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The Dissolution of a Partnership by the Death of a Partner

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THE DISSOLUTION OF A PARTNERSHIP BY THE DEATH OF A PARTNER.

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INTRODUCTION.

The law of partnership, existing to-day as an independent branch of jurisprudence, is the outgrowth of a combination consisting of three elements;- Roman Law, Law Merchant and the Common Law. From the earliest period of its development in the Roman Law it was recognized that a partnership was dissolved by the death of one member, this doctrine resting on the ground that the delectus personae is an essential element in the association. This was also the rule of the Law Merchant and through it became a part of the Common Law of England, not being inconsistent with the principles which the common law applied in governing transactions in all classes of commercial dealings.

There was but one chief point of difference: the tenancy by which the partnership property was held in the Law Merchant was similar to a joint tenancy but without the right of survivorship, with which there was nothing in the common law exactly corresponding. The latter was modified through the medium of the courts so as to recognize such a tenancy, making it more analogous to a tenancy in common, but after death of one partner retaining the title

and possession in the survivor for specific purposes. This was on the ground of expediency and convenience as he, having particular knowledge of the intricacies of the business dealings of the firm would be the most proper person to wind up its affairs.

In treating the present subject, we have considered the law applicable to the dissolution of the ordinary and most frequent types of partnership; omitting all discussion of the special forms which, although of great importance are less often formed; as limited partnerships, mining partnerships and those having shares transferable by sale or assignment.

CHAPTER I.

I. FACT OF DISSOLUTION.

The immediate and inevitable result of the death of one member of a partnership is the dissolution of the firm. The partnership is ended, the connection is dissolved, and the future relations of the surviving parties to each other and with the representatives of the deceased must be determined by some new agreement, or by the results which the law pronounces upon their acts and proceedings.

It was very early recognized that by the principles of the common law, the death of any one partner will operate to dissolve, however numerous the association may be. And this is brought about by the application of the ordinary rules of contract law to the theory of the nature of the relationship. It is the mutual and reciprocal engagement of each partner with all the others that the partnership shall be carried on with the joint co-operation of all. The personal qualities, skill, dilligence and superintendence of each are justly presumed to enter into, and constitute a material consideration and strong inducement for the original formation of the contract. Therefore the survivors should not be forced to continue the connection without a new consent and special agreement entered into by them.

The early case of Godfrey v Browning (a) held that one co-partner could not appoint a representative to take his place in the partnership after his decease; otherwise it might fall to the lot of an infant, or other person not at all fit to carry on the business.

This was also the Roman Law and a like reason is given in support of the doctrine. So strict was the rule that an agreement that the heirs should be admitted, was invalid as defeating an essential ingredient in a partnership, delectus personae. Adeo morte socii solvitur societas ut nec ab initio pacisci possumus ut heres etiam succedat. (b)

Time of Dissolution - The time from which the dissolution takes effect is often of great importance in determining the liability of the partner; the question being, whether it is from the occurrence of the death, or dates from the period when the other partners have notice of the death. The Roman Law, based upon its doctrines of the law of agency was that the dissolution did not take effect until the other partners had such notice.(c)

At Common Law dissolution by operation of law is deemed to be of a public and not a private nature, and is presumed to be taken notice of by every one, hence no notice is necessary. The case of Vulliamy v Noble, (d) went only so far as to hold that neither the

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(a) Cited in 2 Ves. Sen. 33; (b) Digest 17, 2, 59; (c) Digest 17, 2, 65, 10; (d) 3 Meriv. 593.

estate of the deceased partner nor his heir or representative can be bound on a contract entered into in the firm name subsequent to his death, although no notice of the dissolution had been given.

The question as to the liability of the surviving partner, may be considered as having been finally settled in the case of Marlett v Jackson, (a) which laid down the positive rule that a surviving partner cannot be held responsible on contracts made without his consent or knowledge by another co-partner after the firm has been dissolved, although no notice has been given to the person with whom the contract is made.

Immediately upon the dissolution of the partnership the surviving partner, or all the survivors equally if more than one, becomes a representatives of the defuncy firm for the purpose of winding up the business. This capacity necessarily confers many general powers relating to the collection of assets and the payment of debts, each of which will be more fully treated in sunsequent sections.

II. WHO IS A SURVIVOR.

In order to constitute the relation of surviving partner, with the attendant powers and duties, it is not necessary that a dissolution of the partnership should have been caused by the

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(a) 3 Allen 287.

death of one of the partners, for no difference is made between the case where the partnership has been dissolved while all were living and then one dies, and the case where the death of the partner causes the dissolution:under either circumstances the latest surviving partner is the proper person to settle the firm's affairs.(a) In the case of Strange v Graham, (b) a partner died six years after dissolution, yet the title to all the property was held to be cast upon the surviving member of the former firm, and that he had a lien upon such property for the payment of the debts and for his own share, before the administrator was entitled to claim any part of it. It is also held that under the usual rule of jus accrescendi, on the death of the last survivor of the joint parties, his rights and liabilities at law devolve upon his personal representatives.(c)

III. RIGHT TO ADMINISTER.

It is the settled rule in every jurisdiction that to the survivor alone devolves the right to take possession of and administer upon the partnership effects.(d) This right is his, solely by virtue of his survivorship. It has been suggested with good reason that there is a post mortem continuance of the partnership

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(a) Ober v R.R.Co., 13 Mo. App. 81; (b) 56 Ala. 614; (c) Carrere v Spofford, 46 How. Pr. 294, Dayton v Bartlett, 38 Oh. St. 357; (d) Farley v Moag, 79 Ala. 148, Davis v Sowell, 77 Ala. 262, Marlett v Scantland,19 Ark.443,Rla. Ter. v Redding,1 Fla.242, Cobble v Tomlinson,50 Ind.550,Betts v June,51 N.Y.274,Williams v Whedon, 109 N.Y. 333, Bush v Clark, 127 Mass. 111.

with one sole partner for the purpose of winding up, and all the powers of the firm are united in the one survivor. The personal representatives of the deceased are excluded from any participation or direction in the matter of closing up the business. It is only when the partnership debts are paid, its affairs finally settled and assets are found to remain in the hands of the survivor that they may demand an accounting. This presupposes prompt and speedy action by the survivor, and his entire good faith in the management of the estate; otherwise the personal representatives have the right and it may be said the duty of superseding him, or compelling his immediate attention to the business in hand or turning over the assets to a receiver for final disposition. (a)

The insolvency of the survivor does not disqualify him for these duties (b); nor temporary insanity, in which case he may proceed through the medium of his committee.(c)

Waiver of the Right to Administer.- This administration is a right and privilege and not an absolute duty; therefore it may be waived in case the survivor prefers that the representatives of the deceased should take entire charge, leaving to him only the right to receive his share of the surplus, and the liability for his portion of the debts if the assets of the partnership are not

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(a) People v White, 11 Ill. 341, Miller v Jones, 39 Ill. 54,
(b) Heartt v Walsh, 75 Ill. 200, (c) Uberoth v Union Bank, 9 Phil.83.

sufficient therefor. . When there are two or more survivors one may retire in favor of the others. Or if the survivor permits the representatives of the deceased to go ahead with the adjustment without interference he will be deemed to have lost his right by laches.

In case the survivor cannot be found, or refuses to bring action to recover a newly discovered asset, the representatives may sue in their own names.(a)

Statutory Administrator.- Without setting forth at length the regulations of the several jurisdictions, it is sufficient to note that in several states there are statutory provisions for the appointment of an administrator of the partnership. In such case if the survivor makes due application and properly qualifies, he will be appointed; but if he does not apply the trust will be given to some other person, usually the representative of the deceased. These statutes are regarded as mere conditions which must be performed but not as the source of the power of the firm administrator and not interfering with the common law right of the survivor. If the latter qualifies he is not an administrator and does not sue as such, and hence is not within the exception permitting legal representatives to testify as to facts occuring

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(a) Griffin v Spence, 69 Ala. 393; Welborn v Coon, 50 Ind.270; Vetterlein v Barnes, 6 Fed. 693; Kirby v R.R.Co., 14 Fed.261; Drake v Blount, 2 Dev. Eq.(N.C.) 353.

before the death of the deceased. In case the administrator of the deceased or other person qualify, he acts not as administrator but as special trustee. A non-resident partner cannot become administrator of the firm,but where the survivor qualifies and thereafter leaves the state he does not thereby become disqualified.

By a statute in Maine the surviving partner is required to give a bond and on his failure to do this the administrator of the deceased takes active possession of the assets. There are similar statutes in Kansas, Missouri and Oregon. In Louisiana the survivor before he can sue must receive authority from the Probate Court, and his other common law rights have been materially changed, the right to the succession of the share of the deceased is in the heir, and without his authority the surviving partner cannot assume control.(a)

IV. TITLE OF SURVIVOR.

There seems to have been some want of unanimity, especially among the earlier cases, as to the quality of the interest of the survivor in the property in his hands at the time of dissolution.

One line of decisions has held to the doctrine that the survivor becomes a tenant in common with the representatives of the

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(a) Green v Virden, 22 Mo. 510; Putnam v Parker, 55 Me. 235; Burnside v Savier, 6 Oregon 154; Carr v Catlin, 13 Kan. 294; Mc Kowen v Mc Guire, 15 La. An. 637; Skipwith v Lea, 16 La.An. 247.

deceased partner, the interest of the survivor not being enlarged but remaining as it was before, and his power over the property in no way altered except as it is affected by the entire absence of one partner. These cases however admit the survivor's exclusive right to possession and the control of the administration of the firm estate. (a)

The case of Wilson v Spper (b) goes so far as to declare that the personal representatives of the deceased are so fully vested with the share of the deceased that they may dispose of one undivided moiety of the stock in possession. One case only in New York follows this rule (c) , the Court saying that at the death of either partner his share of the firm effects, subject to the partnership debts devolves upon his representatives who thereupon become, both at law and in equity, tenants in common with the surviving partner.

These cases also draw the further distinction between property in possession and choses in action, the legal title to the latter being in the survivor for the purpose of bringing action thereon and reducing to possession, when they will partake of the nature of the other property in possession.

These theories are not supported by the weight of reason or

(a) Adams Ex'r. v Ward & Co.,26 Ark. 135;Wilson v Soper,13 B.Mon. 411; Tremper v Conklin, 44 N.Y. 58;(b)Wilson v Soper,supra, (c) Tremper v Conklin, supra.

authority. It is finally settled in the greater number of states that the survivor becomes the legal owner of the assets, both in action and possession, solely by virtue of his survivorship. The representatives of the deceased do not take his place with respect to the partnership property. They have no legal interest in such assets and no right to interfere in the administration, so long as the survivor is prosecuting the business of closing up the estate and applying the proceeds to the payment of firm debts. The joint relation of the partners with respect to their property is not broken up into a tenancy in common nor are their relations or equities impaired. While the agency in the surviving partner is so qualified that he cannot create any new obligations or liabilities, yet his relation to the situation in which the dissolution has left the property and business, enables him to manage and control the affairs as fully and completely as before. The property and existing rights of the firm continue in the survivor, and are his the same as they had been prior to dissolution. The rights of the survivor are precisely those which both partners would have had, if the dissolution had been otherwise than by death. The survivor is therefore in no sense a representative or assignee of the firm as distinguished from the firm itself. He is a principal and owner <u>because he is survivor</u>, and his right is in no sense

representative or derivative. (a)

It is somewhat remarkable that the case of Tremper v Conklin, (b) has been entirely ignored in all later cases in New York.

