

THE  
AMERICAN LAW REGISTER.

---

NOVEMBER 1884.

---

POWER OF PARTNERS TO WITHDRAW AT WILL  
FROM PARTNERSHIPS ENTERED INTO FOR A  
DEFINITE PERIOD.

It is well settled that a partnership for an indefinite period, may be dissolved at will by either partner at any time when the dissolution will not cause his copartners to suffer extraordinary loss, provided the act of dissolution is free from fraud: *Fletcher v. Reid*, 131 Mass. 312; *Pine v. Ormsbee*, 2 Abb. Pr. (N. S.) 375; *Carlton v. Cummins*, 51 Ind. 478; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Peacock v. Peacock*, 16 Id. 50.

And it has been asserted that partners have the same power of withdrawal where their articles of agreement provide that the partnership shall continue for a definite period, or until the happening of a certain event.

In support of this view of the law it has been contended that it is contrary to public policy to force a man to continue in partnership with another against his will, because it is calculated to encourage discord and litigation and to cause a loss of national wealth; and Chancellor KENT has added (3 Com. 55), that the power of withdrawal in such cases "would seem to be implied in the capacity of a partner to interfere and dissent from a purchase or contract about to be made by his association."

But it may be argued on the other hand, that the power of dissent referred to by Chancellor KENT, is very different from a power to destroy the copartnership, and is, moreover, by no means boundless, inasmuch as the majority of the partners are entitled to

rule. As to public policy, like liberty, it has afforded a pretext for much evil. Questions concerning it should be left to the legislatures. Moreover it may well be doubted whether it is ever for the good of the public to encourage dishonesty, and for a partner to withdraw from a partnership without just cause, and in violation of an express agreement, is certainly not only dishonorable but dishonest.

CIVIL AND FOREIGN LAW.—The authorities are conflicting as to the civil law upon this subject. Chancellor KENT says (3 Com. 55), that “the Commentators on the Institutes lay down the principle as drawn from the common law, that each partner has a power to dissolve the connection at any time, notwithstanding any convention to the contrary, and that the power results from the nature of the association. They hold every such convention null, and that it is for the public interest that no partner should be obliged to continue in such a partnership against his will, inasmuch as the community of goods in such cases engenders discord and litigation; “and he cites, Vinnius in Inst. 3, 26, 4, pl. 1; Ferriere, Ibid. tom. iv. 156, Dig. 17, 2, 14; Domat, b. 1, tit. 8, sect. 5, and art. 1 to 8 by Strahan.

But a different view is taken by Pothier, whose opinion is entitled to great weight. He says that where partners agree upon the time for which the partnership is to continue, they “are considered to agree not to dissolve it until after the expiration of that time, unless there happen some just cause for dissolving it sooner. Therefore one of them cannot, without just cause, dissolve the partnership before the time to the prejudice of his partners. *Qui societatem in tempus coit eam ante tempus renuntiando socium à se non se a socii liberat*; 165 sect. 6, Dig. lib. xvi., tit. 2, l. 65, sect. 6.” (Pothier on Partnerships, sect. 152.)

And the rule laid down by him is the one adopted by the modern Code of France, and substantially the same principles prevail in Scotland: (Story on Part., sect. 274; Bell’s Law of Scotland, sect. 378.) Story quotes Pothier with approval (Story on Part., sect. 276), and the fact that the rule laid down by Pothier is the one adopted in those countries where the civil law prevails, is strong evidence of its correctness.

THE ENGLISH RULE.—In England there is no conflict of authority. The settled rule, both at law and equity, is the same

as the rule of the civil law upon the subject as laid down by Pothier. "If," said Lord ELDON, in *Crawshay v. Maule*, 1 Swanst. Ch. 509, "men will enter into a partnership as into a marriage, for better and worse, they must abide by it; but if they enter into it without saying how long it shall endure, they are understood to take that course in the expectation that circumstances may arise in which a dissolution will be the only means of saving them from ruin." The same distinction between partnerships for a definite, and those for an indefinite period, has also been more or less distinctly recognised in the following cases: *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Peacock v. Peacock*, 16 Id. 49; *Crawshay v. Maule*, 1 Swanst. Ch. 509; *Wrexham v. Hudleston*, Id. 514 n.; and also in the following authoritative English text books, viz.: 1 Lindley on Part. 220, 222; Collyer on Part., sect. 105; Pollock's Dig. of the Law of Part., arts. 41, 42.

