

PARTNERSHIP PROPERTY.

In an article entitled "What Constitutes a Partnership?" which appeared in the March number of this magazine,¹ the writer endeavored to maintain the thesis that partners are co-proprietors and that the conception of partnership at the Common law is that of co-ownership of a trade or business.² If A stands in such a relation to B's trade that he gains if the trade is profitable and loses if it results in loss, these facts are significant only so far as they suggest an inference that he who shares the profit and loss of a trade is really one of the owners of it. Such an inference, however, is obviously not a necessary inference. Some other relation than that of owner may be adequate to explain A's connection with the enterprise. He may be a factor or a lessor or a lender. In a doubtful case it is even true that the inference will be against the existence of a partnership; for the courts recognize that he who seeks to hold A responsible for B's acts must make out a clear case in support of his claim. It follows that to make profit-sharing in any form the test of partnership represents a confusion of thought. To insist upon such a criterion involves the selection of one of the incidents of ownership as a conclusive test of the existence of the partnership relation, although that incident often attaches to relations other than that of ownership.³

¹ 37 Am. Law Reg. (N. S.) 137.

² Readers of the former article will recollect that it was announced as one of a series of papers devoted to an attempted exposition of certain principles of partnership law as developed by James Parsons in his work on Partnership. It is proper to repeat that, while Mr. Parsons is in no way responsible for these articles, the positions assumed by the writer are in substantial agreement with his. References in the foot-notes to sections and pages are (unless otherwise stated) to Parsons (James) on Partnership.

³ The decisions of the Supreme Court of Pennsylvania afford a curious illustration of the tenacity with which judges will often hold to an old rule of law even after its unsoundness has been demonstrated. In *Purviance v. McClintee*, 6 S. & R. 259 (1820), the profit-sharing test was definitely adopted and was applied to a state of facts where the relation

If partners are co-proprietors of the business, it should seem to follow that they are co-owners of the partnership property. It therefore becomes pertinent to inquire what is the nature of their estate and what differences, if any, exist as between firm chattels and firm land. Various forms of collective holding have received legal recognition from time to time. Can the firm estate be assimilated to any one of them or is it *sui generis*? What are the rights of firm creditors and of separate creditors? Are their respective rights as recognized at law modified or controlled by the interposition of equity? It is the purpose of this paper to indicate the answer to these questions.

If we direct our attention to the history of the collective holding of property we find that in early times the property

between the parties was not that of co-proprietors. It is even doubtful whether the case would not have been decided differently in England prior to the decision in *Cox v. Hickman*—the relation between the parties being that of master and servant. In 1869 Judge Sharswood, in *Edwards v. Tracy*, 62 Pa. 374, called attention to the fact that the test applied in *Waugh v. Carver* had been discarded in England but, nevertheless, was of opinion that it was "entirely too late" to question the old rule. When one reflects that the profit-sharing test had its origin in 1775 in *Grace v. Smith* and was discarded by the House of Lords eighty-five years afterward because of its unsoundness, one is led to inquire why a lapse of forty-nine years was thought by the distinguished judge to be an unsurmountable obstacle in the way of correcting an error. In point of fact, the actual decision in *Edwards v. Tracy* was to the effect that no partnership existed although there was a profit-sharing. The result reached was unquestionably correct, as the true relation between the parties was that of consignor and factor. The court reached the sound result by treating the case as an exception to the supposed rule. In order to give relief in cases where the profit-sharing rule works special injustice, the legislature intervened, and by the Act of April 6, 1870, provided that profits stipulated for by a lender as compensation for the use of money might be taken without constituting the taker a partner, provided that the agreement for the loan be in writing and that there be no holding out. In *Weiss v. Weiss*, 166 Pa. 490 (1895), the profit-sharing test was used to make a lender a partner on the ground that the agreement of loan was not in writing and therefore not within the statute, and that the statute by creating an exception has recognized and proved the rule. Finally, in *Merrall v. Dobbins*, 169 Pa. 480, (1895), the court gave a hopeful sign of a possible adoption of the true criterion by making the decision that two persons were partners hinge upon evidence of their intention "to become joint owners of the business." See note 3 to page 153, 37 American Law Register (N. S.).

