

THE AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

VOL. { 46 O. S. } { 37 N. S. }	MARCH, 1898.	No. 3.
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WHAT CONSTITUTES A PARTNERSHIP?

It is not an unusual experience for the lawyer who undertakes to investigate the law on a given point to discover that the authorities are in conflict and the principles in doubt. When such a state of things exists he usually finds in the treatises of those who have dealt with the problem a recognition of the existence of the difficulties of the subject and some comment upon the divergence of judicial opinion. It is not often that he is compelled to witness a conflict of authority as to whether or not a conflict of authority exists. Yet this legal paradox seems to be fairly descriptive of the present state of professional opinion in regard to the criterion of partnership. Some learned writers are of opinion that the question at the head of this article is answered with satisfactory unanimity by the voice of modern authority and that the entire law of partnership has assumed a definite form corresponding in some measure to that which has been attained in those portions of our legal system where the law is best settled. Others, while themselves entertaining definite views in regard to the proper answer to the question, see even in the modern cases a discouraging lack of adherence to any fixed principle of decision

and find a difference of opinion on points of vital importance even as between authors who unite in proclaiming that uniformity has been attained. Thus, Sir Frederick Pollock and Sir Nathaniel Lindley consider that the principles of the partnership relation have been fully established and are susceptible of expression in definitions and of application in formulas.¹ With this view we contrast the following observation of Mr. James Parsons in the introduction to his "Exposition of the Principles of Partnership:" "I am astounded by the statement which both Lindley and Pollock, the leading authors who have written upon the subject, concur in making, that the law of partnership is ripe for codification." After pointing out that these authorities lack guiding principles upon which to proceed in the work of evolving a system, Parsons proceeds: "Look at the law of partnership as it stands to-day, and try to point out the principle which underlies the relation. The last English case abandons the only landmark which remained to individualize a partnership.² There is no clue left to distinguish a partnership from any other agency." In *Pooley v. Driver*,³ Sir George Jessel refers to the attempt made by very many people to define a partnership and mentions the collection in Lindley on Partnership of fifteen definitions by different learned lawyers. He says, "I think no two of them exactly agree but there is considerable agreement amongst them; and I suppose anybody reading the fifteen may get a general knowledge of what partnership means." In the fifth edition of Lindley's work the fifteen definitions have grown to eighteen. Lindley himself does not undertake to define the term partnership but says "an agreement that something shall be attempted with a view to gain and that the gain shall be shared by the parties to the agreement, is the grand characteristic of every partnership and is the leading feature of nearly every definition of the term." There is at

¹ See Pollock's remarks on codification in the preface to the 3d and 4th editions of his Digest of the Law of Partnership and Lindley's expression of approbation in the preface to his 5th edition.

² *Badeley v. Consolidated Bank*, 38 Ch. D. 238 (1886). Mr. Parsons wrote in 1889.

³ 5 Ch. D. 458 (1876). •

least room for doubt whether a reading of these eighteen definitions of partnership will enable the mind to form any such conception of a partnership as will serve as a basis for the development of a coherent system of partnership law. It may also be suggested, with respect for so distinguished an authority, that the student has a right to expect from Lindley a more definite statement of "the grand characteristic of every partnership" than the statement that it is "an agreement that something shall be attempted with a view to gain and that the gain shall be shared by the parties to the agreement." Perhaps it is the vagueness of the conception of a partnership as presented by these authorities that accounts for their view that the law of partnership is substantially settled. If one has a hazy conception of what a partnership is, it is difficult to say whether two decisions are in conflict or in accord. It is generally true that a conflict of authorities can be detected only when the issue is distinctly framed. Parsons has a much more definite conception to put before his readers than that which is to be gathered from the texts of the other authorities. He insists that the joint estate resulting from the contributions of the different partners is the basis of partnership. The property alone is sufficient to make the proprietor a partner although he takes no part in the management of the business. "It is this feature," says Parsons, "which distinguishes the Common law from the Civil law partnership. It is the property which extends the private bargain of the Civil law and converts it into the business-establishment of a Common law partnership."¹ He accordingly proceeds to determine the nature of the partner's contribution and then the title by which the property of the firm is held. He points out that it is the property which "measures the capacity of a partner. The partner pledges the firm property by each firm transaction and thus creates a right in the firm creditor." This principle clears up the mystery of marshalling assets. "The dual position of a partner, (a survival of the *societas bonorum universorum*,) who is charged with unlimited liability, in spite of the fact that he contributes but a portion of his estate, creates a collision of rights at the

