pleadings in an action, whether founded on contract or tort, show that injury has been done to a man's personal estate as distinguished from his person or reputation, the action, in case of the death of the plaintiff survives to and may be continued by his personal representative. Under this rule an action to recover money paid by the plaintiff for shares of a company which he had been induced to take by the fraudulent representations of the defendant, was held to survive his death. The English statute of 3 & 4 Wm. IV., c. 42, provides that an action may be maintained against the executors or administrators of any person deceased "for any wrong committed in his lifetime to another in respect to his property, real or personal." The word "wrong" in this statute has been construed to mean tort, as that word is known in the law. Thus, in *Morgan* v. *Raney*, 6 H. & N. 265, the action was in assumpsit against the executors of an innkeeper for breach of his implied contract to keep safely the goods of a guest. It was objected that the law did not imply a contract under the circumstances, but the court said: "It is not, however, necessary to determine this, if this plaintiff elects to amend, which he may do and we think successfully, because it seems to us, notwithstanding the ingenious argument of Mr. *Phinn*, that if the claim against the defendant is for a tort it is for a wrong committed within the statute." And see *Powell* v. *Rees*, 7 Ad. & Ell. 426.

JOHN D. LAWSON.

(To be continued.)

RECENT ENGLISH DECISIONS.

House of Lords.

BENJAMIN SCARF, APPELLANT, *v.* ALFRED GEORGE JARDINE, RESPONDENT.

A firm of two partners dissolved; one retired and the other carried on the business with a new partner under the same style. A customer of the old firm, sold and delivered goods to the new firm after the change, but without notice of it. After receiving notice he sued the new firm for the price of the goods, and upon their bankruptcy, proved against their estate, and afterwards brought an action for the price against the late partner: *Held*, reversing the decision of the Court of Appeal, that the liability of the late partner was a liability by estoppel only, and not jointly with the members of the new firm; that the customer might, at his option, have sued the late partner or the members of the new firm, but could not sue all three together; and that having elected to sue the new firm, he could not afterwards sue the late partner.

APPEAL from a judgment of the Court of Appeal.

The action was brought by the respondent against the appellant, for the price of goods sold in January and delivered in February 1878, to a firm trading under the name of W. H. Rogers & Co., of which firm the appellant was a member until July 1877. On the trial before DENMAN, J., at Guildhall, on the 30th of May 1879, the facts were proved which are stated in the judgment of the Lord Chancellor, and it was agreed that the only question to be submitted to the jury should be the date on which the respondent first received notice of the appellant's retirement from the firm, and that all the other questions arising in the action should be tried by DENMAN, J., without a jury. The jury found that the respondent first received notice on the 25th of February 1878, after the goods had been delivered. DENMAN, J., gave judgment for the appellant with costs. The Court of Appeal [Lord COLERIDGE, C. J., and BRETT and BAGGALLAY, L. JJ., doubting], reversed this and gave judgment for the respondent for 45*l.* 2*s.* 3*d.* with costs.

Forbes, Q. C., and *G. E. S. Fryer*, for the appellant.

Finlay, Q. C., and *C. A. Russell*, for the respondent.

LORD SELBORNE, L. C.—My lords, the facts in the case are few and simple, but they raise a question which may be of some general importance, and which seems, from what has been stated at the bar, to be as yet undetermined by authority.

There was a firm carrying on business, under the name of W. H. Rogers & Co., in Manchester, with which the plaintiff, Mr. Jardine, had dealings. It consisted at first of two partners, the defendant, Mr. Scarf, and Mr. W. H. Rogers. On the 27th of July 1877, those two persons dissolved the partnership between them, and another person named Beech, joined Mr. Rogers, and they carried on the same business, under the same name and at the same place, from that time forward. Of this, the plaintiff, Mr. Jardine, knew nothing until the 25th of February 1878. In the meantime, in January 1878, goods were ordered from him on behalf of the firm carrying on business under the name of W. H. Rogers & Co. According to the ordinary course of business—which, I presume, was the same as had prevailed before the disso-

lution of partnership in the previous month of July—goods were ordered of the plaintiff, and were delivered by him in February 1878, at the place of business of the firm. At the time when they were ordered, and at the time when they were delivered, he was ignorant of the dissolution of partnership, which had, in fact, taken place, and of the fact that the business was then being carried on, not by Mr. Scarf and Mr. Rogers, but by Mr. Rogers and Mr. Beech. He became aware of those facts upon the 25th of February 1878, on receiving a circular, dated on the 21st of the same month of February, by which notice was given to him, and by which the date of the dissolution of partnership was mentioned as having taken place on the 27th of July 1877; and it was at the same time stated that all debts owing to or by the old firm would be received and paid by Mr. Rogers alone, who would continue to carry on the business as theretofore, in partnership with Mr. Beech, under the same style and firm.

