cases as these has been already considered (*t*).

SECTION III.—OF THE DOCTRINE OF REPUTED OWNERSHIP.

1. *Generally.*

Reputed ownership.

From the time of James the First, and since, it has been thought proper by the Legislature to declare that upon the

(*p*) See *Brickwood* v. *Miller*, 3 Mer. 279. See, too, the excellent judgment of C. J. Eyre, in *Phillips* v. *Hunter*, 2 H. Bl. 410, and the case of *Waring* v. *Knight*, referred to by him.

(*q*) *Brickwood* v. *Miller*, 3 Mer. 284.

(*r*) *Mayhew* v. *Herrick*, 7 C. B. 229. Compare *Morgan* v. *Marquis*, 9 Ex. 145.

(*s*) *Garbett* v. *Veale*, 5 Q. B. 408.

(*t*) *Ante*, book iii. c. 5, § 4.

bankruptcy of any trader his creditors shall have the benefit not only of his own property, but also of all such goods of other people as at the time of his bankruptcy are in his possession, order, or disposition, with their permission. Under the old acts such property did not, like the bankrupt's own property, *vest* in the assignees; but an order for sale was made, and when made, was retrospective, and enabled them or the purchaser from them, as the case might be, to sue for the goods (*u*). Under the Bankruptcy act, 1883, however, this distinction does not appear to exist (*x*).

Object of above enactments.

The object of these enactments is to prevent a trader from obtaining undue credit by being allowed to parade as his own, property which in fact belongs to other people; and notwithstanding the very general language of the enactments, their application has always been controlled by a reference to the mischief which they were designed to prevent; and as the habits of a trading community vary, it may well happen that circumstances which are at one time calculated to deceive are not so at another. Whether, therefore, property in the possession of a bankrupt, but not belonging to him, will pass to his trustee by virtue of the doctrine of reputed ownership, will depend upon the circumstances under which, and the purposes for which, they are in his possession (*y*).

By the Bankruptcy act, 1883 the reputed ownership clause is as follows:—§ 44 enacts that the property of a bankrupt divisible amongst his creditors shall include,—

(iii.) All goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under

(*u*) The order might be made retrospectively, as in *Re Heslop*, 1 De G. M. & G. 477. See, as to the order for sale, *Quartermaine* v. *Bittleston*, 13 C. B. 133; *Freshney* v. *Carrick*, 1 H. & N. 653; and as to its conclusiveness, *Graham* v. *Furber*, 14 C. B. 134; *Ex parte Wood*, 4 De G. M. & G. 861; and as to restraining a sale under it, *Mather* v. *Lay*, 2 J. & H. 374.

(*x*) 46 & 47 Vict. c. 52, § 44 (iii.) and § 54.

(*y*) See as to customs of trade, &c., *Ex parte Brooks*, 23 Ch. D. 261; *Ex parte Turquand*, 14 Q. B. D. 636; *Ex parte Wingfield*, 10 Ch. D. 591; *Ex parte Vaux*, 9 Ch. 602; *Ex parte Watkins*, 8 ib. 520; *Priestley* v. *Pratt*, L. R. 2 Ex. 101; *Ryall* v. *Rowles*, 1 Ves. S. 348; *Joy* v. *Campbell*, 1 Sch. & Lef. 328; *Hamilton* v. *Bell*, 10 Ex. 545; *Horn* v. *Baker*, 9 East, 215, and 2 Sm. L. C.

such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section (*z*).

Upon this enactment the following observations require attention:—

1. Property must be personal.

First, as to the property.—The reputed-ownership clause does not extend to land or any interest therein; and not therefore to leaseholds (*a*), equities of redemption or the like (*b*); nor to fixtures, even though removable as between landlord and tenant (*c*). But with the exception of choses in action other than debts due to the bankrupt in respect of his trade or business, all pure personal estate is included in the clause (*d*). It includes, for example, ships, notwithstanding the registry acts (*e*).

Choses in action.

Debts due to the bankrupt in respect of his trade or business (*f*) are within the operation of the clause. But all other choses in action are excepted, *e.g.*, debentures (*g*), policies of insurance (*h*), shares in partnerships (*i*), shares in companies (*k*) and equitable interests therein (*l*).

(*z*) 46 & 47 Vict. c. 52, § 44 (iii.), and see § 168 for the definition of goods and property.

(*a*) *Roe* v. *Galliers*, 2 T. R. 133.

(*b*) *Jones* v. *Gibbons*, 9 Ves. 407. But as to money directed to be raised by sale or mortgage, see *Re Hughes*, 2 Hem. & M. 89.

(*c*) *Horn* v. *Baker*, 9 East, 215, and 2 Sm. L. C.; *Whitmore* v. *Empson*, 23 Beav. 313; *Mather* v. *Fraser*, 2 K. & J. 536; *Ex parte Scarth*, 1 M. D. & D. 240; *Ex parte Cotton*, 2 ib. 725; *Boydell* v. *McMichael*, 1 Cr. M. & R. 177; *Ex parte Wilson*, 4 D. & C. 143.

(*d*) See *Ryall* v. *Rowles*, 1 Ves. S. 348, as to debts; *Hornblower* v. *Proud*, 2 B. & Ad. 329, as to negotiable instruments; *Edwards* v. *Martin*, 1 Eq. 121.

(*e*) *Monkhouse* v. *Hay*, 2 Brod. & Bing. 114, affirming *Hay* v. *Fairbairn*, 2 B. & A. 193; *Robinson* v. *MacDonnell*, 5 M. & S. 228; *Ex parte Burn*, 1 Jac. & W. 378; *Ex parte Batson*, Cooke's Bank. L. 355, ed. 8.

(*f*) *I.e.*, debts connected with his trade, not all debts contracted whilst he is a trader. See *Ex parte Rensburg*, 4 Ch. D. 685; *Ex parte Kemp*, 9 Ch. 383.

(*g*) *Ex parte Rensburg*, 4 Ch. D. 685.

(*h*) *Ex parte Ibbetson*, 8 Ch. D. 519.

(*i*) *Ex parte Fletcher*, 8 Ch. D. 218. See, also, *Longman* v. *Tripp*, 2 Bos. & P., N. S. 67; *Ex parte Foss*, 2 De G. & J. 230.

(*k*) *Whinney* v. *Colonial Bank*, 11 App. Ca. 426, reversing S. C. 30 Ch. D. 261, and overruling *Ex parte Union Bank of Manchester*, 12 Eq. 354. Older decisions may now be disregarded.

(*l*) *Ex parte Barry*, 17 Eq. 113.

2. Property must be in the order or disposition of the bankrupt.

Secondly, as to the order and disposition.—The act requires that the goods and chattels shall be in the bankrupt's possession, order, or disposition as reputed owner. Goods therefore which are in the bankrupt's possession, but not as reputed owner, are not within the clause (*m*). On the other hand, actual possession on the part of the bankrupt is not necessary. If the goods are in the hands of a servant of a bankrupt or in the possession of a third party, to whom the bankrupt has lent them, and who is bound to return them when required, they are in the bankrupt's order and disposition (*n*). But if goods are in the possession of a third party who is entitled to a lien upon them, the trustee is not entitled to the goods as being in the bankrupt's possession (*o*).

Bills of sale.

Nor does the registration of a bill of sale necessarily prevent the goods comprised in it from remaining in the order and disposition of the vendor or mortgagor (*p*).

As to debts.

Debts are deemed to be in the possession, order, or disposition of him who has the power of giving a valid discharge for the money payable in respect of them, and of transferring them in the market without exciting suspicion. Consequently a mere assignment of debts, although it may be valid enough between the assignor and the assignee, will not have the effect of taking them out of the order and disposition of the former. To effect this, notice of the assignment must be given to the debtor (*q*).

As to the sufficiency of the notice.

What amounts to a sufficient notice of an assignment is often not easy to decide. It seems, however, that it is immaterial by whom the notice is given (*r*); that a verbal communication,

(*m*) See *Priestley* v. *Pratt*, L. R. 2 Ex. 101, where the goods were left with the bankrupt for the owner's convenience. See, also, *Shrubsole* v. *Sussams*, 16 C. B. N. S. 452, where the bankrupt's name had been painted out from over his own shop.

(*n*) *Hornsby* v. *Miller*, 1 E. & E. 192.

(*o*) See *Greening* v. *Clarke*, 4 B. & C. 316; *Ex parte Arbouin*, De G. 359; *Ex parte Taylor*, Mont. 240; and compare *Hoggard* v. *Mackenzie*, 25 Beav. 493, where the person setting up the lien was only a servant of the bankrupts.

(*p*) *Badger* v. *Shaw*, 2 E. & E. 472; *Stansfeld* v. *Cubitt*, 2 De G. & J. 222. Compare *Ex parte Hooman*, 10 Eq. 63; *Ashton* v. *Blackshaw*, 9 Eq. 510.

(*q*) *Ryall* v. *Rowles*, 1 Ves. S. 348; *Ex parte Monro*, Buck, 300.

(*r*) See *Ex parte Agra Bank*, 3 Ch. 555; *Re Rawbone*, 3 K. & J. 300; *Re Langmead*, 20 Beav. 20.

if given in the course of business, is as effectual as a written notice (*s*); that notice by advertisement, if seen by the person to whom notice ought to be given, is sufficient (*t*): and that notice to one partner is notice to the firm (*u*); and notice to one director or officer of a company, whose duty it is to receive it and act upon it or communicate it to the company, is notice to the company (*x*); provided that such director or officer is not the person whose interest in the company is the subject-matter of the transaction to be notified (*y*).

Notice of dissolution of partnership.

Notice of a dissolution of partnership, and that one of the partners will receive and pay all debts, is not notice that he alone is entitled to receive payment of the debts due to the firm, and is therefore insufficient to take such debts out of the reputed ownership of the firm (*z*).

3. In his trade or business.

Thirdly.—The act requires that the goods shall be in the possession, &c., of the bankrupt in his trade or business. This is important. What is in a person's trade or business depends on what he trades in or what his business is, and on where the particular goods are (*a*).

4. Property must be in

Fourthly, as to the time of possession.—The reputed-ownership

(*s*) *Alletson* v. *Chichester*, L. R. 10 C. P. 319; *Ex parte Agra Bank*, 3 Ch. 555; *North British Insur. Co.* v. *Hallett*, 7 Jur. N. S. 1263; *Re Shelley*, 4 De G. J. & S. 543; *Ex parte Richardson*, M. & Ch. 43; *Gale* v. *Lewis*, 9 Q. B. 730. Mere casual knowledge by a secretary is, however, not enough. *Société Générale de Paris* v. *Tramways Union Co.*, 14 Q. B. D. 424, and 11 App. Ca. 20; *Re Barr's Trust*, 4 K. & J. 219; *Ex parte Watkins*, 2 M. & A. 348; *Ex parte Burbridge*, 1 Deac. 131; *Edwards* v. *Martin*, 1 Eq. 121.

(*t*) *Lloyd* v. *Banks*, 3 Ch. 488.

(*u*) *Ante*, p. 141.

(*x*) *Alletson* v. *Chichester*, L. R. 10 C. P. 319; *Browne* v. *Savage*, 4 Drew. 635; *Ex parte Richardson*, M. & Ch. 43; *Gale* v. *Lewis*, 9 Q. B. 730; *Pinkett* v. *Wright*, 2 Ha. 120. Notice to the liquidator, if the company is being wound up, is sufficient. *Wragge's case*, 5 Eq. 284; and see *ante*, p. 143.

(*y*) *Browne* v. *Savage*, 4 Drew. 635; *Ex parte Nutting*, 2 M. D. & D. 302; *Ex parte Boulton*, 1 De G. & J. 163. Compare *Re Shelley*, 4 De G. J. & S. 543; *Duncan* v. *Chamberlayne*, 11 Sim. 123; *Thompson* v. *Speirs*, 13 Sim. 469; *Ex parte Wilkinson*, ib. 475. *Ex parte Rose*, 2 M. D. & D. 131, must be considered overruled.

(*z*) *Ex parte Burton*, 1 Gl. & J. 207; *Ex parte Usborne*, ib. 358; *Ex parte Sprague*, 4 De G. M. & G. 866. Compare *Ex parte Woodgate*, 2 M. D. & D. 394.

(*a*) See *Ex parte Lovering*, 24 Ch. D. 31; *Ex parte Sully*, 14 Q. B. D. 950. See, also, *Colonial Bank* v. *Whinney*, 30 Ch. D. 261; *Ex parte Nottingham Bank*, 15 Q. B. D. 441.

possession of bankrupt at the time of his bankruptcy.

clause only extends to goods and chattels in the bankrupt's order and disposition at the time of the commission of the act of bankruptcy to which the adjudication relates (*b*). Therefore, although such property may have been left in the bankrupt's order and disposition for a long time, and although he may thereby have acquired a false credit, still, if before he has committed an act of bankruptcy, they have been taken out of his order and disposition, his trustee will have no claim to them (*c*).

In a case where the goods of one partner were in the order and disposition of the firm, but were insured in the name of their owner, and the goods were burnt, and afterwards the firm became bankrupt, the proceeds of the policy were held not to form part of the joint estate of the firm, although the goods themselves would have done so had they continued undestroyed (*d*).

Bonâ fide dealings without notice of bankruptcy.

The effect of removing goods from the order and disposition of a bankrupt after he has committed an act of bankruptcy, turns on the *bona fides* of their owner, and on his knowledge or ignorance of the act of bankruptcy; for it is held that a removal of goods is a dealing or transaction within the meaning of the protecting clauses (*e*). Consequently, although a person's goods and chattels may be with his consent in the order and disposition of a trader who commits an act of bankruptcy, yet, if such person afterwards, *bonâ fide* and without notice of such act of bankruptcy, takes those goods out of the trader's order and disposition, they will be protected from the claims of his trustee (*f*).

(*b*) See 46 & 47 Vict. c. 52, §§ 43 and 44 (iii.).

(*c*) See *Ex parte Phillips*, 4 Ch. D. 496; *Stansfeld* v. *Cubitt*, 2 De G. & J. 222; *Jones* v. *Dwyer*, 15 East, 21; *Smith* v. *Topping*, 5 B. & Ad. 674; *Price* v. *Groom*, 2 Ex. 542; *Ex parte Foss*, 2 De G. & J. 230; *Sinclair* v. *Wilson*, 20 Beav. 324. See, also, *Ex parte Littledale*, 6 De G. M. & G. 714; *Ex parte Masterman*, 4 D. & Ch. 751, which related to shares.

(*d*) *Ex parte Smith*, Buck, 149, and 3 Madd. 63; and see *Ex parte Browne*, 6 Ves. 136; *Ex parte Parry*, 5 ib. 575.

(*e*) As to which, see *ante*, p. 664, and *Isitt* v. *Beeston*, L. R. 4 Ex. 159.

(*f*) *Re Styan*, 1 Ph. 105; *Graham* v. *Furber*, 14 C. B. 134; *Brewin* v. *Short*, 5 E. & B. 227. See, too, *Ex parte Dobson*, 2 M. D. & D. 685, and *Burn* v. *Carvalho*, 4 M. & Cr. 690.

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5. Property must be in bankrupt's possession with the consent of the true owner.

Fifthly, as to the consent of the true owner.—Goods and chattels which, at the time of the commission of an act of bankruptcy by a trader, are in his order and disposition, in fraud of, or against, or without the will of the true owner, are not within either the words or the spirit of the reputed-ownership clause (*g*). After a *bonâ fide* demand by the owner to have the goods restored to him, they cannot be said to remain with his consent, or by his permission, in the possession of the bankrupt; and although, therefore, they do continue in his possession until he becomes bankrupt, his trustee must restore them (*h*).

Who are considered true owners.

The expression true owner includes creditors having an equitable or legal charge or lien upon goods and chattels left by their consent in the order and disposition of the bankrupt (*i*). Consequently, the liens of such persons on goods so left are lost in the event of the bankruptcy of their debtor (*k*).

Cases to which the doctrines of reputed ownership do not apply.

Having now alluded to the circumstances required to bring a case within the reputed-ownership clause, it is proposed to advert shortly to the non-application of that clause to property which, although apparently within its words, is not within its spirit.

Property in possession of bankrupt for legitimate purposes.

The doctrine of reputed ownership is confined to those cases in which possession of the goods by the bankrupt is not justified by any known custom of trade (*l*), nor by any *bonâ fide* purpose requiring him to have them under his control (*m*). If, therefore,

(*g*) *Ex parte Ward*, 8 Ch. 144; *West* v. *Skipp*, 1 Ves. S. 239; *Ex parte Richardson*, Buck, 480. See, also, *Acraman* v. *Bates*, 2 E. & E. 456, as to goods at sea.

(*h*) *Ex parte Ward*, 8 Ch. 144; *Smith* v. *Topping*, 5 B. & Ad. 674; *Brewin* v. *Short*, 5 E. & B. 227; *Re Slee*, 15 Eq. 69. As to the effect of giving instructions to demand, see *Ex parte Phillips*, 4 Ch. D. 496.

(*i*) *Ryall* v. *Rowles*, 1 Ves. S. 348; *Hornsby* v. *Miller*, 1 E. & E. 192; *Re Slee*, 15 Eq. 69.

(*k*) See last note, and *Hoggard* v. *Mackenzie*, 25 Beav. 493; and see as to mortgages by deed where the mortgagor retains possession, *Freshney* v. *Carrick*, 1 H. & N. 653; *Spackman* v. *Miller*, 12 C. B. N. S. 659, and *Ex parte Harding*, 15 Eq. 223, where the bill of sale was registered.

(*l*) *Ante*, p. 677, note (*y*).

(*m*) See *Priestley* v. *Pratt*, L. R. 2 Ex. 101; *Hamilton* v. *Bell*, 10 Ex. 545; *Joy* v. *Campbell*, 1 Sch. & Lef. 328; *Holderness* v. *Rankin*, 2 De G. F. & J. 258.

goods are entrusted to factors or brokers or known agents to be disposed of by them in the ordinary course of trade, and they become bankrupt, such goods do not pass to their trustees; for the possession of the goods were not calculated to deceive any one conversant with mercantile operations (*n*).

Trust property.

So, again, property vested in one person in trust for another does not on the bankruptcy of the trustee become divisible amongst his creditors, either under the reputed ownership clause or otherwise (*o*). But the trust must be a *bonâ fide* trust, and not fraudulent, *i.e.*, not created for the purpose of giving the trustee the apparent ownership in order to conceal the true state of things (*p*).

Goods held for specific purpose.

In conformity, however, with the general rule relating to trust property, where goods and chattels are in the hands of a bankrupt, in order that he may apply them for a specific purpose, *e.g.*, in payment of debts owing to him by the owner of the goods, the trustee in bankruptcy must so apply them, notwithstanding the reputed ownership clause (*q*).

2. *Particularly as regards partners.*

Application of doctrine of reputed ownership to partners.

The preceding general notice of the doctrine of reputed ownership will, it is hoped, suffice to render its application to partners readily intelligible. So far as partners are concerned, the doctrine in question derives its chief importance from the effect it produces on the distribution of their assets; for it

(*n*) See *Ex parte Bright*, 10 Ch. D. 566; *Ex parte Wingfield*, ib. 591; *Ex parte Flyn*, 1 Atk. 185; *Collins* v. *Forbes*, 3 T. R. 316, and the cases in the last note. Compare *Ex parte Buck*, 3 Ch. D. 795, where the bankrupt was not known to be a factor.

(*o*) 46 & 47 Vict. c. 52, § 44, cl. 1; *Joy* v. *Campbell*, 1 Sch. & Lef. 328; *Ex parte Geaves*, 8 De G. M. & G. 291; *Bankhead's Trusts*, 2 K. & J. 560; *Ex parte Gillett*, 3 Madd. 28; *Ex parte Martin*, 19 Ves. 491; *Ex parte Smith*, 4 D. & Ch. 579.

(*p*) *Ex parte Watkins*, 2 M. & A. 348, S. C. *Ex parte Burbridge*, 1 Deac. 131, reversing *Ex parte Watkins*, 4 Deac. & Ch. 87. See, also, *Ex parte Ord*, 2 M. & A. 724; *Ex parte The Lancaster Canal Co.*, Mon. & Bl. 94, and further, as to secret trusts, *per* Lawrence, J., in *Horn* v. *Baker*, 9 East, 215, and 2 Sm. L. C.

(*q*) *Ex parte Brown*, 3 M. & A. 471. See other cases, *ante*, p. 653.

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results from the reputed ownership clause, that in the event of the bankruptcy of a firm, whatever is in the reputed ownership of the firm is distributable as its joint estate, whilst whatever is in the reputed ownership of some individual partner is distributable as his separate estate. And this rule prevails over all others; for when a case of reputed ownership is once established, it is not of the least consequence to whom the property in question really belongs. As an instance of this, reference may be made to *Ex parte Hare* (*r*), in which furniture belonging to one partner only, but kept in the office of the firm, and used there as part of the partnership effects, was, on the bankruptcy of the firm, distributed as joint estate. The same principle, probably, led to the decision in *Ex parte Hunter* (*s*), in which there were three partners, but one of them had no interest whatever in anything except the profits; it was contended that under these circumstances there was no joint property of the three, but it was held that the property of the two must be distributed as if it were the property of the three.

Effect of doctrine on joint and separate estate.

Ex parte Hare.

Ex parte Hunter.

Liens destroyed by doctrines of reputed ownership.

Again, if goods and chattels are in the reputed ownership of one or more partners, the liens of the other partners upon such goods and chattels will be overridden in favour of the creditors of those in whose order and disposition the goods and chattels were at the time of the bankruptcy (*t*). Thus, in the case of *Hoggard* v. *Mackenzie* (*u*), where a Scotch firm had an establishment in London, which was conducted in its name by a manager, who had a lien on the goods consigned to him by his principals for advances made by him, it was held, on the bankruptcy of the firm, that goods in the possession of the manager were in the reputed ownership of the firm, and that his lien could not prevail against the assignees.

Hoggard *v.* Mackenzie.

Possession of one partner generally possession of the firm.

As a general rule, however, property of the firm in the possession of one partner for the purposes of the partnership is not in his order and disposition so as to form part of his

(*r*) 1 Deac. 16; 2 Mont. & A. 478, *per* Erskine, C. J. Sir J. Cross thought the furniture was in point of fact partnership property. Compare *Ex parte Murton*, 1 M. D. & D. 252.

(*s*) 2 Rose, 382.

(*t*) See *Ryall* v. *Rowles*, 1 Atk. 184.

(*u*) 25 Beav. 493.

separate estate; he is himself a true owner and his possession is that of the firm (*x*).

No joint estate created where one partner only is bankrupt.

But the doctrines of reputed ownership only apply to that which is in the order and disposition of a bankrupt; whilst, therefore, if one partner only is bankrupt the joint estate of the firm may possibly be treated as his separate estate by being in his order and disposition (*y*), his separate estate cannot be treated as joint estate by reason of its being in the order and disposition of himself and his co-partners (*z*).

The application of the doctrine of reputed ownership to partners, seldom presents peculiar difficulties, except when there has been a change in the firm, or where there is a dormant partner; but its application in these cases requires special notice.

1. Reputed ownership where there has been a change in the firm.

First, where there has been a change in the firm.—It follows from the principles examined in the preceding pages, that a mere change in the firm, whether by the introduction of a new or the retirement of an old partner, does not necessarily cause a change in the reputed ownership of the property of the old firm. This is particularly true of debts owing to the old firm, and of merchandise belonging to it, but in the hands of third persons; and there is abundant authority to show that debts and goods left in the reputed ownership of the old firm, although in fact belonging to the new firm, must, in the event of bankruptcy, be treated as the joint estate of the old firm.

Property of old firm continuing in its reputed ownership.

Ex parte Burton.

In *Ex parte Burton* (*a*) a firm of three partners, A., B., and C., was dissolved. A. continued the partnership business, and the debts due to the firm were assigned to him by B. and C. The dissolution was advertised, and the advertisement stated that all debts by or to the firm would be paid or received by A. No other notice of A.'s exclusive title to the debts was given. A. became bankrupt, and shortly afterwards A., B., and C. became bankrupt. It was held that the debts assigned to A.

(*x*) See *infra*, for cases showing this to be so.

(*y*) It cannot be so treated if the joint estate is in the joint possession of all the partners, *Ex parte Dorman*, 8 Ch. 51. See, also, *Ex parte Fletcher*, 8 Ch. D. 218.

(*z*) See *Ex parte Taylor*, 2 M. D. & D. 753.

(*a*) 1 Gl. & J. 207. See, too, *Ex parte Usborne*, ib. 358; *Ex parte Hawtrey*, 7 Jur. 71; *Ex parte Leaf*, 1 Deac. 176, where one member of the old firm had died.

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were in the reputed ownership of A., B., and C.; for although A., as a partner, was entitled to receive the debts without reference to the assignment, still, until notice of that assignment was given to the debtors, they were as much at liberty to pay their debts to B. or C. as to A.

Ex parte Sprague.

So, in *Ex parte Sprague* (*b*), a firm of A. and B. dissolved partnership; the dissolution was advertised in the *Gazette;* and the debtors of the firm were, by a circular, requested to pay their debts to A. The debts due to the firm were, in fact, awarded to A. by an arbitrator appointed by him and B. to determine the terms of dissolution. On the subsequent bankruptcy of A., and of A. and B., it was held that the debts due to A. and B. were in the order and disposition of the firm; for its debtors had had no notice that A. had become solely entitled to those debts, the circulars amounting to no more than a request that the debtors would pay their debts to A. on behalf of the firm.

Ex parte Harris.

So with goods. If one of two partners retires and assigns his share and interest in the partnership property to the other, and part of that property consists of goods in the docks or at a wharfingers, and notice of the assignment is not given to the custodian of the goods, they will, on the bankruptcy of the two partners, be treated as forming part of the joint estate, and not as part of the separate estate of the partner to whom they were assigned (*c*).

Reputed ownership of old firm determined by notice.

On the other hand, if proper notice of a change of ownership is given, that which was the property of the old firm will become part of the estate of the new firm. Further, if A. is the owner of goods in the custody of a third person, and A. takes B. into partnership with him, and gives notice to such person to hold the goods for A. and B., instead of for A. as formerly, and then A. and B. become bankrupt, those goods will be treated as in the reputed ownership of A. and B., although B. may have been a merely nominal partner, having no share in the assets of the partnership (*d*); nor will a lien on

(*b*) 4 De G. M. & G. 866; compare *Ex parte Woodgate*, 2 M. & D. 394, as to the sufficiency of the notice in this case.

(*c*) *Ex parte Harris*, 1 Madd. 583.

(*d*) *Ex parte Arbouin*, De Gex, 359.

the goods in favour of the person in whose possession they are, affect the result, as between the estates of A., and of A. and B. (*e*).

Property of old firm not in the reputed ownership of continuing partners :

It has already been seen that the doctrine of reputed ownership only applies where a bankrupt's possession of goods is not justified by any *bonâ fide* purpose requiring him to have them in his custody (*f*). This principle is peculiarly applicable to partners; for the possession by one partner of the goods of the firm may be, and often is, perfectly justifiable; and if one partner only is in possession of partnership goods, and the circumstances are not such as to show that he is in exclusive possession for purposes unconnected with the partnership, those goods will not be treated as in his order and disposition (*g*). In conformity with this principle, if a firm is dissolved and all its property is vested in one partner upon trust to pay the debts of the firm, and he becomes bankrupt, the property of the firm is not distributable as his separate estate, but retains its character of joint estate (*h*). It is not even necessary that there should be any actual assignment to him upon an express trust; for if a firm is simply dissolved and one partner continues in possession of its property, he is held to be in such possession on behalf of the firm, and for the purpose of winding up its affairs, until the contrary is proved (*i*).

Ex parte Cooper;

Thus, in the case of *Ex parte Cooper* (*k*), A. and B. dissolved partnership; a notice of the dissolution was inserted in the *Gazette*, and such notice stated that A. would receive and pay all debts. A. continued to carry on the partnership

(*e*) Ibid.

(*f*) *Ante*, p. 682.

(*g*) *Ex parte Flyn*, 1 Atk. 185; *Ex parte Taylor*, Mont. 240, item 2nd. Compare *Ex parte Brown*, 9 Ch. D. 389, where partnership goods were mortgaged by two partners, and one retired, and the mortgagee allowed the goods to remain with the continuing partner.

(*h*) *Copeman* v. *Gallant*, 1 P. W. 314; and see *Ex parte Martin*, 19 Ves. 491; *Ex parte Fell*, 10 ib. 348; *Ex parte Pemberton*, 1 Deac. 421.

(*i*) *Ex parte Williams*, 11 Ves. 3; *Ex parte Taylor*, Mont. 240; *Ex parte Copeland*, 2 Mont. & A. 177. See, too, *Ex parte Vardon*, 2 M. D. & D. 694.

(*k*) 1 M. D. & D. 358. Compare *Graham* v. *McCulloch*, 20 Eq. 397, noticed *infra*, p. 689, where the bankrupt was in possession as purchaser.

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business in the name of the old firm, and he had its property in his possession. On the subsequent bankruptcy of A. and B., four months after the dissolution, it was held that the property of the firm in A.'s possession was not to be considered as in his order and disposition.

nor in that of surviving partner.

Where partnership property comes into the hands of one partner by survivorship, and that partner becomes bankrupt, very strong circumstances are required to show that such property is distributable as his separate, and not as joint, estate (*l*). If he continues to carry on the business, contrary to the trust reposed in him, and against the consent of the persons interested in the estate of the deceased partners, it is clear that the reputed ownership clause will not apply (*m*).

Difference where continuing partner carries on business for himself only.

Where, however, a partnership is dissolved, and one of the partners continues to carry on the business on his own account, and not for the purpose of winding up the affairs of the concern, and where, from lapse of time or otherwise, there is evidence to show acquiescence in such a course of proceeding on the part of the retired partners, then the nature of the partnership property will be held to have been changed, either by virtue of a tacit agreement between the partners themselves, or by virtue of the doctrine of reputed ownership; and in either case, that which was the joint estate of all will be distributable as the separate estate of the continuing partner (*n*). Thus, in *Horn* v. *Baker* (*o*), A., B., and C. dissolved partnership, and it was agreed that C. and a third person, D., should continue the business on their own account, and that they should pay an annuity to A., and after his death to his widow. The partnership property was not assigned to C. and D., but was allowed to remain in their possession for the purposes of their business; and on their bankruptcy, such of the property as consisted of

Horn *v.* Baker.

(*l*) See *Ex parte Manchester Bank*, 12 Ch. D. 917, and 13 ib. 465, *sub nom. Ex parte Butcher*; *Brett* v. *Beckwith*, 3 Jur. N. S. 31, noticed *ante*, p. 600; *Ex parte Leaf*, Mon. & Ch. 662; *Ex parte Heath*, 4 Jur. 28. Compare *Ex parte Taylor*, Mont. 240, noticed *infra*, p. 689.

(*m*) *Ex parte Butcher*, 13 Ch. D. 465; *Stocken* v. *Dawson*, 9 Beav. 239, and on appeal, 17 L. J. Ch. 282.

(*n*) See *West* v. *Skip*, 1 Ves. S. 242; *Ex parte Barrow*, 2 Rose, 252; *Ex parte Fell*, 10 Ves. 347. See, also, *Ex parte Hayman*, 8 Ch. D. 11.

(*o*) 9 East, 215.

goods and chattels was held to be in their order and disposition, with the consent of their true owner.

Graham v. McCulloch.

Again, in *Graham* v. *McCulloch* (*p*), the plaintiff and the defendant were partners, and in a suit for dissolution, and under an order of the Court, the plaintiff agreed to buy the business, and was let into possession as purchaser. Before the money was paid he became bankrupt, and it was held that the business assets belonged to his trustee as part of his estate, and that the partnership could only prove for the purchase-money. The property purchased had, in fact, passed in equity to the bankrupt, who was a mere debtor for the price. The property was not in the order and disposition of the firm, but in his own order and disposition with the consent of his co-partner.

Case of surviving partner.

Where the continuing partner is a surviving partner, the doctrines of reputed ownership may apply, although, as before observed, under ordinary circumstances they do not. In *Ex parte Taylor* (*q*), a debt due to a firm had, on the death of one of the partners, been compromised by the survivors, who, in lieu of payment, had accepted from the debtor two promissory notes, and a policy of insurance, which, on their bankruptcy, were in their possession. The Vice-Chancellor (Shadwell) held, that the debt, having been compromised by the surviving partners, was within the statute.

Ex parte Taylor.

2. Effect of reputed ownership on dormant partners.

Coldwell v. Gregory

Secondly, where there is a dormant partner.—The extent to which a dormant partner is affected by the doctrine of reputed ownership is by no means well settled. It was held in *Coldwell* v. *Gregory* (*r*), that if there was a partnership of two persons, one of whom was dormant, and the other of whom became bankrupt, the share of the former did not pass to the assignees of the latter; it being monstrous to deprive the dormant partner of his share in the partnership property, and yet leave him liable to all the partnership creditors. This case, how-

(*p*) 20 Eq. 397. The doctrine of reputed ownership seems hardly applicable to such a case. The property was in equity the bankrupt's; he was in possession, and was debtor for the purchase-money. So in *Ex parte Assignees of Brewster and West* 22 L. J. Bank. 62, there cited.

(*q*) Mont. 240, item No. 1.

(*r*) 1 Price, 119, 130, and 2 Rose, 149.

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ever, was generally considered as overruled by later authorities which were taken as having settled that, under the circumstances supposed, the whole partnership property was in the order and disposition of the bankrupt, within the meaning of the reputed ownership clause, and was, therefore, distributable as if it belonged to him alone (*s*). It naturally followed from this, that if a dormant partner retired, and the other partners continued to carry on the business of the firm, and became bankrupt, the partnership property was in their order and disposition, although it was agreed that they should apply it in payment of the debts of the old firm (*t*).

Reynolds *v.* Bowley.

However, in *Reynolds* v. *Bowley* (*u*) the Court of Exchequer Chamber held that where two partners carried on business in the name of one of them, the goods of the firm could not be treated, on the bankruptcy of that one, as in his order and disposition with the consent of the other partner. This decision, if based upon the ground that the so-called dormant partner was in joint possession with the bankrupt, offers no real difficulty; and the decision was based on this ground both by Willes, J., and Bramwell, B. But the majority of the Court (*x*) based their judgment on the much broader ground that the reputed ownership clause only applies where there is a true owner, and another person in possession with his consent; and that the clause has no application to cases where the person in possession is himself a joint owner, and is in possession by virtue of his ownership, and has as much right to possession as his co-owner.

Ex parte Hayman.

In *Ex parte Hayman* (*y*), however, property of a father was held to be in the reputed ownership of himself and his son who was not a partner, but was liable to some creditors as if he were a partner. The father, who was the true owner, had

(*s*) *Ex parte Dyster*, 2 Rose, 256; *Ex parte Enderby*, 2 B. & C. 389; *Ex parte Chuck*, Mont. 364, and 8 Bing. 469; *Re Curry*, 12 Ir. Eq. 382.

(*t*) *Ex parte Enderby*, 2 B. & C. 389; *Ex parte Chuck*, 8 Bing. 469; *Ex parte Jennings*, Mont. 45.

(*u*) L. R. 2 Q. B. 474, reversing ib 41. See *ante*, p. 685, notes (*y*) and (*z*).

(*x*) Kelly, C. B., and Byles, Keating and Smith, JJ. See the next case in which their reasoning was not altogether approved.

(*y*) 8 Ch. D. 11. See, also, *Re Rowland and Crankshaw*, 1 Ch. 421; *Ex parte Sheen*, 6 Ch. D. 235.

allowed his property to be in the reputed ownership of himself and son. The possession in this case was not in accordance with the title, whilst in *Reynolds* v. *Bowley* it was, and this seems to be the test in cases of this description.

Ex parte Wood.

In *Ex parte Wood* (*z*), A. and B. were partners, carrying on business in the name of A. They dissolved partnership, and it was agreed that A. should receive and pay all debts, and should retain the stock-in-trade, and pay B. for his interest. A. continued to carry on business on his own account, and became bankrupt, and afterwards B. became bankrupt. It was held that all the partnership debts and stock-in-trade were in A.'s order and disposition, as reputed owner at the time of his bankruptcy, and were consequently distributable as his separate estate, although the dissolution of partnership had not been publicly made known.

In the event of death of dormant partner.

Where, however, a dormant partner is dead, that which the ostensible partner is entitled to receive or have in his possession as survivor, cannot be said to be in his order and disposition with the consent of the true owner (*a*), unless perhaps the executors of the deceased allow him to continue to carry on business with their testator's assets.

SECTION IV.—THE ADMINISTRATION OF BANKRUPT PARTNERS' ESTATES.

1. *General principles.*

Administration of estates of bankrupt partners.

The principles according to which the property of bankrupt partners is distributed amongst the various persons having claims upon it, have next to be considered. These principles are the same, whether the estate to be administered is that of a single bankrupt partner, or that of a bankrupt firm (*b*).

(*z*) De Gex, 134.

(*a*) See *Brett* v. *Beckwith*, 3 Jur. N. S. 31, and other cases cited *ante*, p. 688, note (*l*).

(*b*) The same principles apply where a husband and his wife carry on one business in partnership (she having separate estate), and he carries on another business alone, *Re Childs*, 9 Ch. 508.

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Consequently, the present subject may be conveniently disposed of by examining the principles which apply to a joint adjudication against the firm, and by noticing, as may be required, such peculiarities as are met with when the bankruptcy is confined to one partner only.

Joint estate to be distinguished from separate estate, and joint debts from separate debts.

In administering the estate of a bankrupt firm or of some or one only of its members, it is necessary to distinguish accurately, first, joint from separate estate; and, secondly, joint from separate debts: for the leading principle of administration is, if possible, to pay the debts of the firm (joint debts) out of the assets of the firm (joint estate), and the private debts of each partner (separate debts) out of his own private property (separate estate): in other words, to make each estate pay its own creditors (*c*).

Ex parte Cook.

This rule, which has long been established, was clearly laid down by Lord King in *Ex parte Cook* (*d*), in the following words: "It is settled, and is a resolution of convenience, that the joint creditors shall be first paid out of the partnership or joint estate, and the separate creditors out of the separate estate of each partner; and if there be a surplus of the joint estate, besides what will pay the joint creditors, the same shall be applied to pay the separate creditors; and if there be, on the other hand, a surplus of the separate estate beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors" (*e*).

The rule thus laid down by Lord King still prevails.

(*c*) *Ex parte Elton*, 3 Ves. 239, and see 1 Mont. Part. 110, note 2 D.; Bank. Rules, 1886, r. 293.

(*d*) 2 P. W. 500. See, too, *Twiss* v. *Massey*, 1 Atk. 67; *Ex parte Crowder*, 2 Vern. 706.

(*e*) The principle enunciated above was departed from by Lord Thurlow, who allowed joint and separate creditors to be paid *pari passu*. Lord Rosslyn restored the old rule, but allowed the joint creditors to be paid *pari passu* with the separate creditors out of the separate estate in case of there being no joint estate. The rule thus modified by Lord Rosslyn was adhered to by Lord Eldon, and has not since been departed from. See *Ex parte Tuitt*, 16 Ves. 193; 1 Mont. Part. 110, note 2 D., and 67, note Q.; Cooke's Bank. Law, 259 *et seq.*, ed. 8. See, for some reasons justifying the rule, *Lodge* v. *Prichard*, 1 De G. J. & S. 613, 614, *per* Turner, L. J. The rule is adhered to without reference to the actual advantage or disadvantage to the creditors in any particular case. See *Nanson* v. *Gordon*, 1 App. Ca. 195; *Ex parte Collinge*, 4 De G. J. & Sm. 533.

The Bankruptcy Act, 1883, enacts as follows:—

§ 40. (3.) In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate.

Joint and separate dividends.

§ 59. (1.) Where one partner of a firm is adjudged bankrupt, a creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall not receive any dividend out of the separate property of the bankrupt until all the separate creditors have received the full amount of their respective debts.

(2.) Where joint and separate properties are being administered, dividends of the joint and separate properties shall, subject to any order to the contrary that may be made by the Court on the application of any person interested, be declared together; and the expenses of and incident to such dividends shall be fairly apportioned by the trustee between the joint and separate properties, regard being had to the work done for and the benefit received by each property.

And the Bankruptcy rules, 1886 (like the older rules) require distinct accounts to be kept of the joint and separate estates (*f*). The rule is as follows:—

Joint and separate estates accounts.

293. Where a receiving order has been made against debtors in partnership, distinct accounts shall be kept of the joint estate and of the separate estate or estates, and no transfer of a surplus from a separate estate to the joint estate on the ground that there are no creditors under such separate estate shall be made until notice of the intention to make such transfer has been gazetted.

Further the Bankruptcy rules, 1886, provide:—

Separate firms.

269. If any two or more of the members of a partnership constitute a separate and independent firm, the creditors of such last mentioned firm shall be deemed to be a separate set of creditors, and to be on the same footing as the separate creditors of any individual member of the firm. And where any surplus shall arise upon the administration of the assets of such separate or independent firm, the same shall be carried over to the separate estates of the partners in such separate and independent firm according to their respective rights therein.

(*f*) Bank. Rules, 1886, r. 293. A petition that separate accounts may be kept is improper where the general order applies; *Ex parte Green*, 1 D. & C. 382.

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And as regards costs and remuneration of the trustee they also provide :—

Apportionment of costs between joint and separate estates.

127. In the case of a bankruptcy petition against a partnership, the costs payable out of the estates incurred up to and inclusive of the receiving order shall be apportioned between the joint and separate estates in such proportions as the Official Receiver may in his discretion determine.

Costs out of joint or separate estates.

128. (1.) Where the joint estate of any co-debtors is insufficient to defray any costs or charges properly incurred prior to the appointment of the trustee, the Official Receiver may pay or direct the trustee to pay such costs or charges out of the separate estates of such co-debtors, or one or more of them, in such proportions as in his discretion the Official Receiver may think fit. The Official Receiver may also, as in his discretion he may think fit, pay or direct the trustee to pay any costs or charges properly incurred, prior to the appointment of the trustee, for any separate estate out of the joint estate or out of any other separate estate, and any part of the costs or charges of the joint estate incurred prior to the appointment of the trustee which affects any separate estate out of that separate estate.

(2.) Where the joint estate of any co-debtors is insufficient to defray any costs or charges properly incurred after the appointment of the trustee, the trustee, with such consent as is hereinafter mentioned, may pay such costs or charges out of the separate estates of such co-debtors, or one or more of them. The trustee, with the said consent, may also pay any costs or charges properly incurred for any separate estate, after his appointment, out of the joint estate, and any part of the costs or charges of the joint estate incurred after his appointment which affects any separate estate out of that separate estate. No payment under this rule shall be made out of a separate estate or joint estate by a trustee without the consent of the committee of inspection, of the estate out of which the payment is intended to be made, or, if such committee withhold or refuse their consent, without an order of the Court.

Apportionment of trustee's remuneration.

270. Where joint and separate estates are being administered, the remuneration of the trustee in respect of the administration of the joint estate may be fixed by the creditors, or (if duly authorised) by the committee of inspection of such joint estate, and the remuneration of the trustee in respect of the administration of any separate estate may be fixed by the creditors, or (if duly authorised) by the committee of inspection of such separate estate.

Keeping distinct accounts.

Where, under a separate adjudication, the trustee possesses himself of the assets of the firm, he must keep similar distinct accounts, so as not to pay the separate creditors of the bankrupt out of the assets of the firm, nor the creditors of the firm out of the separate property of the bankrupt (*g*).

(*g*) See *Ex parte Voguel*, 1 Atk. 132, as to the old practice. See, too, Cooke's Bank. Law, 267, ed. 8, and the cases of *Ex parte Tate*, *Ex parte Hayward*, *Ex parte Burnaby*, there cited See, too, Watson on

Correcting mistakes, &c.

If a creditor proves his demand against the wrong estate he will, on discovering his mistake, be allowed to transfer his proof to the other estate (*h*).

Where one estate has paid debts or expenses which ought to have been borne by the other, the amount so paid will be ordered to be refunded by the latter to the former estate (*i*).

Consolidation of estates.

If the joint and separate creditors both agree that the joint and separate estates shall be consolidated and administered as one fund, there is no reason why such consolidation should not take place. And where the two estates are so blended that they cannot be kept separate, they must be consolidated, whether all the creditors desire it or not; but if it is practicable to keep them separate, they will not be consolidated, except by consent (*k*). If a majority of a meeting of both classes of creditors are in favour of a consolidation, it will, nevertheless, not be made until after it has been ascertained by the Court to be for the general benefit (*l*). It is, however, to be observed that a consolidation of estates does not affect debts proved before the consolidation takes place; and if a debt has been properly proved against each of several estates, the creditor will not be prejudiced by their subsequent consolidation (*m*).

Comparison of the modes in which lawyers and accountants proceed in cases of bankruptcy.

The principle adopted in bankruptcy of making each estate pay its own creditors, often produces results strangely at

Part. 324, and 1 Mont. Part. note 2 D., p. 110, in notes; *Dutton* v. *Morrison*, 17 Ves. 209; *Re Wait*, 1 V. & W. 610. Again, when persons are connected in various partnerships, and a joint adjudication is obtained against them all, an order may be obtained for keeping separate accounts of the different firms, as well as the separate estates of each partner: *Ex parte Harlin*, 2 Bro. C. C. 15. But if there are several connected firms, one of which alone is made bankrupt, there can only be the common order for keeping separate accounts of the joint and separate estates of the partners composing it: *Ex parte Parker*, Cooke's Bank. Law, 272, ed. 8.

(*h*) *Ex parte Vining*, 1 Deac. 555.

(*i*) *Ex parte Rutherford*, 1 Rose, 201; *Ex parte Reid*, 2 ib. 84; and see *Rogers* v. *Mackenzie*, 4 Ves. 752, as to contribution between estates.

(*k*) *Ex parte Sheppard*, Mon. & Bl. 415.

(*l*) See *Ex parte Strutt*, 1 Gl. & J. 29; *Ex parte Part*, 2 Deac. & C. 1, where an inquiry was directed. In *Ex parte Smith*, 2 M. & A. 60, it was held unnecessary to serve the assignees before making a consolidating order: the consolidation having been found to be beneficial.

(*m*) *Ex parte Fuller*, 1 M. & A. 222,

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variance with the doctrine of equality, and with an accountant's notions of right and wrong. This cannot be better shown than by the following extract from a work already referred to on the subject of partnership accounts:

Comparison of the modes in which lawyers and accountants proceed in cases of bankruptcy.

"We will suppose A., a man worth 40,000*l.* clear, well known in London, and of extensive credit, to embark with an inventor, B., to carry into effect some invention which requires apparently more credit than actual capital; there being what may fairly be considered a most excellent prospect of success, and of turning the concern, as the phrase is, within a short space of time, *i.e.*, receiving from the anticipated profits of the concern, within the number of months in which the bills given by this partnership become due, sufficient money to meet them or take them up. Some accident intervenes, by which it becomes necessary for A., who undertakes to find money, to raise a sum to meet the numerous bills which the firm has ventured to put afloat, in expectation of their being taken up by the success of the project. A. raises upon his credit from several persons, perhaps at a distance in the country and altogether ignorant of his trading, what he himself considers only temporary loans, to the amount of 39,000*l.*, and brings this money into the firm, not as a loan but as capital. We will further suppose that this is insufficient, and that the firm, after a few more struggles, stops payment for 50,000*l.* owing to different individuals. A general meeting of all the creditors is called, at which there is a desire to settle the matter, and realise the effects as fast as possible, and for that purpose they put the matter into the hands of an accountant. If the accountant knew anything of the law of bankruptcy, he would see the difficulties; but if he simply followed out the mercantile principles, he would first take the accounts of the firm, and there find 50,000*l.* debt, and we will say 4000*l.* assets; and consequently a balance due to the firm from A. and B. to the amount of 46,000*l.*; of which A. would be indebted 23,000*l.* and B. 23,000*l.*, or in some other proportions as the case may be; but as B. is worth nothing at all, A. would be answerable for the whole. The accountant would then take A.'s accounts where he finds A.'s estate worth 40,000*l.*, and that he is liable to the firm for 46,000*l.*, and to other people for 39,000*l.*, making the whole amount of his liabilities 85,000*l.*, upon which he would declare a dividend of 9*s.* 4½*d.* He would, therefore, carry over to the firm, as a creditor for 46,000*l.*, the sum of 21,647*l.* 1*s.* 3*d.*, and to the private creditors 18,352*l.* 18*s.* 9*d.*, which distributed among the 39,000*l.*, would give them a dividend of 9*s.* 4½*d.* He would then proceed to distribute the effects of the firm, amounting to 21,647*l.* 1*s.* 3*d.*, recovered from A., and the assets in hand, viz., 4000*l.*, and this, being altogether 25,647*l.* 1*s.* 3*d.*, distributed among 50,000*l.*, would give a dividend of 10*s.* 3*d.* Such would be the result of the accountant's operation. But some of the separate creditors would probably be dissatisfied with this result, and strike a docket, and have the accounts taken in bankruptcy. The Court of Bankruptcy would immediately overthrow the accountant's labours, and take the accounts upon an entirely different plan. It would direct that the separate estate should be distributed amongst the separate creditors, and if there were any surplus, that it should be paid over to the

joint estate. Therefore, as 40,000*l.* would be distributed among 39,000*l.*, they would be all paid in full, and 1000*l.* passed over to the joint estate, making the assets of the joint estate 5000*l.*, which, being distributed among the 50,000*l.*, would be exactly 2*s.* in the pound. Thus the Court of Bankruptcy would give the separate creditor 20*s.* in the pound, and the joint creditors 2*s.*; while, according to the mercantile principle, the separate creditors ought to have had but 9*s.* 4½*d.*, and the joint creditors 10*s.* 3*d.* Such is the difference between the practice of the two classes. But if the firm had had no property at all, or the partners, in a fit of despair, had pledged all the assets for more than they were worth, the Court of Bankruptcy would have adopted the accountant's principle, and suffered the joint creditors to go in for their dividends upon the separate estate" (*n*).

2. *Of joint estate and separate estates.*

Joint and separate estates.

What property is distributable as partnership property, and what is not, depends mainly upon two questions, viz.:—

1. Whether, as between the partners themselves, the property in question belonged to them jointly, or to some or one of them to the exclusion of the others; and

2. Whether the property in question, no matter to whom it belonged, was, at the time of the bankruptcy, in the reputed ownership of the firm, or in that of some or one only of its members.

The principles applicable to these questions having been already fully examined (*o*), it is only necessary, in the present place, to notice those peculiar difficulties which are met with when it becomes necessary to distinguish joint from separate estate for the purposes of administration in bankruptcy.

Ex parte Ruffin.

It was decided in the celebrated case of *Ex parte Ruffin* (*p*), that agreements between partners altering the character of partnership property are binding on the trustee in bankruptcy, if made *bonâ fide*, and before the commission of any act of bankruptcy. This case has been followed by many others, and it is therefore now beyond dispute that if a partnership is dissolved, and a *bonâ fide* agreement is come to between the partners, to the effect that what was the partnership property shall become the property of him who continues the business,

(*n*) Cory on Merc. Accounts, p. 124 *et seq.*, ed. 2.

(*o*) *Ante*, Bk. III. c. 4, and Bk. IV. c. 2, § 3, and *ante*, § 3.

(*p*) 6 Ves. 119.

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and afterwards the firm or the continuing partner becomes bankrupt, that which was the partnership property cannot be distributed as the joint estate of the firm, but must be treated as the separate estate of the continuing partner (*q*). The creditors of the firm have no lien on its property which can prevent the partners from *bonâ fide* changing its character, and converting it into the separate estate of one of them (*r*).

Even if the liabilities of the partnership exceed its assets at the time when the agreement is made, still, if the partners act *bonâ fide*, and not with a view to defraud their creditors, the ownership in that which before the agreement was partnership property will have changed, and the joint creditors of the firm cannot insist on its distribution as joint estate (*s*).

Observations on agreements converting joint into separate estate, and *vice versâ*.

In order, however, that property of the firm may have lost its character of joint estate by agreement between its partners, the agreement must not be tainted with fraud, nor be still executory, nor leave the property subject to the liens of the partners for their own indemnity. If there be fraud, whether as between the partners themselves or solely as against creditors, the agreement will not be binding on the trustee in bankruptcy (*t*); and where both partners were insolvent, an assignment by one of them of his share to the other in consideration of a covenant by him to pay the partnership debts was held fraudulent and void as against the joint creditors (*u*).

Fraud.

Executory agreements.

Moreover, if the agreement to transfer or assign is still executory, the character of the property will not, in fact, have been changed at the time of the bankruptcy, and it must, there-

(*q*) *Re Simpson*, 9 Ch. 572; *Ex parte Walker*, 4 De G. F. & J. 509; *Ex parte Titner*, 1 Atk. 136; *Ex parte Fell*, 10 Ves. 347; *Ex parte Williams*, 11 ib. 6; *Ex parte Clarkson*, 4 D. & Ch. 56; *Ex parte Gurney*, 2 M. D. & D. 541; *Bolton* v. *Puller*, 1 Bos. & P. 539.

(*r*) *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Williams*, 11 ib. 6; *Stuart* v. *Ferguson*, Hayes (Ir. Ex.) 472. Compare the cases cited *infra*, note (*u*).

(*s*) *Ex parte Walker*, 4 De G. F. & J. 509; *Ex parte Peake*, 1 Madd. 346; *Ex parte Clarkson*, 4 D. & C. 66, *per* Sir G. Rose, and see *Ex parte Carpenter*, Mont. & MacAr. 1. Compare *Re Kemptner*, 8 Eq. 287, where the state of the firm was held to disprove *bona fides*.

(*t*) See *Ex parte Rowlandson*, 2 V. & B. 172, and 1 Rose, 416, and *Anderson* v. *Maltby*, 2 Ves. J. 244.

(*u*) *Ex parte Mayou*, 4 De G. J. & Sm. 664; *Re Kemptner*, 8 Eq. 287. Compare the cases in the last note but one.

fore, be distributed as if the agreement had not been entered into (*x*). Whether an agreement is executory or not, must depend upon its terms; the test, however, is to see whether there was, at the time of the bankruptcy, any act still to be done before the ownership could be considered by the partners as changed; if in any case there was such an act to be done, the trustee will not be bound by the agreement, whilst if there was not he will. In *Ex parte Wheeler* (*y*), a partner retired; the continuing partner was to take the partnership property, and to pay the retiring partner an annuity, and the father of the continuing partner was to become surety for payment of this annuity. The father, however, who was not a party to the agreement, declined to become surety, and on the bankruptcy of the continuing partner it was held that the agreement was not an executed agreement, and that the property of the firm had not therefore, by the agreement, become the property of the bankrupt. On the other hand, in *Ex parte Clarkson* (*z*), where a partner retired upon the terms of receiving a certain sum of money, partly in cash and partly in bills, and the cash was paid and the bills were given, it was held that the ownership in the partnership property had passed, although the bills were subsequently dishonoured (*a*).

Ex parte Wheeler.

Ex parte Clarkson.

Property must not be still subject to the liens of the other partners.

Again, even if it has been agreed between partners that on a dissolution the continuing or surviving partner shall be entitled to the assets of the firm, still so long as these assets continue subject to the right of the other partners to have them applied in discharge of the joint debts, the assets will continue joint for the purpose of distribution in the event of bankruptcy. To convert them into separate estate the agreement between the partners must be inconsistent with the continuance of this lien (*b*).

(*x*) *Ex parte Wheeler*, Buck, 25; *Ex parte Cooper*, 1 M. D. & D. 358; and see *Ex parte Clarkson*, 4 D. & Ch. 64, 67; and *Re Kemptner*, 8 Eq. 286.

(*y*) Buck, 25. See, also, *Ex parte Wood*, 10 Ch. D. 554.

(*z*) 4 D. & Ch. 56; S. C., nomine *Ex parte Gibson*, 2 M. & Ayr. 4. See *Ex parte Wood*, 10 Ch. D. 554, which was a similar case; but as no cash was paid, and the security was not given, the property continued joint.

(*a*) Compare also *Ex parte Cooper*, 1 M. D. & D. 358, and *Ex parte Gurney*, 2 ib. 541; *Re Kemptner*, 8 Eq. 286.

(*b*) See *Ex parte Dear*, 1 Ch. D. 514; *Ex parte Morley*, 8 Ch. 1026; *Ex parte Manchester Bank*, 12 Ch. D. 917, and 13 ib. 465, *sub nom. Ex parte Butcher*, where the joint assets were not converted. Compare *Re Simpson*, 9 Ch. 572, where

Evidence of such agreements.

The mere fact that a partnership has been dissolved, or that a partner has retired, will not be sufficient evidence of an agreement for the conversion of the joint estate of the firm into the separate estate of the continuing partner. It may be that the property has been entrusted to him simply for the purpose of winding up the affairs of the concern; and unless there be some agreement by virtue of which it has become his exclusively, it will in case of bankruptcy be distributable as joint estate (*c*).

Effect of doctrine of reputed ownership.

But, as before observed, whether property is as between the partners themselves the joint property of them all, or the separate property of some of them only, the nature of that property may for the purposes of distribution be altogether changed by reason of the doctrine of reputed ownership. To avoid this some change in the possession of the property should, if necessary, be made consistently with the agreement between the partners (*d*). Under ordinary circumstances if one partner owns all the property used for partnership purposes, and his co-partners have nothing more than an interest in the partnership business, still that property, if personal, will on the bankruptcy of the firm be distributable as the joint estate of all, and not as the separate estate of its true owner (*e*).

Effect of holding out.

Moreover, if A. allows B. to carry on business with his, A.'s, goods and on his, A.'s, behalf, although not in his name, but credit is given to them both on the supposition that they are partners, the property with which the business is carried on will be treated as the joint estate of the two, and not as the separate estate of A. (*f*).

they were. See, also, the cases in note (*e*), *infra*.

(*c*) *Ex parte Leaf*, 4 Deac. 287; *Ex parte Cooper*, 1 M. D. & D. 358; *Ex parte Williams*, 11 Ves. 3. The agreement need not be in writing, ibid., and see 4 D. & Ch. 67, *per* Sir G. Rose.

(*d*) See, as to goods in the possession of third parties, *Ex parte Harris*, 1 Madd. 583; as to debts, *Ex parte Sprague*, 4 De G. M. & G. 866; as to goods in the possession of the bankrupt himself, *Graham* v. *McCulloch*, 20 Eq. 397. These and other cases have been already adverted to. See § 3 of this chapter.

(*e*) See *Ex parte Hayman*, 8 Ch. D. 11; *Ex parte Hunter*, 2 Rose, 382; *Ex parte Owen*, 4 De G. & S. 351. Compare *Ex parte Murton*, 1 M. D. & D. 252.

(*f*) See *Re Rowland and Crankshaw*, 1 Ch. 421; *Ex parte Hayman*, 8 Ch. D. 11.

Where property is distributable as joint estate, the joint creditors take it as the promiscuous joint property of all the partners, without reference to the respective interests of the partners therein (*g*).