¹ Introduction ; P. lxix.

start. The law adheres to tradition, and enforces the liability. Equity recognizes that the liability should be limited to the contribution, and where its principles apply, controls the firm creditors who seek to enforce the liability against the separate estate in competition with the separate creditors. Both the legal right and the equitable control of its exercise must be apprehended, in order to appreciate the exact limits of each. The want of a clear understanding of the difference between the position of the firm and of the separate creditors has introduced a combat of opinion which a statement of the right and of the equity is sufficient to terminate."

The book in which Mr. Parsons has worked out his solution of the problems of partnership is not as widely known as it deserves to be. The author's style is such that his thought is difficult to follow. He takes little pains to disclose his meaning to any one but the most patient reader. Many of his statements are curiously elliptical and, in general, it may be said that the whole subject is treated by him as if it were in the highest degree abstruse. The form in which the book is cast is unfamiliar to the English-speaking lawyer. The subject is reduced to some two hundred and sixteen propositions or compendious statements of the various doctrines of partnership law and each of these is followed, as if it were a proposition in geometry, by the proof which the author adduces in its support. The proof is followed by concise statements of typical judicial decisions, so selected as to illustrate a theory or to give point to a criticism. The book as a whole is not one that the "practitioner" is likely to use and its eccentricities of form and expression have sometimes led younger students to underestimate its true worth. The present writer, however, is one of many who are deeply impressed with the acuteness of the author's criticisms and with the breadth and solidity of his work of construction.¹ An accomplished civilian and a student of the modern law in Germany and France, Mr. Parsons has brought to his work a thorough knowledge of the whole field of American and English judicial

¹ See a striking tribute to the work of Parsons in the preface to Short's recently published book on Corporate Bonds and Mortgages.

decision and an intimate acquaintance with the treatises of the jurists who have discussed problems of partnership law. Under these circumstances it is to be expected that he should emphasize the importance of an orderly development of the law of partnership on the basis of some single guiding and controlling principle. This he finds, as has been intimated already, in the notion of *firm property* and he declares that when this notion is brought forward "the material is furnished for an explanation of the relation in all its bearings." The circumstance that a second edition of his work is about to make its appearance and that advance sheets of it have come into the hands of the writer, seems to make this an opportune time at which to begin a series of papers in this magazine devoted to discussions of various problems of partnership law. It is part of the plan to present in the light of Mr. Parsons' theories a somewhat fuller discussion of certain well known partnership decisions than is to be found in the pages of his work. If, in the course of the discussions, anything of value is developed, the credit belongs to Mr. Parsons and not to the writer. Mr. Parsons is not, however, responsible for all the views expressed nor for the application of his theories to particular cases. In the present paper the question for consideration is "What Constitutes a Partnership?"

By the Roman law partnership was originally a family arrangement. Later the relation was enlarged and the voluntary element was introduced which in time became a distinctive character of partnership. The relation was founded on mutual confidence and the partners became, as it were, mutual trustees in the business. The law, accordingly, was chiefly occupied with the definition of the relation of the partners among themselves: it was almost silent in regard to the rights of third persons against the firm. "Co-owners or co-tenants of land might be partners in it, not because they converted the land into merchandise for traffic, but simply because they effected a joint purchase, and without reference to any use or disposition they might make of the land." "The trade partnership arose from farming the public revenues which overtaxed the administrative resources of the Republic, and

was committed to private individuals." Partnerships were either for gain or not for gain.¹

In mediæval times we find that the commercial law of Western Europe had so developed that the test of one's liability as a partner was his joining as a proprietor in management of the business. In order to be a partner one must needs be a manager as well as an owner. By contributing property to a business exclusively conducted by others one does not become liable beyond the amount of his contribution. The Roman conception of strict confidence was maintained, as was natural in a predatory period. "The intimacy and trust of kinship" made the family a useful agency in carrying on business and family partnerships were therefore common.

