declined to extend the principle in Mansfield *v.* Lynch (*supra*), to the extent of holding the defendant, an accommodation endorser of a note which proved non-negotiable, legally liable upon an implied promise to pay. "To hold" it was said in the opinion, "because the parties were mutually mistaken in the legal effect of the real transaction, justice would be subserved by the imputation in its place of a fictitious one, would be going further than we are aware that any court has yet gone and beyond what it seems to us proper and right or safe to do."

The subject, it will be seen, is full of difficulty to one who would attempt to state general principles applicable in all jurisdictions, but it is not difficult to ascertain the law in any given forum. The peculiarity is that, in almost every instance where the law *has* been laid down, it has been done in such vigorous and decided language that its meaning cannot be mistaken; there is no middle ground. Where, however, a recovery is allowed assumpsit would appear to be the proper form of action and is, indeed, the one usually adopted.

WM. HENRY LOYD, JR.

DEPARTMENT OF WILLS, EXECUTORS AND ADMINISTRATORS.

DEERING & CO. *v.* KERFOOT'S EX.[1] VIRGINIA SUPREME COURT OF APPEALS, DECEMBER 15, 1892.

FAUNTLEROY, J.—"The Commissioners reported as a matter of opinion that the widow of W. S. Kerfoot was entitled to dower in an undivided half interest of a storehouse and lot in

[1] Reported in 16 S. E. 671.

Berryville which was partnership property of Hardesty & Kerfoot, of which firm W. S. Kerfoot has been a member. To this report the creditors, who for the first time were before the court in the case, filed sundry exceptions. They denied that the widow was dowable in the property consisting in the storehouse and lot." The lower court decided that the said property was subject to the dower of Kerfoot's widow after the social debts were provided for. "In this the court erred. The record establishes beyond a doubt that the storehouse and lot in Berryville were part of the social assets of Hardesty & Kerfoot, and, being such, they were, in the eye of the law, personalty in which the widow could participate only as a distributee."

The Devolution of Firm Real Estate.

The principles of the common law, which were established for the government of a nation in which the chief index of wealth should be the ownership of land, and inheritance the only means of its transmission, were to a great extent unsuited to the relation of partnership, which had its origin in the early Roman law, and its growth and perfection in the maritime cities of Europe, where the claims of the heir were less prominent, and the calling of the merchant was not stamped with dishonor. Therefore, no small difficulty was experienced by the early English judges in adjusting the claims of the various interested parties, either among the principals themselves, or their creditors or third parties; and this at a time when the business of partnership was confined strictly to commerce and dealt only with articles of ordinary trade, which were, almost without exception, personal in their nature. But when, in later times, land came to be included among the firm assets, the difficulty was increased, for the principals of the feudal system had more fully fixed themselves on the law of real estate. The common law could recognize only such title to real estate as it already knew, and there was no known tenure which would satisfactorily answer the exigencies of the relation and properly protect the rights of the individual partners, and at the same time recognize the paramount claims of the

partnership creditors. Joint tenancy and tenancy in common were both tried and found wanting, as, in the former, on account of the doctrine of survivorship, the representatives of the deceased partner would be disappointed of their ancestor's share, which would go to the survivor under the well-known principles of the common law; while in the latter the individual creditors would have preference over those of the firm, and so a most important canon of partnership be defeated. In this embarrassment the assistance of the Court of Chancery was called in, which cut the knot by considering the real estate as converted into personalty as soon as it is brought into the partnership and made a firm asset. In this way the rights of all parties were satisfactorily protected, the firm creditors being first entitled to the proceeds of a sale of the land, and the remainder being distributed among the partners according to their interest.

This theory has, as a whole, remained unchanged up to the present time, although some of its corrolaries have occasioned much difference of opinion, and although it has been earnestly contended that, upon a sound understanding of principles of partnership, the same result could have been attained without the introduction of legal fictions: James Parsons on Part., § 109.