Nor can the survivor be treated as a trustee for creditors and representatives of the deceased. Formerly there was deemed to be a trust relation existing between the survivor and those interested in any way in the estate of the firm and of the deceased partner. This view is supported by some early cases and text books.(c)

In Case v Abeel, (d) the Court says, " The surviving partner has the legal right to the partnership effects; but in equity he is considered as trustee to pay the partnership debts and dispose of the effects of the concern, for the benefit of himself and the estate of the deceased partner."

Parsons - " The survivor is from the death a trustee for all concerned in the partnership, for the representatives of the deceased and for himself. The trust is to wind up the concern in the best manner for all interested, without unnecessary delay and his powers are such as enable him most effectually to execute that trust."

(a) Betts v June, supra; Shale v Schantz, 35 Hun 622; Nehrbloss v Bliss, 88 N.Y. 600; Williams v Whedon, 109 N.Y.333;(b) Supra; (c) Case v Abeel,1 Page 393; Smith v Walker, 38 Cal.385; Parsons page 441; (d) Supra.

The idea that the representatives are cestui^s que trustent and the survivor a trustee is but partially true and is distinctly repudiated by many courts. The representatives have no specific interest in, or claim upon, any particular part of the estate; their right consists in having an account of the property, its collection and application, and in receiving that clear balance which accrues to the deceased's share and interest in the partnership. " There is nothing fiduciary between the survivor and the representatives, except that they may sue each other in equity. There are certain rights and duties which attach to him, but it is a mistake to apply the word trust to the relation thereby created."(a) " The position is somewhat anomalous, not exactly and not wholly a trustee, and yet not a full owner of the assets which he takes or retains by reason of survivorship."(b) "While the representatives have an equitable interest in the distribution of any surplus remaining after the payment of debts, yet until such debts are paid there is a mere contingency which may or may not eventually ripen into a legal right."(c)

(a) Knox v Gye, L.R. 5 H.L. 656. (b) Russell v Mc Call,141 N.Y.447. (c) Williams v Whedon, supra.

Note. The fact that the survivor was a dormant partner cannot, it seems, impose any disability upon him so as to deprive him of the right to take possession and wind up. Beach v Hayward,10 Oh.St.455. This was doubted in Johnson v Ames,6 Pick. 334, and in limited partnerships the position of the special partner is analogous to that of a dormant partner and his right to wind up seems clear. Bates on Limited Partnership p. 197.

CHAPTER II.

ADMINISTRATION OF THE FIRM ASSETS.

I. GENERAL POWERS.

Upon the dissolution it becomes the duty of the survivor to take immediate steps leading to the final settlement of the firm business, including the collecting of assets, converting then into distributable form, the payment of all debts and claims against the firm, and striking a balance to ascertain the respective interests of himself and the estate of the deceased in the surplus, or their liability if there be a deficiency in the assets.

The power to sell, and the time, manner and mode of the application of the assets are a part of the administration and therefore under the exclusive control of the survivor: (a) nor is he subject to the direction or supervision of a court of equity except when called upon for an accounting, or in cases of misconduct or delay.

This power or duty by whatever appellation designated, must be exercised by him in a manner most conducive to the interest of all the parties, and subject to the right of the representatives to have an honest and efficient settlement of the partnership business, and to have the share of the decedent ascertained and

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Williams v Whedon, supra; Milner v Cooper, 65 Iowa 190.

faithfully accounted for without unreasonable delay. He must act in all things with the utmost good faith, all operations being directed to the primary and controlling object of a prompt and early settlement and disposal of the funds (a); and he is liable if guilty of intentional or negligent acts which cause loss to the firm estate.(b)

II. FIRM ASSETS.

The assets of the firm may consist in (1) choses in action, (2) personal property or stock in trade, (3) real estate, owned for the purpose of the business or for investment, (4) the good will of the business. The last two will be treated more fully hereafter.

Choses in Action. The survivor may receive payment of all claims due the firm from any source, and his receipt will be effectual to discharge the debtor from liability to the firm.(c) If any debts are not paid voluntarily to him, or if he is in possession of notes or other instruments or evidences of debts; or if the firm at the time owned any rights of action growing out of contract or tort he may bring action thereon in his own name.(d) As an incident to his title to the choses in action he may assign

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(a) Dawson v Parsons, 46 N.Y.State Rep. 721;(b) Calvert v Miller, 96 N.C. 600; (c) Heartt v Walsh, 75 Ill. 200;(d)See post p.27

them in payment of a debt of the firm (a); or as an easy mode of realizing on them. His assignee will be the real party in interest in an action thereon, and the defendant cannot question the consideration paid by such assignee.(b) The insolvency of the firm and all its members individually will not constitute an impediment to this action, if done in good faith without intent to defraud creditors. (c) The indorsement of the survivor on a note, "A as surviving partner of A & B", is sufficient to pass the title to the indorsee, and will not effect the estate of the deceased with any immediate liability.(d)

Personalty. When the assets are in part goods in stock kept for sale, the survivor may sell in such manner as his discretion dictates. The sale need not be immediate when there are reasonable grounds for expecting better results if the disposition is postponed; as, if a sacrifice is apprehended by a sale of unfinished work or material.(e) So, if the dissolution occurs in a dull season of the year he may defer the sale until better prices can be realized, and he may buy new stock in order to render the old more salable, but if the purchase goes beyond the mere freshening

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(a) Loeschigk, v Hatfield, 51 N. Y. 660; (b) Daby v Erickson, 45 N. Y. 786; Roys v Vilas, 18 Wis. 179; (c) Willson v Nicholoson, 61 Indiana 241; (d) Bredow v Mutual Savings Ins., 28 Mo. 181; Bates on Partnership # 731; (e) Calvert v Miller, supra.

of the stock and constitutes a step towards the continuance of the business, he will be responsible if such stock is destroyed.(a) The manner of selling is left largely to the judgment of the survivor. He may dispose of all the property of the firm or only just so much as is necessary to pay the debts. But it seems where stock is not readily distributable, the representative of the deceased may insist that it be sold at once for cash.(b)

As he may sell so he may also pledge or mortgage the property to secure the payment of debts or advances incurred before dissolution, if such a step will prevent the selling or foreclosing of a lien on the property at a needless sacrifice to the firm.(c)

While in possession of the assets he may treat them for some purposes as his own or as a sole agent. If the firm owns stock in a corporation he may vote on it, receive and waive notice of meetings and exercise all other powers incident to the ownership, and this although the stock stood in the name of the deceased if it in reality belonged to the firm.(d) If the firm has funds in the bank he may draw checks thereon in his own name as survivor.(e) He is also entitled to possession of the firm books and if deprived

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(a) Forrester v Oliver, 1 Ill. App.259; (b) Evans v Evans, 9 Paige 178; (c) Breen v Richardson, 6 Col. 605; In Re Clough, L.R. 31 Ch. Div. 324; (d) Kenton Furnace Co. v Mc Alpin, 5 Fed. 737; (e)Bank v Proctor, 98 Ill. 558; Bank v Vanderhorst, 32 N. Y. 553

of them by the administrator of the deceased may maintain replevin therefor.(a)

Real Estate. In order to determine the rights of the surviving partner in the realty and the duties towards the same, it will be necessary to state in a degree the nature of partnership realty in general.

This may be either an adjunct to the firm which deals in personalty or it may itself be the commodity dealt in; but the latter mode of holding is of more recent development, for a partnership could not deal in realty until the relaxation of the feudal system. When land is a mere incident in a firm, many times it becomes difficult to ascertain whether certain real estate is property of the partnership or belongs to the partners in their individual capacities. The legal title of the real estate is held by the partners as tenants in common, providing more than one is named in the conveyance. The mere fact that land is held in the names of several persons who are co-partners does not, of itself, make such realty partnership assets. It is always a question of intention, and as this is rarely expressed in the deed it becomes a matter of inference and evidence to be drawn from all the circumstances; the most controlling of which are, the funds used to pay therefore, the

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(a) Murrry v Mumford, 6 Cow. 441.

uses to which it has been put and improvements out of the joint funds.

The American and English law is in general harmony upon this subject, except as to the equitable conversion of realty into personalty. The English law treats the realty as personalty for all purposes, and that which is not used to pay debts goes to the personal representatives of the deceased: while in America it is converted into personalty only so far as is necessary to adjust the affairs of the firm, the heirs taking the remainder.(a)

It also becomes material in this connection, after it is determined that certain realty is partnership property, to inquire as to how much of said property is to be controlled by the survivor and what is the quality of his title therein. There is a distinction to be drawn between realty and personalty as to the title which the surviving partner acquires upon the dissolution. We have seen that the survivor gets the legal title to the personalty for the purpose of winding up; but as to realty the legal estate of the survivor remains in him as before and that of the deceased descends to his heirs, subject in equity to be converted into personalty for the purpose of adjusting partnership claims.(b)

(a) Logan v Greenlaw, 25 Fed. 299; Offutt v Scott, 47 Ala. 104; Strong v Lord, 107 Ill. 25; Fairchild v Fairchild, 64 N. Y. 471.
(b) Galbraith v Gedge, 16 B. Monroe 631; King v Weeks, 70 N.C.372.

Hence, in an action to recover damages against a railroad company for the value of partnership lands upon which the road was located, it was held that the action must be brought in the name of the heirs of the deceased and of the surviving partner if they owned the land jointly.(a)

The survivor not only has a lien to have the property applied to the payment of debts but he has an equitable estate therein. He has the right to control the property and treat it as personalty in winding up.(b)

As he is charged with the duty of paying the debts it must of necessity follow that he has the right in equity to dispose of the realty for that purpose; and it has been said, it would be unjustifiable to charge him with the payment of debts and at the same time take from him the means of so doing. Therefore, although he cannot by his deed pass the legal title which has descended to the heir of the deceased partner, yet as the heir holds the title in trust to pay the debt, the survivor by his deed does convey the equity therein to the purchaser, and a court of equity, at the suit of the grantee, will compel the widow and heirs to convey to him.(c) The buyer is not obliged to see that the purchase money

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(a) Whitman v R. R. Co., 3 Allen 133;(b) Cobble v Tomlinson, 50 Ind. 550; Merritt v Dickey, 38 Mich. 41; (c) Dupuy v Leavenworth, 17 Cal. 263; Shanks v Clein, 104 U.S. 18; Keith v Keith, 143 Mass. 262.

is properly applied, as such burden would greatly reduce the value.(a) And it has been held that the survivor can sell and convey the real estate without regard to whether it is necessary in order to pay debts of the firm, and in such case the purchaser gets a good title.(b)

Without entering into any discussion of the questions which have arisen as to dower in partnership realty, it may with safety be stated, that the widow has dower in the surplus after the adjustment of the equities of the partners.(c)

Good Will. This is the benefit or advantage which accrues to the firm,in addition to the value of the property, derived from their reputation for promptness, fidelity and integrity in their transactions, from their mode of doing business and other incidental circumstances in consequence of which they acquire general patronage from constant and habitual customers.(d)

(a) Tillinghast v Champlin, 4 R.T. 173; (b) But the authorities are in conflict on this point, many holding that the real estate must be resorted to last, Bates # 294.(c) Huston v Neil, 41 Ind. 505; Howard v Priest, 5 Metcalf 583; Barry v Briggs, 22 Mich. 201; Winter v Eckert, Daily Reg. April 7th 1883, 29 Hun 481.