When we turn to England, we find a development different from that which took place at Rome or under the Law Merchant.

"Under the Feudal law all the rights and duties of the individual took root in the possession of property. Land, the most usual and important form of property, became in effect, though not in name, a legal person, and the man a mere incident or *locum tenens*. Personal property never had this independent legal status, but the habit of mind acquired in dealing with real estate led the Common lawyers to personify the contribution of a partner."² One who made a contribution to the enterprise, whether his contribution consisted of skill or of service or of money, was regarded, in virtue of his contribution, as a proprietor or owner of the enterprise even if he took no part in its management or its direction. In contrast with the Civil law as developed in mediæval and modern times, which regards participation in management as a condition of general partnership liability, the Common law regards the contributor as so identified with his contribution that he is treated as being in the firm in virtue of the presence of his property in the common stock. His unlimited liability to firm creditors followed as a matter of course, "The dormant

¹ See, in general, James Parsons Part. § 1. Throughout these papers foot-notes which merely designate pages and sections are to be understood as referring to Mr. Parsons' work.

² § 3.

partner is the typical common law partner." It may be said, therefore, that proprietorship in the business is the test of partnership at Common law.¹ If the question is whether A is a partner with B and C, we must scrutinize the facts of the relation between the three for the purpose of determining whether the business belongs to A as it does to B and C, or whether A has merely a personal claim against B and C which he expects that B and C will be enabled to satisfy by the successful conduct of their business. What are the indicia of ownership? He who owns property takes the increment of value thereof and he is said to make a profit out of his holding. If, therefore, he has embarked in business and the business is successful, he takes the profits of the business because the profit belongs to the proprietor. The proprietor of a business, in virtue of his ownership, controls the management of the business, whether the actual conduct of it is in his hands or in the hands of his agents. He does not part absolutely with his title or trust to anybody else for its recovery. His position is to be contrasted with that of a lender who surrenders his property to the debtor and in the simplest typical case trusts only to the debtor's solvency as security for the loan. If a man is entitled to the profits of a business he is, *prima facie*, a partner—not because he takes profits but because the taking of profits tends to identify him as a proprietor. A lender, however, may stipulate for a share of profits and a lender is the very opposite of a proprietor. The mere participation in profits is, therefore, not conclusive. If he who shares the profits has no right to insist that the money lent by him shall be used in the business and has no powers of control, he cannot be regarded as a proprietor and he is therefore not a partner. If, however, he takes a profit and stipulates that the sum lent shall be retained in the business and can enjoin the borrowers from withdrawing it, he is a partner.²

It will be perceived that it is quite immaterial whether or not the parties in a given case intend to subject themselves to

¹ § 54.

² § 64.

the liabilities of partners.¹ If they intend that they shall be invested with the prerogatives of ownership, then the law fixes upon them the responsibilities as well as the privileges incident to the partnership relation.² Partnership is, therefore, not a contract: it is a status which results from a contract.³ The term "Partnership" means a relation between two or more persons. The existence or non-existence of the relationship follows as the result of their conduct towards one another. If their conduct takes the form of an agreement by which each is invested with the indicia of co-proprietorship, they become partners even if they expressly stipulate that they shall not be partners. It follows that a man is either a partner or he is not. There can be no such thing as a partnership as to third persons in the absence of a partnership between the parties.⁴ Of course, a man may, in virtue of the doctrine of estoppel, preclude himself from denying that he is subject to a partnership liability; but this results from a principle of equity and has nothing to do with partnership law. One who has so estopped himself is not a partner at all. He may, for convenience, be called a quasi or nominal partner, as Ames uses the term.⁵ There is, however, no room for the distinction attempted by Lindley⁶ between "true partnerships" and "quasi partnerships." A defendant is liable as a partner either because he is in fact a proprietor of the firm stock or because he is estopped from denying that he is a partner. There is no other basis of liability.

As the partnership liability of a defendant results from his assumption of the position of proprietor and exists independently of the will of the defendant, it often happens that the liability exists where it was never suspected and it is sometimes imposed under circumstances of great hardship. It follows naturally that, in a doubtful case, a court will not

¹ § 45.

² See the remarks of Sir George Jessel on this point in *Pooley v. Driver*, 5 Ch. D. 458 (1876).

³ § 101.