rights of the individual were enjoyed only in and through the family of which he was a member. This means that there was practically no separate ownership. The economic condition thus described of course existed long before the recognition of a theory adequate to explain it. Accordingly, when "the law passed into its analytical stage" and it became necessary to give a legal explanation of the survival of the tribal title in the feudal joint tenancy, the theory was developed that the several tenants held their property by a single title. Mr. Parsons thus summarizes the development: "As, at first, the law denied to the individual separate and exclusive property rights, so, at a later date, the jurist denied to the joint tenant a separate and distinct title. In joint tenancy at the Common law there were many owners and one title. The tribal relationship excluded private property, and with it the devolution of property by inheritance. Joint tenancy accomplished the same thing among the co-tenants by the principle of survivorship, which was the result of the single title. This theory of a single title was an abstraction, which neither embodies the facts nor meets the requirements of logic. As the institution of private property became universal, different habits of thought were developed, and tenancy in common appeared as a modification of joint tenancy, more consistent with prevailing ideas. In tenancy in common there were many owners, each of whom had a right of enjoyment covering the whole property, but with a separate and distinct title. As a consequence of the several titles, the right of survivorship was wanting in this form of co-ownership. Neither of these forms was serviceable for anything more than for the *holding* of property, and could not, without modification, meet the requirements of the partnership relation. Partnership demands a theory of ownership which secures to each co-owner the right to dispose of the whole property. Neither tenancy in common or joint tenancy could furnish this essential prerogative. To meet the requirements of partnership, the profession took up the institution of joint tenancy, with which it was acquainted, and adapted it to the novel relation. Common lawyers were familiar with the process of moulding

feudal estates to meet the requirements of a new legal situation. The adaptation of joint tenancy to commercial purposes involved an abridgment of some of its incidents, and an enlargement of others. Survivorship continued to be recognized, but only until the close of liquidation. Although the separate title of the partner was recognized, it could not be made effective until after dissolution. During the continuance of the firm, each partner has an estate in the property, which enables him to convey a good title to any portion of the firm stock without reference to the title of his co-partner. This power of sale is not the result of any relation of principal and agent between the partners, but is an incident of the estate. This makes the partnership title an example of co-ownership in its most complete form."¹

We may, therefore, answer the first of the questions which have been propounded by saying that the firm estate is an adaptation of joint tenancy to commercial purposes, the adaptation involving a modification (but not a destruction) of the principle of survivorship and involving also the introduction of the element of representation, in virtue of which one co-owner may deal with the joint title for purposes germane to the partnership enterprise. If one insists upon viewing the law as static and as recognizing no collective holdings except estates in feudal joint tenancy, in common, in co-parcenary and by entireties, then the conception of the partnership estate is indeed impossible.² If, however, it is remembered that we are dealing with history and with a progressive development, and that joint tenancy was an evolution from tribal ownership and tenancy in common from joint tenancy, we shall see nothing abnormal in the evolution of a firm estate from the estate in joint tenancy. Tenancy in common represents joint tenancy modified to the extent that is necessary to adapt it to the needs of a land-holding community. Tenancy in partnership represents joint tenancy adapted to the needs of a commercial community.

What were the needs of a commercial community? Eco-

¹ §§ 98, 99.

² See Pollock & Maitland, *Hist. Com. Law*; vol. 2, pp. 243.

nomically speaking, the need was the creation of a legal condition in which association in trade might be encouraged and protected. Legally speaking, the need was for a theory which would enable each associate to insist that his fellow should use the firm property for firm purposes and a theory which would at the same time give to firm creditors a right of recourse to the firm estate prior to that of the separate creditors of the associates. Granted the existence of such an economic need and the legal result will invariably follow. "Estates arise at law according to the interests to be subserved." It was in response to the economic demand that the firm estate was developed. It was not enough that the partners should agree by covenant that the firm stock should be answerable for firm debts and should not be chargeable with separate debts. Whatever may have been the rule at the Roman law, where a preference could be given upon a particular fund in favor of those who had dealt with the fund-holder as such,¹ the Common law refused to permit such a result to be reached by private contract, since the separate creditors were not parties to it.² But while the courts were refusing to permit a preference of firm creditors as the direct result of contract, they were all the while recognizing the existence of estates in commercial joint tenancy in obedience to the custom of merchants. In the very next year after his decision in *Lord Craven v. Widdows* (just cited in the note), Lord North