3. *Of joint, separate, and joint and separate debts.*

Of joint, separate, and joint and separate debts.

For the purpose of administering the estates of bankrupt partners, their creditors must be divided into three classes, viz. :—

1. The joint creditors of the firm (*h*), to whom all the partners are jointly liable (*i*).

2. The separate creditors of each partner, to whom the partners are only liable severally and *respectively*.

3. Joint *and* separate creditors, to whom the partners are not only liable jointly, but also separately for the same debt (*k*).

What is a debt of the firm and what is not, must be determined by the principles discussed in the first two chapters of the second book (*l*). Without repeating those principles it may be useful to recapitulate shortly the leading rules dedu-

(*g*) *Ex parte Hunter*, 2 Rose, 382.

(*h*) A curious misnomer. Joint creditors, properly speaking, are persons jointly entitled, and not, as here, persons who have nothing to do with each other, but happen to have the same joint debtors.

(*i*) The word separate is relative. Creditors may be separate relatively to one person, and joint relatively to another, *e.g.*, suppose a partnership of five ; creditors of any four are separate relatively to the creditors of the five, but are joint relatively to the respective creditors of each of the four. See Bank. Rules, 1886, r. 269, *ante*, p. 693.

(*k*) A creditor who has obtained judgment against several persons jointly, can levy execution against any one or more of them ; and therefore, in one sense judgment debtors may be said to be jointly and severally liable. This, however, does not render their creditor a joint and separate creditor. He is a joint creditor ; for his judgment is joint, and the remedies open to him do not alter the character of the right to enforce which they are given. See *Ex parte Christie*, Mont. & Bli. 352. No distinction is made between persons to whom all the partners are jointly indebted in connection with their partnership business, and other persons to whom they are also all jointly indebted. See *Hoare* v. *Oriental Bank Corp.*, 2 App. Ca. 589.

(*l*) The wife of a partner who has lent money to the firm, is a joint creditor of the firm, and ranks as such, *Ex parte Nottingham*, 19 Q. B. D. 88.

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cible from them, and bearing upon the proof of debts in bankruptcy.

1. What debts are originally joint and what separate.

First, as to the orginal nature of a debt.—As a general rule, that which is the debt of the firm is not the separate debt of any of its members who have not made themselves severally liable for it (*m*); but

Frauds and breaches of trust.

Breaches of trust, and frauds imputable to a firm, place the *cestuis que trustent* and defrauded creditors in the position of joint and several creditors (*n*); and

Debts.

A debt of a firm of two partners, of whom one is dormant, may, at the option of the creditor, be treated as the joint debt of the firm, or as the separate debt of the ostensible partner (*o*); and a debt of a firm of two partners, one of whom is merely nominal, may likewise, at the option of the creditor, be treated as the joint debt of the two, or as the separate debt of him who is in substance the whole firm (*p*).

Bills.

Bills accepted in the name of a trading firm give a right of proof against the joint estate to a *bonâ fide* holder for value without notice of the fact that they have been accepted or endorsed without authority (*q*); but not to a drawer affected with such notice (*r*); and if a separate creditor of one partner takes in payment a bill of the firm, he must, in order to entitle

(*m*) See *ante*, p. 192 *et seq.*; *Ex parte Dobinson*, 2 Deac. 341; *Ex parte Carlisle Canal Co.*, ib. 349; *Ex parte Appleby*, ib. 482; *Ex parte Benson*, 2 M. D. & D. 750, and as to bills and notes, *Ex parte Flintoff*, 3 M. D. & D. 726; *Ex parte Wilson*, ib. 57; *Re Clarke*, De Gex, 153; *Ex parte Buckley*, 14 M. & W. 469, and 1 Ph. 562, reversing *Ex parte Christie*, 3 M. D. & D. 736.

(*n*) See *ante*, p. 198 *et seq.* As to breaches of trust, see *Ex parte Poulson*, De Gex, 79; *Ex parte Barnewall*, 6 De G. M. & G. 801. Compare *Ex parte White*, 6 Ch. 397, where the moneys were held not to be trust moneys; and *Ex parte Geaves*, 8 De G. M. & G. 291, where, although there was a clear breach of trust by one partner, the others were not liable for it. See, as to the trustee, *Ex parte Burton*, 3 M. D. & D. 364. As to frauds, see *Ex parte Adamson*, 8 Ch. D. 807; *Ex parte Unity, &c., Banking Association*, 3 De G. & J. 63.

(*o*) *Ex parte Hodgkinson*, 19 Ves. 294; *Ex parte Norfolk*, ib. 458; *Ex parte Law*, 3 Deac. 541.

(*p*) See *Ex parte Arbouin*, De Gex, 359. See, also, *Scarf* v. *Jardine*, 7 App. Ca. 345, *ante*, pp. 197, 198.

(*q*) *Ex parte Bushell*, 3 M. D. & D. 615, and *ante*, p. 180 *et seq.*

(*r*) *Ex parte Holdsworth*, 1 M. D. & D. 475. As to indorsees with notice availing themselves of the ignorance of their indorser, see *Rooth* v. *Quin*, 7 Price, 193.

himself to prove against its joint estate, show that the bill was given with the sanction of the other partners (*s*).

Bills accepted in the name of one partner only do not give their holder a right to prove against the joint estate of the firm (*t*).

Money of which firm has had the benefit.

A separate creditor does not acquire a right to prove against the joint estate, simply because that estate has had the benefit of the money he seeks to recover; nor does the joint creditor acquire a right to prove against the separate estate of one partner because he alone has had such benefit (*u*).

2. Conversion of joint into separate debts, and *vice versâ*.

Secondly, as to the conversion of a joint into a separate debt, and vice versâ.—A joint creditor who releases one of his debtors, cannot prove against the estates of any of the others (*x*); and the doctrine of merger, by taking a higher security, or obtaining a judgment (before bankruptcy) (*y*), applies in bankruptcy as well as at law, and has a most important influence on a creditor's right to prove against the joint estate of a firm, or the separate estates of its members (*z*).

Merger.

A separate bond given to secure a joint debt creates a separate debt (*a*) and destroys the joint debt (*aa*). A judgment has the same effect (*b*); and a joint judgment against several

(*s*) *Ex parte Thorpe*, 3 M. & A. 716; *Ex parte Austen*, 1 M. D. & D. 247; *Ex parte Agace*, 2 Cox, 312; *Ex parte Bonbonus*, 8 Ves. 540; *Ex parte Goulding and Davies*, 2 Gl. & J. 118.

(*t*) *Ex parte Bolitho*, Buck, 100; but where the name of the firm and of the acceptor are the same, see *Ex parte Law*, 3 Deac. 541.

(*u*) *Ex parte Wheatley*, Cooke's Bank. Law, 534, ed. 8; *Ex parte Peele*, 6 Ves. 602; *Ex parte Hartop*, 12 ib. 349; *Ex parte Hunter*, 1 Atk. 223; *Ex parte Emly*, 1 Rose, 65; *Re Ferrar*, 9 Ir. Ch. 11.

(*x*) *Ex parte Slater*, 6 Ves. 146. So a creditor may, by dealing with his debtor, discharge that debtor's surety, and on the bankruptcy of the surety be precluded from proving against his estate. See *Ex parte Webster*, De Gex, 414, where the surety was a firm which had accepted bills sought to be proved against its joint estate.

(*y*) *Ex parte Christie*, Mon. & B. 352.

(*z*) See *ante*, Bk. II. c. 2, § 3.

(*a*) *Ex parte Flintoff*, 3 M. D. & D. 726.

(*aa*) *Ex parte Hernaman*, 12 Jur. 643.

(*b*) *Kendall* v. *Hamilton*, 4 App. Ca. 504. See *ante*, p. 193, and the Addenda; *Ex parte Higgins*, 3 De G. & J. 33. As to when the Court can go behind the judgment, and look to its consideration, see the cases in *Re Tollemache*, viz., *Ex parte Revell*, 13 Q. B. D. 720; *Ex parte Edwards*, 14 ib. 415; *Ex parte Anderson*, ib. 606. See, also, *Ex parte Lennox*, 16

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for a debt owing by them jointly and severally makes the debt joint only (*c*); but a separate judgment for a joint and separate debt, does not make it separate only (*d*).

Ex parte Waterfall.

Notwithstanding the effect of a judgment in merging the debt in respect of which it has been recovered, it was held in *Ex parte Waterfall* (*e*) that where a firm consisted of one partner in this country, and of other partners abroad, and a creditor of the firm sued the partner here and recovered judgment against him, the debt of the firm was not so extinguished as to preclude the creditor from proving against its joint estate on the subsequent bankruptcy of the judgment debtor.

Falling back on original debt after taking a security for it.

Where a creditor obtains an additional security for a pre-existing debt, and that security is not of such a nature as to merge the debt, he may, if the security becomes unavailable, fall back on the original debt. This is constantly done by the creditors of bankrupt partners; and the cases show that a creditor who takes a joint bill for a separate debt (*f*), or a separate bill for a joint debt (*g*), becomes, as he intended, a joint and several creditor, and does not lose his right of having recourse, in case of need, to his original debt, unless he has taken the fresh security in substitution for his original demand (*h*). If, however, he has done this, he cannot fall back on his first debt.

Ex parte Whitmore.

Thus in *Ex parte Whitmore* (*i*), upon the formation of a

ib. 315; *Ex parte Banner*, 17 Ch. D. 480; *Ex parte Kibble*, 10 Ch. 373.

(*e*) *Ex parte Christie*, Mon. & Bl. 352. But this does not apply to breaches of trust in respect of which there is a joint and several liability, see *Re Davison*, 13 Q. B. D. 50.

(*d*) *Drake* v. *Mitchell*, 3 East. 251; *Re Clarkes*, 2 Jo. & Lat. 212; *Ex parte Bate*, 3 Deac. 358.

(*e*) 4 De G. & S. 199, and 15 Jur. 214, sub nom. *Ex parte Jones*. See, too, *Ex parte Dunlop*, Buck, 253, and *Ex parte Stanborough*, 5 Madd. 89, as to actions against several partners, some of whom were outlawed.

(*f*) *Ex parte Seddon*, 2 Cox, 49; *Ex parte Lobb*, 7 Ves. 592; *Ex parte Meinertzhagen*, 3 Deac. 101; *Ex parte Hay*, 15 Ves. 4; *Ex parte Kedie*, 2 D. & Ch. 321.

(*g*) *Keay* v. *Fenwick*, 1 C. P. D. 745; *Bottomley* v. *Nuttall*, 5 C. B. N. S. 122; *Ex parte Hodgkinson*, 19 Ves. 291. See, too, *Ex parte Raleigh*, 3 M. & A. 670; *Ex parte Fairlie*, Mont. 17.

(*h*) In Byles on Bills, ed. 10, p. 381, it is said, "The taking of his separate bill from one of several partners for a joint debt will, as we have seen (*i.e.*, on p. 48), discharge the others." But this is going too far. See the last note, and *ante*, p. 247, where the cases referred to by Mr. Justice Byles are noticed.

(*i*) 3 Deac. 365. See, too, *Ex*

artnership between two persons, one of them wrote to his ankers, to whom he was indebted, and directed them to ansfer any balance due from him to the debit of the new firm; his was done, and the bankers drew on the firm for the nount of the balance; the bills were accepted by the new rm, but were not paid. The firm afterwards became bank- ipt, and it was held that the bankers, having exchanged ebtors, could not be considered as the separate creditors of heir old customer, and could only rank as joint creditors of he firm.

Unless, however, there has been a substitution of debtors, r unless a creditor has by reason of the doctrine of merger ecome deprived of his right to revert to his original debt, the equisition of a fresh security will not destroy the rights which e may have independently of that security.

Substitution of debtors can only be made with the creditor's consent.

With respect to the right of a joint creditor to prove against separate estate or of a separate creditor to prove against a int estate, on the ground that there has been a substitution debtors, or that a new right has been acquired, it is to be membered that there can be no such substitution or acqui- ion save by the creditor's consent. Consequently, if a rtnership is dissolved, and by agreement between the part- rs one of them is to continue the business and pay all the bts, the creditors of the firm do not become the separate ditors of the continuing partner unless they accede to the angement so entered into between him and his co-partners (*k*). Upon precisely similar grounds, a creditor of one person does nt become the joint creditor of him and another who enters o partnership with him, merely because the two partners e agreed between themselves that the debts of each shall be debts of both. Unless the creditor accedes to that arrange- nt, he is not bound by it, nor can he avail himself of it; position in fact is unaltered, he does not lose his old right, r does he gain any new one (*l*).

e Kirby, Buck, 511, and *Ex parte ohnson*, 2 M. D. & D. 146.

(*k*) *Ante*, p. 239 *et seq.*; *Ex parte Freman*, Buck, 471; *Ex parte Fry*, 1 D. & J. 96; *Ex parte Gurney*, 2 M. D. & D. 541; *Ex parte Appleby*, 2 Deac. 482.

(*l*) *Ante*, p. 205 *et seq.*; *Ex parte Jackson*, 1 Ves. J. 130; *Ex parte Peele*, 6 ib. 601; *Ex parte Williams*,

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Easier for separate creditor to become a joint creditor than *vice versâ*.

It is easier for a separate creditor to establish a right to prove against the joint estate, than for a joint creditor to establish a right to prove against a separate estate; for, whilst all that is necessary in the first case is to show that those who were not originally debtors, have become so (*m*), it is necessary in the last case to show that a person already a debtor with others, has taken his and their debt upon himself alone. The difficulty here adverted to does not arise from any legal doctrine, but from the circumstance that what such a debtor may do is *primâ facie* referable to his character of joint debtor, and does not therefore establish what is wanted, viz., his separate liability. For this reason it has been frequently held that a joint creditor of two or more persons does not become the separate creditor of one of them by entering into arrangements with him for the payment of the debt by him (*n*); and that in the case of a dissolution of partnership a creditor of the firm who merely treats the continuing partner as his debtor, does not acquire a right to prove against his separate estate (*o*). To entitle himself so to prove, the creditor must show either that the continuing partner has become separately liable for the

Buck, 13; *Re Littles*, 10 Ir. Eq. 275; *Ex parte Parker*, 2 M. D. & D. 511; *Ex parte Graham*, ib. 781; *Ex parte Hitchcock*, 3 Deac. 507. As to what is a sufficient accession, see *Rolfe* v. *Flower*, L. R. 1 P. C. 27; *Bilborough* v. *Holmes*, 5 Ch. D. 255; *Scarf* v. *Jardine*, 7 App. Ca. 345, noticed *ante*, pp. 197, 198. Mr. Cooke, indeed, lays it down that if new partners come into a firm, and it is agreed that the stock and debts of the old firm shall become those of the new firm, and the latter becomes bankrupt, the creditors of the old firm may prove against the joint estate of the new firm; and he cites *Ex parte Bingham* and *Ex parte Clowes*, 2 Bro. C. C. 595 (Cooke's Bank. Law, 534, ed. 8). The facts of the first of these two cases are not stated. *Ex parte Clowes* was a very peculiar case, and if it was ever an authority for the doctrine that a separate debt can, as between the partners and the creditor, become a joint debt, or *vice versâ*, without the privity of the creditor, the case must be considered as no longer law. See 1 Mont. Part., note 2 F., p. 117, in notes. Perhaps Mr. Cooke rested the right of proof on the absence of joint estate, as in *Ex parte Taylor*, 2 M. D. & D. 753.

(*m*) A written agreement is not necessary to establish this, *Ex parte Lane*, De Gex, 300.

(*n*) *Ex parte Raleigh*, 3 M. & A. 670; *Ex parte Fairlie*, Mont. 17; *Ex parte Smith*, 1 M. D. & D. 165.

(*o*) *Ex parte Appleby*, 2 Deac. 482; *Ex parte Gurney*, 2 M. D. & D. 541 *Ex parte Fry*, 1 Gl. & J. 96; *Ex parte Freeman*, Buck, 471.

debt for which he was already liable jointly with his former partners (*p*), or that there is no joint estate (*q*).

4. *Of the proof and payment of partners' debts generally.*

There is nothing peculiar in the mode of proving debts by or against partners, nor is there any difference between the claims which are provable by or against them and claims which are provable by and against other persons. For information on these subjects the reader is therefore referred to treatises on the law of bankruptcy.

Companies which are incorporated can prove their debts by a duly authorised officer, and a firm can prove by any of its members (*r*).

Bankrupt trustee ought to prove against his own estate.

If a bankrupt is a trustee, and is himself indebted to the estate vested in him, he ought himself to prove against himself on behalf of those whose trustee he is (*s*). It is important to bear this in mind in those cases in which an executor has carried on his testator's trade with assets which ought not to have been employed therein, and has subsequently become bankrupt.

Debts provable.

With respect to debts provable against bankrupts, several important alterations in the law have been made with a view to include all possible claims arising out of contract, so as to discharge the bankrupt therefrom. The present law is contained in the following enactment of the Bankruptcy act, 1883:—

Description of debts provable in bankruptcy.

§ 37. (1.) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust (*t*), shall not be provable in bankruptcy.

(*p*) See *Bilborough* v. *Holmes*, 5 Ch. D. 255, and the cases in the last two notes, and compare *Ex parte Bradbury*, Mon. & Ch. 625, where a joint creditor had acquired a right to prove against a separate estate.

(*q*) See *Ex parte Taylor*, 2 M. D. & D. 753. This matter will be alluded to hereafter.

(*r*) 46 & 47 Vict. c. 52 § 148.

(*s*) See *Ex parte Richardson*, Buck, 202, and 3 Madd. 138; *Ex parte Shaw*, 1 Gl. & Jam. 127.

(*t*) Before the act, demands arising from breaches of trust were provable, and were treated as arising out of contract rather than out of tort, *Emma Silver Mining Co.* v. *Grant*, 17 Ch. D. 122; *Ramskill* v. *Edwards*, 31 Ch. D. 100.

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(2.) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

(3.) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy (*u*).

(4.) An estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value.

(5.) Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the Court.

(6.) If, in the opinion of the Court, the value of the debt or liability is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable in bankruptcy (*x*).

(7.) If, in the opinion of the Court, the value of the debt or liability is capable of being fairly estimated, the Court may direct the value to be assessed, before the Court itself without the intervention of a jury, and may give all necessary directions for this purpose, and the amount of the value when assessed shall be deemed to be a debt provable in bankruptcy.

(8.) "Liability" shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money, or money's worth, whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or as matter of opinion (*y*).

Moreover, by Sched. 2, it is declared that as to future debts:

Future debts.

21. A creditor may prove for a debt not payable when the debtor committed an act of bankruptcy as if it were payable presently, and may receive dividends equally with the other creditors, deducting only thereout

(*u*) As to future calls, see *Re Mercantile Mutual Marine Ins. Ass.*, 25 Ch. D. 415. As to covenants to assign after-acquired property, *Collyer* v. *Isaacs*, 19 Ch. D. 342.

(*x*) Where no order is made, the debt is treated as provable, *Morgan* v. *Hardy*, 18 Q. B. D. 646.

(*y*) See, as to actions for torts, *Ex parte Brooke*, 3 Ch. D. 494, where a verdict was obtained before adjudication; and as to claims to indemnity, *Kellock* v. *Enthoven*, L. R. 9 Q. B. 241, and 8 ib. 458.

a rebate of interest at the rate of five pounds per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted.

Further it is enacted by § 10 as follows :—

Power of Court to stay proceedings.

§ 10. (2.) The Court may at any time after the presentation of a bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just.

Assets distributable *pari passu*.

With certain exceptions (*z*), the assets in the hands of the trustee are distributable *pari passu* amongst all the unsecured creditors for value of the bankrupt, without regard to the question whether they are creditors by specialty or by simple contract (*a*).

Secured creditors.

The position of secured creditors is peculiar and requires special notice.

What creditors have securities for the debts due to them and what have not, and the nature of the securities, if any, to which they are entitled are matters beyond the scope of the present work (*b*). But the rights of the drawers, acceptors, and indorsees of bills of exchange, which are secured by legal or equitable charges upon goods or other property, have so often to be considered in the event of the bankruptcy of commercial firms, that a few observations on such rights may not be out of place.

Secured bills.

Nothing is more common than for the owner of goods to pledge them in some form or other to some person, who, having them as his security, will accept a bill of exchange drawn upon him by their owner. The drawer then discounts the bill, and thus obtains cash.

As between the drawer and the acceptor the question con-

(*z*) The exceptions are enumerated in 46 & 47 Vict. c. 52, §§ 40, 41, and 42 ; they relate to rates, taxes, wages, apprenticeship fees, and rent. See as to Savings Banks, *Re Williams*, 36 Ch. D. 573.

(*a*) As to voluntary bonds, see *Ex parte Berry*, 19 Ves. 218 ; *Ex parte Hookins*, 3 De G. & S. 549.

(*b*) Execution creditors are secured by the seizure of the sheriff, *Ex parte Jones*, 10 Ch. 663 ; *Ex parte Jameson*, 3 Ch. D. 488 ; *Edwards* v. *Scarsbrook*, 3 B. & Sm. 280. See as to them, *ante*, p. 674 *et seq.*

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stantly arises as to the extent of the security; *e.g.*, whether the goods have been pledged for particular bills only, or to cover all the bills of the drawer, or to cover whatever may be due from the drawer to the acceptor, so that the proceeds are to be dealt with generally on account, the goods not being specifically appropriated to anything in particular. The rights of the drawer and acceptor obviously depend on the answers to be given to these questions, which are questions of fact, very often turning on correspondence and the course of dealing between the parties, and sometimes very difficult to determine (*c*).

Right of drawer.

But without solving these questions, it is to be observed, that the right of the drawer is to redeem the goods on paying the amount due upon them; or, if they have been sold, to have an account of their proceeds, and to have them applied in paying such amount, and to have the surplus paid back to him, subject to such lien or set-off, if any, as the acceptor may have against them on some other account.

Right of acceptor.

The acceptor, on the other hand, is entitled to hold the goods as a security and indemnity against his liability on the bill. If he pays the bill out of his own moneys, he becomes the creditor of the drawer for the amount, and can sue him for it, unless it is part of the agreement between them that before having recourse to the drawer personally the acceptor shall realize the goods and so reduce the liability of the drawer. In the absence, however, of some agreement to this effect, it seems that the drawer has no more right than any other mortgagor to have the security given by him realised before he is himself called upon for payment (*d*). The object of giving the security is to keep the acceptor out of cash advances, but not to prevent him from making advances on the credit of the drawer if the acceptor thinks proper to do so.

Effect of bankruptcy.

In the event of the bankruptcy of the drawer, his trustee is

(*c*) See, for example, *Ex parte Dever*, 13 Q. B. D. 766, and 14 ib. 611; *Re Broad*, 13 Q. B. D. 740, and *Re Gothenburg Commercial Co.*, 29 W. R. 358, there referred to.

(*d*) So long as the acceptor is solvent, the drawer does not seem to be entitled to have the goods realised, and applied in taking up the bills. His right seems to be to redeem the goods. See *Ex parte Dever* (No. 2), 14 Q. B. D. 611.

entitled to no greater rights than the drawer would be if solvent, unless indeed the goods can be claimed by the trustee under the reputed ownership clause. On the other hand, the acceptor has the same rights as before (*e*), with this qualification, that his right of action against the drawer is converted into a right of proving against his estate, and that if the right of proof is exercised the security must be given up (*f*).

of drawer;

In the event of the bankruptcy of the acceptor, his trustee can hold the goods subject to the right of the drawer to redeem them, or to have them applied in taking up the bills drawn against them (*g*). If the goods are sold by the trustee and they realise less than the amount of the bills, the trustee is entitled to the difference from the drawer; whilst if they realise more, the trustee must hand the difference to him, subject to any lien or set-off to which the proceeds may be subject on some other account. If the goods are sold before the bankruptcy, the proceeds, unless specifically appropriated to the bills, become a mere debt due to the drawer, for which he can only prove against the acceptor's estate (*h*).

of acceptor.

If the bill has been negotiated by the drawer, further complications arise. It is now clearly settled (*i*) that the indorsement of the bill by the drawer without more, does not confer upon the holder the benefit of the security given by the drawer to the acceptor (*k*), even although the bill refers to the goods and to a letter of advice accompanying it (*l*). But the benefit

Right of holder.

(*e*) See *Ex parte Flower*, 2 Mon. & A. 224, where the drawer's assignees received proceeds of the goods, and the acceptor was held entitled to have the money applied in taking up the bills. See, also, *Ex parte Imbert*, 1 De G. & J. 152.

(*f*) See *infra*, as to this.

(*g*) See *Ex parte Dever*, 13 Q. B. D. 766, and *Ex parte Dever* (No. 2), 14 ib. 611.

(*h*) *Ex parte Dever*, 13 Q. B. D. 766, and S. C. (No. 2), 14 ib. 611.

(*i*) Notwithstanding *Frith* v. *Forbes*, 4 De G. F. & J. 409, see the cases in the next notes, and especially *Phelps, Stokes & Co.* v. *Comber*, 29 Ch. D. 813; *Brown, Shipley & Co.* v. *Kough*, ib. 848.

(*k*) *Banner* v. *Johnston*, L. R. 5 Ho. Lo. 157, and the cases in the next two notes.

(*l*) *Robey and Co.'s Perseverance Iron Works* v. *Ollier*, 7 Ch. 695; *Ex parte Dever*, 13 Ch. D. 766; *Phelps, Stokes & Co.* v. *Comber*, 29 ib. 813, and *Brown, Shipley & Co.* v. *Kough*, ib. 848. These cases cannot be reconciled with *Frith* v. *Forbes*, unless it be on the grounds suggested in 29 Ch. D. 870–872.

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of the security, *i.e.*, the right to have the goods sold and applied in taking up the bill, may be transferred to the indorsee of the bill, and when such is the case he will be entitled to have the goods so applied (*m*). Unless, however, the holder is the transferee of the security as distinguished from the bill, his remedy is on the bill itself, viz., first against the acceptor, and secondly against the drawer. This, moreover, is the case not only when both drawer and acceptor are solvent, but also in the case of the bankruptcy of either of them (*n*).

But if both are bankrupt, the case is different; for the Court having then to administer both the estate of the drawer and the estate of the acceptor, will apply the goods pledged in taking up the bills which were drawn against them. This is the celebrated rule in *Ex parte Waring* (*o*), which is of such great importance in administering the estates of commercial firms.

Rule in Ex parte Waring.

The rule in *Ex parte Waring* is that if both the drawer and the acceptor of a bill of exchange become bankrupt, the holder of the bill is entitled to have any securities held by the acceptor for it applied in taking it up. The rule is based upon the following considerations: the property held by the acceptor for the bill cannot be applied in payment of his general creditors, because it is held by him for a particular purpose, and on trust to relieve the drawer from his obligation to pay the bill on which the acceptor is primarily liable, but which being bankrupt he cannot pay. On the other hand, the property cannot be applied in payment of the general creditors of the drawer because it is pledged to the acceptor, and the drawer is not entitled to have the property back except on redeeming it, or in other words himself paying the bill. The Court, therefore, applies the property in such a way as to give effect as far as possible to the respective rights of both drawer and acceptor under the circumstances of their being both

(*m*) As in *Inman* v. *Clare*, Johns. 769; *Re Agra and Masterman's Bank*, 2 Ch. 391.

(*n*) See the cases in the last four notes, and *Ex parte General South American Co.*, 10 Ch. 635; *Vaughan* v. *Halliday*, 9 Ch. 561.

(*o*) 19 Ves. 345. The principle of the rule was much discussed in *Royal Bank of Scotland* v. *Commercial Bank of Scotland*, 7 App. Ca. 366, and is clearly explained in *City Bank* v. *Luckie*, 5 Ch. 773. See, generally, Eddis on *Ex parte Waring*.

bankrupt, or, as the phrase is, according to the equities between the two estates. The result is that the securities are applied as both parties intended that they should be, viz., in taking up the bill in respect of which they were given (*p*). Moreover this rule has been extended to cases where the estates of the drawer and the acceptor are both insolvent, and are under judicial administration although not in bankruptcy (*q*).

Application of rule.

Such being the principle of the rule, it is obvious that whether the security is given to cover one bill or several is immaterial, except that if given for several the rule will benefit the holders of all of them (*r*); further the rule applies whether the value of the securities is less than the amount of the bills drawn against them or not (*s*); and whether the holders of the bills knew that they were secured or not (*t*). Nor is it necessary that the remitter of the bill should have endorsed it (*u*). But the right is subject to the prior rights of the joint creditors, if any, of the drawer and acceptor to have the securities treated as joint assets (*x*). The principle of these decisions applies where the drawer and acceptor are companies in liquidation, at all events, if they are also insolvent; but, it has been said, not otherwise (*y*). But the rule is based on the equities between the drawer and the acceptor, and has been held not to apply if the acceptor has a general lien on all securities of the drawer in his hands for the general balance of his account (*z*); nor where the bill holder has already received by way of dividend more than the value of the securities (*a*); nor where circumstances have occurred which have rendered the securities no longer applicable to take up the bill (*b*). The

(*p*) See the judgment of Cotton, L. J., in *Ex parte Dever* (No. 2), 14 Q. B. D. 623.

(*q*) *Powles* v. *Hargreaves*, 3 De G. M. & G. 430; *Ex parte Alliance Bank*, 4 Ch. 423; *Bank of Ireland* v. *Perry*, L. R. 7 Ex. 14; *Hickie & Co.'s case*, 4 Eq. 226.

(*r*) *Ex parte Dever* (No. 2), 14 Q. B. D. 611, where the security was given for some bills only, and the holders of them got paid in full.

(*s*) Ib.; *Powles* v. *Hargreaves*, 3 De G. M. & G. 430.

(*t*) *Ex parte Perfect*, Mont. 25.

(*u*) *Ex parte Smart*, 8 Ch. 220.

(*x*) *Ex parte Dewhurst*, 8 Ch. 965.

(*y*) *Hickie & Co.'s case*, 4 Eq. 226. *Sed qu.* See the cases in note (*q*).

(*z*) Ib. *Sed qu.* See *Ex parte Dever* (No. 2), 14 Q. B. D. 611.

(*a*) *Loder's case*, 6 Eq. 491.

(*b*) As in *Ex parte Alliance Bank*, 4 Ch. 423.

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circumstance, however, that the security was given to cover other liabilities besides the bill in question, is not material if in the events which have happened there is no other liability to be covered by it (*c*).

Proof of secured debts.

Passing now to the position of secured creditors in the event of the bankruptcy of their debtor, the rule is that a creditor whose debt is secured is not allowed to retain his security and also to prove in competition with the other creditors. Such a creditor cannot prove his debt or any part of it without giving the other creditors the benefit of his security (*d*). This, however, he can do in one of two ways, viz., either realise his security, or give credit for its value, and prove for the balance then remaining due to him; or give up his security altogether and prove for his whole debt (*e*). The trustee may redeem the security at its assessed value; or he may have the security sold (*f*). The valuation and proof by the creditor may be amended by leave of the Court (*g*); and, if the security is sold after being valued, the amount realised is to be treated as its value, and dividends are to be calculated on the balance and to be rectified accordingly if necessary (*h*).

Secured creditor not compellable to give up his security.

If the creditor's security is sufficient to pay what is due to him, there is no necessity for him to apply to the Court at all; but if it is insufficient, he commonly applies to the Court to have his security realised under its direction, to have the proceeds applied in discharge of his debt, and to have liberty to prove for the difference (*i*). The

(*c*) *City Bank* v. *Luckie*, 5 Ch. 773; but see, *contra*, *Levi & Co.'s case*, 7 Eq. 449.

(*d*) 46 & 47 Vict. c. 52, § 39, and Sched. 2, rr. 9 to 17. If he proves for the whole debt he loses the benefit of his security; *Couldery* v. *Bartrum*, 19 Ch. D. 394; *Ex parte Solomon*, 1 Gl. & Jam. 25; *Grugeon* v. *Gerrard*, 4 Y. & C. Ex. 119.

(*e*) 46 & 47 Vict. c. 51, § 39, and Sched. 2, rr. 9 to 17. See *Ex parte Prescott*, 4 D. & Ch. 23, in which the rule was applied to joint debts and joint securities.

(*f*) 46 & 47 Vict. c. 52, Sched. 2, r. 12.

(*g*) Ib. rr. 13 and 14.

(*h*) Ib. r. 15. See under the former act, *Société Gén. de Paris* v. *Green*, 8 App. Ca. 606, and *Couldery* v. *Bartrum*, 19 Ch. D. 394.

(*i*) Bonds, bills of exchange, and other personal securities in the hands of a creditor are treated like real securities. *Ex parte Hellier*, Cooke's Bank. 146, ed. 8. But not bills discounted by a banker and held pending discount, *Ex parte Schofield*, 12 Ch. D. 337.

trustee, however, has no power to compel a secured creditor to take this course; nor can the trustee deprive him of his security without paying in full what may be due to him upon it (*k*). Moreover, it must be borne in mind that an equitable mortgage may be created by deposit of deeds (*l*) without any written memorandum: and, if originally made for a particular debt, may be extended by parol to some other debt (*m*); and that a creditor who has a security not exclusively appropriated to a particular debt may, on the bankruptcy of his debtor, appropriate that security to any debt which may be owing to him by the bankrupt (*n*). Moreover, a security may be more extensive as against one person than as against another, *e.g.*, more extensive as against a principal debtor than as against his surety (*o*).

Observations on equitable securities.

The rule which precludes a secured creditor from retaining his security and also proving for his debt, applies only where the debt is payable out of the estate to which the security belongs; or in other words, only where the same estate is debtor to the amount due on the security, and creditor by the value of the same security (*p*). Consequently a creditor of a bankrupt firm of two partners, holding a security given by a larger firm of which the bankrupts are members, is not affected by the rule in question; he may prove for the whole amount of the debt against the estate of the bankrupt firm, and yet retain the security given by the larger and solvent firm (*q*). So, if one partner mortgages his own property for

Cases in which a secured creditor can prove and also retain his security.

(*k*) *Ex parte Jackson*, 5 Ves. 357; *Ex parte Topham*, 1 Madd. 38. And see *Davis's case*, 12 Eq. 516.

(*l*) As to the necessity for which, see *Ex parte Broderick*, 18 Q. B. D. 766.

(*m*) See *Ex parte Barnett*, De Gex, 194; *Ex parte Ford*, 3 M. D. & D. 457; *Ex parte Moss*, 13 Jur. 866.

(*n*) See *Ex parte Johnson*, 3 De G. M. & G. 218; *Ex parte Hunter*, 6 Ves. 94. Compare *Ex parte McKenna*, 7 Jur. N. S. 588, which turned on the terms of the deposit. See further, on this subject, the cases referred to, *ante*, p. 654 *et seq.*

(*o*) *Ex parte Walker*, 3 Deac. 672.

(*p*) *Ex parte West Riding Union Banking Co.*, 19 Ch. D. 105, where half the security belonged to the bankrupt and half to his late partners. The question whether this is the case or not is sometimes one of considerable difficulty, as in the case just cited and in *Ex parte Brett*, 6 Ch. 838, but the principle is clear.

(*q*) *Ex parte Parr*, 1 Rose, 76; *Ex parte Bloxham*, 6 Ves. 449; *Ex parte Goodman*, 3 Madd. 373; *Ex parte Sammon*, 1 D. & C. 564. See,

the debt of the firm, the creditor is allowed on the bankruptcy of the firm to prove for his whole debt against the joint-estate, and yet retain the mortgage security given by the one partner (*r*).

If a partner gives as a security for a debt of the firm shares standing in his own name, the right of the creditor to prove for his whole debt and retain his security depends upon whether as between the partners themselves the shares are assets of the firm, or the separate property of the partners in whose name they stand: if they are assets of the firm, they must be so treated, even although the creditor was not aware of the fact when he took them as security (*s*).

Again, if A. and B. are partners, and A. gives a separate security for a partnership debt and dies, and B. becomes bankrupt, the creditor can prove against B.'s estate without giving up his security (*t*). So, where a creditor of a firm has a security belonging to the firm and also a separate covenant for payment by each partner, such creditor may, on the bankruptcy of the firm, retain his security and prove against the separate estates of the covenantors (*u*). Again, where a firm has assigned its property in trust for its creditors, whose rights against the separate estates of the partners are expressly reserved, a creditor who is both a joint and a separate creditor may claim the benefit of the assignment, and yet prove as a separate creditor against one of the firm if he becomes bankrupt (*x*). Where, however, one partner only is bankrupt, and a joint creditor is secured by a mortgage of the bankrupt's separate estate, that creditor cannot prove as a separate

too, *Ex parte English and American Bank*, 4 Ch. 49; and *Ex parte Wilson*, 2 Jur. 67, where a creditor of two firms engaged in a joint transaction, proved against one and retained his security against the other.

(*r*) *Ex parte Caldicott*, 25 Ch. D. 716; *Ex parte Peacock*, 2 Gl. & J. 27; *Ex parte Adams*, 3 M. & Ayr. 157; *Ex parte Groom*, 2 Deac. 265. See, also, the next note, and *Ex parte Manchester and Liverpool District Banking Co.*, 18 Eq. 249, a case of a composition.

(*s*) *Ex parte Manchester and County Bank*, 3 Ch. D. 481; *Ex parte Connell*, 3 Deac. 201.

(*t*) *Ex parte Bowden*, 1 D. & C. 135; *Ex parte Smyth*, 3 Deac. 597.

(*u*) *Re Plummer*, 1 Ph. 56, settling the doubts raised in *Ex parte Shepherd*, 1 M. D. & D. 101, and *Ex parte Davenport*, ib. 313.

(*x*) *Ex parte Thornton*, 5 Jur. N. S. 212. See, too, *Ex parte Geaves*, 8 De G. M. & G. 291.

creditor without giving up his security (*y*); and if the mortgage is a mere equitable mortgage, giving the creditor no *locus standi* as a separate creditor and nothing more than a lien, he will not be a separate creditor of the bankrupt, or be allowed to prove against his separate estate at all (*z*).

Position of cestuis que trustent.

The rule which enables a joint creditor, having a separate security, to prove as a creditor, and yet to retain his security, applies to persons who claim, not as creditors merely, but also as *cestuis que trustent*. Consequently, if A., B. and C. are bankers, having trust-monies in their hands, and A. afterwards improperly invests some of it on a mortgage, the *cestuis que trustent* may, on the bankruptcy of the firm, claim the benefit of the mortgage, and prove against the joint estate of the firm for the whole amount due from it in respect of the trust monies (*a*).

Ex parte Turney.

A curious and instructive case on the right of a creditor to prove without giving up his security, arose in *Ex parte Turney* (*b*). There A. and B., father and son, were partners; A. equitably mortgaged an estate of his own to secure a debt due from B. A. afterwards died, and the estate descended to B., subject to the mortgage in question. At A.'s death, however, the joint debts of A. and B. were more than sufficient to exhaust A.'s assets. B. having become bankrupt shortly after his father's death, it was held that, notwithstanding the descent of the mortgaged estate to B., the mortgage creditor was at liberty to prove against B., without giving up the security, although it was admitted that this could not have been allowed if the descended estate had been of any value to B.

Marshalling.

This right of the secured creditor may avail not only himself but the owner of the security he holds; and by the equitable doctrine of marshalling a joint creditor of a firm

(*y*) *Ex parte West Riding Union Banking Co.*, 19 Ch. D. 105.

(*z*) *Ex parte Leicestershire Banking Co.*, De Gex, 292; *Ex parte Lloyd*, 3 M. & A. 601. The Courts will, however, order the security to be sold to enable the creditor to vote in the choice of a trustee, &c., ibid.

(*a*) See *Ex parte Biddulph*, 3 De G. & S. 587, and *Ex parte Burton*, 3 M. D. & D. 364.

(*b*) 3 M. D. & D. 576. See, also, *Ex parte Brett*, 6 Ch. 839.

may be entitled to prove against the separate estate of one of its members or *vice versâ*, contrary to the general rule.

Ex parte Salting.

For example, in *Ex parte Salting* (*c*), a firm wrongfully pledged the goods of a customer to their bankers for an advance to the firm. One of the partners gave to the bankers a separate guarantee for the advance. On the bankruptcy of the firm the bankers sold the goods and applied the proceeds in reducing their debt. They then proved for the residue against the separate estate of the partner who had given the guarantee. His separate estate was more than sufficient to pay the whole debt; and it was held that the owner of the goods was entitled to have the banker's securities marshalled, and to have the benefit of the guarantee to the extent of the value of the goods which had been sold, and to prove for that value against the separate estate of the partner who had given the guarantee.

Rule that a creditor must prove and not sue the debtor.

The same principle of equality amongst creditors which prevents one creditor from holding a security, and proving for what is due on it, is also the foundation of the rule that no creditor is allowed to sue a bankrupt in respect of any demand which may be proved as a debt under the bankruptcy (*d*). But where the creditor is the creditor not only of the bankrupt, but also of another person, the creditor may prove against the estate of the former, and yet sue the latter, and get from him what he can (*e*). Consequently, if a creditor of a firm, one of the members of which is alone bankrupt, is in a position to prove against his estate, such creditor may prove against it, and, at the same time, sue the solvent partners (*f*), and it is not now necessary to join the bankrupt as a co-defendant (*g*).

(*c*) 25 Ch. D. 148. See, also, *Ex parte Alston*, 4 Ch. 168.

(*d*) 46 & 47 Vict. c. 52, § 9 and § 10, (2) *ante*, p. 709. Under the old law the creditor could sue or prove at his election.

(*e*) See *Ex parte Schofield*, 12 Ch. D. 337; *Ex parte Isaac*, 6 Ch. 58. See, as to cases of suretyship, *Ex parte Coplestone*, Mon. & Ch. 262.

(*f*) *Ex parte Isaac*, 6 Ch. 58; *Keay* v. *Fenwick*, 1 C. P. D. 745; *Bottomley* v. *Nuttall*, 5 C. B. N. S. 122; *Heath* v. *Hall*, 4 Taunt. 326; *Bovill* v. *Wood*, 2 M. & S. 22; *Harley* v. *Greenwood*, 5 B. & A. 95; *Ex parte Read*, 1 Rose, 460. Compare *Blannin* v. *Taylor*, Gow, N. P. 199.

(*g*) 46 & 47 Vict. c. 52, § 114. See, previously, *Ex parte Isaac*, 6 Ch. 58; *Ex parte Stanton*, 1 M. D. & D. 273.

Two proofs for same debt not allowed.

Another fundamental principle relating to the proof of debts, and one which requires notice here, is that there can be only one proof against the same estate in respect of the same debt. Thus, in the common case of principal and surety, if the principal is bankrupt, and the creditor proves against his estate, and receives a dividend, and has recourse to the surety for the difference, the surety cannot prove against the bankrupt's estate without giving credit for the dividend already paid to the principal creditor: in other words the dividend paid in respect of both proofs will be no greater than that payable in respect of one proof for the whole amount of the debt due by the bankrupt (*h*). This rule is of considerable importance in mercantile transactions, and is closely allied to the rule which, as will be seen hereafter, precludes a creditor from proving the same debt against both the joint and the separate estates of a bankrupt firm. The rule forbidding two proofs in respect of the same debt applies in the winding up of companies (*i*).

Again, if a person is adjudicated bankrupt here and abroad, a creditor who has proved abroad cannot prove here without giving credit for what he has received under his proof abroad (*k*).

Interest.

As regards interest, the Bankruptcy act, 1883, sched. 2, r. 20, enacts as follows :—

> 20. On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the receiving order and provable in bankruptcy, the creditor may prove for interest at a rate not exceeding four per centum per annum to the date of the order from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment (*l*).

A jury may allow interest where it is payable by agreement, or by mercantile usage; also (by 3 & 4 Wm. 4, c. 42), where a

(*h*) See *Ex parte Carne*, 3 Ch. 463; *Ex parte European Bank*, 7 Ch. 99; Robson, Bank. 261 *et seq.*, ed. 3.

(*i*) *Ex parte European Bank*, 7 Ch. 99, reversing S. C., 12 Eq. 501.

(*k*) *Ex parte Wilson*, 7 Ch. 490; *Banco de Portugal* v. *Waddell*, 5 App. Ca. 161; *Selkrig* v. *Davies*, 2 Dow, 230.

(*l*) See *Ex parte Bath*, 27 Ch. D. 509; *Ex parte Bishop*, 15 Ch. D. 421.

sum certain is payable under a written instrument at a certain time and where payment of a sum certain, not so payable, has been demanded by notice in writing stating that interest will be claimed (*m*).

Interest at 4 per cent. is payable on all proved debts from the date of the receiving order if the estate is more than sufficient to pay all proved demands upon it (*n*).

Having adverted to the proof and payment of debts generally, it is proposed to pass to the subject of the proof and payment of the debts of partners, first, out of their joint, and next, out of their respective separate assets.

A. *Proof against the joint estate.*

Administration of partner's joint estate.

The administration of the joint estate will be best explained by examining:—

1. The rights of the joint creditors,
2. The rights of the partners,
3. The rights of their separate creditors,

as against that estate.

First, with respect to the joint creditors.

1. Position of the joint creditors.

The joint creditors have the first claim for payment out of the joint estate (*o*): and until they have been paid all the principal monies due to them, with interest thereon (*p*) up to the date of the receiving order (*q*) (if their debts carry interest), no other person is entitled to receive a farthing out of the assets of the firm (*r*). If a person is truly a creditor of the firm, he is not deprived of his right to rank as a joint creditor, merely

(*m*) See 3 Chitty's Statutes, 584, ed. 4.

(*n*) See 46 & 47 Vict. c. 52, § 40 (5). See, as to appropriating securities to interest, *Re Savin*, 7 Ch. 760.

(*o*) *Ante*, p. 692. As to marshalling, see *ante*, p. 717.

(*p*) *Ex parte Ogle*, Mont. 350; *Pearce* v. *Slocombe*, 3 Y. & C. Ex. 84; *Ex parte Reeve*, 9 Ves. 590, and see *Ex parte Woodford*, 3 De G. & S. 666.

(*q*) Interest after that date is not payable in priority to the separate creditors, *Ex parte Findlay*, 17 Ch. D. 334.

(*r*) The expenses of getting in joint estate must of course be paid out of it; *Ex parte Rutherford*, 1 Rose, 201.

because he may have some separate security for his debt (*s*); for he is treated, in such a case, as a joint creditor having the advantage of a collateral security (*t*). But it must not be forgotten, that a person who advances money to one partner, on his separate security, and makes him alone the debtor, has no *locus standi* against the firm merely because the money is afterwards applied to its use (*u*).

Secondly, with respect to the partners.

2. Position of the partners.

Subject to the exceptions which will be hereafter stated, it is an established rule that a partner in a bankrupt firm shall not prove in competition with the creditors of the firm. They are, in fact, his own creditors, and he cannot be permitted to diminish the partnership assets to the prejudice of those who are not only creditors of the firm, but also of himself (*x*). If, therefore, a partner is a creditor of the firm, neither he nor his separate creditors (for they are in no better position than himself) can compete with the joint creditors as against the joint estate. Lord Hardwicke, it is true, in *Ex parte Hunter* (*y*), allowed this to be done; but that case has not, in this respect, been followed, and has long been considered as overruled (*z*).

Ex parte Sillitoe.

In *Ex parte Sillitoe* (*a*), a leading case on this subject, two partners in a banking firm carried on a separate business as ironmongers, and became creditors of the bank to a large amount, in consequence of having, with a view to enable the bank the better to obtain money, discounted their securities.

(*s*) See *Ex parte Brown*, cited 1 Atk. 225; *Ex parte Clowes*, 2 Bro. C. C. 595; *Ex parte Harman*, 2 Gl. & J. 25.

(*t*) See *Ex parte Hunter*, 1 Atk. 227; *Ex parte Harman*, 2 Gl. & J. 25, and *ante*, p. 715.

(*u*) *Ex parte Hunter*, 1 Atk. 223; *Ex parte Emly*, 1 Rose, 65; *Lloyd* v. *Freshfield*, 9 D. & Ry. 19; and see *ante*, pp. 189 *et seq.* and 703.

(*x*) See *Ex parte Sillitoe*, 1 Gl. & J. 382; *Ex parte Hargreaves*, 1 Cox, 441; *Ex parte Reeve*, 9 Ves. 590; *Ex parte Rawson*, Jac. 279. See *Ex parte Gliddon*, 13 Q. B. D. 43, noticed hereafter, where two firms were curiously intermixed.

(*y*) Cooke's Bank. Law, 526, ed. 8, and 1 Atk. 223.

(*z*) *Ex parte Burrell; Ex parte Parker; Ex parte Pine*, all cited in Cooke's Bank. Law, 528, ed. 8, and see *per* Ld. Eldon, *Ex parte Harris*, 1 Rose, 438.

(*a*) 1 Gl. & J. 382. *Ex parte Williams*, 3 M. D. & D. 433, was a similar case. See, also, *Ex parte Maude*, 2 Ch. 550; and *infra*, p. 727.

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The banking firm was adjudged bankrupt, and an attempt was made on behalf of the ironmongery firm, to prove, as joint creditors, against the joint estate of the bank. Lord Eldon, overruling the decision of the Vice-Chancellor, rejected the proof upon the ground which is stated above.

Ex parte Hargreaves.

So in the previous case of *Ex parte Hargreaves* (*b*), alias *Shakeshaft, Stirrup*, and *Salisbury*, three persons were partners as cotton manufacturers, and two of them were also partners as linen-drapers: goods, manufactured by the three, were consigned to the two for sale, for the benefit of the larger firm, and bills were drawn on the two, on behalf of the three; both firms became bankrupt, and the larger firm was indebted to the smaller in respect of the above transactions. It was held, that the members of the smaller firm being liable to the debts of the larger firm, the assignees of the former could not compete with the joint creditors of the latter.

Executors of a deceased partner.

Again, as the estate of a deceased partner is liable to the debts of the firm (*c*), it follows that, so long as such liability exists, his executors cannot prove against the joint estate of the surviving partners for the amount due from them to his estate (*d*). But if those debts are paid, or the estate of the deceased is relieved from them (*e*), such proof is admissible (*f*); except in respect of assets, properly brought into or left in the business by the executors as part of the capital of the deceased. No proof, however, in respect of such assets is admissible against the joint estate of the surviving partners, unless all their joint debts contracted as well before as after the death of the deceased are paid. Thel eading case on this subject is *Ex parte Butterfield* (*g*). In that case a sole trader

Ex parte Butterfield.

(*b*) 1 Cox, 440, and 1 Gl. & J. 382, and 11 Ves. 414, *infra*, p. 726.

(*c*) *Ante*, pp. 194, 595.

(*d*) *Ex parte Blythe*, 16 Ch. D. 620; *Nanson* v. *Gordon*, 1 App. Ca. 195, affirming *Ex parte Gordon*, 10 Ch. 160.

(*e*) *Ex parte Andrews*, 25 Ch. D. 505, shows that the outstanding joint liabilities need not be paid. It is enough if there is no proof in respect of any of them. But note, there was in that case no reason to suppose they ever would be proved.

(*f*) *Ex parte Edmonds*, 4 De G. F. & J. 488, noticed *infra*, p. 723.

(*g*) De Gex, 570; *Ex parte Corbridge*, 4 Ch. D. 246, was decided on the same principle. See, too, *Ex parte Garland*, 10 Ves. 110, where proof in respect of assets improperly employed was admitted, and proof

directed by his will that it should be lawful for his widow to employ 6000*l.* in continuing his business, and he appointed her and his son executors. After the testator's death, his widow and son continued his business with his assets, and became bankrupt. The persons beneficially interested in the assets which had been employed by the bankrupts, sought to prove, in respect thereof, against their joint estate; but it was held that, to the extent of 6000*l.*, no such proof could be allowed, for the employment of 6000*l.* being authorised by the will, the proof could not be admitted, without, in substance, infringing the rule which precludes a partner from competing with his own creditors.

Ex parte Edmonds.

This case may be usefully compared with *Ex parte Edmonds* (*h*). There, partnership articles provided in effect that if one of the partners died, so much of his share in the capital, as should not exceed 100,000*l.*, should be continued in and be considered as part of the partnership effects; that the survivors should pay off the amount of the deceased's share by instalments, with interest, but that his estate should not share in the profits accruing after his death. The partner in question having died, more than 150,000*l.* was found due to him from the partnership. His executors took a bond for this amount from the surviving partners, who afterwards became bankrupt, having, however, previously paid all the debts for which they and the deceased were jointly liable (*i*). It was held, that the executors were entitled to prove against the joint estate of the surviving partners for the whole amount of the bond, and not only for the excess over 100,000*l.*, as the other joint creditors contended. The provisions of the deed taken together showed plainly that the 100,000*l.*, was intended to be continued in the concern in the sense of a loan bearing interest; and that although the money was to be employed in

in respect of assets properly employed was rejected. See, also, *Scott* v. *Izon*, 34 Beav. 434; *Ex parte Thompson*, 2 M. D. & D. 761, and compare the cases in the next note.

(*h*) 4 De G. F. & J. 488. See, also, *Ex parte Hill*, 3 M. & A. 175, and *Ex parte Crofts*, 2 Deac. 102, where trust money lent to partners was held to be provable as a joint debt.

(*i*) The payment of the debts to which the estate of the deceased was liable distinguishes this from *Ex parte Gordon*, 10 Ch. 160.

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the business of the partnership, it was to be so employed, not as the money of the deceased, but as the money of the surviving partners, borrowed by them from his estate.

Assets improperly brought into the business.

Assets of a deceased partner brought into the business by his executor in breach of trust, do not form part of the joint estate of the surviving partners, and may be the subject of proof against that estate, not only in competition with those creditors who have become such since the death of the deceased, but also in competition with those whose debts accrued in his lifetime (*k*); as regards the last, the proof is exceptional, but is allowed for the same reason as similar proof is allowed where separate estate of a partner has been fraudulently dealt with as property of the firm (*l*).

Two firms with common partner.

Ex parte Brown.

Another instructive case, illustrating the rule now under consideration is afforded by *Ex parte Brown* (*m*). There, in substance there were two firms, with a common partner, viz., A. and B., and A. and C.: C. had made himself separately liable for a debt owing by A. and B.; both firms became bankrupt. The principal creditor proved against C.'s separate estate, and received a dividend. A claim was then made on behalf of C.'s separate estate, to prove for the amount thus paid out of it against the joint estate of A. and B. But it was held that this proof could not be allowed, for the principal creditor not having been paid in full, he had a right of proof against the joint estate of A. and B., and that, consequently, C. could not diminish that estate to his prejudice.

Exceptions to rule that partner cannot compete with his own creditors.

There are, however, three exceptions to the rule above stated, viz.:

1. Where the separate property of one partner has been fraudulently dealt with as the property of the firm;

2. Where there are two distinct trades, carried on by the firm, and by one or more of the members of it, with distinct capitals;

(*k*) *Ex parte Garland*, 10 Ves. 110; *Ex parte Westcott*, 9 Ch. 626. See *ante*, c. 3, § 2.

(*l*) See *infra*; assets of the testator in the business when he died, and improperly left in it, cannot, it is conceived, be the subject of proof, unless the debts of the firm contracted in his life are paid.

(*m*) 2 M. D. & D. 718. See, too, *Ex parte Rawson*, Jac. 274.

3. Where a partner has obtained his order of discharge, or has been otherwise discharged from the joint debts, and has afterwards become a creditor of the firm (*n*).

This last exception rests on the principle that the discharged partner is no longer a debtor to the creditors of the firm, and does not, therefore fall within the rule which precludes a person from competing with his own creditors. The two first exceptions are not so easily explained.

Exception in the case of fraud.

Exception in the case of fraud.—If separate property of one partner has been fraudulently converted by his co-partners to the use of the firm, such property must be treated as the separate estate of the defrauded partner; and proof on his behalf (or rather on behalf of his separate estate) is therefore allowed in respect of such property, against the joint estate, and in competition with the joint creditors (*o*). Upon precisely the same principle, if a partner has fraudulently converted property of the firm to his own use, proof on behalf of the joint estate is allowed, in respect of such property, against his separate estate, and in competition with his separate creditors (*p*). This, however, is a subject which will have to be considered hereafter.

Exception in the case of distinct trades.

Exception in the case of distinct trades.—If one of two firms, carrying on distinct trades, becomes creditor of the other in the ordinary way of their trade, the creditor firm may prove against the joint estate of the debtor firm, in competition with its other joint creditors, although one or more persons may be partners in both firms (*q*).

If neither firm contains the other, *e.g.*, if one firm is A. and B., and the other firm is A. and C., either may rank as a joint

(*n*) *Ex parte Smith*, 14 Q. B. D. 394, where the estate of the deceased partner was discharged by the Statute of Limitations; *Ex parte Atkins*, Buck, 479, where a partner who had obtained his certificate took up bills of the firm.

(*o*) See *per* Lord Eldon in *Ex parte Sillitoe*, 1 Gl. & J. 382, and in *Ex parte Harris*, 1 Rose, 437.

(*p*) *Ex parte Lodge and Fendal*, 1 Ves. J. 166, *infra*, p. 735.

(*q*) See, in addition to the cases cited below, *Ex parte Ring*, *Ex parte Freeman*, *Ex parte Johns*, cited in Cooke's Bank. Law, 534, ed. 8. Compare *Ex parte Gliddon*, 13 Q. B. D. 43, where no debt was contracted.

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creditor of the other, because the creditors of the one are not creditors of the other (*r*).

Case where one firm contains the other.

If one of the firms contains the other, *e.g.*, if one firm is A., B., and C., and the other is A. and B., or A. only, two cases have to be considered, according as the larger or the smaller firm is the debtor to the other; for whilst all persons who are creditors of the larger firm are creditors of the smaller, the converse is evidently not true. Consequently, although the larger firm does not compete with its own creditors if it proves against the joint estate of the smaller firm, the smaller firm must necessarily compete with its own creditors if it is allowed to rank as a joint creditor against the estate of the larger firm. Hence, although it was long ago decided that proof might be made by the larger firm against the smaller (*s*), it was also decided that proof could not be made by the smaller against the larger (*t*). However, it seems now settled that if the two trades are distinct, and if the larger firm has become indebted to the smaller in the regular way of their trades (*u*), the smaller firm may prove, like any other joint creditor, against the joint estate of the larger. This was decided in

Ex parte Cook.

Ex parte Cook (*x*), where *one* partner, who carried on a separate business, was allowed to rank as a joint creditor against the joint estate of the firm of which he was a member, and which had become indebted to him in the ordinary way of their and his respective trades.

The trades must be distinct, and the debts have been contracted in the ordinary course of them.

The exception now under discussion is, however, only allowed provided two things concur, viz.: first, there must be two distinct trades; and secondly, the debt sought to be proved must have arisen from dealings between trade and trade in the ordinary way of business. It was because the two firms were, in fact, one, the smaller one being only a branch of the larger, and carrying on *its* business, that proof was disallowed in *Ex parte Hargreaves* (*y*), and it was because, although the two

(*r*) *Ex parte Thompson*, 3 Deac. & Ch. 612.

(*s*) *Ex parte St. Barbe*, 11 Ves. 413; *Ex parte Castell*, 2 Gl. & J. 124; *Ex parte Hesham*, 1 Rose, 146.

