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PARTNERSHIP BILLS AND NOTES.

§ 1. A partnership exists whenever two or more persons unite skill, labor or property in an undertaking, and participate in its profits; unless such participation in the profits be by way of services as an employee without interest in, or control of, the subject matter, in which case the participant is not a partner. *Ogden v. Astor*, 4 Sandf. 311; *Vandenburg v. Hall*, 20 Wend. 70. Partners are of several kinds. I. Actual and ostensible. II. Secret or dormant. III. Nominal or ostensible. IV. General. V. Special or limited. VI. Retired.

§ 2. In the first case, where the partner is both *actual and ostensible*, there can be no difficulty in fixing his liability, which is palpable, although his name may not be expressed in the style of the firm. *Secret or dormant* partners are just as liable, when they are discovered, as those who are ostensible, because, participating as they do in the profits, they are held equally liable for losses. But in case of withdrawal from the firm, no notice is necessary, the secrecy of their connection with it rendering it superfluous. *Davis v. Allen*, 3 Comstock 168; *Magill v. Merrie*, 5 B. Monroe 168; *Scott v. Colmisnil*, 7 J. J. Marshall 416.

§ 3. A mere *nominal or ostensible partner* is as much bound by the negotiable paper, or other engagements of the firm, as if actual; for if he suffer himself to be held out to the world as a member, he authorizes third persons to regard him as a contracting party. If such partner desires to avoid liability, he must give due notice that he is not an actual partner.

§ 4. A *general partnership* is such as exists by operation of law when two or more persons combine in an undertaking and share the profits, and in which all are jointly and severally bound for all the partnership debts. A *special or limited partnership* is one in which the special partner contributes to the common stock a specific sum in actual cash, and is liable only to that extent for the debts of the partnership. This privilege is granted by statute in most of the States, being unknown to the common law, and is accompanied by stringent conditions. Edwards on Bills & Notes 106-7.

§ 5. *Retired partners* must give notice of withdrawal from the firm—otherwise they will be bound. This notice should be given by letter or circular to all business correspondents who have dealings with the firm; and by advertisement to those who know it only by general reputation. Edwards on Bills 116; 1 Parsons Notes & Bills 143.

Partner may Bind Firm in Copartnership Business.

§ 6. One partner may bind all of his copartners in any transaction and by any instrument not under seal, within the scope of the partnership business; and may assign, accept, indorse, present, demand, or receive payment of negotiable papers in the partnership name. And if a bill be drawn upon a firm, the acceptance by one partner, whether in his own name or the name of the firm, is binding upon the firm, it being only necessary for it to appear that he acted for it. *Leroy v. Johnston*, 15 Peters 197; *Mason v. Rumney* 1 Camp. 384; *Jenkins v. Morris*, 16 M. & W. 877. The drawing of a bill of exchange by one partner in his own name upon the firm of which he is a member, it has been held, is in contemplation of law, an acceptance of the bill by the drawer in behalf of the firm. *Dougal v. Cowles*, 5 Day 511.

§ 7. The general authority of a partner to bind the firm springs from the mutual agency of the copartners for each

other; and from the course and usage of the business in which they are engaged. It follows, therefore, that a person contemplating partnership with another cannot, without a special authority, bind him by a contract for the proposed partnership benefit; for example, for the purpose of raising capital—his agency not commencing until the connection is consummated. *Greenslade v. Dower*, 7 B. C. 695. The copartnership being formed the copartner can bind his associates only in such transactions as pertain to their partnership business; and the copartnership business must be of such a character that the giving of negotiable paper would be the convenient and proper mode of conducting it, in order to create the presumption of agency in a copartner to give a bill or note in the firm's name. Thus the U. S. Supreme Court held that a bill drawn by a partner in the name of a firm engaged in farming, working a steam saw mill and in trading, was binding, because trading and running the mill required capital and the use of credit; but if the firm had been engaged in farming alone, no one partner could have bound it by a bill or note. *Kimbro v. Bullitt*, 22 Howard 256.

