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THE LIABILITIES OF A PARTNER'S EXECUTOR.

Partnership is a relation between living people. If a partnership exists between A. and B. the relation is necessarily dissolved by the death of B., just as the marriage relation between two is necessarily dissolved by the death of one. The illustration of a partnership of two is an illustration of the problem in its simplest form. Where there are many partners the situation is essentially the same. Each sustains a relation to all the others and the death of one destroys the integrity of the group. If the survivors continue in business their association is a new partnership: the old partnership is at an end. It is customary to assert that "the firm" continues to exist after a partner's death and "is not thereby dissolved," if there is a provision against dissolution in the articles of partnership. It is also usual to declare that in such a case "the same business" continues, notwithstanding the event of death. The former statement is incorrect: the latter requires analysis. If by "carrying on business" is meant that certain persons are trading together, then, by supposition, the business is *not* the same after one has died. If it is meant that the store or office is kept open by the survivors, that old orders are filled and new ones accepted, with no outward change resulting from the death of one partner, then the statement is unobjectionable. The fact is that partners may by contract displace some of the legal consequences of death, but not all of them. They can agree that the representatives of the dying partner shall not for a certain time be entitled to insist upon a liquidating sale and an accounting. They can agree that immediately upon the grant of letters the executor may associate himself as a partner with the survivors, or they can agree that the survivors shall continue to trade as if death had not occured and that a share of the profits shall be paid to the executor of the dead partner. Similar provisions may be made in the will of a partner instead of in the articles. In the latter case, the testator is powerless to commit the survivors to any course of conduct not acceptable to them, but the survivors may make a contract with the executor upon the lines laid down in the will. It is the purpose of this paper to discuss the legal consequences which ensue when any one of the above courses is adopted.

Let it be supposed that A. and B. are partners and that B. dies leaving X. as his executor.[1] The case may be one in which neither the articles of partnership nor B's will make any provision for the continuance of the business after B's death. On the other hand, either in the articles or in the will provision may have been made for this emergency. The situation must therefore be considered first upon the supposition that such provisions are absent, and second upon the supposition that they are present.

I. If, in the absence of any provision in articles or will, A. carries on the business and uses for that purpose all the joint property belonging to himself and his late partner, A. alone is liable to subsequent creditors. The executor has an equitable right to compel A. to account.

[1] Throughout the discussion, this mode of designating the parties will be adhered to: A. will stand for the surviving partner, B. for the dying partner, and X. for the dying partner's executor.

By supposition, however, he has given to A. no authority to continue the business and retain B's capital therein. If A. has derived no authority from B. or from X. to use B's capital or to bind B's estate, then he has no such authority. From this it follows that the subsequent creditors are A.'s separate creditors and have no rights against the joint property except such rights as they work out through A. If X. unduly delays the settlement of the firm's affairs and A's creditors are deceived by A's continued possession and use of the joint property as a basis of his trading, the question of fraud upon creditors might arise and upon the footing of deceit X. might be estopped from disputing the right of creditors to seize and sell the entire stock.[1] In such a situation it should seem that X. would be liable to be surcharged in favor of the beneficiaries under the will, unless the beneficiaries had acquiesced in his conduct.

If X. deliberately contributes B.'s share in the joint property to a new partnership venture between A. and X. even if X. acts as executor and intends that the profits shall form part of B's estate, X. becomes a partner and is liable without limit. Under such circumstances X. would not be entitled to indemnity from the beneficiaries in respect of losses sustained and he would be personally liable to them for a partial or entire loss of the trust estate.

II. Provision for the continuance of the business may be made (as has been mentioned) either by the will of B, or by the partnership articles. No provision in the will can, of course, impose any obligation upon A. The only effect that such a provision can have is upon the question of the liability of the executor and of B's estate. If the

[1] The case suggested is similar to that which arises when an executor, acting under instructions contained in the will, carries on business in his own name and induces creditors to believe that he is the real owner. If the beneficiaries delay for a period longer than the will contemplates to call the executor to account, an estoppel may arise against them and in favor of creditors. This principle is recognized by Fry J. in In re Morgan (*Pillgrem v. Pillgrem*) L. R. 18 Ch. Div. 93 (1879). In this case, however, there had been no greater lapse of time than the will contemplated and it was held that the beneficiaries were not estopped.

provision is contained in the articles of partnership it may take the form of an agreement that the business shall be continued by the survivor for a certain period for the benefit of the estate of the deceased or the form of a reservation to each partner of the right to have his personal representative substituted for him as a member of the firm. These possible variations in the nature and character of the provision must be borne in mind during the course of the following discussion.