(*t*) *Ex parte Hargreaves*, 1 Cox, 440; *Ex parte Adams*, 1 Rose, 305; *Ex parte Sillitoe*, 1 Gl. & Jam. 382.

(*u*) This is essential, see *infra*.

(*x*) Mont. 228.

(*y*) 1 Cox, 440. See *ante*, p. 722.

firms and their trades were distinct, the debt sought to be proved had not arisen in the ordinary way of trade that proof was disallowed in *Ex parte Sillitoe* (*z*) and in *Ex parte Williams* (*a*). In this last case there was a firm of iron-masters; two of the firm were also bankers; the iron firm was indebted to the banking firm for advances, but proof in respect of them on behalf of the banking firm against the joint estate of the iron firm was disallowed, inasmuch as the circumstances under which the debt was contracted precluded the idea that the bankers had made the advances in the ordinary way of their business as bankers.

Ex parte Williams.

Even in these excepted cases, however, proof by one partner is not allowed unless on taking the partnership accounts a balance still remains due to him (*b*).

Case where partnership has not commenced.

The rule which precludes one partner from proving against the estates of his co-partners does not apply to persons who have not become partners, and who have not rendered themselves liable to third parties as if they were partners. This is well illustrated by *Ex parte Turquand* (*c*). There, in substance, A. agreed to become a partner with B. and C., who were already in partnership together, and who carried on business in the names of B. and C. It was agreed that A. should bring in 2000*l.*, and that the name of the firm should be altered to B., C. & Co. A. advanced 2000*l.* to B. and C.; the name of the firm was altered as arranged, but no articles of partnership were ever signed, and A. refused to sign any or to do anything more before he was satisfied as to B. and C.'s solvency. There was no evidence to show that A. had made himself liable to third parties as if he were a partner; and B. and C. having become bankrupt, A. was allowed to prove against their estate for the advances he had made them.

Ex parte Turquand.

(*z*) 1 Gl. & J. 382. See *ante*, p. 721.

(*a*) 3 M. D. & D. 433. See, also, *Ex parte Maude*, 2 Ch. 550.

(*b*) *Ex parte Maude*, 2 Ch. 550.

(*c*) 2 M. D. & D. 339. See, also, *Ex parte Davis*, 4 De G. J. & S. 523, *ante*, p. 21. *Ex parte Hickin*, 3 De G. & S. 662, shows that a person intending to become a partner, may prove as a creditor for arrears of salary.

Thirdly, with respect to the separate creditors.

3. Position of separate creditors.

The principle which prohibits a partner from competing with the joint creditors of the firm evidently has no application as between one partner and the separate creditors of his co-partners. Moreover, the lien which each partner has upon the assets of the firm must be satisfied before any part of the joint estate can be divided amongst the members of the firm, or, which comes to the same thing, be carried to the account of their respective separate estates. Therefore, after the joint debts of the firm have been paid, with interest to the date of the receiving order (*d*), the surplus of the joint estate must be next applied in satisfaction of the liens of the individual partners upon it (*e*); and it is the ultimate surplus only which is to be divided amongst the partners, or their respective separate estates, in proportion to their respective shares in the assets of the firm. It is hardly necessary to observe that a lien existing in favour of one partner increases his separate estate, and confers upon his separate creditors a right to prove against the joint estate in preference to the separate creditors of the other partners, who have no such lien (*f*). If the joint estate is not sufficient to satisfy the lien, the deficiency becomes provable against the separate estates of the indebted partners (*g*).

Surplus of joint estate.

The joint debts being paid, and the liens of the individual partners on the partnership assets being satisfied, the surplus of the joint estate becomes divisible amongst the respective separate estates of the partners in proportion to their respective shares in the partnership property. The surplus of the joint estate, having been thus distributed, loses its character of joint estate, and becomes, to all intents and purposes, separate estate of the partners to whose credit it is carried. If any joint

(*d*) *Ex parte Findlay*, 17 Ch. D. 334.

(*e*) *Ex parte King*, 17 Ves. 115, and 1 Rose, 212; *Ex parte Reid*, 2 Rose, 84; *Ex parte Reeve*, 9 Ves. 588; *Ex parte Terrell*, Buck, 345 *Fereday* v. *Wightwick*, Taml. 250 *Holderness* v. *Shackels*, 8 B. & C. 612.

(*f*) *Ex parte King*, 17 Ves. 115; *Ex parte Reid*, 2 Rose, 84.

(*g*) *Ex parte Terrell*, Buck, 345; *Ex parte King*, 17 Ves. 115; *Ex parte Watson*, Buck, 449, and 4 Madd. 477; and see, as to the last case, 2 Gl. & J. 172.

estate is carried to a separate estate before the joint debts are paid and the partners' liens are satisfied, such joint estate will be ordered to be restored (*h*).

B.—*Proof against the separate estates.*

Administration of separate estate of partners.

The principles according to which the separate estate of one partner is administered, in the event of an adjudication against him alone, are the same as those which govern the administration of the separate estates of the members of a bankrupt firm (*i*). The leading principle in administering a separate estate is to prefer separate to joint creditors, just as in administering joint estate the leading principle is to prefer joint to separate creditors. But there is this important difference to be borne in mind; the separate creditors of one partner are not creditors of the firm, whilst the joint creditors of the firm are creditors of each of the partners composing it. For this reason it was formerly the rule to distribute the separate estate of each partner, *pari passu*, amongst his creditors, whether joint or separate (*k*); and although this rule has been departed from (*l*), the distinction in question naturally leads to important consequences, as will be seen hereafter.

The administration of the separate estates of bankrupt partners, and the administration of the separate estate of one bankrupt partner, if one alone is bankrupt, will be best explained by examining

1. The rights of the separate creditors,
2. The rights of the joint creditors,
3. The rights of the partners,

as against such estates or estate.

(*h*) See *Ex parte Lanfear*, 1 Rose, 442.

(*i*) 46 & 47 Vict. c. 52, § 40 (3), and § 59, and Bank. Rules, 1886, r. 269. *Ex parte Taitt*, 16 Ves. 197; *Everett* v. *Backhouse*, 10 Ves. 98.

(*k*) *Ex parte Blake*, Cooke's Bank. Law, 528, ed. 8; *Ex parte Cobham; Ex parte Haydon; Ex parte Caruthers; Ex parte Upton; Stephens* v. *Brown*, and *Mathews* v. *Aland*, all cited in Cooke's Bank. Law, 260–264, ed. 8; and see *Lord Craven* v. *Widdows*, Ca. in Ch. 139; *Ex parte Copland*, 1 Cox, 420; *Ex parte Hodgson*, 2 Bro. C. C. 5; *Ex parte Page*, ib. 119; *Ex parte Flintum*, ib. 120.

(*l*) See next note, and *Ex parte Baudier*, 1 Atk. 98; *Ex parte Olknow*, Cooke's Bank. Law, 259, ed. 8.

First, with respect to the separate creditors.

1. Position of separate creditors.

Except in those cases which will be specially noticed hereafter, the separate estate of each partner is to be first applied in payment of his separate creditors (*m*), to the extent of 20*s.* in the pound on their provable debts with interest up to the date of the receiving order; but not with interest after that date until the joint creditors have also received 20*s.* in the pound on their provable debts (*n*).

A bankrupt's wife who has lent him money for the purpose of his business cannot compete with his other creditors (45 & 46 Vict. c. 75, § 3). But this enactment does not preclude the wife of a partner from proving against the joint estate of the firm in respect of a loan to her husband and his co-partners jointly (*oo*).

After payment of the separate creditors of each partner, the surplus of his separate estate is carried to the credit of the joint estate (*o*); and if the partner is a member of several bankrupt firms, the surplus of his separate estate must be divided amongst their respective joint estates, in proportion to the amount of the debts proved against them respectively (*p*).

Secondly, with respect to the joint creditors.

2. Position of joint creditors.

Except in the cases hereafter mentioned, the joint cre-

(*m*) 46 & 47 Vict. c. 52, §§ 40 (3) and 59, and Bank. Rules, 1886, r. 269; *Ex parte Elton*, 3 Ves. 238; *Ex parte Abell*, 4 Ves. 837; *Ex parte Clay*, 6 Ves. 813; *Ex parte Taitt*, 16 Ves. 193. As to marshalling, see *ante*, p. 717.

(*n*) 46 & 47 Vict. c. 52, § 40, cl. 5, and Sched. 2, r. 20, and *Ex parte Findlay*, 17 Ch. D. 334. Under the old law the separate creditors were not entitled to interest until the joint creditors had received 20*s.* in the pound on their principal debts, see *inter alia*, *Ex parte Wood*, 2 Mont. D. & D. 283; *Ex parte Clarke*, 4 Ves. 677; *Ex parte Boardman*, 1 Cox, 275; *Ex parte Minchin*, 2 Gl. & Jam. 287.

(*oo*) *Ex parte Nottingham*, 19 Q. B. D. 88.

(*o*) *Ex parte Wood*, 2 M. D. & D. 283, where the surplus of the separate estate of a bankrupt shareholder in a company being wound up in equity was held applicable to the payment of the creditors of the company, and not payable into court in the suit.

(*p*) *Ex parte Franklyn*, Buck, 332, where the order is given at length.

Cases in which they may compete with the separate creditors.

ditors of partners (*q*) are not entitled to payment out of their separate estates, in competition with their separate creditors (*r*). This is in accordance with the old law (*s*). The Bankruptcy Act, 1883, mentions no exceptions, and it has not yet been decided that there are any; and owing to the language of § 59 (1) it is doubtful whether they exist in cases where one partner only is bankrupt. But it would be strange if the exceptions existed (and it is apprehended that the first three do exist) where a separate estate is administered under a joint adjudication against a firm, and not where the separate property of one partner is administered under an adjudication against himself alone (*t*).

The exceptions are four in number. The first exists where there is no joint estate; the 2nd where the property of the firm has been fraudulently converted; the 3rd where there has been a distinct separate trade, in respect of which a separate debt has been contracted; the 4th is in favour of the petitioning creditor himself (*u*).

1. Exception where there is no joint estate.

Exception where there is no joint estate.—If in the case of a bankrupt firm there is no joint estate the joint creditors are entitled to rank as separate creditors against the separate estates of the individual partners (*x*). So if one partner only is bankrupt, the creditors of the firm are entitled to rank as separate creditors against the separate estate of the bankrupt, if there is no joint estate (*y*), *and* if there is no sol-

(*q*) As to co-debtors not partners, see *Ex parte Field*, 3 M. D. & D. 95; *Ex parte Buckingham*, 1 M. D. & D. 235; *Ex parte Crosfield*, 1 Deac. 405.

(*r*) 46 & 47 Vict. c. 52, § 40 (3) and § 59 (1), *ante*, p. 693.

(*s*) See 6 Geo. 4, c. 16, § 62; Yate Lee and Wace's Law of Bankruptcy, 243, ed. 3; Robson on Bankruptcy, 735, 736, ed. 6.

(*t*) See Yate Lee and Wace, *ubi sup.* Mr. Robson (Law of Bank. 736, ed. 6), doubts whether the exceptions exist any longer.

(*u*) *Qu.* as to this; see Robson Bank. 736, note (*l*), ed. 6. The older cases establishing the exception are *Ex parte Hall*, 9 Ves. 349; *Ex parte Ackerman*, 14 Ves. 604; *Ex parte De Tastet*, 17 Ves. 247; *Ex parte Burnett*, 2 M. D. & D. 357, reversing S. C., 1 ib. 608, where the petitioning creditor was a joint creditor in respect of one demand, and a separate creditor in respect of another.

(*x*) See the next note.

(*y*) See *Ex parte Hayden*, 1 Bro. C. C. 453; *Ex parte Sadler*, 15 Ves. 52; *Ex parte Bradshaw*, 1 Gl. & Jam. 99; *Ex parte Bauerman*, 3 Deac. 476; and the next three notes.

vent ostensible partner (*z*), or at all events none in this country (*a*).

One partner dead solvent.

The fact that the estate of a deceased partner is solvent does not deprive the joint creditor of his right against the separate estate of the bankrupt (*b*). This was so before the Judicature Acts, because, the legal remedy surviving against the latter, the creditor had no *locus standi* at law against the representatives of the deceased; and the Judicature Acts leave the old rule untouched, as the joint creditors of the firm are not separate creditors of a deceased partner, as has been pointed out in an earlier portion of the work (*c*).

Again, if several firms enter into a joint adventure and one of them becomes bankrupt, the joint creditors of all the firms may prove against the joint estate of the bankrupt firm, if the partners in the solvent firms are abroad and there are no assets belonging to all the firms jointly (*d*).

Joint estate small.

If there is any joint estate, however small, the joint creditors will not be permitted to rank *pari passu* with separate creditors against the separate estate (*e*). But where one partner only is bankrupt nothing can be treated as joint estate by reason only of the doctrines of reputed ownership (*f*); and joint property which is pledged for more than its value, or which for any other reason cannot to any extent be made available for the benefit of the creditors of the firm, is treated, with reference to the rule in question, as having no existence (*g*). In *Ex parte*

Ex parte Geller.

(*z*) See *Ex parte Kensington*, 14 Ves. 447; *Ex parte Janson*, 3 Madd. 229. This last case shows that for this purpose a person who is not bankrupt is solvent. The existence of a dormant partner is immaterial, see *Ex parte Chuck*, 8 Bing. 469; *Ex parte Heighington*, 19 Ves. 294; *Ex parte Norfolk*, ib. 458.

(*a*) *Ex parte Pinkerton*, 6 Ves. 814, *n*.

(*b*) *Ex parte Bauerman*, 3 Deac. 476. The creditors of the survivor could not insist on the creditors of the firm going against the estate of the deceased; because there is no marshalling except as between creditors of one and the same debtor. See acc. *Ex parte Kendall*, 17 Ves. 514.

(*c*) See *Kendall* v. *Hamilton*, 4 App. Ca. 504, and *ante*, pp. 193, 598.

(*d*) *Ex parte Nolte*, 2 Gl. & J. 295 (overruling *Ex parte Wylie*, 2 Rose, 393); *Ex parte Machel*, 1 Rose, 447.

(*e*) *Ex parte Kennedy*, 2 De G. M. & G. 228; *Ex parte Peake*, 2 Rose, 54; *Ex parte Harris*, 1 Madd. 583. Compare *Ex parte Burdekin*, 2 M. D. & D. 704; *Ex parte Birley*, ib. 354.

(*f*) *Ex parte Taylor*, 2 M. D. & D. 753. See *ante*, p. 685.

(*g*) See *Ex parte Peake*, 2 Rose,

Geller (*h*), it was accordingly held that a joint creditor who had sold property of the firm, which had been pledged to him for more than its value, might, there being no other joint property, prove so much of his debt as remained unpaid against the separate estates of the partners. A joint creditor holding a pledge belonging to the firm must sell it or have it valued before he can claim to rank as a separate creditor, for until he has done that he is not in a position to say that there is no joint estate (*i*).

If it is doubtful whether there is any joint estate or not, an inquiry will be directed (*k*).

Reimbursing separate estate on subsequent realisation of joint estate.

If joint creditors prove against the separate estate of any partner, and obtain a dividend thereout upon the assumption that there is no joint estate, and joint estate is afterwards realised, the separate estate is entitled to be repaid the amount paid to the joint creditors (*l*).

Joint creditors may pay separate creditors.

Joint creditors can acquire a right to prove against the separate estate of any partner by paying his separate creditors 20*s*. in the pound on the amount of their provable debts (*m*).

2. Exception in cases of fraud.

Exception in the case of fraud.—It has been already seen that if a partner's separate property has been fraudulently converted by his co-partners to the use of the firm which becomes bankrupt, the property so converted cannot be treated as part of the joint estate, but must be placed to the separate account of the defrauded partner (*n*). Upon the same principle, if a partner has fraudulently converted to his own use property, which in truth belongs to the firm, such property cannot be treated as part of his separate estate; but forms part of the joint estate of the firm. Hence, as in the former case proof on behalf of the separate estate is admitted against the joint

54; *Ex parte Hill*, 2 Bos. & P. N. R. 191, note; but see *Ex parte Clay*, 1 Mont. Part. 223, note; *Ex parte Kennedy*, 2 De G. M. & G. 228.

(*h*) *Ex parte Geller*, 2 Madd. 262.

(*i*) This follows from *Ex parte Smith*, 2 Rose, 64; *Ex parte Barclay*, 1 Gl. & J. 272; and cases of that class. In *Ex parte Hill*, 2 B. & P. N. R. 191, note, the pledge had been sold, and the creditor proved for the difference.

(*k*) *Ex parte Birley*, 1 M. D. & D. 387; and see S. C., 2 ib. 354.

(*l*) See *Ex parte Willock*, 2 Rose, 392.

(*m*) See *Ex parte Chandler*, 9 Ves. 35, and *Ex parte Taitt*, 16 Ves. 193. See as to interest, *ante*, pp. 719, 720.

(*n*) *Ante*, p. 725.

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estate (*o*), so in the latter case, if the firm is bankrupt, proof on behalf of the joint estate is admitted against the separate estate (*p*); although that estate may not in the result be greater by reason of the fraud (*q*). Moreover, if the firm is not bankrupt, proof on behalf of the solvent partners is admitted against the estate of their bankrupt co-partner: and in this case the solvent partners rank as separate creditors, although the property fraudulently appropriated by the bankrupt belonged not to them exclusively, but to them jointly with himself (*r*).

No sufficient fraud.

Whether in any particular instance there has been a fraudulent misappropriation of the partnership property or not must of course be determined by the facts of each case. It may, however, be observed that the mere circumstance that one partner is indebted to the firm is no proof of fraud; and even if he has acted in violation of the articles of partnership, it may be found that those articles have by common consent been habitually ignored. To bring a case within the exception now under consideration, the individual partner must in effect have stolen the property of the firm, and his breach of good faith must not have been acquiesced in or condoned by his co-partners (*s*). Any arrangement by which a debt arising from fraud is made a matter of mere partnership account, precludes the firm from ranking, in respect of that debt, as a separate creditor against the separate estate of the individual partner (*t*).

The leading cases on this subject are *Fordyce's case* and *Ex parte Lodge and Fendal.*

Fordyce's case.

In *Fordyce's case* (*u*), A., B., C., and D. were partners as bankers, and had in the course of their business discounted a number of bills and notes, which had thus become the property

(*o*) *Ex parte Harris*, 2 V. & B. 210; S. C., 1 Rose, 437; *Ex parte Sillitoe*, 1 Gl. & J. 382.

(*p*) *Ex parte Lodge and Fendal*, 1 Ves. J. 166; *Ex parte Smith*, 1 Gl. & Jam. 74; *Ex parte Watkins*, Mont. & McA. 57; *Ex parte Cust*, Cooke's Bank. Law, 531, ed. 8.

(*q*) *Lacey* v. *Hill*, 4 Ch. D. 537, affirmed on appeal under the name *Read* v. *Bailey*, 3 App. Ca. 94.

(*r*) *Ex parte Yonge*, 3 V. & B. 31, and 2 Rose, 40. The judgment in this case is very masterly.

(*s*) See *Ex parte Yonge*, 3 V. & B. 31; *Ex parte Smith*, 1 Gl. & J. 74, and 6 Madd. 2; *Ex parte Turner*, 4 D. & Ch. 169; *Ex parte Crofts*, 2 Deac. 102; *Ex parte Hinds*, 3 De G. & Sm. 613.

(*t*) See *Ex parte Turner*, 4 D. & C. 169.

(*u*) Also known as *Ex parte Cust*, Cooke's Bank. Law, 531, ed. 8.

of the firm. A. fraudulently applied to his own use some of these bills and notes. He was subsequently adjudged bankrupt, and shortly afterwards the firm itself was adjudged bankrupt. The assignees of the firm claimed to prove as separate creditors of A., in competition with his other separate creditors and against his separate estate, for the value of the bills and notes thus abstracted, and they were allowed so to do. But in this same case the assignees were not allowed to prove against A.'s separate estate for what the joint estate had been compelled to pay in respect of bills issued by him in the partnership name for private uses of his own.

Ex parte Lodge and Fendal.

In *Ex parte Lodge and Fendal* (*x*), the facts were in substance as follows. John Lodge and his two sons, James and John, were partners. John Lodge, the father, died, having bequeathed his residuary personal estate to his two sons, and appointed them and their mother his executors. After the death of the father, his two sons continued to carry on the old business together for two years, when they dissolved partnership. No accounts were taken, but it was arranged that James should pay the debts of the firm. James immediately entered into a new partnership with Fendal. Fendal brought in 12,000*l.* as his share of the capital, and James Lodge brought in the same amount in stock and goods. After this, James Lodge, without Fendal's knowledge or consent, applied the assets of the new firm in paying the debts of the old firm, and the private debts of himself, James Lodge. Ultimately James Lodge and his partner Fendal became bankrupt. The joint creditors of the two partners Lodge and Fendal petitioned for liberty to prove against James Lodge's separate estate, and in competition with his separate creditors, for the amount of the assets of Lodge and Fendal thus improperly applied. Lord Thurlow, relying on *Fordyce's case*, expressed a strong opinion in favour of the proof, and allowed it *de bene esse*. But, after taking time to consider, his Lordship "thought he could not permit the assignees under the joint commission to prove against the separate estate of Lodge, without deciding upon a principle that must apply to all cases, and constantly occasion the taking an account between the partners and the partnership

(*x*) 1 Ves. J. 165, and Cooke's Bank. Law, 530, ed. 8.

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in every joint bankruptcy. He said that if the affidavits had gone the length of connecting the bankruptcy with the institution of the partnership trade, and that Lodge, with a view of swindling Fendal out of his property, had got him into the trade, and then taken the effects of the partnership into his own hands, with a view to his separate creditors, it might have been different. The petition on the part of the joint creditors, to prove against the separate estate, was dismissed" (*y*).

3. Exception in cases of distinct trades.

Exception in the case of distinct trades.—The same principle which, in the event of the bankruptcy of a firm, allows proof to be made on behalf of one of its members against its joint estate, in respect of a debt contracted by the firm to him as a distinct trader (*z*), also allows proof to be made on behalf of the joint estate of a firm against the separate estate of one of its partners, who has carried on a trade distinct from that of the firm, and has become indebted to it in the ordinary course of his distinct trading. If, therefore, a person who is a partner in a trading firm carries on a distinct trade of his own, and becomes indebted to the firm for goods sold to him in the way of their trades and then becomes bankrupt, the firm is treated as a separate creditor for the debt so contracted, and is allowed to prove accordingly (*a*). So, in the case of a bankrupt firm, proof for debts thus contracted by an individual partner is allowed as between the joint estate of the firm and the separate estate of that partner, in competition with his separate creditors (*b*). As Lord Eldon put it in *Ex parte St. Barbe*, "a joint trade may prove against a separate trade, but not a partner against a partner." But although there may have been distinct trades, still if the debt in question has not been contracted in the ordinary course of carrying them on, such proof will not be allowed (*c*).

(*y*) The passage in inverted commas is taken from Cooke's Bank. Law, 530, ed. 8. See, further, as to the necessity of fraud, *Ex parte Grill*, ib.

(*z*) *Ante*, p. 725.

(*a*) *Ex parte Hesham*, 1 Rose, 146; *Ex parte Castell*, 2 Gl. & J. 124; *Ex parte Johns*, Cooke, B. L. 538, and Wats. Part., 286.

(*b*) *Ex parte St. Barbe*, 11 Ves. 413.

(*c*) See, as to this, *ante*, p. 726, and *Ex parte Hargreaves*, 1 Cox, 440; *Ex parte Sillitoe*, 1 Gl. & J. 382; *Ex parte Williams*, 3 M. D. & D. 433, there cited.

In *Ex parte Gliddon* (*d*) an ingenious attempt was made to obtain the benefit of the above rule in a case where, although there were two firms in appearance, there was really only one and an agent, and no such separate trading as the exception requires. In appearance there were two firms, A. and B. and C. and D.; but D. was only C.'s agent; and C. himself was only A.'s agent; but neither B. nor D. knew this to be so. Both firms became bankrupt, and C. and D. were indebted to A. and B. An attempt was made by the trustee of A. and B. to prove against the separate estate of D. for the debt due from C. and D. to A. and B. But it was held that there was no such trading between A. and B. on the one side and D. on the other as was necessary to create a provable debt. The circumstances were such as to negative the existence of any debt from D. to A. and B. The real debt was owing by A. to A. and B.

Ex parte Gliddon, in re Wakeham.

Thirdly, with respect to the partners.

3. Position of the partners.

The principle that a debtor shall not be allowed to compete with his own creditors, is as strictly carried out in administering the separate estates of individual partners, as in administering the joint estate of a firm. The separate estate of each partner is liable to the debts of the firm, subject only to the prior claims of his separate creditors; whence it is obvious that one partner cannot compete with the separate creditors of his co-partner, without diminishing the fund which, subject to their claims, is applicable to the payment of the joint debts, and therefore of his own creditors. In other words, the rights of the joint creditors preclude one partner from ranking as a separate creditor of his co-partner, until the joint creditors are paid in full (*e*). Moreover, it is now settled, in opposition to some older cases (*f*), that a solvent partner is not entitled to rank as a creditor against the estate of his bankrupt co-partner upon indemnifying that estate against the claims of the joint

(*d*) *Re Wakeham*, or *Ex parte Gliddon*, 13 Q. B. D. 43.

(*e*) See, accordingly, *Ex parte Collinge*, 4 De G. J. & S. 533, where the result of such proof would have benefited the joint creditors; *Ex parte Carter*, 2 Gl. & J. 233, where an executor of a deceased partner sought to prove; *Ex parte Ellis*, ib. 312; *Ex parte Rawson*, Jac. 274; *Ex parte Robinson*, 4 D. & Ch. 499; *Ex parte May*, 3 Deac. 382.

(*f*) Viz., *Ex parte Taylor*, 2 Rose, 175; *Ex parte Ogilvy*, ib. 177.

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creditors; he must show that those claims are discharged or otherwise barred (*g*).

Assignee of solvent partner.

Although a partner cannot prove against his co-partner so long as the joint debts are unpaid, yet, if a debt owing by the bankrupt partner to his co-partner has been cancelled, and in consideration thereof the bankrupt has taken upon himself a debt due from his co-partner to a third party, this debt, so substituted for the first, may be proved by such third party, in competition with the other separate creditors of the bankrupt, whether the joint creditors are paid or not (*h*).

Proof by firm against estate of bankrupt partner.

The disability of a partner to prove in competition with his own creditors, prevents proof by a firm to which he belongs against his own separate estate; for proof by such a firm is obviously nothing more than proof by himself and co-partners (*i*).

The principle which allows joint estate to prove against separate estate, and separate estate to prove against joint estate, in cases where there has been a fraudulent conversion of property, or where there have been distinct trades, and a debt contracted in the course of those trades, is also applicable to proofs by one partner against another, in similar cases (*j*). Moreover, if A., intending to become a partner with B., advances him money as his, A.'s share of the common stock, and before the partnership is entered into, B. becomes bankrupt, A. may prove against B.'s separate estate, as a separate creditor for the amount of the advance, unless A., without being a partner, has made himself liable to creditors, as if he were one (*k*).

(*g*) *Ex parte Moore*, 2 Gl. & J. 166. Compare *Ex parte Andrews*, 25 Ch. D. 505, where the possibility of a claim being made was held not enough to prevent the executors of one partner from proving against the surviving partner. The joint liability in that case was really visionary only.

(*h*) *Ex parte Todd*, De Gex, 87.

(*i*) See acc. *Ex parte Smith*, 1 Gl. & J. 74, and 6 Madd. 2; *Ex parte Turner*, 4 D. & Ch. 169.

(*j*) See *Ex parte Westcott*, 9 Ch. 626, as to proving for a devastavit by an executor; *Ex parte Maude*, 2 Ch. 550, where two solvent co-partners sought to prove against the separate estate of their bankrupt partner. See *ante*, p. 726.

(*k*) *Ex parte Turquand*, 2 M. D. & D. 339, *ante*, p. 727; and as to money payable to a person in lieu of his being taken into partnership, see *Ex parte Megarey*, De Gex, 167.

Partnership induced by fraud.

At one time it was supposed that when a person had been induced by the fraud of another to join him in partnership, the former could not, on the bankruptcy of the latter, prove against his separate estate, for the amount paid to the bankrupt as a consideration for the partnership. This opinion was founded on the case of *Ex parte Broome* (*l*). There A. was induced, by the false and fraudulent representations of B., to enter into partnership with him, and to pay him a considerable premium. Shortly afterwards, B. became bankrupt, and A. sought to recover out of B.'s estate the amount of the premium paid as above mentioned. According to the report this was refused, upon the ground that, although A. might be entitled to recover the money as between himself and B., yet he was liable with B. to third persons, viz., the creditors of the firm.

Ex parte Broome.

The report of this case, however, is not warranted by the order which was actually made in it (*m*). Indeed, the order expressly directed that A. should be at liberty to prove against B.'s estate, and that A. should be paid a dividend in respect of his proof, rateably with B.'s other creditors. This order is in conformity with the opinion expressed by Lord Thurlow, in *Ex parte Lodge and Fendal*, and with the cases of *Hamil* v. *Stokes* (*n*) and *Bury* v. *Allen* (*o*).

Proof by company against estate of shareholder.

The application of the foregoing doctrines to cases where a shareholder in an unincorporated company has become bankrupt, and the company seeks to prove as a creditor against his separate estate, and in competition with his other separate creditors, has given rise to some difficulty. But in *Ex parte Davidson* (*p*), it was held that the public officer of a banking company, governed by 7 Geo. 4, c. 46, might prove against the separate estate of one of its members for what was due from him as a customer of the company, in respect of his overdrawn account, although the company (including therefore the bankrupt) was itself indebted to other persons; and in *Ex parte*

Ex parte Davidson.

(*l*) 1 Rose, 69.

(*m*) See the order in 1 Coll. 598.

(*n*) Dan. 20, and 4 Price, 166. See, on this case, 1 Mont. Part., 210.

(*o*) 1 Coll. 589.

(*p*) 1 M. D. & D. 648, and on appeal, sub nomine *Re Caldecott*, 2 ib. 368; settling the doubts raised in *Ex parte Marston*, Mon. & Ch. 576; *Ex parte Prescott*, ib. 611; *Ex parte Law*, ib. 590; and *Ex parte Snape*, ib. 607.

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Ex parte Ball.

Ball (*q*) it was held that a liquidator of an unregistered and unincorporated company being wound up under the Companies act, 1862, was entitled to prove against the estate of a bankrupt shareholder, in respect of a call made in the winding up. The same rule applies *à fortiori* to the case of an incorporated company. Excepting, therefore, those companies which are merely large partnerships, not empowered to sue and be sued by a public officer, and not being wound up, it is now settled that where a member of a company becomes bankrupt, the company, whether its debts are paid or not, may prove as a separate creditor of such member for what is due from him to it, either in respect of calls (*r*) or other matters (*s*). But the company, if it holds a security of the bankrupt for what is so due, must realise the security and prove for the difference, as in ordinary cases (*t*).

One partner may rank as a separate creditor of his co-partner, provided the joint creditors are not prejudiced.

Hitherto the right of one partner to rank as a separate creditor of his co-partner, has been considered solely with reference to joint creditors; it is necessary, however, also to notice it with reference to separate creditors. They are obviously benefited by the rule which prevents one partner from proving against the separate estate of his co-partner; but it is not for their sake that such rule has been established; and where the reason for the rule ceases to exist, the rule itself ceases to be applicable. Hence, if there never were any joint debts, or if all those which once existed have ceased to exist (*u*), either because they have been paid, barred, satisfied, or converted into separate debts, then one partner who is a creditor of another may, on the bankruptcy of the latter, prove against his separate estate in competition with his other separate creditors.

(*q*) 10 Ch. 48.

(*r*) *Ex parte Brown*, 3 De G. & S. 590; *Ex parte Nicholas*, 2 De G. M. & G. 271. See 19 & 20 Vict. c. 47, § 90.

(*s*) *Ex parte Davidson*, 1 M. D. & D. 648, and 2 ib. 368; *Ex parte Cooper*, 2 M. D. & D. 1; *Ex parte Wallis*, ib. 201. *Ex parte Woodroffe*, Fonbl. Bank. Ca. 14, cannot be supported.

(*t*) *Ex parte Manchester and County Bank*, 3 Ch. D. 481; *Ex parte Cooper*, 2 M. D. & D. 1; *Ex parte Wallis*, ib. 201. See, also, *Ex parte Connell*, 3 Deac. 201, where the security consisted of shares in the company itself.

(*u*) *Ex parte Andrews*, 25 Ch. D. 505, seems to show that it is enough if they have not been proved, and are not likely to be so

A leading case on the subject is *Ex parte Grazebrook* (*v*); there a dormant partner had retired, and the continuing partner continued the business and was adopted as the sole person liable to pay the debts formerly due from the firm. On the retirement of the dormant partner, the accounts of the firm were taken and settled, and a balance was found due to him. On the bankruptcy of the continuing partner, the dormant partner was allowed to prove as a separate creditor, for the amount of the balance so found due, although there were partnership debts still unpaid, because these debts had been converted into the separate debts of the continuing partner, and by the statement of the account, the latter had become debtor for the balance in question to his late co-partner.

Ex parte Grazebrook.

Effect of paying joint debts.

Again, if one partner has paid the joint debts, he is entitled to prove as a separate creditor of his co-partner for the amount of the share which ought to have been paid by him (*w*); and it is immaterial whether the debts have been paid before or since the bankruptcy (*x*).

In cases of this sort, moreover, the amount provable against each bankrupt is ascertained, not by dividing the whole amount of the debts paid by the number of partners, or by the number of shares held by them, without reference to their ability to pay; but by treating each partner as liable to contribute his own share, calculated as above, and also to contribute, as surety for the rest, to the payment of what is due from them, but which they are themselves unable to pay. Those, in fact, who can pay, must make up for those who cannot (*y*).

Proof for what is not satisfied by lien.

Again, although where one partner is indebted to the firm,

(*v*) 2 D. & Ch. 186. See, too, *Ex parte Gill*, 9 Jur. N. S. 1303; *Ex parte Hall*, 3 Deac. 125. In *Ex parte Dodgson*, Mont. & MacAr. 445, there were no joint debts. So in *Ex parte Davis*, 4 De G. J. & S. 523, noticed *ante*, p. 21.

(*w*) See *Ex parte Watson*, 4 Madd. 477; *Ex parte Carpenter*, Mont. & MacAr. 1; *Wood* v. *Dodgson*, 2 M. & S. 195. In the two last cases the partner who had paid the debts had retired and been indemnified against them by the bankrupt.

(*x*) See, in addition to the cases in the last note, *Moody* v. *King*, 2 B. & C. 558; *Parker* v. *Ramsbottom*, 3 B. & C. 257; *Ex parte Young*, 2 Rose, 40.

(*y*) See *Ex parte Hunter*, Buck, 552; *Ex parte Moore*, 2 Gl. & J. 172; *Ex parte Plowden*, 2 Deac. 456, and 3 M. & A. 402, overruling *Ex parte Watson*, Buck, 449, and *Ex parte Smith*, ib. 492.

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and the lien upon his share is insufficient to satisfy such debt, the deficiency cannot be proved against his separate estate in competition with the joint creditors of the firm, or until they are paid (*z*); yet such deficiency is provable against his separate estate in competition with his separate creditors, where the rights of the joint creditors do not intervene (*a*).

Separate estate insolvent.

Further, if the separate estate of a partner is clearly insufficient to pay his separate debts excluding that which he owes to his co-partner, the latter is entitled to prove; for, *ex hypothesi*, there is no possibility of any surplus out of which the joint creditors can be paid anything whatever. They therefore are in no way prejudiced by the proof (*b*).

But even in cases in which the right to prove exists, the proof cannot be admitted without taking the partnership accounts; for if they are taken the debt sought to be proved may be found to be balanced, and not really to exist (*c*).

Surplus of joint estate when administered under a separate adjudication.

Before leaving this subject, it may be remarked, that where one partner only is bankrupt, and his trustee administers the joint estate of the firm, as well as the separate estate of the bankrupt, and there is an ultimate surplus, that surplus ought to be divided between the bankrupt and the solvent partners, according to their respective interests therein.

Ex parte Lanfear.

In *Ex parte Lanfear* (*d*) one of two partners became bankrupt, and the other died. The bankrupt partner having paid all his creditors 20*s.* in the pound, the surplus of the joint and of his separate estate was ordered to be paid over to him, and it was paid over accordingly. The executor of the deceased partner, however, applied for an order that the bankrupt might account for what was due to the deceased in respect of his interest in the surplus of the joint estate, and that the money

(*z*) *Ex parte Carter*, 2 Gl. & J. 233; *Ex parte Ellis*, ib. 312; *Ex parte Reeve*, 9 Ves. 588, which shows that the joint creditors are entitled to be paid interest before the co-partners receive anything.

(*a*) *Ex parte Terrell*, Buck, 345; *Ex parte King*, 17 Ves. 115; *Ex parte Watson*, Buck, 449, and 4 Madd. 477; and see, as to this last case, 2 Gl. & J. 172.

(*b*) *Re Levey*, 4 De G. J. & S. 551. See, also, *Ex parte Sheen*, 6 Ch. D. 235, where the proof was by a person who had held himself out as a partner.

(*c*) See *Ex parte Maude*, 2 Ch. 550.

(*d*) 1 Rose, 442.

which had been restored might be paid into court, and an order to that effect was made.

C. *Proof against both the joint and the separate estates.*

First, general rule as to election.

Rights of joint and separate creditors.

With a view to avoid as much as possible any interruption in the statement of the principles according to which the conflicting rights of the creditors of the firm, and the separate creditors of the individual partners, are adjusted, the consideration of the position of those creditors who are both *joint and separate* (*i.e.*, of those, who, in respect of the same debt, have the option of suing either all the partners jointly, or some or one of them separately from the others) has been hitherto postponed.

In order that a creditor may rank as a joint and separate creditor, it is necessary that there should be two distinct rights vested in him at the same time, by virtue of which he is enabled to pursue either of the two remedies above alluded to. The modes in which these rights are acquired and lost have been already investigated (Bk. II. c. 2), and consequently it is unnecessary to refer to that subject in the present place.

Rule against double proof.

Subject to the exception which will be noticed presently, a person to whom the members of a firm are bound jointly and severally is not allowed in bankruptcy to rank as a creditor both against the joint estate and also against the separate estates, or any of them; he is compelled to elect whether he will rank as a joint creditor or as a separate creditor (*e*). If he elects to rank as a joint creditor he must, like other joint creditors, go in the first place against the joint estate, and he has no greater rights than they against the separate estates, or any of them; whilst, on the other hand, if he elects to rank as a separate creditor he must, like other separate creditors, confine himself in the first place to the separate estates, and he has no greater rights than they to the joint estate (*f*).

(*e*) See *Ex parte Bond*, 1 Atk. 98; *Ex parte Banks*, ib. 106; *Ex parte Rowlandson*, 3 P. W. 405; *Ex parte Bevan*, 10 Ves. 106; *Ex parte Hay*, 15 Ves. 4.

(*f*) *Ex parte Bevan*, 10 Ves. 106; *Bradley* v. *Millar*, 1 Rose, 273.

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Reason of the rule.

The reasoning upon which this rule is founded is as follows: If the members of a firm are bound jointly and severally, the creditor may sue them all jointly, or he may sue all or any of them separately, but he cannot do both; and as he cannot do both before bankruptcy, neither ought he to do what is tantamount to the same thing, after bankruptcy. It is very true that if he sues them all jointly, he can levy execution against the property of the partnership, or against the private property of each member, or against both at once; but so can any joint creditor. So far as analogy goes, therefore, there is no reason why a joint and separate creditor should be allowed to go against both estates at once, whilst a creditor who is merely joint is compelled to go against the joint estate before he can go against the separate estate (*g*). Nor is this all. The grand principle in bankruptcy is, as far as possible, to distribute the bankrupt's estate equally amongst all his creditors, and not to prefer one creditor to another. Now if a joint and separate creditor were to be allowed to prove against both estates at once, he would diminish the separate estate to the prejudice of the joint creditors, and diminish the joint estate to the prejudice of the separate creditors, and gain an advantage over them both (*h*). Such are the reasons which induced the Courts to hold that a joint and separate creditor ought not, as a rule, to be allowed to go against both estates at once, but that he should be compelled, like other creditors, to go in the first instance against one estate only. In giving the option to him, the Courts act in analogy to the rule, by which a joint and separate creditor can, as he pleases, sue his debtors jointly or separately.

Examples of the rule.

In conformity with the rule thus established, and excepting always the statutory exceptions to be noticed presently, a creditor who is a joint creditor by one instrument, and a separate creditor by a distinct instrument, is as much compelled to elect as if his joint and separate rights were conferred by one

(*g*) See *Ex parte Rowlandson*, 3 P. W. 405; *Ex parte Banks*, 1 Atk. 106; *Ex parte Bond*, ib. 98; Lord Eldon followed the rule, but disapproved it; see *Ex parte Bevan*, 9 Ves. 225, and 10 ib. 109.

(*h*) See *per* Lord Hardwick in *Ex parte Bond*, 1 Atk. 100.

and the same instrument (*i*); and if a firm has been implicated in a breach of trust, the *cestui que trust* (who thereby acquires a right available against all the partners jointly, as well as against each of them separately) cannot prove against the joint and separate estates at the same time, but must elect against which he will prove as if he were an ordinary joint and separate creditor (*j*). The same rule applies in cases of fraud (*k*).

Rule pre-supposes a creditor to be a joint as well as a separate creditor.

The doctrine of election, however, only applies where a creditor is, properly speaking, a creditor as well of the firm jointly as of some or one only of its members separately. Where, therefore, a firm has been dissolved, and the continuing partner is to pay all the debts of the firm, then, inasmuch as a creditor of the firm is in no way affected by this arrangement unless he accedes to it, he has not, without having acceded to it, any right, in the event of bankruptcy, to stand as the separate creditor of the continuing partner in respect of the old debt. Under such circumstances he has no right of election, but must rank as a joint creditor (*l*).

Electing against which estate to prove.

The rule as to election would, obviously, be wholly useless unless an election, once deliberately made, were held to be final (*m*). On the other hand, it would operate with great harshness if a creditor were held to have finally elected, when, in point of fact, he was not in a position to judge which course it would be best for him to adopt. It becomes, therefore, necessary, before leaving this subject, to examine the circumstances which have, and those which have not, been held to bind the creditor in this respect.

Election when conclusive.

In those cases in which a creditor has been held to have made his election beyond recall, it will be found that he acted

(*i*) *Ex parte Hill*, 2 Deac. 249. *Ex parte Vaughan*, 3 P. W. 407, is not law. Query, if double proof will not be now allowed in all such cases as these; see *Ex parte Honey*, 7 Ch. 178, *infra*, p. 748.

(*j*) *Ex parte Barnewall*, 6 De G. M. & G. 795; *Ex parte Chandler, Re Davison*, 13 Q. B. D. 50. Compare *Ex parte Sheppard*, 19 Q. B. D. 84, *infra*, p. 749, where the act applied.

(*k*) *Ex parte Adamson*, 8 Ch. D. 807.

(*l*) *Ex parte Freeman*, Buck, 471; *Ex parte Fry*, 1 Gl. & J. 96, and see *ante*, p. 705.

(*m*) A surety is apparently bound by the election of the principal creditor. See *Ex parte Carne*, 3 Ch. 463.

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not only with a full knowledge of his position, and of the material facts of the case, but also in some manner quite inconsistent with the character which he has subsequently sought to assume (*n*).

Creditor entitled to know how estates stand before he elects.

That which is principally calculated to influence the creditor's choice is the comparative solvency of the joint and of the separate estates; and in order to make his election he must have a reasonable time to inquire into the state of the different funds. He is entitled to defer his election until a dividend is declared, or at least until the trustee is possessed of a fund to make a dividend (*o*); and in a case where a large number of creditors had a right of election, and the estates were not so ascertained as to enable the creditors to elect, a temporary order was made that no larger dividend should be declared of the one than of the other estate (*p*).

Election when not considered as made.

A joint and separate creditor ought, it seems, to prove against both estates, but elect which he will be paid out of before he takes a dividend (*q*); and a creditor who, having a right of election, proves against one estate rather than another, will not be permitted to transfer his proof without showing the grounds which have induced him to change his mind (*r*). But the mere fact of his having proved against one estate will not, if he has received no dividend from it, preclude him from proving against the other estate, provided he does not seek to disturb any distribution of it which may already have been made (*s*). And even if the creditor has not only proved, but received a dividend, still if he can show that he did so in ignorance of material facts, he will be allowed to vary his proof on refunding the dividend he has received, with interest (*t*).

(*n*) As in *Ex parte Liddel*, 2 Rose, 34, and see *Ex parte Adam*, 1 Ves. & B. 494; *Bradley* v. *Millar*, 1 Rose, 273; *Ex parte Borrodailes*, 1 Mont. Part. 129, Appx. was a somewhat similar case. See, too, *Ex parte Solomon*, 1 Gl. & J. 25; *Couldery* v. *Bartrum*, 19 Ch. D. 394.

(*o*) See Cooke's Bank. Law, 275, ed. 8, *Ex parte Butlin*, there cited; *Ex parte Bond*, 1 Atk. 98; *Ex parte Bentley*, 2 Cox, 218.

(*p*) *Ex parte Arbouin*, De Gex, 359.

(*q*) *Ex parte Bentley*, 2 Cox, 218.

(*r*) *Ex parte Dixon*, 2 M. D. & D. 312.

(*s*) *Ex parte Bielby*, 13 Ves. 70; *Ex parte Masson*, 1 Rose, 159.

(*t*) *Ex parte Adamson*, 8 Ch. D. 807; *Ex parte Rowlandson*, 3 P. W. 405; *Ex parte Bolton*, 2 Rose, 389;

Position of petitioning creditor.

A joint and separate creditor who petitions for adjudication of bankruptcy against a firm, thereby *primâ facie* elects to be treated as a joint creditor (*u*); but if, instead of petitioning against the firm, he petitions for a separate adjudication against one of the partners, he may afterwards declare whether he will be treated as a joint or as a separate creditor (*v*). And if the separate adjudication is afterwards superseded in consequence of an adjudication against the firm, the creditor is restored to his right of election under the bankruptcy of the firm, and is not prejudiced by anything he may have done in the former bankruptcy (*w*).

Secondly, cases in which double proof is allowed.

Exception to the rule against double proof.

The rule which excludes a joint and separate creditor from receiving dividends from two estates at once, was subject to an exception where each estate represented a different trade carried on by a different firm. For example, if a firm, A., B., and C., carrying on one business, drew a bill on a firm, A., B., and D., carrying on a distinct business, and the bill was accepted and circulated, a holder of the bill was permitted to rank as a creditor of both firms at the same time, and to obtain dividends from their respective estates accordingly.

Reason of the exception.

The principle upon which this exception was founded was that there were distinct trades carried on with distinct capitals, and that the debts of each trade were properly payable out of the assets of the persons who carried it on, whether those debts were collaterally secured or not (*x*). If this principle had been logically carried out, double proof would have been allowed in all cases where a debt had been contracted by two parties carrying on distinct trades with distinct capitals, and both of

S. C., Buck, 7; *Ex parte Husbands*, 2 Gl. & J. 4, reversing S. C., 5 Madd. 419; *Ex parte Law*, 3 Deac. 541, and Mon. & Ch. 111. See, also, the next note.

(*u*) That he may be allowed to withdraw his joint proof and prove against the separate estates, or one of them, see *Ex parte Chandler, Re Davison*, 13 Q. B. D. 50.

(*v*) See *per* Lord Eldon in *Ex parte Bolton*, 2 Rose, 390, 1.

(*w*) *Ex parte Brown*, 1 Rose, 433, and 1 V. & B. 60; *Ex parte Smith*, 1 Gl. & J. 256.

(*x*) See *Ex parte Adam*, 1 V. & B. 496; *Ex parte Bigg*, 2 Rose, 37.

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whom had become bankrupt. It would have been immaterial whether the bankrupt parties were a firm and one of its members; or two firms, one of which included the other; or two firms having only one partner common to them both. It would also have been immaterial whether the creditor was or was not aware that one of the trades was in fact carried on by one or more of the persons who, with others, carried on the other trade. Unfortunately, however, the principle in question had been occasionally lost sight of, and the consequence was that the cases bearing upon the subject were in an unsatisfactory state, and extremely difficult to reconcile (*y*).

In order, however, to remove the doubts and difficulties which had thus arisen, the following clause has been inserted in the Bankruptcy act, 1883, sched. 2 :—

Proof in respect of distinct contracts.

18. If a debtor was at the date of the receiving order liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of the contracts, against the properties respectively liable on the contracts.

This section, it will be observed, extends to all liabilities on distinct contracts which a bankrupt may have entered into, either as a member of two or more distinct firms, or as a sole contractor and also as a member of a firm (*z*). The section applies, although there may not be any distinct trades at all; and so long as there are distinct contracts between such persons as are mentioned in the section, double proof is now admissible. If, for example, the members of a firm give a joint and several promissory note, the holder will be entitled to prove as well against the joint estate as against the separate estates of the partners (*a*). The old rule against double proof still remains; but it is now subject to so large a class of ex-

(*y*) See the 1st ed. of this Treatise, vol. ii. p. 1019 *et seq.*, and *Goldsmid* v. *Cazenove*, 7 H. L. C. 785.

(*z*) The fact that the contract is entered into by one of the parties as a partner need not appear from the contract itself, *Ex parte Stone*, 8 Ch. 914.

(*a*) *Simpson* v. *Henning*, L. R. 10 Q. B. 406; *Ex parte Honey*, 7 Ch. 178. As to the Act of 1861, see *Ex parte Wilson*, 7 Ch. 490. As to joint and several covenants to pay rent, see *Re Corbett*, 14 Ch. D. 122.

ceptions as to render the rule itself practically of little consequence. Joint and several liabilities arising otherwise than by distinct contracts are, comparatively speaking, few in number. All frauds and breaches of trust are not within the act; but if a partner who is a trustee improperly lends trust money to the firm the *cestui que trust* can prove both against his separate estate and against the joint estate of the firm, for such a case is within the act (*b*).

The act, however, only applies where there are two estates, it does not give a right of double proof against the same estate, although it may be the estate of a firm carrying on two businesses in different places (*bb*).

Thirdly, cases where a secured creditor may split his demand.

Position of joint and separate creditors who have securities.

The rule as to election throws a joint and separate creditor wholly upon one estate or wholly upon the other; whilst the exceptional rule as to double proof allows him to prove his whole debt against both estates at the same time (*c*). There is, however, a middle course, and one which is open to a joint and separate creditor who has a security for his debt.

It has already been seen that under ordinary circumstances a creditor whose debt is secured is not allowed to prove for his debt without giving up his security (*d*); but that this rule does not extend to a creditor who has the security, not only of his bankrupt debtor, but also of somebody else; nor to a creditor of a firm having a separate security from one of the partners, nor to a creditor of one partner having a security from the firm (*e*). This doctrine, coupled with that of election, puts a person who is a joint and separate creditor of one or more bankrupt partners, and who has a security for his debt, in this position:—

(*b*) *Ex parte Sheppard*, 19 Q. B. D. 84. Compare *ante*, p. 745.

(*bb*) *Banco de Portugal* v. *Waddell*, 5 App. Ca. 161, affirming 11 Ch. D. 317.

(*c*) Of course he cannot obtain more than the whole amount due to him.

(*d*) *Ante*, p. 714. He may now have it valued, and prove for the difference; but this does not affect the principle adverted to in the text.

(*e*) *Ante*, p. 715, and see *Ex parte Thornton*, 5 Jur. N. S. 212.

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1. He may prove for his whole debt against the estate to which the security does not belong, and retain and make what he can of his security (*f*); or,

2. He may give up his security; prove for the whole debt due on it (*i.e.*, the whole secured debt) against the estate to which the security belongs, and then prove for the residue of his debt against the other estate: thus in fact splitting his demand and proving for part against the joint estate, and for the residue against the separate estates of the partners, or *vice versâ*.

Ex parte Ladbroke.

The first case in which this splitting of debts was allowed was in *Ex parte Ladbroke* (*g*). There the bankrupt firm was indebted to their bankers to the extent of 27,000*l.* The sum of 18,000*l.*, part of this, was secured by the joint notes of the firm and by a mortgage of the separate property of one of the firm. This mortgage, moreover, extended not only to the 18,000*l.*, but to further advances, and contained a joint and several covenant by the bankrupt partners to pay the 18,000*l.* and further advances. The bankers were allowed to prove against the joint estate for the 18,000*l.*, and against the separate estate of the mortgagor for the residue of their debt, after deducting therefrom the sum obtained by a sale of the mortgaged property (*h*). The report of the judgment is to the effect that the Lord Chancellor thought that the bankers were entitled to pursue the joint liability of the bankrupts on the promissory notes to the extent of those notes, and at the same time to proceed on the several covenants for the residue of the debt.

Ex parte Hill.

Again, in *Ex parte Hill* (*i*) a partner covenanted to pay 4000*l.* and assigned as a security 3000*l.*, portion of his capital in the firm. A sum of 3000*l.* was then placed in the books of

(*f*) As in *Ex parte Bate*, 3 Deac. 358; *Ex parte Smyth*, ib. 597; *Ex parte Groom*, 2 ib. 265. He can now, it is apprehended, prove against the other estate for the difference between his debt and the value of the security.

(*g*) 2 Gl. & J. 81.

(*h*) The mortgage security had been sold and a sum of money had been received by the bankers out of the proceeds of the sale, and this sum was deducted from the sum they sought to prove against the separate estate.

(*i*) 3 M. & Ayr. 175, and 2 Deac. 249.

the partnership to the credit of the assignee, and the firm acknowledged themselves debtor to him for the amount. The firm became bankrupt, and although the creditor was not allowed double proof, viz., for 3000*l.* against the joint estate of the firm, and for 4000*l.* against the separate estate of the covenantor, yet he was allowed to prove for the 3000*l.* against the joint estate, and for the remaining 1000*l.* against the separate estate of the covenantor (*k*).

SECTION V.—THE BANKRUPT'S ORDER OF DISCHARGE.

Order of discharge.

The law relating to the discharge of a bankrupt was recast by the Bankruptcy Act, 1883 (see §§ 28—31, and the Bankruptcy Rules of 1886, rr. 235—238). An order of the Court must be obtained before a bankrupt is discharged from his debts and liabilities. Moreover the Court has a wide discretion conferred upon it, and may either grant or refuse the order, or suspend it for a time, or grant it subject to conditions as to future earnings or property. Further, if the bankrupt has been guilty of certain misdemeanors (*l*), the Court is forbidden to grant the order at all; and if he has conducted himself improperly in any of the ways specified in § 28 (3) or § 29 the Court is bound either to refuse it, or to suspend it, or to grant it subject to conditions as to future earnings or property (*ll*).

Effect of order of discharge.

The effect of an order of discharge is to discharge the bankrupt from all provable debts and liabilities with some exceptions (*m*), viz., crown debts, debts payable under Revenue Acts, or to sheriffs or other public officers, debts or liabilities incurred by any fraud or fraudulent breach of trust to which

(*k*) Some deductions were made, but the above statement is substantially correct with reference to the point for which the case is cited in the text.

(*l*) See § 28 (2) and § 31.

(*ll*) As to not keeping proper books, see *Re Mutton*, 19 Q. B. D. 102.

(*m*) § 30 (1), as to debts incapable of valuation, see *Morgan* v. *Hardy*, 18 Q. B. D. 646.

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the bankrupt was a party (*n*), debts or liabilities whereof he has obtained forbearance by any fraud to which he was a party.

Whether an adjudication is joint or separate, all the creditors, as well joint as separate, are entitled to be heard against the granting of an order of discharge to the bankrupt (*o*).

An absolute order of discharge entitles the bankrupt to all property subsequently acquired by him although the bankruptcy may not be closed (*p*).

Effect of bankrupt's order of discharge.

An order of discharge operates as a discharge of the bankrupt from all debts provable under the bankruptcy, whether owing by him alone or by him jointly with others (*q*).

But the discharge of one of several joint debtors does not discharge his co-debtors (*r*). On the bankruptcy of one partner, his order of discharge discharges him from all demands which his co-partners may have had against him, and which were provable by them. A leading case on this head is

Wood *v.* Dodgson.

Wood v. *Dodgson* (*s*): there the defendant had covenanted with the plaintiffs, his co-partners, on their retirement from the firm, to indemnify them against the partnership debts; the defendant became bankrupt, and afterwards the plaintiffs were compelled to pay debts of the firm. The defendant obtained his certificate, and this was held to be a bar to an action brought on the covenant by the plaintiffs; for although their demand accrued subsequently to the bankruptcy, it was provable therein by virtue of the enactment in the bankruptcy laws relating to proofs by sureties. The same point has been decided in other cases (*t*).

(*n*) Not necessarily personally, by his agent or partner is enough, see *Cooper* v. *Pritchard*, 11 Q. B. D. 351; *Emma Silver Mining Co.* v. *Grant*, 17 Ch. D. 122.

(*o*) 46 & 47 Vict. c. 52, § 28 (5), and Rules of 1886, r. 235.

(*p*) *Ebbs* v. *Boulnois*, 10 Ch. 479.

(*q*) See 46 & 47 Vict. c. 52, § 30; *Thompson* v. *Cohen*, L. R. 7 Q. B. 527; *Ex parte Hammond*, 16 Eq. 614.

(*r*) § 30 (4); *Sleech's case*, 1 Mer. 570, 571.

(*s*) 2 M. & S. 195, and see, *contra*, *Dally* v. *Wolferston*, 3 Dowl. & Ry. 269, in which, however, *Wood* v. *Dodgson* was not cited. See as to staying a partner's certificate until the partnership accounts have been taken, *Ex parte Hudley*, 1 Gl. & J. 193.

(*t*) *Ex parte Carpenter*, Mont. & MacAr. 1; *Aflalo* v. *Fourdrinier*, 6 Bing. 306; *Wright* v. *Hunter*, 1 East, 20.

Joint orders of discharge.

An order of discharge granted to two or more persons protects each and all, so that the death of one does not affect the others (*u*).

Where there is a joint adjudication against several partners, and some of them appeal from it, the Court will not on that account delay granting orders of discharge to the others (*x*).

Refusal of orders of discharge.

For further information relating to the granting and refusal of orders of discharge, the reader is referred to treatises on bankruptcy. Such matters illustrate no principle of the law of partnership, and are foreign, therefore, to the objects of this work (*y*).

Allowance to bankrupt partners.

The same observation applies to the law and practice relating to the allowance made to a bankrupt out of his estate for the support of himself and family (*z*). Upon this subject, however, the following rules, established under the old practice, may still be usefully noticed:

1. Unless a sufficient dividend is paid both to the joint and to the separate creditors of a bankrupt partner, he will not be entitled to any allowance (*a*).

2. If both classes of creditors are paid a sufficient dividend, each partner will be entitled to an allowance, although he may have contributed little or nothing to the payment of the joint creditors (*b*).