The question as to dower cannot arise in England where the realty after the payment of debts is treated as personalty. Darby v Darby, 3 Drewry 495; Murtagh v Costello, 7 L. R. Ireland 428; (d) Anderson's Law Dictionary

The good will is a very important and valuable part of the partnership property; and it has been a matter of some controversy among the courts whether the surviving partner is entitled personally to this portion of the assets. The conflict of authority on this question has been especially great in England, where the theory of survivorship holds more firmly to the judicial mind, than in the United States.

In 1800 the case of Hammond v Douglas,(a) arose, and the Court was clearly of the opinion that in absence of stipulation to the contrary the good will of the firm inured to the surviving partner and to him alone. Therefore a sale of it could not be compelled by the representatives of the deceased. In Crawshay v Collins,(b) the above decision was questioned; but in the later English case of Lewis v Langdon,(c) decided in 1835 the doctrine of Hammond v Douglas was reasserted, and it was held that the surviving partner had a right to carry on the business in the firm name and to that extent, at least, the good will of the partnership survived to him. However, in Wedderburn v Wedderburn, (d) all the cases were reviewed at length and it was there held, that the good will of the business is an appreciable part of the assets of a firm, both in fact and in the estimation of a court of equity. A share of it

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(a) 5 Vesey 539; (b) 15 Vesey 226; (c) 7 Sim. 421; (d) 22 Beav.84.

belongs to the estate of the deceased partner and does not inure beneficially to the survivor. This may now be stated as the settled law of England. In the United States the law has been distinctly settled in the case of Dougherty v Van Nostrand, (a) where the doctrine of Hammond v Douglas (b) was disavowed, and it was held that the good will does not inure to the survivor but is partnership property and if not otherwise disposed of by consent must be sold as part of the firm assets.(c)

In a professional partnership however, good will is not strictly applicable, as its business has no local existence but is entirely personal, consisting in a confidence in the ability of the individual. So in Farr v Pearce, (d) where the articles defined the interests which the representatives of the deceased partner were to have, and there was no provision which gave them the good will of the firm, the Vice-Chancellor said, " If the general question had arisen here I think it would have been difficult to maintain that where a partnership is formed between professional persons as lawyers or surgeons, and one dies, the other is obliged to give up his business and sell the connections for the joint

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(a) 1 Hof. Ch. 68; (b) Supra; (c) Williams v Wilson, 4 Sandford's Ch. 379; Wade v Jenkins, 2 Giffard 509; Butler v Burleson, 16 Vt. 176; Howe v Searing, 6 Bos. 354; Sheppard v Boggs, 9 Neb. 257; Bates on Partnership #688; (d) 3 Maddock's Ch. 74.

benefit of himself and the estate of the deceased partner.When such partnership determines, unless there be a stipulation to the contrary each must be at liberty to continue his exertions and when the dissolution is by death of one the right of the survivor cannot be affected."

Firm Name. As we have seen, the good will is an asset of the firm and does not survive to the surviving partner alone and this being the case, the question has arisen as to the right of the survivor to use the firm name, or in other words, is the firm name included in the good will.

Story in his work on Partnership states, "That the right to use the name of a known and celebrated firm, especially in the case of manufacturers, is often a very valuable possession is unquestionable, and therefore courts of equity will often interpose to protect the right against the abuse by a third person; but it has been thought that this right however valuable does not fall within the true character and nature of good will, but that it belongs to the surviving partner." It has been argued (a) that if the firm name was to be considered as a salable article which belongs to the partnership, the survivor will be under the obligation to carry on trade for some time after the partner's death

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(a) Lewis v Langdon, 7 Sim. 421.

in order that the thing which is said to be salable shall be preserved. And that as the court of equity has no power to compel a partner to carry on trade for the purpose of preserving the firm name, it is plain that unless there is such power in the court, it must be in the discretion of the surviving partner to determine what shall be done with it, and if that is the case it must be his property.(a)

It was first held in New York, that the survivor could not use the firm name without the consent of the personal representatives; the Court stating that, either the partnership name and style ceases and perishes with the firm, neither the representatives nor the survivor being entitled to use it, or it is an interest held in common after the death of one partner as fully as before.(b) A dictum in a later case(c) is contrary to the case last cited, and in Caswell v Hazard,(d) the Court upheld the rule as given by Story, supra, and stated that it was the common law; so the New York decisions as they now stand are averse to regard the firm name as an asset. It may be well to state in this connection, the statutory provision (e) which permitted the surviving partners of firms having relations with foreign countries, to

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(a) Webster v Webster, 3 Swan. 490; Bank v Gibson, 34 Beav. 566; Robertson v Quiddington, 28 Beav. 529; (b) Fenn v Polles, 7 Abb. Pr. 202; (c) Blake v Barnes, 26 Abb. Pr.N.S. 204;(d) 121 N.Y.484; (e) Laws of 1854, Chap. 400.

continue the use of the co-partnership name on complying with certain formalities: and this privilege has now been extended to all partnerships in the state which have transacted business therein for a period of three years or upwards.(a) But these statutes confer no right and only modify pro tanto the penal provisions of 1833,(b) which forbid transactions of business in the name of a person not interested in the firm.

III. CONTRACTS.

As the business of the survivor is solely that of closing up, he cannot make any new contracts or change the form of old ones.(c) If the survivor enter into new transactions or carry on the same business with partnership funds, he does so at his own peril. If profits are made thereby, the representatives of the deceased may elect to call for a share of the profits or for the interest on the fund so used. If no profits are made and even if a loss is incurred, the survivor is charged with the interest on the money employed and he must bear the whole loss.(d) However it seems that profits cannot be claimed for one period and interest for another.(e)

(a) Laws of 1888, Chapter 142; (b) Laws of 1833, Chapter 28; 343. See Code
(c) Remick v Emig, 42 Ill. 342; (d) Franklin v Michael, 1 Texas Civil Appeals 250; Brown's Appeal, 89 Pa. St. 139.; (e) Goodburn v Stevens, 1 Md. Ch. 420; Berry v Folkes, 60 Miss. 576.

Contracts made by the Survivor After Dissolution. The survivor has no power to expend the money of the firm for the purpose of entering into new contracts, or extending the business in any way, without the consent of the personal representatives of the deceased; and whenever the administrator sees the survivor expending funds of the firm and does not forbid it, this cannot as in the case of a person acting in his own right, estop him from resisting a claim growing out of it.(a) He cannot bind the estate for debts incurred after death even though he continue business under authority of the court, unless the representative ratifies them by sharing in the profits.(b) Hence, where the survivor undertook to continue in business with the old assets, and then made an assignment for the benefit of the creditors of the new firm, it was held that the purchaser from the assignee did not get a valid title and could rescind the purchase.

This general rule that no new contracts shall be made is subject to the exception, that he is not bound to sacrifice the interest of the firm where by taking slight action he might avoid a loss. So where on dissolution, a firm had a large amount of raw material on hand which could only be disposed of at a great sacrifice, it was held that a creditor advancing money to the survivor

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(a) Oliver v Forrester, 96 Ill. 315; (b) Cock v Carson, 45 Tex.429.

in good faith, to enable him to work up the raw material, were entitled to payment out of firm assets. (a)

Continuing Contracts. It is the duty as well as the right of the survivor to complete all contracts from which the death of one partner does not absolve the firm; (b) for this purpose he may pledge the assets of the firm, borrow money (c) and draw checks upon the firm bank account. (d) The estate of the deceased is liable for loss occasioned in the efforts of the survivor to carry out unfulfilled agreements, and for any misconduct of the survivor which might have been chargeable upon the firm.(e)

However he is not obliged to carry out incomplete contracts for services: as where a firm employs an agent for a certain time, the agency terminates by the death of one partner; and so when the firm acted as agents for a foreign principal, the dissolution terminated the relation.(f) If the contract is based upon the trust and confidence reposed in the deceased, or his personal skill, his death justifies the recission of the contract by the survivor where the parties can be placed in statu quo. (g) This principle of continuing contracts does not apply to a contract

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(a) Calvert v Miller, 94 N.C. 600;(b) Denver v Roane, 99 U.S.355; Mason v Tiffany, 45 Ill. 392; (c) Durant v Pierson, 124 N. Y.444; (d) Butchart v Dresser, 10 Hare 453; (e) Tompkins v Tompkins, 18 S.C. 1; Mc Gill v Mc Gill, 2 Met. (Ky.) 258; (f) Tasker v Shepherd, 6 H. & N. 575; (g) Fulton v Thompson, 18 Texas 278.

inter se; as, the mode of conducting business. Thus if a firm A & B agree with the firm A, B & C for the shipment of lumber from one firm to the lumber yard of the other the death of A thus dissolving both firms, terminates this agreement.(a)

The question whether the survivor must carry out contracts in the case of Professional firms was discussed in Sterne v Goep, (b). The Court after stating the duties of the survivor in this connection, said, " It would seem to be a harsh rule which would require the surviving partner of a law firm to take upon himself solely the conduct of all pending litigations in the office at the time of his partner's decease, and devote his personal service and labor through a possible period of years to conducting and closing up such litigation. It would seem that equity might decree some juster rule by which to ascertain the rights of the parties in such a case." This case seems to suggest some limitation upon the doctrine as to the continuing contracts of a legal partnership, but it might easily be brought within the exception above stated, where the personal qualities of the members are largely relied upon.

IV. ACTIONS BY SURVIVOR.

It is now fully settled in practically all jurisdictions, that in accordance with the general right of the survivor and his

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(a) Oliver v Forrester, supra; (b) 20 Hun 396.

exclusive ownership in all choses in action, he may bring action on all causes belonging to the firm in his own name alone, and not in a representative capacity, and it is improper to make the representatives parties. Even the description of the plaintiff in the caption "as survivor" is surplusage.(a) The death of the partner, the consequent dissolution and the fact that the plaintiff is survivor should however be alleged in the body of the complaint.(b) When a partner dies pending suit, it does not abate nor is the administrator made a party, but the death is suggested and the action proceeds with the survivor as sole party.(c)

Joinder. So complete is his title to the choses in action that he may unite in one suit a claim due the partnership and one due himself individually.(d) In Massachusetts it is held that if he brings separate actions against the same defendant, one on an individual claim and the other on a partnership claim, he is entitled to costs in but one of these actions.(e)

Actions Against the Survivor. As a corollary all actions are brought against the survivor personally for claims due from

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(a) Bernard v Wilcox, 2 Johnson's Cases 374; Mathews v Stutz, 5 Civ. Pro. 235; Murray v Mumford, 6 Cowen 441; Berolzheimer v Strauss, 51 N.Y.Super. 96; City of Atlanta v Dingley, 74 Ga. 702; Dicey on Parties, page 162, rule 24; (b) Holmes v De Camp, 1 Johns. 34; (c) Phoenix Ins. Co. v Moog, 1 So. 108; (d) Smith v Wood, 31 Md. 293; Adams v Hackett, 27 N.H. 289; Mc Cartney v Hubbel, 52 Wis. 360. (e) Stafford v Gold, 9 Pick. 533.

the firm to third parties, on the theory that what were once firm debts are now his debts. A judgment against him will bind the partnership property in his hands and is conclusive against all the members of the firm; the representatives of the deceased should not therefore be made parties defendant.(a)

Set-Off. When the survivor sues or is sued on claims arising from partnership dealings, individual debts may be set off against the individual debts on whichever side they may be. This is on the ground that the debts are now mutual. The rules may best be stated in the four propositions laid down by Bates; (b)

I. If the survivor is sued in his individual capacity on a non-partnership debt, he may set off a clain due him as surviving partner.(c)

2. When sued on a partnership liability he may set off his individual demand. (d)

3. When he sues as an individual, a partnership liability may be set off against his claim.(e)

4. When the survivor sues on a partnership claim, a debt due from him individual may be set off. (f)

The right of set off is not allowed in Missouri; (g) nor

(a) Childs Sanford Co. v John Hyde Co.,10 Ia.294;(b) Sec. 723;(c) Harris v Pierce, 5 Ill. App. 622;(d) Lewis v Culbertson,11 S & R 48 (e) French v Andrade, 6 Term Rep.582;(f)Holbrook v Lackey,13 Met.132. Nehrbloss v Bliss,88 N.Y. 600;(g) Weil v Jones, 70 Mo. 560.

in Alabama (a). In each of these states the authority for the decision is founded upon cases in which the firm was still existent and they seem wrong on principle.

