South Carolina Law Review

Volume 4 | Issue 1 Article 5

Fall 9-1-1951

Partnership Law and the Uniform Partnership Act in South Carolina--Part 3

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THE SOUTH CAROLINA
LAW QUARTERLY

REVIEW SECTION

PARTNERSHIP LAW AND THE UNIFORM PARTNERSHIP ACT IN SOUTH CAROLINA—Part 3

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PART V.

PROPERTY RIGHTS OF A PARTNER

SECTION 24. Extent of Property Rights of a Partner. The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management.

SECTION 25. Nature of a Partner's Right in Specific Partnership Property.

(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution, except

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on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

SECTION 26. Nature of Partner's Interest in the Partnership. A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

SECTION 27. Assignment of Partner's Interest. (1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners.

SECTION 28. Partner's Interest Subject to Changing Order.

(1) On due application to a competent court by any judgment creditor of a partner, the court which entered

the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(a) With separate property, by any one or more of the partners, or

(b) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(3) Nothing in this act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership.

The five Sections set out are grouped here because of the close and interacting relationship among them. Section 24 is merely an enumeration of a partner's property rights, which (except for the third there stated—"his right to participate in the management") are specifically dealt with in Sections 25 and 26. The right of participation in management is virtually a restatement of the rule expressed in and discussed under Section 18 (e). Sections 27 and 28 are sequences, in special cases, of material covered in or affected by Sections 25 and 26.

Nature of Partner's Tenancy. Subsection (1) of Section 25, in describing a partner as "a tenant in partnership", creates, for all practical purposes, a new kind of tenancy, the incidents of which are spelled out precisely thereafter. It may be that the nomenclature is not so much the fabrication of a new kind of interest as it is the giving of a new name, but the designation is the product of a need for a suitable characterization which will indicate the distinctive and peculiar ownership of partners. With the establishment or recognition of tenancy in partnership, the uncertainty that has previously

existed in determining whether the co-ownership of partners is joint tenancy, tenancy in common, or a hybrid of the two, disappears—at least as partnerships are affected by the Act.

The South Carolina cases have followed an irregular course in denominating the tenancy of partners, although in most, if not all of them, the result reached would probably have been the same whatever label may have been attached.

Outside of South Carolina, the inclination has been to treat firm *personal property* either as belonging to the firm as such, or to the partners collectively, or to the partners as joint tenants.[703] Fundamentally, the local view seems to have been that the ownership is joint. In *Kinsler v. McCants,*[704] it is said (at p. 47): "It is elementary law that, by the contract of partnership, the partners acquire a joint interest in the effects of the partnership. . . . The possession of any part of the assets, by either partner, does not sever the joint property, nor vest a separate interest in him." The point of difference in this and other cases is how far the customary incidents of joint tenancy extend; more specifically, the incident of survivorship. Since the transmission of interests on death is specially dealt with in the next topic, a consideration of these cases will be had there.

The *real property* of a partnership also falls into a conflicting pattern in the local cases. Except where the title to firm property is in one partner, the holding during the lifetime of the partners has been described on occasion as joint,[705] and elsewhere as a tenancy in common.[706] Much depends upon the form in which the transfer runs to the partners. In *Boyce v. Coster,*[707] a deed to copartners and to the survivor or survivors of them was held to create a joint tenancy, though viewed in equity as being a tenancy in common (*i.e.*, so far as

703. MECHEM, PARTNERSHIP, §§ 150-153; CRANE, PARTNERSHIP, § 40, n. 65; 40 Am. Jur. 202; note, 1 A. L. R. 564, 567.

704. Note 196, *supra.*

705. Jones v. Smith, note 176, *supra,* at 536: "Lands owned by a partnership are not held by the members as tenants in common, but as joint tenants."

706. Bowman v. Bailey, 20 S. C. 550, 553 (1883): "It may be laid down as a general proposition that, if real estate be purchased by two or more parties and paid out of partnership funds, it will be regarded in law as held by the several parties as tenants in common . . ."