A court of equity will not, as a general rule, attempt to enforce a contract of partnership for an indefinite period, but it will entertain a bill for the specific performance of articles of copartnership which provide that the association shall endure for a specified length of time. Thus, in the case of *England v. Curling*, 8 Beav. 129, where the bill prayed that an agreement for a copartnership for fourteen years might be specifically performed, and for an injunction to restrain the other parties to the agreement from engaging in the same branch of business transacted by the firm, alone or with other persons, before the expiration of the term mentioned in the agreement, specific performance was decreed and the injunction granted. In delivering the opinion of the court, when the case was finally disposed of, Lord LANGDALE, M. R., said: "This business has been carried on for one year since the injunction was granted, but under circumstances which cannot render it beneficial to any one. This is a difficulty which always arises when partnership contracts come under the consideration of this court. It is impossible to make persons, who will not concur, carry on business jointly for their own common advantage. It is that which makes everything of this kind exceedingly uncertain. It is that which makes this court, on all such occasions, exceedingly anxious (an anxiety, I believe, that has been felt by every judge who has ever sat in a court of equity), that when these disputes do arise, the parties should, if possible, come to some arrangement between themselves to do that for their common

benefit which the court cannot do otherwise than at the common expense. But if the parties insist on having a declaration of their rights, the court has, over and over again, entertained the jurisdiction, and must entertain the jurisdiction unless some one or two of several partners are to be permitted to do just as they like with the partnership rights and interests." See also, *dicta* of Lord Chancellor HARDWICKE, in *Buxton v. Lister*, 3 Atk. 382.

THE AMERICAN DOCTRINE.—In the case of *Skinner v. Dayton*, 19 Johns. 538 (1822), a question arose as to whether or not a certain article of a copartnership agreement was intended to secure to each partner the right of withdrawal at his pleasure, and Mr. Justice PLATT, in discussing that question, said the article could not be interpreted as giving such a right, "because each partner would have the same right without any such provision." "It is a right," said he, "inseparably incident to every partnership. There can be no such thing as an *indissoluble* partnership. Every partner has an indefeasible right to dissolve partnership as to all future contracts, by publishing his own volition to that effect; and after such publication the other members of the firm have no capacity to bind him by any contract. Even where partners covenant with each other that the partnership shall continue seven years, either partner may dissolve it the next day by proclaiming his determination so to do; the only consequence being that thereby he subjects himself to a claim for damages for the breach of covenant. The power given by one partner to another to make joint contracts for them both, is not only a revocable power but a man can do no act to divest himself of the capacity to revoke it."

The partnership in that case seems, however, to have been entered into for an indefinite period, and, consequently, Mr. Justice PLATT's remarks, so far as they applied to partnerships for a term of years, were mere *obiter dicta*; *dicta*, moreover, which Chief Justice SPENCER, who also delivered an opinion in the case, did not find it necessary to assent to, though he reached the same conclusion arrived at by Mr. Justice PLATT.

The latter cited no authority in support of his views upon this subject, and with the exception of the works of certain commentators upon the civil law, there is no authority which he could have cited which would have borne him out. The doctrine he so boldly advanced has been given an undeserved prominence by being

referred to with apparent approval by Chancellor KENT in his Commentaries (3 Com. 55); and some other American text writers have hesitated whether to adopt it or not. But there is no good reason for such hesitation. Mr. Justice PLATT's views have been emphatically condemned by the courts even in his own state.