V. PAYMENT OF CREDITORS.

The survivor may pay the creditors at such time and in such manner as he pleases, the only limitation upon this right being that he shall perform the duty with due diligence.

Preference. During the existence of the partnership, with the concurrence of all the partners the joint property could have been used in the payment of a debt in full even though this resulted in the prefenence of a creditor provided there was no statute forbidding it: therefore the surviving partner standing in the shoes of the firm and by virtue of his title, has the same authority. And his authority to make such preference cannot upon principle be less than that which an individual debtor has in the case of his own creditors.(b)

While the firm exists the creditors have no such relation with it as entitles them to interfere with the complete control of the joint property, and this relation, and their right in respect to the property has been in no manner improved or changed by the death of the partner. So also there has been no alteration in

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(a) Ross v Pearson, 21 Ala. 473;(b) Loeschigk v Hatfield, 51 N.Y. 660; Cushman v Addison, 52 N.Y. 628.

their relation to the survivor in any important respect, for the debts become those of the survivor as they had before been the debts of the firm, with the ultimate right on the part of the creditors to seek the estate of the decedent.(a)

The statements by judges, in the courts which adhere to the above doctrine, and also by text writers, have led to some confusion for it is said that the survivor holds the property in trust for partnership creditors, neglecting to state that this was a trust not peculiar to the surviving partner and existed before the firm was dissolved. The trust here spoken of amounts merely to this, that the partnership creditors have in equity a preference over the creditors of the individual partner in respect to the disposition of the partnership property. A partner is not at liberty to withdraw it from application on behalf of such creditors, and the same rule applies to the individual creditors of a partner, in so far as it is his duty to pay his individual debts out of his individual property.

In the following states the privilege of preferring creditors is not given, on strict grounds of trusteeship:- Tennessee, Colorado, Missouri.(b)

(a) Emerson v Senter, 118 U.S. 3; Roach v Brannon, 57 Miss. 490; Kreis v Gorton, 23 Oh. St. 468;(b)Anderson v Norton, 15 Lea 14; Salsbury v Ellison, 7 Col. 167; Tiernan v Molliter, 71 Mo. 512.

Assignment. We have seen that as a common rule the survivor has the right to pay creditors in any manner he sees fit, though he create preferences in so doing. However, in New York a distinction has been drawn between a payment of creditors and an assignment to a third party for the benefit of such creditors, the law being somewhat unsettled on this point. In the case of Nelson v Tenney,(a) the Court, recognizing the doctrine as to preferences by the survivor, said, " But it is a very different question whether he can by an assignment of the property of the firm transfer the trust to another trustee in the manner attempted to be done in this case, by an assignment which operates as a preference among the creditors and over which the survivor has no control. Such an act is an entire abnegation of the duties of the trust existing between himself and the representatives of the deceased partner.....Such is an attempt to escape from his obligation as trustee for such personal representatives." This case decided that the executor could have an assignment, made by the survivor without his consent set aside. It seems according to the reason of the court that it makes no difference whether or not preferences are made in the assignment. The personal representatives, by applying to a court of equity could have it set aside and a receiv-

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(a) 36 Hun 327.

er appointed to settle up the affairs of the partnership, so as to protect the property under their control: and this, upon the ground stated by Story on Partnership, " However if there be any danger of abuse or positive misapplication of funds by the surviving partner, a court of equity will interpose and restrain it by injunction, and even appoint a receiver upon application of the representatives of the deceased."

This case left the problem unsolved as to whether such an assignment would be valid between the creditors of the firm and the survivor. The question came squarely before the court in the case of Williams v Whedon, (a) wherein it was said by the Court that there is no defined relation of trust between the creditors and the survivor, and it exists only between the latter and the representatives; and it decided that the survivor has the right to make an assignment which cannot be attacked by creditors, ... it does not hold that it is not though liable to be set aside by the fepresentatives.

While the case of Nelson v Tenney has not been expressly overruled and must still be considered as law in this state, yet the reasons for the decision have been much impaired by later decisions which ~~intimate~~ state that there is no relationship of trust between the survivor and the representatives.(b)

(a) 109 N. Y. 333; (b) Cohen v Hymes, 64 Hun 54.

The states other than New York seem to make no distinction between payment and assignment. (a)

VI. COMPENSATION FOR WINDING UP.

As a general proposition the surviving partner is not allowed any compensation for winding up unless there is a provision therefor in the articles of partnership.(b) In Berry v Jones, (c) it is declared to be the settled law that a surviving partner appointed receiver at his own instance is not entitled to any compensation. The reason assigned for this rule is that when persons enter into a partnership, each undertakes certain risks, one of which is the liability of winding up the concern in the case of its dissolution by death.

But in North Carolina (d), the court seems to lose sight of the reasoning as above stated, and holds that the English rule that executors, trustees and surviving partners are not entitled to compensation for their services is not suited to this country, and the surviving partner should be allowed an adequate compensation.

The general rule goes to the extent only of disallowing compensation for the immediate personal services in winding up. For

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(a) Emerson v Senter, supra; (b) Burden v Burden,1 Vesey & B.170; Brown v Mc Farland,41 Pa. St.129; Johnson v Hartshorne, 52 N. Y.173 Preston v Fitch,137 N.Y.41;Burgess v Badger,82 Hun488;(c)11 Hiesk. 206; (d)Royster v Johnson 73 N.C.474.

the proper and legitimate expenses which are incurred by him, he is entitled to be reimbursed. Thus he may bring suit for the collection of debts, and provided due care is used in such litigation if he fails the estate of the deceased partner must contribute to pay costs.(a) So if he continues the business with the consent of the representatives of the deceased he will be allowed to deduct from the profits such remuneration for his services as is reasonable.(b) But if the partnership agreement provides for the continuance of the business after the death without making provision for compensation, the partners will be deemed to have accepted the risk of having to continue, and no compensation will be allowed: but the courts will give effect to any intent to permit such allowance to its fullest extent.

Where one of the partners of a mercantile firm is a lawyer, and on dissolution he collected certain accounts belonging to the firm, those collected without suit are held to be gratuitous but where action is necessary he is allowed the usual value of his professional services.(c) But in the case of Starr v Case,(d) where the firm was a legal one a different doctrine was enunciated. The plaintiffs claimed a certain sum for services rendered by them

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(a) Allen v Blanchard,9 Cow.631;(b)Newell v Humphrey,37 Vt.265; Gyger's Appeal,62 Pa. St.73;Cameron v Francisco,26 Oh.St.190; Schenkl v Dana,118 Mass.236;(c)Vanduzer v Mc Millan,37 Ga.299;(d) 59 Ia. 503.

in bringing actions since the death of the deceased partner for the collection of claims due the firm. The Judge in the case on appeal said, it is conceded that the general rule is that surviving partners are not entitled to compensation for settling the affairs of the partnership. It is claimed however that the legal services rendered in the prosecution of claims due the firm constitute an exception to the rule. The court cited Vanduzer v Mc Millan, supra, and stated that in that case the rendering of legal services was entirely foreign to the business of the partnership; but in the case at bar the rendering of such services was the business for which the partnership was formed. It is submitted that there is nothing in Starr v Case which should form an exception to the general rule.

In comparing the two cases cited the actions were brought for the collection of claims. As stated above, the reason for the rule is that he must have forseen when he entered the partnership that it would be his duty to wind up in case of death. So if compensation could be allowed in the Georgia case it is difficult to see why it should not have been allowed in the Iowa case. It cannot be argued that in one the partners foresaw that there would be outstanding claims which would require action in order to collect, and not in the other.

In commercial partnerships where some additional service has been rendered in the same line of business as that in which the firm was engaged, the survivor is entitled to compensation: for example, where the property of a firm consisted of patents for improvements in weapons and valuable contracts had been made with the government, the survivor was allowed compensation for manufacturing stock to fulfill them. It would seem that the fact that the services performed were those which were in the line of the partnership business can make no difference.(a)

(a) Camerson v Francisco, 26 Oh. St. 190;Schenkl v Dana,118 Mass. 236; Griggs v Clark, 23 Cal.427.
Note. A distinction should be drawn between a case of suits brought to collect debts of a legal firm and where the firm had contracted to conduct certain litigations. See Contracts, supra.

CHAPTER III.

RELATIONS BETWEEN THE SURVIVOR AND THE REPRESENTATIVES OF THE DECEASED.

I. INTERFERENCE BY THE REPRESENTATIVE.

The representatives of the deceased cannot be excused in any act which interferes with the proper management of the estate by the survivor. If they take possession of property belonging to the firm and refuse to give it up, or misappropriate any funds of the firm, the survivor may maintain an action against them for the property or its value, although the decedent may have had the right to the custody of such property.(a) This action must be brought against the representatives personally, for it is a tort of their own in taking possession of firm property wrongfully, and is not chargeable upon the estate of the deceased.(b) However an injunction will not lie to restrain a person contracting with the firm, from delivering manufactured goods to the administrator, on the ground that if delivery is made the possession of the administrator will be wrongful and there is an adequate provision at law for the recovery of the property or for proceeding against the third party for non-delivery to the survivor.(c)

If money has been paid by a debtor of the firm to the admin-

(a)Sweet v Taylor,36 Hun 256;Calvert v Marlow,18 Ala.67;Shields v Fuller,4 Wis.102;(b)Smith v Wood,31 Md.293;(c)Davis v Sowell,77 Ala. 262.

istrator of the deceased, the survivor may collect again from the debtor. (a) And where an attorney for the firm collected money during the life of the deceased and afterwards paid it over to the representative,he was held responsible to the survivor for the amount.(b) It has been held where the old idea that the survivor and the administrator held the property as tenants in common obtains, that the survivor has no exclusive right to possession except to pay debts and cannot therefore sue the administrator in conversion if he retains the property.(c)

II. RIGHTS OF THE SURVIVOR AGAINST THE ADMINISTRATOR.

As Debtor and Creditor. Inasmuch as until all the partnership affairs are settled it is impossible to know whether a particular member is indebted to the firm, the only claim which the survivor can have against the estate of the deceased is one for a balance found to be due him on the adjustment of all partnership dealings; and until this balance is struck the relation of debtor and creditor does not arise between the representatives of the estate and the survivor.(d) He cannot sue the administrator on an unsettled account.(e) And this is so even when the balance may be deducible from the firm books, as there may be omissions or