Most American courts treat the ownership as that of tenants in common. See CRANE, PARTNERSHIP, § 40; TIFFANY, REAL PROPERTY (3d Ed.), § 445; THOMPSON, REAL PROPERTY (Perm. Ed.), § 1844; POWELL, REAL PROPERTY, § 138.

707. Note 173, *supra.*

the beneficial interests were concerned). And even where a joint tenancy as at common law is created, the statute abolishing the incident of survivorship may have the net effect of producing a tenancy in common upon the death of one of the joint owners.[708] The more important consequences of the partners' tenancy in real estate will also be treated hereafter in the next topic.

Whatever may have been the older classifications of the co-ownership of the partners, the recognition of the partners' equities took the ownership out of the ordinary categories of joint or common tenancies and effectively modified them. The adoption of the Act sends into discard these earlier tenancies, however — or however accurately — they might have been termed: the tenancy in partnership becomes the authoritative classification, and the detailed incidents the prescribed ones.

Deceased Partner's Interest. Under subsection (2) (d) of Section 25, the right of survivorship is specifically declared. No distinction is here drawn between real and personal property. In ordaining survivorship, the Act makes certain what was previously uncertain as to firm personal property, and changes the law as to real property.

The South Carolina cases—taken together—leave their position in doubt as they view the devolution of a deceased partner's interest in firm personalty. Although the general rule in the United States, aside from statutes, puts the legal title to firm personalty in the survivor,[709] the local cases as a whole—at least the earlier ones—while seeming to recognize the joint tenancy, reject the notion of survivorship. In *Fisher v. Tucker*,[710] it is said that on the death of a partner "his representatives become tenants in common with the survivor." But, in *Boyce v. Coster*,[711] the Court declares: "Partners in trade are, at law, joint tenants of the partnership stock and effects, with the right of survivorship and its incidents. But

708. § 8911, S. C. CODE (1942): "Where any person shall be, at the time of his or her death, seized or possessed of any estate in joint tenancy, the same shall be adjudged to be severed by the death of the joint tenant and shall be distributable as if the same were a tenancy in common." This Section (enacted in 1791, 5 STAT. 163) was construed as working a severance between partners in Reed v. Kennedy, 2 STROBHART'S LAW 67 (S. C. 1848).
709. MECHEM, PARTNERSHIP, § 402; CRANE, PARTNERSHIP, §§ 65, 83; 40 Am. Jur. 337.
710. Note 280, *supra*, at 171.
711. Note 173, *supra*, at 30.

in equity the joint estate is subject to the maxim, *jus accrescendi in mercatores locum non habet*"—the right of survivorship does not exist among merchants.[712] A variation appears in *Moffatt v. Thomson:*[713]

> The principle is as old, at least as the time of Lord Coke, that copartners constitute an exception to the rule as to the *jus accrescendi* amongst joint tenants. . . . Though they are joint tenants of all the partnership stock during their lives there is no survivorship *either at law or in equity*[714] (emphasis supplied). It follows that, upon the decease of one of several partners, his share of the stock and effects of the partnership, subject to the partnership debts, devolves to his personal representatives, who thereupon become, both at law and in equity, tenants in common with the surviving partner.[715]

It is to be noticed that the reference in the cases is to "stock and effects," which may be taken to mean chattels as distinguished from choses in action. The latter, according to the law of *joint rights and obligations,* pass to the survivor, subject to a duty to account. It seems, on general authority, that, conceding the worth of the maxim denying survivorship among partners, the rule does not apply to choses in action—at least so far as the legal title is concerned.[716] The South Carolina cases clearly put the title to firm choses in action in the survivor for purposes of collection and enforcement.[717] And when the survivor has died, his legal representative succeeds to the title, subject to the same duties.[718]