In the case of *Ferrero v. Buhlmeyer*, 34 How. Pr. 33, the question of whether or not either member of a partnership entered into for a definite period can dissolve it at will without just cause, came squarely before the Superior Court and was decided in the negative. Mr. Justice JONES, who delivered the opinion of the court, after criticising the views expressed by Mr. Justice PLATT in *Skinner v. Dayton*, very severely, said: "Moreover, I have been unable (the views expressed by the learned judge in the cases in Johnson, above commented on, to the contrary notwithstanding), to perceive any good reason why parties should not be allowed to enter a partnership for a specified period of time; on the contrary, the present large and extended commercial interests would seem to require the formation of such contracts. Nor do I perceive any good reason why, having entered into such contract, a party thereto should, before the expiration of the time, be allowed to put an end to it by his own mere will and caprice, any more than he can be allowed, in such manner, to put an end to any other contract. As to the suggestion that discord and litigation would ensue if partners were not allowed to dissolve their connection at pleasure, the Court of Chancery has ample power to apply a correction by way of injunction, and when necessary, by a decree of dissolution. This is the proper forum to which to intrust the corrective, and not to individual members of a firm to exercise by way of dissolution their mere whim and caprice."

And *Smith v. Mulock*, 1 Abb. Pr. (N. S.) 374; s. c. 1 Rob. 569, and *Bishop v. Breckles*, 1 Hoff. Ch. (N. Y.) 534, are to the same effect.

So, in *Stevenson v. Shields*, 7 La. 433, it was held that where a firm is composed of several partners, and according to the articles of agreement one of them is to be a silent partner, and the partnership is to continue for a definite period, the others cannot by mutual consent and notice dissolve the partnership without the silent partner's consent.

Again, in *Cole v. Moxley*, 12 W. Va. 730, where it appeared that one of the members of a partnership entered into for a definite

period, had at a certain time previous to the expiration of the agreed term, refused to allow his copartner to have anything further to do with the business, and claimed to have dissolved the partnership, it was held as in the above cases, that "a partnership for a limited period cannot be dissolved at the mere pleasure of one of the partners." A *dicta* to that effect had previously been delivered by one of the judges of the same court in *McMahon v. McClernan*, 10 W. Va. 419.

We have also the *dicta* of two eminent judges of other courts in favor of this view of the question.

In the case of *Howell v. Harvey*, 5 Ark. 281, in which the question before the court was as to the dissolution of a partnership at will, Judge LACY, in delivering the opinion, said that a "partnership for a limited period of time cannot be dissolved at the mere pleasure of one of the parties within the time prescribed. On the contrary, it only can be dissolved from just motives and for a reasonable cause." And in the case of *Pearpoint v. Graham*, 4 Wash. C. C. 234, which is frequently referred to upon this point, Judge WASHINGTON said, in delivering the opinion of the court, that "it is perfectly clear that one partner cannot, by withdrawing himself from the association before the period stipulated between the partners for its continuance, either dissolve the partnership or extricate himself from the responsibility of a partner, either in respect to his associates or to third persons; and if this be so, it would seem that he could not produce the same consequence by any voluntary act of his own."

This is the view adopted by Judge STORY also, who, in his work on Partnerships (sect. 275) says: "Whenever a stipulation is positively made that the partnership shall endure for a fixed period, or for a particular adventure or voyage, it would seem to be at once inequitable and injurious to permit any partner, at his mere pleasure, to violate his engagement, and thereby to jeopard, if not to sacrifice, the whole object of the partnership; for the success of the whole undertaking may depend upon the due accomplishment of the adventure or voyage, or the entire time be required to put the partnership into beneficial operation. It is no answer to say that such a violation of the engagement may entitle the injured party to a compensation in damages; for independently of the delay and uncertainty attendant upon any such mode of redress, it is obvious that the remedy may be and must be, in many cases,

utterly inadequate and unsatisfactory. If there be any real and just ground for the abandonment of the partnership, a court of equity is competent to administer suitable redress. But that is exceedingly different from the right of the partner, *sua sponte*, from mere caprice or at his own pleasure, to dissolve the partnership. In short, the opposite doctrine is founded upon reasons exceedingly artificial, if not indefensible." See also, *Durbin v. Barber*, 14 Ohio 311.