The question which arose in the principal case, and a question which must immediately arise under the conversion theory, is the extent to which it is to be carried. If land belonging to a partnership is, so far as the principals are concerned, to be considered as personal property, how long is it to retain that character? And is the interest of a deceased partner in firm real estate to go to his heir or to his personal representative? Upon this last question there has been much diversity of opinion, and the doctrine held by the English and American courts is, with a few exceptional States, diametrically opposed. One of the earliest cases to rule the point was Thornton *v.* Dixon, 3 Cro. Ch. C. 199, decided by Lord Chancellor Thurlow in 1791. It arose out of the construction of a partnership agreement, and the Lord Chancellor, after determining that the agreement was not sufficiently clear to alter the course of

the law, awarded the fund in hand for distribution, in so far as it was derived from the personal assets of the late firm, to the personal representative of the deceased partner, and, so far as it was derived from the real assets, to the heir-at-law. This would seem to recognize a conversion *sub modo* only, and so to oppose the modern English doctrine. The decision was followed in 1802 by Sir William Grant, in Bell *v.* Phyn, 7 Vesey, 453, and in Belman *v.* Shore, 9 Vesey, 501, and by Sir Lancelot Shadwell in Cookson *v.* Cookson, 8 Sim. 529, so late as 1837. Notwithstanding the decision of Lord Thurlow, Lord Eldon, a few years later, laid down a different rule in Townsend *v.* Devuynes, 1 Montague Part., App. 97, and followed it, in 1814, by his judgment in Selkrigg *v.* Davis, 2 Dow. P. C. 231, where he is quoted as saying: "My own individual opinion is, that all the property involved in a partnership concern ought to be considered as personalty." The modern English decisions have followed this rule, so that Mr. Lindley (Partnership, 343, etc.) adopts the language of Vice-Chancellor Kindersly in Darby *v.* Darby (post), to the effect that "wherever a partnership purchases real estate for the partnership purposes, and with partnership funds, it is, as between the real and personal representatives of the partners, personal estate: Phillips *v.* Phillips, 1 My. and K. 649 (1833); Fereday *v.* Wightwick, 1 R. and M. 435; Broom *v.* Broom, 3 M. and K. 443; Morris *v.* Kearsley, 2 Y. and C. Ex. 139; Houghton *v.* Houghton, 11 Sim. 491; Darby *v.* Darby, 3 Drew, 495.

Sir Lancelot Shadwell, in 1845, refused to consider the conversion so complete as to subject the fund arising from a sale of firm real estate to the payment of probate duty: Custance *v.* Bradshaw, 4 Hare, 315; but even this point has been set at rest in the affirmative by the case of the Attorney-General *v.* Hubbock, L. R. 13 Q. B. D. 287, where it was decided by Lord Chief Justice Colridge and Lords Bowen and Brett that the real estate of a firm was converted out and out into personalty, and that the probate duty would attach: Att'y-Gen. *v.* Marq. of Ailesbury, L. R. 12 App. Cases, 672.

Although, as remarked a few lines back, Cookson *v.* Cookson (8 Sim. 529) adhered to the rule of Thornton *v.* Dixon,

the immediate decision was put upon the ground that the land had not been purchased with partnership funds, but had descended to the partners from their father; and also that, since no rights of creditors were involved, there was no occasion for the conversion. This distinction was pressed in several cases, and would seem to have been suggested by Thornton *v.* Dixon itself, It was not recognized, however, by Lord Justice James in Waterer *v.* Waterer, L. R. 15 Eq. 402 (1872), where he put the question finally to rest with the remark: "It seems to me immaterial how it (*i. e.*, the land) may have been acquired, whether by descent or by devise, if, in fact, it was subsequently involved in the business." And the same thought is well expressed by Lindley (Part. 343, etc.): "Notwithstanding Cookson *v.* Cookson, no satisfactory distinction with reference to the question of conversion can be drawn between land purchased with partnership moneys and land acquired in any other way, provided such land is, in the proper sense of the expression, an asset of the partnership. And this may be considered as the American rule, also: Collumb *v.* Reed, 24 N. Y. 505 (1862).

From these statements of the law the further proposition is easily deduced that, whether or not particular property is an asset of the partnership is a question, notwithstanding the name in which it is held, which may, as a general rule, be proved by parole evidence, notwithstanding the Statute of Frauds. This, however, is subject to the right of innocent third persons, without notice, who have depended on the record title or some similar circumstances: Am. and Eng. Ency. of Law, Vol. 17, p. 945; Whaling Co. *v.* Borden, 10 Cush, 458; Shafer's App. 106 Pa. St. 49 (1884). But see Fairchild *v.* Fairchild, 64 N. Y. 471 (1876); Bird *v.* Morrison, 12 Wis. 138 (1860).