¹ "Whenever an individual is doing business in any particular capacity or relation as partner, executor or guardian, there are two methods of measuring his liability. He may, upon one theory of law, be held personally liable to the full extent of his resources for all acts done by him in that capacity, or his responsibility may be limited to the fund over which he has control as an incident to his relation. The latter was the *persona* of the Roman law and involved a preference upon a particular fund in favor of those who had dealt with him in his special relation. The Common law in all cases took the first view and refused to recognize any limited liability whatever. This is what is meant by saying, the Common law refused to recognize "acting in a capacity." As the individual's liability could not be limited to the particular fund, it followed, conversely, that he could create no preference upon that fund to creditors who had dealt with him in his special capacity. These creditors stood upon the same footing with all his other creditors."

² *Lord Craven v. Widdows*, 2 Cases in Chancery, 139 (1682).

made a decree in favor of an executor of a deceased partner who prayed to be relieved against survivorship.¹ As early as 1365, in Year Book 38, Edw. 3, fol. 7, Tit. "Accompt," the title of two merchants to the firm stock had been recognized as a joint title. As an incident of the joint holding, the legal title was held to survive "but not the beneficial interest."² Creditors of the partners in the course of the partnership business were regarded as joint creditors and they, therefore, had the right which only a joint creditor could enjoy—the right to seize and sell the joint title of the partners to the firm property. The separate creditor of a partner could, of course, seize and sell only the separate title of his debtor. Had the partners held by separate titles as tenants in common, the separate creditors could have come in upon the firm property through their debtor's title. Such a result, however, would have frustrated the purpose which the partnership estate was developed to satisfy. The exclusion of the separate creditor from the partnership estate was an inevitable consequence of the conception of that estate as joint. The firm creditor on the other hand, of course, had a right equal with that of the separate creditors to obtain satisfaction out of the separate estate of either or both of the partners. This result was an incident of his position as a creditor under a joint contract which gave him a right upon a joint judgment to take out a joint execution and satisfy it out of any property of his debtors, or of either of them, wherever such property could be found.

The results just outlined are familiar to all students of partnership law. We have seen that they were not reached merely by contract. To say, therefore, that the results were reached at all, is to say that the common law developed a tenancy in partnership. The partners by their contributions created a new estate. The separate title of each partner was, in effect, held in abeyance during the continuance of the enterprise and until a final settlement of accounts. Each, accordingly, has a right against the other to compel the

¹Jeffereys v. Small, 1 Vernon, 217.

²See the language of Lord Eldon in *Crawshay v. Collins*, 15 Vesey, 227 (1808).

application of the joint estate to the payment of firm debts in relief of his separate estate. This is a vested legal right (although called the partner's *equity*) which no dissolution can destroy, "and the priority of firm creditors upon partnership funds is nothing more than the sequestration of this, vested right in their interest."¹

There seems to be no reason, on principle, why tenancy in partnership should not be recognized as existing in the case of land as well as in the case of personalty. If A and B, partners, acquire land for partnership purposes the title to the land is a firm asset and must be controlled as a firm asset, if the law is to keep pace with commercial necessity. In point of fact, on one theory or another, this result has been reached by the courts. Land bought with partnership funds, the title being taken by one or more of the partners, "belongs to the firm," and the title-bearer will be treated as trustee. A firm creditor has the same prior right of recourse against such property that he has against any other part of the firm estate. A separate creditor who gets judgment against his debtor is not in the position of a purchaser for value and so can take only subject to the equities which exist against his debtor. The proceeds of the sale of firm real estate belong, accordingly, to the firm creditor—not to the creditor of the title-bearing partner. To reach a different result would give to a creditor a greater right than his debtor possessed. In Pennsylvania, indeed, judgment creditors and general creditors of the title-bearer are presumed to have relied upon the record title and to have contracted on the faith of it. They are accordingly protected as if they were purchasers for value or mortgagees and are given precedence over the firm and the firm creditors. This result is an