In Iowa the question is considered doubtful: *Blake v. Dorgan*, 1 G. Gr. 537.

In Pennsylvania it has been twice passed upon by inferior courts, but does not seem to have ever come squarely before the Supreme Court. It first arose in *Mason v. Connell*, 1 Whart. 381. The partnership in question there had been entered into for a term of three years. The defence was that the defendants had withdrawn from the firm before the debt sued for was contracted. At the trial Judge ROGERS charged the jury, following *Skinner v. Drayton*, that "there is no such thing as an indissoluble partnership. It is revocable in its own nature, and each party may, by giving due notice, dissolve the partnership as to all future capacity of the firm to bind him by contract; and he has the same legal power, even though the parties had covenanted with each other that the partnership should continue for such a period. The only consequence of such a revocation of the partnership power in the intermediate time would be that the partner would subject himself to a claim for damages." The case was reviewed in the Supreme Court upon a motion for a new trial, but as the motion did not call the correctness of the above proposition in question, it cannot be considered to have been there passed upon by that tribunal, and with the exception of a *dictum* of Judge SHARSWOOD in *Slemmer's Appeal*, 58 Penn. St. 168, favoring the view adopted by Judge ROGERS, we have really nothing from the Pennsylvania Supreme Court upon the subject.

*Von Tagen v. Roberts*, 2 Pearson 137, which is the latest Pennsylvania case in point, went no higher than the Court of Common Pleas, where it was tried before Judge PEARSON. That learned judge, after a careful investigation of the subject, refused to follow *Mason v. Connell*, *supra*, and held, notwithstanding the *dictum* of Judge SHARSWOOD, that a partner cannot withdraw from a partnership entered into for a term of years before the expiration

of that period agreed upon, without he had just cause for doing so. He considered the doctrine of *Mason v. Connell* not only opposed to the better authorities, but also to sound reason and the principles of moral honesty.

Thus we find that the *dictum* of Mr. Justice PLATT is not only opposed to the English authorities, but has been condemned in America in every case in which the question now under discussion has arisen, except *Mason v. Connell, supra*, in which his view had the honor to be adopted by a Nisi Prius Court.

I therefore consider myself justified, in view of all the authorities, in stating that the rule sanctioned by the united voice of the Roman, the French, the Scotch and the English jurists, and above all by the voice of honor, is now the established rule in America.

EXCEPTIONS.—Having, as it is believed, shown what the general rule governing this subject is, the next question is as to whether or not there are any exceptions to it.

It seems that a partnership entered into for a definite period would be dissolved by the suicide of a partner, notwithstanding the voluntary nature of the act; but there are no decisions in point, and as the subject is of little practical importance we will pass on to a discussion of the effect of—1st. Assignments. 2d. Marriage.

1. *Assignments*.—It is well settled that unless there is a provision in the articles of copartnership to the contrary (*Merrick v. Brainard*, 38 Barb. 574), an assignment by a partner of his interest in a firm entered into for an indefinite period, will effect a dissolution of the partnership if such is the intention: *Ketcham v. Clark*, 6 Johns. 144; *Ogden v. Gregg*, 29 Hun 146; *Murray v. Bogert*, 14 Johns. 318; *Kingman v. Spur*, 7 Pick. 235; *Morss v. Gleason*, 64 N. Y. 204; *Thompson v. Spittle*, 102 Mass. 207. And where an assignment is made by a member of such a firm the presumption of law seems to be, that he intends that it shall work a dissolution; but that presumption is not conclusive, and if, in fact, he does not intend to dissolve the firm a dissolution will not result: *Monroe v. Hamilton*, 60 Ala. 227; *Taft v. Buffum*, 14 Pick. 322; *Bank v. Fowle*, 4 Jones Eq. 8; *Du Pont v. McLaran*, 61 Mo. 502; *State v. Quick*, 10 Ia. 451. At least this seems to be the rule where the assignment is voluntary. The authorities are conflicting as to the effect of involuntary assign-

ments: *Choppin v. Wilson*, 27 La. Ann. 444; *contra*, *Marquand v. Mfg. Co.*, 17 Johns. 525; *Spalding v. Black*, 22 Kans. 55; *Renton v. Carter*, 9 N. J. Eq. 62.