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(a) Wallace v Fitzsimmons,1 Dallas (Pa.)248;(b)Kinsler v Mc Cants, 4 Rich.46;(c)Strathy v Crooks,2 Up. Can.(Q.B.)51;Canfield v Hard, 6 Conn.180;(d)Arnold v Arnold, 80 N.Y.580;(e)Grim's Ap.105 Pa.St.37

false entries. The presentation of a claim is not a necessary prerequisite to the right of the survivor to have the account adjusted on a final settlement.(a) But in some states this rule has been changed by statutes requiring the presentation of contingent claims.(b) In New York a statute authorizes a reference to be made of claims presented to an executor or administrator, and if such claim is doubted "he may enter into an agreement to refer the matter in controversy to three disinterested person". This statute has been held broad enough to include the unliquidated claims of a surviving partner against the estate of the deceased growing out of the partnership.(c)

The survivor cannot recover for any isolated service performed or expenditure made by him during the continuance of the partnership; For he may have received a greater amount from the joint funds or the deceased may have rendered equal or greater services in the same business. He is allowed to recover only when it is shown that his claim constitutes an excess above all the charges properly made against him in the firm business.(d) But if the deceased held property in his own name for the firm and had agreed to transfer it to the firm, the survivor may maintain an action for it against the administrator before settlement, as the court

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(a) Kensey v Kellogg, 65 Cal.110;(b) Mc Kay v Joy,9 Pac.940; (c) Francisco v Fitch, 25 Barb. 130; (d) Warren v Whelock,21 Vt.323.

will not compel parties to proceed for a judicial accounting when substantial justice can be done without it.(a)

Accounting. The survivor may file a bill against the representatives of the deceased for an accounting; and when one solvent member of an insolvent firm appropriated the funds of the firm for the purphase of real estate and for the purpose of hindering and delaying creditors transferred it to his wife, and then died, it was held on a bill being filed by the survivor that he was entitled to have the property subjected to the payment of firm debts,and that the wife could be made a party to the suit.(b) When upon the striking of a balance and the final settlement it is ascertained that the estate of the deceased is debtor to the firm, the survivor may prove the amount of such debt against the estate as though it were a personal claim.

Right to Contribution. If the survivor after exhausting the partnership assets pays debts from his individual funds, he becomes an individual creditor of the estate with all the rights and equities which attach to all the separate creditors as distinguished from firm creditors. Equity requires that when he uses his own property in liquidation of partnership debts, the estate of the deceased should contribute equally with him in their payment.

(a) Berolzheimer v Strauss, 51 N.Y.Super.76;(b)White v Russell, 79 Ill. 155.

The part advanced by the survivor does not give rise to a debt against the firm but is an individual debt against the deceased.

Judgment as Evidence. The courts seem about equally divided as to the effect of a judgment against the survivor in favor of a creditor of the firm as evidence against the estate of the deceased partner in favor of such creditor in seeking to charge the separate estate of the deceased after having exhaused the joint funds; and also against the estate in favor of the survivor who has paid such a judgment. One line of cases hold that the judgment against the survivor is res inter alios acta and therefore not evidence against the deceased. In Sturges v Beach,(a) it was held that the judgment was proper evidence of the fact of a recovery, but was no proof of the existence of a debt, the court basing its decision on the principle that judgments are binding only between the parties and their privy, and that no man is to be concluded by a judgment when he was not a party and could not be heard. "Should a contrary principle be adopted it might be productive of great inconvenience and injustice;.....if a judgment against him is sufficient evidence of a debt against the representatives of the deceased partner, then this mode of making out the claim would usually be adopted and many frauds and collusions might be prac-

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(a) 1 Conn. 507.

ticed which would be very difficult to detect and expose".(a)

On the other hand it is held in some jurisdictions that a judgment against a survivor, paid by him, may be given in evidence against the representatives, (b) on the ground that as the survivor in settling the account would be entitled to credit for the payment of all judgments recovered against him, this would be evidence of such payment as against the estate of the deceased. Otherwise the validity of all claims whatsoever paid by him would have to be again adjudicated on the final settlement with the representatives.(c)

But this is not extended to cases wherein the survivor is seeking contribution from the representatives for a balance due, on the ground that it is res inter alios acta, and it seems that this is not even prima facie evidence, but is like any other item in his favor.(d)

Lien of Survivor. Upon the dissolution the survivor has an equitable lien upon all the assets to indemnify himself against all debts of the firm and secure any balance which may be due him from the deceased partner upon the settlement of the partnership accounts.(e)

(a)Also Rose v Gunn,79 Ala.411;Buckingham v Ludlam,37 N.J.E.137; (b)Hanna v Wray,77 Pa.St.27;(c)Wiley v Thompson,9 Met.329;Valentine v Farnsworth,21 Pick.176;Logan v Greenlaw,29 Fed.299;(d)Hamilton v Summers,12 B.Mon.11;(e)Pearson v Keedy,6 B.Mon.128;Dyer v Clark,5 Met.562;Wilson v Soper,13 B.Mon.411.

Where it appears that the survivor has paid all the partnership debts and that the estate of the deceased is indebted to him, the heirs cannot compel the survivor to account without showing that he has property in his hands in excess of the amount required to reimburse himself.(a) But the survivor, having no greater equity than any individual creditor of the decedent, the lien which he has for the debts due him relates to claims against the firm and does not extend to mere private debts due from the deceased.(b)

III. RIGHTS OF THE REPRESENTATIVES AGAINST THE SURVIVOR.

Accounting. If the business of the partnership is expediciously wound up, the executor or administrator has no right to interfere, but as stated elsewhere, when the debts have been paid and a final balance has been struck the relation of debtor and creditor arises,(c) and the representatives have a right to receive the share of their decedent and may maintain an action at law to recover it.(d) It is the rule in some jurisdictions that this action can be brought only after a demand has been made.(e) It is also held that after the debts are paid the survivor is bound to pay over to the decedent's estate its share as fast as realized.(f)

(a)Valentine v Wysor,123 Ind.47;(b)Moffat v Thompson,5 Rich.Eq.155; (c)Alston v Rowles,13 Fla.117;(d)Holman v Nance,84 Mo.674;Krutz v Craig,53 Ind.561;(e)Anderson v Ackerman,88 Ind.481;(f)Heath v Waters 40 Mich.457.

The administrator has an equity to have the assets applied to the adjustment of claims, equal to that which the deceased had and so he has a right to an accounting, in which the survivor is entitled to credit for all sums paid by him to the representatives out of the funds collected by him.(a) A decree in favor of the administrator for a sum due should be against all the survivors jointly, for unless there had been a division of the assets before the death of the member, the administrator cannot be compelled to accept several decrees against each for a proportionate amount.(b)

Contribution. If the administrator has paid any of the debts of the firm he may have contribution from the survivors.(c)

The fact that the partnership is insolvent and there will be no surplus coming to the estate of the deceased, does not curtail the right of the administrator to file a bill for an accounting or to compel the survivor to wind up the business and apply the assets to the payment of debts, as the liability of the estate of the deceased is thereby reduced.(d) But where the deceased partner has no capital in the concern which might be endangered by a continuance of the trade, the rule prohibiting such continuance does not apply.(e) This equity exists although the administrator

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(a)Collender v Phelan,79 N.Y.366;(b)Bundy v Youmans,44 Mich.376; (c)Preston v Fitch,137 N.Y.41;Sells v Hubbel,2 John's.Ch.394;(d) Jennings v Chandler,10 Wis. 21;(e) Hyde v Easter,4 Md. 84.

has sold his interest to the survivor,"interest" being construed to mean only an expected surplus.(a)

Lien. As has been stated with respect to the survivor, the administrator cannot bind the estate by continuing the business of his own motion, for the legatees or distributees do not take their rights subject to every venture which they cannot control; but authority may be given to continue in the will or articles of partnership.(b) Provided the administrator has authority to carry on the business with the old assets, his lien for an accounting, which is superior to the newly incurred debts, in such of the property as remains unchanged, is not impaired; but it never attaches to new property which in the course of business takes the place of the old and he cannot share even pari passu with the creditors of the new firm. But it seems that if there are no new creditors his lien extends to the whole. In the case of Hoyt v Sprague,(c) the court, stating that the cases are somewhat in conflict, laid down the above rule. A cursory reading of the earlier cases (d) would lead to the opinion that the administrator's lien extends to the newly acquired property as well as to the original assets. But these are inconsistent with the later cases.(e)

(a)Denver v Fowler,2 Paige 400;but see Wilson v Soper,13 B.Mon.411;
(b)Columbus Watch Co.v Hodenpyl,135 N.Y.430;see post page
(c)103 U.S.613;(d)Skipp v Harwood,2 Swan.586;West v Skipp,1 Vesey Sen.239;(e)Nerot v Burnard,4 Russ.247;Payne v Hornby,25 Beav.280.

The earlier decisions however were rendered when the property had been used against the will of the parties entitled thereto. Lindley (a) states the rule as follows, "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 for old. Further on the death or bankruptcy of the partner his lien continues in favor of his assignees or representatives, and does not terminate until his share has been ascertained and provided for by other partners. But after the partnership is 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 persons who continue to carry on the business." On the other hand, where as a result from a continuance in the business by the survivor, the stock of the old firm has become so blended and intermingled with the new stock as to lose its identity, a lien will attach to the whole in favor of the representatives and to the exclusion of the individual creditors of the survivor except as against a bona fide purchaser or a party who had acquired a specific lien by the levy and execution of an attachment.(b)

Misconduct of the Survivor. As already intimated, when the

(a)Page 700; (b)Hooley v Gieve,9 Daly 104,s.c.73 N.Y.594.

survivor is not judiciously adjusting matters, by reason of misconduct, negligence, bad faith or unreasonable delay there is an imperative obligation resting upon the representatives to make application to the court of equity for an accounting, injunction or to have the survivor discharged and a receiver appointed. The neglect of the representatives to do this will render them liable to those whose interests are involved.(a)

It is difficult to define specifically the meaning of the term "bad faith", "unreasonable delay" or "negligence" in this connection, as each case must be decided upon the particular facts and surrounding circumstances. But it may be safely stated, without the use of the confusing terms great, ordinary and slight care, that the survivor, having taken advantage of his privilege to wind up, must in so doing use that degree of care which is proportionate to his undertaking. This can be measured only by reference to the conduct of a careful and reasonable man in conducting his own affairs.

If the survivor continue business with the firm property he is guilty of a breach of trust. So if the survivor mingle goods of the firm with his own, sells them together and keeps no separate account, using the proceeds for his own purpose the court will

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(a) Fletcher v Vandusen,52 Ia.448;Miller v Jones,39 Ill.54; Mc Kean v Vick,108 Ill.373.

grant an injunction against his further proceeding, appoint a receivor and direct an accounting.(a) The Court said in the case last cited, " In this confusion and mixing up the affairs of the partnership with his own personal matters, we cannot see how a proper settlement of the partnership business can ever be arrived at between him and the administrator."