¹In *Doner v. Stauffer*, 1 Pa. 203 (1829), Gibson, C. J., said "That a contract which enables the parties to keep a class of their creditors at bay, and yet retain the indicia of ownership, should not have been deemed within the statutes of *Elizabeth*, is attributable exclusively to the disposition universally manifested by courts of justice to encourage trade." This extract (as well as the decision in the course of which the words were uttered) shows that this very great lawyer had wholly failed to grasp the conception of the joint estate. He conceived of partners as tenants in common and in effect subordinated the firm creditor to the separate creditor.

anomaly. It must be recognized as out of harmony with the principles of partnership. Even in Pennsylvania, however, the title to land will be controlled as a firm asset if the deed manifests an intention that the firm shall be grantee.

As a matter of legal history it is interesting to note that the courts have been slow to recognize that land can be treated as a firm asset just as personalty has been so treated. Common law conceptions of tenure and landed estates have been so rigid that it has been tacitly assumed to be impossible for the partners to overcome the incidents of a tenancy in common by, merely evidencing their intention to dedicate the land to the uses of trade. It was for years supposed to be inevitable that a dying partner's moiety of the partnership land should descend to his heir free from the partnership debts. To remedy this defect the courts resorted to fictions. It was said, for example, that the partnership contract, by providing for a sale of partnership land, would be regarded as working an equitable conversion and the land would be treated as money.¹ Subsequently it was decided that as all partnership land must ultimately be sold as an incident of dissolution, land would be regarded as personalty in virtue of the fact of its acquisition by the firm.² By means of this fiction the desired result was reached. Firm creditors were accorded their priority and a judgment recovered against a partner by his separate creditor was held not to create a lien upon the land.³ Few fictions are wholly unobjectionable, however, and the fiction of conversion has led to most unjust results. Upon the death of a partner, although all debts are paid, the heir is disinherited under the conversion theory and the land, or its proceeds, goes to the personal representative.⁴ The widow is deprived of her dower. The fiction, introduced for a firm purpose, was thus made to outlive the firm, with results which were found most inconvenient in practice. Thereupon the courts called to their assistance the counter-fiction of reconversion and began to treat

¹ *Thornton v. Dixon*, 3 Bro. Ch. Cas. 199 (1791).

² *Darby v. Darby*, 3 Drewry, 495 (1856).

³ *Kramer v. Arthurs*, 7 Pa. 165 (1847).

⁴ See *Darby v. Darby* (*supra*).

the firm asset as reconverted into land upon settlement of the final account.¹ The land, upon reconversion, goes to the heir and the widow is entitled to her dower.² The lien of a judgment entered against a partner before reconversion does not bind the land, as the reconverted asset is treated as after-acquired real estate.³ It will be perceived that the net result of the resort to a fiction and a counter-fiction is to adjust the rights of all parties upon the basis of a partnership estate in land in all respects analogous to the partnership estate in personalty.⁴ The same remark applies to the result of the attempt sometimes made to explain the rights of firm creditors on the theory of an equitable lien.⁵

Such, in briefest outline, is the partnership estate as developed at Common law. Each partner is a debtor to his firm creditor and to his separate creditor. The firm creditor is therefore a firm and separate creditor as well. He may, at his election, seek satisfaction from the firm estate or the separate estate or he may proceed against both. The limit of the separate creditor's right is to compete with the firm creditor for the separate estate.

At this point we note, for the first time, the way in which equity has interfered in the interest of the separate creditor. It is to this interference, especially in bankruptcy proceedings, that we trace the modern rule that upon insolvency the firm estate belongs to the firm creditors and the separate estate to the separate creditors. At law the firm creditor competes with the separate creditor for the separate estate. In equity

¹ *Shearer v. Shearer*, 98 Mass. 107 (1867).

² *Foster's Appeal*, 74 Pa. 381 (1874). For a case in which a reconversion was held to be excluded by the terms of the partnership contract, see *Leaf's Appeal*, 105 Pa. 505 (1884).