§ 8. For these reasons one of a law partnership cannot bind the firm by a promissory note: *Levy v. Pyne*, Car. and M. 453; *Hedley v. Bainbridge*, 3 Q. B. 316. (42 E. C. L. R.); nor can one of a firm practicing medicine bind it in a like manner except for medicine and other necessities of his profession: *Crosthwait v. Ross*, 1 Humph. 23; nor can one of a firm keeping tavern bind his copartners except strictly within the business; *Cooke v. Branch Bank*, 3 Ala. 175. It is said, however, that if the concerns were of such vast magnitude as to require large capital and credit, the rule would be of doubtful application, and that it would depend very much upon the usage of the particular firm and others similarly engaged. 1 Parsons, N. and B. 139. The general authority of a partner to bind the firm exists only by implication, and may be rebutted by evidence that the party who took the security had previous notice that no such authority existed. *Galticay v. Mathew*, 10 East. 264; *King v. Faber*, 22 Penn. 21.

§ 9. A note beginning "I promise," and signed by one of

the firm for the rest, as A. B. for C. D., E. F., &c., will bind the firm. *Galway v. Matthew*, 10 East 264, 1 Camp. 403; *Staats v. Howlett*, 4 Denio 559; and will not bind the separate partner singly; *In re Clarke*, 14 M. & W. 469, overruling *Hall v. Smith*, 1 B. & C. 407. So if it begins, "I promise," and is signed by the firm's name. *Doty v. Bates*, 11 Johns. 544. And if a partner draws a bill or note in a fictitious name and indorse the partnership name, the firm will be bound by the indorsement. *Thickensse v. Bromilowe*, 2 Crompt. & J. 425. If the partner intending to use the firm's name make a slight and immaterial variation from it, the firm is still bound; *Williamson v. Johnson*, 1 B. & C. 146; *Faith v. Richmond*, 11 A. & E. 339; *Forbes v. Marshall*, 11 Exch. 166; but if the variation is material it will not be. *Kirk v. Blurton*, 9 M. & W. 284; *Maclae v. Sutherland*, 3 Ellis & B. 31. If A., B. and C. are partners, a note given by one of them signed A. & Co. will be presumed to be in the partnership name. *Drake v. Elwyn*, 1 Caines 184. And if the names of all the partners are written on the paper instead of the firm's name, the firm will be bound. *Norton v. Seymour*, 3 C. B. 792. One partner cannot, without special authority, execute a joint and separate note in the partnership name; *Perring v. Hone*, 2 C. & P. 401, 4 Bing. 28 (13 E. C. R. L.); but it has been held—and justly as we think—that such a note would be void only as a several note, and good as a joint note. *Maclae v. Sutherland*, 3 El. & B. 36 (77 E. C. L. R.).

§ 10. If one partner obtains money by representing the signature to be that of the firm, and misapplies it, he will commit a fraud on his co-partners; but they will be liable to all *bona fide* holders without notice, as the partnership existence enabled him to commit it. *U. S. Bank v. Binney*, 5 Mason 176; *Buckner v. Lee*, 8 Ga. 285.

Cases of the Name of an Individual Used as a Style of Firm.

§ 11. Sometimes the partnership transacts business in the name of a single partner, and questions often arise whether or not paper executed in the name of the single partner was intended as his only, or as that of the firm.

Prima facie it is presumed to be the paper of the individual

partner alone. *Cunningham v. Smithson*, 12 Leigh 48; *Manufacturers Bank v. Winship*, 5 Pick. 11; *Boyle v. Skinner*, 19 Misso. 82; *Mercantile Bank v. Cox*, 38 Maine 500; *Buckner v. Lee*, 8 Georgia 285; *U. S. Bank v. Binney*, 5 Mason 176; *Bank of Rochester v. Monteath*, 1 Denio 402. But if it is shown to have been executed in the business of the firm, and that he intended to sign it as a partner, it will be considered the firm's paper. *South Carolina Bank v. Case*, 8 B. & C. 427.

§ 12. If a person is a partner in two firms, the one firm cannot sue the other *at law*, as the names of all the members, whether appearing in the firm's name or not, must beset forth in the declaration, and the same party cannot be both a plaintiff and a defendant; *Pitcher v. Barrows*, 17 Pick. 361; *Babcock v. Stone*, 3 McLean 172; *Mainwaring v. Newman*, 2 B. & P. 120; *Neale v. Turton*, 4 Bing. 149; *Moffat v. Van Milligan*, 2 B. & P. 124. The remedy would be in equity. In some States, however, as in Pennsylvania, the common law has been changed by statute, so that an action will lie.