However. if the administrator permits the business to be carried on by the survivor when the firm is insolvent, and this continuance results in an increase of assets there is no reason for surcharging the administrator, he not having ventured or lost in the business any estate real or personal of the decedent.(b)

Purchase by the Survivor of the Interest of the Deceased from the Representatives. The survivor standing in a fiduciary relation to those in interest, cannot take the property of the firm to himself at an estimated valuation without the assent of the personal representative.(c) If he so takes the property without their consent, the survivor will have to account for the profits made upon it, at the election of the personal representatives.

Although the survivor has no priority of right to purchase or pre-emption over other buyers, there may be a stipulation in the

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(a) Jennings v Chandler,10 Wis. 21; (b) Sterns Appeal,95 Pa. St. 504;(c) Brown v Gellatly, 31 Beav. 243.

articles of partnership whereby such right is given. These agreements are always held valid even though the partnership is insolvent at its dissolution, for while the partnership was solvent and the agreement was made the creditors had no equities strictly speaking, and they have no lien until judgment or execution. Where the articles provide that the assets shall vest in the surviving partners upon the death of a member of the firm, the survivor becomes a debtor to the estate of the deceased for the value of his share.

Some states have statutory provisions permitting the surviving partner to take the assets and business at an approved valuation, and thereby he becomes debtor to that extent to the representatives of the deceased.(a)

It has been strenuously contended on the part of litigants, as the representatives of the deceased and the surviving partner are, for some purposes considered as trustees of the deceased's interest, that the survivor could not purchase even with the consent of the executor, for there is generally a dangerous inequality of knowledge in respect to the subject matter of the sale. But the courts have taken into consideration the ruinous consequences to all persons interested, by the forced conversion of a large

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(a) Rammelsberg v Mitchell, 29 Oh. St. 22.

stock into money, and permit a purchase by the surviving partner. This is the easiest and most rational solution of the problem. In Chambers v Howell, (a) it was said, " No doubt when such relation subsists between the parties courts of justice will look at such transactions with close attention, for in dealings between executors of the deceased and the surviving partners there may be an inequality in respect of knowledge which may be taken advantage of in such a way as to lead to very inequitable and unfair results. But those circumstances if they exist must not only be directly alleged, but must also be shown by sufficient evidence, and they are not to be inferred from the mere relation between the parties. If it were otherwise many fair transactions of that sort, between the executor and surviving partners of the testator, which have been going on to a vast extent every day in the belief that they are valid,would be invalidated." And the court held that there is no principle in equity, that a surviving partner cannot become a purchaser from the representatives of the share of the deceasdd. Such settlements are deemed prima facie fair (b), and in absence of fraud will be treated valid. Mere inadequacy of consideration will not of itself vitiate the sale under such circumstances.(c)

However, if the survivor is also executor of the deceased he

(a) 11 Beav. at p.14;(b)Sage v Woodin,66 N.Y.578;Hoyt v Sprague, 103 U.S.613;(c)Kimball v Lincoln,99 Ill. 578.

cannot buy the share of the latter, for this transaction would be a sale with himself. Neither good faith nor adequate consideration will uphold the transaction in the absence of the assent of the heirs and distributees. So, where two of three administrators sold the deceased's interest in the firm to the third administrator who was one of the surviving partners, the court held that the transaction was voidable at the election of the parties in interest, regardless of the bona fides.(a)

IV.THE SURVIVOR AS REPRESENTATIVE OF THE DECEASED.

The position of the representative of a deceased partner is often one of considerable hardship and difficulty; if he insists on an immediate adjustment he may ruin those whom the deceased may have been most anxious to benefit, but if for their advantage the business is allowed to go on, he runs the risk of being ruined himself.

With a view to obviate this difficulty, frqquently one partner appoints his co-partner executor of his will or such co-partner is appointed administrator after the dissolution, and under certain circumstances this may seem a necessity. But as a general rule, the inconveniences arising from his relation as representative,

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(a)Gilbert's Appeal, 78 Pa. St.266;Ogden v Astor,4 Sandford(N.Y.) 311; Holmes's Appeal, 79 Pa. St. 279; Sage v Woodin,66 N.Y.578; Moses v Moses,50 Ga. 9;Kimball v Lincoln,99 Ill. 578.

outweigh the advantage which he may gain.(a) To be sure, his position is more advantageous when all parties claiming under him are sui juris; but even then, the survivor-executor acquires no additional right to contract in the name of the firm, and he cannot make his position a means of advantage to his co-partnership, without full knowledge of all parties interested.(b) Again there being a conflict of duties which he is to perform, his conduct is likely to be misinterpreted by those in interest, and equity will scrutinize his acts closely, in order that he shall obtain no personal advantage to which he is not entitled.

The additional disadvantage which arises when some of the next of kin or other interested parties are non sui juris, is illustrated by the case of Wedderburn v Wedderburn,(c) in which the survivors beside being executors were guardians of the infant legatees. This was a strong case because the partnership was under articles which authorized a settlement of accounts between the executors of the deceased partner and the survivors;but there was no provision for the contingency of the survivor acting as executor. The court opened accounts and agreements between executors, partners and legatees, after having been confirmed and acted upon for thirty years. The court stated that had the rep-

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(a)Estate of Brown,11 Phila.127;(b)Heward v Slagle,52 Ill.336; White v Gardner,37 Tex.401;(c)2 Keen 722.

resentatives of the testator not been his surviving partners their duty would have been to follow as closely as possible the agreement and provisions of the will; and any settlements which they might have made with the surviving partners would have been binding. The union of the two characters in the same person rendered any conclusive settlement extremely difficult. A strict adherence to the agreement could not have been so conducted as to prevent future investigation and inquiry.

The acts done by the survivor in one capacity shall not effect rights or interests in his hands in another. So payment by a firm after the death of a partner under its old name shall not be considered a payment by that partner as executor, if such act would result in preventing the operation of the statute of limitations, as against debts due from his estate.(a)

The survivor under these circumstances, having control of the whole property, thereby preventing an investigation as to his manner of doing business, on his failure to account may be held liable for the highest value shown by the proofs and for all rents and profits with interest, which he might have received by a proper management of the business.(b)

He having a lien to require the payment of debts, by reason of his representative capacity, must make such payment of his own

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(a)Way v Basset,5 Hare 55;(b)Kellefer v Mc Lain,78 Mich. 249.

volition, or the law will make the appropriation.(a)

It has been stated that the survivor-executor cannot settle the partnership accounts in the probate court, and it is conceded that the court has no power to order the sale of the deceased partner's interest before the joint debts are paid and accounts adjusted. However, when he renders his account to the court as executor of the estate of the decedent this necessarily involves the partnership accounts, otherwise the court could not judge of its correctness.(b)

(a)Strauss v Frederick,91 N.C.121;(b)Leland v Newton, 102 Mass.350.
Note. The fact that the survivor is executor does not give him any right to compensation for winding up the partnership affairs. Dodson v Dodson, 6 Heisk.110; Burden v Burden, 1 V & B 170.

As to the right of the survivor to purchase the interest of the deceased when he is also executor see ante page 52.

He cannot be sued by a co-executor or co-survivor, Forward v Forward, 6 Allen 499.

CHAPTER IV.

RIGHTS OF CREDITORS.

I. REMEDIES OF CREDITORS.

At Law. The only means at common law by which a creditor of the dissolved firm may enforce his claims against the firm, is by an action against the surviving partner, who theoretically becomes personally liable for the firm debts, having in his hand the joint funds for the primary purpose of paying any and all liabilities of the concern. In such an action he is sued alone, it not being proper to join the representatives of the deceased as they are under no immediate liability at law to the partnership creditors.(a)

In some states statutes are in force which provide that if one of several joint obligees shall die the obligation shall be joint and several, and these by judicial interpretation permit the joining of the representatives of a deceased partner with the survivor in a suit upon a firm debt.(b)

While, therefore the survivor is charged with the personal liability for the firm obligations, it seems proper that only the joint assets in his hands should be in the first instance applicable to their payment. If the joint estate is insufficient to

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(a)Cases cited ante, under Actions page 28 ;(b)Maxey v Averill,2 B. Mon.107; Freeman v Stewart, 41 Miss. 138;Garrard v Dawson,49 Ga. 434.

pay the debts and he is individually insolvent, the separate creditors are entitled to a priority over the firm creditors in the distribution of his private estate. This is the rule in the administration of the estates of the partners in the case of a dissolution by insolvency: whenever the estates of the firm and of the partners are brought into the court for distribution the court will adhere to the strict rules of marshalling assets, and require the joint debts to be paid first out of the joint assets, and the separate debts to be paid from the separate estates. And any surplus of either remaining is divided among the other class of claims if needed.(a)

Although there seems to be little direct authority that this rule would be applied in the distribution of the estate of an insolvent survivor, there can be no reason for a different doctrine.

In Equity. The inability to bring an action at law to recover from the estate of the deceased would lead to inevitable hardship to the firm creditor, but for that equity has provided adequate means for reaching and subjecting to liability, the separate estate of the deceased.

There is a great conflict of authority in various jurisdictions as to the exact extent of the equitable remedies and under what

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(a) Parsons on Partnership, # 383 and cases cited in note N.

circumstances they will be granted. This conflict being mainly as to whether the suit in equity against the representatives of the deceased partner is concurrent with the action at law against the survivor and may be resorted to in the first instance: or that the creditor must first exhaust his remedy at law against the survivor, and then on the ground of the failure of partnership assets seek relief from the individual estate.

English Rule. The older English doctrine on this point though not entirely clear and settled, was that a joint creditor must in the first instance seek his redress against the survivor. and that he had no claim in equity against the estate of the deceased unless the survivor was insolvent or bankrupt. This rule was based upon the general principle that the joint estate was the first fund for the payment of joint liabilities, and inasmuch as the joint estate vests in the survivor, the joint creditors upon equitable considerations ought to resort to the survivor before they should be allowed to obtain satisfaction out of the assets of the deceased partned.

But in the case of Devaynes v Noble,(a) decided in 1816, the tide was set in a more radical and seemingly inequitable direction. In this case the partnership was continued after the death of one

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1 Meriv.530.

member and subsequently became bankrupt. The firm creditors were permitted to charge the separate estate of the deceased partner without having first resorted to dividends which might have been obtained from the surviving partners.

In the case of Wilkinson v Henderson,(a) the question came up squarely, whether the joint creditors shall be compelled to pursue the surviving partner in the first instance and shall not be permitted to resort to the assets of the deceased partner until it is established that full satisfaction cannot be obtained from the survivor; or whether they may in the first instance resort to the assets of the deceased partner, leaving the personal representatives to settle with the survivor. It was held that as the estate of the deceased partner is liable at all events to the full satisfaction of the creditors, and no additional burden is thrown on the assets of the deceased by a recovery against him in the first instance, the plaintiff was entitled to satisfaction out of the estate of the deceased, although it was not proved that the survivor was insolvent. Even where the business is continued and the creditors knowing of the death, keep on dealing as before with the survivor, without requiring payment of the balance due from the firm at the time of the death, he does not thereby lose the remedy

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(a)1 M & K 582; Stephenson v Chiswell, 3 Vesey 566.

in equity against the estate.(a) Except where there are acts that would clearly constitute a discharge of the liability of the deceased, by which the creditor intended to take the separate security of the continuing partner in discharge of the joint debt.(b]

The court in the case of In Re Hodgson,(c) quotes with approval from the opinion of Colton, C.J. in Kindall v Hamilton,(d) "It is now well established that a court of equity does treat the estate of the deceased partner as still liable to the partnership creditor, though at law the survivor has become solely liable, and it must now be considered as established that the partnership creditor may obtain relief against the estate of the deceased partner without having exhausted his remedy against the survivor."