⁴ See the trenchant and characteristic observations of Lord Bramwell to this effect in *Bullen v. Sharp*, L. R. 1 C. P. 86 (1865).

⁵ Ames's Cases on Partnership, 138.

⁶ *10, *25.

hold a defendant to partnership liability. It must appear clearly that he has secured for himself all the rights of a co-proprietor in the business before the court is justified in subjecting him to corresponding liabilities. There can be no clear inference of such co-proprietorship if the facts are consistent with the existence of some other and older form of legal relation. In a given case the phenomena may be satisfied by the hypothesis of co-ownership, of sale on joint account, of bailment, of factorship, of the relation of master and servant or of lessor and lessee. In such a case the parties will be held not to be partners.¹

The principles which the writer has been endeavoring to set forth may be seen to advantage in their application to concrete cases. It therefore becomes expedient to apply the theory of proprietorship to a number of typical partnership decisions.

In *Grace v. Smith*,² it appeared that B and C had been partners but that the partnership had been dissolved. C by the agreement of dissolution purchased the stock in trade and debts due the partnership, while B was to receive back again the money which he had put into the partnership and a sum representing past profits. He was also to make a loan of a smaller sum to C, at five per cent. interest, C paying him an annuity of three thousand pounds per annum. C carried on the business in his own name and A, who subsequently sold goods to C, brought an action of assumpsit against B to charge him as a secret partner. Clearly A had no right to recover against B. After the agreement of dissolution was consummated B was in the position of a vendor who has sold his property partly for cash and partly on credit. His position was the opposite of that of an owner or proprietor. It does not appear that he had any right to control the business or even to insist that it should be carried on. It was found as a fact that the sum paid by way of annuity was a personal claim against C and was not "payable out of the profits." Even if it had been payable out of the profits, B's position would still have been clearly that of a vendor and his

¹ § 67.

² 2 Wm. Bl. 998 (1775).

right to share in the profits of the business would have sprung not from proprietorship but from the assignment to him by C who was the owner of them. The court, however, based a denial of A's right of recovery on less satisfactory grounds. "Every man who has a share of the profits of a trade," said Chief Justice De Grey, "ought also to bear his share of the loss."¹ "If any one," he proceeded, "takes part of the profit, he takes a part of that fund upon which the creditor of the trader relies for his payment." "I think the true criterion is, to inquire whether Smith (B) agreed to share the profit of the trade with Robinson (C), or whether he only relied on those profits as a fund of payment." It may be observed, however, that the word "profits" has no meaning except when used with reference to an owner and his property. From the creditor's point of view there is no distinction between profits and capital. Whatever is the debtor's property the creditor is entitled to take.² It may also be observed that even between the owner and his property there cannot be a profit until the creditors are paid. "The creditors cannot realize on that which does not come into existence until they have ceased to exist, *i. e.*, are satisfied."³

Grace v. Smith is one of many cases which complicate the question as to the existence of a partnership by discussing whether the share of profits of the business stipulated for by the defendant is or is not a usurious return for the use of his money.⁴ If the radical difference between a proprietor and a lender is borne in mind, it will be perceived that these questions are wholly distinct from one another. If the defendant

¹This is true if he who takes a share is a proprietor. If so, he is liable because he is a proprietor. If he is not a proprietor, he is not liable as a partner, even if he takes by assignment a share of the proprietor's profit.

²This is evidently the thought in Lord Bramwell's mind in *Bullen v. Sharp*, *Supra*, where (in quoting C. J. De Grey) he remarks: "This would be a bad reason if true in fact. A man who trusts another generally has a claim on his profits and capital too. How does a man who trusts the former only more affect the creditor's fund?"

³§ 55.

⁴See, for example, *Morriset v. King*, 2 Bur. 891 (1759); *Bloxam v. Pell*, 2 Wm. Bl. 999 (1775). The true principle is recognized in *Morse v. Wilson*, 4 T. R. 353 (1791).

is a partner no question of usury can possibly arise. If he is not a partner it is quite immaterial, from the plaintiff's point of view, whether the defendant's contract is or is not tainted with usury.