Before noticing the American rule upon this subject, it may be well to look slightly at the reasoning which, in England, has given the land to the personal representatives, and in America has preserved the rights of the heir-at-law. The early English cases have given no definite reasons for the introduction of the conversion theory further than that stated in

the early part of this note. Mr. Parsons (Partnership, 369) suggests two rather historical grounds, to the general effect that, since partnership is an agent of trade, where a man puts land into the firm it must be treated as if he had actually sold it and contributed the proceeds. He also suggests the inequality in distribution in case of death, were any other scheme to prevail. The reason, as stated in many of the American cases is, that, having put land into the trade, it must be considered that a conversion was intended by the parties themselves, and that intention will, of course, prevail. Of all these reasons, the supposed intention of the parties is the basis. A very ingenious explanation of the rule was that advanced by Vice-Chancellor Kindersly in Darby *v.* Darby 3 Drew, 495 (1856). His argument, somewhat abridged, follows: "The clear principle of this court as to partnership is, that on dissolution all the property of the partnership shall be sold, and after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital. This is the general rule; it is inherent in every contract of partnership. That the rule applies to all ordinary property is beyond all question, and no one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he shall retain his own share of it in specie." This principle is clearly laid down by Lord Eldon and Sir William Grant, and the right of a partner to insist on a sale of all the partnership property is just as stringent as a special contract would be. "If, then, this rule applies to ordinary stock in trade, why not to all kinds of partnership property?" He then shows that the same rule does apply to a lease for years where the rent is paid with firm moneys, and argues that the same rule must apply to a fee simple necessary for and paid for by the firm. Continuing, he says: "It may, therefore, be conceded that on dissolution all kinds of property may be compelled to be sold by the partners, or each representative of a deceased partner. Now, what is the doctrine of this court as to conversion? If a testator seized of real estate, devise it for sale, and direct that all the proceeds of such sale shall be

divided among certain persons so that each of the *cestui que trusts* is entitled to say he will have it sold and will take his share of the proceeds, that real estate is, in equity, converted into personalty; and so, if three persons contract that real estate belonging to them shall be sold and the proceeds be divided among them, so that each of them has the right to insist that it shall be sold, and that he shall have his share of the proceeds as money, that real estate is, in equity, converted into personalty, and if one of them dies while the property remains unsold, his share is personalty as between his heirs and personal representatives. Now, if it be established that by the contract of partnership all the partnership property is to be sold at the dissolution of the partnership, then any real estate which has become the property of the partnership becomes, by force of the partnership contract, personalty, and that not merely as between the partners to the extent of discharging partnership debts, but as between the real and personal representatives of the deceased partner." Although this statement of the law is from a high authority, and from the closeness and clearness of the reasoning would seem to carry considerable conviction, it does not seem to have been considered in any of the later decisions, and none of the American authorities which have so fiercely combatted the ultimate English rule have in any way attacked the reasoning of the Vice-Chancellor. Perhaps the same thought may be found in Sumner *v.* Hampson, 8 Ohio, 328 (1838), and in Green *v.* Green, 1 Ohio, 535 (1824), and possibly a few other cases; but in none is the doctrine so fully considered as in Darby *v.* Darby. It is open to the objection, which is especially weighty to an American, that it is entirely a deduction of legal and technical logic, the result of which is the establishment of a rule incomprehensible to the lay mind and contrary to ordinary common sense.

A number of the earlier American decisions adhered to the English rule, and a few of the States even yet hold to it in a more or less modified form. As early as 1824, the Supreme Court of Ohio held, in Green *v.* Green, 1 Ohio, 535, that a man had no such estate of inheritance in land held by a partnership

of which he was a member as to entitle his wife to dower in it upon his death, and the same rule still subsists in that State, with a modification to be mentioned later: Rammelsburg *et al.* *v.* Mitchell *et al.*, 29 Ohio St. 22 (1875); Green *v.* Graham, 5 Ham. (O.) 244 (1831).

Virginia, from whence came the principal case, adopted the same rule in 1839, and has adhered to it ever since. The reasoning of Pierce *v.* Trigg, 10 Leigh. 423, in which the rule was first laid down, is worth considering, especially in the case where land is purchased by the firm, with firm moneys; but it has no application to the case of land contributed by one partner, or, in fact, to land acquired in any other way. The court said: "Since upon familiar principles the land was purchased with personalty, it ought, as between the executor and heir, to replace the fund withdrawn from the personal estate:" Wheatly Heirs *v.* Calhoun, 12 Leigh. 264 (1841); Parrish *v.* Parrish, 88 Va. 529 (1892); Deering *v.* Kerfoot (principal case).