I. CASES IN WHICH THE EXECUTOR DOES NOT BECOME A PARTNER.

Let it be supposed that there is a provision in the articles that the survivor shall carry on the business for his own benefit and for that of the persons entitled to share in the estate of the deceased, or that there is a provision in B.'s will directing or authorizing X. to allow B's share to remain in A.'s hands for a longer or shorter time. Here, if A. carries on the business, the question arises whether he acts as a sole principal, under a mere contractual obligation to pay over to X. a certain proportion of A.'s profit, or whether he is to be regarded as agent for X. and those whom X. represents. On either view X. will be entitled to receive the stipulated proportion of profits and for this he will account to the beneficiaries. The important question, however, is whether X. and those whom he represents are individually liable to A.'s creditors. If X. or the beneficiaries under the will are thus liable, their liability must result from the fact that they are partners or from the fact that A. is carrying on the business as their agent, thus imposing upon them the responsibilty of principals.

(1) Let the problem of X's liability be first considered. X. certainly is not a partner. He has no powers of control over the business. Nor has he a beneficial interest, except, possibly, to the extent of his commissions. It is not reasonable, therefore, to work out a theory of liability on the ground that he who takes the profits of the

business must bear the loss.[1] In *Wild* v. *Davenport*,[2] the articles provided that in the event of death the sum standing to the credit of the dying partner should remain as a part of the capital of the firm until the expiration of the co-partnership. A subsequent creditor attempted to hold the executors personally liable. The court were of the opinion that the defendants were entitled to judgement.[3]

(2) Let the problem of the liability of the beneficiaries next be considered. Are the beneficiaries under B.'s will to be considered partners? Since, by supposition, the executor has no power of control, the only difference between his position and that of the beneficiaries is that while he receives a share of the profits merely in order to distribute them, the beneficiaries receive them through him for their own use. Will any court carry the profit-sharing test of partnership far enough to subject the beneficiaries to liability? This question, it is submitted, must be answered in the negative. The doctrine that he who takes part of the profit must bear the loss is applied only to those who have themselves embarked property in trade, and have become the proprietors in a business enterprise. No such consequence attaches where a testator, who is himself a co-proprietor, permits his interest in the business to remain in the hands of his surviving associate for the purpose of earning profits for designated beneficiaries.

It is undeniable that both executor and beneficiaries have some of the characteristics of owners. Not only do they receive a share of the profits, but the interest of the dead partner is at the risk of the business. If A. were

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[1] The discussion proceeds upon the assumption that the mere receipt of profits, even if the profit-sharer takes beneficially, does not constitute the taker a partner. It is essential that he be invested with a proprietor's rights of control; otherwise he is not a partner. If, therefore, powers of control are absent in the case of an executor, it is clear that his mere right to receive the profits can impose no liability upon him.

[2] 48, N. J. L. 129 (1886).

[3] See to the same effect *Richer* v. *Poppenheysen*, 39 Howard's Practice 83 (1870) and *Owens* v. *Mackall*, 33 Md. 382 (1870).

to fail, undoubtedly the whole stock in trade would be answerable for his debts and neither X. nor the beneficiaries could compete with the creditors.[1] Here, then, is a case in which the decision that no partnership exists must be based upon the absence of the power of control.

Having decided that X. and the beneficiaries are not owners and therefore not partners, or part-owners, it follows that A. is not to be regarded as their agent. To regard A. as principal in respect of his own interest in the business and as agent in respect of the remaining interest, really involves the conception that the actual owners of that remaining interest are X. and the beneficiaries—a conclusion which has just been negatived. From these considerations it results that A., the surviving partner, is the sole owner of the stock in trade and the sole proprietor of the business. He is subject to the liability of a principal and is not to be regarded as acting as agent for anybody. He is subject to a contractual obligation to pay over a certain portion of his profits to X. for the uses of B.'s will.