In *Hoare v. Dawes*,¹ a broker had been employed by a number of persons, of whom B and C were two, to purchase a lot of tea of which each was to have a separate share. There was not any joint concern in the re-disposal of the tea. The vendor of the tea (the East India Company) issued warrants for the tea to the broker who, as was the custom in the business, pledged them to A. The broker became bankrupt and the value of tea sank. Although B and C had paid their proportion of the purchase money, A sued them for the full amount of purchase money, claiming that they were partners. A was held not to be entitled to recover. The court were of the opinion that this was not a case of partnership though no very definite reason was given for the decision. The decision was clearly right. The purchase by the broker, though joint in form, was several in substance. Even had it been otherwise, the right of the plaintiff to recover against B and C would have depended upon the joint contract and not upon the existence of a partnership. B and C were not proprietors in trade or business, for in this case there was no act either of trade or business. "Trade" involves buying and selling. When partnership was confined to trade there could be no such thing as a partnership in buying only or a partnership in selling only. Even in modern times, partnership being now co-extensive with the scope of "business," it must at least appear that the parties alleged to be partners are embarked in business together and here it appeared that they were not.

The facts in *Waugh v. Carver*² are too well known to require extended statement. The action was assumpsit against B, a merchant of Gosport, for goods sold and delivered to C, a merchant of Cowes. B and C had entered into a contract in virtue of which each was to use his influence for the purpose of directing custom to the business house of the other and each

¹ 1 Douglas, 371 (1780).

² 2 Henry Blackstone, 235.

was to receive a proportion of the profits of the business done by the other. The agreement contained covenants to the effect that neither would make inconsistent arrangements with third persons during the life of the contract. Provision was also made for the settlement of accounts and for arbitration in cases of a dispute. B was held liable on the ground that he had entitled himself to take a portion of the profits of C's house "generally and indefinitely as they should arise" and was therefore, upon the authority of *Grace v. Smith*, taking "from the creditors a part of that fund which is security to them for the payment of their debts." The fallacy involved in the reason assigned for the decision has already been commented upon. The decision itself was wrong. There was no common business belonging to B and C. B was entitled to exercise only a slight degree of control over C in the management of C's business; C had no powers of control over B. The agreement showed that each was to conduct his own business and receive the profits thereof, and was to assign a certain proportion to the other in consideration of that other's service as an agent.

In *French v. Styring*,¹ A and D had jointly purchased a race horse. D sold his share of the horse to C and it was agreed between C and A that A should train the horse, have the control and management of him and pay the expense of entering him in different races. The expenses of the horse's keep were to be equally divided between A and C, and the winnings were to be shared in a like proportion. B, with the consent of A, took C's place, and A subsequently sued B for a moiety of the keep and expenses. B defended on the ground that he and A were partners and that an action at law was not maintainable. It was held that A was entitled to recover: "It is no more a partnership," said Willes, J., "than if two tenants in common of a house agreed that one of them should have the general management and provide funds for necessary repairs so as to render the house fit for the occupation of a tenant and that the net rent should be divided among them equally." This was clearly a case in which the theory

¹ 2 C. B. N. S. 255 (1857).

of a mere holding in common furnished an adequate explanation of the relation between the parties. The question at issue involved an advance made by one co-owner for the benefit of the common property. If the parties could be regarded as having embarked in business then the explanation of a tenancy in common would not suffice, and upon the principle of proprietorship they would be held to be partners in the enterprise. The thought here suggested is well illustrated by a reference to the case of ships. At first the ship was treated as not forming part of the firm stock where the co-owners fitted her out, freighted her and sent her off on a voyage.¹ Gradually, however, the ship itself became, as it were, identified with the enterprise and the co-owners came to be regarded as partners in virtue of the doing of a continuous business comprising a series of voyages.²

Another well known case is *Cox v. Hickman*.³ Of this case Sir Montague Smith said in *Mollwo, March & Company v. The Court of Wards*;⁴—"The judgment in *Cox v. Hickman* had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this kind is made to depend, not on arbitrary presumptions of law, but on the real contracts and relations of the parties." He used this language because the theory that he who takes part of the profits is necessarily a partner was in that case finally discarded as a principle of decision. "The law," said Lord Bramwell

¹ *Mumford v. Nicholl*, 20 Johnson, 611 (1822).