The presumption as to intention where an assignment is made, does not seem to exist where a partner merely mortgages his interest: *Du Pont v. McLaran*, 61 Mo. 502; *State v. Quick*, 10 Ia. 451.

Where a partnership is entered into for a definite period, the effect of a voluntary assignment by one of the partners of his interest in the firm is different. The question in such cases is not so much as to the intention of the assignor, for that is not necessarily conclusive, but rather as to the necessary effect of the assignment regardless of intention.

In the case of *Ferrero v. Buhlmeyer*, 34 How. Pr. (N. Y.) 33, the question whether or not a voluntary assignment made by a member of a partnership for a term of years, can effect a dissolution arose, and this whole subject was discussed at considerable length and with great ability by Judge JONES, who delivered the opinion of the court. After reaching the conclusion that a member of a partnership entered into for a term of years, cannot withdraw at will without just cause, he continued as follows: "The next point of inquiry is, whether a purely voluntary assignment by one partner, of his right and interest in a copartnership limited to continue for a specified period, is not such an act as, notwithstanding its voluntary character, dissolves the partnership. The learned judge in *Marquand v. Mfg. Co.*, 17 Johns. 538, is of opinion that it is, because in his view it brings in interests which are incompatible with the carrying on of the business as originally organized, and because so that the assignee is according to acknowledged principles entitled to a division of assets if he insists upon it. With all due respect to the opinion of the learned judge, I feel obliged to differ. The question is, what has a partner a right to transfer by an assignment, for it is clear that he can pass to his assignee only such interests and powers as he has a right to transfer. It necessarily results from the doctrine that a partner cannot by his purely voluntary act dissolve the partnership, or make such act cause for a decree of a dissolution in his own application, that he cannot transfer any such right. It is also evident that he cannot transfer those rights, powers and duties which, by the partnership connection, he is bound to exercise and perform personally

for the benefit of the partnership itself, nor can he transfer any right or power, the exercise of which would be antagonistic to the partnership articles. He can, by such an arrangement, transfer only his interest in the goods and profits, subject to all the equities, but can transfer none of his personal rights, powers and duties. What are the equities subject to which the assignee takes? He takes subject to the covenants and contracts existing between the partners. Among these covenants are:

“1st. That the goods and assets shall remain under the control and in the possession of the partners; and the debts due the firm shall be collected by, or the debts due from the firm paid by the partners, consequently the assignee is not entitled to participate in such control and possession, or to interfere in the collection or payment of such debts.

“2d. That the goods and chattels shall be sold by the partners in the usual course of trade, and the proceeds thereof and other assets used by the partners in the legitimate prosecution of the business during the term of the partnership.

“Therefore the assignee takes no right to sell or dispose of the goods, or to insist on their sale, otherwise than in the legitimate prosecution of the business, and no right to insist upon the payment to him, or otherwise, of any portion of the proceeds, or of the other assets, except as provided for by the contract, and no right to insist on the application of the proceeds of the goods sold, or other assets, in a manner contrary to the contract, or in any one particular manner in preference to several authorized by the contract.

“3d. That all the partnership matters shall be under the control and supervision of the partners.

“Therefore the assignee takes no right to participate in such contract or supervision. These various matters are attached to the persons of the partners, and although a partner may assign the pecuniary interest, yet he cannot assign the personal rights. It is like unto a contract for personal services, which cannot be assigned without the consent of the employer, so as to enable the assignee to perform the services and receive pay therefor; yet the emolument may be assigned, so that when earned by the employee it may be recovered by the assignee.

“There is nothing to prevent a partner who has assigned his share or interest, from still continuing to perform these duties and exer-

cising the powers attached to his person, which are to be performed and exercised for the benefit of the partnership.