The plaintiff afterwards supplied other goods to the new firm. He made no break in the accounts in his books. He rendered an account consisting of the old and new debts—by "the old," I mean the debt which had been incurred before he became aware of the dissolution of partnership; by "the new," I mean that which had been incurred afterwards—he rendered that account to the new firm. He had some correspondence with them, looking to them as the persons from whom he might expect payment of the whole of the demand; and they, on the other hand, replied in the correspondence as being prepared to liquidate the debt; they made some payment on account, and they gave a check for the balance on the 22d of July 1878, which was post-dated a week. That check, when presented, was dishonored; and on the 7th of August 1878, the plaintiff commenced an action against Rogers and Beech for the balance, which included the present demand; that is to say, included the demand for the goods which had been ordered in January and supplied in February, before notice of the dissolution of the partnership. That action was stopped, not by any discontinuance on the plaintiff's part, but by the failure of the new firm, which went into liquidation on the 16th of August 1878. Under this liquidation, the plaintiff proved as a creditor of the new firm, by an affidavit in which he swore that Rogers and Beech were justly and truly indebted to him in the sum of 125*l.* 19*s.* 1*d.*, for

goods sold and delivered by him to Rogers and Beech, that sum including the goods in question.

Your lordships, I think, must take it upon the facts as they appear, that no objection was made to that proof; that it was never retracted; that it was admitted; and although it does not appear upon proceedings that a dividend has been paid under it, yet, at all events, for anything that your lordships know to the contrary, that may be the case, or may be the case hereafter.

Now, after the liquidation and after the proof, the present action was brought by the plaintiff against Mr. Scarf, who, in point of fact, had ceased to be a partner in July 1877; who, in point of fact, had given no authority to order the goods in question upon his credit, and who, as between himself and the persons who did order the goods, was at the time when they were supplied a stranger to the business. On the other hand, the persons who actually ordered these goods, and to whom they were supplied, were Rogers and Beech. They were the persons alone interested in the business, and they were undoubtedly, upon ordinary principles, liable for what they so ordered. The defendant also might be held liable—about that there can be no doubt; because the principle of law which is stated in Lindley on Partnership, vol. 1, p. 429, 3d ed., is incontrovertible, namely, that "where an ostensible partner retires, or when a partnership between several known partners is dissolved, those who dealt with the firm before a change took place, are entitled to assume, until they have notice to the contrary, that no change has occurred;" and the principle on which they are entitled to assume it is that of the estoppel of a person who has accredited another as his known agent from denying that agency at a subsequent time as against the persons to whom he has accredited him, by reason of any secret revocation. Of course, in partnership there is agency, one partner is agent for another, and in the case of those who, under the direction of the partners for the time being, carry on the business according to the ordinary course, where a man has established such an agency, and has held it out to others, they have a right to assume that it continues until they have notice to the contrary.

There was, therefore, in this undoubtedly a state of circumstances which would have entitled the plaintiff, if he had thought fit, to hold Mr. Scarf liable, the credit being given to him and to

Rogers, there being no knowledge on the part of the plaintiff of the dissolution of partnership; no knowledge of any revocation of the agency at the time when the goods were delivered. On the other hand, if you look not to the estoppel but to the fact, the plaintiff was entitled to hold the persons who actually gave the order and received the goods, and were interested in the profit and loss of the firm which ordered them, liable to him; those persons being not Scarf, Rogers and Beech, or Scarf and Rogers, but Rogers and Beech alone.

Now it appears to me that the real question which your lordships have to determine, is not as it was treated in the courts below—in, I think, both courts below—namely, the question of what is called "novation;" but it is this: whether in that state of circumstances there was a concurrent joint liability of the three persons, Scarf, Rogers and Beech, upon the principles which I have stated; or whether the plaintiff had a right to make his choice whether he would sue those who were liable by estoppel, or sue those who were liable upon facts. Put it as I can I am unable to understand how there could have been a joint liability of the three. The two principles are not capable of being brought into play together; you cannot at once rely upon estoppel and set up facts; and if the estoppel makes A. and B. liable, and the facts make B. and C. liable, neither the estoppel nor the facts, nor any combination of the two can possibly make A. B. and C. all liable jointly.