The reason for permitting the proceeding is well explained by Judge Selden in Voorhis v Childs (e) though the rule is disapproved. "In the earlier cases it had been assumed that the liability in equity of the estate of the deceased partner was produced by a sort of equitable transfer to the creditor of the right of the surviving partner to insist that the estate of the deceased should contribute to the payment of the debts of the firm; but upon its being afterwards held that the obligations of the firm were to be

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(a) Delaynes v Noble, supra;Winter v Inness,4 M & C 110;(b)Bedford v Deakin,2 B & A 210;(c)L.R. 31 Ch.Div.177;(d)L.R.3 C.P.Div.407. (e)17 N.Y. at p.354.

regarded as joint and several, the English court said that in all cases of that kind the creditor has the right to pursue his remedies against all or either of the debtors. They therefore hold that that they may proceed immediately against the personal representatives of the deceased without resorting to the legal remedies."

The expression that the debts of the partnership are "joint and several" is not strictly true and by a somewhat blind following has led to inequitable results in the United States. Its use in the English cases is explained in Kendal v Hamilton,(a) "The only interposition of a court of equity with regard to partnership debts took place in the administration of the assets, either of the partnership or of a deceased member of the firm. When a member died, the debts became in the eye of a court of law the debts of the survivors; but the survivors on the other hand in the court of equity had the right, as against the estate of the deceased partner, to say that his representatives should not withdraw any part of the partnership property until all the debts were paid or provided for. If therefore a court of equity was administering the assets of a deceased partner, it would in order to clear his estate, ascertain the debts due from the co-partnership

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(a) L.R. 4 App. Cases at page 517.

at his death. From this the transition was easy to giving the creditors of the partnership a direct right, and not merely an indirect right through the surviving partners to come in for payment against the assets of the deceased partner; and from this again, the transition was easy to the expression which said that partnership debts in the eye of a court of equity were joint and several, not thereby meaning that a court of equity altered or changed a legal contract, but merely that the court in order, before distributing the assets to administer all the equities existing with regard to them, would go behind the legal doctrine that a partnership debt survived as a claim against the surviving partner only and would give the creditor the benefit of the equity which the surviving partner might have insisted on."

This conception of the expression makes it clear that the court of equity does not consider the debts to be joint and several for all purposes.

Unites States Rule. The United States Supreme Court in Nelson v Hill (a), follows the English doctrine, considering the rule too well established to be shaken. This case was decided on a point of practice and the question was necessarily involved only so far as to permit the equitable action, in case no property of

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(a) 5 Howard 127.

the firm could be found on execution, this fact being alleged in the bill. It is however cited as authority in many states in support of a doctrine even more liberal to the firm creditor than the English rule.

Nearly all the states which follow this rule have swallowed whole and without exception or qualification the rule that in equity the debts of the firm are joint and several. The court in Camp v Grant (a) said, that debts are in equity joint and several, and that partnership debts where one partner is dead may at once be presented against his estate, though the survivor be solvent and within the jurisdiction of the court.

An equal or greater number of states, however, have refused to follow the English rule, or the more radical doctrine in the foregoing states. Of these New York is the type. It was said by Chancellor Kent in the earlier case of Hammersley v Lambert(b) "It is well settled that relief may be had in equity against the representatives of the deceased leaving assets, if the surviving partner be insolvent." The partnership fund is at law appropriated to the creditors of the firm and they ought to show that it

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(a) 21 Conn. 41; also Mc Lane v Carson's Ex.,4 Ark. 164; Fillyau v Laverty, 3 Fla. 72; Eads v Mason, 16 Ill. App. 545; Ralston v Moore, 105 Ind. 343; Postlewait v Howes, 3 Ia. 365; Vance v Cowing, 13 Ind. 460; (b) 2 Johnson's Ch. 508.

has been exhaused before they can resort to the estate of the deceased.

The case of Lawrence v Trustees,(a) laid down positively that the estate of the deceased cannot be reached until the legal remedies against the survivor have been exhausted. There is no concurrent remedy. The reasons given are strong: " By a contrary rule the creditor is put in a better situation than he would have been if he had sued in the life time of the deceased partner, for then he could not have sued him alone; and it is a rule that the individual property of a partner must be first applied to pay individual debts before it can be taken to satisfy firm debts. If the action against the representatives was allowed on the ground of his several liability, the partnership debts will come in to be paid off pari passu with the individual debts, thus breaking down the rule which gives preference to individual debts. The law authorizes the survivor to retain possession of all partnership property and it gives the creditors of the partnership a preference over the individual creditors in their right to satisfaction out of such property." To allow these rules to stand and yet permit the creditors of the firm to resort in the first instance to the assets of the dead partner and come in for payment equally with

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(a) 2 Denio 577.

the individual creditors seems inconsistent with principle. When the partnership funds are sufficient to satisfy the claims upon them, it is harsh and unjust to those who succeed to the estate of the deceased to permit the creditors of the firm to seek satisfaction out of the individual estate having two funds to which to resort, depriving the individual creditors of their preference, and leaving the representatives of the deceased to seek indemnity from the survivor. This doctrine is followed in all later cases in this state.(a)

The insolvency or the inability of the survivor to meet the liabilities must be alleged in the complaint and proved, in order that equity may grant this relief. The return of an execution against the survivor unsatisfied is conclusive proof of his insolvency, and of the exhausting of all legal remedies.(b) And if the execution is so returned it is not necessary to aver or prove the insolvency of the survivor.(c) Or if insolvency is alleged the issuing of an execution need not be averred.(d) The insolvency of the firm exonerates the creditor from pursuit of the survivor to judgment as the lack of property will defeat the only

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(a) Voorhis v Childs, 17 N. Y. 354; Richter v Poppenhausen, 42 N. Y. 373; Pope v Cole, 55 N. Y. 124; Murray v Fox, 39 Hun 108; (b) Murray v Fox, supra; (c) Pope v Cole, 64 Barb.406; (d)Stahl v Stahl, 2 Lansing 60.

object of a judgment. So also where he has absconded from the country and it is evident that such pursuit would be fruitless.(a) The other states which follow the New York rule base their decisions on the same principle of the primary liability of the survivor and the want of any ground for the interference of equity unless the partnership is insolvent or its funds already expended.(b)

In reviewing and comparing these doctrines, it seems that that of New York is the more just, equitable and consistent with principle. The opinions in those cases which announce and follow the English rule do not satisfactorily meet the grounds upon which the New York rule rests. The partnership property is the primary fund for the payment of firm debts. During the existence of the partnership there is at law only the legal remedy of action against the partnership, and there is no lien upon the firm estate until judgment. The death of a member should not place a creditor in a better position than that in which he was during the continuance of the firm. It is a matter of some injustice and inconvenience to force the estate of the deceased to pay, when there may be ample funds in the hands of the survivor to whom the title devolves for the very purpose of payment and settlement. At law confess-

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(a) Horsey v Heath, 5 Ohio 353;(b)Emanuel v Bird,19 Ala.596;Sherman v Kruel,42 Wis.33;Horsey v Heath,supra; Buckingham v Ludlum, 37 N.J.E.137;Anderson v Pollard,62 Ga.46.

edly, the representatives are not liable at all but the survivor solely, and it does not appear in the ordinary case that a judgment against the survivor and through him to reach the fund presumptively in his hands will not be completely effectual; so that there is no reason for going into equity until the remedy is exhausted or proved to be useless. Any direct and immediate action in equity would subvert the rule that equity will not grant relief when there may be an adequate remedy at law.

II. MUTUAL RELATIONS OF JOINT AND SEVERAL CREDITORS.

Having seen that there is in equity provided a way for reaching the separate estate of the deceased partner and charging it with the partnership debts, it must now be ascertained in how much of this estate these creditors may share, and also their position with respect to the claims of the individual creditors of the deceased. It will be well first to define the terms, joint and separate estate,- and joint and several debts.

A <u>joint debt</u> arises where the original credit is given to the partnership; notwithstanding that the partner contracting may have also given his own separate security therefor, or made himself personally liable. On the other hand wherever the original credit has been exclusively given to the party contracting the debt the partnership will not be liable therefor, but the individual only,

although it has been applied to the use and benefit of the firm.

The joint estate of the partnership is that which belongs to the firm, and in which the partners have a joint interest either at law or in equity at the time of dissolution. The separate estate is that in which any of the partners has a separate interest either at law or in equity at the same period. Story # 367, 371.

The administration of both the joint estate by the survivor and of the separate estate of the representatives of the deceased should proceed entirely on equitable principles. The joint estate is not primarily under the direct view of the court, but having once been brought within its jurisdiction in any action, will be settled by its authority. So if the assets of the deceased are placed under the jurisdiction of the court by a suit brought to subject them to liability for joint debts, they will be distributed among the two classes of creditors, joint and separate, according to the rules followed in the court of equity, which are in the main similar to those laid down for the distribution in cases of bankruptcy.

Joint Estate. In the settlement of the affairs of the firm the joint creditors have a priority of right to payment out of the joint estate, and the separate creditors of either partner may share in his moiety of the surplus then remaining. Lindley on Partnership, page 599, note 2 and cases cited.

This rule is well settled and has never been questioned. It is certainly just and equitable, on the theory that those who have given credit relying on the joint estate should be given preference in the division of that estate to the exclusion of those who may have become creditors of a partner, trusting in his separate property. If the share of that partner in the firm assets influenced the action of his creditor in the extension of credit to him individually, he is not injured for this share is only a moiety remaining above and beyond the firm liability. So where all the partners have died and the joint estate has fallen into the hands of the administrator of the last survivor, it must be kept separate from the individual estate of the deceased. The joint fund must be first applied to the joint debts to the exclusion of the separate debts. This is on the ground of the equity existing between partners that neither has the right to withdraw anything from the joint stock and apply it to his private purposes, until the debts are paid ; and this equity is not destroyed by death. It would be monstrous if the surviving partner or the executor after his death should apply the whole partnership property to the payment of his separate debts, in consequence of which the partnership debts would fall on the estate of him who died first.(a)

(a) But see rule in Pennsylvania.,Bell v Newman,5 S & R 78.

Separate Estate of the Deceased. The equity of the rule would with equal force naturally require that the joint creditor should look only to the surplus of the separate estate of the deceased, after the payment of the individual debts. The origin of this branch of the rule is declared by Lord Eldon to be unknown and as resting partly on convenience and partly on abstract equity.

The rule as laid down in the early case of Ex Parte Crowder(a) was, "that the joint funds were applicable in the first instance to the payment of joint debts, and then separate debts; and that the separate effects should be applied to the payment of separate debts and that the surplus should go to the liquidation of the joint debts." This was followed in the subsequent cases in England until the decision of Ex Parte Hodgson,(b) where Lord Thurlow broke in upon the established practice and resolved that there was no distinction between joint and separate creditors; and that the joint creditors ought to come in pari passu with the separate creditors in the settlement of the separate estate. This was qualified however by making it competent for the assignee of the insolvent to confine the joint creditors, when there was a joint estate, to that fund exclusively, by means of an injunction granted by a court of equity: so that while one court would grant

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(a) 2 Vern.706 decided in 1706; (b) 2 Bro. Ch. 5.

to the joint creditors the right to direct participation in the joint estate, another would restrain them from exercising that right. This resulted in serious inconvenience and useless expense and the old rule was re-established in Ex Parte Elton,(a) and has continued to be the rule in England. While these cases were mainly in bankruptcy the rules were followed in equity in the distribution of the estate of the deceased partner.