Despite the assertion in the early cases that the survivor does not take the whole title to firm personalty, there are

712. BOUVIER LAW DICT. (8th Ed.), 2141; LINDLEY, PARTNERSHIP (9th Ed.), 428.
713. Note 562, *supra,* at 160.
714. To the same effect see LINDLEY, PARTNERSHIP (9th Ed.), 428.
715. This excerpt is quoted with approval in Wiesenfeld v. Byrd, note 269, *supra,* at 117.
716. See LINDLEY, PARTNERSHIP (9th Ed.), 430.
717. Kinsler v. McCants, note 196, *supra,* at 48: "The legal title to the choses in action, which belonged to the partnership, becomes vested in the survivor. * * * The representative of the deceased partner has no legal interest or title in the choses in action which have been in possession of the deceased partner at the time of his death." See, also, Dial v. Agnew, note 488, *supra;* Younts v. Starnes, note 487, *supra.* As to money, the result is the same—Knox v. Shepler, note 563, *supra,* at 596: "Certainly at law he, as surviving partner, is entitled to the whole fund."
718. Dial v. Agnew, note 488, *supra.*

statements to the contrary elsewhere;[719] and, practically, the proposition is incompatible with the undeniable right of a surviving partner to sell and transfer firm personalty in liquidation—a result which could hardly follow without his having title and which is not to be ascribed simply to a power. It is true that cases speak of the right of a partner "to take and hold"[720] the partnership assets for purposes of winding up—something which is not synonymous with title—but when they also speak of reducing the assets to money, what is contemplated with personal property is a transfer by the survivor, which would be ineffectual without title. That there is something more than merely taking and administering is to be found in an older case, *White v. Union Ins. Co.*:[721] "Upon the death of one of the copartners, the partnership is dissolved . . . and the joint effects are cast upon the survivor afterwards, for the purpose of paying off the joint debts, and then for an equitable distribution afterwards, if any surplus remains. And for this purpose, the survivor has a right to sell and dispose of all the remaining stock of the copartnership, and such sale is unquestionably good and valid in law." Altogether, it may be questioned whether the doctrine of nonsurvivorship as to personal property ever had a real foothold in South Carolina, and it may be surmised, in view of the practicalities and practices, that in fact it was obsolete almost from the time it was declared in this state. In any event, the declaration of survivorship in subsection 2(d) removes for future purposes any lingering doubt as to the transmission of firm personalty. The whole title is in the survivor.

From what has been said as to the nature of the holdings of partners in real estate, it is reasonably apparent that at common law the devolution of the interest of a deceased partner will depend upon the character of that holding—*i.e.*, as a joint tenancy or as a tenancy in common. The maxim denying survivorship among merchants has no meaning as to real estate. If the tenancy in real estate is joint, the devolution will be correspondingly so at law. If the tenancy is in common, the devolution will take that course. "The legal estate or interest

719. Dial v. Agnew, note 488, *supra*, at 459: "When a partnership is dissolved by the death of one of the partners, the survivor becomes the legal owner of the assets of the partnership * * *."
720. Moffatt v. Thomson, note 562, *supra*, at 160; Wiesenfeld v. Byrd, note 269, *supra*, at 114.
721. Note 307, *supra*, at 559.

in partnership real estate devolves according to the nature and tenure thereof, and according to the general rules of real estate applicable thereto."[722] But, as has been seen, the statute abolishing survivorship in joint tenancies (except, perhaps, where the transfer runs specifically to the grantees *and* the survivor) will convert the estate into a tenancy in common on the death of one of the partners.[723] The rule, therefore, has been that ordinarily on the death of a partner, title to his share of firm real estate will pass not to the survivor but to the decedent's heirs or devisees, subject to partnership equities and in effect impressed with a trust, the fulfillment of which can be compelled by the survivor.[724] The survivor might, in liquidation, sell the real estate, but a deed would pass only his fractional legal title and the whole equitable title of the firm; hence, only by joinder of the heirs or devisees in a conveyance, or by compelling a transfer of their interests through court action, could legal title be conferred on a purchaser.[725]