By the decision of Galbraith *v.* Gedge, 16 B. Mon. 641 (1855), Kentucky laid the foundation for the same rule, although the land actually in question was awarded to the heir, but upon the ground that it did not appear that it was actually partnership property. But in Cornwall *v.* Cornwall, 6 Bush. (Ky.) 369 (1869), the land had been purchased with partnership funds, and clearly for partnership purposes, and although it was not necessary that it should have been sold for the payment of debts, the wife was awarded one-third of the preceeds as personalty, the court saying; "Where real estate is purchased with partnership funds for the purpose of carrying on and facilitating the partnership business and purposes, and it is used as a means of continuing and enlarging the partnership business, operations and profits, it then is partnership property, impressed with the character of personalty for any and all purposes, not only as between the partners *inter se*, and the firm and its creditors, but also as to distribution between the administrators and heirs:" Bank of Louisville *v.* Hall & Long, 8 Bush. (Ky.) 672 (1871).

In the case of Hoxie *v.* Carr, 1 Sum. 173 (1832), Mr. Jus-

tice Story expressed a decided opinion in favor of the English rule, although the case before him did not actually raise the point; and Mr. Chancellor Kent (Com. III, 39), after noticing some of the American cases, says: "But the other American decisions are more restricted in their operation, and are not inconsistent with the more correct and improved view of the English law."

These instances mark the extent of the absolute conversion theory, in so far as it has been adopted in the American courts; but, as hinted a few lines back, even these are not as extreme in their scope as the rule laid down by Lord Eldon.

The basis of the whole theory of conversion is the supposed intention of the parties: Coles *v.* Coles, 15 Johns. 159; Buckley *v.* Buckley, 11 Barb. S. C. 43 (1850); Galbraith *v.* Gedge, 16 B. Mon. (Ky.) 631 (1855).

The parties may specially agree among themselves that the land shall be considered either real or personal property, and that agreement will control its character. This was clearly the opinion of Lord Thurlow in Thornton *v.* Dixon (*supra*), when he said the agreement under consideration "was not sufficient to vary the nature of the property." And Mr. Justice Story follows the same opinion: Story on Part., § 93 and n. See cases: Bell *v.* Phyn, 7 Vesey, 453; Lindley on Part. 343; Goodburn *v.* Stevens *et. al.*, 5 Gill (Md.), 1 (1847); Green *v.* Green, 1 Ohio, 535 (1824); Smith *v.* Jackson, 2 Edwd. Ch. 28 (1833); Lenow *v.* Jones, 48 Ark. 557 (1886). Upon this theory, then, the question has arisen, what is a sufficient declaration of intention to change the nature of the property? This would seem to be the real point of divergence between the cases which hold to a conversion out and out, and those which hold to a conversion *sub modo* only. Thus it was said in Coles *v.* Coles (*supra*): "There may be special covenants and agreements relative to the use and enjoyment of the real estate, and in the absence of such special covenant the real estate owned by the partnership must be considered and treated as such, without any reference to the partnership." And in Buckley *v.* Buckley (*supra*), Judge Hand said that in the absence of any express intention, the presump-

tion is there should be no change in character. As a general rule the simple use and occupation of the land by the partnership is not sufficient to establish such an intention and consequent conversion, as may be seen by nearly all the cases in which the question has been considered. Yet in most of the United States where the absolute conversion theory holds, this fact *has* been considered as a sufficient declaration of the intention of the parties. Thus it was said in Galbraith *v.* Gedge (*ante*): "If real estate purchased by partners with partnership means, for partnership purposes—that is be so purchased, to be used, dealt with, and disposed of as personalty, it should for commercial convenience partake of the character which the partners have thus impressed upon it, and upon the dissolution of the firm by the death of one of the partners, his share ought to belong as personalty to the executor or administrator, and not descend to the heir, and should in all respects be treated as personal estate."