Therefore it appears to me that if the plaintiff chose to go upon the facts, and to make the persons who actually ordered and got the benefit of the goods his debtors (which he had a plain and certain right to do), he entirely disavowed the estoppel and could no longer set it up. If, on the other hand, he chose to go upon the estoppel, then Beech, being a stranger to the liability upon that footing, he could only sue Scarf and Rogers. One way of testing it would be by inquiring what was the rule under the old system of pleading. If at that time Scarf and Rogers had been sued, could they have pleaded in abatement that Beech ought also to be joined as being also liable; I think most clearly they could not. And upon the other hand, if Rogers and Beech had been sued, still more impossible would it have been for them to plead in abatement that Scarf ought also to be joined, for he was neither a partner when the goods were ordered, nor as between him and themselves could any liability possibly have attached to him.

It seems to me, therefore, that the plaintiff was necessarily put to his election. He might hold either Rogers and Scarf, or Rogers and Beech, liable; he could not hold Rogers, Scarf and Beech all liable together. That makes it unnecessary for me to say much upon the question of novation, except that if your lordships should differ from the Court of Appeal in this case, you will have the satisfaction of feeling that you do so on grounds which do not seem to have been clearly or fully presented, if they were presented at all, to the Court of Appeal. In the court of first instance the case was treated really as one of what is called "novation," which, as I understand it, means this—the term being derived from the civil law—that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract. A common instance of it in partnership cases is where, upon the dissolution of a partnership the persons who are going to continue in business agree and undertake, as between themselves and the retiring partner, that they will assume and discharge the whole liabilities of the business, usually taking over, the assets; and if in that case they give notice of that arrangement to a creditor, and ask for his accession to it, there becomes a contract between the creditor who accedes and the new firm, to the effect that he will accept their liability instead of the old liability, and on the other hand that they promise to pay him for that consideration.

Now if this case had rested upon that ground (on which it appears to have been put in the court of first instance), I could not myself have agreed in the decision at which the court of first instance arrived; because there is really only one act done upon which a serious argument, as it seems to me, could be found in favor of novation, if the circumstances had required that the case should be put upon that ground. I mean the giving of the check, which I have already mentioned, on the 22d of July 1878, by the new firm. Down to that time it was, as it seems to me, merely in the natural and ordinary course of things, that when the notice of dissolution referred to Mr. Rogers (who was continuing to carry on the business of that firm with Beech), as the person who would receive and pay all debts owing to or by the old firm, either Mr. Rogers or his firm should act in the liquidation of the affairs and debts of the old concern; and the mere corresponding with them,

the mere sending in the accounts to them, would not, as it seems to me, make Beech liable unless he did something to make himself liable beyond carrying on that kind of correspondence. Then, upon the other hand, is there sufficient evidence of the intention which would be necessary on the part of the plaintiff to relinquish these original debtors? The fact of this check being given, which as I have said is the only thing which can be relied upon as showing that Beech was willing to make himself liable, is perfectly consistent with the plaintiff's not relinquishing the original debtors. If it results in payment he is perfectly entitled to take it. If it does not result in payment it will not fulfil its original object. It did not result in payment and the action followed. The proof in bankruptcy afterwards being *in invitas*, though it might be some evidence of the intention of the plaintiff to get what he could out of Rogers and Beech, yet certainly would be no evidence of any accession on the part of Beech to the liability, which was not upon him at all.

I therefore should not have differed from the opinion of the Court of Appeal if I had thought (as the Court of Appeal seems to have treated it) that the case depended upon what is called the doctrine of novation. I am inclined to say that the facts which have taken place were susceptible of an interpretation consistent with an intention on the part of the plaintiff to retain his original debtors, at all events at the time of action brought, and that on the other hand there was nothing to make Beech a debtor if he had not been so before. But as Beech was really a debtor, the whole doctrine of novation disappears from the case, and the question resolves itself into that which I originally stated, namely, whether there was an intention on the part of the plaintiff to hold the three persons liable or only two, and if two, whether it is possible, after choosing to hold those who actually gave the order and received the goods liable, and proceeding against them as debtors in such a way as to amount to a distinct election to take their liability, to retract that and to fall back upon the liability which, on a different principle, might have been asserted against the other two, that is to say, against Scarf and Rogers, to the exclusion of Beech. I think that the plaintiff was bound by his election, and that after approbating the liability according to the facts, and taking as his debtors those who had actually given the order, he could not, when it suited his convenience, retract it, reprobate it, and go back upon

the liability, by estoppel, of the man who never gave the order at all.