“While on the other hand he transfers to his assignee those rights and powers which he may exercise for his own individual benefit, and among them a right to call for an account according to the terms of the partnership contract, a right to demand a dissolution for such causes, and under such circumstances as he himself could; and a right upon the dissolution of the partnership by the influx of time, to apply to the court to wind up his affairs.

“Under this construction of the effect of a voluntary assignment made by one partner of his share, there is no new element imported into the partnership, and no right in the assignee to demand an immediate division of the assets.

“One who purchases such an interest from a partner must take *cum onere* the obligations resting on that partner.”

*Ferrero v. Buhlmeier*, is believed to be the only case bearing directly upon this point. It was, indeed, said by Mr. Justice STRONG, in *Bank v. Carrollton Railroad*, 78 U. S. 628, where the partnership had been entered into for a term of years, and Graham, one of the partners, had assigned his interest in the firm before the expiration of the term that “the effect of Graham’s assignment \* \* \* was undoubtedly to dissolve the partnership,” but the decision of that case turned upon an entirely different point, and what was there said amounts to little more than an *obiter dictum*.

In the case of *Marquand v. Mfg. Co.*, 17 Johns. 525, referred to by Judge JONES, the question was as to whether or not a partnership entered into for a term of years, was dissolved by an assignment by an insolvent partner of his interest in the firm to a creditor whom he was unable to pay, and who was in a position to enforce his claim at law and satisfy it by buying in the interest assigned; and it was held, in substance, that the assignment was not voluntary, and that it operated to dissolve the firm: *Ferrero v. Buhlmeier*, 34 How. 35.

2. *Marriage*.—It seems tolerably well settled that where a partner, who is a *feme sole*, marries either one of her copartners (*Bassett v. Shepard*, 16 The Rep. 755), or a stranger (*Nerot v. Burnand*, 4 Russ. (Eng.) 260), (*Antoine v. Dallaire*, 2 Rev. de Leg. 74), the partnership is immediately dissolved, if at will, except in

those states where the common-law disabilities of married women have been removed by statute. It is so held for two reasons:

1st. Because at common law all a woman's personal property and effects are transferred by her marriage to her husband.

2d. Because married women cannot bind themselves by contract.

Whether the marriage of a female partner will dissolve a partnership entered into for a definite period, is a question which has never been passed upon by a court of last resort, either in this country or England.

The mere transfer of her interest in the firm to her husband, would appear from the cases already cited, insufficient of itself to cause a dissolution.

The inability of married women to make binding contracts seems, at first glance, a more conclusive reason for holding that a woman cannot, under any circumstances, remain a partner after marriage.

But this does not seem so clear when we remember that the power which the majority of the members of a partnership entered into for a term of years, have to dispose of the partnership property in the usual course of trade, and the proceeds thereof, and other assets in the legitimate prosecution of the business during the term of the partnership, is a power coupled with an interest, and therefore not necessarily revoked by marriage.

It has never been held that a partnership entered into by persons who are *sui juris* for a term of years, can be dissolved by one of the partners afterwards becoming *non sui juris*. On the contrary, it is well settled that the *insanity* of a partner does not work a dissolution in such cases: *Jones v. Noy*, 2 Myl. & K. (Eng.) 125; *Mellersh v. Keen*, 27 Beav. (Eng.) 236; *Bagshaw v. Parker*, 10 Id. 532; *Sayer v. Bennet*, 1 Cox (Eng.) 107; *Sanders v. Sanders*, 2 Collyer (Eng.) 276.

In delivering the opinion of the court in *Wrexham v. Hudleston*, 1 Swanst. 514, where a member of a firm entered into for a term of years, had become insane and remained so during the remainder of the term, Lord ELDON said, "that lunacy does not dissolve the partnership, even as to the party incapacitated, much less as to the rest, and though in partnerships the parties rely upon the mutual skill and assistance of each other, yet that is to be understood subject to the common accidents of life, as lunacy is."

If lunacy is a "common accident of life" marriage is still more