But the land must be necessary for and actually used in the partnership or it will be converted only *sub modo*. This theory was well discussed in the case of Runmelsburg *et al. v.* Mitchell *et al.*, 29 Ohio St. 22 (1875), where the question of conversion was squarely before the court, Judge McIlvane says: "But what is a sufficient agreement? It need not be in writing—the intention may be shown from circumstances," merely bringing real estate into the partnership is not sufficient, but where "real estate is purchased for partnership purposes, paid for with partnership money, and used simply for the partnership business" such conversion is sufficiently shown. The line of demarcation between an absolute conversion, and a conversion *sub modo* is this, in the former it must be needed and actually used in the partnership business, in the latter it is sufficient that it was purchased with partnership funds: Pierce *v.* Trigg, 10 Leigh. 423; Calhoun *v.* Calhoun, 12 Leigh. 264.

It is generally admitted, however, that any agreement or provision which evinces a clear design that the land shall be considered and distributed as money will stamp its character, although such understanding does not appear in terms. Thus, such a provision in the will of a deceased partner will be suffi-

cient: Woodbridge *v.* Watkins *et al.*, 3 How. (Miss.) 360 (1839); Davis *v.* Clark, 82 Ala. 198 (1886); Coster *v.* Clark, 3 Edwd. Ch. 452.

Having noticed the English rule and its modifications in the United States we will proceed with a discussion of what may be termed the general American doctrine. It is thus stated in the American and Eng. Ency. of Law, Vol. 17, p. 953. Firm real estate "is to be regarded in equity as personal property so far only as may be necessary for the payment of debts and the adjustment of partnership accounts, the balance retaining all the incidents of real property." A great number of authorities may be cited for this, among which may be noted the following: Story on Partnership, § 93 and n.; Lindley on Partnership, 343, etc.; Scribner on Dower, II, 103; Shanks *v.* Kline, 14 Otto, 18 (1881); Platt *v.* Oliver, 3 McLean (U. S.), 27 (1842); Logan *v.* Greenlaw, 25 Fed. Rep. 299 (1885); Clay *v.* Field, 34 Fed. Rep. 375 (1888); Burnside *v.* Merrick, 4 Met. (Mass.) 537; Dyer *v.* Clark, 5 Met. (Mass.) 569 (1843); Wilcox *v.* Wilcox, 95 Mass. 255 (1866); Shearer *v.* Shearer, 98 Mass. 107 (1867); Keith *v.* Keith, 143 Mass. 262 (1887); Foster's App. 74 Pa. St. 391 (1873); Dubree *v.* Albert, 100 Pa. St. 483 (1882); Leif's App., 105 Pa. St. 505 (1884); Smith *v.* Jackson, 2 Edwd. Ch. 28 (1833); Coster *v.* Clark, 3 Edwd. Ch. 452 (1840); Buchan *v.* Sumner, 2 Barb. Ch. 548 (1847); Buckley *v.* Buckley, 11 Barb. S. C. 43 (1850); Collumb *v.* Reed, 24 N. Y. 505 (1862); Fairchild *v.* Fairchild, 64 N. Y. 471 (1876); Bopp *v.* Fox, 63 Ill. 540 (1872); Simpson *v.* Leich, 86 Ill. 286 (1877); Strong *et al.* *v.* Lord *et al.*, 107 Ill. 25 (1883); Duhring *v.* Duhring, 20 Mo. 174; Holmes *v.* McGill, 27 Mo. 597 (1859); Grissom *v.* Moore, 106 Mo. 296 (1885); Young *v.* Thrasher, 21 S. W. (Mo.) 1104; Yetman *v.* Woods, 6 Yerg. (Tenn.) 20 (1834); Piper *v.* Smith, 1 Head (Tenn.), 937 (1858); Griffy *v.* Northcutt *et al.*, 5 Heisk (Tenn.), 747 (1871); Jones *v.* Sharp, 9 Heisk (Tenn.), 660 (1872); Markham *v.* Merritt *et al.*, 7 How. (Miss.), 437 (1843); Sykes *v.* Sykes, 49 Miss. 190 (1870); Robinshaw *v.* Hanway, 52 Miss. 713 (1876); Wheeler *v* Sempler, 5 C. E. Grier (N. J.), 228; Campbell *v.*

Campbell, 30 N. J. Eq. 415 (1879); Buffman *v.* Buffman, 49 Me. 108 (1861); Goodburn *v.* Stevens, 5 Gill (Md.), 1 (1847); Bird *v.* Morrison, 12 Wis. 138 (1860); Martin, etc. *v.* Martin, 62 Wis. 418 (1885); Smith *v.* Davis, 82 Ala. 198 (1886); Lenow *v.* Jones, 48 Ark. 557 (1886); Bowman *v.* Baily, 20 S. C. 550 (1883); Clay *v.* Stebbins, 47 Mich. 296 (1882); Hewett *v.* Rankin, 41 Ia. 35 (1878); Tellinghast *v.* Chapman *et al.*, 4 R. I. 173 (1856).