³ § 109.

⁴ For an exposition of the objections to the fiction theory see § 109.

⁵ See § 103. The existence of an equitable lien, as distinguished from a legal lien, is theoretically sufficient to explain the prior rights of firm creditors. Mr. Parsons shows, however, that the "rights of firm creditors have been recognized at law from the beginning, whereas the equitable lien is exclusively a doctrine of chancery." In other words, the courts of law, without the aid of courts of equity, developed a partnership estate in realty as well as in personalty.

and bankruptcy the separate creditor is given exclusive rights against the separate estate analogous to the legal rights of the firm creditor to the firm estate. The chancellor, regarding the two estates as if they were two distinct funds, saw an opportunity to apply the doctrine of marshalling. The "joint creditor" said Lord Loughborough in *Ex parte Elton*,¹ "is in exactly the case of a person having two funds; and this court will not allow him to attach himself upon one fund to the prejudice of those who have no other, and to neglect the other fund. He has the law open to him; but if he comes to claim a distribution, the first consideration is, what is that fund from which he seeks it? It is the separate estate, which is particularly attached to the separate creditors." Here we see a clear recognition of the legal right of the firm creditor and an assertion of a determination to control that right in equity. The control might be exercised in any one of three ways:

(1) The firm creditor, on the true doctrine of marshalling, might be compelled first to exhaust the firm estate and be permitted to compete for the separate estate only after he has done so. This seems to have been the thought in Lord Loughborough's mind is using the language above quoted—for he immediately says:—"Upon the supposition that there is a joint estate, the answer is 'apply yourself to that: you have a right to come upon it, the separate creditors have not: *therefore do not affect the fund attached to them till you have obtained what you can get from the joint fund.*'"² (2) The firm creditor might be permitted to compete with the separate creditor after allowing to the latter as large a prior dividend from the separate estate as the firm creditor has been able to obtain from the firm estate.³ (3) The firm creditor, by an extension of the doctrine of marshalling, might be shut up to the firm estate, as at law the separate creditor is to the separate estate—with a cross-remainder in favor of each estate with

¹ 3 Vesey, 238 (1796).

² The actual decision in *Ex parte Elton* went the full length of the rule stated in (3) in the text.

³ *Bell v. Newman*, 5 S. & R. 78 (1819). Per Tilghman, C. J.; Gibson, J., dissenting and urging the recognition of the bankruptcy rule as stated in (3) in the text. See *Fayette Bank v. Kenney*, 49 Ky. 133 (1880).

respect to any surplus remaining in the other.¹ This is the specious but unsound result which is known as the bankruptcy rule. It was applied in *Ex parte Elton* (*supra*). It had been previously applied by Lord Hardwicke but had been rejected by Lord Thurlow.² After Lord Loughborough had reinstated it, Lord Eldon followed it at first with doubt³ and afterwards with admitted regret.⁴ Lord Loughborough's reasoning, as cited above, does not lead to any conclusion more advanced than that stated in (1). No satisfactory reason has been advanced to support the rule; but it has, when superficially examined, an appearance of fairness which has commended it to legislatures on both sides of the Atlantic. It was embodied in the English Bankruptcy Acts and in the United States Bankrupt Law when that was in force. It is to be found in the drafts of the proposed bankrupt laws now before Congress. It is recognized as the basis of distribution of insolvent estates in the absence of a bankrupt law. It will be observed that the rule is recognized only in equity and bankruptcy: at law, the parties are left to their legal rights. Therefore if, upon insolvency, there is no firm estate, it follows that there are not two funds. If there are not two funds, there can be no marshalling. Therefore the firm creditor may prove against the separate estate.⁵ Of course if before insolvency a firm creditor, after judgment, has levied upon the separate estate, equity will not subsequently disturb his vested right at the instance of a separate creditor. Between equal equities the law prevails.⁶ These instances serve to emphasize the assertion that the bankruptcy rule, where it is applied, is in derogation of the legal right. It may also be observed that the enforcement of the bankruptcy rule is inconsistent with the commercial view of the nature of the creditors' contract with the firm. That contract, though joint in form, is several in

¹ Black's Appeal, overruling *Bell v. Newman*.