3. When one partner only is bankrupt, and he has paid his separate creditors in full, he is not entitled to an allowance out of the joint estate to the prejudice of the joint creditors (*c*).

4. A bankrupt partner is not entitled to a double allowance, one in respect of the joint and the other in respect of his separate estate. He is entitled to only one allowance, calcu-

(*u*) See, as to advertising a joint certificate as a separate one, *Ex parte Carter*, 1 M. & A. 115; *Ex parte Cossart*, 1 Gl. & J. 248; *Ex parte Currie*, 10 Ves. 51.

(*x*) *Ex parte Braggiotti*, 2 De G. M. & G. 964.

(*y*) An order of discharge may apparently be void, see *Wagner* v. *Imrie*, 6 Ex. 882; *Allcard* v. *Weeson*, 7 ib. 753; *Courtivron* v. *Meunier*, 6 ib. 74.

(*z*) See § 64.

(*a*) *Ex parte Goodall*, 2 Gl. & J. 281; *Ex parte Farlow*, 1 Rose, 421; *Ex parte Powell*, 1 Madd. 68.

(*b*) *Ex parte Morris*, Mon. 505; *Ex parte Gibbs*, 105.

(*c*) *Ex parte Holmes*, 3 V. & B. 137.

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lated on the amount of his separate estate, and of his share o the joint estate (*d*).

5. Where a separate adjudication is annulled in favour of a joint adjudication, the bankrupt's right to an allowance is not prejudiced (*e*).

Position of undischarged bankrupt.

An undischarged bankrupt is liable to be sued and otherwise proceeded against as if he were not a bankrupt (*f*); but proceedings against him may be stayed either by the Court in Bankruptcy or by the Court in which they are taken (*g*).

50 & 51 Vict. c. 66.

The discharge of persons adjudicated bankrupt under the Bankruptcy act, 1869, or any previous Bankruptcy act, and the closure of Bankruptcy proceedings commenced before the Bankruptcy act of 1883 came into operation, are governed by the Bankruptcy discharge and closure act, 1887. But there is nothing in it which specially relates to partners.

SECTION VI.—ARRANGEMENTS WITH CREDITORS.

Arrangements with creditors.

By the Bankruptcy act, 1883, debtors, whether partners or not, are enabled, either before or after adjudication, to compound or make arrangements with their creditors respecting their debts and liabilities, and their release therefrom, and for the distribution, inspection, management, and winding up o their estates; and the arrangements so made are binding no only on assenting but also on all other creditors, provide certain conditions which are specified in the act are dul observed and the Court approves of the scheme (*h*). If th scheme is approved, the receiving order is rescinded, and th

(*d*) *Ex parte Lomas*, 1 Mon. & A. 525. See, too, *Ex parte Bate*, 1 Bro. C. C. 453; *Ex parte Minchin*, Mont. & MacAr. 135.

(*e*) *Ex parte Llewellen*, 3 M. D. & D. 573.

(*f*) This seems to follow from the fact that the Bank. Act, 1883, contains no provision to the contrary.

(*g*) 46 & 47 Vict. c. 52, § 10 (and § 102 (2 and 4).

(*h*) 46 & 47 Vict. c. 52, §§ 18 a 23, and Bank. Rules, 1886, rr. 1 to 216. See, as to the approval the Court, *Ex parte Reed and Bow* 17 Q. B. D. 244; *Ex parte Bischo heim*, 19 Q. B. D. 33, and *ib.* Q. B. D. 258.

bankrupt (if there is no trustee) is restored to his property (*i*). It is not, however, necessary further to advert to the law on this subject; for there is nothing in it peculiar to partners except as mentioned below.

Several schemes.

The Bankruptcy rules, 1886, rr. 266 and 267, are however important. They authorise in the case of partners several schemes, viz., a scheme for the joint liabilities of the firm, and separate schemes for the separate liabilities of its several members.

266. At the first meeting, or any adjournment thereof, the joint creditors and each set of separate creditors may severally entertain proposals for compositions or schemes of arrangement under section 18 of the act (*k*). So far as circumstances will allow, a proposal entertained by joint creditors may be confirmed and approved in the prescribed manner, notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be entertained, confirmed, and approved.

267. Where proposals for compositions or schemes are made by a firm, and by the partners therein individually, the proposal made to the joint creditors shall be considered and voted upon by them apart from every set of separate creditors; and the proposal made to each separate set of creditors shall be considered and voted upon by such separate set of creditors apart from all other creditors. Such proposals may vary in character and amount. Where a composition or scheme is approved, the receiving order shall be rescinded only so far as it relates to the estate, the creditors of which have confirmed the composition or scheme.

Default in payment.

If default is made in any payment under a composition or scheme the remedy is to apply to the Court (*l*).

The Court has power to annul the composition or scheme if default is made in payment of any instalment due under it, or if it cannot proceed without injustice or undue delay, or if the approval of the Court was obtained by fraud (*m*).

Effect of scheme.

Whether the debtor is adjudged bankrupt or not, if a trustee is appointed, the property of the debtor vests in him and his title to it relates back as if he were a trustee in a bankruptcy (*n*).

(*i*) Bank. Rules, 1886, r. 208.
(*k*) Or under § 23, see r. 216.
(*l*) Bank. Rules, 1886, r. 211, and see *Ex parte Godfrey*, 18 Q. B. D. 470.
(*m*) 46 & 47 Vict. c. 52, § 18 (11) and § 23 (3), and see Bank. Rules, 1886, rr. 211 to 213; *Ex parte Moon*, 19 Q. B. D. 669.
(*n*) Ib. § 18 (12 and 13) and § 23.

Bk. VI. Chap. 4. Sect. 6.

The debts provable are the same as in bankruptcy (*o*); and, unless otherwise agreed and approved, the rules respecting the payment of joint debts out of joint estate and of separate debts out of separate estate are also the same as in bankruptcy (*o*).

A composition or scheme duly accepted and approved binds all the creditors so far as relates to their provable debts (*p*): but it does not release any person who would not be released by an order of discharge (*q*).

A discharge by joint creditors does not affect the separate creditors nor *vice versâ* (*r*).

After a complete discharge the debtor's after-acquired property belongs to him (*s*).

50 & 51 Vict. c. 57.

By the Deeds of arrangement act, 1887, all instruments of arrangement with creditors (otherwise than in pursuance of the bankruptcy law), must be registered, and are declared void if not registered (see § 5). But the act has no provisions specially affecting partners: nor have the rules of 1888 which have been issued in order to carry it into effect.

(*o*) 46 & 47 Vict. c. 52, and Bank. Rules, 1886, r. 215.

(*p*) Ib. § 18 (8) and § 23.

(*q*) Ib. § 18 (15) and § 23.

(*r*) See *Meggy* v. *Imperial Discount Co.*, 3 Q. B. D. 711.

(*s*) *Ex parte Wainwright*, 19 Ch. D. 140; *Ebbs* v. *Boulnois*, 10 Ch. 479.

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THE PARTNERSHIP ACT, 1890.

THE

PARTNERSHIP ACT, 1890,

With Notes:

BEING A SUPPLEMENT TO

A TREATISE

ON THE

LAW OF PARTNERSHIP.

BY

THE RIGHT HONOURABLE

SIR NATHANIEL LINDLEY, KNT., LL.D. ED.,

ONE OF THE LORDS JUSTICES OF HER MAJESTY'S COURT OF APPEAL.

ASSISTED BY

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WITH

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BY

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Bythewood & Jarman's System of Conveyancing is cited as . . Byth. & Jarm.
Lewin on the Law of Trusts, 8th Edition, is cited as . . . . . Lewin.
The references to Daniell's Chancery Practice, are to the 6th Edition, by Messrs. Field, Dunn, Ribton, and Upjohn.
Rules of the Supreme Court, 1883, and the subsequent rules, are cited as . R. S. C.

Reports.

In citing the current series of Law Reports, cases decided by the Court of Appeal are distinguished by abbreviating "Division" into "Div.," while in referring to cases decided by a Court of first instance or a Divisional Court, the abbreviation "D." is used.

SCOTCH AUTHORITIES AND ABBREVIATIONS.

Lord Stair's Institutions. More's Edition, 1832 . . . . . Stair.
Mr. Erskine's Institutes. Nicolson's Edition, 1871 . . . . . Erskine.
Professor George Joseph Bell's Commentaries on the Law of Scotland. Lord McLaren's Edition, 1870, 2 Vols. . . . . Bell Com.
Professor Bell's Principles of the Law of Scotland . . . . Bell's Prin.
F. W. Clark's Law of Partnership, 2 Vols., 1866 . . . . . Clark.
H. Goudy's Law of Bankruptcy, 1886 . . . . . Goudy.
Decisions of the Court of Session, viz. :—
Morison's Dictionary, 20 Vols. . . . . M.
Appendix, 2 Vols. . . . . M. App.
Hume's Decisions, 1781—1822, 1 Vol. . . . . H.
Faculty of Advocates' Collection, 1808–24 . . . . . F. C.
Cases in Court of Session, 1st Series, Shaw, 1821–38 . . . . S.
2nd Series, Dunlop, 1838–62 . . . . D.
3rd Series, Macpherson, 1862–73 . . Mc.
4th Series, Rettie, since 1873 . . . . R.
Scottish Law Reporter . . . . . S. L. R.
Scottish Jurist . . . . . Scot. Jur.
Decisions of the House of Lords in Scotch appeals, viz. :—
Robertson, 1709—1727 . . . . . Rob.
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ADDENDA.

PAGE 2, line 6 from bottom *after* "respect," *add*, A summary of the changes made in the English Law of Partnership, and of the doubtful points which have been settled by the present Act will be found *infra*, pp. 115 and 116.

,, 23. *Western National Bank of the City of New York* v. *Perez Triana* (C. A., W. N. 1890, 227). If a firm consists of one or more partners resident abroad, a writ against the firm in the name of the firm should not be issued without leave for service abroad. The action should be brought against the partners, or partner, in England, in their, or his, own names, or name, and be prosecuted accordingly. *Pollexfen* v. *Sibson* (1886), 16 Q. B. D. 792, and *Shepherd* v. *Hirsch Pritchard & Co.* (1890), 45 Ch. D. 231, can no longer be relied upon.

,, 43, note (*g*). Before "p." *add* "*ib.*"

,, 49, line 16. Dele "to," the first word in the line.

SUPPLEMENT

TO THE

LAW OF PARTNERSHIP.

INTRODUCTION.

History of the act.

In 1879, Sir Frederick Pollock drew a bill for the consolidation and amendment of the Law of Partnership. This bill was brought into the House of Commons in 1880, and again with modifications in 1882, 1883, 1884 and 1889. It was ultimately in its amended form taken up by the Government, and although in many respects altered, it was the foundation of the act passed last session and now known as the Partnership act, 1890.

Act not a complete code.

The Partnership act, 1890, is not a complete code of Partnership law; the mode of administering partnership assets in the event of death or bankruptcy is not to be found in the act, neither is there anything in the act relating to goodwill. The act itself provides, by § 46, that existing rules of equity and of common law shall continue in force except so far as they are inconsistent with the express provisions of the act.

Codification by Parliament.

Opinions will naturally differ as to the utility of statutes which deal with important branches of law, but which do not profess to deal with them exhaustively. No doubt an incomplete piece of work is unsatisfactory from whatever point of view it is regarded; but it does not follow that such a work is not worth executing; if it is well done as far as it goes, it may be a great boon; and the present act, although imperfect, has the merit of reducing a mass of law, hitherto undigested except

by private authors, into a series of propositions authoritatively expressed and as carefully considered as any act of Parliament is likely to be.

The Parliament of this country is very ill adapted to the work of codification. It is matter of amazement that Englishmen should be content to have the laws by which they are governed in such an inaccessible shape as they are; but, no doubt, one explanation of this state of things is the hopelessness of passing through Parliament, without mutilation, any carefully considered exposition of any great branch of law. Such an exposition must introduce amendments; for anomalies and irrational rules, though they may exist for centuries if only occasionally brought to light by judicial decision, would inevitably disappear if any attempt were made to formulate and perpetuate them in a legislative enactment. Necessary amendments, however, ought to be carefully considered by men who understand the subjects to which they relate and ought to be adopted by those who do not; but amendments laid before Parliament are very likely to be dealt with by incompetent persons, if not by opposing political parties acting on political party lines; and rather than run such a risk many earnest law reformers prefer to leave things as they are, or at all events not to bring forward measures calculated to arouse opposition. Taken as a whole, the law of England, both civil and criminal, is well adapted to the requirements of English people: but it sadly wants methodising and authoritative revision; and any such revision of any branch of it is a distinct gain. From this point of view the act in question is decidedly useful, although it is by no means a perfect measure, nor even so good as Parliament might have made it.

Alterations in the law.

With one important exception the Partnership act, 1890, introduces no great change in the law. It amends the law in some small particulars, and it removes doubts on one or two controverted points: but, speaking generally, the act makes no important change in the law save in one respect.

Charging orders.

The exception alluded to is the mode of making a partner's share of the partnership assets available for the payment of his separate judgment debts. For many years past the writer of these observations has called attention to the unsatisfactory state of the law on this subject and has suggested the im-

provement which has at length been adopted. A *fi. fa.* founded on a judgment obtained against one partner only can no longer be executed against the goods of the firm: but, following the procedure available in the case of public companies, the separate judgment creditor of a partner can obtain an order charging his interest in the partnership assets with the payment of the judgment debt; and this charge can be enforced by a sale or the appointment of a receiver. The other partners can pay off the judgment creditor and so obtain the benefit of his charge, which in this case the judgment debtor will be entitled to redeem; or if his interest is ordered to be sold they can buy it, and so get rid both of the judgment creditor and of the partner against whom the judgment was obtained (see § 23).

This procedure moreover extends to cost-book companies (§ 23, cl. 4), although in other respects the act does not apply to them (§ 1, cl. 2*c*). It was necessary to refer specially to these companies, because unregistered cost-book mining companies were not within the provisions of the existing statutes relating to charging orders, and unless they had been expressly provided for, the old cumbrous procedure would still have been applicable to them, although abolished as to all other companies and partnerships.

Sub-division of the act.

The act is divided into 5 parts headed—

Nature of Partnership, §§ 1—4.

Relations of Partners to persons dealing with them, §§ 5—18.

Relations of Partners to one another, §§ 19—31.

Dissolution of Partnership and its consequences, §§ 32—44.

Supplemental, §§ 45—50.

Part I. §§ 1—4.

The first four of these parts correspond with the four books into which the author's work on the Law of Partnership is subdivided. The division is one which naturally suggests itself.

Definition.

A definition of the term partnership is given in § 1. Carrying on business with a view to profit is the key to the definition; but as pointed out in § 2 profits may be shared by persons who are not partners.

Bovill's act.

Bovill's act, although repealed by § 48, is in effect re-enacted

by §§ 2 and 3; but it would have been better to have omitted it and to have expressed more emphatically the principle laid down by the House of Lords, in *Cox* v. *Hickman*, and to have left that principle to be practically worked out by the Courts. A loan on the terms that the lender is to share the profits of the borrower does not constitute a partnership if the agreement between the borrower and lender is in writing and signed by them (§ 2, cl. 3, *d*); but what if there is no writing? Is the lender a partner with the borrower? and if not, can the lender compete with the borrower's other creditors in the event of his bankruptcy? (see § 3). *Cox* v. *Hickman* leaves the first of these questions to be determined by the real intention of the parties; and good sense will probably lead the Courts to construe § 3 so as to avoid the absurdity of putting a lender of money without, in a better position than one with, a written agreement for a share of profits.

A firm.

Partners are for the purposes of the act called collectively a firm (§ 4), but the firm is not a corporate body in England. In Scotland a firm is a legal person distinct from the partners of whom it is composed; but each partner can be compelled to pay the debts of the firm (§ 4, cl. 2). The term *firm* as defined in § 4 does not apparently include a person liable to the debts of a firm by holding himself out as a partner in it. Nor does the act contain any provisions relating to legal proceedings by and against a firm for its debts and liabilities. These are governed in England by the rules of the Supreme Court, as to which see "Partnership," pp. 264 *et seq.*

Part II. §§ 5—18.

The second part headed Relations of partners to persons dealing with them, §§ 5—18, contains nothing new. Partnership debts continue to be joint, and not both joint and several as in Scotland (§ 9); but the estate of a deceased partner can be reached by a creditor of the firm as heretofore.

The law as to the liability of a firm for money misapplied by one of its members is compendiously stated in §§ 11 and 13.

The doctrine of liability by holding out is formulated by § 14, and it is expressly declared that liability may attach although the defendant may not have known that the plaintiff was trusting him. But the continued use of a deceased partner's name does not impose liability on his estate.

The liabilities of incoming and outgoing partners are tersely expressed in § 17, and the possible discharge of a retired partner by agreement to be inferred from a course of dealing is prominently alluded to. The act has not altered the law relating to the discharge of one partner by obtaining judgment against another. See "Partnership," p. 254 *et seq.*

Part III. §§ 19—31.

The third part, treating of the relations of partners to one another whilst the firm is a going concern, extends from § 19 to § 31. The cardinal principle here is that the rights of partners *inter se* depend on the agreement into which they may choose to enter, and that such agreement may be inferred from their conduct. This principle is clearly recognised in § 19.

Partnership property.

Partnership property and the interest of each partner therein, are dealt with in §§ 20—22 and 24 (1); and the obligation of every partner to account for profits made by himself is expressed in § 29 and § 30. The legislature has adopted the established rules of equity as to these matters.

The act removes some doubts on minor points. In the absence of special agreement, a right is given to interest on advances though not on capital (§ 24 (3) and (4)); and a majority can bind a minority as to ordinary matters connected with the partnership business (§ 24 (8)). But as before the act so now, a majority cannot change the nature of the business of the firm (§ 24 (8)), nor expel a partner (§ 25) unless expressly authorised so to do.

Assignments and mortgages.

The rights of assignees and mortgagees of shares are dealt with in § 31, and care has been taken to prevent such persons from interfering with the transaction of the business of the firm, and at the same time to secure to them payment of all money to which the assignor would have been entitled if he had not parted with or charged his interest.

Charging orders.

The alteration in the law already noticed (p. 2), substituting a charging order for a *fi. fa.* on a separate judgment against a partner, is effected by § 23; and if a partner's share is charged under this section his co-partners are entitled to have the partnership dissolved (§ 33 (2)).

Part IV. §§ 32—44.

Part IV. treats of dissolution and its consequences, §§ 32—44.

Causes of dissolution.

The causes of dissolution by a partner, as distinguished

from the Court, are enumerated in §§ 32—34. Apart from agreement, there seems to be no right to retire except by dissolving the firm, although retirement in some other way is apparently pointed to or implied: see the marginal heading of § 26, and § 37. This last section may however apply to retirement by agreement.

The power of the Court to decree a dissolution is more extensive than before; for in addition to the old-established grounds for dissolution, enumerated in § 35 (*a*) to (*e*), the Act confers upon the Court the power to dissolve whenever circumstances have arisen which in the opinion of the Court render it just and equitable that the partnership be dissolved (§ 35 (*f*)). These words are very wide, and it is to be hoped that the discretion conferred by them will not be restricted, little by little, by judicial decision. Each case ought to be considered on its own merits; and all the circumstances of each case ought to be weighed.

Advertisement.

The right to advertise a dissolution is recognised in § 37, and the effect of not notifying it is stated in § 36.

The continuance of the powers of partners for the purpose of winding-up the affairs of their dissolved firm is recognised in § 38; and the right of each partner to have its assets realised, its debts and liabilities discharged, the accounts of its members adjusted, and its surplus assets divided, is expressed in § 39.

Premium.

The difficult subject of the apportionment of premiums is dealt with in § 40. No right to any return of premium is given; but in certain specified cases the Court is empowered to order a return of part or even of the whole.

A person induced to become a partner by fraud or misrepresentation, and who rescinds the partnership contract on that ground, is entitled to indemnity, the nature of which is defined with care in § 41.

Continued use of capital.

The act preserves the old equitable doctrine entitling a retired partner, or the representatives of a deceased or bankrupt partner, whose capital is not paid out, to interest at 5 per cent., or, if he or they prefer it, to such a share of profits as can be attributed to the use of his capital, § 42. The difficulty, however, of ascertaining such share is shown by experience to be very great; and it would have been well if the Court had

been empowered to give a higher rate of interest than 5 per cent. instead of a share of profits.

The mode in which the assets are to be applied and the accounts of the partners adjusted is stated in § 44, and is in accordance with the existing law.

Goodwill.

One matter of great practical importance and of some difficulty is unfortunately not dealt with, *i.e.* the goodwill of a dissolved firm and the extent to which, and the persons by whom, the use of its name may be continued. Sir F. Pollock's bill dealt with these points; as did also the bill which passed the House of Commons in 1889 and the bill which was brought into the House of Lords in 1890. But owing, it is believed, to differences of opinion, and to the difficulty of arriving at a conclusion which would be acceptable to both Houses of Parliament, the clauses relating to these subjects were struck out. The law upon them must therefore be extracted from judicial decisions (see § 46), and the doubts and difficulties which beset questions arising on these subjects must remain for future judicial or legislative solution.

Bankruptcy.

Bankruptcy dissolves the firm as before (§ 33 (1)). The Bankruptcy act, 1883, and the Bankruptcy rules of 1886 apply both to joint adjudications against firms and to separate adjudications against their individual members.

Scotland.

The distinctive feature of the law of partnership in Scotland is the separate *persona* of the firm. It is deemed to be a separate person in law, capable of entering into obligations and contracts, of holding personal property, and of carrying on legal proceedings by its distinctive name or firm as its individual appellation. By the law of England and Ireland a private partnership of two or more persons is not recognised separately from the co-partners of whom it is composed. This characteristic of Scottish partnerships is preserved by the fourth section of the statute, which declares that "in Scotland a firm is a legal person, distinct from the partners of whom it is composed." The Mercantile Law Amendment Commission in 1855, after full enquiry, expressed the opinion

that this principle "is a very convenient and useful one," and recommended its introduction into the law of England and Ireland (*b*), a suggestion which has not yet received effect.

The doctrine as recognised in Scotland is not a mere legal fiction, but is productive of many important practical results, the leading differences between the English and Scotch law of partnership being directly traceable to it. It may therefore be useful here to note the leading consequences of the doctrine.

1. The funds of the partnership belong not to the partners as joint owners, but to the firm itself as sole owner.

2. The firm itself is the proper or primary debtor in debts owing by the partnership, and the debt must, in the first place, be constituted against the firm. On the failure of the firm to pay according to its obligation, the partners individually are liable *singuli in solidum* for the debts as obligations of a third party. The estate of a partner can, in bankruptcy, be charged only with the balance not met by firm's estate.

3. In legal proceedings by or against the partnership, if the name of the firm comprises the name of persons only, (*e.g.*, A. & B. or A. B. & Co.), the firm itself may sue or be sued by that name, and no partners need be named or served: but if the name be a descriptive one (*e.g.*, Clyde Shipping Co.), the names of three partners (if there be so many) must be used along with the descriptive name.

4. The firm may stand in the relation of debtor or creditor to any of its partners, and can sue or be sued by any of them.

5. Two firms having one or more members in common may sue each other.

6. A firm may be sequestrated without the individual partners being sequestrated.

7. Creditors of a partner may attach his share or interest in the partnership by arrestment in the hands of the firm, as

(*b*) Mercantile Law Amendment Commission, 2nd Report (1855), p. 18.

a separate person; and it may be assigned, and the right completed by intimation to the firm.

The second of these points is touched by the ninth section of this statute, which reaffirms the joint and several liability of partners of a Scotch concern for the firm's obligations, without, however, referring to the necessity of first constituting the debt against the firm; but, for the reasons stated in the notes on that section, it is thought no change is thereby made on the existing law.

The seventh of these consequences is left in the very unsatisfactory position which it at present holds. The interest of a partner in a partnership concern is a *jus crediti*, a personal or moveable right, in the hands of a third party, the firm. Like any other right or moveable so situated it is attachable by arrestment, to be made effectual by an action of furthcoming; and similarly it is assignable by the partner, and the right is completed by intimation of the assignation to the debtor, the firm. This confers, however, no right on the arresting creditor or assignee to become a partner; nor to dissolve the partnership if, under the contract, there be still a term to run. Further action cannot be taken till dissolution of the firm, when in a winding-up the creditor or assignee would realise his debtor's share or interest in the concern. What may be done in the case of a partnership at will is not clear. The thirty-third section of the act gives a remedy in the corresponding case of a charging order in England, by conferring on the other partners an option of dissolving the partnership. The remedy, it is to be observed, is given in the interest or for the benefit, not of the partner who is indebted, or of his creditors, but of the other partners of the concern. It is to be regretted that some similar power has not been given in Scotland.

Little has been done to assimilate the laws of England and Scotland, even in points where the way was paved by the report of the Mercantile Law Amendment Commission. The effect of the thirty-sixth section, however, though not happily expressed, appears to be to remove a difference between these laws on a comparatively minor point, viz., the notice required to be given by a dormant partner on his retirement. In

Scotland there was no difference, in this respect, between an ostensible and a dormant partner. In England, however, the dormant partner only required to give special notice of his retirement to those persons at the time having relations with the partnership *who were aware of the dormant partner's connection with it*, and to no others either specially or by advertisement. The terms of this section are commented on in the notes.

But the important subject of set-off between the firm's and partners' debts, upon which the Commission made several recommendations, is not touched by the act. This point is referred to under the ninth section, which deals with the joint and several liability of partners according to the law of Scotland.

The forty-sixth section has the effect of preserving the existing state of the law wherever not expressly altered. The question will accordingly arise whether the marriage of a female partner (which is not mentioned in the Act) shall continue, as hitherto, to operate *ipso facto* a dissolution, or whether the Married Women's Property (Scotland) act, 1881, has any effect in modifying the common law. This point is further referred to in the notes.

The law on the subject of the bankruptcy of a firm and individual partners, including the question of ranking of debts arising thereon, is excluded by the forty-seventh section of the act, and left to stand upon the statutes and decisions in the law of bankruptcy.

The annotations on the statute, so far as affecting the law of Scotland, are intended to illustrate the present state of that law, and to point out any alterations introduced by the act. Reference is accordingly made to the institutional writers, and notably to Mr. George Joseph Bell, Professor of Scots Law in the University of Edinburgh (from 1822 to 1843) whose Commentaries have placed the profession and his country under lasting obligations. The leading decisions of the Court of Session and on appeal therefrom of the House of Lords are also cited. The subjects and sources of many of the notes are familiar and accessible enough to most Scottish lawyers; but it is hoped that in this form they will, with the parallel notes and

references to English authorities, prove useful to readers and practitioners both in England and Scotland.

The most recent (the seventh), edition of Professor Bell's Commentaries on the Law of Scotland, edited by Lord McLaren, when at the bar, and published in 1870, has been used. It contains the text as left by the author, with valuable annotations by the editor, and a reference to authorities of later date; and is now the edition most generally in use.

PARTNERSHIP ACT, 1890.

53 & 54 Vict., Chapter 39.

An Act to declare and amend the Law of Partnership.

[14*th August*, 1890.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Nature of Partnership.

Definition of partnership.

1.—(1.) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.

(2.) But the relation between members of any company or association which is—

(*a.*) Registered as a company under the Companies Act, 1862, or any other Act of Parliament for the time being in force and relating to the registration of joint stock companies; or 25 & 26 Vict. c. 89.

(*b.*) Formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter; or

(*c.*) A company engaged in working mines within and subject to the jurisdiction of the Stannaries:

is not a partnership within the meaning of this Act.

For previous attempts at defining partnership, see "Partnership," pp. 2—4.

Sub-section 1.

Sub-section (1).

When the present Act was introduced into the House of Lords § 1 (1) stood as follows:—

"Partnership is the relation which subsists between persons who have agreed to carry on a business in common with a view of profit."

This definition was inaccurate, for, as pointed out by Parke, J., in *Dickinson* v. *Valpy* (1829) (*a*), persons who have entered into an agree-

(*a*) 10 B. & C. pp. 141—2.

Section 1.

ment that they will at some future time carry on business as partners, can not be considered as partners until the arrival of that time. The definition in its present form avoids this inaccuracy, but it may be a question whether it does not go too far in the opposite direction by making the actual carrying on business a test of partnership. The cases on this subject will be found in "Partnership," pp. 20 *et seq.*

It will be observed also that the definition in its original form stated that the partnership relation rested upon agreement. The present definition does not state this, but it is conceived that the relation can only result from an agreement. Before therefore the relation can result, all the elements of a legal contract between the persons carrying on a business in common with a view of profit must be present, and therefore in every case in which the existence of a partnership is in question, the following points will require attention :—

(1.) The consideration necessary to support the contract ; as to which see "Partnership," p. 63.

(2.) The capacity of the persons in question to enter into a contract of partnership ; see *ib.* pp. 71 *et seq.*

(3.) The evidence by which such a contract may be proved ; see *ib.* pp. 83 *et seq.* (*b*).

(4.) The legality of the contract ; see *ib.* pp. 91 *et seq.*

"*Business.*"—See § 45, *infra.*

"*With a view of profit.*"—These words will distinguish partnerships from other kindred associations, such as clubs, which do not exist with a view of profit (see "Partnership," p. 50). Hitherto it has been considered essential for a partnership to have for its object not only the acquisition, but also the division, in some way or another, of profit (*c*), and consequently mutual insurance societies have not hitherto been treated as partnerships (*d*). Such societies are, however, associations "which have for their object gain" within the meaning of § 4 of the Companies Act, 1862 (*e*). It may therefore be that societies of this nature, which, by reason of the number of the persons carrying on the business (*f*) or otherwise, do not require to be registered under the Companies Act, 1862, will be held to be partnerships under this Act.

Scotch Law.

Scotch Law. Definitions.

Mr. Erskine's definition is,—Society or co-partnery is a consensual contract "by which the several partners agree concerning the communication of loss

(*b*) In addition to the cases there cited as to the application of § 4 of the Statute of Frauds to contracts of partnership, see *Gray* v. *Smith* (1889), 43 Ch. Div. 208.

(*c*) *Pooley* v. *Driver* (1876), 5 Ch. D. p. 472 ; *Mollwo, March & Co.* v. *Court of Wards* (1872), L. R. 4 P. C. p. 436.

(*d*) "Partnership," p. 51, and cases there cited.

(*e*) See *Ex parte Hargrove* (1875), 10 Ch. 542, and other cases collected in "Lindley on the Law of Companies," pp. 114—15.

(*f*) As in *Smith* v. *Anderson* (1880), 15 Ch. Div. 247.

or gain arising from the subject of the contract" (*g*). Professor George Joseph Bell's definition is,—"a mutual contract and voluntary association of two or more persons for the acquisition of gain or profit with a contribution for that end of stipulated shares of goods, money, skill, and industry; the stock of the society being held *pro indiviso* in trust for the creditors" (*h*). Section 1.

Professor Bell observes that definitions of partnership are to be received with peculiar caution if borrowed from the Civilians "who neglect almost entirely the implied power and unlimited mandate of the partners to bind the rest" (*i*).

SUB-SECTION 2.

Section 4 of the Companies Act, 1862, prohibits the formation of any company, association, or partnership consisting of more than ten persons for the purpose of carrying on the business of banking, or consisting of more than twenty persons for the purpose of carrying on any other business, that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered under that Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries. Sub-section (2).

For cases which have been decided under this section, see "Lindley on the Law of Companies," pp. 114—115.

By a comparison of this section of the Companies Act with the present Act it will be observed—

(1.) That "business" in this Act may, by reason of the interpretation of that word given in § 45, have a more extensive application than "business" in § 4 of the Companies Act.

(2.) That the present Act speaks of "profit," and the Companies Act of "gain" (*k*).

(3.) That the Companies Act does not expressly exclude from its operation companies formed under royal charter. The Crown at common law possesses the right of incorporating by charter any number of persons who assent to be incorporated, and as the Crown is not bound by the Companies act, 1862 (*l*), it is conceived that that Act cannot render the registration of corporations formed by royal charter, however numerous the members of such corporations may be, compulsory.

As to what companies or associations may be registered under the Companies Act, 1862, see "Lindley on the Law of Companies," pp. 111 *et seq.*

Though companies engaged in working mines within and subject to the jurisdiction of the Stannaries are not partnerships within the meaning of Cost-book companies.

(*g*) III. 3, 18.
(*h*) Principles, § 351.
(*i*) 2 Bell's Com. 499.
(*k*) See the remarks of Jessel, M.R., in *Ex parte Hargrove* (1875), 10 Ch. 542.
(*l*) See *Oriental Bank Corporation* (1884), 28 Ch. D. 643; *Re Henley & Co.* (1878), 9 Ch. Div. 469.

Section 2.

this Act, section 23, which regulates the procedure against partnership property for a partner's separate judgment debt, applies to cost-book companies. (See *infra*, § 23 (4).)

Unregistered companies.

The companies referred to in Part VIII. of the Companies Act, 1862 (§§ 199—204), viz., those consisting of more than seven members and unregistered, will fall under this Act while the company is a going concern; but the provisions of the Companies Acts, with the exceptions and additions enacted in these sections, will apply to the winding up thereof. One of these exceptions excludes winding up voluntarily or under supervision of the Court.

Rules for determining existence of partnership.

2. In determining whether a partnership does or does not exist, regard shall be had to the following rules:

(1.) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

(2.) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3.) The receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

(*a*.) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such;

(*b*.) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such:

(*c*.) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such:

(*d.*) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto :

(*e.*) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

"Partnership," pp. 10 *et seq.*

The rules contained in this section only state the weight which is to be attached to the facts mentioned, when such facts stand alone. These facts, when taken in connection with the other facts of the case, may be of the greatest importance, but when there are other facts to be considered this section will be found to be of very little assistance. The main rule to be observed in determining the existence of a partnership, a rule which has been recognised ever since the case of *Cox* v. *Hickman* (1860) (*m*), and was expressly stated in the present Act when it was first introduced into the House of Lords, is that regard must be paid to the true contract and intention of the parties as appearing from the whole facts of the case. Although this principle is no longer expressed it is still law (see § 46).

Adam *v.* Newbigging.

If the real effect of the agreement is to create the partnership relation, the parties cannot escape from the consequences of being partners. This is clearly stated by Lord Halsbury in the following passage from his judgment in the case of *Adam* v. *Newbigging* (1888) (*n*). "If a partnership in fact exists, a community of interest in the adventure being carried on in fact, no concealment of name, no verbal equivalent for the ordinary phrases of profit and loss, no indirect expedient for enforcing control over the adventure will prevent the substance and reality of the transaction being adjudged to be a partnership ; and I think I should add, as applicable to this case, that the separation of different stipulations of one arrangement into different deeds will not alter the real arrangement, whatever in fact that arrangement is proved to be. And no 'phrasing of it' by dexterous

(*m*) 8 H. L. C. 268. See *Badeley* v. *Consolidated Bank* (1888), 38 Ch. Div. at p. 258, "Partnership," pp. 10 *et seq.*

(*n*) 13 App. Ca. p. 315.

Section 2.

draftsmen, to quote one of the letters, will avail to avert the legal consequences of the contract." Nevertheless a clause negativing partnership may throw light on other clauses in the agreement, and rebut inferences which might be drawn from them alone. (See "Partnership," p. 11.)

SUB-SECTION 1.

Sub-section (1).

This sub-section has not introduced any alteration in the existing law. For cases illustrating the position of co-owners, see "Partnership," pp. 51 *et seq.* See also *infra*, § 20 (3).

Scotch Law.

Scotch Law.

This is the existing law (*o*). In *Parnell* v. *Walter* (1889) (*o*), after hearing evidence, including that of English counsel, Lord Kinnear held that the proprietors of *The Times* newspaper formed a partnership, and were not merely co-owners. See as to co-lessees, *McVean* v. *McVean* (1864) (*p*), and *Moore* v. *Dempster* (1879) (*q*).

SUB-SECTION 2.

Sub-section (2).

This sub-section appears only to summarise the law which may be deduced from the cases collected or referred to in "Partnership," pp. 17 and 18.

Persons who share gross returns necessarily share profits, if there are any, but they do so only incidentally, because such profits are included in what is divided. (See "Partnership," pp. 8 and 9.)

Scotch Law.

Scotch Law.

This has also been stated as the law of Scotland (*r*). See also *per* Lord Shand in *Eaglesham* v. *Grant* (1875) (*s*).

SUB-SECTION 3.

Sub-section (3).

The first clause of this sub-section is not well expressed, and indeed appears to contain a contradiction in terms, for if the receipt of a share of the profits of a business is *prima facie* evidence of partnership, it necessarily follows that the receipt of such a share, if that is the only fact in the case, must of itself be sufficient to establish a partnership. The effect of the receipt of a share of profits in determining the existence or non-existence of a partnership was very carefully considered by the Court of Appeal in the recent case of *Badeley* v. *Consolidated Bank* (1888) (*t*), and it is conceived that

(*o*) Stair I. 16, 1; Erskine III. 3, 18; 2 Bell's Com. 544; Bell's Pr. § 351; *Neilson* v. *McDougal* (1682), M. 14,551; *Aitchison* v. *Aitchison* (1877), 4 R. 899; *Parnell* v. *Walter* (1889), 16 R. 917.

(*p*) 2 Mc. 1150.

(*q*) 6 R. 930.

(*r*) Clark on Partnership, 47 and 53.

(*s*) 2 R. 964.

(*t*) 38 Ch. Div. 238.

Section 2.

this sub-section does not alter the law stated in that case. The meaning of the rule that the sharing of profits is *primâ facie* evidence of partnership is explained in the following passages from the judgments in that case.

Badeley *v.* Consolidated Bank.

"It is said that there are *dicta* of various judges in various cases that the participation in the profits may decide the question, or that it is *primâ facie* evidence of partnership. Undoubtedly, if one found that two persons were participating in the profits made by a business, and knew nothing more, one would say, How is this? If they participate in the profits as being jointly entitled to the profits, that unless explained would lead to the conclusion that the business is the joint business of the two, and this would be partnership. But then when the participation in profits arises from a clause in an agreement entered into between the parties, it is wrong to say that this is *primâ facie* evidence of a partnership, because you must look not only to that stipulation, but to all the other stipulations in the contract, and determine whether on the stipulations of the contract, taken as a whole, you can come to the conclusion that there is a partnership—that there is a joint business carried on on behalf of the two—or whether the transaction is one of loan between debtor and creditor, a loan secured by giving a certain interest in the profits" (*u*).

"I take it, it is quite plain now, ever since *Cox* v. *Hickman* (*x*), that what we have to get at is the real agreement between the parties. It is no longer right to infer either partnership or agency from the mere fact that one person shares the profits of another. It may be, and probably it is true, that if all that is known is that one person carries on a business and shares the profits of that business with another, *primâ facie* those two are partners, or *primâ facie* the person carrying on the business is carrying it on as the agent of the person with whom he shares his profits. That may be true, and I think is true even now; but when you have a great deal more to consider, it appears to me to be a fallacy to say that you are to proceed upon the idea that sharing profits *primâ facie* creates a partnership or an agency, and that *primâ facie* presumption has to be rebutted by something else" (*y*).

For other cases illustrating the first clause of this sub-section, see "Partnership," pp. 12 *et seq.*

Scotch Law.

Scotch Law. Cox *v.* Hickman.

Prior to *Cox* v. *Hickman* (1860), the Law of Scotland on this point was summarised by Professor Bell thus:—"If by such evidence" (*i.e.*, parole or written) "either a direct connection as partners shall be established, or participation of profit, it will be sufficient to raise the responsibility as a partner" (*z*).

(*u*) Per Cotton, L.J., 38 Ch. Div. at p. 250.

(*x*) 8 H. L. C. 268.

(*y*) Per Lindley, L.J., 38 Ch. Div. at p. 258. See also Bowen, L.J., p. 262, ib; and *Mollwo, March & Co.* v. *Court of Wards* (1872), 4 P. C. 433.

(*z*) 2 Bell's Com. 511; Bell's Pr. § 363. See also *McKinlay* v. *Gillon* (1830), 9 S. 90; affd. H. L. 5 W. & S. 468.

Section 2.

Commenting on the cases of *Cox* v. *Hickman* (1860), *Bullen* v. *Sharpe* (1865), and *Mollwo, March & Co.* (1872), Lord Shand, in 1875, states his concurrence "in the view expressed by Mr. Lindley, that the judgments in those two cases merely carried out to their legitimate results the principles which were announced, and which received effect in the decision of *Cox* v. *Hickman;* and I think they bear out the statement made by Mr. Lindley . . . . that they 'establish the doctrine that no person who does not hold himself out as a partner is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se.*' . . . . Where, however, the question is whether a person who receives with others a share of the profits of a business, of which they are unquestionably partners, is also a partner, I think it is the result of the decisions above referred to that (in the absence of acts showing that with his knowledge or authority he was held out as a partner), the receipt of profits will not infer responsibility as a partner, unless the parties, having regard to the subsistence of their arrangements, are really partners *inter se;* and referring in particular to the opinion of Baron Bramwell, in the case of *Bullen* v. *Sharpe*, and to the judgment in the case of *Mollwo, March & Co.*, I think there is no more reason for inferring agency, with resulting liability for the debts of the business, from an agreement to share profits, than for inferring partnership as between the parties receiving profits." *Eaglesham* v. *Grant* (1875) (*a*).

Sub-section 3. (*a*).

Sub-section (3) (*a*).

Sub-section (3) (*a*) substantially expresses the decision in *Cox* v. *Hickman* (1860) (*b*); for observations on that case and other cases following it, see "Partnership," pp. 30 *et seq.*

Scotch Law.

Scotch Law.

This sub-section is illustrated in *Eaglesham* v. *Grant* (*supra*), and *Stott* v. *Fender and Crombie* (1878) (*c*).

Sub-section 3 (*b*), (*c*), (*d*), and (*e*).

Sub-section (3) (*b*), (*c*), (*d*), and (*e*).

Sub-sections (3) (*b*), (*c*), (*d*), and (*e*) are re-enactments, with some slight modifications, of §§ 2, 3, 1, and 4 of Bovill's Act (28 & 29 Vict. c. 86), which is repealed by the present act (*d*).

There was a doubt whether § 2 of Bovill's Act (*e*) did not deprive a servant remunerated by a share of the profits of the right to an account to which he would otherwise have been entitled (*f*). This doubt has been

(*a*) 2 R. 964—5.
(*b*) 8 H. L. C. 268.
(*c*) 5 R. 1104.
(*d*) See for decisions upon this Act, "Partnership," pp. 36 *et seq.*
(*e*) See the Act printed in Partnership, p. 35, and note (*s*).
(*f*) *Harrington* v. *Churchward*, 6

removed by the omission in sub-section (3) (*b*) of the words "nor give him the rights of a partner," which occurred in Bovill's Act, and occasioned the doubt. Section 2. Sub-section (3) (*b*).

Section 3 of Bovill's Act, for which sub-section (3) (*c*) of this Act is substituted, applied only to the widow or child of the deceased partner of a trader, while the present section applies to the widow or child of a partner generally. Similar modifications have been made in the other sub-sections. Sub-section (3) (*c*).

Section 1 of Bovill's Act, for which sub-section (3) (*d*) of this Act is substituted, required the contract to be in writing, but did not expressly require that it should be signed. In *Pooley* v. *Driver* (1876) (*g*), Jessel, M.R., decided that an unsigned contract was not within the first section of Bovill's act, but was nevertheless admissible as evidence to show the terms on which the advance was made, and he relied upon these terms as evidence of the partnership, which in that case he held to exist. If it is law that a contract not within this sub-section is admissible as evidence to show the terms on which a loan is made, and there appears to be nothing in this act to exclude such evidence, it is difficult to see the utility of the proviso to the present sub-section. Whether a contract is or is not within the sub-section, when its terms are once proved its real effect must be considered, and if on the construction of the contract the relation between the parties is that of debtor and creditor, there is nothing in this act or the general law to change this relation into the different relation of partners. If this be so, the only advantage of a signed contract appears to be that such a contract is more easily proved than a verbal or unsigned agreement. No doubt the Court would very closely examine any alleged advance by way of loan to a person engaged in business upon the terms that the lender should receive a share of profits arising from the business, unless the agreement was in writing and signed by the parties. On the other hand, if the lender is able to overcome this difficulty, as, for instance, by producing a memorandum of all the terms of the agreement signed by all parties except himself, it may be that he will be in a better position than if the contract had been duly signed, for it appears doubtful whether § 3 of this Act would apply to the case of a loan upon a contract not signed by all the parties thereto (see that section and notes thereto). If § 3 does not apply, there is no rule of law that would prevent the lender from proving his loan and receiving payment thereof in competition with the other creditors of the borrower. Sub section (3) (*d*).

Scotch Law.

Even prior to Bovill's Act the law was stated by Professor Bell thus:— "Such responsibility," (*i.e.*, as a partner) "however, is not incurred by receiving a mere payment, allowance, or wages proportioned to the profits. So wages may be paid to clerks, commission to a broker, or hire to a Scotch Law.

Jur. N. S. 576; *Rishton* v. *Grissell* (1868), 5 Eq. 326; *Turney* v. *Bailey* (1864), 4 De G. J. & Sm. 332.

(*g*) 5 Ch. D. at pp. 468—469.

Sections 3—4.

lighterman for working a lighter, proportionally to the gains to be made, without involving the responsibility of a partner" (*h*).

Postponement of rights of person lending or selling in consideration of share of profits in case of insolvency.

3. In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied.

"Partnership," pp. 36 *et seq.*

This section is substantially a re-enactment of § 5 of Bovill's Act, which was probably the only section of that act that introduced a change into the existing law (see Sir Frederick Pollock's "Digest of the Law of Partnership," 4th edit. p. 12).

"*Upon such a contract as is mentioned in the last foregoing section.*"—These words refer to § 2 (3) (*d*), and introduce some difficulty; they may refer to the substance of the contract or to the substance and form of the contract. If they refer to the substance only, the proviso to that sub-section appears to be without meaning; if they refer to the substance and the form, the position of a person who lends money to another engaged in business on the terms that the lender shall receive a rate of interest varying with the profits or shall receive a share of the profits, will, as pointed out in the notes to that sub-section, depend upon whether the contract upon which the loan so made is or is not in writing and signed by all the parties thereto. Of the two constructions the former appears to be the less objectionable.

It has been decided that § 5 of Bovill's Act did not deprive the lender of his right to retain any security he might take for his money (*i*), and the same construction would doubtless be put upon the present section.

Meaning of firm.

4.—(1.) Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name.

(*h*) Bell's Principles, § 364. Div. 789.
(*i*) *Ex parte Sheil* (1877), 4 Ch.

(2.) In Scotland a firm is a legal person distinct from the partners of whom it is composed, but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief *pro ratâ* from the firm and its other members. Section 4.

SUB-SECTION 1.

"Partnership," pp. 110 *et seq.*

This sub-section introduces no change in the existing law. Sub-section (1).

Speaking generally, the English law does not recognise a firm as distinct from the members composing it, and in this respect the legal differs from the mercantile notion of a firm (see "Partnership," pp. 110 *et seq.*).

The English law does, however, recognise the firm so far as to allow actions and proceedings to be brought by or against the partners in the firm-name; see

Rules of Supreme Court, Order xvi. r. 4.

Bankruptcy act, 1883, § 115.

Bankruptcy rules, 1886, r. 259.

"Partnership," pp. 115, 264 *et seq.*, and 456 *et seq.*

In addition to the cases cited in "Partnership," see

Russell v. *Cambefort* (1889) (*k*), which decides that a writ cannot be served under Order ix. r. 6, upon the manager at the principal place of business within the jurisdiction of a firm, the members of which are foreigners resident out of the jurisdiction. And compare *Shepherd* v. *Hirsch*, *Pritchard & Co.* (1890) (*l*), which decides that such service is good if one of the partners is a British subject resident in England. Russell *v.* Cambefort

Davies & Co. v. *André & Co.* (1893) (*m*), decides that a person served with a writ issued against the firm in the firm-name can not enter a conditional appearance, under protest; his proper course under such circumstances is to appear, if he is a partner, or not to appear, if he is not a partner. Davies & Co. *v.* André & Co.

The firm-name in point of law is a conventional name applicable only to the persons who on each particular occasion when the name is used are members of the firm (see "Partnership," pp. 112 *et seq.*).

SUB-SECTION 2.

Scotch Law.

This has always been a distinctive feature of the Scotch law of partnership. Professor Bell states it thus:—"The company forms a separate person, competent to maintain its relations with third parties by its separate name or firm, independently of the partners; capable also of holding a lease, but not of holding feudally as a vassal" (*n*). The leading consequences of this principle are enumerated in the Introduction supra, p. 8. Scotch Law. Sub-section (2). Firm a separate *persona*.

(*k*) 23 Q. B. Div. 526.

(*l*) 45 Ch. D. 231.

(*m*) 24 Q.B.Div.598. See also *Alder* v. *Beckley & Co.* (1890), 25 Q. B. D. 543.

(*n*) Pr. § 357. See also 2 Bell's Com. 507.

Section 4 (2).

Professor Bell also points out that though one person cannot form a firm or partnership, the same persons may form several distinct firms provided there be a real and perceptible distinction of trade and establishment between them (*o*).

Action and diligence.

Action or diligence by or against a firm having a personal name (such as A. & B. or A. B. & Co., or the like), may be taken in that name, without joining the name of any individual partner, *Forsyth* v. *Hare & Co.* (1834) (*p*). When, on the other hand, the firm's name is descriptive (such as the Clyde Shipping Co.), the recognised mode is to join with the firm the names of three partners, if there be so many: *London, &c., Shipping Co.* v. *McCorkle* (1841) (*q*). Action or diligence by or against the officials of such a firm on its behalf, even with the addition of the descriptive name, is incompetent: *McMillan* v. *McCulloch* (1842) (*r*). Each partner has, in virtue of his legal *prepositura* or mandate in the firm's affairs, a right to sue debtors of the firm in the firm's name, and if necessary to use the names of other partners, *Antermony Co.* v. *Wingate* (1866) (*s*); and that notwithstanding disclaimer by another partner, *Kinnes* v. *Adam* (1882) (*t*); but not in matters beyond the scope of the firm's business, *Tasker* v. *Shaws Water Co.* (1866) (*u*).

Enforceable against partners.

Moreover, decree or judgment (including a registered bond or bill) against a partnership in its firm-name is, in legal signification, a decree against every individual who is *de facto* a partner; and all competent diligence, both on the dependence of the action and in execution of the decree, is enforceable against each partner. Further, without any judicial procedure to establish the fact, it lies with the messenger-at-arms to discover who the individuals comprising the firm are: *Ewing* v. *McClelland* (1860) (*x*). If their character as partners be denied, they will be entitled to suspension of the diligence, with or without caution (security), and may also be entitled to damages (*y*). The Law Amendment Commissioners in 1855 expressed the opinion that in this respect the law of Scotland was unjust, and might lead to great oppression, and recommended that separate judicial procedure should be required where the names of partners are not included in the action or judgment. This sub-section has not given effect to that recommendation, but leaves the common law as it was (*z*).

It is incompetent to sue individual partners of a subsisting firm without calling the firm and constituting the debt against it: *Muir* v. *Collett* (1862) (*a*). But if the firm be a foreign one, whose domicile does not recognise the separate *persona* of a firm, it is enough to call all the partners who are within the jurisdiction of the Scotch Court;

(*o*) 2 Bell's Com. 515.
(*p*) 13 S. 50, affd. H. L. 3 Paton, 428.
(*q*) 3 D. 1045.
(*r*) 4 D. 492.
(*s*) 4 Mc. 1017.
(*t*) 9 R. 698.
(*u*) 5 Mc. 256. See Mackay's Court of Session Practice, I. 328.
(*x*) 22 D. 1347, and prior cases.
(*y*) Bell's Pr. § 371.
(*z*) Second Report, p. 18. See § 46, *infra*.
(*a*) 24 D. 1119. See § 9, *infra*.

Section 4 (2).

otherwise the debt must first be constituted against the firm, *Muir, supra;* but see *contra* in England, *Bullock* v. *Caird* (1875) (*b*), where action in England was sustained against a partner of a Scotch firm without judgment being first obtained against the firm. In *Paton* v. *Neill, Edgar & Co.* (1873) (*c*), after jurisdiction had been founded in Scotland by arrestment, action was sustained there against an English firm in its firm-name, without calling individual partners.

After dissolution.

After a firm is dissolved it is not necessary to call the firm, but only every individual partner within the jurisdiction, *Muir, supra; McNaught* v. *Milligan* (1885) (*d*), unless the remaining partner has taken over the firm debts, in which case it is enough to call him : *Price* v. *Wise* (1862) (*e*). As the firm, however, still subsists for winding up, the debts due to it may, as formerly, be sued for in the firm's name, without the name of the partners ; and an action at the instance of a sole surviving partner has been sustained as in substance at the firm's instance : *Nicoll* v. *Reid* (1877) (*f*).

Criminal or penal actions.

A firm can neither prosecute nor be prosecuted *socio nomine* in a criminal or penal action. The proceedings must be by or against the individual partners (*g*).

Extent of relief.

The extent to which a partner paying a firm debt will be entitled to relief from the firm and the other partners will depend on their contract, and the state of accounts between them.

(*b*) L. R. 10 Q. B. 276.
(*c*) 10 S. L. R. 461.
(*d*) 13 R. 366.
(*e*) 24 D. 491.
(*f*) 5 R. 137.
(*g*) Macdonald's Criminal Law, p. 275. *Miles* (1830), 9 S. 18. But see as to bodies corporate, Interpretation Act, 1889, § 2.

Section 5.

Relations of Partners to persons dealing with them.

Power of partner to bind the firm.

5. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

"Partnership," pp. 124 *et seq.*

This section is in accordance with the existing law. In any case in which the implied authority of one partner to bind the firm is in question, the nature of the business of the firm and the practice of those who carry on similar businesses must be ascertained, and if it is usual amongst such persons for one partner to do the act in question, the firm will be bound; if it is not usual, the firm will not be bound, however urgent the circumstances under which the partner acted may have been (*d*). Hence it is obvious that a decision that a particular act, when done by a partner in a firm of bankers, binds the firm, can afford no answer to the question whether a firm of merchants would be bound by a similar act if done by a member of such a firm (*e*).

For particular instances of the power of one partner to bind his firm, see "Partnership," pp. 128 *et seq.* In addition to the cases there cited, see

Simpson's Claim.

Simpson's Claim (1887) (*f*), where it was held that a manager abroad of a company carrying on the business of importers and dealers in tinned provisions has no implied authority to bind the company by a promissory note given to indemnify a person who had guaranteed the fulfilment of a contract entered into by the manager for securing a supply of meat to the company, although the person with whom the contract was made required such a guaranty, and was almost the only person in the place with whom the contract could have been made.

Singleton *v.* Knight.

Singleton v. *Knight* (1888) (*g*), in which it was held by the Privy Council that a partner has no implied authority to enter into partnership with other

(*d*) *Hawtayne* v. *Bourne* (1841), 7 M. & W. 595; *Simpson's Claim* (1887), 36 Ch. D. 532; and see *Ex parte Chippendale* (1853), 4 De G. M. & G. 19; compare *Montaignac* v. *Shitta* (1890), 15 App. Ca. 357.

(*e*) See remarks in *Niemann* v. *Niemann* (1889), 43 Ch. Div. 198, on *Weikersheim's case* (1873), 8 Ch. 831.

(*f*) 36 Ch. D. 532.

(*g*) 13 App. Ca. 788. See also *British Nation. Life Assurance Association* (1878), 8 Ch. Div. p. 704.

persons in another business so as to make his partners partners in such other business.

Niemann v. Niemann.

Niemann v. *Niemann* (1889) (*h*), where the Court of Appeal held that a partner in a firm of merchants has no implied authority to accept on behalf of his firm fully paid-up shares in a company, in satisfaction of a debt due to the firm.

The implied agency of a partner to act on behalf of his co-partners commences with the commencement of the partnership (see §§ 1 and 17 (1), and "Partnership," pp. 201 *et seq.*), and, subject to §§ 36 and 38, terminates with its termination.

"*Either knows that he has no authority.*"—See infra, § 8.

"*Or does not know or believe him to be a partner.*"—These words adopt the view of the law expressed by Cockburn, C.J., in *Nicholson* v. *Ricketts* (1860) (*i*), and by Cleasby, B., in *Holme* v. *Hammond* (1872) (*k*).

It is not necessary for the person with whom the partner is dealing to know who the co-partners of such partner are, it is sufficient if he knows or believes him to be a partner with some other person or persons. These words do not, therefore, relieve a dormant partner from any liability to which he may be subject under the earlier part of this section, but prevent the co-partners of a dormant partner from being bound by his acts if, without authority, he deals with a person who does not know or believe him to be in partnership with anyone.

Factors' Act.

It is conceived that the Factors' Act, 1889, neither extends nor abridges the power of a partner to sell or pledge the goods of a firm (*l*).

The equitable doctrine under which, where money, borrowed by one partner in the name of the firm but without the authority of his co-partners, has been applied in paying off debts of the firm or for any other legitimate purpose of the firm, the lender is entitled to repayment by the firm of the amount which he can show to have been so applied (*m*), is not affected by this Act. See § 46.

Scotch Law.

Scotch Law.

Implied mandate.

This is in accordance with existing law (*n*). The implied mandate covers power to sue debtors in the firm's name: *Antermony Co.* (1866) (*o*), and that notwithstanding disclaimer by another partner: *Kinnes* v. *Adam* (1882) (*p*). In *Smith* v. *North British Ry. Co.* (1850) (*q*), an action based on the averment that the partner's want of authority was known to the person dealt with, was sustained as relevant. But the implied mandate does not extend to extraordinary acts out of the usual course of business, *e.g.*, entering into an arbitration: *Lumsden* v. *Gordon* (1728) (*r*), nor to

(*h*) 43 Ch. Div. 198.
(*i*) 2 E. & E. 524.
(*k*) L. R. 7 Ex. 233.
(*l*) 52 & 53 Vict. c. 45, and for Scotland, 53 & 54 Vict. c. 40. And see "Partnership," p. 140.
(*m*) See "Partnership," pp. 189 *et seq.*, and "The Law of Companies," pp. 235 *et seq.* and cases there cited.
(*n*) 2 Bell's Com. 503—507.
(*o*) 4 Mc. 1017.
(*p*) 9 R. 698.
(*q*) 12 D. 795.
(*r*) M. 14, 567.

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what is prohibited by statute, as granting orders to workmen upon a store-keeper in contravention of the Truck Act: *Finlayson* v. *Braidbar Co.* (1864) (*s*).

Partners bound by acts on behalf of firm.

6. An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners.

Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.

"Partnership," pp. 176 *et seq.*

This section deals with the liability of a firm for acts done on its behalf by persons who have authority to do the acts, and who do the acts with the intention of binding the firm, and is a statement of a general rule of the law of principal and agent.

"*In any other manner showing an intention to bind the firm.*"—For cases illustrating these words see "Partnership," pp. 176 *et seq.*

"*By any person.*"—Person, by § 19 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), includes any body of persons corporate or unincorporate.