A general summing up of these authorities would seem to amount to this, that upon the bringing of real estate into a firm as an asset, it is, in equity, converted into personalty to all intents, so far as the partnership or its affairs are concerned, but that upon the settlement of the affairs of the partnership, that which is ascertained to be remaining in specie, or the balance of what has been sold for the partnership business and not used, will retain its natural character, and descend, in case of the death of a partner, in all respects as land. During the continuance of the relation, so far as the individual partners are concerned, the land is absolutely converted, and a judgment against one will not bind his share in it: Meily *v.* Wood, 71 Pa. St. 488 (1872); Leif's App. 105 Pa. St. 505 (1884).

And it has even been held that equitable ejectment will not be for a partner's interest in firm real estate, because there is no such legal title as will support it: Du Bree *v.* Albert, 100 Pa. St. 483 (1882).

However reasonable these expressions of the law may appear on their face, there is a manifest inconsistency when we remember that in all this line of cases the right of the widow to her dower is never doubted, and that right can only attach to land of which the husband has a legal seizen in his lifetime: James Parsons on Part., § 109.

But the question can now hardly be considered an open one. The right of the widow to her dower, and of the heir to his inheritance depend upon the same theory, and what will support the one, must support the other: Dyer *v.* Clark, 5 Met. (Mass.) 569; Goodburn *et ux. v.* Stevens *et al.*, 5 Gill (Md.), 1.

While the reasons given for the English rule are few and in

the main unsatisfactory, those which have been advanced in America as the basis of the right of the heir are somewhat diverse, and while the result is in the end the same, that end is reached sometimes by different paths. It has been held in a number of cases that, immediately upon the death of a partner, the land descends to the heir and surviving partner as tenants in common, subject to an implied trust for the benefit of the creditors of the partnership, and that the survivor may make a valid conveyance of the land for their benefit. It will not, however, be a complete conveyance, since the heirs, who have an equal right, have not joined in the deed, but the court will compel them to do so in a proper case: Delmonico *v.* Guelaume *et al.*, 2 Sanf. Ch. 366 (1845); Griffy *et ux. v.* Northcutt, 5 Heisk (Tenn.), 747 (1871); Jones *v.* Sharp, 9 Heisk (Tenn.), 660 (1872); Shanks *v.* Kline, 104 U. S. (14 Otto.) 18 (1881).

Nearly the same view was taken in the case of Martin, etc., *v.* Martin, 62 Wis. 418 (1885), where the court said: "While there were debts, Hall, held as surviving partner and trustee for the creditors of the firm, but on winding up he was trustee of the balance for the benefit of the heir of the deceased partner, as against the personal representatives."

Judge Hammond in Logan *v.* Greenlaw, 25 Fed. Rep. 299 (1885), advanced quite a new and original opinion when he said: "In my view of it the land descends only *sub modo* and they (that is, the heirs), do not hold so much as heirs at law, but rather as statutory assignees, or distributees of the surplus proceeds of partnership real estate."

These expressions of opinion show clearly, by their variety and difference, the lack of positive and certain foundation for the conversion fiction as a whole, and demonstrate the misfortune which Mr. Parsons has pointed out (Partnership, § 109), that it was ever thought necessary to introduce it.

The course of reasoning by which the American rule has been established is well shown by the able opinion of Justice Sharswood in Foster's Appeal, 74 Pa. St. 391 (1873). An abridgement of it follows: "Conversion is altogether a doctrine of equity . . . it is admitted only for the accomplish-