But this difficulty ceases when the instrument passes to a third party, who may sue both firms: *Pitcher v. Barrows*, 17 Pick. 361; *Davis v. Briggs*, 39 Maine 304. And when there is a good defense against one of several partners it applies equally to all, although the others may have been entirely innocent of complicity in the fraud of the one, or have been themselves its victims; *Richmond v. Heapy*, 1 Stark. 204; *Brandon v. Scott*, 7 E. & B. 234, (90 E. C. L. R.); *Attley v. Johnson*, 5 H. & N. 137.

§ 13. Copartners may enter into any contract between themselves restraining the firm, or any member of it, from executing or indorsing a negotiable instrument; and it is a fraud upon the firm for any member to violate it, for which his injured copartners may maintain an action. Byles on Bills (Sharswood's ed.) 128. But in the hands of a *bona fide holder*, without notice, the fact that partnership articles have been violated is no objection to the validity of the instrument, or his right to recover; for their association with the wrong-doer enabled him to commit the fraud. *Michigan Bank v. Eldred*, 9 Wallace 544; *Kimbrow v. Bullit*, 22 Howard 256; *Winship v.*

Bank U. S., 5 Peters 529; *Catskill Bank v. Stall*, 15 Wend. 364, and 18 Wend. 466; *Waldo Bank v. Lambert*, 16 Maine 416; *Bascom v. Young*, 7 Misso. 1; *Cotton v. Evans*, 1 Dev. & B. Eq. 284; *Miller v. Hughes*, 1 A. K. Marsh. 181.

§ 14. No one member of a firm can, without the consent of his copartners, bind them by executing a bill or note for his private debt in the partnership name; and the creditor who receives such an instrument participates in the wrong. In order to recover upon it he must prove the assent of the copartners. *Smith v. Strader*, 4 Howard 404; *Sweetser v. French*, 2 Cush. 309; *Rogers v. Batchelor*, 12 Peters 229; *Poindexter v. Waddy*, 6 Munf. 418; *Foot v. Sabin*, 19 Johns. 154; *Taylor v. Hillyer*, 3 Blackf. 433; *Noble v. McClintock*, 2 Watts & S. 152; *Maudlin v. Branch Bank*, 2 Ala. 502; *Williams v. Gilchrist*, 11 N. H. 535; *Baird v. Cochran*, 4 Sergt. & R. 397. This seems to us the rule established by the English authorities; also, See Bayley on Bills, p. 43; Chitty on Bills (13 Am. Ed.) 60-61, and cases cited by those authors, although there are cases to the contrary. *Swan v. Steele*, 7 East 210; *Ridley v. Taylor*, 13 East 175, which are cited by Professor Parsons, 1 N. & B. 127, with evident disapprobation. The cases cited by Bayley and Chitty fully sustain the text. *Swan v. Steele*, however, may be distinguished from the other case, the instrument being for a larger amount than the private debt, and having been executed some time previous to the transaction.

Distinct proof is required of the assent of the copartners—*mere knowledge* of the transaction, it has been held, is not sufficient. *Elliott v. Dudley*, 19 Barb. 326. But unless they were prompt to repudiate it, we should say they were bound. *Foster v. Andrews*, 2 Penn. 160. And their assent may be implied from circumstances. *Gansevoort v. Williams*, 14 Wend. 133. A course of dealing of the firm in recognizing such accommodation paper as theirs, or in executing it, would suffice; *Butler v. Stocking*, 4 Selden 108; Edwards on Bills 105; and when such a course of dealing has been proved, evidence that the partnership articles prohibited it, would be inadmissible. *Michigan Bank v. Eldred*, 9 Wallace 544.

The admissions of the partner executing partnership paper

for his private debt are no evidence to bind the firm. *Hickman v. Reineking*, 6 Blackf. 387.

§ 15. If the firm receive and hold the proceeds of negotiable paper, executed by one of their number in a transaction not in their business, the firm will be considered as ratifying the act and will be bound; *Richardson v. French*, 4 Met. 577; *Clay v. Cottrell*, 18 Penn. 408; *Whitaker v. Brown*, 16 Wend. 505; and this is the rule whether the paper be signed by the partner in his own name or the firm's; *Haldeman v. Bank of Middletown*, 28 Penn. 440; and likewise if they delay so long after having knowledge of the transaction as to raise a presumption that they ratify and adopt it. *Foster v. Andrews*, 2 Penn. 160. But if as soon as the other partners hear of the transaction they repudiate it they will not be bound.