"*Thereto authorised.*"—The authority may be express or implied, and may be conferred upon the agent previously to his acting or subsequently by ratification, if such ratification does not prejudice third parties (*t*). For an extreme instance of the application of the maxim *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur*, see *Bolton Partners* v. *Lambert* (1889) (*u*), and *Portuguese Consolidated Copper Mines, Ld., Ex parte Badman* (1890) (*x*).

"*General rule of law relating to the execution of deeds.*"—By the general rule of English law if a deed is executed by an agent in his own name, he and he only can sue or be sued thereon, although the deed may disclose the fact that he is acting for another (*y*).

"*Or negotiable instruments.*"—As to bills of exchange and promissory notes, see Bills of Exchange Act, 1882, §§ 23 and 89, and "Partnership," pp. 180 *et seq.* By reason of § 23 of the Bills of Exchange Act, 1882, it would seem that a firm would not now be liable on a bill drawn on the firm and accepted by one partner in his own name, unless his name was the name of the firm, and the cases of *Mason* v. *Rumsey* (1808) (*z*) and *Jenkins*

(*s*) 2 Mc. 1297.

(*t*) See per Fry, L.J., in *London and Blackwall Railway Company* v. *Cross* (1886), 31 Ch. Div. at p. 364.

(*u*) 41 Ch. Div. 295.

(*x*) 45 Ch. Div. 16.

(*y*) *Appleton* v. *Binks* (1804), 5 East, 148; *Hancock* v. *Hodgson* (1827), 4 Bing. 269; *Hall* v. *Bainbridge* (1840), 1 Man. & Gr. 42, and *Pickering's case* (1871), 6 Ch. 525. See also "Partnership," pp. 137, 177.

(*z*) 1 Camp. 384.

v. *Morris* (1847) (*a*) cited in "Partnership," p. 186, note (*x*), cannot be relied upon. Section 7.

Scotch Law.

This is the existing law. See *Blair Iron Co.* v. *Allison* (1855) (*b*), where a promissory note was signed by one of the five partners of a trading firm using the firm-name and adding his own. This was held sufficient; and it was stated by Lord Cranworth that "any form of signature whereby he indicated that he signed as the acting partner of the firm was sufficient to bind them." A letter written and signed by one of the partners of a firm in the firm-name is holograph of the firm and privileged as such: *Nisbet* v. *Neil* (1869) (*c*). In general, a partner may bind his co-partners in any form in which he can bind himself in transactions in the ordinary course of business. SCOTCH LAW. Instruments.

7. Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner. Partner using credit of firm for private purposes.

"Partnership," pp. 172 *et seq.*

This section applies whether the partner who pledges the credit of the firm has or has not authority to pledge the credit of the firm for partnership purposes. The law is stated in Smith's Mercantile Law (*d*) as follows: "The unexplained fact that a partnership security has been received from one of the parties in discharge of a separate claim against himself, is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove, by shewing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so." This statement was adopted by the Court of Common Pleas in *Leverson* v. *Lane* (1862) (*e*). But Cockburn, C.J., in *Kendal* v. *Wood* (1871) (*f*), though otherwise adopting it, expressed a strong opinion that a reasonable cause to believe in the existence of the authority was not sufficient to enable a party who so took the security to hold the firm liable, and this opinion has been adopted by the present section.

Nevertheless, if any other partner has so conducted himself as to give the person taking such a security reasonable ground for believing that the partner giving the security had authority, such other partner may be liable

(*a*) 16 M. & W. 879.
(*b*) 1 Paterson's Scotch Appeals, 609.
(*c*) 7 Mc. 1097.
(*d*) 10th ed. p. 41.
(*e*) 13 C. B. (N. S.) 278.
(*f*) L. R. 6 Ex. p. 248.

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on the principle of estoppel (*g*), and this liability is preserved by the concluding words of the section.

For other cases illustrating this rule, see "Partnership," pp. 171 *et seq.*

It is conceived that this section does not alter the law as to *bonâ fide* holders of negotiable instruments for value without notice (*h*).

Scotch Law.

Scotch Law. Firm's credit pledged for private debts.

This is the existing law (*i*). When the transaction, by its circumstances, or in its own nature, is such as to carry evidence of the misapplication of the firm-name to what is an individual concern only, the firm is not liable; unless there be previous consent or subsequent approval. This is illustrated by cases where a firm's bill is taken in payment of a partner's private debt. In *Miller* v. *Douglas* (1811) (*k*), an acceptance of a firm was given in security of a private debt of a partner, with which the firm had no concern, as the pursuer who took the acceptance must necessarily have known, and no communication was made to the firm or its co-partners. The firm was accordingly held not liable. See also decisions noted below (*l*), none of which were cases with *bonâ fide* holders of negotiable instruments.

Effect of notice that firm will not be bound by acts of partner.

8. If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

"Partnership," pp. 174 *et seq.*

This section adopts the dicta of Lord Ellenborough in *Galway* v. *Mathew* (1808) (*m*) and *Alderson* v. *Pope* (1809) (*n*), and is probably an extension of the law. As pointed out in "Partnership" (pp. 174—176), notice of an agreement between the members of a firm that one of them shall not do certain things is by no means necessarily equivalent to notice that the firm will not be liable for them if he does; and from the analogy of such cases as *Brown* v. *Leonard* (1820) (*o*), and of the undoubted proposition that if partners agree not to be liable beyond a certain amount, and a stranger has notice of that agreement, the notice avails nothing against him (*p*), it

(*g*) See per Blackburn, Montague Smith, and Lush, JJ., in *Kendal* v. *Wood* (1871), L. R. 6 Ex. pp. 251, 253, 254.

(*h*) See Bills of Exchange Act, 1882.

(*i*) 2 Bell's Com. 504.

(*k*) 22 Jan. 1811, F. C.

(*l*) *Matheson* v. *Fraser* (1820), H. 758; *Johnston* v. *Phillips* (1822), 1 Sh. App. 244; *Blair* v. *Bryson* (1834), 13 S. 901.

(*m*) 10 East, 264.

(*n*) 1 Camp. 404.

(*o*) 2 Chitty, 120.

(*p*) *Greenwood's case* (1854), 3 De G. M. & G. p. 459.

would appear more consonant with general principles for a firm to be bound by the acts of a partner exceeding a restricted authority, unless the person with whom he dealt had notice that the firm would not be liable for such acts.

It may be a question whether this section will prevent an indorsee of a bill of exchange accepted in the partnership name by a partner who by agreement between the members of the firm has no authority to accept bills on behalf of the firm availing himself of the ignorance of his indorser if he himself has notice of the agreement (*q*).

Notice.—Generally as to what will amount to notice, see "Watson's Compendium of Equity" (ed. 2), Vol. II., pp. 1149 *et seq.*, and the cases there collected.

Scotch Law.

This is the existing law (*r*). SCOTCH LAW.

9. Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts. Liability of partners.

"Partnership," pp. 192 *et seq.*

The first part of this section, so far as it deals with England and Ireland, states the law in accordance with the decision of *Kendall* v. *Hamilton* (1879) (*s*).

In the event of the death of a partner, a creditor of the firm has concurrent remedies against the surviving partners and the estate of the deceased partner, and it is immaterial which remedy he pursues first, but it is necessary that the surviving partners should be present at the taking of the accounts of the deceased partner (*t*).

"*Debts and obligations of the firm.*"—The obligations here mentioned are obligations of a contractual nature, the liability for obligations arising *ex delicto* is joint and several (see the next three sections). For the difficulty of distinguishing in all cases between these two classes of obligations. See "Partnership," pp. 198 and 199.

Although the liability for the debts of a firm is as mentioned in this section, the partners may by special contract with a creditor incur joint

(*q*) *Rooth* v. *Quin* (1819), 7 Price 193. Bills of Exchange act, 1882, § 29 (3).

(*r*) 2 Bell's Com. 504.

(*s*) 4 App. Ca. 504, and see cases collected in "Partnership," pp. 192 *et seq.*

(*t*) *Re Hodgson, Beckett* v. *Ramsdale* (1885), 31 Ch. Div. 177, and see "Partnership," pp. 597 *et seq.*

Section 9.

and several, or merely joint liability, and in the latter case the estate of a deceased partner will not be liable (for instances, see "Partnership," pp. 196 *et seq.*).

Subject in England and Ireland to the prior payment of his separate debts.—This is in accordance with the existing law. See "Partnership," pp. 598 *et seq.*; Seton, p. 1210; *re Hodgson* (1885) (*u*); and *re Barnard* (1886) (*x*).

Scotch Law.

Scotch Law. Liability of partners.

The present law is thus stated by Professor Bell:—"To third parties each partner is responsible for the whole debts of the concern. In legal language they are liable *singuli in solidum*, and more as guarantors than as principals. They are not entitled . . . to the benefit of discussion. The non-payment on the part of the company at once raises their responsibility. Like other mercantile guarantors, they are conditional debtors if the debt is not paid at the day" (*y*). "It is a consequence of this separate existence of the company as a person that an action cannot directly and in the first instance be maintained against a partner for the debt of the company. The demand must be made first against the company, or the company must have failed to pay, or have dishonoured their bill, before the partner can be called on" (*z*).

Whether debt must be first constituted against firm.

The question occurs whether by force of this section the joint and several liability of partners in Scottish partnerships will now arise immediately, so that an action may be maintained directly and in the first instance against a partner for a firm debt, without, as at present, requiring it to be constituted against the firm? In favour of an affirmative answer are the scope of this act, which is imperial, and designed to declare and amend the law applicable to the three kingdoms; the precise terms of the section; and the fact that, though Scotland is mentioned in it, no qualification of the liability in this particular is introduced, and none exists in England. On the other hand the Scots law doctrine of the legal *persona* of a firm is recognised and continued in this act, § 4 (2), and the present common law rule is, as Professor Bell points out, a consequence of it. Further, by § 46 of this act, the rules of the common law are continued in force, "except so far as they are inconsistent with the express provisions of this act." On the whole, the latter view appears to be the better opinion. The liability affirmed in the section is not denied by the common law rule referred to; but a qualification merely is appended, which is based on a principle elsewhere sanctioned by the Act.

Deceased partner's estate.

The estate of a deceased partner is similarly liable, in a due course of administration, for obligations incurred prior to death (*a*), even though assets and liabilities were transferred and retirement published: *Milliken* v. *Love* (1803) (*b*); *Campbell* v. *McLintock* (1803) (*c*). A partner's separate

(*u*) 31 Ch. Div. 177.
(*x*) 32 Ch. Div. 447.
(*y*) 2 Bell's Com. 507.
(*z*) 2 Bell's Com. 508.
(*a*) 2 Bell's Com. 528; *Cheap* v. *Aiton* (1772), 2 Paton's App. 283.
(*b*) H. 754.
(*c*) H. 755.

creditors have no priority on his estate over the firm creditors. But the firm creditors have a preference on the firm's estate, and rank on the estates of the individual partners only for what is not paid by the firm's estate (*d*).

Compensation or set-off.

As a natural consequence of the doctrine of the separate *persona* of the firm, compensation or set-off takes place, as in the case of individuals, between debts due to and by firms, or to and by an individual and a firm; and also between debts due to a firm by one of its partners, and by the firm to that partner.

Further, as a consequence of that doctrine, and of the principle of joint and several liability of partners for the debts of the firm, compensation or set-off holds in Scotland, though not in England, in the following cases:

(1.) A partner when sued for a firm debt, as he is liable for it *in solidum*, may set off against the claim a debt owing to him by the pursuer: *Bogle* v. *Ballantyne* (1793) (*e*).

(2.) A firm, when sued for a firm debt, may, with the concurrence of a partner who has a counterclaim against the pursuer, set-off that counterclaim against the debt sued for: *Thomson* v. *Stevenson* (1855) (*f*).

(3.) A partner when sued for a private debt may, with the concurrence of the other partners, set-off against that debt a counterclaim of the firm against the pursuer (*g*).

The Law Amendment Commissioners recommended the assimilation of English to Scotch law in the first and second cases; and of Scotch to English law in the third case (*h*), but the recommendations have not been carried out. See further on this subject the authorities cited below (*i*).

Liability of the firm for wrongs.

10. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

"Partnership," pp. 147 *et seq.* and 162 *et seq.*

This section states the application to partners of a general rule of the law of principal and agent, and probably introduces no change in the existing law, though it removes the doubt (*k*) as to whether a firm is or is not

(*d*) 2 Bell's Com. 501, 549; Bell's Prin. § 371.

(*e*) M. 2, 581.

(*f*) 17 D. 739.

(*g*) Mercantile Law Am. Com. 2nd Report, pp. 19 and 142.

(*h*) 2nd Report, p. 19.

(*i*) 2 Bell's Com. 553 *et seq.*; Clark on Partnership, pp. 416 *et seq.*; *Mitchell* v. *Canal Co.* (1869), 7 Mc. 480.

(*k*) See "Partnership," p. 163, and in addition to the cases there cited, *Derry* v. *Peek* (1889), 14 App. Ca. 337, reversing 37 Ch. Div. 541; *Glasier* v. *Rolls* (1889), 42 Ch. Div. 436.

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liable in an action of damages for the fraud of one of its members, if committed by him in the ordinary course of the business of the firm, by making the firm liable in every case in which the partner himself is liable. A difficult question of liability in an action for damages may still arise if one partner in the ordinary course of the business of the firm makes a statement, which he *bonâ fide* believes to be true, but which his co-partners know to be false (see Pollock on Torts, 1st ed., p. 256).

The section only deals with the liability of a firm for the wrongful acts or omissions of a partner and leaves its liability for the wrongful acts or omissions of any other agent to be determined by the general law. It is, however, the better opinion that a firm is liable in an action of damages for the fraud of any agent, whether a partner or not, acting within the limits of his authority.

In spite of the general words used in this section (*l*), it is conceived that a firm will not be liable for a false and fraudulent representation concerning the character, credit or solvency of any person unless the representation is in writing signed by all the partners (*m*).

The liability of partners under this section is joint and several. See § 12.

As to representations made by any partner being evidence against the firm, see § 15.

Scotch Law.

Scotch Law. Firm liable for wrongs.

This is the existing law. "The company is liable even for the fraudulent acts of a partner acting in the line of the partnership" (*n*). The principle is that a master is liable for every such wrong of his servant or agent (a partner being the agent of the firm) as is committed in the course of the service or agency, and for the master's or principal's benefit though no express command or privity be proved; and there is no distinction between fraud and any other wrong: *Mackay* v. *Commercial Bank of New Brunswick* (1874) (*o*). In *Scottish Pacific, &c., Co.* v. *Falkner, Bell & Co.* (1888) (*p*), a partner having, with the knowledge of his firm, occupied a fiduciary position towards a public company in its purchase of a mine, his firm was bound to repay a commission got in the purchase. A firm may also be sued for damages for slander and wrongous use of diligence: *Gordon* v. *British and Foreign Metaline Co.* (1886) (*q*); *Wright* v. *Outram & Co.* (1890) (*r*); and prior cases.

(*l*) Maxwell on Interpretation of Statutes, ed. 2, pp. 186 *et seq.*; *Garnett* v. *Bradley* (1878), 3 App. Ca. 944; *Hawkins* v. *Gathercole* (1855), 6 De G. M. & G. 1.

(*m*) 9 Geo. IV. c. 14, § 6; *Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301; *Williams* v. *Mason*, 28 L. T. (N. S.) p. 232.

(*n*) 2 Bell's Com. 506.

(*o*) L. R. 5 P. C. 394.

(*p*) 15 R. 290.

(*q*) 14 R. 75.

(*r*) 17 R. 596.

Section 11.

11. In the following cases; namely:—

Misapplication of money or property received for or in custody of the firm.

(*a.*) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

(*b.*) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm;

the firm is liable to make good the loss.

"Partnership," pp. 151 *et seq.*

The liability of the partners under this section is joint and several, see § 12.

Sub-section (*a*) is in accordance with the law laid down in *Willett* v. *Chambers* (1778) (*s*) and *Brydges* v. *Branfill* (1841) (*t*) and the other cases collected in "Partnership," pp. 151 *et seq.* Sub-section (a).

"*His apparent authority*," i.e. his authority as evidenced by the business of the firm. Money received for the firm by a partner within the scope of his apparent authority is received by the firm (see § 5 and "Partnership," p. 150).

For instances in which a firm has been held liable, see "Partnership," pp. 151 *et seq.*

For instances in which a firm has been held not liable on the ground that the partner who received the money was not acting within his apparent authority, see "Partnership," pp. 155 *et seq.*

Sub-section (*b*) is in accordance with the law laid down in *Clayton's Case* (1816) (*u*), *Baring's Case* (1816) (*x*), *Blair* v. *Bromley* (1847) (*y*), and other cases collected in "Partnership," pp. 152 *et seq.* Sub-section (b).

The fact that particular members of the firm have no knowledge of the receipt of the money in question is immaterial, if the money was received in the course of the business of the firm (*z*).

In order that the firm may be liable, the money must be misapplied while in the custody of the firm. The cases of *Coomer* v. *Bromley* (1852) (*a*) and *Bishop* v. *Countess of Jersey* (1854) (*b*) are instances of firms escaping liability on the ground, amongst others, that at the time of the misappropriation the property was not in the custody of the firm (*c*).

Scotch Law.

This is the existing law (*d*). Scotch Law.

(*s*) Cowp. 814.
(*t*) 12 Sim. 369.
(*u*) 1 Mer. 575.
(*x*) 1 Mer. 611.
(*y*) 5 Ha. 542, and 2 Ph. 354.
(*z*) *Marsh* v. *Keating* (1834), 2 Cl. & F. 250.
(*a*) 5 De G. & Sm. 532.
(*b*) 2 Drew. 143.
(*c*) See these and other cases fully discussed, "Partnership," p. 158.
(*d*) 2 Bell's Com. 506; Clark, 253—254.

Sections 12—13.

Liability for wrongs joint and several.

12. Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections.

"Partnership," pp. 198 *et seq.*

This section is in accordance with the existing law. The difficulty and importance, alluded to above (p. 31), of distinguishing between obligations which arise from contract and those which arise from tort still remains, the former are governed by § 9, the latter by this and the two preceding sections.

Partners are jointly and severally liable, in the same way and to the same extent as other principals and masters, for the torts of their agents and servants acting within the scope of their authority or employment. This liability does not belong to the law of partnership, and therefore is not dealt with by this act.

Scotch Law.

See note on section 9.

Improper employment of trust-property for partnership purposes.

13. If a partner, being a trustee, improperly employs trust-property in the business or on the account of the partnership, no other partner is liable for the trust-property to the persons beneficially interested therein:

Provided as follows:—

(1.) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and

(2.) Nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control.

"Partnership," pp. 160 *et seq.*

As pointed out by Sir Frederick Pollock (*e*), the liability of one partner for breaches of trust committed by his co-partner is not a partnership liability. The liability of each partner depends upon whether or not he has notice of the breach of trust and not upon the relation of partnership existing between the members of the firm (*f*).

Cases under this section should be distinguished from the cases dealt with by section 11; that section deals with money which comes or is treated as coming to the hands of the firm in the ordinary course of its business, this section deals with money which comes into the hands of the firm improperly.

As to the rights of the executors of a deceased partner against the sur-

(*e*) Digest of the Law of Partnership (5th ed.), p. 48.

(*f*) See proviso (1) and cases collected, "Partnership," pp. 160 *et seq.*

viving partners, where the share of the deceased partner has been left in the business without any final settlement of accounts, see *infra*, § § 42 and 43. Section 13.

This proviso imposes no liability upon partners who have notice of a breach of trust, but leaves them to the general law (*g*). Proviso (1).

There is some doubt how far a partner, who joins a firm which is at the time to the knowledge of the incoming partner improperly employing trust monies in its business, is liable for the breach of trust if he merely leaves matters as he finds them (*h*).

Persons implicated in a breach of trust are jointly and severally liable to the beneficiaries for the loss incurred, although as between themselves they are not all equally to blame (*i*).

Notice. Knowledge of the breach of trust on the part of one partner will not affect the others, for the fact to be known has nothing to do with the partnership affairs. Actual knowledge is not necessary (*k*), but any partner who ought to be treated as knowing that trust monies are being employed in the business of the firm, will be held bound to see that the trust to which the money is subject authorises the use made of it, and will be answerable for a breach of trust in case of its misapplication or loss (*l*). Notice.

As to the right of following trust monies, see Lewin on Trusts, chap. xxx. § 2 ; "Partnership," p. 162, note (*i*) ; and *Lister & Co.* v. *Stubbs* (1890) (*ll*). Proviso (2).

Scotch Law.

This appears to be the existing law : *Cochrane* v. *Black* (1855—57) (*m*) is an illustration of liability enforced against partners who were trustees. See further explanation of this case under § 42 (1), *infra*. In *Macfarlane* v. *Donaldson* (1835) (*n*), a firm of solicitors and the individual partners were made liable for the intromissions of a partner who was *factor loco tutoris* to a pupil, and to their knowledge immixed the funds of the factory with the firm funds. In the case of *Cochrane*, *supra*, from the firm's balance sheets it must have been known to the partner who was not a trustee that the trust funds were used in the business. See also *Laird* v. *Laird* (1855) (*o*). Scotch Law.

(*g*) See "Partnership," pp. 160 *et seq.*

(*h*) *Twyford* v. *Trail* (1834), 7 Sim. 92.

(*i*) Lewin, 8th ed. p. 908 ; *Oxford Benefit Building Society* (1886), 35 Ch. D. 502 ; *Leeds Estate Building Co.* v. *Shepherd* (1887), 36 Ch. D. 787. As to the rate of interest charged in such cases, see Lewin, pp. 340 *et seq.*

(*k*) See *Marsh* v. *Keating* (1834), 2 Cl. & Fin. p. 289.

(*l*) *Ex parte Woodin* (1845), 3 M. D. & D. 399 ; *Ex parte Poulson* (1844), De Gex 79, and other cases cited, "Partnership," p. 161, note (*c*). And generally as to notice see Watson's Compendium of Equity (ed. 2), vol. ii. p. 1149.

(*ll*) 45 Ch. Div. 1.

(*m*) 17 D. 321 ; 19 D. 1019.

(*n*) 13 S. 725.

(*o*) 17 D. 984.

Section 14.

Persons liable by "holding out."

14.—(1.) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

(2.) Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors or administrators estate or effects liable for any partnership debts contracted after his death.

SUB-SECTION 1.

"Partnership," pp. 40 *et seq.*

Sub-section (1).

The rule of law contained in this sub-section has long been recognised (*p*), and is merely a particular instance of the general principle of estoppel by conduct.

This section gives rise to the question whether a person, held out as a partner without his own consent, will incur liability, if, knowing that he is being so held out, he takes no steps to prevent it being done (see "Partnership," p. 217).

Before the act, in order that a person who had been represented as a partner might be liable as such, two conditions must have been fulfilled, first, the representation must have been made either by the person himself or with his consent, secondly, the person seeking to avail himself of the representation must have known of it and given credit to the firm on the faith of it (*q*). A person held out as a partner may be liable to others, although they may know that as between himself and his quasi partners he does not share either profits or losses, for the lending of his name may justify the belief that he is willing to be responsible to those who may be induced to trust to him for payment (*r*).

A person who represents himself as a partner will not be the less liable to third parties because he was induced to do so by promises of irresponsibility or by fraud (*s*).

If the representation be made by or with the consent of the person who is held out as a partner the manner in which this is done is immaterial. It may be by signing prospectuses (*t*), by being party to resolu-

(*p*) See for an early case, *Waugh* v. *Carver*, 2 H. Blacks. 235; and also *Scarf* v. *Jardine* (1882), 9 App. Ca. 345.

(*q*) "Partnership," pp. 42 *et seq.*

(*r*) *Brown* v. *Leonard* (1820), 2 Chitty 120, "Partnership," p. 41.

(*s*) "Partnership," pp. 41—42.

(*t*) *Collingwood* v. *Berkeley* (1863), 15 C. B. N. S. 145.

tions (*a*), by his own statements though not intended to be repeated (*c*), by a course of conduct (*y*), or by retiring from the firm and failing to give due notice of such retirement (*z*). Section 14.

It should be noticed that clauses (*a*) to (*e*) of section 2, sub-section 3 of this act apply to liability arising from holding out as well as to liability from actual partnership (*a*).

As a partner.—A person who holds himself out as willing to become a partner does not incur liability by so doing (*b*), he must hold himself out as a partner.

In a particular firm.—These words will include the case of a person who holds himself out as a partner with a sole trader.

Given credit to the firm.—Unless credit has been given to the firm on the faith of the representation, the person representing himself as a partner will be under no liability. For example, the doctrine has no application to actions of tort arising from negligent conduct of a firm where no trust has been put in it (*c*).

Liable as a partner.—As to the extent of this liability, see §§ 9—13.

The difficulties in the way of the application of the rule as to holding out to cases where the firm name does not disclose the names of the partners are pointed out in "Partnership," pp. 45 and 46, and still exist (*d*).

Scotch Law.

This comprehensive statement of the doctrine of "holding out" is in accordance with the existing law (*e*). The issue for a jury is, whether the defender held himself out, or allowed himself to be held out, as a partner of A. & Co.: whether the pursuers made furnishings in the belief that the defender was a partner; and whether the defender is indebted and resting owing, &c.: *Gardner* v. *Anderson* (1862) (*f*). The liability is direct to the person giving credit; and is not open to the trustee in bankruptcy of the firm for behoof of the creditors generally: *Mann* v. *Sinclair* (1879) (*f*). Scotch Law. Holding out.

SUB-SECTION 2.

This sub-section is in accordance with the previous law (*g*). Even if the executor is the surviving partner using the old name this will make no difference (*h*). Sub-section (2).

(*a*) *Maddick* v. *Marshall* (1864), 16 C. B. N. S. 387, and 17 ib. 829.

(*x*) *Martyn* v. *Gray* (1863), 14 C. B. N. S. 824.

(*y*) *Wood* v. *Duke of Argyll* (1844), 6 Man. & Gr. 928; *Lake* v. *Duke of Argyll* (1844), 6 Q. B. 477.

(*z*) See *infra*, § 36, and "Partnership," pp. 121 *et seq.*

(*a*) See the words "or liable as such" in those clauses.

(*b*) *Bourne* v. *Freeth* (1829), 9 B. & C. 632, "Partnership," p. 44.

(*c*) See "Partnership," p. 47.

(*d*) See also *Newsome* v. *Coles* (1811), 2 Camp. 617, and *Scarf* v. *Jardine* (1882), 7 App. Ca. 345.

(*e*) 2 Bell's Com. 513.

(*f*) 24 D. 315; 6 R. 1078.

(*g*) *Webster* v. *Webster* (1791), 3 Swanst. 490, and other cases cited, "Partnership," p. 47.

(*h*) *Farhall* v. *Farhall* (1871), 7 Ch. 123; *Owen* v. *Delamere* (1872), 15 Eq. 134, "Partnership," p. 47.

Section 17.—(2) Bankrupt.

Though a bankrupt partner cannot by his acts bind his partners, a person may be liable by such acts if he holds himself out as the partner of the bankrupt after the bankruptcy (*c*).

As to the administration in bankruptcy where two persons trading as partners, though not in reality, became bankrupt, see *Ex parte Hayman* (1870), *In re Bonhard & Cruickshank* (1879), (*d*) and *Ex parte Shaw* (1881) (*e*).

Scotch Law.

Scotch law.

This is the existing law (*f*). Though not expressly decided, in Scotland the rule laid down by Lord Eldon in *Cothay v. Noble* (1817) (*g*) would apply (*h*).

Admissions and representations of partners.

16. An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.

"Partnership," p. 128.

This section introduces no alteration into the previous law. It deals only with the admissibility of admissions and representations, and not with the force that when admitted.

Admissions are not necessarily conclusive, but they and representations may be conclusive by way of estoppel.

As to the liability of a firm for the misrepresentations of one of its members, see § 10, *supra*, and the cases collected and examined, "Partnership," pp. 103 *et seq.*

For admissions or representations to be evidence against the firm the person making them must have been a partner at the time they were made (*i*).

The section only deals with admissions or representations made in the ordinary course of the partnership business, and therefore does not affect the rule that a firm is not bound by the representations by one of its members as to the extent of his individual authority (*k*), or the extent and nature of the business of the firm (*l*). For the same reason it does not alter the rule that in an action against partners the answer of one of them to interrogatories cannot be read against the others unless they have an opportunity of contradicting it (*m*).

(*c*) See *infra*, § 39.
(*d*) 8 Ch. Div. 11.
(*e*) 1 Ch. 121.
(*f*) 10 Ch. Div. 356.
(*g*) 1 Chark. p. 140.
(*h*) 3 Mac. 611.
(*i*) Mr. Mackie's Notes on Blatt, p. 102. See also *Morrison v. Learmont* (1850), 8 Mc. 466.
(*k*) *Hackham v. Hackham* (1850), 2 L. & J. 101; *Stead v. Salt* (1825), 3 Bing. p. 103.
(*l*) *Pooley v. Evans* (1848), 2 Dowl. & L. 1; *Hall v. Howard* (1820), 3 Stark. 3.
(*m*) *Ex parte Agace* (1793), 2 Cox, 312. The bill as originally drawn contained a proviso to this effect.
(*n*) See "Partnership," p. 106.
(*o*) *Parker v. Morrell* (1840), 2

In the bill as originally drawn this section only dealt with the admissibility of the admissions and representations of one partner so far as concerned the civil rights and liabilities of the partners. Does the section as it now stands make such admissions evidence in criminal cases? Sections 15 – 16.

Scotch Law.

This is the existing law. The admission or representation falls under the implied mandate or *procuratory* of the partners. Scotch Law

16. Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner. Notice to acting partner to be notice to the firm

"Partnership," pp. 141 *et seq.*

As to what amounts to notice, see Watson's "Compendium of Equity" (ed. 2), Vol. II., p. 1149.

To any partner. These words would perhaps justify a negative answer to the question discussed by Sir George Jessel (*a*), whether notice to a person who afterwards becomes a partner is notice to the firm.

Who habitually acts in the partnership business. Notice to a dormant partner is not notice to the firm. If a partner, who habitually acts in the partnership business, receives notice, will the firm, under this section, be affected thereby, if at the time of receiving such notice he was not in any way acting for the firm? (*y*)

Of any matter relating to partnership affairs. If a partner, being a trustee, improperly employs trust money in the business, his knowledge is not imputable to the firm, for the fact that the money is trust money does not relate to the partnership business: see *supra*, § 13. Breaches of trust.

Notice will only affect the firm as constituted at the time such notice was received. A retired partner will not be affected with notice on the part of the continuing partners of what has occurred since the partnership, if the agency subsisting between them has been dissolved (*z*). Nor is an incoming partner affected with notice of what occurred before he joined the firm (*a*).

The exception at the end of the section is well established (*b*). Notice to the clerks of a firm of what a fraudulent partner is doing is no more than notice to him (*c*). Fraud.

Ph. 453; *Dale* v. *Hamilton* (1846), 5 Ha. 393.

(*x*) *Williamson* v. *Barbour* (1877), 9 Ch. D. p. 535.

(*y*) See *Société Générale de Paris* v. *Tramways Union Co.* (1884), 14 Q. B. Div. pp. 443, 450.

(*z*) *Adams* v. *Bingley* (1836), 1 M. & W. 192.

(*a*) *Williamson* v. *Barbour* (1877), 9 Ch. D. p. 536.

(*b*) See *Williamson* v. *Barbour* (1877), 9 Ch. D. p. 535; *Lacey* v. *Hill* (1876), 4 Ch. D. p. 549.

(*c*) See cases in the last note.

Sections 16—17.

The section only deals with notice to a partner, a firm may be affected by notice to its other agents in the same way as any other principal.

Scotch Law.

Scotch Law.

This section does not appear to introduce any change. The exception does not refer to *bonâ fide* notice to a partner who proves fraudulent; but to notice by a third party to a partner with whom he is united in committing a fraud on the firm. Notice to such a partner will not operate as notice to the firm.

Liabilities of incoming and outgoing partners.

17.—(1.) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

(2.) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

(3.) A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

"Partnership," pp. 206 *et seq.*

This section does not introduce any change into the existing law.

SUB-SECTION 1.

Sub-section 1.

For cases illustrating sub-section (1), see "Partnership," pp. 206 *et seq.*

An incoming partner is, however, liable for debts arising out of a contract entered into by the firm before he joined, if they are in reality new debts; as in the case of *Dyke* v. *Brewer* (1849) (*d*). In that case the plaintiff contracted with A. to sell him bricks at so much a thousand, and began to supply them accordingly. B. then entered into partnership with A., and the plaintiff continued to supply the bricks. It was held that A. and B. were liable to pay, at the rate agreed upon, for the bricks supplied to both after the commencement of the partnership, on the ground that, as A. had not ordered any definite number of bricks, each delivery and acceptance raised a new tacit promise to pay on the old terms.

Dyke v. Brewer.

An incoming partner may by agreement, either express or implied, between himself and the creditors of the firm, make himself liable for the debts of the firm contracted before he became a partner; but an agreement

(*d*) 2 Car. & Kir. 828, and see also *Helsby* v. *Mears* (1826), 5 B. & C. 504, explained in *Beale* v. *Mouls* (1847), 10 Q. B. 976.

between the incoming partner and his co-partners that the debts of the old shall be taken by the new firm does not of itself give the creditors any right to sue the new partner for the old debts (*e*).

Section 17.

Scotch Law.

SCOTCH LAW.

Liability of new partner for old debts.

Conflict of judicial opinion.

This proposition expresses the existing law, in the sense that the mere admission of a partner does not subject him to liability for prior debts. "All are agreed that liability for the debts of a pre-existing business does not arise merely from joining a new partnership by which the same business is to be continued." Lord Craighill, in *Nelmes* v. *Montgomery* (1883) (*f*). "The contention for the pursuers comes to nothing short of this, that a man who joins any trader as a partner becomes liable in consequence for all the debts which that trader owes, so far as connected with the business which he has carried on. Is there any authority for that, or any principle? I should say none; and it seems to me irrational on the statement of it. Such liability would go as far back as it is possible to prove the debts." . . . . "I can listen to no proposition which disputes that a partner admitted into partnership in a going concern takes his share of profit and loss from the date of his admission to the partnership, and from no other time, in the absence of stipulation to the contrary." Lord Young (*g*). In that case there was no undertaking by the new firm, either express or implied from conduct, of the obligations of the old firm; nor was there evidence that all the assets of the old firm were transferred to the new. Accordingly, the new partner was held not liable for the price of certain billiard tables purchased a year before he joined, and used in carrying on the business.

Nevertheless, in a prior case the law was stated by Lord Justice Clerk (now Lord President) Inglis, thus:—"As a matter of general principle it appears absurd to hold that a person in trade by taking his son into partnership can do anything to injure the rights of his trade creditors; and the way in which the law interposes, in such a case, to prevent injustice, is by holding that where a new firm takes over the whole stock and business of a going concern, it is held also to take over the whole liabilities. In short, the business being taken over, and not wound up, the business and its liabilities must be held to go together. That is matter of general principle, which was established by the cases of *McKeand* (*h*) and *Ridgeway* (*i*), and I see nothing to take this case out of it." *Miller* v. *Thorburn* (1861) (*k*). Lord Cowan in the same case says, "I concur in the principle given effect to in the cases of *Ridgeway* and *McKeand*, that, in the general case, where the whole estate of a company is given over to, and taken possession of by a new concern or partnership, the business being continued on the same

(*e*) See "Partnership," p. 208, and the cases there cited.

(*f*) 10 R. 974, 981.

(*g*) P. 980.

(*h*) *McKeand* v. *Laird* (1860), 23 D. 846.

(*i*) *Ridgeway* v. *Brock* (1831), 10 S. 105.

(*k*) 23 D. 359. Lord Justice Clerk and Lord Cowan, p. 362.

Section 17.

footing, the estate goes to the new company *suo onere*, that is, the liabilities go along with the effects. To sustain any other principle might result in the greatest injustice. This is the general presumption, although there may be special circumstances in particular cases not admitting of its application. In this case there are no such specialties. Of course private debts are not in the same position as trade debts." The liability in question was a cash credit contracted, for the purposes of the business, by a father long before he assumed his son as a partner; and the ground of judgment was that "taking the whole facts, the new firm must be held to have assumed the responsibilities as well as the assets of the former company."

These cases were followed by *Heddle* v. *Marwick* (1888) (*l*), in which the doctrine of *Miller* v. *Thorburn* was emphatically re-affirmed, notwithstanding the *dicta* in *Nelmes*. It was held that the facts clearly showed that the debt in dispute was assumed, taken over, and all along dealt with as a debt of the new firm; and accordingly on its bankruptcy a creditor of the old firm was found entitled to rank in the sequestration of the new one. Again in *Stephen* v. *MacDougall* (1889) (*m*), where it was equally clear that the debt and the security had not been taken over by the new company, an opposite conclusion was reached.

Effect of sub-section 1.

The presumption referred to in *Miller* v. *Thorburn* is said, by the Lord President, to arise "where a new firm takes over the whole stock and business of a going concern." As this is almost implied in the admission of "a partner into an existing firm," it would appear that any such presumption is over-ruled by this sub-section.

Sub-section 2.

Sub-section 2.

A partner who retires from a firm may become liable for debts contracted after he has left the firm, if he omits to give due notice of his retirement. See *infra*, § 36.

Scotch Law.

Scotch Law. Liability of retired partner.

This is trite law (*n*). It is applied even where the retiring partner had paid his partners enough to meet the debt sued for: *Anderson* v. *Rutherfurd* (1835) (*o*). In the case of banking partnerships the customer does not lose his right by allowing the money to remain with the continuing partners. See *Ramsay* v. *Grahame* (1814) (*p*); *Dewaynes* v. *Noble* (1816) (*q*), *per* Sir Wm. Grant, M.R. But a retired partner is not in general liable for advances made after retirement upon a cash credit opened before: *Padon* v. *Bank of Scotland* (1826) (*r*); but in special circumstances he may: *Aytoun* v. *Dundee Bank* (1844) (*s*).

(*l*) 15 R. 698.
(*m*) 16 D. 779.
(*n*) 2 Bell's Com. 528.
(*o*) 13 S. 488.
(*p*) 18th Feb. 1814, F. C.
(*q*) 1 Meriv. 530.
(*r*) 5 S. 160.
(*s*) 6 D. 1409.

SUB-SECTION 3.

The numerous cases illustrating this proposition are collected and examined in "Partnership," pp. 239 *et seq.*

The difficulty in these cases is one of fact, whether such an agreement as is here dealt with has or has not been entered into. There is no presumption in favour of any such agreement having been entered into (*t*).

Without referring to all the cases on this subject it may be useful to reprint here the review of their effect given in "Partnership," on p. 253. The cases there examined establish that:—

1. An express agreement by the creditor to discharge a retired partner, and to look only to a continuing partner, is not inoperative for want of consideration; for *Lodge* v. *Dicas*, (1820) (*u*) has, as to this point, been overruled by *Thompson* v. *Percival* (1834) (*x*);

2. An adoption by the creditor of the new firm as his debtor does not by any means necessarily deprive him of his rights against the old firm either at law (*y*) or in equity (*z*);

3. And it will certainly not do so if, by expressly reserving his right against the old firm, he shows that by adopting the new firm he did not intend to discharge the old firm (*a*);

4. And by adopting a new firm as his debtor, a creditor cannot be regarded as having intentionally discharged a person who was a member of the old firm, but was not known to the creditor so to be (*b*);

5. But the fact that a creditor has taken from a continuing partner a new security for a debt due from him and a retired partner jointly, is strong evidence of an intention to look only to the continuing partner for payment (*c*).

6. And a creditor who assents to a transfer of his debt from an old firm to a new firm, and goes on dealing with the latter for many years, making no demand for payment against the old firm, may not unfairly be inferred to have discharged the old firm. If a jury finds that he has done so, the

(*t*) *Lyth* v. *Ault* (1852), 7 Ex. 669.

(*u*) 3 B. & A. 611.

(*x*) 5 B. & Ad. 925.

(*y*) *David* v. *Ellice* (1826), 5 B. & C. 196; *Thompson* v. *Percival* (1834), 5 B. & Ad. 925; *Heath* v. *Percival* (1720), 1 P. W. 682, and 1 Str. 403; *Kirwan* v. *Kirwan* (1834), 2 Cr. & M. 617; *Gough* v. *Davies* (1817), 4 Price, 200; *Blew* v. *Wyatt* (1832), 5 C. & P. 397.

(*z*) *Oakford* v. *European, &c., Ship Co.* (1863), 1 Hem. & M. 182; *Sleech's case* (1816), 1 Mer. 539; *Clayton's case* (1816), ib. 579, *Palmer's case* (1816), ib. 623; *Braithwaite* v. *Britain* (1836), 1 Keen, 206; *Winter* v. *Innes* (1838), 4 M. & Cr. 101.

(*a*) *Bedford* v. *Deakin* (1818), 2 B. & A. 210; *Jacomb* v. *Harwood* (1721), 2 Ves. S. 265.

(*b*) *Robinson* v. *Wilkinson* (1817), 3 Price, 538.

(*c*) *Evans* v. *Drummond* (1801), 4 Esp. 89; *Reed* v. *White* (1804), 5 ib. 122.

Sections 17—18.

Court will not disturb the verdict (*d*); and if the question arises before a judge, *e.g.*, in bankruptcy or in the administration of the estate of a deceased partner, the Court will consider all the circumstances of the case, and will infer a discharge if upon the whole justice to all parties so requires (*e*). But the small number of cases in which relief has been refused, compared with those in which it has been granted, shows that the leaning of the Court is strongly in favour of the creditor.

In addition to discharge by agreement dealt with by this section a retiring partner may be discharged from his liability by

(1) Bankruptcy.
(2) Payment. See "Partnership," pp. 225 *et seq.*
(3) Release. See *ib.*, pp. 237 *et seq.*
(4) Merger of securities. See *ib.*, p. 254.
(5) Lapse of time. See *ib.*, pp. 257 *et seq.*

Deceased partner.

The same principles which govern the discharge of a retiring partner are applicable to the discharge of the estate of a deceased partner (*f*).

Scotch Law.

Scotch Law. *Novatio debiti.*

This is the existing law,—an application of the doctrine of *novatio debiti*. As the presumption is against novation, the agreement, if not in express terms, must be established by unequivocal actings: *Buchanan* v. *Adam* (1833) (*g*); *Campbell* v. *Cruickshank* (1845) (*h*); *Ker* v. *McKechnie* (1845) (*i*); *Blacks* v. *Girdwood* (1885) (*k*). Only in the case of *Ker*, where the discharge was express and in writing, was the evidence held sufficient. See also *Scarf* v. *Jardine* (1882) (*l*).

Revocation of continuing guaranty by change in firm.

18. A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given.

"Partnership," pp. 117 *et seq.*

This section replaces § 7 of the Mercantile Law Amendment (Scotland)

(*d*) *Hart* v. *Alexander* (1837), 2 M. & W. 484.

(*e*) *Ex parte Kendall* (1811), 17 Ves. 522—527; *Oakeley* v. *Pasheller* (1836), 4 Cl. & Fin. 207; *Wilson* v. *Lloyd* (1873), 16 Eq. 60; *Brown* v. *Gordon* (1852), 16 Beav. 302.

(*f*) See "Partnership," pp. 249 *et seq.*

(*g*) 11 S. 762.

(*h*) 7 D. 548.

(*i*) 7 D. 494.

(*k*) 13 R. 243.

(*l*) 7 App. Ca. 345.

act, 1856, and § 4 of the Mercantile Law Amendment act, 1856, which are repealed by § 48 of the present act. Section 18.

The wording of the present section differs considerably from that of the previous acts, but so far at least as relates to England, it does not appear to have introduced any alteration in the law.

The text of the repealed section of the Mercantile Law Amendment act, 1856 (19 & 20 Vict. c. 97, § 4), will be found in "Partnership," p. 119, and cases illustrating that section on pp. 117 *et seq.*

As to what is a continuing guaranty, see Smith's Mercantile Law, Ed. 10, pp. 579 *et seq.*

This section only deals with continuing guarantees, but the same principle applies to the somewhat analogous case where securities have been deposited with bankers to secure further advances. *Primâ facie* the securities extend only to advances which are made by the firm, whilst its members continue the same as when the securities were deposited (*m*). But a security given to a firm for advances to be made by it, is, upon a change in the firm, readily made a continuing security; and a slight manifestation on the part of the borrower that it should so continue, will enable the new firm to hold the securities until the advances made by itself, as well as those made by the old firm, have been repaid (*n*). Deposit of securities.

Scotch Law.

The change referred to is in the constitution of the firm either of the creditor or debtor. Professor Bell, writing before the Mercantile Law Amendment Acts, 1856, points out the inconvenience to a banking firm and its customers of having all its bonds of credit renewed upon every change among its partners; and adds: "but there does not seem in law to be any necessity for this, and generally there is a stipulation against it in the bond." The case, however, is different (he says) with changes in the debtor's firm, for they may materially affect the risk (*o*). Scotch Law. Continuing guarantee.

On this subject the Law Amendment Commissioners reported that it was doubtful whether any substantial difference existed between the laws of the different parts of the United Kingdom, but in order to extinguish such doubts, recommended that a guarantee, whether to or for a firm, should cease as to fresh transactions when a change takes place in the partners, unless the contrary appears, either expressly or by implication, to be the intention (*p*). Report of Law Commission.

The enactment took the form of § 4 and § 7 in the English and Scotch Mercantile Law Amendment Acts, 1856, respectively (*q*), which provided

(*m*) See *per* Lord Eldon in *Ex parte Kensington* (1813), 2 V. & B. 83.

(*n*) See "Partnership," pp. 119—120.

(*o*) 1 Bell's Com. 387—388.

(*p*) Second Report (1855), p. 12.

(*q*) 19 & 20 Vict. c. 97, and 19 & 20 Vict. c. 100.

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that no guarantee granted "to or for a company or firm consisting of two or more persons, or to or for a single person trading under the name of a firm" should be binding after a change in any one or more of the partners of the company or firm, to or for which it was granted; unless the intention of the parties that it should continue to be binding notwithstanding the change should "appear either by express stipulation or by necessary implication from the nature of the firm or otherwise." These sections are repealed by § 48 of this act, but the present section is in substance a re-enactment thereof. The exception, indeed, is differently expressed, the words being simply "is, in the absence of agreement to the contrary, revoked," which however have the same meaning.

Relations of Partners to one another.

19. The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.

Variation by consent of terms of partnership.

"Partnership," pp. 408 *et seq.*

The law upon which this section is based is clearly stated by Lord Eldon in *Const* v. *Harris* (1824) (*l*), and by Lord Langdale in *England* v. *Curling* (1844) (*m*); and other cases illustrating its application will be found discussed or referred to in "Partnership," pp. 408 *et seq.*

By the consent of all the partners.—The mutual rights and duties of partners cannot be varied except by the consent of all the partners, and the passage in Lord Eldon's judgment in *Const* v. *Harris* (*n*), in which he says that "that is the act of all which is the act of the majority, provided all are consulted and the majority are acting *bonâ fide*," is only true of cases in which the majority has the power of binding the minority: as to which see *infra*, § 24 (8), and notes.

It appears that a person who comes into a firm, or claims an interest in partnership property, under another who has acquiesced in the variation of the terms of the partnership articles, is bound by that acquiescence and cannot revert to the original articles (*o*).

For the usual clauses contained in partnership agreements, and the principles governing their construction, see "Partnership," pp. 406 *et seq.*

Scotch Law.

Scotch Law.

Variation of contract of copartnery.

The mode of proving the variation of a written contract of copartnery will be in accordance with the general rules of evidence. Although parole is in general inadmissible to contradict or modify a written contract, yet it is admissible to prove acquiescence in actings inconsistent with the written contract, to the effect of establishing a new or altered agreement. *Wark* v. *Bargaddie Coal Co.* (1856) (*p*); *Sutherland* v. *Montrose Shipbuilding Co.* (1860) (*q*). *Kirkpatrick* v. *Allanshaw Co.* (1880) (*r*). In *Geddes* v. *Wallace* (1820) (*s*), the House of Lords held that the circumstances, including the conduct of the partners, shewed that the real intention of

(*l*) T. & R. at p. 523.
(*m*) 8 Beav. p. 133.
(*n*) T. & R. p. 524—525.
(*o*) *Const* v. *Harris* (1824), T. & R. p. 524. See also *Ffooks* v. *South Western Ry.* (1853), 1 Sm. & G. 168; and *Peek* v. *Gurney* (1871), 13 Eq. 79.
(*p*) 18 D. 556, revd. 3 Macq. App. 467.
(*q*) 22 D. 665.
(*r*) 8 R. 327.
(*s*) 2 Bligh. 270.

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parties had been different, or that a new agreement had been entered into. In *Barr's Trustees* v. *Barr and Shearer* (1886) (*t*), an attempt to vary a written contract of copartnery by parole evidence was disallowed.

Partnership property.

20.—(1.) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

(2.) Provided that the legal estate or interest in any land, or in Scotland the title to and interest in any heritable estate, which belongs to the partnership shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.

(3.) Where co-owners of an estate or interest in any land, or in Scotland of any heritable estate, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase.

"Partnership," pp. 322 *et seq.*

It is within the power of the partners by agreement between themselves to decide what property shall, or shall not, be partnership property, and the rules laid down in this and the following section are only applicable to cases in which there is no agreement, express or implied, excluding their application (see *supra*, § 19). In every case it will be necessary to examine all the circumstances to see whether or not there is any agreement between the partners.

SUB-SECTION 1.

Sub-section (1).

This sub-section appears only to state the law which may be deduced from the numerous cases on the subject, which will be found collected and examined in "Partnership," pp. 322 *et seq.*

(*t*) 13 R. 1055.

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Property.—This word is not defined by the present act. It is not, however, a word of art and must be taken in an ordinary sense (*u*).

Goodwill.

The goodwill of a business forms part of the partnership property and in the absence of an agreement to the contrary any partner may upon a dissolution insist upon having it sold for the benefit of all the partners (*x*).

The right to continue to use the firm name is often the most important element in the goodwill, but if the firm name contains as part of it, the name of a retiring partner, such partner can, in the absence of an agreement to the contrary, prevent the continued use of the name, for otherwise he might incur liability under the doctrine of holding out (*y*). A sale by him of his interest in the goodwill includes the right to use the old name even if it be his own (*z*), but not the right to expose him to any risk by so doing (*zz*).

For the rights of the vendors and purchasers of the goodwill of a business see "Partnership," pp. 439—448.

An agreement for the sale of goodwill must now bear an ad valorem stamp (*a*).

Offices.

A question sometimes arises whether the profits of offices and appointments held by one partner belong to him or to the firm. On this subject see *Collins* v. *Jackson* (1862) (*b*), *Smith* v. *Mules* (1851) (*c*), and *Ambler* v. *Bolton* (1872) (*d*).

Acquired . . . on account of the firm.—See *infra*, § 21.

It should be recollected that any property, which one partner may have acquired in breach of the good faith which ought to regulate the conduct of partners *inter se*, is considered as acquired on behalf of the firm and forms part of the partnership assets: see *infra*, §§ 29 and 30.

Or for the purposes and in the course of the partnership business.—Very difficult questions have arisen when land has been devised to persons who are already partners and is used by them for the purposes of the partnership business. The leading cases on this subject, which will be found stated or referred to in "Partnership," pp. 331 *et seq.*, are *Morris* v. *Barrett* (1829) (*e*), *Brown* v. *Oakshot* (1857) (*f*), *Phillips* v. *Phillips* (1832) (*g*), *Jackson* v. *Jackson* (1814) (*h*), *Crawshay* v. *Maule* (1818) (*i*), *Waterer* v. *Waterer* (1873) (*k*), and *Davies* v. *Games* (1879) (*l*). The present section does not lend much assistance in solving such questions, for such lands though used for the partner-

(*u*) See per Bramwell, B., in *Queensbury Industrial Society* v. *Pickles* (1865), L. R. 1 Ex. at p. 4—5.

(*x*) *Pawsey* v. *Armstrong* (1881), 18 Ch. D. 698; *Bradbury* v. *Dickens* (1859), 27 Beav. 53, and other cases cited, "Partnership," pp. 439 *et seq.*

(*y*) See *supra*, § 14; *Gray* v. *Smith* (1889), 43 Ch. D. 208, and "Partnership," pp. 444 *et seq.*

(*z*) *Levy* v. *Walker* (1878), 10 Ch. D. 436; *Banks* v. *Gibson* (1865), 34 Beav. 566.

(*zz*) *Thynne* v. *Shore* (1890), 45 Ch. D. 577.

(*a*) Revenue Act, 1889, 52 & 53 Vict. c. 42, § 15; *Potter* v. *Commissioners of Inland Revenue* (1854), 10 Ex. 147.

(*b*) 31 Beav. 645.

(*c*) 9 Ha. 556.

(*d*) 14 Eq. 427.

(*e*) 3 Y. & J. 384.

(*f*) 24 Beav. 254.

(*g*) 1 M. & K. 649.

(*h*) 9 Ves. 591; and 7 Ves. 535.

(*i*) 1 Swanst. 495.

(*k*) 15 Eq. 402.

(*l*) 12 Ch. D. 813.

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ship business can hardly be said to be acquired for the purposes and in the course of the partnership business.

Conversion of partnership property into separate property.

And must be held, &c.—That is, until by agreement between all the partners, such property ceases to be partnership property. That partnership property can be converted into the separate property of one partner by agreement between the partners themselves, and that such conversion, apart from fraud, will be binding on creditors, was decided at the commencement of this century in *Ex parte Ruffin* (1801) (*m*) and *Ex parte Williams* (1805) (*n*). It should be remembered that in the event of bankruptcy, the trustee, as representing the creditors, may be able to impeach as fraudulent against them agreements by which the bankrupt himself would have been bound (*o*).

Scotch Law.

Scotch Law. Partnership property.

Professor Bell's description of the partnership property is to the same effect. He adds,—"All this, by the operation of law and the nature and effect of the contract, becomes common property, is held by all the partners jointly" (*i.e., pro indiviso*) "for the uses of the partnership, and is directly answerable as a stock for the payment of its debts" (*p*). And he points out that while the contract of partnership has the effect of a direct conveyance (*titulus transferendi dominii*) of property to the firm, that does not supersede the necessity of the completion of the transference by delivery, possession, or intimation, which vest the property in the partners for the firm. "Where the question is between the parties and their representatives, as to what shall be considered as the estate of the company, but without involving any competition with third parties, whatever falls under the fair construction of the contract will, as a personal right, belong to the company and its creditors. But where there arises a competition, depending on the question of real right, it will be determined according to that criterion of real right which the law has appointed in cases of transference" (*q*). In the former case it is a *jus ad rem*, in the latter a *jus in re*. In both cases the right must be established by appropriate evidence; but in the former the intention of parties will rule, in the latter the rights of third parties to attach or otherwise affect the property can only be displaced by a completed transfer to, or vesting in the firm, or a partner or other person on its behalf.

Moveables.

As to moveables, possession by a partner will be presumed to be for the firm; but funds or commodities in the hands of third parties require to be delivered actually or constructively, or assigned, and the assignation intimated. In a question between partners the mere use of heritable property for partnership purposes is not conclusive: *Sime* v. *Balfour* (1804) (*r*). *Wilson* v. *Threshie* (1826) (*s*); and the terms of the feudal title

(*m*) 6 Vesey, 119.
(*n*) 11 Vesey, 3. For other cases see "Partnership," pp. 334 *et seq.*
(*o*) See "Partnership," p. 338.
(*p*) 2 Bell's Com. 500.
(*q*) 2 Bell's Com. 501.
(*r*) M. App. Herit. & Mov. No. 3.
(*s*) 4 S. 366.

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will yield to evidence (such as entries in the firm's books) that the property truly belongs to the firm: *Campbell* (1805) (*t*), *Minto* v. *Kirkpatrick* (1883) (*u*).

Ships.

As to the transfer of ships, see the Merchant Shipping Amendment Act, 1862, § 3 (*x*), and *Watson* v. *Duncan* (1879) (*y*).

Insurance policy.

In *Forrester* v. *Robson* (1875) (*z*), a life policy taken out in name of a partner of one of two firms, and payable to his executors, administrators, and assignees, formed the security for a loan to these firms, and the premiums were paid by them. On the death of the partner, the proceeds of the policy after meeting the loan were held to belong to the two firms as partnership property. As to the mode of proof, doubt was expressed whether the act of 1696, c. 25, confining proof of trust to writ or oath of party, did not apply; and in the case of *Laird* v. *Laird and Rutherford* (1884) (*a*), where a patent was taken in name of a partner and another person, it was held that proof *pro ut de jure* was under that act inadmissible. But an averment that money deposited in bank in name of a partner really belongs to the firm is provable by parole, on the ground that the averment resolves itself into one of partnership and not of trust: *Baptist Churches* v. *Taylor* (1841) (*b*).

Mode of proof.

Acquisition in partner's name.

Property or rights acquired by a partner in his own name, in the line of the firm's business, and during its subsistence, are held to belong to the firm: *Marshall* (1815) (*c*); *McNiven* v. *Peffers* (1868) (*d*); *Davie* v. *Buchanan* (1880) (*e*). So also commissions or discounts received by a partner in connection with the business belong to the firm: *Pender* v. *Henderson* (1864) (*f*); illustrations of which also occur in the law of public companies.

Application.

The partnership property is applicable in the first place to partnership obligations. Creditors of the firm have a right prior to creditors of a partner; for a partner's interest in a firm, which is available for his creditors (*infra*, § 23), only emerges after the firm debts are provided for (*g*).

Sub-section 2.

Sub-section (2).

Devolution of legal estate in land.

The result of the rule contained in this sub-section in England is that if several partners are seised of land forming part of the partnership property as joint tenants, the legal estate will, on the death of one, accrue to the survivor or survivors. But if an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments corporeal or incorporeal, other than lands of copyhold or customary tenure,

(*t*) 2 Bell's Com. 565, note.
(*u*) 11 S. 632.
(*x*) 25 & 26 Vict. c. 63.
(*y*) 6 R. 1247.
(*z*) 2 R. 755.
(*a*) 12 R. 294.
(*b*) 3 D. 1030.
(*c*) F. C. 26th Jan. 1815; 23rd Feb. 1816.
(*d*) 7 Mc. 181.
(*e*) 8 R. 319.
(*f*) 2 Mc. 1428.
(*g*) 2 Bell's Com. 501.

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is partnership property and vested in one person solely (and this would be the case as to each partner's undivided interest in the land where they are tenants in common) such estate or interest will, upon the death of such person, devolve upon his legal personal representatives (*h*).

Scotch Law.

Scotch Law. Heritage.

The beneficial interest in the heritable estate, being established by appropriate evidence to belong to the partnership, the partner or other person in whose name the title stands holds in trust for the firm, and thereby in the first place for creditors (effect being given to any preference obtained by way of security or diligence), and in the second place for the partners, according to their rights under their contract. The appropriate form of title to heritable estate belonging to a partnership is in favour of the partners by name, and the survivors and survivor as trustees for the firm; but a lease may be validly granted to a firm *socio nomine; Dennistoun, McNair & Co.* (*i*).