(3) It follows from what has been said that, under the facts just stated, neither X. nor the beneficiaries under the will are liable to subsequent creditors. The question whether B.'s share of the firm estate may be seized and sold for their satisfaction then arises. This question requires an affirmative answer.[2] The only reasonable

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[1] That so much of B's estate as is directed to be embarked in trade is at the risk of the business appears from *Ex parte Richardson*, Buck's Rep. 202 (1818); 3 Maddox, 138. In that case the executor was allowed to prove in the bankruptcy of the firm only for that sum which had been embarked in the business in excess of the limit fixed by the testator.

[2] Apart from the intention of B, it should seem that the portion of B's estate that is left in A's hands must necessarily be at the risk of the business. If B. were clearly to indicate an intention that his capital should be lent to A. and a share of profits received in lieu of interest, it is possible that effect might be given to this intention. It seems to the writer, however, that it would be an unwise policy to allow to the executor and those whom he represents all the advantages incident to the partnership relation and yet to place them in the category of creditors with a right to prove in bankruptcy for the amount of the contribution. In *Vyse* v. *Foster*, L. R. 8 Chancery 309 (1870), the

interpretation of the partnership contract or the provision of the will is that B. intended to leave his share of the firm property at the risks of the business. In the one case, the survivor acquires the right to pledge B's share in virtue of the contract. In the other case, he acquires the right in virtue of a testamentary disposition. In either aspect of the case it is immaterial whether or not the creditors knew of the use of B.'s property in the business. A.'s act pledges the property whether the creditors know of it or not.

It will be remembered that the case under discussion is that in which there is a provision in articles or will directing X. to allow B.'s interest to remain in the business but not conferring upon X. such proprietary rights in the enterprise as suffice to make him a partner. X. accordingly is not liable to A.'s creditors. It has also been concluded that the beneficiaries under B.'s will are not liable. That portion of B's estate, however, which remains in the business is at the risk of the trade and may be swept away at the suit of subsequent creditors.

The next problem that presents itself is whether or not the creditors of A. can reach that portion of the estate of B. which is not invested in the partnership. This same problem must be solved in those cases in which articles or will impose upon the executor such rights and duties as actually constitute him a partner with A. Whether X. is a partner in a given case or whether he is not, the creditors are apt to attempt to reach B's separate estate. The success or failure of their attempt seems not to depend upon the status of X. It is accordingly proposed to postpone discussion of the problem until after the liability of an executor-partner has been considered.

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executors delayed to withdraw the testator's interest from the hands of the surviving partners, some of the executors being themselves members of the firm. The court treated the situation as if there had been a loan of the interest of the deceased partner to the firm. The real question involved, however, was whether or not one of the residuary legatees who declined to accept payment of the debt, with interest, was entitled to claim a share in the profits of the business.

2. CASES IN WHICH THE EXECUTOR DOES BECOME A PARTNER.

Turning, then, from the case in which the executor does not become a partner, let the situation be supposed in which it is provided, either by articles or will, that X. as B.'s personal representative, shall be substituted as a partner in B.'s place. In such a situation X. must have the option either to associate himself with A., the survivor, or to decline to do so.[1]

If the executor elects to associate himself with A. the question at once arises as to the extent of his liability. He has become a co-proprietor in the business with a partner's powers of control, but he will not profit by conducting it, for he is subject to a duty to account to the beneficiaries under the will. Under such circumstances, it might be held that the executor was subject to no personal liability but that creditors might have recourse either to the whole estate in his hands or to such portion of it as is embarked in the trade. On the other hand, it might be decided that his representative capacity will be ignored and an unlimited personal liability enforced. The choice between these two possible views must be made. On the one side, there are weighty considerations arising from the unfairness to the executor of a rule which penalizes the discharge of duty. On the other, there is the traditional insistence of the common law upon a man's unlimited liability for the consequences of his acts.

An examination of the cases discloses this fact: that the problem under discussion is not really a question of partnership law, but of the law governing executors and administrators. In other words, the question of the liability or immunity of an executor may present itself when an executor carries on the business of a deceased sole trader as well as in the case in which the business is the business of a firm.

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[1] *Ex parte Garland*, 10 Vesey, Jr. 109, (1804); *Wild* v. *Davenport* 48 N. J. L. 129, (1886), and cases there cited.