² *Williams v. Lawrence*, 47 N. Y. 462 (1872). See also *Eldridge v. Frost*, 6 Rob. (N. Y.) 518 (1866). For a case in which the real relation of the parties was that of lessor and lessee and where the inference should have been against the existence of a partnership even under the view of the testimony most favorable to the plaintiff, see *Dry v. Boswell*, 1 Camp. 329 (1808). For a case in which the relation between the parties was that of principal and agent and where the inference was against partnership although the agent shared profits and loss, see *Meyers v. Sharpe*, 5 Taunt. 74 (1813). See also § 27 where Parsons disposes of the contention sometimes made that persons may be "partners in the profits but not in the stock of the firm." On theory of proprietorship such a relation is impossible.

³ 8 House of Lord's Cases, 268 (1860).

⁴ 4 Privy Council App. 419 (1872).

in *Bullen v. Sharp*,¹ "had drifted into the condition from which it was rescued by *Cox v. Hickman*." The facts were, briefly as follows: X and Y had become insolvent. Their creditors, instead of selling them out, executed a deed of arrangement, to which X and Y were parties, by which certain of the creditors were appointed trustees to take possession of the business established by X and Y, to carry on the business under the name of the "Stanton Iron Company" and to divide net income (which was always to be deemed the property of X and Y) among the creditors of X and Y. A majority of the creditors had power to control the conduct of the business but when the debts had been paid the trustees were to hold the property in trust for X and Y. A supplied goods to the trustees and drew certain bills of exchange which were accepted by one of the trustees in the name of the Stanton Iron Company. A sued B and C, two of the creditors² upon the theory that they had become partners in virtue of the execution of the deed. It was held that B and C were not liable. Lord Cranworth's opinion is a vindication of the principle of proprietorship. Referring to the status of the partner, he says, "The real ground of the liability is that the trade has been carried on by persons acting on his behalf." "It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf; *i. e.*, that he stood in the relation of principal towards the persons acting ostensibly as traders, by whom the liabilities have been incurred, and under whose management the profits have been made. Taking this to be the ground of liability as a partner it seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners

¹ *Supra*.

² Both B and C had been named as trustees, but B had resigned the trust and C had never acted in that character.

with their debtor, or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors; though their consent is necessary in such a case, for without it all the property might be seized by them in execution. But the trade still remains the trade of the debtor or his trustees; the debtor or the trustees are the persons by or on behalf of whom it is carried on." Lord Cranworth then proceeds to say that the powers of control given to the creditors by the deed were consistent with the maintenance of the relation of debtor and creditor, and do not afford a basis for the contention that the creditors had become proprietors or owners in the business. Lord Cranworth uses the expression "principals" throughout his judgment, but it is obvious that he uses that word to designate those to whom the business belongs. The same fundamental thought evidently underlies the opinion of Lord Wensleydale, although he is led by the use of the word "principal" to dwell upon the element of agency in a way that is not incorrect, but is, perhaps, misleading.

Following *Cox v. Hickman* come the cases of *Kilshaw v. Jukes*¹ and *Bullen v. Sharp*.² In the former case it appeared that the creditor had agreed to assist his debtors in a building operation, in consideration of a participation in their profit, until his debt should be extinguished. In the latter case a father had guaranteed the son's business to a certain extent in consideration of the payment of an annuity, which was to be increased in proportion to profits if they reached beyond a certain amount. In each case it was held that the debtor was still the person solely interested in the profits, save that he had transferred a part of them to the defendant as a creditor. In neither case, therefore, was the defendant held to be a partner.

¹ 3 B. & G. 847 (1863).

² L. R. 1 C. P. 86 (1865).