SUB-SECTION 3.

Sub-section (3).

Sub-section 3 is in accordance with the view taken in the case of *Steward* v. *Blakeway* (1869) (*k*), though a different inference was drawn from the facts in *Morris* v. *Barrett* (1829) (*l*) and *Waterer* v. *Waterer* (1873) (*m*). See also *supra*, § 2 (1).

Scotch Law.

Scotch Law.

This does not seem to have been made the subject of decision in Scotland.

Property bought with partnership money.

21. Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

"Partnership," p. 329.

This section is in accordance with the previous law, and is illustrated by *The Bank of England's Case* (1861) (*n*).

Contrary intention.—For an instance where a contrary intention did appear, see *Smith* v. *Smith* (1800) (*o*). In that case the property, although paid for by the firm, was in fact bought for one partner, and he became a debtor to the firm for the purchase-money.

(*h*) See Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 30; Copyhold Act, 1887 (50 & 51 Vict. c. 73), § 45, and Wolstenholme & Turner's Conveyancing and Settled Land Acts, 5th ed. pp. 73—76.

(*i*) 16 Feb. 1808, F. C.

(*k*) 4 Ch. 603, and 6 Eq. 479.

(*l*) 3 Y. & J. 384.

(*m*) 15 Eq. 402; *Phillips* v. *Phillips* (1832), 1 M. & K. 649.

(*n*) 3 De G. F. & J. 645.

(*o*) 5 Ves. 189; also *Walton* v. *Butler* (1861), 29 Beav. 428, and "Partnership," p. 329.

Sections 21—22.

Where money of the firm has been laid out in improvements upon the separate property of one partner, the usual course upon a dissolution is to grant an enquiry whether, having regard to the terms of the partnership and the purposes for which the expenditure was made, any and what sums should be allowed to the partnership in respect of such outlay (*p*). The grounds upon which such an enquiry is directed are explained by Kay, J., in the case of *Pawsey* v. *Armstrong* (1881) (*q*), where money belonging to Pawsey & Armstrong as partners had been expended in the erection of buildings and works upon the separate property of Armstrong. The passage in the judgment referring to this point is as follows :—

Pawsey v. Armstrong.

"If this money was expended out of what would otherwise have been divided as partnership profits, *primâ facie* the effect of that would be to diminish the amount of profits to be divided. If it did diminish the amount of profits to be divided, then the extent to which it diminished Mr. Pawsey's profits may be treated as having been expended out of Mr. Pawsey's money. But it does not follow even then, that Mr. Pawsey is entitled to get that money back. It may be that the expenditure has been practically exhausted, that the partnership had the full benefit of it, and that nothing remains now to be divided or to be recovered in respect of that expenditure. It may be that it was expended with Mr. Pawsey's full consent, as he admits, and with his eyes open to the fact that his interest would be a determinable interest, and it may be that having permitted the expenditure to be made, knowing precisely what his interest was, that he is not now entitled to get back any part of it. I do not mean to prejudice even that question. On the other hand, it may be that he looked to the partnership continuing much longer than it has in fact continued. The expediture may have been so large that it is not an exhausted improvement even now, and it may be fair and right, looking to all the circumstances of the case, that he should have some portion of the money paid back to him in respect of that amount of profit which would otherwise have come to his share, and which has been expended upon these mills and cannot be treated as exhausted ; and it is in order not to prejudice that, and to give him any advantage which he is fairly entitled to upon that last head, that I shall direct an enquiry upon the subject" (*r*).

Scotch Law.

Scotch Law.

This is the existing law. In *Davie* v. *Buchanan* (1880) (*s*) the steamer was bought on the credit of the joint adventure. See also cases of *McNiven* and *Marshall,* referred to under § 20.

Conversion into personal estate.

22. Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention

(*p*) See *Pawsey* v. *Armstrong* (1881), 18 Ch. D. 698 ; *Burdon* v. *Barkus* (1862), 3 Giff. 412 ; 4 De G. F. & J. 42.

(*q*) 18 Ch. D. pp. 707—708.

(*r*) See also "Partnership," p. 330.

(*s*) 8 R. 319.

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land held partnership roperty.

appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal or moveable and not real or heritable estate.

"Partnership," pp. 343 *et seq.*

onversion of and.

The English decisions upon this point although somewhat conflicting, had established the doctrine adopted by the legislature in this section (*t*).

The rule was founded upon the equitable doctrine of conversion, based upon the right of each partner to have the partnership property sold on the dissolution of the partnership, and the proceeds of sale divided amongst the partners after discharging all the debts and liabilities of the partnership (*u*). If, therefore, there is no right to a sale, there will, it is conceived, be a contrary intention within the meaning of the section (*x*).

The section applies to all land which is partnership property by whatever means it became so, and therefore leaves no room for the distinction at one time drawn (*y*) between lands purchased out of the partnership assets and lands which became partnership property by other means. The section only applies to land which is partnership property and has no application to land held by partners as co-owners and not as partners (*z*).

Probate and legacy duty are payable in respect of a share in a partnership the assets of which consist of land (*a*).

An agreement to assign a share in a partnership, part of the assets of which consists of land, is within § 4 of the Statute of Frauds (*b*).

A partner's share in the land of the partnership is within the Mortmain and Charitable Uses Act (*c*).

As to the right to vote on the election of members of parliament in respect of land belonging to a partnership, see "Partnership," p. 348.

Scotch Law.

Scotch Law. Conversion to moveable estate.

This is the existing law. Professor Bell traces the peculiarity to the *pro indiviso* right vested in the partners for behoof of creditors in the first place

(*t*) See the cases collected and examined in "Partnership," pp. 343 *et seq.*

(*u*) See *A.-G.* v. *Hubbuck* (1884), 13 Q. B. Div. p. 289; *Darby* v. *Darby* (1856), 3 Drew, 495; *Re Hulton*, W. N. 1890, p. 14.

(*x*) *Steward* v. *Blakeway* (1869), 4 Ch. 603, and 6 Eq. 479, and the remarks of Bowen, L.J., in *A.-G.* v. *Hubbuck* (1884), 13 Q. B. Div. p. 289.

(*y*) See *Cookson* v. *Cookson* (1837), 8 Sim. 529.

(*z*) See *Rowley* v. *Adams* (1844), 7 Beav. 548; *Steward* v. *Blakeway* (1869), 4 Ch. 603, and 6 Eq. 479.

(*a*) *A.-G.* v. *Hubbuck* (1884), 13 Q. B. Div. 275; *Forbes* v. *Steven* (1870), 10 Eq. 178.

(*b*) *Gray* v. *Smith* (1889), 43 Ch. D. 208. This question was not argued in the Court of Appeal.

(*c*) *Ashworth* v. *Munn* (1878), 15 Ch. D. 363, decided under the re-

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and of partners afterwards, the beneficial interest under this *quasi* trust being a *jus crediti* (*d*). The rule has been long recognised in Scotland : *Corse* v. *Corse* (*e*), *Murray* (*f*), *Kirkpatrick* v. *Sime* (1811) (*g*), *Minto* v. *Kirkpatrick* (1833) (*h*), *Irvine* (1851) (*i*).

Procedure against partnership property for a partner's separate judgment debt.

23.—(1.) After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm.

(2.) The High Court, or a judge thereof, or the Chancery Court of the county palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

(3.) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same.

(4.) This section shall apply in the case of a cost-book company as if the company were a partnership within the meaning of this Act.

(5.) This section shall not apply to Scotland.

This section is new and is intended to do away with the hardship and inconvenience previously caused by partnership property being taken in execution for a partner's separate debt, and to substitute a procedure, by which a complete and equitable settlement of the rights of all parties, may be effected (*k*).

pealed Act, 9 Geo. II. c. 36. The present Act, 51 & 52 Vict. c. 42, is the same is this respect.

(*d*) 2 Bell's Com. 501.

(*e*) 10th Dec. 1802, F. C.

(*f*) 5th Feb. 1805, F. C.

(*g*) 5 Paton's App. 525.

(*h*) 11 S. 632.

(*i*) 13 D. 1367.

(*k*) See *ante*, p. 2, and generally as to the previous law, "Partnership," pp. 356 *et seq.*

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SUB-SECTION 1.

Sub-section (1).

After the commencement of this Act.—*I.e.* 1st January, 1891, see § 49.

A writ of execution.—The Act contains no definition of a writ of execution, but the term when used in the rules of the Supreme Court includes writs of *fieri facias*, *capias*, *elegit*, sequestration and attachment and all subsequent writs that may issue for giving effect thereto (*l*).

Partnership property.—See *ante*, § 20.

SUB-SECTION 2.

Sub-section (2).

Sub-section 2 should be compared with 1 & 2 Vict. c. 110, § 14, which enables a judgment creditor to obtain a charging order upon any shares in a public company in England belonging to his judgment debtor (*m*).

Chancery Court of the County Palatine of Lancaster.—See now 53 & 54 Vict. c. 23.

On the application by summons.—No directions are given in this act as to the procedure to be adopted, but probably R. S. C. Order XLVI. will apply. Under 1 & 2 Vict. c. 110, §§ 14 and 15, an order *nisi* charging the shares of the judgment debtor is obtained *ex parte*, and the order is served upon the company, whose shares are charged, and upon the judgment debtor or his solicitor. The application for the order absolute is made to a judge in chambers (*n*).

Extent of charge.

Charging that partner's interest in the partnership property and profits.—The Act contains no definition of a partner's interest in the partnership property. The bill in its original form defined a partner's share in the partnership property at any time as the proportion of the then existing partnership assets to which he would be entitled if the whole were realised and converted into money and after all the then existing debts and liabilities of the firm had been discharged. This definition, though now omitted, seems to be in accordance with the law (*o*).

An order under this section will charge the whole of the partner's interest, whereas formerly the sheriff under a *fi. fa.* could only sell the share and interest of the execution debtor in such of the chattels of the partnership as were seizable under such a writ (*p*).

Accounts and inquiries.

Direct all accounts and inquiries, &c.—It would seem that these words will not entitle a judgment creditor to any account of the partnership transactions, so long as his judgment debtor remains a member of the firm, except perhaps where by agreement between the partners a partner may give this right to his assignees. See *infra*, § 31.

Though it seems to follow from this section that a judgment creditor who has obtained a charging order will be entitled to an order for the sale of his judgment debtor's interest in the partnership (see sub-section 3 of the

(*l*) R. S. C. Order XLII. r. 8.

(*m*) See "Lindley on the Law of Companies," p. 460, and "Annual Practice," Order XLVI. r. 1 and notes.

(*n*) "Annual Practice," Order XLVI. r. 1, and "Daniell's Chancery Practice," pp. 934—941.

(*o*) See "Partnership," p. 339.

(*p*) *Helmore* v. *Smith* (1886), 35 Ch. Div. 436.

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section) there may be a question whether he is entitled to a decree of foreclosure against his judgment debtor; the balance of authority appears to be in favour of such a right (*q*). Assuming the judgment creditor to be entitled to such an order, the Court will probably have power under this section to make an order for the foreclosure or sale without an independent action being commenced for that purpose (*r*).

Extent of rights under charging order.

A charging order under this section will not confer upon the judgment creditor any greater right than the debtor could honestly give him (*s*) and therefore it will not give him priority over a person to whom the partner has assigned his interest subsequently to the judgment and previously to the charging order (*t*).

If a charging order is made under this section, the partners of the judgment debtor have the right to dissolve the partnership. See *infra*, § 33 (2).

SUB-SECTION 3.

Sub-section (3)

Sub-section 3, while giving the partners of a judgment debtor against whom a charging order has been made under this section the right to redeem the charge, does not in terms give the judgment creditor the right to a decree of foreclosure against such partners; and *quære*, whether such a right is consistent with a right to redeem at any time?

SUB-SECTION 4.

Sub-section (4).

Sub-section 4 removes any difficulty arising from the doubt whether cost-book companies were or were not public companies within the meaning of 1 & 2 Vict. c. 110, § 14 (*u*).

SUB-SECTION 5.

Scotch Law.

SCOTCH LAW.

Sub-section 5.

Partner's interest attachable by arrestment.

By the common law of Scotland, and as a consequence of the separate *persona* of the firm, the interest of a partner in the concern is attachable by his creditors. Professor Bell says: "Another consequence" (of the separate *persona* of the firm) "is that the creditors of a partner, if they want to attach his share, must arrest in the hands of the company as a separate person" (*x*). Again, "The share of each partner is a portion of

(*q*) See cases decided under 1 & 2 Vict. c. 110, § 13, in favour of the right, *Ford* v. *Wastell* (1847), 6 Hare 229, and 2 Ph. 591; *Jones* v. *Bailey* (1853), 17 Beav. 582; *Messer* v. *Boyle* (1856), 21 Beav. 559; *Beckett* v. *Buckley* (1874), 17 Eq. 435, and against the right, *Footner* v. *Sturgis* (1852), 5 De G. & Sm. 736.

(*r*) Compare *Leggott* v. *Western* (1884), 12 Q. B. D. 287.

(*s*) *Re Onslow's Trusts* (1875), 20 Eq. 677; *Gill* v. *Continental Gas Co.* (1872), L. R. 7 Ex. 332: cases decided under 1 & 2 Vict. c. 110.

(*t*) *Scott* v. *Lord Hastings* (1858), 4 K. & J. 633; *Brearcliff* v. *Dorrington* (1850), 4 De G. & Sm. 122, cases decided under 1 & 2 Vict. c. 110.

(*u*) See "Lindley on the Law of Companies," p. 463.

(*x*) 2 Bell's Com. 508.

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the *universitas:* it forms a debt or demand against the company, so as to be arrestable in the hands of the company" (*y*). The interest of a partner which is so attachable is his proportionate share of the partnership assets, after paying partnership debts. In the recent case of *Parnell* v. *Walter* (1889) (*z*), Lord Kinnear explains that the law of England, as proved to him, was precisely the same as the law of Scotland, and that it followed as a necessary consequence that particular debts due to the firm could not be taken in execution by the creditor of a partner for a private debt; but, he added, "it is not, in my opinion, because of the mere impersonation of the firm that its assets cannot be arrested by the creditors of a partner, but because the partner has no separate share in the assets which is capable of being attached by that diligence. The principle is that a partner has no right to claim any particular portion of the assets as belonging exclusively to him; and neither his assignees nor his separate creditors can have any higher right against the joint property than the debtor or cedent from whom they derive their interest. The true ground, therefore, is that which is stated in Lord Pitfour's note, quoted by Mr. Bell, when he says that the creditors of the partner can only affect his share of the balance after payment of the co-partnery debts" (*a*).

The diligence for attaching the partner's interest is arrestment, not poinding, for the partnership assets are in the hands of the firm, or of the partners on its behalf (*b*); and not adjudication, for it is moveable not heritable in character: *Rae* v. *Neilson* (1742) (*c*); *Neilson* v. *Rae* (1745) (*d*). The arrestment attaches the partner's interest while the firm subsists, but requires to be made effectual by an action of furthcoming, which cannot be raised till the dissolution of the partnership (*e*). In the case of *Rae* (*supra*), it was observed on the bench that an arrestment could not carry a right of partnership to any other effect than to pursue a division and the arresting creditor was not entitled to name a partner in place of his debtor. This is obvious (*f*). The debtor remains a partner, and if a definite term be fixed by the contract, the creditor seems to have no means of forcing an earlier dissolution; but the creditors will through him reap the whole accruing benefits during the subsistence of the partnership, and the other partners cannot object: *per* Lord Gifford in *Cassells* v. *Stewart* (1879) (*g*). If it be a partnership at will, can the creditor compel his debtor to dissolve, or exercise the power himself? or can the power be adjudged from his debtor, and put in exercise? These questions have not been solved in the law of Scotland, probably either because special stipulations in the contract of copartnery usually provide for the retirement of insolvent partners, or the inconveniences of a continuing arrestment have been found potent enough to compel a settlement.

(*y*) 2 Bell's Com. 536.
(*z*) 16 R. 917.
(*a*) 16 R. 925.
(*b*) Erskine III., 3, 24.
(*c*) M. 716.
(*d*) M. 723.
(*e*) Erskine, *supra*.
(*f*) Bell's Pr. § 358.
(*g*) 6 R. 936, 956.

Section 24.

Rules as to interests and duties of partners subject to special agreement.

24. The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules:

(1.) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm. (See *infra*, p. 62.)

(2.) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—

(*a.*) In the ordinary and proper conduct of the business of the firm; or

(*b.*) In or about anything necessarily done for the preservation of the business or property of the firm. (See *infra*, p. 64.)

(3.) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per cent. per annum from the date of the payment or advance. (See *infra*, p. 65.)

(4.) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him. (See *infra*, p. 66.)

(5.) Every partner may take part in the management of the partnership business. (See *infra*, p. 66.)

(6.) No partner shall be entitled to remuneration for acting in the partnership business. (See *infra*, p. 66.)

(7.) No person may be introduced as a partner without the consent of all existing partners. (See *infra*, p. 67.)

(8.) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners. (See *infra*, p. 68.)

(9.) The partnership books are to be kept at the place of

Section 24.

business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them. (See *infra*, p. 69.)

Partnership Property, see §§ 20 and 21.

SUB-SECTION 1.

Sub-section (1). "Partnership," p. 348.

Shares of partners in partnership.

If it be proved that the partners contributed the capital of the partnership in unequal shares it is presumed that, in the absence of an agreement to the contrary, on a final settlement of accounts, the capital of the business remaining after the payment of outside debts and liabilities, and of what is due to each partner for advances, will, subject to all proper deductions, be divided amongst the partners in the proportions in which they contributed it and not equally (*h*). But although the partners may have contributed the capital unequally they will, in the absence of any agreement, share profits and losses, whether of capital or otherwise, equally (*i*).

If it has been agreed that profits shall be divided in a certain proportion the inference, in the absence of an agreement to the contrary, is that losses are to be shared in the same proportion (*k*).

In the absence of any agreement, the partners will have to share the losses equally, even though the loss may have been due to the conduct of one partner more than another, provided he is acting *bonâ fide* and without culpable negligence (*l*). But where a loss has been incurred by the fraud, culpable negligence, or wilful default of one partner, hitherto the other partners have been entitled to throw the whole of such loss upon the partner in default (*m*), unless they have treated the loss as a partnership loss (*n*); and it is conceived that this sub-section has in no way deprived them of this right.

The rule contained in this sub-section applies to partnerships for a single transaction (*o*).

Where a firm, say of two persons, enters into a partnership transaction with a person who is not a member of the firm, if the two partners entered into the speculation as a firm the profits and losses will be divided equally

(*h*) See *infra*, § 44 (*b*), 1, 2, and 3.

(*i*) *Stewart* v. *Forbes* (1849), 1 Mac. & G. 137; *Webster* v. *Bray* (1849), 7 Ha. 159; *Robinson* v. *Anderson* (1855), 20 Beav. 98, and 7 De G. M. & G. 239; *Peacock* v. *Peacock* (1809), 16 Vesey 49, and other cases cited "Partnership," pp. 348 *et seq.*

(*k*) See per Jessel, M.R., in *Albion Life Assurance Society* (1880), 16 Ch. Div. p. 87, and *infra*, § 44 (*a*).

(*l*) *Ex parte Letts and Steer*, 26 L. J. Ch. 455.

(*m*) *Thomas* v. *Atherton* (1878), 10 Ch. Div. 85, and "Partnership," pp. 386 *et seq.*

(*n*) *Cragg* v. *Ford* (1842), 1 Y. & C. C. C. 280.

(*o*) See *Robinson* v. *Anderson* (1855), 20 Beav. 98, and 7 De G. M. & G. 239.

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in two parts, but if they entered into it as two individuals the profits and losses will be shared equally between all three (*p*).

Where some partners have retired and the others have taken over their shares, the inference, in the absence of evidence to the contrary, is that the continuing partners took the shares of the retiring members in the proportions in which they, the continuing partners, were originally interested in the business (*q*).

An agreement excluding the application of this sub-section may be inferred from the mode in which the partners have dealt with each other and from the contents of the partnership books (*r*).

Scotch Law.

SCOTCH LAW.

This is the existing law and is in accordance with the House of Lords' decision in *Campbell's Trustees* v. *Thomson* (1829—31) (*s*). In that case the Court of Session held that "according to the law of Scotland the presumption was for equality," and Professor Bell had before stated the doctrine thus :—"The presumption is that in the opinion of the parties their several contributions" (of property, money, skill, or labour) "are equalised, though it may be impossible or difficult to state in what that equality consists" (*t*). The House of Lords (Lords Brougham and Wynford) held the judgment of the Court of Session to mean "that where there is no express contract fixing the rights of the parties, the partnership property and the partnership profits must be equally divided," and that this was an over-ruling presumption of law. It is not quite clear that this is what the Court of Session really meant; for it was there stated that "confessedly there is no evidence as to the extent of the share, and in the absence of evidence it is the duty of the judge to tell the jury that they must find equality, so that a remit to the jury court is superfluous" (*tt*). In somewhat similar terms Lord Brougham stated that the jury would only have recourse to the presumption of equality in the last resort and for want of evidence. Accordingly the House of Lords reversed, and directed the Court of Session to send an issue to the jury court to ascertain, under all the circumstances, what was the fair proportion of the business to which the party was entitled (*u*). Similarly, in a later case of joint adventure in the absence of any circumstances indicating a different proportion the shares were held to be equal: *Fergusson* v. *Graham* (1836) (*x*).

In a prior Scotch case in the House of Lords, *Struthers* v. *Barr* (1826) (*y*), it was held by Lord Gifford, reversing the judgment of the Court of Session,

(*p*) *Warner* v. *Smith* (1863), 1 De G. J. & S. 337.

(*q*) *Robley* v. *Brooke* (1833), 7 Bli. N. S. 90, and see *Copland* v. *Toulmin* (1840), 7 Cl. & Fin. 349.

(*r*) *Stewart* v. *Forbes* (1849), 1 Mac. & G. 137.

(*s*) Ersk. III. 3, 19; 7 S. 650, 5 W. & S. 16; Bell's Prin. § 362.

(*t*) 2 Bell's Com. 503.

(*tt*) 7 S. 653.

(*u*) See also *Aberdeen Bank* v. *Clark* (1859), 22 D. 44.

(*x*) 14 S. 871.

(*y*) 2 W. & S. 153.

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that the extent of a partner's interest, where not fixed by contract, was not to be regulated by the amount of his input capital, as compared with that of the other partners, but that he was to be held as having an equal share, and to be liable for losses in the same proportion. There was no written contract, and the case was stated to be one merely of evidence, Lord Gifford holding that it appeared evident that at the outset the respondent was to have an equal share, each to contribute one-third of the capital, though he actually contributed less than one-third, and less than the other partners did.

Under this sub-section it is thought that the amount of input capital, though an important element, will not be conclusive. If there be no other circumstances to throw light (a case not very likely to occur), it may determine the proportion; but, as was observed by Lord President Hope in *Campbell's Trustees* v. *Thomson*, which was a professional partnership, "it is immaterial that no capital was contributed, because a person's mind and exertions may be more valuable than capital." And Mr. Erskine says, "the skill or industry of one partner may be worth the stock of another" (*z*).

SUB-SECTION 2.

Sub-section (2) (*a*).

"Partnership," pp. 368 *et seq.*

Sub-section (2) (*a*) is in accordance with the previous law.

Right of indemnity.

Since every partner is an agent of the other partners for the purpose of carrying on the partnership business in the usual way (see *supra*, § 5), it follows from the ordinary rules of principal and agent that he is entitled to be indemnified against all loss incurred by him while so doing (*a*), unless it has been incurred by his own fraud, culpable negligence, or wilful default (*b*).

Sub-section (2) (*b*).

The second half of sub-section 2 is also in accordance with the previous law (*c*). The right to indemnity in this case rests on a different basis to the right under the former clause of this sub-section. For a partner is not the agent of a firm for doing any act, however urgent it may be, unless such act is done in carrying on the partnership business in the usual way (see *supra*, § 5, and notes). The right to indemnity in these cases arises *quasi ex contractu*; analogous rights are found in cases of salvage and average (*d*).

There will be no right of indemnity for any payments which are inconsistent with the agreement between the partners (*e*). And it is quite open to partners to agree that, as between themselves, they shall not be liable

(*z*) 7 S. 652; Ersk. III. 3, 19.

(*a*) See "Partnership," pp. 369 *et seq.*

(*b*) See *ante*, p. 62, note (*m*).

(*c*) *Ex parte Chippendale* (1854), 4 De G. M. & G. 19, and "Partnership," p. 383.

(*d*) See Sir Frederick Pollock's "Digest of the Law of Partnership," 5th ed. p. 72.

(*e*) *Thornton* v. *Procter*, 1 Anst. 94, and "Partnership," p. 383.

beyond a certain sum, and in such a case no partner can enforce contribution or indemnity beyond that amount (*f*). They may even by agreement entirely exclude the right to indemnity (*g*), Section 24.

Scotch Law.

This is the existing law, and arises from each partner being liable to the debts of the company, and entitled, under the general or implied mandate, to bind the company within the lines of its business. But where the actings are illegal, *e.g.*, contravention of Truck or Revenue statutes, the company is not liable to indemnify the partner, and an innocent partner forced to pay a penalty is entitled to relief against the guilty ones: *Findayson* v. *Braidbar Co.* (1864) (*h*); *Campbell* (1834) (*i*). Nor can any action be maintained by one partner against another for loss, remuneration, or accounting in connection with an illegal enterprise: *Gibson* v. *Stewart* (1835) (*k*). Scotch Law.

Sub-section 3.

"Partnership," p. 390. Sub-section (3).

Sub-section (3) is in accordance with the previous law (*l*). Right to interest on advances.

It does not appear to be necessary in order to give the partner making the advance a right to interest that his co-partner should be aware of the transaction (*m*); but the advance must be of such a nature that the partner making it has a right to be indemnified by the firm (*n*).

If the firm carries on a business in which it is customary to pay a higher rate of interest than 5 per cent., or if a higher rate has been allowed in the books of the particular partnership, there will be an implied agreement to pay such higher rate, which will exclude this sub-section (*o*).

A partner indebted to the firm in respect of money borrowed or in respect of a balance in his hand is not liable for interest, unless there has been a fraudulent retention or an improper application of the money (*p*).

See also *infra*, § 29.

Scotch Law.

Professor Bell points out that the liability between the firm and individual partners, in respect of advances beyond the contribution of partnership stock, rests on the relation or principle of debtor and creditor; but a partner is barred from competing against the firm's creditors (*q*). The advance is a loan, and money lent bears interest even though not stipulated for, "unless from the circumstances of the case there is ground in equity Scotch Law.

(*f*) *Worcester Corn Exchange* (1853), 3 De G. M. & G. 180.

(*g*) *Ex parte Chippendale* (1854), 4 De G. M. & G. 52.

(*h*) 2 Mc. 1297.

(*i*) 12 S. 573.

(*k*) 14 S. 166; 1 Robin. App. 260.

(*l*) See *Ex parte Chippendale* (1854), 4 De M. & G. 36.

(*m*) See case in last note.

(*n*) See ib. and § 24 (2).

(*o*) See "Partnership," p. 390, and commencement of this section.

(*p*) *Rhodes* v. *Rhodes* (1860), Johns. 653, and 6 Jur. N. S. 600; and other cases cited, "Partnership," p. 391.

(*q*) 2 Bell's Com. 507 and 536.

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to hold that interest was not meant to be demanded" (*r*): *Cuninghame* v. *Boswell* (1868) (*s*). Five per cent. is legal interest, and is due in the absence of special stipulation. This sub-section, however, removes any doubt as to liability for interest, and fixes the rate. A contribution of capital in money, due at a specified date and in arrear, will likewise bear interest at 5 per cent. from the due date, unless otherwise stipulated. In *Ballandene* v. *Glasgow Union Bank* (1839) (*t*), it was so stipulated and enforced.

SUB-SECTION 4.

Sub-section (4). Interest on capital.

"Partnership," p. 389.

Sub-section (4) is in accordance with the decision of *Cooke* v. *Benbow* (1865) (*u*), but like the other sub-sections of this section it only applies in the absence of any agreement between the partners.

Scotch Law.

SCOTCH LAW.

This is the existing law, but is often the subject of stipulation to the contrary.

SUB-SECTION 5.

Sub-section (5). Right of management.

"Partnership," p. 301.

The rule contained in sub-section (5) has long been recognised. Even if one partner has mortgaged all his share and interest in the partnership to his co-partner, the latter will not be permitted during the continuance of the partnership to avail himself of his rights as a mortgagee, to exclude the former from interference in the partnership (*x*).

Not only may every partner take part in the management of the partnership business, but, in the absence of any agreement to the contrary, it is the duty of every partner to attend diligently to the business.

Scotch Law.

SCOTCH LAW.

This is the existing law. The right to take part in the management flows from the mandate in the firm's affairs which is implied in partnership. Hence payment to a partner is payment to the firm: *Nicoll* v. *Reid* (1878) (*y*). The right may be excluded by contract. It would not be excluded by an arrestment or assignation of a partner's interest in the concern. See *infra*, § 31.

SUB-SECTION 6.

Sub-section (6).

"Partnership," p. 380.

It is conceived that sub-section (6), which is in accordance with the

(*r*) 1 Bell's Com. 692.
(*s*) 6 Mc. 890.
(*t*) 1 D. 1170; 1 Bell's Com. 691.
(*u*) 3 De G. J. & Sm. 1; "Partnership," p. 389.
(*x*) *Rowe* v. *Wood* (1822), 2 J. & W. 558; "Partnership," p. 301.
(*y*) 6 R. 217.

Section 24.

Remuneration for extra work.

previous law, will not prevent a partner from obtaining compensation for extra work and trouble imposed upon him by his co-partner wilfully neglecting to attend to the partnership business (*a*).

Where a partner has died or retired, and his co-partners have continued the business without any final settlement of accounts between the firm and the outgoing partner or his estate, the continuing partners are, in the absence of special reasons to the contrary, allowed some remuneration for their trouble (*b*).

Scotch Law.

Scotch Law.

"This is one of the plain and obvious principles of the law of partnership:" per Lord Justice Clerk (Inglis) in *Pender* v. *Henderson*, (1864) (*c*). Any claim to remuneration must be rested on specified grounds of express or implied agreement, and such agreement cannot be inferred from the mere circumstance of one partner having taken the sole management: per Lord Barcaple in *Faulds* v. *Roxburgh* (1867) (*d*); *McWhirter* v. *Guthrie* (1821) (*e*). The same applies to joint adventure: *Campbell* v. *Beath* (1826) (*f*). But where services were given by one of four joint lessees of a farm under the erroneous belief that he had right to the farm, a claim for remuneration was sustained: *Anderson* (1869) (*g*).

SUB-SECTION 7.

Sub-section (7).

"Partnership," pp. 363 *et seq.*

Sub-section (7) states a proposition which has long been recognised as one of the fundamental principles of partnership law.

Introduction of new partner.

The consent to the introduction of a new partner may be given prospectively; as observed in *Lovegrove* v. *Nelson* (1834) (*i*). "To make a person a partner with two others their consent must clearly be had, but there is no particular mode or time required for giving that consent; and if three enter into a partnership by a contract which provides that on one retiring, one of the remaining two, or even a fourth person who is no partner at all, shall name the successor to take the share of the one retiring, it is clear that this would be a valid contract which the Court must perform, and that the new partner would come in as entirely by the consent of the other two as if they had adopted him by name."

As to the effect of the assignment by a partner of his share in the partnership, see *infra*, § 31.

As to the apparent exception in the cases of mining partnerships and partnerships in ships, see "Partnership," p. 366.

(*a*) *Airey* v. *Borham* (1861), 29 Beav. 620.
(*b*) See "Partnership," p. 381, and p. 524 *et seq.*; and *infra*, § 42 (1).
(*c*) 2 Mc. 1428 (1438).
(*d*) 5 Mc. 373 (375).
(*e*) H. 760.
(*f*) 2 W. & S. 25.
(*g*) 8 Mc. 157.
(*i*) 3 M. & K. 20.

Section 24.

Scotch Law.

Scotch Law.

This is the existing law, and flows from "the *delectus personæ* implied in the nature of the contract," which "bars the admission of new partners either by succession or alienation" (*k*). But the parties may stipulate that their heirs and even their assignees shall be adopted in their room (*l*); a curious illustration of which is the case of *Warner* v. *Cuninghame* (1815) (*m*), where two partners granted to themselves and their heirs and assignees mutual leases of coal and salt works on their respective estates for 124 years, which were held by the House of Lords binding on the heirs taking up the succession. A share in a partnership destined to heirs goes to the heir in *mobilibus: Irvine* (1851) (*n*). In *Hill* v. *Wylie* (1865) (*o*), and *Beveridge* (1872) (*p*), the partnership was continued between the surviving partners and the representatives or testamentary trustees of the deceased, the latter collectively constituting one partner.

SUB-SECTION 8.

Sub-section (8). Rights of majority.

"Partnership," pp. 313 *et seq.*

The first part of sub-section (8) adopts what was stated as probably the law in "Partnership," p. 314, though, as there pointed out, there does not appear to have been any clear and distinct authority on the point.

If there is no provision in the partnership articles on the point in dispute and the partners are equally divided, those who forbid a change must prevail; *in re communi potior est conditio prohibentis* (*q*).

In order that the decision of the majority may bind the minority, the majority must be constituted and act in perfect good faith, and every partner has a right to be consulted, to express his own views, and to have those views considered by his co-partners (*r*).

The rule that no change may be made in the nature of the partnership business without the consent of all the partners was laid down and acted on by Lord Eldon in *Natusch* v. *Irving* (*s*) and *Const* v. *Harris* (1824) (*t*), and these cases have since been frequently followed. The difficulty in such cases is in the application of the rule to the facts in each case; instances of its application will be found in "Lindley on the Law of Companies," p. 320.

Scotch Law.

Scotch Law.

The right of a majority in number of the partners has hitherto been assumed; but by contract it is frequently stipulated that the votes shall be

(*k*) 2 Bell's Com. 509, 520.
(*l*) *Ibid.*
(*m*) 3 Dow. 76.
(*n*) 13 D. 1367.
(*o*) 3 Mc. 541.
(*p*) L. R. 2 Sc. App. 183.
(*q*) See "Partnership," p. 314, and cases there cited.
(*r*) See *Const* v. *Harris* (1824), Turn. & R. 525; and other cases quoted, "Partnership," p. 315.
(*s*) Gow on "Partnership," App. p. 398, ed. 3, and "Partnership," pp. 316—317.
(*t*) Turn. & R. 525.

in proportion to the partner's interest in the concern. Mr. Clark (*u*) states some rules in reference to the powers of majorities, but there is no direct authority by decision. Compare *Wyse* v. *Abbot* (1881) (*x*) as to trustees duty of consultation in trust affairs. Sections 24—25

SUB-SECTION 9.

"Partnership," pp. 404 and 421. Sub-section (9).

Sub-section (9) states the previous law on this subject, but like the other sub-sections of this section, it is subject to any agreement between the partners. Partnership books.

As to the duty of keeping accounts, see *infra*, § 28.

Scotch Law.

The place where the business books of the partnership are kept is an important element in determining the seat or centre of the business, and thereby the domicile of the firm: *per* Lord Shand, in *Lord Advocate* v. *Laidlay's Trustees* (1889) (*z*). Under the existing law "it is the privilege of each of the partners, unless they are excluded by the contract, to see the whole books at all times;" but "it is not the privilege of a partner to introduce a stranger to examine the books": *per* Lord Colonsay, in *Cameron* v. *McMurray* (1855) (*a*). But when the partners are engaged in a litigation with each other, they are entitled to professional assistance in the inspection (*b*). The exclusion will not hold in a charge of fraud against partners: see *Collins* (1850) (*c*). SCOTCH LAW.

25. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners. Expulsion of partner.

"Partnership," pp. 426 and 574.

It should be noticed that the power of expulsion must be conferred by express agreement, and this is in accordance with the decision in *Clarke* v. *Hart* (1858) (*d*).

Powers of expulsion are "*strictissimi juris*," and "parties who seek to enforce them must exactly pursue all that is necessary in order to enable them to exercise this strong power" (*e*). They must also be exercised in good faith,

(*u*) Clark on Partnership, pp. 186 *et seq.*
(*x*) 8 R. 983.
(*z*) 16 R. 959, 974; revd. 17 R. (H. L.).
(*a*) 17 D. 1142.
(*b*) *Ibid.*
(*c*) 13 D. 349.
(*d*) 6 H. L. C. 633.
(*e*) Per Lord Chelmsford in *Clarke* v. *Hart* (1858), 6 H. L. C. 650. See also *Blisset* v. *Daniel* (1853), 10 Ha. 493.

ections 25—26.

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and the partner, whom his co-partners seek to expel, must have a full opportunity of explaining his conduct (*f*).

An attempt to expel a partner which fails, owing to the absence of a power of expulsion or the irregular exercise of such a power, is void, and the partner whose expulsion was attempted, never having ceased to be a partner, can recover no damages for the ineffectual attempt to expel him (*g*).

A power to determine the partnership, if the business should not be conducted or the results not be to the satisfaction of one of the partners, must be distinguished from a power to expel. In such a case, as Jessel, M.R., pointed out, "you give the power to a single partner in terms which show that he is to be the sole judge for himself, not to acquire a benefit but to dissolve the partnership, and in such a case he may exercise the discretion capriciously and there is no obligation upon him to act as a tribunal or state the grounds on which he decides" (*h*).

It may be a question how far an express power to expel a partner without giving any reasons for such expulsion and without hearing him would be upheld by the Court (*i*).

Scotch Law.

Scotch Law.

This is in accordance with existing law. Clauses providing for expulsion of a partner are *strictissimi juris: Munro* v. *Cowan*, 1813 (*k*). See case of a power to repone a partner who had agreed to go out: *Tennent* v. *Tennent's Trustees* (1868-70), 6 Mc. 840; 8 Mc. (H. L.), 10.

tirement m partnership will.

26.—(1.) Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners.

(2.) Where the partnership has originally been constituted by deed, a notice in writing, signed by the partner giving it, shall be sufficient for this purpose.

SUB-SECTION 1.

b-section (1).

"Partnership," pp. 571 *et seq.*

The first part of this section is in accordance with the previous law.

The notice of dissolution must be explicit (*m*), but may be prospective (*n*).

(*f*) *Wood* v. *Woad* (1874), L. R. 9 Ex. 190; *Labouchere* v. *Wharncliffe* (1879), 13 Ch. D. 346; *Steuart* v. *Gladstone* (1879), 10 Ch. Div. 626. See "Partnership," pp. 426 *et seq.*

(*g*) *Wood* v. *Woad* (1874), L. R. 9 Ex. 190. Compare *New Chile Gold Mining Co.* (1890), 45 Ch. D. 598.

(*h*) *Russell* v. *Russell* (1880), 14 Ch. D. at p. 480. Compare *Blissett* v. *Daniel* (1853), 10 Ha. 493.

(*i*) See Sir Frederick Pollock's "Digest of the Law of Partnership," 5th ed. p. 76.

(*k*) 8 June, F. C.

(*m*) *Van Sandau* v. *Moore* (1826), 1 Russ. 463.

(*n*) *Mellersh* v. *Keen* (1859), 27 Beav. 236.

If once given it cannot be withdrawn without the consent of all the partners, even though one of them be a lunatic (*o*). Section 26.

A notice will be effectual though one of the partners is a lunatic, but in such a case the dissolution cannot be carried out without having recourse to an action (*p*).

Scotch Law.

This is the settled rule in partnerships at will: *Marshall* v. *Marshall* (*q*). The notice does not require to be "reasonable," per Sir Wm. Grant, M.R., in *Featherstonhaugh* v. *Fenwick* (*r*), notwithstanding Erskine's *dictum* that a partner shall not renounce from unfair or interested views (*s*). Professor Bell observes that "although in such cases the dissolution cannot be prevented, the beneficial effects of it will be communicated to the partnership; the acquisition will be held as partnership property at the time of the dissolution" (*t*): *McNiven* v. *Peffers* (1868) (*u*). Scotch Law.

SUB-SECTION 2.

"Partnership," pp. 572 *et seq.*

Sub-section (2) settles a point which has long been considered doubtful (*x*). It will be observed that this sub-section says that a notice in writing signed by the partner giving it shall be sufficient, and not that such a notice shall be necessary. It would, however, be prudent in all cases to give such a notice as is here mentioned. As to the date of the dissolution, see *infra*, § 32; and the effect thereof, see *infra*, § 38. Sub-section (2).

The act does not deal with the right of a partner to retire, as distinguished from his right to dissolve the firm (see *ante*, p. 6); as to this it may be said— Right to retire.

1. That it is competent for a partner to retire with the consent of his co-partners at any time and upon any terms (*y*).

2. That it is competent for him to retire without their consent by dissolving the firm, if he is in a position to dissolve it; as to this see *infra*, §§ 32 and 35.

3. That it is not competent for a partner to retire from a partnership which he cannot dissolve, and from which his co-partners are not willing that he should retire (*z*).

As to the liabilities of a partner who has retired, see *supra*, § 17, and *infra*, § 36.

Scotch Law.

It is not said that notice must be in writing. The ordinary rule of evidence is not displaced *unumquodque eodem modo dissolvitur quo colli-* Scotch Law.

(*o*) *Jones* v. *Lloyd* (1874), 18 Eq. 265.

(*p*) *Mellersh* v. *Keen* (1859), 27 Beav. 236.

(*q*) 10th Jan. 1815, and 23rd Feb. 1816, F. C.; 2 Bell's Com. 520 *et seq.*

(*r*) 17 Vesey, 298.

(*s*) III. 3, 26.

(*t*) 2 Bell's Com. 522.

(*u*) 7 Mc. 181.

(*x*) "Partnership," p. 572.

(*y*) As to agreements giving a right to retire, see "Partnership," pp. 422 *et seq.*

(*z*) "Partnership," pp. 573—674.

Section 27.

gatur (*zz*). The notice should be in writing. But in the case of verbal constitution verbal notice of dissolution would, it is thought, suffice.

Where partnership for term is continued over, continuance on old terms presumed.

27.—(1.) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.

(2.) A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership.

"Partnership," p. 410.

Continuance of business after expiration of term.

This section only applies where the fixed term has expired; but the same rule has been applied where the partnership has been determined by the death of one partner and the business has been continued by the surviving partners without coming to any new agreement (*a*).

Sub-section (1).

SUB-SECTION 1.

The new agreement need not be in writing, and may extend to some only of the former provisions, in which case the former provisions, so far as they are consistent with the new agreement and with a partnership at will, will continue in force.

It is not by any means clear what provisions are, and what are not, consistent with a partnership at will. It has, however, been decided that a right of expulsion cannot be exercised after the expiration of the original term (*b*); and it is clear that any clause which prevents a partner from determining the partnership at his will would be inapplicable (*c*).

An arbitration clause (*d*) and a clause giving a right of pre-emption have been held applicable after the expiration of the original term (*e*).

The fact that the articles of partnership provide for events happening *during the term* or *during the partnership* will not prevent the application of the rule (*f*).

(*zz*) Dickson on Evidence (Grierson), §§ 627, 628.

(*a*) *King* v. *Chuck* (1853), 17 Beav. 325, and "Partnership," p. 410.

(*b*) *Clark* v. *Leach* (1863), 32 Beav. 14, and 1 De G. J. & Sm. 409.

(*c*) See § 26, and *Neilson* v. *Mossend Iron Co.* (1886), 11 App. Ca. 298.

(*d*) *Gillett* v. *Thornton* (1875), 19 Eq. 599.

(*e*) *Essex* v. *Essex* (1855), 20 Beav. 442; *Cox* v. *Willoughby* (1880), 13 Ch. D. 863; but see *Cookson* v. *Cookson* (1837), 8 Sim. 529; *Yates* v. *Finn* (1880), 13 Ch. D. 839.

(*f*) See cases in the last note.

Scotch Law.

SCOTCH LAW.

This is the point decided in the Court of Session and House of Lords in *Neilson* v. *Mossend Co.* (1885-86) (*g*), where, however, it was held that a certain stipulation as to dissolution could apply only to the termination of the original contract, and was totally inapplicable to a partnership at will.

SUB-SECTION 2.

Sub-section (2).

For an illustration of this sub-section, see *Parsons* v. *Hayward* (1862) (*h*).

As to the rights of the parties where some only of the original partners continue the business and there is no final settlement of accounts, see *infra*, § 42.

Scotch Law.

SCOTCH LAW.

This is also existing law (*i*) : *Dalgleish* v. *Sorley* (1791) (*k*).

Duty of partners to render accounts, &c.

28. Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

"Partnership," p. 404.

The duty of keeping accurate accounts was recognised in *Rowe* v. *Wood* (1822) (*l*), and indeed has never been doubted.

For the manner in which partnership accounts are usually kept, see "Partnership," p. 396.

As to the right of a partner to inspect and take copies of the partnership books, see *supra*, § 24 (9).

The duty is confined to rendering accounts to partners and their legal representatives, and does not extend, during the continuance of the partnership, to the assignees of a partner's share (see *supra*, § 31), nor to persons who have obtained a charge under § 23.

The Act contains no definition of the term legal representative, but it will, it is conceived, include the trustee of a bankrupt partner (*m*).

Scotch Law.

SCOTCH LAW.
Duty to account.

This is the existing law, and has been thus expressed: "The right to share profits and the liability to incur loss consequent on the partnership relation necessarily involve mutual rights of accounting between the company and its partners, and between each partner and his fellows in all matters relating to the partnership" (*n*). It underlies the very common action of accounting raised by the representatives of a deceased partner,

(*g*) 12 R. 499 ; 11 App. Ca. 298.
(*h*) 4 D. F. J. 474.
(*i*) 2 Bell's Com. 522.
(*k*) H. 746.
(*l*) 2 J. & W. 558.
(*m*) *Wilson* v. *Greenwood* (1818), 1 Swanst. 471.
(*n*) Clark, 396 ; see also 2 Bell's Com. 536.

Sections 28—29.

against the remaining partners: *Lawson* v. *Lawson's Trustees* (1872) (*o*). In actions of accounting while the firm is a going concern, the firm should be a party either as pursuer or defender; and when the firm is dissolved, the whole partners or their representatives should be parties: *Bell* v. *Willison* (1822) (*p*). Compare *Beveridge* (1869) (*q*) as to the firm being a party in an action by a partner to determine questions of internal management of the firm. Arresting creditors or assignees of a partner's interest in the firm, not being "legal representatives," do not seem to be within the purview of this section.

Accountability of partners for private profits.

29.—(1.) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property name or business connexion.

(2.) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

"Partnership," pp. 305 *et seq.*

This section introduces no change into the previous law; the foundation of the rule is the relation of agency which exists between a partner and the firm (see § 5) and the good faith which is required in all transactions between partners (*r*).

This section will include—

Cases in which a partner seeks to derive a profit from some transaction between himself and his firm; as, for instance, by selling his own property to the firm (*s*), or making a secret profit out of the sale of partnership property (*t*).

Cases in which a partner attempts to obtain for himself a benefit which it was his duty to obtain, if at all, for the firm; as, for instance, where a partner obtained for himself a renewal of a lease of the partnership property (*u*), or abatements from incumbrances upon property which he was purchasing for his firm (*x*).

(*o*) 11 Mc. 168.

(*p*) 1 Shaw App. 220; Clark, 397.

(*q*) 7 Mc. 1034.

(*r*) *Cassells* v. *Stewart* (1881), 6 App. Ca. 64.

(*s*) *Bentley* v. *Craven* (1853), 18 Beav. 75.

(*t*) *Dunne* v. *English* (1874), 18 Eq. 524.

(*u*) *Featherstonhaugh* v. *Fenwick* (1810), 17 Ves. 298; *Clegg* v. *Fishwick* (1849), 1 Mac. & G. 294; *Clegg* v. *Edmonson* (1857), 8 De G. M. & G. 787.

(*x*) *Carter* v. *Horne* (1728), 1 Eq. Ab. 7.

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Cases in which a partner seeks to obtain a private profit from the use of the partnership property or connection, as in the cases of *Burton* v. *Wookey* (1822) (*y*) and *Gardner* v. *MacCutcheon* (1842) (*z*).

Remedies of principal when his agent receives bribes.

If a person bribes an agent the principal has two distinct causes of action, one against his agent for the bribes he has received, and another against the person who gave the bribes and the agent jointly and severally for any loss he may have suffered by their fraud (*a*). The relation, however, between the principal and his agent as regards such bribes is one of debtor and creditor, and the principal has no right to follow the moneys and treat them as trust moneys (*b*).

Without the consent.—Knowledge on the part of the other partners will not exclude their right unless they consent, though they may lose their remedy by laches and delay (*c*).

Interest.

Where one partner claims a benefit obtained by his co-partner, and succeeds in establishing his claim, the claimant is charged as the price of the relief afforded not only with the amount actually expended by his co-partner in obtaining the benefit, but with interest on that amount at the rate of 5 per cent. per annum (*d*). On the other hand, if one partner has in breach of the good faith due to his co-partners obtained money which he is afterwards compelled to account for to the firm, he will be charged with interest upon the amount at the rate of 4 per cent. (*e*).

Scotch Law.

Scotch Law.

Benefit from partnership transaction.

The doctrine of this section is well settled in the law of Scotland. See Erskine (*f*) and Professor Bell (*g*); also *Marshall* (*h*); *Pender* v. *Henderson* (1864) (*i*); *McNiven* v. *Peffers* (1868) (*k*). The same principle holds in regard to the directors of public companies: *Huntingdon Copper Co.* v. *Henderson* (1877) (*l*); *Scottish Pacific Co.* (1888) (*m*). But a sale or transfer by one partner to another of his interest in the concern is not a benefit or acquisition within the meaning of this section: *Cassells* v. *Stewart* (1879) (*n*).

(*y*) 6 Mad. 367.

(*z*) 4 Beav. 534, and other cases cited, "Partnership," p. 309.

(*a*) *Mayor, &c., of Salford* v. *Lever* (1890), 25 Q. B. D. 363; affd. W. N. (1890), 179.

(*b*) *Lister & Co.* v. *Stubbs* (1890), 45 Ch. Div. 1.

(*c*) *Clegg* v. *Edmonson* (1857), 8 De G. M. & G. 787.

(*d*) *Hart* v. *Clarke* (1854), 6 De G. M. & G. 254; *Perens* v. *Johnson* (1857), 3 Sm. & G. 419, and see § 24 (3).

(*e*) *Fawcett* v. *Whitehouse* (1829), 1 R. & M. 132. In this case the commission was received before the partnership had actually commenced, though after an agreement for partnership had been concluded.

(*f*) III. 3, 20.

(*g*) 2 Com. 522.

(*h*) 20th Jan. 1815, and 23rd Feb. 1816, F. C.

(*i*) 2 Mc. 1428.

(*k*) 7 Mc. 181.

(*l*) 4 R. 294.

(*m*) 15 R. 290.

(*n*) 6 R. 936, affd. 6 App. Ca. 64.

Sections 30—31.

Duty of partner not to compete with firm.

30. If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.

"Partnership," p. 312.

The rule laid down in this section depends upon the same principles as that contained in the preceding section, and is illustrated by the cases of *Russell* v. *Austwick* (1826) (*o*), *Lock* v. *Lynam* (1854) (*p*), and other cases referred to in "Partnership," pp. 310—312.

Partner competing with firm.

If a partner carries on a business which is not of the same nature as and does not compete with that of the firm, his partners have no right to the profits he may make even if he has agreed not to carry on any separate business (*q*), though if there is such a covenant they may obtain an injunction, and perhaps damages for the breach of covenant (*r*).

It follows from this rule, as pointed out by Sir Frederick Pollock (*s*), that no partner can, without the consent of his co-partners, be a member in another firm carrying on the like business in the same field of competition; and if that consent is given he is limited by its terms.

Scotch Law.

Scotch Law. Competition.

It does not appear that there is any direct authority in the law of Scotland in support of this proposition, but it flows from the exuberant trust on which the relation of partnership is based, and is in harmony with the law as applied in Scotland. Of course there may be difficulty in many cases in establishing the fact of competition, for the businesses may be carried on in different localities, and this may or may not be inconsistent with competition.

Rights of assignee of share in partnership.

31.—(1.) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

(*o*) 1 Sim. 52.
(*p*) 4 Ir. Ch. 188.
(*q*) *Dean* v. *MacDowell* (1878), 8 Ch. Div. 345.
(*r*) *Ibid.*
(*s*) "Digest of the Law of Partnership," 5th ed. p. 83.

Section 31.

(2.) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

"Partnership," pp. 363 *et seq.*

Assignment, how far a ground for dissolution.

Before the passing of this Act an assignment by one partner of his share in the partnership dissolved the partnership if it were at will, and in other cases gave his co-partners the right to dissolve (*ss*). It is to be regretted that neither this, nor any other section of the Act, expressly states how far the assignment or charge by a partner of his share in the partnership operates as a dissolution of the partnership, or a cause of dissolution at the option of the other partners. From the silence of §§ 32 & 33 on this subject, it would appear that the assignment of a share in no case operates as a dissolution (*t*). This is of slight importance in the case of partnerships for an undefined term, as they may be dissolved at any time upon notice (§§ 26 & 32 (c), nor will it be of much consequence in the case of partnerships for a fixed term if the other partners have a right to treat the assignment as a ground for dissolution. But from the silence of the Act on this point and the express mention in § 33 (2), of the option to dissolve when a partner suffers his share of the partnership property to be charged under § 23 for his separate debts, it may be that an assignment or charge by a partner gives no right of dissolution unless his co-partners can bring the case within § 35, and so obtain a dissolution by the Court.

This section, like all the other sections in this group (see § 19), only operates so far as there is no agreement to the contrary between the partners. If the partners agree, whether by their articles or subsequently, that any partner may assign his share in the partnership, and that the assignee shall become a partner or have certain rights of account or otherwise, such an agreement would be binding on them (*u*). Perhaps, also, a judgment creditor who obtains a charging order under § 23 will be entitled to all the rights which the partner, whose share is charged, is entitled, as between himself and his co-partners, to confer on a mortgagee of his share, even if such rights exceeded those enumerated in this section (see the concluding words of § 23 (2)).

SUB-SECTION 1.

Sub-section (1). Rights of assignee against assignor.

As against the other partners.—This section does not deal with the rights of the assignee against his assignor: these rights are left to be determined

(*ss*) See "Partnership," p. 363.

(*t*) But qu. if § 46 leaves the law as before.

(*u*) *Jefferys* v. *Smith* (1826), 3 Russ. 158; *Lovegrove* v. *Nelson* (1834), 3 M. & K. 1; and "Partnership," pp. 364—365, and *supra*, § 24 (7).

Section 31.

by the general law. If, therefore, a partner charges his share, in favour of another by deed, the latter will probably, as against the former, be entitled to sell the share or appoint a receiver under the powers conferred upon mortgagees by the Conveyancing Act, 1881 (*x*).

An assignee of a share in a partnership can compel his assignor to account to him for all profits he may have received (*y*). But a mortgagee can not compel his mortgagor to account retrospectively.

During the continuance of the partnership.—It may be a question whether in the case of a partnership for a fixed term the assignee of a share would have the right to receive his assignor's share of the partnership assets at the expiration of that term, if the partners continue the partnership without any settlement of the partnership affairs, see *supra*, § 27 and § 32 (a).

Only to receive the share of profits, &c.—These words appear to prevent an assignee from obtaining during the continuance of the partnership any moneys to which his assignor may be entitled which are not strictly profits: compare § 23 (2), "profits . . . . or any other money."

The assignee must accept the account of profits agreed to by the partners.—This settles a doubtful point of law; though there does not appear to be any express decision recognising the right of an assignee to an account during the continuance of the partnership, opinions in favour of such a right are to be found (*z*).

Scotch Law.

Scotch Law. Assignation of interest in firm.

This section is in accordance with the existing law, but there is a lack of authority on the subject. Erskine (*a*) lays it down that one partner may assume another person into partnership, who thereby becomes a partner not of the firm but of the assumer; and he adds: "The company are not bound to regard the second contract formed by the assumption which is limited to the share of the partner assuming. He still continues with respect to the company the sole proprietor of that share and must sustain all actions concerning it." See also Lord Eldon in *Barrow* (1815) (*b*).

In *Cassells* v. *Stewart* (1879) (*c*), Lord Moncreiff said: "It cannot be disputed upon the decided cases that although there is a *delectus personæ* in the contract of copartnery, any partner may, if he chooses, assign his own share to a third party as long as that does not interfere with the conduct of the company, or the respective rights and interests of the partners. There is nothing to prevent this at common law." Lord Gifford said: "An out-and-out assignation of Reid's interest was quite lawful, provided

(*x*) See §§ 19 & 2 (i.) (vi.) of that Act. The definition of property in § 2 (i.) is wide enough to cover a share in a partnership and would probably do so; but see *Blaker* v. *Herts & Essex Waterworks Co.* (1889), 41 Ch. D. 399.

(*y*) *Brown* v. *De Tastet* (1821), Jac. 284.

(*z*) See *Whetham* v. *Davey* (1885), 30 Ch. D. 574; and other cases cited, "Partnership," p. 364.

(*a*) III. 3, 22.

(*b*) 2 Rose, 215.

(*c*) 6 R. 945.

Reid continued a partner, and fulfilled all the conditions of the contract;" and he accepts Lord Justice Lindley's statement of the law (*d*) as accurate for Scotland. Section 31.

The transaction between the cedent and the assignee is legal; but the cedent remains the partner exercising all his rights as such, and the assignee cannot be introduced as a partner without the consent of the other partners. To complete, however, the assignee's right, such as it is, and give a preference over the cedent's creditors, intimation to the firm, or all the partners, is necessary, unless the cedent and assignee are the only partners, in which case intimation is unnecessary and incongruous (*dd*).

If the other partners accept the assignee as a partner, the cedent's rights as such cease, and the cedent has no right to exclude the assignee. This seems to be implied in the first sub-section. The second sub-section proceeds on the footing that the assignee has not been received prior to the dissolution, otherwise his partnership account would date from his reception, not from the dissolution. The amount due becomes a debt from the date of dissolution, bearing interest. See § 43, *infra*.

The leading decisions on the subject of this section are *Russell* v. *Earl of Breadalbane* (1827) (*e*), *Hill* v. *Lindsay* (1846) (*f*), *Cassells* v. *Stewart* (1879) (*g*). See also *Lonsdale Hæmatite Co.* v. *Barclay* (1874) (*h*), where partners were by contract allowed to assign their shares on condition of first offering them to the firm and partners.

Sub-section 2.

Sub-section (2) is in accordance with the previous law (*i*). Sub-section (2).

(*d*) Vol. i. p. 698, 4th edition [5th edition, p. 634.]

(*dd*) *Per* Lord Fullerton, 8 D. 480.

(*e*) 5 S. 827, affd. 5 W. & S. 256.