Section 25 works a different result. For, by eliminating joint tenancy and tenancy in common and erecting in their place tenancy in partnership, and by prescribing survivorship, the devolution must take place as directed. On death of a partner, therefore, the *whole legal title* vests in the survivor; and a deed made by the survivor in the course of the settlement of the partnership concerns will carry the legal and beneficial title.[726] Of major importance too is the provision that on the death of the survivor, in whom title had vested, the whole title thereupon passes to his personal representative—not to his heirs or devisees, nor back into the heirs, devisees or personal representative of the deceased partner. The deed of the

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722. Schenk v. Lewis, note 151, *supra*, at 245. The quotation is taken from 30 Cyc., 625. It is repeated now in 68 C. J. S. 776.

723. See note 708, *supra*.

724. Wagner v. Sanders, note 183, *supra*, at 197; Schenk v. Lewis, note 151, *supra*. In the United States the rule generally, in the absence of statute, is the same. MECHEM, PARTNERSHIP, § 169; THOMPSON, REAL PROPERTY (Perm. Ed.), § 1844; POWELL, REAL PROPERTY, § 138; 68 C. J. S. 777; 40 Am. Jur. 330.

725. Schenk v. Lewis, note 151, *supra*. See, also, the text citations in note 724, *supra*.

726. Wharf v. Wharf, 306 Ill. 79, 137 N. E. 446 (1922); Davis v. Hutchinson, 36 Fed. 2d 309 (C. C. A. 9, Alaska, 1929). See, also, CRANE, PARTNERSHIP, §§ 83, and 45: "The surviving partner may dispose of the property, including real estate, without any joinder in conveyances by heirs, devisees or widow of the deceased partner. He needs no aid from the courts to enable him to liquidate real estate interests." See, also, POWELL, REAL PROPERTY, § 139.

survivor's representative, if otherwise proper, would carry the legal and beneficial interests.

One item of practical concern needs to be noted here. The assumed fact throughout has been that the property is partnership property. The fact is self-revealed if the particular conveyance by which the partners acquired title ran to the firm by name or to the partners specifically designated as such. It has already been seen—in dealing with partnership property under Section 8—that property owned by the partners may be owned by them in tenancy in common as individuals, even though purchased with partnership funds, or used for firm purposes (its use being contributed). Since the co-ownership of partners is thus in a sense ambiguous, a deed by the surviving partner of property acquired by the partners in a conveyance not calling them partners, or not running to the firm, would be good if it was the *fact* that the property was firm property. But a purchaser cannot authoritatively assay facts, and the survivor's declaration or recital would not establish the fact even if it were so. Even if the purchaser were satisfied that the property was firm property, succeeding purchasers might not be. The prudent course in any such case, as a practical matter, is to have a joinder by the heirs or devisees, or judicial establishment of the fact of firm ownership—before, rather than after, the purchase.

Where title stands in the name of the firm, and since, as has been seen, title can be conveyed only in that name,[727] it would seem that on the death of a partner an effective conveyance could be made in the name of the firm by the survivor.[728]

No specific mention is made in Section 25 of the situation where title to firm property is in the name of only one partner. As has been seen—in the discussion under Section 8—he would in effect be holding in trust for the firm. If his copartner were to die first, no difficulty is presented: the survivor has the legal title necessary for a transfer.[728a] But if he, the title-holder, dies first, the question is not so simple.

727. Section 8(3) of the Act; and see the discussion of that Section in the text.
728. See the remarks of the draftsman of the Act, William Draper Lewis: 24 YALE L. J. 617, 625 (1915). There seem to be no cases putting the matter in issue.
728a. MECHEM, PARTNERSHIP, § 169.