² See *Ex parte Clay*, 6 Vesey, 813 (1802).

³ *Ex parte Clay* (*supra*).

⁴ *Ex parte Hill*, 2 B. & P. N. R. 191 (1802); *Ex parte Pinkerton*; Ames's Cases on Part., 342, n. 2.

⁵ *Ex parte Hill*, 2 B. & P. N. R. 191, note (a).

⁶ *Meech v. Allen*, 17 N. Y. 300 (1858).

substance and gives the firm creditor a vested right against the separate estate.¹ This right a court of equity ought to be powerless to disturb. The bankruptcy rule is also inconsistent with the refusal to permit a creditor-partner to prove against the firm estate in competition with firm creditors. If the separate estate belongs to the separate creditors they ought to be permitted to prove through their debtor in respect of his claim against the firm. This, however, is not permitted² except where it is the case of a separate trade.³ The real reason for the refusal is that the separate estate of the creditor-partner is liable to firm creditors and when he claims against the firm's assignee he is met by the answer that the firm creditors, in virtue of possession, have acquired the legal title to the asset which he seeks. It is another instance of the application of the principle that between equal equities the law will prevail.⁴ While, therefore, the bankruptcy rule is too well established to be overthrown, it is none the less important to remember that the rule does not reflect the legal rights of the parties but represents a particular instance of equitable control.

Answers have now been given (at least in outline) to the questions originally proposed for discussion. It remains to state *seriatim* the more familiar applications of the principles which have been worked out.

I. *Rights of the Partners (and of those claiming through them) in respect of the Firm Estate.*

(1) As the estate is a joint estate,*all the partners together

¹ See § 78. See also *Kendall v. Hamilton*, 4 App. Cas. 504. It is there said that the contract with the creditor is, in equity, joint and several—at least under certain circumstances. Now if a firm creditor expressly stipulates for a joint and several security he may prove against the separate estate in competition with separate creditors. (See the Matter of Farnum, 6 Boston Law Rep. 21. A different decision, in England, in *Ex parte Bevan*, 10 Vesey, 107, was nullified by Act of Parliament.) The same result should follow in every case where the firm obligation is regarded as essentially an aggregate of several contracts.

² *Ex parte Sillitoe*, 1 Glyn & J. 374 (1824).

³ *Ex parte Cook*, Montagu, 228 (1831).

⁴ § 202. See also *Houseal's App.*, 45 Pa. 484 (1863).

(or one of them by representation) may transfer firm property for firm purposes. The joint title passes and the assignee succeeds to the rights of the firm.

(2) It follows that a firm creditor, as he has a right against all the partners (as well as against each of them), may seize and sell the joint title, and the purchaser at the execution sale will become absolute owner of the property.

(3) Hence, if all the partners unite in an agreement by which the firm sells out to one or more remaining partners who covenant to pay the firm debts, the joint title passes and the property becomes the separate property of the purchasing partners.¹ If the firm is solvent and the covenant of the purchasing partners is valuable, firm creditors cannot complain. If, however, the covenant is the covenant of an insolvent, there is no consideration for the transfer and it is void as against firm creditors.²

(4) The rights of firm creditors, as respects the firm estate, are not affected by the death of a partner. The joint estate is not dissolved until final liquidation.

II. *Rights of the Partners (and of those claiming through them) with respect to the Separate Estates of the Individual Partners.*

(1) At law, each firm creditor is a creditor of each partner. The firm creditor, therefore, has an unrestricted right against the separate estate.

(2) In equity the firm estate and the separate estate will be marshalled in favor of the separate creditor, to the extent of confining the firm creditor to the firm estate until separate creditors are paid in full. Marshalling takes place no matter how small the firm estate may be. If there is no firm estate there is no marshalling.³

(3) The substantive rights of firm creditors were, to a certain extent, frustrated at law, as a consequence of treating the

¹ Ex parte Ruffin, 6 Vesey, 119 (1801); Baker's Appeal, 21 Pa. 76 (1853); Bullitt v. Chartered Fund, 26 Pa. 108 (1856).