If a sole trader dies and appoints an executor, the case may be one in which the will contains no provision for carrying on the business, or it may confer upon the executor an authority to carry it on. It was said by Lord Langdale, in *Kirkman* v. *Booth*,[1] that there must be a distinct and positive authority given by the will itself in order to justify an executor in carrying on a trade or in permitting it to be carried on. This is, he said, "a rule without exception." If, in the absence of such authority, he carries on the business, he takes the risk of any loss that may occur.[2] The risk run under such circumstances is referred to by Lord Mansfield in *Barker* v. *Parker*,[3] although the case did not directly involve the question of the executor's personal liability.

The result of the decisions in cases where the will contains an authority to continue the business is thus expressed by Fry J., in *In re Morgan*[4]:

> "It appears to me that the principles which regulate questions of this sort are very clear. As I understand them, where a trustee or executor carries on a business under the directions contained in the will of the testator, and in that character contracts a debt, the debt is one for which an action must be brought against the executor personally, and for which judgment must be obtained de bonis propriis of the executor, and no action can be successfully brought against the executor as executor, and no execution can be had de bonis testatoris, for this very simple reason, that the debt was not the debt of the testator. In making these observations I say nothing about the right

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[1] 11 Beav. 273 (1848).

[2] In *Shinn's Estate*, 166 Pa. 121, (1895), an administrator without consultation with the creditors and without asking authority from the court, invested a large sum of money belonging to the intestate in continuing a mining enterprise. The business proved a disastrous failure. "He might," said the court, "almost as safely have invested it in stocks on the prospect of a rise. This was not ordinary business sagacity or prudent management. His conduct, on the facts found by the auditing judge, therefore, warranted the surcharge."

Of course, the risk of a surcharge may be eliminated where the conduct of the executor is authorized or acquiesced in by the beneficiaries. *Poole* v. *Munday*, 103 Mass. 174. No amount of acquiescence on their part, however, can displace the primary legal liability of the executor to creditors. This liability, as appears from the discussion in the text, exists even where a clear authority to carry on the business is contained in the will.

[3] 1 Term Rep. 287 (1786).

[4] L. R. 18 Ch. Div. 93 (1879); cited also as *Pillgrem* v. *Pillgrem*.

which the executor undoubtedly has to come against the assets of the testator."[1]

The position of the executor of a partner, where a business is conducted by the executor under the authority of the will, is similar to the position of the executor of a sole trader under like circumstances. Perhaps the argument based on the hardship of a rule which penalizes the executor may be urged with more force in partnership cases than in others. If the creditors know that the execu-

[1] The point actually decided in the case from which the extract is taken was that a judgment creditor of the executor, where the debt was incurred in carrying on the business under the authority of the will, was not entitled to take in execution a leasehold belonging to the estate and used in the way of trade. It is to be noted, however, that the executor was carrying on the business in his own name.

It had previously been decided in *Owen* v. *Delemeare*, L.R. 15 Equity, 134, 27 T. L.N.S. 647, (1873), that an administration bill filed by creditors must be dismissed on the ground that the true remedy of the complainants was by an action at law, against the executors personally, although they had contracted the debts in carrying on business as directed by the will. The Vice-Chancellor, Sir James Bacon, remarked: "*Ex parte Garland* and *ex parte Richardson* show that the executor is liable for every shilling on every contract he enters into."

Following on *Owen* v. *Delemeare*, came the decision in *Fairlamb* v. *Percy*, 32 L.T.N.S. 405, (1875,) L.R. 3 P. & D. 217. In that case the testator appointed executors and directed them to allow his widow to carry on the business. They renounced and she administered and carried on the business. On her death, administration was granted to a creditor of the widow on the theory that he was an equitable creditor of the estate. Sir James Hannen observed "there can be no doubt that originally Martha Percy was the legal debtor of the plaintiff's firm, and that had she been solvent they would have been bound to look to her estate for payment, and that no claim could have been made against the estate of the deceased." He added that the creditors, in addition to the individual responsibility of the persons ordering the goods, may claim in equity against the estate to the extent that it was authorized to be used in the business.

The following is a summary of the most important American cases upon the point under discussion:

Stedman v. *Feidler*, 20 N. Y. 464 (1859).

The administrator of a deceased part owner of a vessel, if taking part in her running, may render himself personally responsible for supplies furnished her, but cannot bind the estate of the intestate.

Lovell v. *Field*, 5 Vt. 218 (1833).

Administrators held liable as individuals for the debts they contract while administrators, though the contract be for the benefit of the estate.