(*f*) 8 D. 472, and 10 D. 78.

(*g*) 6 R. 936, affd. L. R. 6 App. 64.

(*h*) 1 R. 417.

(*i*) *Whetham* v. *Davey* (1885), 30 Ch. D. 574.

Dissolution of Partnership, and its consequences.

Dissolution by expiration or notice.

32. Subject to any agreement between the partners, a partnership is dissolved—

(*a.*) If entered into for a fixed term, by the expiration of that term:

(*b.*) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking:

(*c.*) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice.

"Partnership," pp. 570 *et seq.*

Partnership for a fixed term.

It is presumed, though there appears to be no actual decision on the point, that a partnership for the joint lives of the partners is a partnership for a fixed term, which would expire on the death of the partner who first died.

If a partnership for a fixed term is continued after the expiration of the term without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term so far as is consistent with a partnership at will (see *supra*, § 27). The partnership then becomes a partnership for an undefined time, and may be dissolved by notice (see clause (*c*) of this section and § 26).

Partnerships for a single adventure.

For instances of partnerships for a single adventure or undertaking, see "Partnership," p. 49.

Partnerships for an undefined time.

A partnership is presumed to be a partnership at will unless some agreement to the contrary can be proved (*k*). Such an agreement may be either express or implied (*l*).

Except in the case of partnerships constituted by deed (see § 26 (2)) the Act is silent as to the form of notice; the existing law (*m*) on this subject will therefore continue (see § 46).

A partner may waive his right to receive a formal notice of dissolution, and such waiver may be inferred from the conduct of the parties (*n*).

(*k*) *Heath* v. *Sanson* (1832), 4 B. & Ad. 175, and "Partnership," p. 121.

(*l*) *Crawshay* v. *Maule* (1818), 1 Swanst. 509.

(*m*) See *supra*, § 26, and notes, and "Partnership," pp. 426 and 571.

(*n*) *Pearce* v. *Lindsay* (1860), 3 De G. J. & Sm. 139.

The date of dissolution was the same under the previous law (*o*).

Even after a dissolution the rights and obligations of the partners continue so far as is necessary to wind up the affairs of the partnership and to complete unfinished transactions: see § 38. Date of dissolution.

As to the effect of a dissolution on third parties, see § 36.

Scotch Law.

Scotch Law.

(*a.*) This is the existing law. "Partnership dissolves by the consent and mutual act of the parties in terms of the contract, *i.e.*, by expiration of the term appointed for its duration. At the same time it may be renewed or continued by tacit consent, not to the effect of engaging the parties again for a renewal of the original term, but to the effect of engaging them as partners for an indefinite time, and so dissoluble at pleasure" (*p*), and on the same terms so far as applicable (*q*). It would appear that the term of endurance if not fixed by the contract may be inferred from other circumstances; but it has been ruled that the duration of a lease is not by itself conclusive, and the unexpired lease falls to be sold (*r*). *Marshall* (1816) (*s*), *McNiven* v. *Peffers* (1868) (*t*), *Aitken* v. *Shanks* (1830) (*u*), *McWhannell* (1830) (*x*). But see *contra* observations of Lord President (Inglis) in *Miller* v. *Walker* (1875) (*y*), a case of joint adventure. Expiration of fixed term.

(*b.*) As in the case of a fixed term the relation may be continued or extended by the actings of parties beyond the original adventure: *Davie* v. *Buchanan* (1880) (*z*). Single adventure.

(*c.*) This is the recognised law. See *supra*, § 26 (1). If one partner gave notice, specifying a date more or less distant, it would still be in the power of another partner to expedite the dissolution, by a notice with a shorter date, or without specified date. The first notice would not of itself make an agreement for a fixed term. But (*quære*) might not the actings of parties on such a first notice rear up an agreement? Notice of dissolution.

33.—(1.) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner. Dissolution by bankruptcy, death or charge.

(2.) A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

(*o*) *Robertson* v. *Lockie* (1846), 15 Sim. 285; *Bagshaw* v. *Parker* (1847), 10 Beav. 532; *Mellersh* v. *Keen* (1859), 27 Beav. 236.
(*p*) 2 Bell's Com. 521.
(*q*) *Supra*, § 27 (1).
(*r*) 2 Bell's Com. 523.
(*s*) 23rd Feb. 1816, F. C.
(*t*) 7 Mc. 181.
(*u*) 8 S. 753.
(*x*) 8 S. 914.
(*y*) 3 R. 242 (249).
(*z*) 8 R. 319.

Section 33.

"Partnership," p. 570.

This section applies alike to partnerships for a fixed term and partnerships at will, but, as in the case of the preceding section, it is subject to any agreement between the partners.

SUB-SECTION 1.

Sub-section (1).

Sub-section 1 is in accordance with the previous law. It was decided as long ago as *Crawford* v. *Hamilton* (1818) (*a*), that although a partnership is entered into for a term of years, it is previously dissolved by the death of a partner unless there be an agreement to the contrary; the same rule was recognised in the case of bankruptcy in *Fox* v. *Hanbury* (1776) (*b*).

Foreign bankruptcy.

It may be a question how far proceedings in a foreign country equivalent to an English bankruptcy cause a dissolution of the partnership. There does not appear to be any decision on the point. But it is submitted that such proceedings would cause a dissolution, at any rate if taken in the country in which the bankrupt partner is domiciled. If the bankruptcy is not in the country of the partner's domicile, it appears to be doubtful whether the English law would recognise the title of the assignee in bankruptcy to the partner's share in an English partnership (*c*), and if that be so, it may be that such a bankruptcy would not cause a dissolution.

Date of dissolution.

The act does not fix the date from which the dissolution is to take effect. In the case of death there is no difficulty. In the case of bankruptcy, the date of dissolution will, it is presumed, be the date of the commencement of the bankruptcy (*d*). By the Bankruptcy Act, 1883 (*e*), the bankruptcy of a debtor is deemed to commence at the time of the act of bankruptcy being committed on which a receiving order is made against him, or if the bankrupt is proved to have committed more acts of bankruptcy than one, to commence at the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the petition.

Scotch Law.

Scotch Law.

Death of partner.

Death.—This is in conformity with existing law. "The whole society is dissolved by the death of one or more of the partners. . . . . And the fixing of a definite term of duration for the partnership will not continue it after the death of a partner, without special stipulation." And even where a person is appointed to succeed one dying, if "such person does not choose

(*a*) 3 Madd. 251, and "Partnership," p. 590.

(*b*) Cowp. 448, and "Partnership," p. 649.

(*c*) See *Re Artola Hermanos* (1890), 24 Q. B. Div. 649; *Re Blithman* (1866), 2 Eq. 23; but see Foote, Private International Jurisprudence (2nd ed.), pp. 308 *et seq.*; and Dicey on Domicil, p. 288, and cases there cited.

(*d*) See *Harvey* v. *Crickett* (1816), 5 M. & S. 341; *Thomason* v. *Frere* (1808), 10 East, 418, and other cases cited "Partnership," p. 667.

(*e*) 46 & 47 Vict. c. 52, § 43. The section does not apply to Ireland or Scotland, see § 2.

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to accept, the death of the person so making the appointment operates as the dissolution" (*f*). *Hill* v. *Wylie* (1865) (*g*) is an illustration, however, of the continuance in terms of the contract of a partnership with the representatives of a deceased partner, who were held neither bound nor entitled to make an election in the matter. In *Young* v. *Collins* (1852-53) (*h*), the House of Lords applied the general rule that when a partnership is dissolved by the death of a partner the surviving partners are entitled to wind up the business. See also section 39, *infra*, and cases of *Dickie* v. *Mitchell* (1874) (*i*), *Russell* v. *Russell* (1874) (*j*) and *Gow* v. *Schulze* (1877) (*k*), as to circumstances in which the Court will appoint judicial factor to wind up partnership estate.

Bankruptcy of partner.

Bankruptcy.—See also § 47, *infra*, which provides that the bankruptcy "of an individual shall mean sequestration under the Bankruptcy (Scotland) Acts and also . . . . the issue against him of a decree of *cessio bonorum*." Under the existing law mere insolvency of a partner does not dissolve the partnership: *Paterson* v. *Grant* (1749) (*l*). Bankruptcy by sequestration which produces incapacity and transfers the bankrupt's estate to a trustee does, and so also it was thought would the granting of a trust deed for behoof of creditors (*m*).

But "notour bankruptcy" under the Act 1696, c. 5, and later Acts, does not operate as a transfer, nor tie up the hands of a partner from carrying on business, but only cuts down preferences to creditors, granted at or after a certain date, or within sixty days previously; and accordingly "notour bankruptcy" has not hitherto been understood to dissolve partnership. Bell, *supra*. No change in this respect is thus made by this sub-section.

Insolvency, notour bankruptcy, and granting a trust deed for creditors are frequently in contracts of co-partnery declared to dissolve the partnership: *Monro* v. *Cowan* (1813) (*n*); *Hannan* v. *Henderson* (1879) (*o*). In the latter case it was observed that such a conventional irritancy must be enforced according to its terms, and cannot be purged.

A firm is rendered notour bankrupt by any of the partners being rendered so for a firm debt. Bankruptcy (Scotland) Act, 1856, § 4.

The Bankruptcy Acts are: The Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79), The Bankruptcy and Real Securities (Scotland) Act, 1857 (20 & 21 Vict. c. 19), The Bankruptcy (Scotland) Amendment Act, 1860 (23 & 24 Vict. c. 33), The Bankruptcy (Scotland) Amendment Act, 1875 (38 & 39 Vict. c. 26), The Conveyancing Amendment Act, 1879 (42 & 43 Vict. c. 40). See Goudy on Bankruptcy, 1886.

The Cessio Acts are those of 1836 (6 & 7 Wm. IV. c. 56) and 1876 (39 & 40 Vict. c. 70, § 26), the Debtors (Scotland) Act, 1880 (43 & 44 Vict. c. 35), and the Bankruptcy and Cessio (Scotland) Act, 1881 (44 & 45 Vict. c. 22).

(*f*) 2 Bell's Com. 524.
(*g*) 3 Mc. 541.
(*h*) 14 D. 540; 1 Macq. App. 385.
(*i*) 1 R. 1030.
(*j*) 2 R. 93.
(*k*) 4 R. 928.
(*l*) M. 14, 578.
(*m*) 2 Bell's Com. 524.
(*n*) 8th June, 1813, F. C.
(*o*) 7 R. 380.

ctions 33—34.

ub-section (2).

SUB-SECTION 2.

Sub-section 2 is new and has reference to the new procedure substituted by § 23 for the old method of levying execution against a partner for his separate debt.

The statute does not prescribe the manner or time in which the option is to be exercised. Any unequivocal act done to the knowledge of the partner whose share is charged will be an exercise of the option which cannot be withdrawn (*p*). The option must be exercised within a reasonable time (*q*).

The question arises whether each of the other partners has an option of dissolving the partnership or whether there is but one option given to all. As a general rule, if several persons have an election the first election made by any one of them would seem to determine the election for all (*r*), but this rule can hardly apply to the case referred to in this section. The majority would not it is conceived have the power to dissolve the partnership against the wishes of the minority (see § 24 (8)). The meaning apparently is either that all the other partners must be unanimous, or that a separate option is given to each of the other partners, so that any one of them can dissolve the partnership, whether the others have or have not expressed their intention of not doing so.

te of solution.

As no date is fixed from which the dissolution is to take effect, it is presumed that it will date from the time at which the option is exercised.

It will be noticed that the words "*as regards all the partners*," which occur in sub-section 1, do not occur in sub-section 2; in spite of this variation in the language of the two sub-sections, it is conceived that their meaning is the same. The words in question do not occur in §§ 26, 32, 34 or 35, in all of which a dissolution as regards all the partners is clearly intended.

As to the question whether an assignment or a mortgage by a partner of his share in a partnership gives his co-partners any right of dissolution, see *supra*, § 31 and notes.

Scotch Law.

Scotch Law.

This sub-section does not apply to Scotland. See section 23 (5), and notes thereon. Neither arrestment nor assignment of a partner's share operate dissolution; and this sub-section gives no option of dissolution to partners in Scotch firms. See section 35 (*f*), *infra*, p. 94.

solution by gality of tnership.

34. A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership.

(*p*) *Scarf* v. *Jardine* (1882), 7 App. Ca. p. 361; *Clough* v. *L. N. W. Rail. Co.* (1871), L. R. 7 Ex. 34.

(*q*) *Anderson* v. *Anderson* (1857), 25 Beav. 190; *Scarf* v. *Jardine* (1882), 7 App. Ca. pp. 360—361.

(*r*) Co. Litt. 145a.

"Partnership," p. 585.

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This section is in accordance with the previous law.

The two most probable events which will cause a dissolution under this section are a change in the law, and the outbreak of war. If a partnership exists between two persons residing and carrying on trade in different countries, and war is proclaimed between those countries, this will dissolve the partnership (*s*).

Scotch Law.

Scotch Law.

There does not appear to be any direct authority in the Law of Scotland on these points. But there are illustrations of original illegality, resulting in the court refusing its aid to either party in an accounting, or other claims arising out of it: *A. B.* v. *C. D.* (1832) (*t*); *Gordon* v. *Howden* (1845) (*u*); *Fraser* v. *Hair* (1848 (*x*); *Fraser* v. *Hill* (1853—54) (*y*); *Gibson* v. *Stewart* (1840) (*z*). The illegality under this section must be inherent in the purposes of the firm, not merely in some particular act of the firm or partners, or in the mode in which an otherwise lawful act may be carried out.

Unlawful event happening.

35. On application by a partner the Court may decree a dissolution of the partnership in any of the following cases:

Dissolution by the Court.

(*a.*) When a partner is found lunatic by inquisition, or in Scotland by cognition, or is shown to the satisfaction of the Court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his committee or next friend or person having title to intervene as by any other partner: (see *infra*, p. 86).

(*b.*) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract: (see *infra*, p. 88).

(*c.*) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business: (see *infra*, p. 91).

(*d.*) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in

(*s*) *Griswold* v. *Waddington*, 15 Johns. 57, 16 ib. 438 (Amer), cited Story on Partnership, § 315

(*t*) 10 S. 523.

(*u*) 4 Bell, App. 254.

(*x*) 10 D. 1402.

(*y*) 16 D. 789; 1 Macq. App. 392.

(*z*) 1 Robin. App. 260.

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matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him: (see *infra*, p. 92).

(*e*.) When the business of the partnership can only be carried on at a loss: (see *infra*, p. 93).

(*f*.) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved: (see *infra*, p. 93).

"Partnership," pp. 575 *et seq.*

The Court.—This expression includes every Court and judge having jurisdiction in the case, see § 45.

nacy Act, 90.

By the Lunacy Act, 1890 (*a*), the judge in Lunacy (*b*) has power to dissolve a partnership where a member becomes lunatic (*c*). Lunatic under that act means an idiot or person of unsound mind (*d*). The power can also be exercised in the cases mentioned in § 116, which include *inter alia* the cases of persons lawfully detained as lunatics and of persons with regard to whom it is proved to the satisfaction of the Judge in Lunacy that they are through mental infirmity, arising from disease or age, incapable of managing their affairs. In exercising this power the Judge in Lunacy is to consider what is best for the lunatic and his family (*e*). It does not seem to be necessary for the exercise of the power under that Act that the partner should be of permanently unsound mind, or permanently incapable of managing his affairs (compare clauses (*a*) and (*b*) of this section).

scretion of urt.

May decree a dissolution (*f*).—The Court has a wide discretion given to it, and though in exercising that discretion it will no doubt follow the principle of previous decisions, it must not be forgotten that the Court has a discretion, and will not be bound to dissolve a partnership *ex debito justitiæ* in any of the cases mentioned in the section (*g*). The principles upon which the Court acts in such cases are now fairly well settled, and will be found in the cases mentioned below and in "Partnership," pp. 575 *et seq.*

otch Courts.

As to the Courts having jurisdiction in Scotland, see notes on § 45, *infra*.

CLAUSE (*a*).

ause (*a*). macy.

Clause (*a*) makes no alteration in the previous law, but settles (so far, at least, as regards a dissolution under this clause) the doubt which formerly existed as to whether a decree for the final dissolution of a partner-

(*a*) 53 Vict. c. 5.
(*b*) See ib. § 108.
(*c*) Ib. § 119.
(*d*) Ib. § 341.
(*e*) Ib. § 116 (4).
(*f*) The introductory words of this section are very similar to those of § 79 of the Companies Act, 1862.
(*g*) See as to the meaning of the word "may," *Julius* v. *Bishop of Oxford* (1880), 5 App. Ca. at p. 235, and *Re Baker* (1890), 44 Ch. Div. 262.

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ship could be made, in an action commenced by the next friend of a partner of unsound mind, without the appointment of a committee in lunacy (*h*).

Dormant partner.

It has long been recognised that lunacy does not of itself dissolve a partnership, but that the confirmed lunacy of an active partner is sufficient to induce the Court to order a dissolution (*i*). This clause applies as well to the case of a dormant as to that of an active partner. The reason for granting a dissolution in the case of lunacy is the permanent incapacity of the lunatic to perform his part of the partnership contract (*k*). As a dormant partner has, as a rule, no duties to perform, there would be no reason for the Court, except under very special circumstances, to order a dissolution on the ground of his insanity.

Of permanently unsound mind.—Temporary incapacity was not considered by the Court of Chancery sufficient to warrant an application for dissolution (*l*). A person will be considered as of permanently unsound mind "when the evidence shows a reasonable ground for supposing a recovery to be hopeless, or at least very improbable, during the remainder of the time for which the partnership contract is to endure" (*m*). As to the powers of a Judge in Lunacy under the Lunacy Act, 1890, see *supra*, and see *infra* on clause (*f*).

The evidence must shew that the insanity exists at the time of the application, and if necessary an inquiry will be directed to ascertain the state of mind of the alleged lunatic (*n*); no such inquiry is necessary if the partner be a lunatic so found by inquisition (*o*).

Costs of the dissolution are ordered to be paid out of the partnership assets (*p*).

Scotch Law.

Scotch Law.

Insanity of partner.

The common law is comprehensively stated by Lord President Inglis in the recent case of *Eadie* v. *McBean's Curator bonis* (1885)(*q*), thus: "There can be no doubt that under ordinary circumstances where two or more persons are engaged in business together as partners, and all of them are expected or by contract of copartnery bound to take an active management of the business, the permanent insanity or incapacity of one of the partners necessarily operates a dissolution of the partnership." His Lordship then points out the difference between cases where the partner has to contribute personal skill and exertions, and where he merely provides the funds. See also Bell's Commentaries (*r*).

The cognition of the insane is now regulated by 31 & 32 Vict. c. 100,

(*h*) *Jones* v. *Lloyd* (1874), 18 Eq. 265.

(*i*) *Sayer* v. *Bennet* (1784), 1 Cox 107; *Waters* v. *Taylor* (1813), 2 V. & B. 303, and other cases cited "Partnership," p. 577.

(*k*) See ib. and *Jones* v. *Noy* (1833), 2 M. & K. 125.

(*l*) *Leaf* v. *Coles* (1851), 1 De G. M. & G. 171; *Anon.* (1855), 2 K. & J. 441, and other cases cited "Partnership," pp. 577—579.

(*m*) Ib. See also *Jones* v. *Lloyd* (1874), 18 Eq. p. 272.

(*n*) *Anon.* (1855), 2 K. & J. 441.

(*o*) *Milne* v. *Bartlet*, 3 Jur. 358.

(*p*) *Jones* v. *Welch* (1855), 1 K. & J. 765.

(*q*) 12 R. 660 (665).

(*r*) 2, 524.

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section 101 ; and Act of Sederunt, 3 Dec. 1868. The definition of insanity under that statute is: "such person shall be deemed insane if he be furious or fatuous, or labouring under such unsoundness of mind as to render him incapable of managing his affairs." Observe that *permanency* is not essential. A brieve of cognition may be prosecuted by the nearest agnate, or other near relation, but the person claiming the office of tutor must be the nearest male agnate of twenty-five years of age. If on the cognition being retoured to Chancery, he does not claim the office, a tutor dative may be appointed under 19 & 20 Vict. c. 56, § 19 ; or a curator bonis : *Larkin* v. *McGrady* (1874) (*s*). Without cognition a curator bonis may be appointed by the Court of Session to an insane person on the petition of any near relative, or other person interested. For this purpose the above definition of insanity is sufficient. Permanency does not require to be established. It would therefore appear that unless a partner has been formally cognosced the Court must be satisfied that he is of "*permanently unsound mind*" before decreeing a dissolution ; but in neither case is the Court bound to decree a dissolution, and the discretion will probably be exercised in view of the circumstances of different partnerships, and the terms of their deeds as pointed out by the Lord President in the case of *Eadie*. There the Court refused to decree a dissolution where a partner had been incapacitated by paralysis, because under the contract personal services were not required of him. The questions of the unsoundness and its permanency are for the skilled opinion of medical experts.

The application will be made to the Court of Session on behalf of the lunatic partner, or by one or more of the other partners. The expressions "committee" and "next friend" are peculiarly English ; but "person having title to intervene" will include tutor-at-law, tutor dative, or curator bonis. It would probably not include one who is merely entitled to sue out a brieve of cognition, or apply for appointment as tutor dative or curator bonis ; for until the office is taken up, or the appointment made, there is no title to intervene.

Clause (*b*).

ause (*b*).
rmanent
capacity.

Clause (*b*) states the general principle of the application of which a dissolution on the ground of insanity affords the most common example ; but there is no reason why the principle should be confined to these cases, nor has it been so confined. In *Whitwell* v. *Arthur* (1865) (*t*), the plaintiff sought a dissolution of his partnership with the defendant in consequence of the latter being incapacitated by a paralytic attack from performing his duties as a partner, and would have succeeded had not the medical evidence showed that the defendant's health was improving, and that his incapacity was probably only temporary ; and other cases might easily be suggested (*u*).

(*s*) 2 R. 170.

(*t*) 35 Beav. 140.

(*u*) See Pothier, Traité du Con. de Soc., Nos. 142 and 152, and Treatise on the Law of Partnership, by Theophilus Parsons (3rd ed.), pp. 502 and 503.

Section 35.

Marriage.

The marriage of a female partner, since the passing of the Married Women's Property Act, 1882 (*x*), no longer causes a dissolution of the partnership, but it might perhaps, in some cases, afford a ground for applying to the Court for a dissolution under this clause or clause (*f*), as depriving her of the power of independent personal action in matters of business (*y*).

It will be noticed that the application to the Court in cases coming under this clause must be made by a partner other than the partner incapacitated.

See also § 116 of the Lunacy Act, 1890, referred to *supra*, p. 86.

Scotch Law.

Scotch Law.

Permanent incapacity.

This is a statement of the principle in the law of Scotland of which insanity is an illustration, and, as observed by the Lord President in *Eadie* v. *McBean's Curator bonis* (1885) (*z*), the incapacity is to be judged of with reference to the particular contract and the duties required of the partner. Bodily ailment permanently incapacitating from all business, or necessitating residence permanently away from the seat of the business, would fall under this sub-section. Professor Bell says: "Perhaps the nearest approximation to be made to a rule on the subject is that a remedy and relief will be given only where the circumstances amount to a total and important failure in those essential points on which the success of the partnership depends" (*a*).

Marriage of female partner.

Common law.

The effect upon a firm of the marriage of a female partner is not stated in the act. As, by section 46, the common law is continued in force, except in so far as the act contains provisions inconsistent with it, it is necessary to consider the existing law on the subject. Professor Bell says: "The marriage of a female partner of a company seems a change so important that it should form a ground for dissolving the partnership" (*b*). He cites no authority. On the other hand, the Lord President (Inglis) in *Russell* v. *Russell* (1874) (*c*), says: "The dissolution of a business by the marriage of a female partner has the same effect as if it had been dissolved by the death of a partner. The female partner drops out of the firm just as if she were dead, because she is incapacitated from continuing. She cannot continue in the business without her husband, and she cannot bring him in." Lord Deas concurred and added, "The fact that the dissolution of the partnership took place by the marriage of one of the partners rather tells against the application" [for the appointment of a judicial factor to wind up] "than otherwise. The lady dissolved the partnership by her own voluntary act." Where, however, the *jus mariti* (*d*) and right of administration (*e*) were excluded, the wife was

(*x*) The act does not extend to Scotland, 45 & 46 Vict. c. 75, § 26.

(*y*) See Parsons on Partnership, p. 502.

(*z*) 12 R. 660.

(*a*) 2 Bell's Com. 525.

(*b*) 2 Bell's Com. 524.

(*c*) 2 R. 93.

(*d*) *Jus mariti* was "the right by which the husband acquired to himself absolutely the personal property of his wife," per Lord Fraser, "Husband and Wife," p. 676.

(*e*) Right of administration "is a

Section 35.

held entitled to manage her separate estate and to enter into obligations and contracts in regard thereto which would bind it, just as if she were an unmarried woman. *Biggart* v. *City of Glasgow Bank* (1879) (*f*). The contract there in question was partnership by acquiring shares in a joint stock company. The exclusion of the *jus mariti* and right of administration by antenuptial contract even when done *per aversionem* and embracing *acquirenda* was recognized by the court as placing the wife's separate estate at her own disposal as if she were unmarried, *McDougall* v. *City of Glasgow Bank* (1879) (*g*).

Recent statutes.

Conjugal Rights Act, 1861.

Married Women's Property Act, 1877.

Married Women's Property Act, 1881.

By three recent statutes, however, the exclusion of the *jus mariti* and right of administration has been dealt with. (1.) By the Conjugal Rights (Scotland) Amendment Act, 1861 (*h*), a deserted wife obtaining a protection order and a wife obtaining a decree of separation are entitled to hold property subsequently acquired or succeeded to as separate estate. (2.) By the Married Women's Property (Scotland) Act, 1877 (*i*), the *jus mariti* and right of administration were, after 1st January, 1878, excluded from the earnings and property of married women acquired in any employment or trade, or through the exercise of any literary, artistic, or scientific skill and all such money and property, and the investments thereof, were declared separate estate. Lastly, by the Married Women's Property (Scotland) Act, 1881 (*k*), shortly stated (in the case of marriages entered into after its date), the *jus mariti* is excluded from all moveable estate of the wife, and the right of administration from the income of all her heritable and moveable estate; but it was declared that the wife should not be entitled to assign the prospective income of the moveable estate, nor, without her husband's consent, to dispose of the capital thereof. At common law she could not deal with her heritable estate without his concurrence.

Result.

Effect of right of administration excluded.

The common law was stated by the Lord President and Lord Deas in the case of *Russell*, *supra*, prior to the recent Married Women's Property Acts and where there was no exclusion of *jus mariti* and right of administration. The result seems now to be that, wherever the wife has separate estate, it is possible for her, in the administration thereof, to enter into or continue in partnership, and to bind that estate in all obligations connected therewith. Her separate estate may or may not embrace the whole of her property, but to the extent to which it is separate, she has capacity, without the concurrence of her husband, to contract and bind it. At the same time, as the husband is the head of the family, and as the duties of a partner in a firm may involve personal attendance and services inconsistent with domestic duties, or opposed to the wishes of her husband, it is thought that he would be entitled to prohibit her joining a partnership (*l*). Such a case differs

right of managing property whereby the husband's consent must be obtained to every act of administration," *ibid.* 796.

(*f*) 6 R. 470.

(*g*) 6 R. 1089.

(*h*) 24 & 25 Vict. c. 86.

(*i*) 40 & 41 Vict. c. 29.

(*k*) 44 & 45 Vict. c. 21.

(*l*) Compare Lord President's opinion in *Ferguson's Tr.* v. *Willis & Co.* (1883), 11 R. 261 (268).

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materially from becoming a partner of a joint stock company by acquiring shares, which is merely a form of investment, and an act of management of her separate estate. Even where the husband does not object to her continuing in the firm, the other partners may, in some cases, find her "permanently incapable of performing her part of the partnership contract," within the meaning of this sub-section, and might, it is thought, successfully apply for decree of dissolution in terms thereof, or of sub-sections (*d*) or (*f*). Each case would depend on its own circumstances.

If right of administration not excluded.

Where, however, the right of administration is not, or is only partially excluded, as is the case under the Act of 1881, the wife could not bind her capital in questions either with her partners or the public; and the dilemma stated by the Lord President in the case of *Russell* would remain. But if either her husband concurs with her in placing her capital in the hands of the firm, a third party; or she is not called upon to put in any capital, why may she not act and contract as partner, *i.e.*, as agent of the firm, and bind the estate of the firm, a person separate from herself? This is the principle upon which, when stock of a public company is purchased with the husband's money, but the shares are taken in the wife's name, she is held to act as agent of her husband, and "consequently binds not herself but her husband only." *Thomas* v. *City of Glasgow Bank* (1879) (*m*), per Lord President (*n*) and Lord Shand (*o*).

CLAUSE (*c*).

Clause (*c*).

Conduct injurious to business of firm.

Clause (*c*) in its original form was confined to the case of a partner becoming liable to a criminal prosecution, and this is perhaps as far as any reported case has gone (*p*). But a case, which does not appear to have been reported, was mentioned in argument before V.-C. Page Wood (*q*), in which a partnership between accoucheurs had been dissolved on the ground of the immoral conduct of one partner. The Vice-Chancellor pointed out that such conduct would materially affect the particular business of the firm (*r*). The clause in its present form is in accordance with that case; the test in every case under the sub-section is that mentioned by the Vice-Chancellor.

Guilty of such conduct.—This expression implies voluntary action, and an attempt by one partner to commit suicide while suffering from temporary insanity (*s*) would not justify a dissolution under this clause, even if such conduct would otherwise be within it.

The clause is not confined to conduct connected with the partnership business, all that is necessary is that the conduct be of such a nature as, having regard to the particular business of the firm, is calculated to injure

(*m*) 6 R. 607.

(*n*) Ib. p. 611.

(*o*) Ib. p. 614.

(*p*) *Essel* v. *Hayward* (1860), 30 Beav. 158.

(*q*) *Anon.* (1855—6) 2 K. & J. p. 446.

(*r*) But qu. whether the Vice-Chancellor would have granted a dissolution on such a ground, see ib. pp. 452, 453.

(*s*) As in *Anon.* (1855—56), 2 K. & J. 441.

Section 35.

it; for instance, gambling on the Stock Exchange, though such gambling may be in no way connected with the business of the firm, would probably in some cases be a ground for dissolution under this clause (*ss.*)

Scotch Law.

Scotch Law.

cope of lause.

This clause seems to point at conduct unconnected with the partnership relation, but of such a kind as, considering the nature of the business, is detrimental to it, as distinguished from clause (*d*), where the conduct referred to is connected with the partnership relation and affairs, and makes continued joint action therein impracticable. Confirmed habits of intoxication would seem, according to the degree and circumstances thereof, to fall under either clause (*b*), (*c*) or (*d*). There does not appear to be direct authority in the law of Scotland on the subject of clause (*c*); but Professor Bell, figuring a case of uncontrollable habits of intoxication in a partner of a gunpowder manufactory, says, there can be no doubt that such perils would afford ground for dissolution by the Court, and even for at once entering an act of dissolution in the books of the firm (*t*).

CLAUSE (*d*).

lause (*d*).

Breach of artnership greement.

Clause (*d*) is in accordance with the previous law (*u*). It is difficult to state what misconduct will be sufficient to induce the Court to order a dissolution under this clause, but instances in which such relief has been granted will be found collected or referred to in "Partnership," pp. 580 *et seq.* Here it will be sufficient to mention that keeping erroneous accounts (*x*), refusal to meet on matters of business (*y*), and continued quarrelling (*z*), have been held to justify a dissolution, but the Court will not interfere on account of mere squabbles and ill-temper (*a*).

The application under this and the two preceding clauses must not be made by the partner in fault, and this is in accordance with the previous law (*b*). The dictum by Lord Cairns in *Atwood* v. *Maude* (1868) (*c*), to the effect that, when it is admitted that a state of feeling exists which renders it impossible that the partnership can continue with advantage to either, it is immaterial by whom the bill is first filed, cannot now be considered law.

(*ss*) See *Pearce* v. *Foster*, 17 Q. B. Div. 536.

(*t*) 2 Bell's Com. 525.

(*u*) See *Marshall* v. *Colman* (1820), 2 J. & W. 266; and *Harrison* v. *Tennant* (1856), 21 Beav. 482.

(*x*) *Cheeseman* v. *Price* (1865), 35 Beav. 142.

(*y*) *De Berenger* v. *Hammel* (1829), 4 Byth. & Jarm. (4th ed.) 287.

(*z*) *Baxter* v. *West* (1860), 1 Dr. & Sm. 173.

(*a*) See "Partnership," p. 466.

(*b*) *Harrison* v. *Tennant* (1856), 21 Beav. p. 493; *Fairthorn* v. *Weston* (1844), 3 Ha. 387.

(*c*) 3 Ch. p. 373.

Scotch Law.

Scotch Law.

See above note on clause (*c*). Conduct of this description amounting to a breach of the contract of a partnership was reached by the common law. See *Macpherson* v. *Richmond* (1869) (*cc*).

CLAUSE (*e*).

Clause (*e*) is in accordance with the previous decisions. In *Jennings* v. *Baddeley* (1856) (*d*), V.-C. Wood said: "If this concern cannot be worked at a profit I consider the case as falling within the authority of *Baring* v. *Dix* (1786) (*e*), and *Bailey* v. *Ford* (1843) (*f*); and indeed it would almost seem that nothing more than common sense is required to lead to the conclusion that in a common case of partnership formed, as all partnerships must be, for the purpose of an effectual working at a profit, you cannot force the partners to continue the co-partnership when it is clearly made out that the business is no longer capable of being carried on at a profit."

Clause Certainty of loss.

If the firm is already insolvent and becomes more so every day, the Court will interfere on motion and appoint a person to sell the business and wind up the affairs of the partnership (*g*).

Scotch Law.

Scotch Law.

In the case of a joint adventure in a mine, which had been unsuccessfully tried for three years, the Court found "that the lead mine has not hitherto yielded any profit, and that there is no reasonable prospect of profits being realized in future," and accordingly held that one of two partners was entitled to put an end to the adventure: *Miller* v. *Walker* (1875) (*h*). The same would hold in partnership proper. The terms of this clause seem to impose a somewhat heavier onus on the partner seeking a dissolution.

Certainty of loss.

In regard to the date of dissolution the Lord President in the above case observed that the partner was not entitled to put an end to the adventure at a day's notice, but was entitled to have it settled in the course of the action that the adventure was to be brought to an end. The date of the decree in this and the following clause will be the date of the dissolution, unless some other date be fixed by the decree.

Date of dissolution.

CLAUSE (*f*).

Clause (*f*) is apparently inserted in order to extend the power of the Court to decree a dissolution (*supra*, p. 6). Most, if not all, of the

Clause (*f*). Just and equitable.

(*cc*) 41 Scot. Jurist, 288.
(*d*) 3 K. & J. 78.
(*e*) 1 Cox, 213.
(*f*) 13 Sim. 495. See also "Partnership," p. 576.
(*g*) *Bailey* v. *Ford* (1843), 13 Sim. 495.
(*h*) 3 R. 242.

Section 35

cases in which a dissolution has been granted would fall under one or other of the preceding clauses, but it is nowhere definitely stated that these are the only cases in which the Court would have granted such relief.

The clause, coming as it does after a number of particular instanc in which a dissolution may be ordered, will perhaps be limited in its application to cases *ejusdem generis* as those mentioned in the previous parts of this section (*i*). Any case, however, in which it is no longer reasonably practicable to carry out the partnership contract according to its terms will, it is apprehended, be within this section (*k*).

ignment of re.

As already pointed out (see § 31 and notes), the assignment of a share in a partnership for a fixed term does not dissolve the partnership, but since such an assignment was, before the passing of this act, considered to be a good cause for dissolution (*l*), it may well be that the Court will decree a dissolution in such cases on the application of any partner other than the partner who has assigned his share (*m*). The Court may however consider that such an assignment will not of itself be a ground for a dissolution, now that the rights of an assignee are limited to those mentioned in § 31, and that his right to compel the firm to come to an account with him during the continuance of the partnership is clearly negatived.

e of olution.

No mention is made in this section of the date as from which the partnership is to be dissolved. The rule in such cases was, and still is (see § 46), that where the order of the Court is necessary for the dissolution of the partnership, the dissolution will, in the absence of special reasons, date from the judgment (*n*). If the partnership has been effectually dissolved by notice, the dissolution will date from the time at which it was so dissolved, whether the notice has been given under the general power which exists for that purpose in the case of partnerships at will (*o*), or under a special power conferred upon the partners by agreement (*p*). If the partnership is at will the Court may treat the writ as a notice of dissolution, and declare the partnership dissolved as from that date (*q*).

Scotch Law.

SCOTCH LAW.

Cases have occurred where in consequence of change of circumstances a partnership or joint adventure was brought to an end though originally

(*i*) See the interpretation put upon the similar clause in the Companies Act, 1862, § 79 (5) in *Suburban Hotel Co.* (1867), 2 Ch. 737; and *Ex parte Spackman* (1849), 1 Mac. & G. 170; a decision under the earlier act.

(*k*) See *supra*, p. 6.

(*l*) See "Partnership," pp. 363 and 583; and see § 46.

(*m*) Compare § 33 (2).

(*n*) *Lyon* v. *Tweddell* (1881), 17 Ch. Div. 529; *Besch* v. *Frolich* (1842), 1 Ph. 172.

(*o*) *Mellersh* v. *Keen* (1859), 27 Beav. 236, and see *supra*, §§ 26 and 32 (c).

(*p*) *Robertson* v. *Lockie* (1845), 15 Sim. 285; *Bagshaw* v. *Parker* (1847), 10 Beav. 532; *Jones* v. *Lloyd* (1874), 18 Eq. 265.

(*q*) *Kirby* v. *Carr* (1838), 3 Y. & C. Ex. 184; *Shepherd* v. *Allen* (1864), 33 Beav. 577.

stipulated for a term of years. See *Montgomery* v. *Forrester* (1791) (*r*), where, after trial, a vessel bought for whale fishing proved unsuitable for the purpose ; and *Barr* v. *Speirs* (1802) (*s*), where two of three partners who had engaged for three years in building houses, were held entitled to have the partnership dissolved upon large advances being required without prospect of success.

But this clause confers a wider discretion than the Court has hitherto possessed or exercised. It is to be observed, however, that the occasion for the Court's interference must be circumstances emerging since the partnership was entered into, rendering dissolution just and equitable ; and apparently indicating that its continuance would be unjust or inequitable.

Quære, will the arrestment or assignment of a partner's share or interest form a ground for invoking the aid of the Court under this clause ? It is thought that in some circumstances it may.

Rights of persons dealing with firm against apparent members of firm.

36.—(1.) Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

(2.) An advertisement in the London Gazette as to a firm whose principal place of business is in England or Wales, in the Edinburgh Gazette as to a firm whose principal place of business is in Scotland, and in the Dublin Gazette as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.

(3.) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

" Partnership," pp. 210 *et seq.*

This section is in accordance with the previous law.

The liability of a retired partner under this section depends upon the general rule that a principal is liable for the acts of his former agent to persons who, knowing him to have been an agent, continue to deal with him, unless proper notice has been given of the termination of his authority (*t*). Though a partner by his retirement from the firm terminates

(*r*) H. 748.
(*s*) 18th Feb. 1802, F. C.
(*t*) *Trueman* v. *Loder* (1840), 11 A. & E. 589.

Section 36.

the agency of his co-partners it follows, from the rule above stated, that he will still be liable for their acts to third parties who know him to have been in partnership with them, unless due notice of his retirement be given.

Sub-section 1.

ub-section (1).

Apparent Members.—The meaning of these words is not quite clear: they may limit the application of the sub-section to persons who by their names forming part of the firm name, appear to every one to be members of the firm, or they may include partners who are known by the persons dealing with the new firm to have been members of the old firm. The question is not of importance, for if the narrower meaning be correct, retired partners, whose names are not part of the firm name, will by the previous law (*u*) be under a liability to persons who know them to have been members of the firm similar to that of apparent members under this section.

ormant artner.

A dormant partner, *i.e.*, a person who is not known to be a partner, will not be liable for the acts of his co-partners after his retirement, although no notice of his retirement be given; this was decided in *Carter* v. *Whalley*, (1830) (*x*), and is adopted by the present act (see sub-section 3 of this section). The liability under this section is a liability by way of estoppel (*y*).

ontinued ability after otice of etirement.

When a retired partner has given due notice of his retirement his liability for the future acts of his former partners ceases (*z*), except in the two following cases:

1.—Under § 14 it he holds himself out as a partner (*a*).

2.—Under § 38 for the acts of his co-partners which are necessary to wind up the affairs of the partnership and to complete unfinished transactions (*b*).

For the liability of a deceased or retired partner for the debts and obligations of a firm incurred before his retirement see *supra*, § 17 (2).

Scotch Law.

Scotch Law. etiring ormant artner.

By the law of Scotland a dormant (called also a secret or latent) partner, retiring from a partnership, required, in order to avoid liability for its subsequent engagements, to take the same means as were necessary in the case of an ostensible partner, viz., as to customers (whether aware of his connection with the firm or not), to give special notice of his retirement, and as to the public to advertise it: *Hay* v. *Mair* (1809) (*c*), and other cases referred to by the Lord President in *Mann* v. *Sinclair* (1879) (*d*).

(*u*) See § 46, and "Partnership," p. 214.

(*x*) 1 B. & Ad. 11, and "Partnership," pp. 212 *et seq.*

(*y*) See *Scarf* v. *Jardine* (1882), 7 App. Ca. 345.

(*z*) See "Partnership," p. 215, and cases there cited.

(*a*) *Brown* v. *Leonard* (1820), 2 Chitty, 120; "Partnership," p. 216, and *supra*, § 14 and notes.

(*b*) See *infra*, § 38 and notes.

(*c*) 27th Jan., 1809, F. C.

(*d*) 6 R. 1078, 1085.

Section 36.

But, as pointed out by the Mercantile Law Amendment Commissioners, a retiring dormant partner in England requires to give special notice "to those persons, at that time having relations with the partnership, who were aware of his connection with it ; but he need not give notice to any other persons, either specially or by public advertisement" (*e*) ; and they recommended that in this respect the law of Scotland should be assimilated to that of England. Dissatisfaction with the Scotch law was also expressed on the bench in the case of *Mann* v. *Sinclair* (1879), *supra* (*f*).

"Apparent members."

It is thought that the expression "apparent members" in this section is used to describe ostensible partners of the old firm, and dormant partners thereof, known as such to the person dealing with the firm. No change is thus made in the English law, and the assimilation of the Scotch law on the point is carried out.

Form of notice.

As to the form of notice to customers, the natural mode is by special circular, but an obvious change of the firm name has been held sufficient : *Dunbar* v. *Remington* (1810) (*g*). Advertisement and Gazette notice are not enough, unless brought home to the customer's knowledge : *Campbell* v. *McLintock* (1803) (*h*), *Sawers* v. *Tradeston Society* (1815) (*i*), *Bertram* v. *McIntosh* (1822) (*k*). But personal knowledge is sufficient without intimation : *Aytoun* v. *Dundee Bank* (1844) (*l*). See also Bell's Commentaries (*m*). In *Mann* v. *Sinclair, supra*, the circular was sent three years after the retirement, and in reference to a different change in the firm, but it gave notice by distinct implication ; and was held sufficient.

Claim against dormant partner.

In that case it was also decided that the claim against a former dormant partner failing to give notice of retirement is not competent to the trustee in the bankruptcy of the firm from which he retired, because it is not based on partnership, but on representation as a partner, and the claim of the creditor depends on knowledge or notice in each individual case. The opinion was also expressed that a retired dormant partner so made liable would have a claim of relief against the bankrupt estate of the firm. On this last point, see *Wright* v. *Gardner's Trustees* (1831) (*n*).

Sub-section 2.

Sub-section (2). Notice of dissolution.

Sub-section 2 is in accordance with the previous law (*o*). It is to be observed that this sub-section only states that notice in the proper Gazette is sufficient notice as to persons who have not dealt with the firm before the change in its constitution occurred. Notice to such persons may be proved in other ways (*p*). With regard to persons who dealt with the firm, before

(*e*) Second Report (1855), p. 19.
(*f*) Per Lord Young, 6 R. 1081 ; and Lord Shand, 1088.
(*g*) 10th Mar. 1810, F. C.
(*h*) H. 755.
(*i*) 24th Feb. 1815, F. C.
(*k*) 1 S. 315.
(*l*) 6 D. 1409.
(*m*) 2. 530—1.
(*n*) 9 S. 721.
(*o*) See *Godfrey* v. *Turnbull* (1795), 11 Esp. 371, and other cases cited, "Partnership," p. 222.
(*p*) See cases cited, "Partnership," p. 222.

Section 36.

the change in the firm occurred, a notice in the Gazette is not sufficient unless it can be proved that the person, seeking to make the retired partner liable, saw it (*q*). In all such cases notice in point of fact must be proved, if this be done the form of the notice is immaterial (*r*).

Scotch Law.

Scotch Law. Gazette notice.

This is according to existing practice; but a Gazette notice might be counteracted by circumstances indicative of continued connection with the concern on the part of an individual, *e.g.*, allowing the name to continue on the premises and business documents (*s*).

Sub-section 3.

Sub-section (3).

Sub-section 3 contains the exceptions to the general rule stated in sub-section 1 and is in accordance with the previous law (*t*).

Death.

It was decided in the case of *Devaynes* v. *Noble* (1816) (*u*) that notice of death is not requisite to prevent liability from attaching to the estate of a deceased partner, in respect of what may be done by his co-partners after his decease. For by the law of England the authority of an agent is determined by the death of his principal, whether the fact of death is known or not (*x*).

The estate of a deceased partner may however be liable to contribute to debts contracted by his co-partners after his death in consequence of some agreement between him and his co-partners. And if the deceased partner has set apart the whole or a portion of his assets as a fund to be employed by his executors in the partnership business, and they have by so doing incurred liabilities to the creditors of the firm, such creditors are entitled to obtain out of that fund what, if anything, may be payable to the executors by way of indemnity for their liabilities (*y*).

The continuing partners may be liable for acts done after the death of their late partner under an authority given by the firm through him (*z*).

Bankruptcy.

That a bankrupt partner is not liable for partnership debts incurred after his bankruptcy has long been recognised (*a*).

Dormant partner.

The third case dealt with in this sub-section, namely the case of a partner who is not known to the person dealing with the firm to have been a partner, is not so much an exception to, as altogether outside the general rule, and has been already referred to (*b*).

(*q*) *Graham* v. *Hope* (1792), Peake, 154.

(*r*) See "Partnership," p. 223.

(*s*) 2 Bell's Com. 532. See § 14, *supra*.

(*t*) See "Partnership," p. 211.

(*u*) 1 Mer. 616.

(*x*) *Smout* v. *Ilbery* (1842), 10 M. & W. 1, and "Partnership," p. 211.

(*y*) See *re Gorton* (1889), 40 Ch. Div. 536; "Partnership," p. 607 and cases there cited.

(*z*) *Usher* v. *Dauncey* (1814), 4 Camp. 97.

(*a*) See "Partnership," p. 212.

(*b*) See *supra*, p. 96.

Scotch Law.

Scotch Law.

These are cases in which notice is not necessary. In the case of death and bankruptcy it is according to existing law, the reason being that death is deemed to be a public fact, and bankruptcy is published: *Cheap* v. *Aiton* (1772) (*c*), a very crucial case; *Royal Bank* v. *Christie* (1839) (*d*); *Oswald's Trustees* v. *City of Glasgow Bank* (1879) (*e*). See also Bell's Commentaries (*f*). But "notour bankruptcy" under the Act 1696, c. 5, which is not published in the Gazette, is not sufficient to free from liability. See *supra*, § 33 (1).

As to the immunity of a dormant partner, not known to the person dealing with the firm to be a partner, this is a change from the existing law, as above explained; the reason being that as no credit was given on the faith of the retired dormant partner, no liability should attach to him.

Right of partners to notify dissolution.

37. On the dissolution of a partnership or retirement of a partner any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.

"Partnership," p. 214.

This section is in accordance with the decisions of *Troughton* v. *Hunter* (1854) (*g*), and *Hendry* v. *Turner* (1886) (*h*). If a partner refuses to concur in notifying a dissolution when his concurrence is necessary, an action to compel him to do so may be brought by his co-partners though they claim no other relief against him (*i*).

Scotch Law.

Scotch Law.

In Scotland there is nothing to prevent a retired partner, himself alone, advertising or issuing a circular announcing his retirement, and such notice is enough for his protection. But the London Gazette notice cannot, it appears, be inserted without the signatures of the partners, and a statutory declaration by a solicitor: *Hendry* v. *Turner* (1886) (*k*). At the Edinburgh Gazette office a written notice, signed by a partner, and attested by two witnesses, intimating his own retirement, cannot be refused (*l*), and is in practice inserted. When the notice, however, takes the form of an announcement of the dissolution of the firm, it is the practice in that office to require the signatures, duly attested, of all the partners. The principle appears to

Edinburgh Gazette.

(*c*) 2 Paton, App. 283.
(*d*) 1 D. 745, and 2 Robin. App. 118.
(*e*) 6 R. 461.
(*f*) 2. 530.
(*g*) 18 Beav. 470.
(*h*) 32 Ch. D. 355.
(*i*) *Hendry* v. *Turner* (1886), 32 Ch. D. 355.
(*k*) *Supra*.
(*l*) 2 Bell's Com. 533.

Sections 37—38.

be that a partner is only entitled to notify his own retirement, and the dissolution *quoad* him which that involves, but not to notify a dissolution *quoad* other partners, who may be continuing the concern. Under this section the practice will probably continue where the notice involves a dissolution between parties not signing it.

Continuing authority of partners for purposes of winding-up.

38. After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

Provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this proviso does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt.

"Partnership," pp. 217 *et seq.*

Extent of authority.

This section settles the law as to the extent of a partner's authority to bind the firm after a dissolution in accordance with the view expressed in "Partnership," p. 219, where the various cases on the subject are discussed. The more general statement that a firm notwithstanding its dissolution continues to exist so far as may be necessary for the winding up of its business is too wide.

It should be remembered that the authority of a partner to bind the firm may be effectually restricted by an agreement between the partners of which persons dealing with the firm have notice (see *supra*, § 8). If a partner previous to a dissolution has a limited authority to act for the firm, his authority will not be increased by this section, but will be continued within its former limitations for the purposes mentioned in the section.

The authority only extends to partners and not to the executors of a deceased, or the trustee of a bankrupt, partner.

Though as between themselves the authority of each partner is limited in the manner here mentioned, the firm may be bound by the acts of the partners to the same extent as before the dissolution, if proper notice of the dissolution be not given (see *supra*, § 36).

For cases illustrating the application of this section, see *Re Clough* (1885) (*m*); *Butchart* v. *Dresser* (1853) (*n*); *Morgan* v. *Marquis* (1853) (*o*); *Ex parte Owen* (1884) (*p*); and other cases referred to in "Partnership," pp. 217 *et seq.*

Bankrupt partner.

That the power of a partner to bind the firm ceases upon his bankruptcy

(*m*) 31 Ch. D. 324.
(*n*) 4 De G. M. & G. 542.
(*o*) 9 Ex. 145.
(*p*) 13 Q. B. Div. 113. See also *McClean* v. *Kennard* (1874), 9 Ch. 345.

has long been settled (*q*). His power determines as from the commencement of his bankruptcy (*r*). Sections 38—39

The exception from the proviso in the case of a person holding himself out as a partner of the bankrupt was recognised in the case of *Lacy* v. *Woolcott* (1823) (*s*). Holding out.

Scotch Law.

This is the existing law. *Douglas Heron & Co.* v. *Gordon* (1795) (*t*). "The partnership is dissolved in so far as the power of contracting new debts is concerned, but continued to the effect of levying the debts, paying the engagements of the company, and calling on the partners to answer the demands" (*u*). Hence receipts to debtors of the firm in the firm name are valid (*x*). But one partner is not entitled to bind the others by bill even for an existing debt, "to embody debts in bills after dissolution." It would alter the *onus probandi*, and might subject to summary diligence: *Snodgrass* v. *Hair* (1846) (*y*). But where a partner charged with the winding up dispensed with notice of dishonour of a bill of the firm, it was held a reasonable act of administration, and the creditor did not thereby lose recourse against the retired partner. The rule is that after dissolution no valid draft, acceptance, or endorsation can be made by the firm; all the partners must join in it (*z*). It is usual but not imperative to sue in the firm's name, *Nicoll* v. *Reid* (1877) (*b*). SCOTCH LAW Winding-up.

In regard to obligations of partners for transactions entered into before the dissolution, see *Milliken* v. *Love & Crawford* (1803) (*c*); *Ramsay's Exrs.* v. *Graham* (1814) (*d*); *Matheson* v. *Fraser* (1820) (*e*); *Anderson* v. *Rutherfurd* (1835) (*f*).

The proviso follows from the effect of the bankruptcy of a partner to dissolve the partnership. "Partnership is as effectually dissolved by sequestration as by death" (*g*). Being published there is notice of the withdrawal of the mandate. But this again is qualified by the doctrine of "holding out." Proviso.

39. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the Rights of partners as to application of partnership property.

(*q*) *Hague* v. *Rolleston* (1768), 4 Burr. 2174; *Thomason* v. *Frere* (1808), 10 East 418.

(*r*) 46 & 47 Vict. c. 52, § 43, and *Thomason* v. *Frere* (1808), 10 East, 418, and "Partnership," p. 666.

(*s*) 2 Dowl. & Ry. 458, and see *supra*, § 14.

(*t*) 3 Paton's App. 428.

(*u*) 2 Bell's Com. 527.

(*x*) 2 Bell's Com. 534

(*y*) 8 D. 390.

(*z*) 2 Bell's Com. 534.

(*b*) 5 R. 137.

(*c*) H. 754.

(*d*) 18th Jan. 1814, F. C.

(*e*) H. 758.

(*f*) 13 S. 488.

(*g*) 2 Bell's Com. 530.

Section 39.

surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm.

"Partnership," 351 *et seq.*

artner's lien

This section gives effect to what has been called the equitable lien which each partner has on the partnership property, and adopts the law which may be found in *West* v. *Skip* (1749) (*h*), and the other cases collected in "Partnership," 352 *et seq.*

Every partner is entitled; from the concluding words of this section it appears that the right extends to the representatives of a partner; this is in accordance with the previous law (*i*).

As against the other partners . . . . and all persons claiming through them in respect of their interest as partners. These words will include the executors of a deceased and the trustees of a bankrupt partner (*k*), the assignees of a partner's share (*l*), and, it is conceived, judgment creditors, who have obtained a charging order under § 23 of this Act, but will not include a person who *bonâ fide* purchases from one partner specific chattels belonging to the firm (*m*); such a purchaser acquires a good title to the chattels whatever lien the other partners might have had on them prior to the sale.

The property of the partnership. As to what constitutes the property of the partnership, see *supra*, §§ 20 and 21. The lien extends only to the partnership property as it existed at the time of the dissolution, and does not extend to what may have been subsequently acquired by the persons who continue to carry on the business (*n*).

Applied in payment of the debts, &c., for the rule for the distribution of the assets on the final settlement of accounts, see *infra*, § 44.

Due from them as partners. Sums due to the firm from a partner otherwise than in his character of a member must not be deducted in ascertaining the amount of such partner's share; an illustration of this will be found in the case of *Ryall* v. *Rowles* (1749) (*o*).

oss of lien.

The right mentioned in this section is lost by the conversion of partner-

(*h*) 1 Ves. Sen. 239.

(*i*) See *Stocken* v. *Dawson* (1845), 8 Beav. 239, affd. 13 L. J. (Ch.) 282, and *West* v. *Skip* (1749), 1 Ves. Sen. 239.

(*k*) *Croft* v. *Pike* (1733), 3 P. W. 180.

(*l*) *Carauder* v. *Bultrel* (1873), 9 Ch. 79; and see *supra*, § 31.

(*m*) *Re Langmead's Trusts* (1855), 20 Beav. 20; and 7 De G. M. & G. 353, and "Partnership," p. 354.

(*n*) *Payne* v. *Hornby* (1858), 25 Beav. 280; cf. *West* v. *Skip* (1749), 1 Ves. Sen. 239, and see "Partnership," pp. 352—353.

(*o*) 1 Ves. Sen. 348, and 1 Atk. 165; see also *Meliorucchi* v. *The Royal Exchange Assurance Co.* 1 Eq. Ca. Ab. 8; *Croft* v. *Pike* (1733), 3 P. & W. 180.

ship property into the separate property of a partner (*p*) unless the right is specially retained (*q*). Section 39.

Apply to the Court. The Court, see *infra*, § 45.

The application must be made by an action.

The Court will, if necessary, grant an injunction (*r*) or appoint a receiver or a receiver and manager (*s*) to protect the partnership assets, or prevent a partner from doing any act which will impede the winding up of the concern.

Scotch Law.

SCOTCH LAW.

The rights of partners and their representatives here defined are in accordance with the common law, subject to a qualification regarding winding up by the Court (*t*). In order to apply the partnership property as here stated there must be realization, and for this purpose, any partner or the representatives of a deceased partner may insist on a sale as the best evidence of value, and is not bound to accept a valuation: *Marshall* (1816) (*u*), *Stewart* v. *Simpson* (1835) (*x*). *McNiven* v. *Peffers* (1868) (*y*). But if a valuation has been agreed to, a sale will not afterwards be decreed: *McKersies* v. *Mitchell* (1872) (*z*). The rights of the firm's creditors against the firm's property, which are preferable to those of private creditors of partners, being settled, the surplus is available for the partners; but here the separate debtor and creditor relations between each partner and the firm require to be adjusted,—what each partner owes to the firm being deducted from what the firm owes to him. If his debt to the firm exceeds he will require to contribute for the benefit of the other partners. The claim of the partners on the surplus assets of the concern is preferable to the claims of personal creditors (if any) of the partners as individuals: *Keith* v. *Penn* (1840) (*a*). The same principle holds if one of the partners be another firm or company or body corporate (*b*).

Realization.

Distribution.

The existing law in regard to the winding up, by a judicial factor appointed by the Court, of a dissolved firm's business was summarised by Lord President (Inglis) in *Dickie* v. *Mitchell* (1874) (*c*), thus:—

Winding up by Court.

(1.) "When all the partners in a co-partnery are dead, this Court has the power, and will exercise it, of appointing a factor to wind up the partnership estate:" *Dixon* v. *Dixon*, (1831—2) (*d*).

Rules.

(2.) "If there are surviving partners, then, if there is no fault or

(*p*) *Lingen* v. *Simpson* (1824), 1 Sim. & Stu. 600; *Re Langmead's Trusts* (1855), 7 De G. M. & G. 353, the judgment of Turner, L.J.; *Holroyd* v. *Griffiths* (1856), 3 Drew. 428.

(*q*) *Holderness* v. *Shackels* (1828), 8 B. & C. 612.

(*r*) See "Partnership," pp. 541 *et seq.*

(*s*) See "Partnership," pp. 545 *et seq.*

(*t*) 2 Bell's Com. 535 and 507.