§ 16. Nor can any one member of the firm bind the copartnership by signing its firm name as drawer, indorser or acceptor of a bill or note for accommodation of a third party. If the payee knew that the copartner signed the firm's name for accommodation he cannot enforce payment against them without proving their assent. *Bank of Rochester v. Bowen*, 7 Wend. 158. *Chenowith v. Chamberlin*, 6 B. Monroe 60; *Beach v. State Bank*, 2 Ind. 488. If the partner add the word "surety" to the partnership name already signed to a bill or note, this stamps upon the paper an indication of its character; *Foot v. Sabin*, 19 Johns. 154; *Austin v. Vandermark*, 4 Hill 259; and where a bill or note is carried by the drawer or maker to a bank to get it discounted on his own account, or transfer it to another party, and it bears the name of a firm which is payee and indorsed therein, the transaction shows on its face that it is accommodation paper, and the bank or other holder must prove the copartners' assent in order to bind them. *Bank of Vergennes v. Cameron*, 7 Barb. 143; *Austin v. Vandermark*, 4 Hill 259; 1 Parsons N. & B. 141. But a bank discounting partnership paper for one partner, and placing the amount, to his credit would not be chargeable with notice that he was acting in fraud of the firm, or be required to prove assent of his copartners. *Ex parte Bonboatus*, 8 Vesey 842.

§ 17. If the partnership engagement as surety or indorser is really for the partnership benefit in their legitimate business, the paper will be valid; *Langan v. Hewitt*, 13 Smedes & M. 122; and a single partner it has been held may renew the paper executed by the consent of all for accommodation. *Dundas v. Gallagher*, 4 Penn. St. R. 205.

The Burden of Proof.

§ 18. When the payee or holder of a bill or note executed by a partner in the name of the firm exhibits it, and proves the signature of the signing partner (where such proof is necessary) he establishes a *prima facie* right to recover of the partnership, it being presumed that the partner acted within scope of the partnership business: *Doty v. Bates*, 11 Johns 544; *Manning v. Hays*, 6 Md. 5; *Vallett v. Parker*, 6 Wend. 615; *Knapp v. McBride*, 7 Ala. 19; *Foster v. Andrews*, 2 Penn. 160; *Hamilton v. Summers*, 12 B. Monroe 11. If the copartnership resists payment, it must first show the fact that the paper was executed for a private debt, for accommodation, in violation of terms, or otherwise beyond the scope of the partnership business: *Ibid.* If the suit be brought by the payee, the firm must go a step further and show that *he knew* the copartner was exceeding his authority: *Doty v. Bates*, 11 Johns. 544; *Edwards on Bills*, 105. The defense against the payee is then established, and while the instrument would still be valid in the hands of a subsequent holder, it has been held in a number of American cases that he must show that he acquired it *bona fide* for value without notice that the copartner exceeded his powers: *Bank of St. Albans v. Gillilands*, 23 Wend. 311; *Bank of Vergennes v. Cameron*, 7 Barb. 143; *Monroe v. Cooper*, 5 Pick. 412; and some of the English authorities are to the same effect; *Hogg v. Skene*, 34 L. J., C. P. 153; *Grant v. Hawkes*, Chitty on Bills (13th Am. ed.) 55; *Byles on Bills*, (Sharswood's ed.) 129. But it is less likely that the third party or indorsee should know the circumstances affecting the validity of the instrument, than that the payee should know them, unless there was something on the face of it to denote them; when of course all parties would be chargeable with notice; and when suit is brought

against the co-partnership by an indorsee the burden of proof should be imposed on the firm to show that the instrument was not in its nature a partnership obligation, and that the endorsee knew its character: *Michigan Bank v. Eldred*, 9 Wallace 544; *Albeitz v. Mellon*, 1 Wright (Penn.) 367; *Musgrave v. Drake*, 5 Q. B. 185 (48 E. C. L. R.) in which case Lord DENMAN said: "Where issue is joined on the plea of *non accepit* and the proof offered of the acceptance is the signature of one partner competent to bind the firm, then, though the defendants show that this signature was a fraudulent act on the part of such partner, yet if the proof does not affect the plaintiff with knowledge of the fraud, that does not put the plaintiff to an answer nor make it necessary for him to give any explanation or account of the transaction." To same effect is Thompson on Bills (Wilson's ed.) 761.