Fitzhugh v. *Fitzhugh*, 11 Gratt. 300 (1854).

Assumpsit by a creditor against executors. There were three counts, one for materials furnished, one for services rendered and one for money paid for the use of the defendants as executors. Held that the promises set forth in the two first counts could create no liability on the executors as such, but charged them only personally. Under the tor is trading with the survivor only in his capacity as executor, it may be said that they are not entitled to complain if they are denied the right to satisfy their claims out of the executor's private estate. In order to reach a conclusion favorable to the executor, however, it is necessary to oppose the tendency of the common law to hold every

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third count facts might be shown which would justify a recovery de bonis testatoris. There was, therefore, a misjoinder of counts in the declaration. A judgment overruling a demurrer to the declaration was reversed.

McKay v. *Royal*, 7 Jones L. (52 N.C.) 426 (1860).

In an action by an attorney against an executrix for professional fees, it was held that the debt created by her employment of counsel, after testator's death, to advise and assist her in the discharge of her duties was a personal debt for which plaintiff was entitled to judgment against her personally.

Wade v. *Pope*, 44 Ala. 690 (1870).

Upon a bill filed against the executrix and devisees of a deceased trader by one who had a claim for services rendered at the request of the executrix who was given power by the will to carry on the testator's farming business as it had been carried on in his lifetime, held that bill must be dismissed as the plaintiff's right was to bring an action at law against executrix in her individual capacity. This he had actually done, but the judgment obtained by him remained unsatisfied.

Austin v. *Munro*, 47 N.Y. 360 (1872).

In an action against the executors it was held that a contract made by executors in form as such in consideration of services to be rendered in vindicating and asserting their claims to property in their representative capacity and for the benefit of the estate they represent, does not bind the estate or create a charge upon the assets in the hands of the executors.

Morrow v. *Morrow*, 2 Tenn. Ch. 549 (1875).

In a proceeding by a surety of decedent to be allowed priority out of assets of the estate over creditors whose debts had been created since testator's death, it was held that the debts created by testator were to be first satisfied out of the assets of the estate in preference to debts created after his death in carrying on a business under the provisions of his will, even though the will directed that all his property should be responsible for the debts thus incurred.

Clopton v. *Gholson*, 53 Miss. 466 (1876).

Upon a bill filed by attorneys who had rendered services at the request of the administrator to reach the assets of the estate, it was held that the plaintiffs need not first establish their claim at law, provided they could so amend their bill as to show the impossibility of obtaining payment from the administrator individually. The court regarded them as entitled to be subrogated to the rights of the administrator against the estate.

Liable v. *Ferry*, 32 N.J.Eq. 791 (1880).

A, a brewer, directed that his executors should allow the business to be carried on until in their judgment it ought to be sold. He designated one of his sons as the manager of the business. The son managed the business under the authority of the executors, and after his man to an unlimited liability for the consequences of his own acts, leaving him to obtain such indemnity as he can from those for whose benefit he was acting.[1]

If the executor were liable only in his representative capacity, he would be entitled to an unlimited indemnity against the estate of his testator. Since, how-

death they carried it on themselves. The complainants furnished malt to the executors. They filed their bill and sought a decree declaring that all the property of the testator in the hands of the executors was chargeable with the indebtedness due the complainants and should be sold, for the payment of the same. The Chancellor made a decree as prayed for. On appeal the decree was reversed. The bill contained no direct averment of the insolvency of the executors, but the evidence disclosed their inability to meet the complainants' claim and no objection was made to the want of allegation of some specific reason for the interference of equity. The real question therefore was as to the extent to which the executors themselves could receive from the estate indemnity for the debts incurred; it being conceded that to this extent the creditors might avail themselves in equity of the right of the executors. It was held that certain of the property which the complainants sought to sell was neither embarked by the testator in the business before his death nor designated to be so embarked thereafter, and that there was nothing, therefore, sufficient to induce the court "to postpone legatees and devisees until the posthumous ventures of the testator are ended."

Willis v. *Sharp*, 113 N.Y. 586 (1889).