In *Mollwo, March & Company v. The Court of Wards*,¹ the creditor of a firm took a mortgage of all its property, landed or otherwise, including its stock in trade. He was also given extensive powers of control, in the sense that he could restrain the trading of the debtors if he considered it excessive. It was further agreed that he should receive a commission of 20 per cent. on all net profits and 12 per cent. on cash advances made or to be made. It will be observed, however, that even upon such a state of facts there could be no clear inference of proprietorship. The story began with the undoubted relation of lender and borrower. All that followed was consistent with the taking of security by a creditor. The creditor made no stipulation which could be explained only upon the theory that he became a part owner of the business. After the repayment of his advances and the stipulated return, his interest necessarily terminated. Large as were his powers of control, they were wholly of a negative character. He "had no initiative powers; he could not direct what shipments should be made or consignments ordered, or what should be the course of trade. He could not require the Watsons to continue to trade, or even to remain in partnership." Contrast with this case the facts in *Badeley v. Consolidated Bank*.² There the so-called loan was made concurrently with the stipulation for a share of profits and for powers of control. There was no antecedent relation of debtor and creditor. Moreover, the lender's powers of control were characteristic of ownership. The agreement for a share of profits included a stipulation for profits after the loan should be refunded and in order to obtain the continued profits the so-called lender could still control the business after he had been paid off both principal and interest. The court, nevertheless, held that the relation between the parties continued to be that of debtor and creditor, and was not replaced by a co-proprietorship. It is submitted that the decision was certainly wrong. A just view of the case, in which a proprietor attempts to relieve himself from responsibility of ownership by

¹ *Supra*.

² 38 Ch. D. 238 (1886).

masquerading in the guise of a lender, is the view taken by Sir George Jessel, in *Pooley v. Driver*.¹ That distinguished judge, by a searching analysis of the facts, showed that the would-be creditor had stipulated for all the rights of an owner, and he reached the inevitable conclusion that that which was called a loan was, in substance, a property contribution to the common stock.

The last case which space permits us to examine is *Merrall v. Dobbins*.² Here it appeared that B and C had entered into an agreement purporting to be a lease by B to C of a certain hotel. There was a provision that B should not be liable for the business done or for the debts contracted by C. Applying the test of proprietorship, the court found no difficulty in holding that A, who had sold goods to C for the purpose of the business, was entitled to hold B liable as a partner. B, by the terms of the instrument, was entitled to insist that the business should be carried on by C, that B or his representatives should have free access to the premises, that, in addition to the rent reserved, he should be paid eighty per cent. of the net profits, and that he should have the appointment of a person to keep the books, act as cashier and handle the receipts. There was also a provision for the right in B to terminate the agreement upon twenty-four hours' notice, but C was to control and manage the business during the continuance of the contract. The court considered the agreement as evidence of the intention of the parties "to become joint owners of the business." The relation of lessor and lessee was not adequate to explain the phenomena of the case. It is submitted that the decision was correct.³

¹ 5 Ch. D. 458 (1876).

² 169 Pa. 480 (1895).

³ In the course of his opinion Mr. Justice Fell used the following language: "We are not concerned with the question whether the law of the state by which the contract is governed is in harmony with the old English rule of *Grace v. Smith*, 2 Wm. Blackstone, 998, and *Waugh v. Carver*, 2 H. Blackstone, 235, which makes participation in the profits conclusive of the liability of the participant to creditors without regard to the agreement or intention of the parties, or with the modern rule of *Cox v. Hickman*, 2 H. L. C. 268, under which a participation in profits is held to be strong but not conclusive evidence of a partnership, and the

The foregoing cases have been selected because they present a great variety of facts. They have been chosen from the great mass of judicial decisions in which the courts have attempted the solution of this fundamental problem of partnership law. It is of course not contended that the theory of co-proprietorship reconciles the decisions. On the contrary, it brings into strong relief the conflict of authority which is conceived to exist. It *is* contended, however, that this is the theory which affords the only rational basis for the development of a coherent system of partnership law. As for the conflict of authority, the remark made at the beginning of this paper may be emphasized at its close;—that the conflict can be avoided only by proclaiming such an absence of fixed principle as would be most discreditable to our legal system.

George Wharton Pepper.

whole transaction is taken into consideration in order to determine whether the relation of partners was to be created. If there was a partnership resulting from intention, all other questions drop out of the case." With deference it may be suggested that the learned judge was necessarily concerned with the question which he sought to put aside. The decision which he made and the satisfactory reasons assigned for the decision necessarily involved a rejection of the rule in *Grace v. Smith and Waugh v. Carver*, and an adoption of the principle vindicated in *Cox v. Hickman*. The expression "a partnership resulting from intention" is somewhat misleading. B and C were co-proprietors by intention and therefore were in law partners. It is clear that they did not intend to assume the liabilities of partners.