Then did the plaintiff do that which was, and ought to be held as, an election of liability. I think that he did, with full knowledge of all the facts, from the 25th of February. He not only carried on the correspondence to which I have referred—which might have been entirely consistent with his reserving his right to elect; he not only received the check—upon which I am disposed to make the observation that taking it would not have been a conclusive election—but he brought his action against Rogers and Beech; and not only did he bring his action, but when the action was stopped by the liquidation, he carried in his proof, swearing that they were justly and truly indebted to him for the goods as sold and delivered by him to them. Rogers and Beech were in point of fact the debtors, and he had the benefit of that, which really (without going into any technical distinctions), for this purpose appears to me to be a sufficient ground of judgment. I do not think it necessary to go into any of the cases which have been mentioned, because I think that the principle is perfectly distinct. The case, which was relied upon by the respondent, of *Curtis* v. *Williamson*, Law Rep., 10 Q. B. 57, simply held the mere act of making and filing in bankruptcy an affidavit of the kind which was made was not one as to which the party would have no *locus penitentiæ* under any circumstances where he had been desirous, when he had fully considered the matter, of withdrawing it before it was put upon file; and nothing was done, so far as appears, after it was put upon the file. There was nothing to bind him to his election except that inadvertent and (at the time when it was done) unintentional act of his agent; and the court were quite right in holding that that ought not to be regarded as an election by him.

I need not refer particularly to the facts of *Bilborough* v. *Holmes*, 5 Ch. D. 255, but a proof under circumstances similar to the present was held, upon the principle of election, to bind the party who made it. In *Bottomley* v. *Nuttall*, 5 C. B. (N. S.) 122; 28 L. J. (C. P.) 110, an acceptance had been given which was evidence of a successive obligation, and proof of it would by no means extinguish or destroy any right which the party might have upon the original debt and the original consideration.

There is, therefore, as frankly admitted at the bar, no direct

authority upon this point. Your lordships are obliged to determine it upon principle; and on principle I think your lordships ought to hold that the plaintiff was put to his election, that he made it when he brought the action and proved in the liquidation, and that he cannot now, consistently with the election which he has made, hold Scarf liable. I therefore move your lordships, that the order under appeal be reversed, which will have the effect of restoring the judgment of the court of first instance; and that the defendant (the appellant here) have his cost in the Court of Appeal and in this House.

Lords BLACKBURN, WATSON and BRAMWELL, also delivered concurring opinions.

With the exception of the cases of the death of a partner, the bankruptcy of the firm, and the retirement of a dormant partner, the general rule is that the agency of each partner, and his consequent power to bind his copartners within the scope of the copartnership business, can only be effectually determined by notice of its revocation. If a partnership is dissolved, or one of the known members retires from the firm, until the dissolution or retirement is duly notified, the power of each to bind the rest remains in full force, although as between the partners themselves a dissolution or retirement is a revocation of the authority of each to act for the others: 1 Lind. on Part. (Ewell's ed.) *404–407, and notes, where a large collection of cases will be found. So, it has been held, that a partner who retires without giving sufficient notice, is liable for torts committed subsequently to his retirement by his late copartners or their agents: *Stables* v. *Eley*, 1 Car. & P. 614. Even where a partner has retired and notified his retirement, if he nevertheless continues to hold himself out as a partner, he will continue liable as a member of the firm. A firm, notwithstanding its dissolution, is also generally considered as existing so far as may be necessary for the winding up of its business: 1 Lind. on Part. *409–411. As to the notice of the dissolution, public notice by advertisement is sufficient both as against all who can be proved to have seen it, and as to all who have had no dealings with the old firm, whether they saw it or not; but as to old customers of the firm actual notice is requisite. This applies only to ostensible partners, for when a dormant partner retires, he need give no notice of his retirement in order to relieve himself from liability as to acts done after his retirement. As to persons, however, having knowledge that he is a partner, he owes the same duty as to giving notice as if he were an ostensible partner. See, generally, 1 Lind. on Part. *405–417, and notes.

In the principal case there was no doubt as to the liability of the new firm, for the reason that the contract was, in fact, made with it. Had the remedy been first sought against the old firm, there could also have been, on well-settled principles, no doubt of the liability of the retiring member of that firm. The point actually decided, that after having elected to hold the new firm, the creditor could not also pursue the retiring member, is both new and important. This question does not appear ever to have been decided in Eng-