² Franklin Sugar Ref. Co. v. Henderson, 38 Atl. 991 (1897); Howe v. Lawrence, 9 Cush. 553 (1852) *contra*.

³ Ex parte Peake, 2 Rose, 54 (1814). As to the exception in case of a living solvent partner, see Ex parte Kensington, 14 Vesey, 447 (1808).

creditor's contract with the firm as a *joint contract*.¹ Modern legislation, however, has developed the contract along commercial lines and has resulted in the treatment of it as several in substance though joint in form.²

(4) If a partner withdraws money from the firm, either by contract or through a fraud it should seem that the other partners ought, on principle, to prove (as a firm) against the separate estate. If firm debts have been paid, this may be done in all cases. If they have not been paid, proof is allowed only in cases of fraud.³

III. *Rights of persons claiming through a Partner, with respect to the Firm Estate.*

(1) As the firm estate is joint until final liquidation, one who takes an assignment of a partner's interest takes no title but only the assignor's right to reassert a separate title upon distribution of the ultimate surplus.⁴

(2) Hence a separate creditor cannot, upon execution, reach and sell anything more than the debtor-partner could assign: *i. e.*, a right to participate in the ultimate surplus.⁵

(3) The result is, of course, the same if separate creditors of all the partners sell their debtors' interests simultaneously or successively.⁶ The partner's equity, growing out of the liability of the separate estate to firm creditors, is a right which belongs to the partner until all firm creditors are paid. The right is therefore unaffected by a sale of the partner's interest in the firm for the partner's separate estate continues to be liable.⁷

(4) Upon the death of a partner, firm choses-in-action and firm chattels survive to the co-partners. The personal representative of the deceased succeeds to the right to share in the ultimate surplus. He may, therefore, proceed against the

¹ § 81.

² § 161 *et seq.*

³ *Read v. Bailey*, L. R. 3 App. Cas. 94 (1877). For a decision impossible to explain on any theory, see *McCormick's App.*, 55 Pa. 252 (1867).

⁴ *Bank v. Carrolton R. R.*, 11 Wall. 624 (1870).

⁵ *Menagh v. Whitwell*, 52 N. Y. 146 (1873).

⁶ *Menagh v. Whitwell* (*supra*); *Case v. Beauregard*, 99 U. S. 119 (1878), and *Doner v. Stauffer*, 1 P. & W. 198 (1829), *contra*.

⁷ § 102.

survivors for an accounting. On principle, the right to an account should not be barred until six years after the date of an adverse holding by the survivors.

(5) Land held in partnership is held jointly until final liquidation. When this is accomplished the partner or his heir may reassert the partner's separate title and claim the land or its proceeds. The widow is likewise entitled to dower.¹

IV. *Rights of persons claiming through a Partner who deals with Firm Property as if he were Sole Owner.*

(1) As the firm estate arises by the subjection of each share to the rights of the other partners, it follows that each partner acquires a right to compel the use of firm property for firm purposes. If a partner violates his obligation and sells firm property as if it were his own, a purchaser with notice takes subject to the rights of the firm and of those claiming under the firm.

(2) If the purchaser believes the property to be the separate property of the selling partner, it is the case of an attempt by one joint owner to pass the joint title to one who thinks it several. Whether or not title passes should depend upon the scope of the right of representation which the firm estate confers upon the selling partner. On principle, either the whole title and interest should pass, or nothing. The latter alternative is more in harmony with the tendency of decision as to personalty than is the former;² and the result of the weight of American authority as to realty seems to be that a transfer by one partner before dissolution does not pass a beneficial interest in the property to the purchaser.³

Such are the most important applications of the doctrine of the Partnership Estate. It is submitted that Mr. Parsons is right when he says: "The instant the notion of firm property is brought forward, the material is furnished for an explanation of the relation in all its bearings."⁴

George Wharton Pepper.

¹ *Supra*, p. 4

² See note to p. 596, Ames's Cas. Part.

³ See note to p. 602, Ames's Cas. Part.

⁴ P. lxx.