United States Rule. In the United States there has been little conflict on the point, it having been early decided that the separate creditors have priority of claim on the separate estate. This rule is closely adhered to in all the states, not only on the ground of the granting of credit to different funds in different classes of cases, but also upon the principle of equity that he who has the right to go upon two funds can be compelled by a person who can go upon but one of them, to take payment as far as possible from the fund to which he may resort exclusively.(b)

The first ground is attacked with good authority, as it may be well assumed that the individual creditor regards the solvency of the firm and its business capital as additional security for his claim; and the partnership creditors do trust, in a measure, to the individual as well as the firm assets for the payment of

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(a) 3 Vesey 238; (b) Cases cited, Lindley on Partnership p.599.

partnership debts.

If the estate of the deceased is solvent and fully able to meet both joint and individual obligations, nothing can be gained by the right of either class to have priority over the other; but if the estate is insolvent and so unable to pay all, the manner of its distribution is a matter of great moment to all parties.

The correctness of the doctrine has been severely questioned by Judge Story, and he declares it to stand as much if not more on the general ground of authority and the maxim stare decisis, than upon the ground of equitable reasoning. It has been repudiated in a few states which hold that after the firm property has been exhausted the joint creditors may share equally with the separate creditors in the separate estate.(a)

The general rule as above stated will not, however, operate to avoid or override any lien which may have attached upon the separate estate in favor of a firm creditor (b); or deprive a firm creditor of any individual security he may have taken from the deceased, in which latter case he will be in truth a several as well as joint creditor and may prove his claim against the estate as though he were merely a separate creditor.(c)

Exception. An exception has been made that where there is

(a)Blair v Black, 31 S.C.346; Pettijohn v Woodruff,86 Va. 478;
(b)Meech v Allen, 17 N.Y.300; (c)Matter of Gray,111 N.Y.404.

no joint fund and no surviving partner who is solvent, the joint creditors will have the benefit of the separate estate of the deceased equally with the separate creditors. This doctrine is recognized in a limited number of cases.(a)

In Emanuel v Bird,(b) the Court says after stating the general rule, "but when there is no joint estate and the surviving partners are insolvent, then there can be no reason why the separate creditors should be entitled to priority over creditors of the firm, for the debt though joint at law, is considered joint and several in equity. It is therefore a debt which the deceased partner separately as well as jointly owned, and the only ground upon which such a debt could be postponed must be that there was another fund bound for its payment. But when this ground is removed and there is no other fund that can be reached by the joint creditors, there can be no reason in allowing the separate creditor a priority over them.....there can be no other ground on which the joint creditors can be allowed to prove their debts against the estate of a bankrupt and receive payment pari passu with the esparate creditors, than this, that in equity the joint demands must be considered as separate as well as the joint debt of the bankrupt, and there being no other fund out of which it can be paid, justice

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(a) Pahlman v Graves, 26 Ill. 405; Higgins v Rector, 47 Tex.361; Emanuel v Bird, 19 Ala. 596; (b) supra.

requires that it should be paid pro rata with all the other debts of the bankrupt."

Two conditions must exist in combination to permit the application of the exception: (1) no joint estate, the test being whether the joint creditor can get anything from it; and (2) no living solvent partner, one from whom no fund, however small, can be derived. If there are in the hands of the survivor any funds of any description, no matter how inconsiderable, which are capable of being realized, the rule is inflexible and the joint creditor is postponed until the satisfaction of the claims of the separate creditors. This exception or rule, if so it may be called, is expressly repudiated by many courts and text books, in so far as the distribution of the estate of the deceased partner is concerned, though retained in cases of bankruptcy alone. Parsons says, " We can see no more justice in this rule and no more reason for it than for saying that the separate creditor, if there be no separate estate may come in on the joint property with the joint creditors and this has never been permitted;.....and the strong disapproval sometimes met with connected with the general tendency of the law at this day to complete its recognition of a partnership as a body by itself with its own means appropriated to its own ends, leads us to doubt the propriety and permanency of

the rule."

Kentucky Rule. In Kentucky, whose law is proverbally unlike that of any other state, the following rule has been laid down judicially. If the partnership creditors exhaust the partnership assets without having been paid in full, the individual creditors have a right to make a like amount out of the individual assets, if so much exists, and when this is done the individual estate remaining will be distributed among all the creditors, partnership and individual, in proportion to their respective debts. But this will not act to deprive any creditor of any lien or legal preference which he may have obtained before the dissolution.(a)

(a) Fayette v Kenney's Assignee, 79 Ky. 133.

CHAPTER V.

CONTINUANCE OF THE PARTNERSHIP AFTER DEATH.

It was very early recognized as an exception to the rule that a firm is dissolved ipso facto by the death of a partner, that the partnership could be continued after such death by an agreement made by the partners when entering upon the relation; or by direction in the will of the deceased assented to by the survivor.

This qualification was first suggested by Lord Eldon in the case of Pearce v Chamberlain,(a) and has never since been questioned. "That it is competent for partners, when constituting the relation of partnership between themselves, to provide that the same relation shall continue between the survivor of them and the estate or representatives of the deceased partner for a time to be specified under the firm name, on the same terms and for the same purpose as the original partnership, has never so far as we know been denied in any adjudicated case or by any of the elementary writers."(b)

It is doubted by Parsons whether this qualification is necessary or accurate. He contends that no provisions made beforehand or directions in a will can prevent the dissolution; and that as the partner who has died cannot still be a member, and as any firm

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(a) 2 Vesey Senior 33; (b) Matter of Laney, 50 Hun 15.

of which he is not a member will not be the same firm, this cannot be a bargain for a continuance, but rather for the creation of a new partnership when the old one ceases to exist.

Any discussion of this question would be unprofitable, it being a mere matter of name rather than substance, and for all practical purposes the continuing parties may well be considered the old partnership continued with, as partners, the survivor and such other as may be admitted in accordance with the stipulation for that purpose.

How Accomplished. The continuance may be provided for in the articles or by the will of the deceased partner. In either case the agreement or authority must be clearly made out and expressed in the most unequivocal terms. The court will not imply such directions from mere construction; so where the profits depend upon the skill of the parties this will tend to preclude a construction favoring continuance where the articles are of doubtful import.(a) An option in the articles, giving the surviving partner in the event of the death of either, the right to continue or not as he chooses has been held void for want of mutuality and not binding on the heirs.(b)

When the continuance is directed in the will of the deceased

(a) Carroll v Alston, 1 S.C. (N.S.) 7;(b) Hart v Anger, 38 La.Ann. 341.

such provision does not of itself continue the firm,but the assent of the survivor is necessary to carry it out, and his further consent is required to admit the appointee of the deceased to his place in the business. But if the provision is in the articles, that upon the death of the partner his personal representative or some other person, shall be entitled to his place with the capital of the deceased, this is binding on the survivor to admit such person but does not bind the latter to come in. He will have an option to come in or not and a reasonable time to elect.(a) But a stipulation, that the capital of the deceased shall remain in the business until the expiration of the prescribed term, is binding as well on the estate of the deceased as upon the surviving partner.

Liability of the Estate of the Deceased. The question as to how far the estate of the testator, who directs such continuance, is bound, is a matter of importance to those dealing with the firm. They,having had notice of the death,are bound to enquire how far the authority extends and if they trust the survivor beyond the reach of such agreement or authority it is their own fault, and they cannot complain if the law does not give them satisfactory redress.(b)

(a) Madgewick v Wimble, 6 Beav. 495; Downs v Collins, 6 Hare 418; Wild v Davenport,48 N.J.L. 129;(b)Burwell v Mandeville's Exr., 2 Howard 576.

The testator may if he choose bind his general assets and render all his estate subject to liability for the debts contracted after his death; or he may limit the future responsibility to the capital already embarked in the partnership business, or to any specific amount to be thereafter invested.(a) In the latter case the creditors can resort to that amount only although the survivor who carries on the business will still be personally liable for all the debts contracted. To bind his whole estate, an intent so to do must appear in express and unequivocal language demonstrating in the most positive manner that it is his purpose to make his entire property liable; and in the absence of such specific directions or in case of doubt the courts will construe the will to provide that merely the capital already invested shall remain in the business.(b) So, a direction that his interest shall "remain and be used as heretofore" is held to exclude the idea that it was intended to invest or render liable any other portion of his estate.(c)

Where the agreement is in the articles, it seems that the liability of the estate of the deceased does not extend beyond the fund already in the business.(d) But it was held in Blodgett v

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(a) Columbus Watch Co. v Hodenpyl,134 N.Y.130;(b)Burwell v Mandeville's Exr.,supra;Smith v Ayers,101 U.S.320;Jones v Walker,103 U.S.444;(c)Brasfield v French,59 Miss. 632;(d)Stewart v Robinson, 115 N.Y. 328.

Bank, (a) that the liability of the estate was not limited to the capital but extended to all his property, the court distinguishing this case from those where the continuance is directed by will.

The Position of the Executor or Appointee. Where the executor or nominee of the decedent elects to come in under the provisions of the partnership articles, he will come in as a partner, with all the rights and liabilities of such, and consequently becomes personally responsible for the debts contracted in the business. He is liable for the reason that he has of his own volition engaged in the business as principal, judging for himself whether it is fit and safe to enter that situation and contract that sort of liability. So also if he enter in accordance with the testator's will, with the survivors consent, he will be personally liable. But in either case if he acts in compliance with the testator's direction he will be entitled to indemnity out of the testator's estate to the extent of the fund which the testator invested in the business.(b) But on the other hand, if the agreement is simply that the capital of the deceased shall remain in the business, the executor is not admitted into the management of the business, nor can he withdraw the capital without subjecting the estate to liability for a breach of contract. The control is

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(a) 49 Conn. 9; (b)Ex Parte Garland, 10 Vesey 109; In Re Johnson, 15 Ch. Div. 548; Wild v Davenport, supra.

with the survivor absolutely, so here none of the reasons for responsibility as a partner exist against the executor, and the creditors have only the liability of the survivor and the security of the capital which is left with the business. So also there is no personal liability, when the executors allow the share of the deceased to remain in the business when done by the instruction of the deceased in his will.(a)

The direction to carry on the business must be restricted to mean on the same terms and with the same partners as before. The executors cannot enter a new or different partnership; they cannot change the terms of the contract so that greater or different powers might be implied. They cannot directly or indirectly, by consent, acquiescence or ratification give validity to any act for which authority did not exist by the terms of the contract as it stood at the death of the deceased.(b)

Powers of the Survivor. The powers and liabilities of the survivor are essentially the same as during the life of all the partners,(c)but he can do nothing which is so far outside the scope of the business that it would have required the sanction of all the partners if done during their lives.(d)

Nelson M. Gould. Joseph A. Greene

(a)Richter v Poppenheysen, 59 How.Pr.83;(b)Berry v Folkes, 60 Miss. 611;(c)Bell v Hepworth, 134 N.Y.442;(d)Nat.Bank v Bigler, 83 N.Y.51.

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