In an action against an executor to subject the general assets of the estate to liability for goods sold and delivered to him as such it was held that a testator may bind his general assets for all of his debts, and where such intent finds expression in his will, in case of the insolvency of the executors, the general assets may be made liable in equity for the debts. But where such an intent does not appear a creditor

[1] The decision of the Supreme Court of Pennsylvania in *National State Bank of Camden* v. *Pennock*, 2 Monahan, 166, (1889,) appears at first sight to be a case favorable to the immunity of an executor-partner. Upon examination, however, it will be found that the case was really decided upon the ground that there was no evidence from which a jury would be justified in inferring that the executors had become partners with the survivors and no evidence (as to one of the executors) that there had been any such "holding-out" as would suffice to raise an estoppel. The facts were as follows:

B., by his will, directed his executors to continue his interest in a partnership. After B.'s death a notice, signed with the firm name, was sent to customers that B.'s interest would remain as before and the business be continued in the old name by the surviving partners and the executors. Two of the three executors of B. took no part in the conduct of the business, and one of these two, C., B.'s widow, knew nothing of the notice, but received from the firm the same weekly allowance B. had received. In an action by A. against the surviving partners and B.'s executors, as partners, to fix an individual liability of the executors, on notes given in the firm name after B.'s death, nonsuit, on the ground that, under the evidence, defendants were not liable as a firm. Refusal to take off nonsuit affirmed.

ever, he is liable without limit for acts done by him in carrying on business, either as a sole trader or as an associate of the surviving partner, it follows that his right of indemnity is limited to that portion of the stock embarked in the business by the testator, or directed by the will to be so embarked by the executor.[1] Where an executor has acted in good faith, there is so much fairness in his plea for full indemnity that a court should be astute to find some justification in the facts of a particular case for postponing distribution to the beneficiaries under the will until the executor has first been made whole.[2]

has no remedy except to pursue the assets embarked in the trade or business at the time of the death.

Munzor's Est. 4 Misc. Rep. (N.Y.Surrogate) 374 (1893).

Upon exceptions to the account of an administrator it was held that where the business in which the decedent has been engaged is conducted by his administrator, the latter continues the same at his individual risk and as his individual business, being obliged only to credit the estate with whatever profit is derived therefrom.

Strong cases emphasizing the individual liability of the executor on contracts made by him after the death of the testator are the following:
Taylor v. *Mygatt*, 26 Conn. 184 (1857).
McFarlin v. *Stinson*, 56 Ga. 396 (1876).
Davis v. *French*, 20 Me. 21 (1841).
Sumner v. *Williams*, 8 Mass. 162 (1811).

[1] *Ex parte Garland*, 10 Vesey Jr. 109, (1804).
Ex parte Richardson, Buck's Rep. 202 (1818); 3 Maddox 138.
In re Morgan, L.R. 18, Ch. Div. 93 (1879).
Wild v. *Davenport*, 48 N.J.L. 129 (1886).
Liable v. *Ferry*, 32 N.J.Eq. 791 (1880).
In re Johnson, L.R. 15 Ch. Div. 548 (1880).

[2] B. died in 1883 owing C. and leaving a will wherein he empowered X., his executor, to continue his business and employ therein his estate. C. was promptly informed of the facts and acquiesced in such continuance of the business, which, however, was unsuccessful and three years later C. brought an action for the administration of the estate wherein he asked that the assets of the business be applied in payment of debts due by B. at the time of his death in priority to any claim for indemnity by X. or the persons with whom he had dealt, which prayer was allowed by the court below as to that portion of the estate existing at B.'s death. On appeal the House of Lords was of opinion, reversing the court below, that as the business had been carried on for the benefit and with the consent of C., X. was entitled to indemnity to the full amount of the debts incurred in carrying on the business. *Dowse* v. *Gorton*, '91 Ap. Cases 190, Herschell, J.

"I think it is clear that where a business has been carried on under such an authority as was conferred upon the executors by the will of this testator, they would be entitled to a general indemnity out of the estate as against all persons claiming under the will. But I take it to be equally clear that they could not by reason only of such authority maintain this right against the creditors of the testator." Per Herschell, J., in above case.