(*u*) 23rd Feb. 1816, F. C.

(*x*) 14 S. 72.

(*y*) 7 Mc. 181.

(*z*) 10 Mc. 861.

(*a*) 2 D. 633.

(*b*) See § 1, *supra*. 2 Bell's Com. 514.

(*c*) 1 R. 1030.

(*d*) 10 S. 178, affd. 6 W. & S. 229.

Sections 39—40.

incapacity on the part of them or any of them, preventing them carrying on their business, this Court will not interfere, but will leave the surviving partners to extricate their affairs in their own way:" *Young* v. *Collins* (1852—3) (*e*). This does not however derogate from the right of a partner to insist upon the realization of the partnership property by sale.

(3) "Where there is a surviving partner or partners, but these partners are unfitted either for carrying on or winding up the affairs of the partnership, whether from failure of duty, or incapacity of any one or more of them, then this Court can, and if satisfied of the necessity, will appoint a factor. All such cases are in their nature cases of circumstances; but if the circumstances are strong enough, it is within the competency of the Court to make the appointment." See also *Gow* v. *Schulze* (1877), and particularly the opinion of Lord Shand (*f*).

Principle of rules.

These rules are the application of the general principle that the Courts in Scotland do not assume the management of partnership or trust estates when the parties interested have provided adequate machinery, and will only appoint a judicial factor when the persons entrusted prove incapable or unreliable, or the rights or interests of parties are endangered, or the trust has become unworkable. See *Ewing* v. *Ewing* (1884) (*g*).

Effect of last clause of section.

The question arises whether the last clause of this section alters all this, and entitles any partner of a dissolved firm, or his representatives, disregarding the principles of the common law, to insist on the appointment of a judicial factor, notwithstanding that competent and trustworthy partners are ready to undertake the duty. The question is not free from doubt, but it is thought that the common law rules are not superseded. A partner may apply to the Court, but the Court will deal with the application on the lines of the common law, which are saved by section 46, *infra*.

Apportionment of premium where partnership prematurely dissolved.

40. Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless

(*a.*) the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium, or

(*b.*) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.

(*e*) 14 D. 540, revd. 1 Macq. 385.
(*f*) 4 R. 928 (933—4).
(*g*) 11 R. 600, *per* Lord President, 627—8.

"Partnership," pp. 64 *et seq.*

Section 40

This section, according to a statement in the memorandum to the original bill, is intended to adopt the law laid down in the case of *Atwood* v. *Maude* (1868) (*c*). The existing cases on this subject are difficult to reconcile and the principles upon which the Court has hitherto acted were not well settled (*d*).

A partnership for a fixed term. The section does not deal with the case of a partnership at will; in such cases the parties must be taken to have run the risk of the partnership being determined at any time (*e*) and, apart from fraud no part of the premium will be returned, but a person who has received a premium for taking another into partnership with him would probably not be allowed to determine the partnership next day without cause and retain the premium (*f*).

If the partner who paid the premium was induced to enter into partnership by fraud or misrepresentation he will be entitled, on the contract being rescinded, to a lien on the partnership assets for the amount of the premium (see *infra*, § 41 (*a*)), in addition to his right to recover the premium from his co-partner to whom he paid it.

Fraud.

Otherwise than by the death of a partner. This exception is in accordance with the previous law (*g*). Death is a contingency which all persons entering into a partnership know may unexpectedly determine it (see *supra*, § 33), so that if they do not guard against the risk they may reasonably be treated as content to incur it.

Death.

It is conceived that these words will not prevent the Court in a proper case from ordering the repayment of the whole or part of the premium where a person knowing himself to be in a precarious state of health conceals the fact, and induces another to enter into partnership with him and pay him a premium, and shortly afterwards dies (*h*).

In all other cases except those mentioned in clauses (*a*) and (*b*), the Court has a discretion, and the Court of Appeal will not interfere with its exercise except on special grounds (*i*). In the exercise of this discretion attention must be paid to the terms of the partnership contract, and to the length of time during which the partnership has continued, and it would seem, under this section, that the Court is not to take other matters into consideration; if this be so the discretion of the Court will be more limited than has hitherto been the case (*k*). As a rule the part of the premium returned bears the same proportion to the whole premium as the unexpired part of the term bears to the whole term (*l*).

Discretion.

(*c*) 3 Ch. 369.

(*d*) See "Partnership," pp. 66 *et seq.*

(*e*) See per Lord Eldon in *Tattersall* v. *Groote* (1800), 2 Bos. & P. 134.

(*f*) See *Featherstonhaugh* v. *Turner* (1858), 25 Beav. 382; *Hamil* v. *Stokes*, Dan. 20.

(*g*) See *Whincup* v. *Hughes* (1871), L. R. 6 C. P. 78; *Ferns* v. *Carr* (1885), 28 Ch. D. 409.

(*h*) *Mackenna* v. *Parkes*, 36 L. J. Ch. 366.

(*i*) *Lyon* v. *Tweddell* (1881), 17 Ch. Div. 529.

(*k*) See *Lyon* v. *Tweddell* (1881), 17 Ch. Div. 529.

(*l*) See *Atwood* v. *Maude* (1868), 3 Ch. 369.

ctions 40—41.

That a partner whose conduct is the cause or chief cause of dissolution is not entitled to a return of any part of the premium paid by him has long been recognised as the law (*m*). The fact that the partner paying the premium is not altogether free from blame will not deprive him of his right to recover a portion of the premium (*n*).

ause (*a*).

ause (*b*).

Clause (*b*) is also in accordance with the previous law (*o*). But if no definite agreement has been come to and the partners have merely consented to dissolve, it is presumed that the question of the return of the premium will remain open (*p*).

The decision of the Court upon the question whether any part of the premium is returnable or not, should be obtained at the hearing of the action (*q*).

Scotch Law.

Scotch Law. portionment premium.

There is no trace of such a claim having been made in the Scotch Courts. But see claim sustained for repayment of disbursements made in promoting an object of common interest that proved abortive : *Dobie* v. *Lauder's Trustees* (1873) (*r*), and prior cases.

The repayment provided for in this section is by a partner, not by the firm ; and it would not be allowed to come in competition with the claims of the firm's creditors.

ghts where rtnership dis- ved for fraud misrepre- ntation.

41. Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(*a.*) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and is

(*b.*) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and

(*c.*) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm.

(*m*) *Airey* v. *Borham* (1861), 29 Beav. 620 ; *Atwood* v. *Maude* (1868), 3 Ch. 369 ; *Wilson* v. *Johnstone* (1873), 16 Eq. 606 ; *Black* v. *Capstick* (1879), 12 Ch. D. 863.

(*n*) *Astle* v. *Wright* (1856), 23 Beav. 77 ; *Pease* v. *Hewitt* (1862), 31 Beav. 22.

(*o*) *Lee* v. *Page* (1861), 30 L. J. Ch. 857.

(*p*) See *Astle* v. *Wright* (1856), 23 Beav. 77 ; *Wilson* v. *Johnstone* (1873), 16 Eq. 606 ; *Bury* v. *Allen* (1844), 1 Coll. 589.

(*q*) *Edmonds* v. *Robinson* (1885), 29 Ch. D. 170.

(*r*) 11 Mc. 749.

"Partnership," pp. 482 *et seq.*

This section is in accordance with the previous law (*s*), and settles the question left open by the House of Lords in *Adam* v. *Newbigging* (1888) (*t*), as to the extent of the indemnity to which a person, who has been induced to enter into a partnership by misrepresentation apart from fraud, is entitled, in accordance with the decision of the Court of Appeal in that case (*u*).

Without prejudice to any other right. This section does not deal with the right of the defrauded party to make the persons guilty of the misrepresentation personally liable for the monies mentioned in clause (*a*) (*c*); nor with his right in cases of fraud to recover any damages to which he may be entitled (*y*).

Interest.

In *Mycock* v. *Beatson* (1879) (*z*), the plaintiff was declared entitled to a lien on the partnership assets for interest at the rate of 5 per cent. on the sum paid by him for his share in the partnership as well as for that sum itself, and also for the costs of the action. In *Newbigging* v. *Adam* (1887) interest at the rate of 4 per cent. was allowed (*a*). It is conceived that the Court may still allow interest in such cases and declare the plaintiff entitled to a lien for that interest and for his costs.

The Court is often called upon to rescind other contracts between partners besides those for the formation of a partnership, and more especially agreements entered into on or after a dissolution. The principles upon which the Court acts in such cases will be found in "Partnership," pp. 484 *et seq.*, and the cases there collected and discussed.

Scotch Law.

Scotch Law.

There is no direct authority in the law of Scotland, but the principles of *Adam* v. *Newbigging* (1887), *supra*, and prior cases appear to be in harmony with that law (*b*).

Right of outgoing partner in certain cases to share profits made after dissolution.

42.—(1.) Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner

(*s*) *Pillans* v. *Harkness*, Colles, 442; *Rawlins* v. *Wickham* (1858), 1 Giff. 355, and 3 De G. & J. 304; *Mycock* v. *Beatson* (1879), 13 Ch. D. 384.

(*t*) 13 App. Ca. 308.

(*u*) 34 Ch. Div. 582.

(*c*) See the cases in the last three notes.

(*y*) That the relief mentioned in this section may not in every case cover all the damages to which he is entitled, see the judgments of the Court of Appeal in *Newbigging* v. *Adam* (1887), 34 Ch. Div. 582.

(*z*) 13 Ch. D. 384.

(*a*) See 34 Ch. Div. p. 585; the order in this case does not appear to have contained any declaration as to the right of lien.

(*b*) Clark, 256—57.

Section 42.

or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent. per annum on the amount of his share of the partnership assets.

(2.) Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

"Partnership," pp. 521 *et seq.*

This section deals with the liability of the surviving partners, as partners, towards a retired partner or the estate of a deceased partner, and is in accordance with the previous law (*c*); it does not touch the liability of partners, who are also the executors of a deceased partner, towards the persons interested in their testator's estate in their character of executors. The cases on this subject will be found in "Partnership," pp. 528 *et seq.*

SUB-SECTION 1.

b-section (1).

In the absence of any agreement.—If there be any agreement the liability of the continuing partners will be regulated thereby (*d*). If the executors of the deceased partner, not themselves being members of the firm, lend their testator's share in the assets of the partnership to the continuing partners at interest, the continuing partners will only be liable for interest and not for profits although they know that the money so lent belongs to the testator's estate and that the loan is unauthorised (*e*).

tion.

At the option of himself or his representatives.—The persons having the option are entitled to have such enquiries and accounts as will enable them

(*c*) See *Crawshay* v. *Collins* (1808), 15 Ves. 218; 1 J. & W. 267, & 2 Russ. 325; *Booth* v. *Parks*, 1 Moll. 465, and Beatty 444; *Vyse* v. *Foster* (1874), L. R. 7 H. L. at p. 329, and other cases cited, "Partnership," pp. 526 *et seq.*

(*d*) *Vyse* v. *Foster* (1874), 8 Ch. 309; L. R. 7 H. L. 318.

(*e*) *Stroud* v. *Gwyer* (1860), 28 Beav. 130. If, in such a case the executors are members of the firm it appears doubtful whether the persons interested in the testator's estate have or have not an option between profits and interest, se *Vyse* v. *Foster*, 8 Ch. p. 334.

to exercise their option (*f*), but they are only entitled to profits or interest and not both, nor partly to one and partly to the other (*g*).

Share of profits.

Such share of the profits, &c., &c.—It is often a matter of much difficulty to ascertain how much of the profits made since the dissolution is attributable to the use of a retired or deceased partner's share in the assets and how much is attributable to the skill and conduct of the continuing partners. Every case must depend on its own circumstances and as pointed out by Wigram, V.-C. in *Willett* v. *Blanford* (1841) (*h*), "the nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the late partnership and the deceased partner at the time of his death, and the conduct of the parties after his death may materially affect the rights of the parties." It was by taking into consideration such facts as these that in the cases of *Simpson* v. *Chapman* (1853) (*i*), and *Wedderburn* v. *Wedderburn* (1836) (*k*), the continuing partners were held not liable to account for profits made after dissolution. The proportion in which profits were divided before the dissolution appears to have little or no bearing on this question (*l*).

Remuneration to continuing partners.

This section is silent as to the allowance of any remuneration to the continuing partners for their trouble in carrying on the business and earning the profits; it has been usual in such cases to allow remuneration (*m*), unless the partner claiming it is a trustee and guilty of a breach of trust (*n*). It is submitted that in a proper case the Court will still be able to make such allowances (see § 46).

Interest.

Interest at five per cent. per annum; this is simple interest. If the partners are also trustees and bound to accumulate, compound interest may be charged against them (*o*), but the liability to compound interest is a liability *qua* trustee and not *qua* partner and is therefore beyond the scope of this section.

Parties to action.

The proper persons to bring an action against the continuing partners for the share of the deceased partner are the executors, but if they stand in such a position with regard to the surviving partners that they cannot fairly prosecute the rights of the parties interested in their testator's estate, the persons so interested may sue (*p*).

(*f*) *Vyse* v. *Foster* (1872), 8 Ch. p. 334.

(*g*) *Vyse* v. *Foster* (1874), L. R. 7 H. L. p. 336.

(*h*) 1 Hare, 253, at p. 272.

(*i*) 4 De G. M. & G. 154.

(*k*) 2 Keen, 722; 4 M. & Cr. 41; and 22 Beav. 84.

(*l*) *Yates* v. *Finn* (1880), 13 Ch. D. 843.

(*m*) *Yates* v. *Finn* (1880), 13 Ch. D. 839, and other cases cited, "Partnership," p. 528.

(*n*) *Stocken* v. *Dawson* (1845), 6 Beav. 371, and 9 Beav. 247, and "Partnership," p. 528.

(*o*) See *Jones* v. *Foxall* (1852), 15 Beav. 388, and "Partnership," p. 531.

(*p*) *Travis* v. *Milne* (1851), 9 Hare, 141; *Beningfield* v. *Baxter* (1887), 12 App. Ca. pp. 178—179.

Section 42.

SCOTCH LAW.

tgoing rtner's assets t in firm.

Scotch Law.

This is the existing law, *Laird* v. *Laird* (1855) (*q*). In the two earlier cases of *Minto* v. *Kirkpatrick* (1833) (*r*) and *McMurray* (1852) (*s*), the Court (in the latter case being much divided) awarded only five per cent. interest, on the ground that the claim being by a child of the deceased partner for *legitim*, which was a debt of the deceased's estate as at his death, no more than legal interest was due. The principles given effect to in *Laird*, *supra*, were also applied where two partners, being trustees of a third party (not a deceased partner), employed the trust funds in the business; and it was held that, in ascertaining the profits made on the trust funds, there must be taken into account, not only the input capital of all the partners, but funds obtained on loan or otherwise and invested in the partnership business; and that the proportion which the trust monies in the business bore to the whole funds so employed regulated the share of profits to be paid to the beneficiaries under the trust: *Cochrane* v. *Black* (1855–57) (*t*). In this case the rate of interest to which, as an alternative to profit, beneficiaries were entitled, in the case of a trustee dealing with the estate for his own behoof, was stated by Lord Wood as "five per cent. or four per cent. according to circumstances,—five per cent. being the lowest rate when the funds have been embarked in trade,—the law presuming that every business yielded a profit to that amount" (*u*).

SUB-SECTION 2.

-section (2).

The proviso contained in the second sub-section of this section is in accordance with the statement of the law by Lord Cairns in *Vyse* v. *Foster* (1874) (*x*). It deals with the case of an option to purchase, as in *Willett* v. *Blanford* (1841) (*y*), and not with an executed contract to purchase, which was the case in *Vyse* v. *Foster* (1874) (*z*). In the latter case the continuing partners will not in the absence of fraud be liable to account for profits, unless by neglecting to fulfil some condition, or not complying with some stipulation of the essence of the contract, or otherwise, they repudiate or give the representatives of the deceased partner a right to rescind the contract (*a*).

As to the construction of clauses giving an option of purchase, see "Partnership," pp. 423 *et seq.*, and 429 *et seq.*

As to the evidence upon which accounts are taken, see "Partnership," pp. 536 *et seq.*

The amount due from the continuing partners under this section is a debt (see *infra*, § 43 and notes), and the liability is therefore joint in England and joint and several in Scotland (see *supra*, § 9).

(*q*) 17 D. 984.
(*r*) 11 S. 632.
(*s*) 14 D. 1048.
(*t*) 17 D. 321; 19 D. 1019.
(*u*) 17 D. 331, foot.
(*x*) L. R. 7 H. L. p. 329.
(*y*) 1 Ha. 253.
(*z*) 8 Ch. 309, and L. R. 7 H. L. 318, see p. 337.
(*a*) See per Lord Cairns, L. R. 7 H. L. pp. 334, 335.

43. Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death.

Retiring or deceased partner's share to be a debt.

This section is in accordance with the previous law (*b*). The surviving or continuing partners not being trustees, the Statute of Limitations will run in their favour from the date of the dissolution or death (*c*), and their liability will be joint in England and joint and several in Scotland (see § 9). If in addition to being partners they are trustees, or liable as trustees, the statute will still run in their favour, except in the cases mentioned in the Trustee Act, 1888 (*d*), but their liability to account to their *cestuis que trustent* will be joint and several.

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Scotch Law.

This section proceeds on the footing that there is no winding up, but that by contract, the value of a deceased or retiring partner's share is to be ascertained and paid out. Accordingly the date, unless otherwise stipulated, at which the value falls to be ascertained will be the date of dissolution. The amount thus becomes a debt bearing interest from that date. This was illustrated in *Ewing and Co.* v. *Ewing* (1882) (*e*), where, however, the amount was payable by instalments, and a question arose as to interest. See also Bell's Commentaries (*f*). But where a deceased partner's share was to be paid out according to the prior balance, and the firm became totally insolvent between the date of that balance and the partner's death, it was held that the firm was not liable for the value of the deceased partner's share as ascertained by the prior balance: *Blair* v. *Douglas Heron & Co.* (1776-77) (*g*).

44. In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:

Rule for distribution of assets on final settlement of accounts.

(*a.*) Losses, including losses and deficiences of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits:

(*b*) *Knox* v. *Gye* (1871), L. R. 5 H. L. 656.

(*c*) See ib. and "Partnership," pp. 508 *et seq.*

(*d*) 51 & 52 Vict. *c.* 59, § 8.

(*e*) 10 R. (H. L.) 1, 8 App. Ca. 822, per Lord Young, p. 3, and Lord Bramwell, pp. 9—10.

(*f*) 2. 535.

(*g*) M. 14,577, Affd. 6 Paton, 796.

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(*h.*) The assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiences of capital, shall be applied in the following manner and order :

1. In paying the debts and liabilities of the firm to persons who are not partners therein :
2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital :
3. In paying to each partner rateably what is due from the firm to him in respect of capital :
4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

"Partnership," pp. 401 *et seq.*

This section follows almost word for word the statement of the law n "Partnership," p. 402, and the cases there quoted may be referred to to illustrate and explain the present section. It is open to partners to modify the rules contained in this section by agreement.

It should be remembered that, in the absence of any agreement, partners are entitled to share profits and are bound to contribute to losses, whether of capital or otherwise, equally. See *supra*, § 24 (1).

As to what advances a partner is entitled to be repaid by the firm, and to his right to interest thereon, see *supra*, § 24 (3).

As to the right of a partner to have the partnership assets applied in the way mentioned in this section, see *supra*, § 39.

Scotch Law.

Scotch Law. Distribution of assets and losses.

This section appears to be in conformity with legal principle and practice in Scotland (*h*). In the case of loss the principle is tested where one partner contributes all the capital, and yet the profits are shared equally. In that case any undivided profits would, in the first place, be applied in meeting losses. This would fall equally on both partners. Then the whole capital of the monied partner would be absorbed, there being no corresponding contribution by the other partner. Lastly the other funds of both partners would be put under equal contribution.

(*h*) Erskine, III. 3, 27 ; 2 Bell's Com. 535.

Supplemental.

45. In this Act, unless the contrary intention appears,— Definitions of "court" and "business."

The expression "court" includes every court and judge having jurisdiction in the case:

The expression "business" includes every trade, occupation, or profession.

Court.—By section 34 (3) of the Judicature Act, 1873 (36 & 37 Vict. c. 66), all causes and matters for the dissolution of partnerships or the taking of partnership and other accounts, are assigned to the Chancery Division of the High Court of Justice, but this is subject to any arrangement which may be made by any rules of Court or orders of transfer to be made under the authority of the Act. (See § 33.) Chancery Division.

By the Chancery of Lancaster Act, 1890 (53 & 54 Vict. c. 23, § 3), the Court of Chancery of the County Palatine of Lancaster has, as regards persons and property subject to its jurisdiction, similar powers and jurisdiction to those exercised by the Chancery Division of the High Court. County Palatine of Lancaster.

By the County Courts Act, 1888 (51 & 52 Vict. c. 43, § 67), the County Court is empowered to exercise all the powers and authority of the High Court in actions or matters for the dissolution or winding up of any partnership in which the whole property, stock and credits of the partnership do not exceed in amount or value the sum of £500. If during the progress of any action or matter it should appear that the value of the partnership property exceeds this amount, it is the duty of the judge to direct the action to be transferred to the Chancery Division of the High Court; but it is open to any party to apply to a judge of the Chancery Division in chambers for an order directing the action or matter to be carried on in the County Court notwithstanding such excess, and the Judge may make an order for this purpose (see § 68). If any action or matter is pending in the Chancery Division which might have been commenced in the County Court, any party may apply to the Judge of the Chancery Division, to whom the action or matter is attached, to have the same transferred to the County Court, and the judge may upon such application, or without it if he should think fit, order this to be done (see § 69). County Court.

For the power of the Judge in Lunacy to dissolve a partnership in the case of the lunacy of a partner, see the Lunacy Act, 1890 (53 Vict. c. 5, §§ 108, 119 & 341), and *supra*, § 35, p. 86. Judge in Lunacy.

Business.—The meaning of the word business has often come before the Courts, both in connection with § 4 of the Companies Act, 1862 (*h*), and with restrictive covenants against carrying on any business (*i*). The meaning

(*h*) See *Harris* v. *Amery* (1865), L. R. 1 C. P. at p. 155; *Smith* v. *Anderson* (1880), 15 Ch. Div. 247, and other cases cited in Lindley on the Law of Companies, p. 114.

(*i*) See *Rolls* v. *Miller* (1884), 27 Ch. Div. 71; *Bramwell* v. *Lacy* (1879), 10 Ch. D. 691, and other cases

Section 45.

of the word in this Act is very wide, but probably not wider than its ordinary meaning as given in dictionaries (*k*).

Interpretation Act, 1889.

By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), the following words, which occur in the present Act, have the meanings mentioned below, unless a contrary intention appears.

Masculine. Singular.

Words importing the masculine gender include females, and words in the singular include the plural, and words in the plural include the singular (52 & 53 Vict. c. 63, § 1).

County Court.

"County Court" means, as respects England and Wales, a Court under the County Courts Act, 1888 (*ib.* § 6), and, as respects Ireland, a civil bill Court within the meaning of the County Officers and Courts (Ireland) Act, 1877 (*ib.* § 29).

High Court.

"High Court," when used with reference to England or Ireland, means Her Majesty's High Court of Justice in England or Ireland, as the case may be (*ib.* § 13 (3)).

Land.

"Land" includes messuages, tenements and hereditaments, houses and buildings of any tenure (*ib.* § 3).

Person.

"Person" includes any body of persons corporate or incorporate (*ib.* § 19).

Writing.

"Writing." Expressions referring to writing shall be construed as including references to printing, lithography, photography, and other modes of representing or reproducing words in a visible form (*ib.* § 20).

Scotch Law.

Scotch Law. Court.

The sections of the statute in which the "Court" is mentioned are 35, 39, 40 and 42.

Dissolution.

Section 35.—Under this section, on an application by a partner, the Court may decree a dissolution of the partnership in any of the cases specified. There is no trace of any such jurisdiction having been exercised by the Sheriff Court. Such applications generally take the form of a petition to the Court of Session (Junior Lord Ordinary) for the appointment of a judicial factor to wind up the partnership estate: *Macpherson* v. *Richmond* (1869), *Eadie* v. *MacBean's Curator bonis* (1885) (*l*); and the Sheriff Court has not jurisdiction to appoint judicial factors in partnership estates. The Judicial Factors (Scotland) Act, 1880 (*ll*), from which the Sheriff Court jurisdiction in the appointment of judicial factors (with a single exception) flows, declares judicial factor to mean *factor loco tutoris* and *curator bonis*. Again, if the action take the form of a declarator (as was suggested in the case of *Eadie*) (*m*), it would be incompetent in the Sheriff Court, as not falling within the Sheriff Court (Scotland) Act, 1877 (*n*).

Form of action to dissolve firm.

Although questions of this kind have been disposed of under petitions to the Court for the appointment of a judicial factor to wind up a partnership

collected in Kerr on Injunctions (3rd edition), p. 441.

(*k*) See per Jessel, M.R., in *Smith* v. *Anderson* (1880), 15 Ch. Div. p. 258.

(*l*) 41 Scot. Jurist, 288; 12 R. 660.

(*ll*) 43 & 44 Vict. c. 4, §§ 3 & 4.

(*m*) 12 R. 665, 669.

(*n*) 40 & 41 Vict. c. 50, § 3; see *Wilson* v. *Co-operative Store Co.* (1885), 13 R. 21.

concern, an action of declarator, with conclusion for dissolution, appears to be the more appropriate form of procedure. On the dissolution being decreed there may be no need for a judicial winding up, if there be surviving, competent and reliable partners willing to undertake the work. See notes on section 39, *supra*, p. 103. Section 46.

See Mackay's Court of Session Practice (*o*) and Dove Wilson's Sheriff Court Practice (*p*).

Section 39.—The Court in this case is the Court of Session (Junior Lord Ordinary). Winding up.

Sections 40 *and* 42.—Actions under these sections will be competent both in the Sheriff Court and in the Court of Session. Apportionment of premium. Accounting for profits.

46. The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act. Saving for rules of equity and common law.

A similar provision is found in the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61, § 97 (2)); the object of such a section is to meet cases not dealt with by the other sections of the Act (*q*).

It may be convenient here to give a short summary of the changes introduced into English law by the present Act, and of the doubtful points which have been settled by it.

Changes in English Law.

Section 23 introduces a new method of making a partner's share in the partnership assets available for the payment of his separate judgment debts. See *supra*, pp. 57 *et seq.* See also § 33 (2). Section 23.

Probably the assignment or mortgage by a partner of his share in the partnership assets does not in any case dissolve the partnership nor give the other partners a right to dissolve. See *supra*, pp. 77 *et seq.* Section 31.

The power of the Court to decree the dissolution of a partnership is extended by § 33 (*f*) and perhaps also by § 33 (*c*). See *supra*, pp. 91 *et seq.* Section 35.

It is doubtful whether the doctrine of holding out has been extended by the words "knowingly suffers" in §§ 14 (1) and 38. See *supra*, p. 38. Section 14.

Possibly § 15 has made the admissions of a partner concerning the partnership affairs made in the ordinary course of business evidence against his co-partners in criminal cases. See *supra*, p. 41. Section 15.

Section 16 may have made notice to a partner who habitually acts in the partnership business notice to the firm, though he was not acting in the partnership business when he received the notice. See *supra*, p. 41. Section 16.

Doubtful Points Settled.

A servant remunerated by a share of profits has a right to an account. See *supra*, pp. 20 & 21. Section 2 (3) (*b*).

(*o*) I. Ch. XI.
(*p*) Ch. II. & III.
(*q*) *In re Gillespie*, 18 Q. B. D. 286, at pp. 292—293.

Section 46. A partner who has in fact no authority to bind the firm will not bind it by dealings with a person who does not know or believe him to be a partner. See *supra*, p. 27.

ection 5.

ection 7. A person who takes a partnership security from a partner in discharge of a separate claim against him, cannot make the firm liable by proving that he believed the partner had authority to give the security. See *supra*, p. 29.

ection 8. An act done by one partner in contravention of an agreement between the partners is not binding on the firm in respect of persons who have notice of the agreement. See *supra*, p. 30.

ection 10. An action in deceit for damages will lie against the firm for the fraud of a partner committed in the ordinary course of the partnership business. This was perhaps doubtful. See *supra*, pp. 33 & 34.

ection 24. Section 24 (8) settles the powers of a majority of partners to bind the minority. See *supra*, p. 68.

ection 26. A partnership constituted by deed may be dissolved by a notice in writing. See *supra*, p. 71.

ection 31. Section 31 settles the extent of the right to an account enjoyed by the assignee of a partner's share in the partnership. See *supra*, pp. 76 *et seq.*

ection 35 (*a*). A decree for the final dissolution of a partnership on the ground of the insanity of a partner may be made in an action commenced by the next friend of the partner of unsound mind. See *supra*, p. 86.

ection 38. Section 38 settles the extent of the authority of a partner to bind the firm after the dissolution of the partnership. See *supra*, p. 100.

ection 40. The rules upon which a Court is to act in apportioning a premium where a partnership has been prematurely dissolved are settled by § 40. See *supra*, p. 104.

ection 41. The indemnity to which a person, who has been induced to enter into partnership by fraud or misrepresentation, is entitled is settled by § 41. See *supra*, p. 106.

Scotch Law.

Scotch Law. By the Interpretation Act, 1890, 52 & 53 Vict. c. 63, § 19, "person," it is declared, "shall, unless the contrary intention appears, include any body of persons corporate or unincorporate." It would appear, therefore, that companies and firms can, if allowed by their own constitutions, enter into partnerships, and this is in accordance with the law as stated by Professor Bell. "One company frequently becomes a member of another company. This is quite legal" (*r*). See *Fraser* v. *City of Glasgow Bank* (1879) (*s*), *Gillespie and Paterson* v. *same* (1879) (*t*).

Who may be a partner.

nother company or firm.

Minor. Any person of sound mind may become a partner with others. A pupil, being incapable of consent, cannot be a partner, but a minor may with consent of his curators, if he has such, if not by his own act; subject, however, to the protection which the law affords by an action of reduction

(*r*) 2 Bell's Com. 574.
(*s*) 6 R. 1259.
(*t*) 6 R. 714.

within the *quadriennium utile* (*u*): *Hill* v. *City of Glasgow Bank* (1879) (*x*), and prior cases. Section 47.

As to married women, see *supra*, § 35 (*b*), pp. 89 *et seq.* Married woman.

See also under sections 9 and 39.

47.—(1.) In the application of this Act to Scotland the bankruptcy of a firm or of an individual shall mean sequestration under the Bankruptcy (Scotland) Acts, and also in the case of an individual the issue against him of a decree of cessio bonorum. Provision as to bankruptcy in Scotland.

(2.) Nothing in this Act shall alter the rules of the law of Scotland relating to the bankruptcy of a firm or of the individual partners thereof.

Scotch Law.

SUB-SECTION 1.

It would be out of place here to deal with the various questions arising on the bankruptcy of firms and partners in Scotland. Bankruptcy is defined to mean (1) sequestration under the Bankruptcy Scotland Acts, whether of the individual or of a partner; and (2) the issue of a decree of *cessio bonorum* against an individual. Cessio of a firm is not included, though it is believed to be competent, the term "debtor" bearing the same meaning under the Cessio as under the Bankruptcy Acts; and "Cessio is in practice a not uncommon mode of liquidating small trading firms" (*y*). The only part of the statute where bankruptcy is specially mentioned is § 33, sub-section (1), where it is enacted that subject to any agreement to the contrary every partnership is dissolved by the bankruptcy of any partner. Scotch Law. Sub-section (1). Definition of bankruptcy.

SUB-SECTION 2.

A firm may be sequestrated while the partners or some of them remain solvent, and conversely one or more partners may be sequestrated while the firm remains solvent. The sequestrations of the firm and partners are separate proceedings. The most important point is the ranking of creditors. The leading rules may be deduced from the doctrine of the separate *persona* of the firm, and the liability of the individual partners as co-obligants or cautioners for the firm debts; and may be stated thus:— Sub-section (2). Rules for ranking creditors on firm and partner's estates.

1. In the sequestration of the firm, the firm's creditors rank on the firm estate for the full amount of their debts, to the exclusion of the separate creditors of the partners.

2. They may also rank, along with the private creditors of the partners, on the individual estates of the partners, for the balance of the firm debt, after valuing and deducting the claim against the firm estate, and the claim

(*u*) Erskine, I. 7, 38.
(*x*) 7 R. 68.
(*y*) Goudy on Bankruptcy, p. 441.

Sections 47—50.

against the other partners, so far as they may be liable to relieve the bankrupt partner.

3. But such a claim on a partner's estate can only be made by proper creditors of the firm, and not by a creditor who is also a partner.

4. Again, in the bankruptcy of a partner the firm may rank on his estate for any sum due in respect of contribution of capital, over-drafts or otherwise; and if the firm be itself bankrupt its trustee may so rank on the partner's estate; and that without prejudice in the latter case to the firm's creditors claiming under rule 2, *supra*.

5. Where a firm is bankrupt the partners have no claim on its estate for over-advances, but only on each other's private estates for the balance due in a mutual accounting.

6. In the bankruptcy of a partner his creditors have a claim against the firm, for his share and interest in the concern after deduction of debts.

On this subject generally, see Bell's Commentaries (*a*), and Goudy on Bankruptcy (*b*).

Repeal.

48. The Acts mentioned in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule.

Commencement of Act.

49. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-one.

Short title.

50. This Act may be cited as the Partnership Act, 1890.

SCHEDULE.

Section 48.

ENACTMENTS REPEALED.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
19 & 20 Vict. c. 60 .	The Mercantile Law Amendment (Scotland) Act, 1856.	Section seven (*e*).
19 & 20 Vict. c. 97 .	The Mercantile Law Amendment Act, 1856.	Section four (*e*).
28 & 29 Vict. c. 86 .	An Act to amend the law of partnership.	The whole Act (*d*).

(*a*) II. 547 *et seq.*
(*b*) 560 *et seq.*
(*c*) See *supra*, § 18.
(*d*) See *supra*, §§ 2 (3), (*b*), (*c*) (*d*), (*e*), and 3.

APPENDIX I.

PARTNERSHIP ACT, 1890.

53 & 54 VICT. CAP. 39.

ARRANGEMENT OF SECTIONS.

Nature of Partnership

Sect.
1. Definition of partnership.
2. Rules for determining existence of partnership.
3. Postponement of rights of person lending or selling in consideration of share of profits in case of insolvency.
4. Meaning of firm.

Relations of Partners to persons dealing with them.

5. Power of partner to bind the firm.
6. Partners bound by acts on behalf of firm.
7. Partner using credit of firm for private purposes.
8. Effect of notice that firm will not be bound by acts of partner.
9. Liability of partners.
10. Liability of the firm for wrongs.
11. Misapplication of money or property received for or in custody of the firm.
12. Liability for wrongs joint and several.
13. Improper employment of trust-property for partnership purposes.
14. Persons liable by "holding out."
15. Admissions and representations of partners.
16. Notice to acting partner to be notice to the firm.
17. Liabilities of incoming and outgoing partners.
18. Revocation of continuing guaranty by change in firm.

Relations of Partners to one another.

19. Variation by consent of terms of partnership.
20. Partnership property.
21. Property bought with partnership money.
22. Conversion into personal estate of land held as partnership property.
23. Procedure against partnership property for a partner's separate judgment debt.
24. Rules as to interests and duties of partners subject to special agreement.
25. Expulsion of partner.
26. Retirement from partnership at will.
27. Where partnership for term is continued over, continuance on old terms presumed.
28. Duty of partners to render accounts, &c.
29. Accountability of partners for private profits.
30. Duty of partner not to compete with firm.
31. Rights of assignee of share in partnership.

Sections 1—2.

Dissolution of Partnership and its consequences.

Sect.
32. Dissolution by expiration or notice.
33. Dissolution by bankruptcy, death, or charge.
34. Dissolution by illegality of partnership.
35. Dissolution by the Court.
36. Rights of persons dealing with firm against apparent members of firm.
37. Right of partners to notify dissolution.
38. Continuing authority of partners for purposes of winding up.
39. Rights of partners as to application of partnership property.
40. Apportionment of premium where partnership prematurely dissolved.
41. Rights where partnership dissolved for fraud or misrepresentation.
42. Right of outgoing partner in certain cases to share profits made after dissolution.
43. Retiring or deceased partner's share to be a debt.
44. Rule for distribution of assets on final settlement of accounts.

Supplemental.

45. Definitions of "court" and "business."
46. Saving for rules of equity and common law.
47. Provision as to bankruptcy in Scotland.
48. Repeal.
49. Commencement of Act.
50. Short title.

SCHEDULE.

An Act to declare and amend the Law of Partnership.

[14th *August* 1890.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Nature of Partnership.

Definition of partnership. [Pp. 13—16.]

1.—(1.) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.

(2.) But the relation between members of any company or association which is—

25 & 26 Vict. c. 89.

(*a.*) Registered as a company under the Companies Act, 1862, or any other Act of Parliament for the time being in force and relating to the registration of joint stock companies ; or

(*b.*) Formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter ; or

(*c.*) A company engaged in working mines within and subject to the jurisdiction of the Stannaries :

is not a partnership within the meaning of this Act.

Rules for determining existence of partnership. [Pp. 16—22.]

2. In determining whether a partnership does or does not exist, regard shall be had to the following rules :

(1.) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof

(2.) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3.) The receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

(*a.*) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such:

(*b.*) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such:

(*c.*) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such:

(*d.*) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto:

(*e.*) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

Postponement of rights of person lending or selling in consideration of share of profits in case of insolvency.

[P. 22.]

3. In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied.

Meaning of firm.

[Pp. 22—25.]

4.—(1.) Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name.

(2.) In Scotland a firm is a legal person distinct from the partners of

Sections 4—12.

whom it is composed, but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief *pro ratâ* from the firm and its other members.

Relations of Partners to persons dealing with them.

Power of partner to bind the firm.
[Sc. 26—28.]

5. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

Partners bound by acts on behalf of firm.
[Sc. 28, 29.]

6. An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners.

Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.

Partner using credit of firm for private purposes.
[Sc. 29, 30.]

7. Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner.

Effect of notice that firm will not be bound by acts of partner.
[Sc. 30, 31.]

8. If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

Liability of partners.
[Sc. 31—33.]

9. Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts.

Liability of the firm for wrongs.
[Sc. 33, 34.]

10. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his copartners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

Misapplication of money or property received for or in custody of the firm.
[Sc. 35.]

11. In the following cases; namely—

(*a.*) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

(*b.*) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm;

the firm is liable to make good the loss.

Liability for wrongs joint and several.
[Sc. 36.]

12. Every partner is liable jointly with his copartners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections.

Sections 13—20.

13. If a partner, being a trustee, improperly employs trust-property in the business or on the account of the partnership, no other partner is liable for the trust-property to the persons beneficially interested therein :

Improper employment of trust-property for partnership purposes.

Provided as follows :—

(1.) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust ; and

[Pp. 36, 37.]

(2.) Nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control.

Persons liable by "holding out."

14.—(1.) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

[Pp. 38—40.]

(2.) Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors or administrators estate or effects liable for any partnership debts contracted after his death.

Admissions and representations of partners.

15. An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.

[Pp. 40, 41.]

Notice to acting partner to be notice to the firm.

16. Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

[Pp. 41, 42.]

Liabilities of incoming and outgoing partners.

17.—(1.) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

(2.) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

[Pp. 42—46.]

(3.) A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

Revocation of continuing guaranty by change in firm.

18. A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given.

[Pp. 46—48.]

Relations of Partners to one another.

Variation by consent of terms of partnership.

19. The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.

[Pp. 49, 50.]

Partnership property.

20.—(1.) All property and rights and interests in property originally

[Pp. 50—54.]

ections 20—24.

brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

(2.) Provided that the legal estate or interest in any land, or in Scotland the title to and interest in any heritable estate, which belongs to the partnership shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.

(3.) Where co-owners of an estate or interest in any land, or in Scotland of any heritable estate, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase.

roperty bought ith partner- hip money.

21. Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on the account of the firm.

Pp. 54, 55.]

onversion into ersonal estate f land held as artnership roperty.

22. Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal or moveable and not real or heritable estate.

Pp. 55—57.]

Procedure gainst partner- hip property or a partner's eparate judg- nent debt.

23.—(1.) After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm.

Pp. 57—60.]

(2.) The High Court, or a judge thereof, or the Chancery Court of the county palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

(3.) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same.

(4.) This section shall apply in the case of a cost-book company as if the company were a partnership within the meaning of this Act.

(5.) This section shall not apply to Scotland.

Rules as to interests and duties of partners sub- ject to special agreement.

24. The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules :

[Pp. 61—69.]

(1.) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.

(2.) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—

(*a.*) In the ordinary and proper conduct of the business of the firm : or,

(*b.*) In or about anything necessarily done for the preservation of the business or property of the firm.

(3.) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per cent. per annum from the date of the payment or advance.

(4.) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.

(5.) Every partner may take part in the management of the partnership business.

(6.) No partner shall be entitled to remuneration for acting in the partnership business.

(7.) No person may be introduced as a partner without the consent of all existing partners.

(8.) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.

(9.) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them.

Expulsion of partner.

25. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

[Pp. 69, 70.]

Retirement from partnership at will.

26.—(1.) Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners.

(2.) Where the partnership has originally been constituted by deed, a notice in writing, signed by the partner giving it, shall be sufficient for this purpose.

[Pp. 70—72.]

Where partnership for term is continued over, continuance on old terms presumed.

27.—(1.) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.

(2.) A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership.

[Pp. 72, 73.]

Duty of partners to render accounts, &c.

28. Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

[Pp. 73, 74.]

Accountability

29.—(1.) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction

Sections 29—35.

of partners for private profits.
[Pp. 74, 75.]

concerning the partnership, or from any use by him of the partnership property name or business connexion.

(2.) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

Duty of partner not to compete with firm.
[P. 76.]

30. If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.

Rights of assignee of share in partnership.
[Pp. 76—79.]

31.—(1.) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

(2.) In the case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

Dissolution of Partnership, and its consequences.

Dissolution by expiration or notice.
[Pp. 80, 81.]

32. Subject to any agreement between the partners, a partnership is dissolved—

(*a.*) If entered into for a fixed term, by the expiration of that term:

(*b.*) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking:

(*c.*) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice.

Dissolution by bankruptcy, death, or charge.
[Pp. 81—84.]

33.—(1.) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

(2.) A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

Dissolution by illegality of partnership.
[Pp. 84, 85.]

34. A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership.

Dissolution by the Court.
[Pp. 85—95.]

35. On application by a partner the Court may decree a dissolution of the partnership in any of the following cases:

(*a.*) When a partner is found lunatic by inquisition, or in Scotland by cognition, or is shown to the satisfaction of the Court to be of permanently unsound mind, in either of which cases the application

may be made as well on behalf of that partner by his committee or next friend or person having title to intervene as by any other partner :

(*b.*) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract :

(*c.*) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business :

(*d.*) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him :

(*e.*) When the business of the partnership can only be carried on at a loss :

(*f.*) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.

Rights of persons dealing with firm against apparent members of firm.
[Pp. 95—99.]

36.—(1.) Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

(2.) An advertisement in the London Gazette as to a firm whose principal place of business is in England or Wales, in the Edinburgh Gazette as to a firm whose principal place of business is in Scotland, and in the Dublin Gazette as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.

(3.) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

Right of partners to notify dissolution.
[Pp. 99, 100.]

37. On the dissolution of a partnership or retirement of a partner any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.

Continuing authority of partners for purposes of winding up.
[Pp. 100, 101.]

38. After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

Provided that the firm is in no case bound by the acts of a partner who has become bankrupt ; but this proviso does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt.

Rights of partners as to application of partnership property.
[Pp. 101—104.]

39. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and

Sections 39—44.

to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm.

Apportionment of premium where partnership prematurely dissolved. [Pp. 104—106.]

40. Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless

(*a.*) the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium, or

(*b.*) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.

Rights where partnership dissolved for fraud or misrepresentation. [Pp. 106, 107.]

41. Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(*a.*) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and is

(*b.*) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and

(*c.*) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm.

Right of outgoing partner in certain cases to share profits made after dissolution. [Pp. 107—110.]

42.—(1.) Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent. per annum on the amount of his share of the partnership assets.

(2.) Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

Retiring or deceased partner's share to be debt. [P. 111.]

43. Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death.

Rule for distribution of [Pp. 111, 112.]

44. In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:

(*a.*) Losses, including losses and deficiences of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits : Sections 44—50 assets on final settlement of accounts.

(*b.*) The assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order : [Pp. 111, 112.]

1. In paying the debts and liabilities of the firm to persons who are not partners therein :
2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital :
3. In paying to each partner rateably what is due from the firm to him in respect of capital :
4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

Supplemental.

45. In this Act, unless the contrary intention appears,— Definitions of "court" and "business."

The expression "court" includes every court and judge having jurisdiction in the case :

The expression "business" includes every trade, occupation, or profession. [Pp. 113—115.]

46. The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act. Saving for rules of equity and common law.

47.—(1.) In the application of this Act to Scotland the bankruptcy of a firm or of an individual shall mean sequestration under the Bankruptcy (Scotland) Acts, and also in the case of an individual the issue against him of a decree of cessio bonorum. [Pp. 115, 116.] Provision as to bankruptcy in Scotland.

(2.) Nothing in this Act shall alter the rules of the law of Scotland relating to the bankruptcy of a firm or of the individual partners thereof. [Pp. 117, 118.]

48. The Acts mentioned in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule. Repeal.

49. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-one. Commencement of Act.

50. This Act may be cited as the Partnership Act, 1890. Short title

SCHEDULE.

ENACTMENTS REPEALED. Section 48.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
19 & 20 Vict. c. 60 .	The Mercantile Law Amendment (Scotland) Act, 1856.	Section seven.
19 & 20 Vict. c. 97 .	The Mercantile Law Amendment Act, 1856.	Section four.
28 & 29 Vict. c. 86 .	An Act to amend the law of partnership.	The whole Act.

APPENDIX II.

ADDENDA TO "PARTNERSHIP."

N.B.—*This Addenda does not contain references to the Partnership Act*, 1890, *nor, as a rule, to any new cases which are mentioned in the Notes to that Act.*

Page 72, line 5. After "engaged" add, "although he may be a British subject." *Macartney* v. *Garbutt*, 24 Q. B. D. 368. But this privilege may be lost by an express condition to the contrary made at the time the minister is received. *Ib.*

„ 91, note (*b*). Add and compare *Swaine* v. *Wilson*, 24 Q. B. Div. 252; *Collins* v. *Locke*, 4 App. Ca. 674.

„ 98, note (*l*). Add *The Pharmaceutical Soc.* v. *Wheeldon*, 24 Q. B. D. 683.

„ 106, line 6 from bottom. After (*o*) add, "wholly or in part;" and see *Kearley* v. *Thompson*, 24 Q. B. Div. 742.

„ 113, note (*k*). Add *Kenrick & Co.* v. *Lawrence & Co.*, 25 Q. B. D. p. 106.

„ 114, line 14 *et seq.* As to the right of a person to carry on business in his own name, and to allow other persons to do so, see *Turton* v. *Turton*, 42 Ch. Div. 128; *Tussaud* v. *Tussaud*, 44 Ch. D. 678; and *Lewis's* v. *Lewis*, 45 Ch. D. p. 284.

„ 114, note (*y*). Before *Hendriks* v. *Montagu* add *Tussaud* v. *Tussaud*, 44 Ch. D. 678.

„ 117. After line 12, add, "By 53 Vict. c. 5 (The Lunacy Act, 1890), §§ 30 & 32, certain persons *and their partners* are disqualified from signing lunacy certificates; and by The Companies Winding up Rules, 1890 (rr. 156, 157 and 158), the partners of the liquidator of a company or of a member of the committee of inspection are forbidden to deal with the assets of the company or to derive any profit from any transaction arising in the winding up, without the express sanction of the Court.

Page 140, note (*h*). The statutes mentioned are now repealed and replaced by the Factors Act, 1889 (52 & 53 Vict. c. 45); and, as to Scotland, by the Factors (Scotland) Act, 1890 (53 & 54 Vict. c. 40). Add to the cases quoted, *Cole* v. *North Western Bank*, L. R. 10 C. P. 354.

„ 141, note (*i*). Add *Niemann* v. *Niemann*, 43 Ch. Div. 198.

„ 162, note (*i*), } Add *Hancock* v. *Smith*, 41 Ch. D. 456. As to the limi-
„ 228, note (*a*). } tations of this doctrine, see *Lister* v. *Stubbs & Co.*, 45 Ch. Div. 1.

„ 163, notes } Add, *Derry* v. *Peek*, 14 App. Ca. 337.
(*k*) and (*l*). }

„ 227. As to the onus upon a creditor, seeking to appropriate payments made by a deceased debtor in a manner greatly to his disadvantage, to show that no appropriation was made by the debtor, see *Lowther* v. *Heaver*, 41 Ch. Div. 248.

„ 228, note (*a*). } After reference to *Hallett's Estate*, add *Hancock* v.
„ 234, note (*t*). } *Smith*, 41 Ch. D. 456.

„ 256, note (*a*). Add *Field* v. *Robins*, 8 A. & E. 90.

„ 261, notes } 9 Geo. 4, c. 14, § 1, has been amended by the Statute
(*d*) and (*g*). } Law Revision Act, 1890, 53 & 54 Vict. c. 33.
„ 509.

„ 266, line 14. After "properly appeared," add, "or if none of them have appeared after proper service." See *Alden* v. *Beckley & Co.*, 25 Q. B. D. 543; and cases in notes (*q*) and (*r*).

266, line 15. After "but not," *read*, "if some only have appeared" (*r*).

„ 266, last line. A debt due from a firm under a judgment recovered against it in its mercantile name can now be attached under a garnishee order. See R. S. C., Order XLV., r. 10.

„ 274, line 5. For "they have been indorsed," *read* "the only or last indorsement is an indorsement;" and add a reference to the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), § 8 (3).

„ 276, last line. If the bill or note is signed in the firm name, and that name includes the name of a person who is not liable as a partner, it seems no longer necessary for such person to be a party to an action on the bill or note. See Bills of Exchange Act (45 & 46 Vict. c. 61) § 23 (2).

Page 285, line 9. An assignment by way of mortgage is an absolute assignment within the meaning of § 25, cl. 6, of the Judicature Act, 1873. *Tancred* v. *Delagoa Bay, &c., Co.*, 23 Q. B. D. 239.

„ 286, note (*b*). Add, reference to *Government of Newfoundland* v. *Newfoundland Rail. Co.*, 13 App. Ca. 199.

„ 289. As to execution against partners on a judgment against a firm, see *Davies & Co.* v. *André & Co.*, 24 Q. B. Div. p. 606; and also *Alden* v. *Barkley & Co.*, 25 Q. B. D. 548.

„ 317, note (*p*). Add "But the principal cannot follow the investments made by the agent by means of such profits": see *Lister & Co.* v. *Stubbs*, 45 Ch. Div. 1. See also *Boston Deep Sea Fishing Co.* v. *Ansell*, 39 Ch. Div. 369.

„ 345, line 3. After "debts" add "not."

„ 369, note (*f*); 381, note (*p*); 383, note (*a*). *Newington* v. *Adam* is now reported on appeal, 13 App. Ca. 308.

„ 372, note (*q*). Add "See also *Re Earl of Winchilsea's Policy Trusts*, 39 Ch. D. 168."

„ 396, note (*q*). *Colquhoun* v. *Brooks* is now reported on appeal in 14 App. Ca. 493. See also *Werle & Co.* v. *Colquhoun*, 20 Q. B. Div. 753, and *The New York Life Insurance Co.* v. *Styles*, 14 App. Ca. 381.

„ 401, note (*d*). See also *Lee* v. *Neuchatel Asphalte Co.*, 41 Ch. Div. p. 23.

„ 409, note (*l*). As to the different weight to be attached to a course of practice in a large company and in an ordinary partnership, see *Re Frank Mills Mining Co.*, 23 Ch. D. at p. 56.

„ 429, line 19. After "paid" add "But notwithstanding an agreement for the division of the partnership property, the court can order a sale if that appears to be most beneficial to the parties. It will also appoint a receiver and manager until sale: *Taylor* v. *Neate*, 39 Ch. D. 538."

„ 432, note (*s*); 559, (*s*). Qu. whether damages can be recovered from the estate of a deceased partner if his executors do not join the partnership in accordance with a covenant entered into by their testator: see *Downs* v. *Collins*, 6 Ha. 418.

„ 439, note (*a*). As to whether the transfer of the goodwill of a solicitor's business passes the custody of his clients' papers, see *James* v. *James & Bendall*, 22 Q. B. D. 669, note p. 675; this case was affirmed on another point, 23 ib. 12.

Page 439, note (*a*). Add "And now an agreement for its sale must bear an *ad valorem* stamp. See Revenue Act, 1889 (52 & 53 Vict. c. 42), § 15, which alters the law declared by *Commissioners of the Inland Revenue* v. *Angus & Co.*, 23 Q. B. Div. 579."

„ 440, note (*q*). Add "*Re Irish*, 40 Ch. D. 49, where on a sale by the court, the receiver and manager who had been carrying on the business until sale was not restrained from soliciting custom."

„ 441, note (*i*). Add "*Turton* v. *Turton*, 42 Ch. Div. 128; *Tussaud* v. *Tussaud*, 44 Ch. D. 678. In *Vernon* v. *Hallam*, 34 Ch. D. 748, there was a covenant not to carry on business under a particular name, which happened to be that of the defendant."

„ 446, line 7 (*et seq.*) A partner who has purchased his co-partner's share in the partnership, but has not bought the goodwill of the business nor the right to continue to use the partnership name, will not be restrained from selling the existing stock which bears the name of the firm. See *Gray* v. *Smith*, 43 Ch. Div. p. 221.

„ 446, line 15. After (*m*). Add "but not the right to expose him to any risk by so doing: *Thynne* v. *Shove*, 45 Ch. D. 577."

„ 452, paragraph 2 } 17 & 18 Vict. c. 125, § 11, is now repealed, and is replaced by the Arbitration Act, 1889 (52 & 53 Vict. c. 49). See Annual Practice, 1890—91, p. 147 *et seq.*
„ 515. }

„ 453, note (*r*). Add *Turncock* v. *Sartoris*, 43 Ch. Div. 150.

„ 453, line 12. After "commenced" add "where the point in dispute was really a question of law: *Re Carlisle*, 44 Ch. D. 200; *Lyon* v. *Johnson*, 40 Ch. D. 579; where one party was not willing to refer the whole dispute to arbitration: *Davis* v. *Starr*, 41 Ch. Div. 242. See also *Farrar* v. *Cooper*, 44 Ch. D. 323."

The Arbitration Act, 1889, does not seem to have materially altered the law as stated in the above page of the Partnership volume.

„ 480, note (*l*). Add "but statements as to the existence of a particular intention may be statements of a fact: *Edgington* v. *Fitzmaurice*, 29 Ch. Div. 459; *R.* v. *Gordon*, 23 Q. B. D. 354."

„ 480, note (*m*) }
„ 481, note (*p*) } Add *Derry* v. *Peek*, 14 App. Ca. 337.

„ 484, note (*a*). The question as to the extent of the right to indemnity was not decided in the House of Lords in *Adam* v. *Newbigging*, 13 App. Ca. 308.

Page 504, line 16. Add "but may be compelled to produce them after the hearing: see *Turney* v. *Bayley*, 34 Beav. 105."

„ 510, note (*s*). Add *Barton* v. *North Staffordshire Ry. Co.*, 38 Ch. D. 458.

„ 538, note (*b*). § 56 of the Jud: Act, 1873, has been amended, and § 57 repealed by the Arbitration Act, 1889, 52 & 53 Vict. c. 49.

„ 546, line 15. After "decided" add note. See, however, *Manchester & Liverpool District Banking Co.* v. *Parkinson*, 22 Q. B. Div. 173.

„ 545,
„ 548 note (*k*)
„ 555 note (*h*) } Add *Taylor* v. *Neate*, 39 Ch. D. 538.

„ 554, line 8. After Court add "The receiver cannot, however, present a petition in Bankruptcy: *Re Sacker*, 22 Q. B. Div. 179. The Court cannot authorise a receiver to do anything which it cannot authorise one partner to do against the will of the other: *Niemann* v. *Niemann*, 43 Ch. Div. 198."

„ 557, line 7. After "may" insert "not."

„ 579, last line. The Lunacy Regulation Act, 16 & 17 Vict. c. 70, § 123, is now repealed and is replaced by § 119 of the Lunacy Act, 1890 (53 Vict. c. 5).

„ 590, note (*a*). The reference to *Crawford* v. *Hamilton* should be 4 Madd. 251.

„ 607, note (*z*),
„ 609, note (*d*). } Add *Re Gorton*, 40 Ch. Div. 536.

„ 609, note (*f*). The reference to *Re Johnson* is 15 Ch. D. 548.

„ 625, last line but 3. } Add reference to *Ex parte Foley*, 24 Q. B. Div. 729.

„ 626,
„ 665, note (*x*). } § 4 (*e*) is now repealed and replaced by § 1 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71).

„ 633, line 15. After "debt" add "And no order will be made upon a joint petition where the debtors are neither partners nor joint debtors: *Re Bond*, 22 Q. B. D. 17."

„ 646, line 18, after (*c*).
„ 665. } Add "But dealings by a bankrupt with property acquired by him after adjudication *bonâ fide* and for value, are valid until the trustee intervenes: *Cohen* v. *Mitchell*, 25 Q. B. Div. 262."

„ 651, note (*f*),
„ 652, note (*t*). } § 55 is amended by § 13 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71).

Page 654, note (*l*), „ 675, paragraph 2. — Sub-sections 1 & 2 of § 46 of the Bankruptcy Act, 1883, are now repealed and replaced by § 11 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71).

„ 708, note (*x*), „ 751, note (*m*). — *Morgan* v. *Hardy* is now reported on appeal in 13 App. Ca. 351, sub nom. *Hardy* v. *Fothergill*.

„ 709, note (*z*). Section 42 of the Bankruptcy Act, 1883, is amended by § 28 of the Bankruptcy Act, 1890, and § 40 (1) by the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), which see ; and as to Ireland see the Preferential Payments in Bankruptcy (Ireland) Act, 1889 (52 & 53 Vict. c. 60).

„ 719, line 22, „ 730, line 5. — As to Interest see now § 23 of the Bankruptcy Act, 1890.

„ 751, line 12. Add note (*kk*) see further as to a bankrupt's discharge Bankruptcy Act, 1890, § 8 : Section 28 of the Act of 1883 is now repealed.

„ 751, last lines. — See also Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), § 10.

„ 754, *et seq.* See now, as to compositions and schemes of arrangement, Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), § 3, which replaces the main provisions of the Act of 1883.

„ 754, note (*h*), „ 755, note (*k*). — § 23 (1) of the Bankruptcy Act, 1883, has been amended by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), § 6.

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