ment of equitable results. It may be termed an equitable fiction, and the legal maxim *in fictione juris semper subsistit equitas* has redoubled force in application to it. It follows of necessity that it is limited to its end. There must be some purpose recognized as lawful to be accomplished before equity will allow it to have place." "Land of a partnership when sold by the firm becomes land again in the hands of the purchaser, and the proceeds personalty; but personalty to what extent? Only to the extent of accomplishing the conversion, namely, the equity of the partners to have the joint debts and their own advancements paid, before any part goes to the other partners or their seperate creditors." He concludes this branch of the opinion as follows: "If the land remaining in specie after the partnership is dissolved and wound up, and all the purposes of conversion answered is still personal property, how long is it to remain so? Certainly, all the forms of law as to real estate must be observed from hand to hand, and shall it not be subject to the lien of judgments in the lifetime, and debts upon the death of the owner? If not, uncertainty and litigation will indelibly mark its character. But it may be asked, when is the exact moment of its re-conversion? The answer is, the moment the partnership is wound up either by decree, judgment, or agreement, and it is determined that it no longer forms part of the partnership stock, and is not required for its purposes." This is certainly a strong case, not only on account of its high authority and able reasoning, but because of the practical common sense of the rule evolved. It has frequently been cited as an authority in other jurisdictions, and when considered with the opinion of Justice Shaw, of Massachusetts, in Dyer *v.* Clark, 5 Met. 569 (1843), and Justice Wells in Shearer *v.* Shearer, 98 Mass. 107 (1867), the whole learning on this branch of the law is pretty well covered. The following language from the last case should be quoted as a supplement to that from Foster's Appeal. "It would seem, therefore, that conversion should be made only when, and so far as is required for that purpose (*i. e.*, adjusting the affairs of the partnership) and that the effect on the descent or distribu-

tion of the share of a deceased partner among his representatives should be regarded as an incident merely, and not an end for which the interference of a court of equity is to be sought."

Upon this subject there is but a single further point to be noted. It was raised in Pennsylvania in the case of Leaf's Appeal, 105 Pa. St. 505 (1884). The partnership agreement provided that all real estate should be personal property and that the firm should not be dissolved by the death of a partner, but only by the consent of all. The firm acquired a large amount of real estate with its profits. One partner died leaving children, and a wife who subseqently married again and died. The widow, by will, gave all her interest in the firm, of which her deceased husband was a member, to her second husband, who claimed the dividends of the firm as the proceeds of personal property, as against the heir at law, who claimed that, for purposes of descent, the partnership land was to be considered as unconverted. The court considered the contract not to dissolve on the death of a partner valid (Loughlin *v.* Lorenzo, 48 Pa. St. 282; Burwell *v.* Manderson, 2 How. 576; Jones *v.* Walker, 13 Otto. 446), and held that since the firm was still existing its real estate was to be considered and to descend as personalty, and that the second husband was entitled to receive the dividend on one-third of the one-fifth interest held by the deceased member. This is not inconsistent with the general rule, and alone is not surprising. But the language of the court which follows is not so satisfactory and would seem, to some, open to grave question, at least on account of its practical effect. Justice Green, after confirming the doctrine of Foster's Appeal, in a case where the affairs of the firm were wound up, and distinguishing the circumstances of the case before him, concludes his opinion with the following language (pp. 513, 514): "It cannot now be known that the real estate will not be required for the payment of debts. The firm still continues its business under a lawful agreement to that effect. Whenever a dissolution shall be established, and a final settlement of accounts shall take place, the positions contended for and the reasons by which they are enforced will become entirely appli-

cable and will exercise a very potent and possibly controlling influence upon the question which will then arise between the present litigants or who may succeed them."

The action was simply for the income, and the principal fund was not contended for, but it is difficnlt to see how one set of claimants can be entitled to that income, during the continuance of the partnership, and immediately on its dissolution, another set become entitled—not by reason of any act by any individual, but simply by the act of the law—operating through the fact of dissolution.

Ordinarily, the rights of the claimants in the estate of a deceased person are fixed at his death, and once vested cannot be divested, save by special provisions or circumstances; but the rule here laid down, unless made necessary by peculiar circumstances not appearing in the report, may unsettle this rule and give rise to considerable uncertainty in the future. Truly the language is dictum only, but it is worth considering.

Upon the subject of firm land generally, and its disposition after the death of a partner the student will find additonal information in the American and Eng. Ency. of Law, Vol. 17, p. 952, &c., where many authorities are cited. In an article on Firm Real Estate in the Albany Law Journal, Vol. 32, pp. 284, 304, 326, and the able note of Judge Arnold to Foster's App., 13 Am. Law. Reg., N. S. 300, beside the generally full treatment of the matter in most of the leading text books.

C. WILFRED CONARD.

Phila., Pa., May 9, 1894.