3. THE RIGHTS OF CREDITORS AGAINST THE GENERAL ESTATE.

The last question for discussion is that referred to above: whether creditors of A, the surviving partner, or of A, and X. as partners, can reach that portion of B's estate which is not embarked in the business. This question may present itself either where B's separate estate is still in X's hands, or where there has been a total or partial distribution to the beneficiaries. Again, the case may be one in which X. is acting under the provisions of partnership articles or merely under the directions contained in B's will. In case the articles or will expressly limit the liability of the estate to the sum embarked in the business, it seems that the limitation will be enforced.[1] Where X. is a partner and liable as such, the conclusion just stated causes no difficulty. Where X. is not a partner, however, the curious spectacle is presented of a limited partnership between A. and the estate of B, the liability of the estate being limited to the amount of the contribution.

The next case is that in which there is no expressed provision, either in articles or will, that the liability of the estate shall be limited to the amount embarked in the business. It is obvious that either of two rules is applicable in such a case. It might be declared that in the absence of a restriction the whole estate is to be regarded as placed at the risks of the business.[2] Or it

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[1] *Ex parte Garland*, 10 Vesey Jr. 109 (1804).
Liable v. *Ferry*, 32 N.J.Eq. 791 (1880).
Wild v. *Davenport*, 48 N. J. L. 129 (1886).

[2] *Laughlin* v. *Lorenz*, 48 Pa. 275, (1864). A. and B., partners, covenanted that, on death of one, the business should be continued by the survivor till August first next ensuing. B. died in October, 1854; A. continued the business till August 1, 1855, when a new firm was formed, composed of A., of C., a son of B., and of one of B.'s administrators. The three wound up the affairs of the old firm, thereby becoming firm creditors. On bill filed by the new firm's assignee of the debt due by the old firm to the new for accounting between the firms, held that the covenant for the continuation of the partnership was enforceable against the separate estate of B; and a decree for the complainant was affirmed. Agnew J., who delivered the opinion discussed the subject as follows:

might be decided that in the absence of any provision extending A's authority it should be regarded as limited to that portion of the estate already embarked in the business.[1] If the latter view is taken, a case of doubt

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"It is urged that the individual estate of Lorenz is not liable for any debts contracted by the surviving partner in carrying on the business after his death. We cannot assent to the proposition that a covenant for the continuation of a partnership for a reasonable period after death, is not binding on the estate of the dying partner, if assented to and carried out by the personal representatives. The covenant descends upon all who take the estate by succession, and will justify his continuing the business, whatever may be his own right to refuse to continue and to incur thereby personal liabilities as a partner. But the point has been solemnly decided upon full argument and mature consideration by this Court in *Gratz* v. *Bayard*, 11 S. & R. 41, that a partnership may be continued after death by an agreement to this effect, and that in such case death does not work a dissolution. To the authorities therein referred to, we may add Toller on Executors 166–7; Collyer on Part. 5, 6, 120, 121; Story on Part., par. 196; *Scholfield* v. *Eichelberger*, 7 Peters 594; *Burwell* v. *Mandeville*, 2 How. 76; 2 Williams on Executors 1226–7, 1243–4. It flows as a corollary from this proposition that the assets of the deceased partner are liable to the debts created in the business, either generally or specifically, according to the nature and extent of the fund devoted to the continuance of the partnership.

"In Toller's Law of Executors 166–7, it is said the articles may contain a proviso for continuing the partnership, or the testator may by his will direct his executors to carry on his trade after his death, either with his general assets, or appoint a specific fund to be severed from the general mass of his property for that purpose. This is the solution of all the cases cited in the paper book as adverse to the proposition stated. *Burwell* v. *Mandeville*, 2 How. 560; *Ex parte Garland*, 10 Vesey 110; and *Pitkin* v. *Pitkin*, 7 Conn. 307, are all instances of partnership continued by will, and specific portion only of the estate appropriated to the continuance. Instead of denying the principle that the general assets may be liable, it is admitted in its full breadth, and in each case the decision is put upon the extent of the fund or portion of the assets devoted to the continuation of the partnership. The only difference between these cases and *Ex parte Richardson*, 3 Madd. 138, is, that in this last case the partnership agreement provided if one should die, he should name in his will a successor to continue business on behalf of his estate, and the partner dying appointed his executors. But the decision in that case was put expressly upon the ground that all that was meant to be left to carry on the trade, was the capital invested, and that in all beyond the executrix acted in breach of her trust. It was also a fact in the case that the two executors who were appointed in the will jointly with the executrix, refused to carry on the partnership, and renounced in consequence of her determination to proceed with it.

"In the present case neither the covenant nor the will of Lorenz limited the fund to be made liable by the continuation of the partnership business after his decease, and we discover nothing therefore to restrain the general liability of his estate."