Authority of a Partner Terminates with the Firm.

§ 19. The power of a partner ceases upon dissolution of the firm; and the surviving partners can enter into no contract which will bind the estate of the deceased except such as is necessary or appropriate in settling the affairs of the concern. *Darling v. March*, 22 Maine 184; *Gannett v. Cunningham*, 84 Maine 56. The power of the surviving partners does not extend to giving a note: *Lockwood v. Comstock*, 4 McLean 383; *Lusk v. Smith*, 8 Barb. 570; *Mitchell v. Ostrom*, 2 Hill 520; *Perrin v. Keene*, 19 Maine 355; *Hamilton v. Seaman*, 1 Ind. 185; *Bank of Port Gibson v. Baugh*, 9 Smedes & M. 290; *Contra, Robinson v. Taylor*, 4 Barr 242; or accepting a bill, in the firm's name; *Tombeckbee Bank v. Dumell*, 5 Mason 56, nor according to the weight of authority can they renew a bill or note of the firm: *Parker v. Cousins*, 2 Grat. 373; *Long v. Story*, 10 Misso. 636; *Stone v. Chamberlain*, 20 Georgia 259; *Martin v. Kirk*, 2 Hump. 529; *National Bank v. Norton*, 1 Hill 572; *Palmer v. Dodge*, 4 Ohio State 21; nor can they indorse bills and notes given to the firm before the dissolution. *Parker v. Macomber*, 18 Pick. 505; *Humphries v. Chastain*, 5 Georgia 166; *Sanford v. Mickles*, 4 Johns. 224; *Abel v. Sutton*, 3 Esp. 108.

§ 20. It has been held, however, that after dissolution one

partner may waive demand and notice: *Darling v. March*, 22 Maine 184; acknowledge a balance due from the partnership: *Ide v. Ingraham*, 5 Gray 106; and where the paper was drawn in blank by one partner to the order of the firm and indorsed before dissolution that it might afterward be filled up and negotiated: *Usher v. Dancy*, 4 Camp. 97; *Lewis v. Reilly*, 1 Q. B. 349. But see *Abel v. Sutton*, 3 Esp. 108, and 1 Pars. N. & B. 146-7. And notwithstanding the dissolution the act of the ex-partner will bind the firm unless due notice of the dissolution had been given so as to affect the holder with knowledge. If his indorser were not affected with notice neither would the holder be. *Lansing v. Gaine*, 2 Johns. 300; *Bristol v. Sprague*, 8 Wend. 423; *Cony v. Wheelock*, 33 Maine 366; *Whitman v. Leonard*, 3 Pick. 177; *Booth v. Quin*, 7 Price 193; Byles on Bills (Sharswood's ed.) 134.

§ 21. If authorized verbally or in writing, one ex-partner may bind the firm after dissolution as party to a bill or note. But general authority to settle or close up the firm's business in the firm's name; or to settle all demands in favor of or against it; or to use its name in liquidation of past business; or any other general authority relating to winding up of the partnership concerns does not extend authority to the execution or renewal of bills and notes in the firm's name. *Parker v. Cousins*, 2 Grat. 372; *Long v. Story*, 10 Misso. 636; *Palmer v. Dodge*, 4 Ohio St. 21; *Lockwood v. Comstock*, 4 McLean 383; *National Bank v. Norton*, 1 Hill 572; *Martin v. Kirk*, 2 Humph. 529; *Hamilton v. Seaman*, 1 Ind. 185. Though in England authority to use the partnership name was considered sufficient to leave it for a jury to say whether according to usage and custom it would authorize a renewal in the firm's name: *Myers v. Huggins*, 1 Strob. 473.

In Pennsylvania, however, the courts hold that after dissolution a partner has free authority to borrow money: *Davis v. Desauque*; 5 Whart. 530; and to execute or renew bills and notes in settlement of the past business of the firm. *Brown v. Clark*, 14 Penn. St. 469; *Robinson v. Taylor*, 4 Penn. St. 242.

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