[1] *Smith* v. *Ayer*, 101 U. S. 320, 1879.
Jones v. *Walker*, 103 U. S. 444, 1880.

will be resolved against the authority of the survivor to pledge more than the property already in his hands[1]

In *Blodgett* v. *American National Bank*,[2] the right of executors, continuing a business in accordance with the partnership articles, to pledge the entire assets of the estate for the debts of the firm was sustained. The court held that under the articles each partner's liability was unlimited and such liability continued without change after death. Without expressly dissenting from the decisions[3] in which subsequent creditors of a partnership continued after death of a member have been confined to the assets embarked in the business by the partner when living, it was pointed out that such cases were those in which the business had been continued under testamentary provisions without any contract in relation thereto.

Let it be supposed that X., the executor, has distributed all of B.'s estate excepting that which is left in A.'s hands. The distributees are either general legatees who will receive nothing more from the estate, or they are residuary legatees, whose shares will be increased from the profits of the business. Can either or both of these classes of distributees be made to refund all or part of the amount received by them for the purpose of answering the demands of A.'s creditors? In *Hankey* v. *Hammock*,[4] it appears

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[1] *Burwell* v. *Mandeville's* Exr. 2 Howard, 560, 1844.

[2] Articles of partnership between A. and B. provided that the partnership should not be dissolved by B.'s death but that his executor should act in his place. Each partner was to be credited with the amount invested and receive interest thereon. B. died leaving X. his executor but making no further provision with regard to the partnership. The business was continued and X. pledged other assets of the estate for partnership debts. A bill filed by beneficiaries of the will to compel the surrender of such pledged assets was dismissed. Decree affirmed. *Blodgett* v. *American National Bank*, 49 Conn. 9 (1881), Pardee, J.

[3] A. and B. were partners. B. died leaving X. his executor and directing that his interest in the firm should remain and the business be conducted as before. Several years later X. pledged a part of B.'s estate not included in the business at the time of B.'s death, to secure funds for the firm. In a proceeding to compel a restitution of the estate so pledged the court below dismissed the bill. Decree reversed. *Smith* v. *Ayer*, 101 U. S. 320 (1879), Field, J.

[4] Cook's Bankruptcy Law, p. 67, 5th Ed. and 3 Maddox Rep. at 148, Note.

to have been decided that legatees irrespective of their class must refund under such circumstances. This decision was, however, disapproved by Lord Eldon in *Ex parte Garland*,[1] and the law may be regarded as settled the other way.[2] In *Jones* v. *Walker*[3] an attempt was made to recover from residuary legatees the amounts paid them from year to year as profits of a partnership business carried on by the survivor in accordance with directions of the decedent's will. The court was of the opinion that, under the facts there shown, no such liability existed. If however, as pointed out by Miller, J., the dividends paid had not been declared in good faith or had not been really earned or if they had diminished the capital or if, when they were paid, debts existed which would have been left without means of payment, the persons sharing in the dividends would probably have been liable to the creditors to the extent of the money so received.

George Wharton Pepper.

[1] B. died leaving a will wherein he directed his business to be carried on by his executor X., who was authorized to withdraw for that purpose a certain portion of the estate. X. subsequently became a bankrupt and a petition was presented for the purpose of having the whole estate subjected to the debts contracted by X. Prayer refused. *Ex parte Garland.* 10 Ves. Jr. 109 (1803), Eldon, L. C.

[2] See *ex parte Richardson*, 3 Maddox, 138, 1818. *Pitkin* v. *Pitkin*, 7 Conn. 306, 1828.

[3] B., partner of A., died leaving a will wherein he directed that his capital and interest in the firm should be continued and be chargeable for its debts and liabilities but that his other property should not be so chargeable. It was further provided that the profits should from time to time be paid over to certain legatees. The firm was subsequently declared bankrupt and a bill filed by the assignee to subject the general assets not embarked in the business to the payment of partnership debts and to recover from the residuary legatees the sums paid them as profits earned by B.'s interest in the firm. The original capital had not been diminished and at the time the dividends had been paid there remained ample funds for the payment of their existing debts, which were in fact fully paid. Decree dismissing bill affirmed. *Jones* v. *Walker*, 103 U.S. 444 (1880), Miller, J.