Aside from the Act, there is no doubt that on his death the *whole* legal interest would pass to his heirs or devisees, impressed with a trust which the survivor could enforce[729]—a result produced in the same fashion as the vesting of an undivided legal interest in heirs or devisees of a deceased partner holding as tenant in common. Whether an opposite result would be reached under the Act is problematic, and there seems to be no authority interpreting the Act in such a set of facts. Even though legal title may be in one partner only, the beneficial ownership is in the firm; and the language of the Act certainly would permit the passage of the whole beneficial interest to the survivor for purposes of settlement. It might not be reading too much into the words in subsection 2(d), "his right in specific partnership property vests in the surviving partner," to include the legal title which the deceased partner had; but the lack of court opinion suggests caution on the score. The absence of precise treatment in the Act, and the want of judicial authority, would probably justify a prospective purchaser in rejecting a conveyance from the survivor by reason of doubt as to the effective transfer of the legal title; and the safer course would be, naturally, for him to insist upon either a voluntary joinder by the heirs or devisees of the deceased title-holder or a court-directed transfer of their interests. Again, as has already been noted, the *fact* of firm ownership could be established conclusively only through judicial determination; and no prudent purchaser would undertake to substitute his own judgment for the safer and binding judgment of a court.

Both under the Act and outside it, if there is no appearance of firm ownership and the deceased partner was apparently the sole owner, or owner of an absolute undivided interest, a purchaser from the heirs or devisees who could otherwise qualify as a *bona fide* purchaser would be protected against the survivor and firm claimants. These are the necessary accompaniments of the provisions of Section 10—as they deal with the conveyance of real property of the partnership; and, even if the consequences cannot be attributed to that Section, that conclusion must emerge from the fact of the appearance of personal ownership—whether in the partner himself or his

729. 68 C. J. S. 777, 779.

heirs or devisees—and the operation of the *bona fide* purchaser rule.[730]

Nature of Partner's Interest in Partnership. The declaration in Section 26 that a "partner's interest in the partnership is his share of the profits and surplus" is a restatement in different terms of an almost axiomatic principle—that the share of a partner in the assets of the partnership is what remains after the payment of firm debts and the adjustment of firm equities.[731] A partnership—in the sense that a partner has a property interest in it—is a complex of assets and of interacting rights and duties, and it is only the residue which is left after the process of subjecting the assets to the action of rights and duties that belongs to a partner. South Carolina authority in keeping with the rule is ample. A typical expression, adequate for the purpose, is found in *Knox v. Shepler*:[732] "In equity, the interest of a partner in the partnership property is a share of the surplus that may remain after winding up the affairs of the partnership and paying off all its debts." Other cases use comparable language embodying the same idea.[733]

Just as the shares of the partners in relation to each other are worked out on the basis of the rule, so is the position of firm and separate creditors as related to their resort to partnership property. The subordination of separate creditors to firm creditors in firm property is justified in the South Caro-

730. POWELL, REAL PROPERTY, § 139. See the discussion of the rights of purchasers from partners under Section 8.

731. MECHEM, PARTNERSHIP, §§ 143-145; 68 C. J. S. 525; 40 Am. Jur. 209.

732. Note 563, *supra*, at 596.

733. Seabrook v. Rose, note 131, *supra*, at 556 (of 2 Hill's Equity): "The interest of each partner in the partnership in his share in the surplus after the settlement of partnership accounts;" Hammond v. Aiken, note 243, *supra:* "His rights depend upon a settlement of the accounts, and the closing of the balance sheet;" Moffatt v. Thomson, note 562, *supra*, at 161: "Nothing can be considered as the share of a partner but his proportion of the residue, after an account of what has been taken and advanced;" Kuhne v. Law, note 196, *supra*, at 25: ". . . the right subsisting between the partners, under which each partner is entitled to only his share of the surplus after the payment of the debts and settlement of the accounts of the firm"; Blair v. Black, 31 S. C. 346, 357, 9 S. E. 1033, 17 Am. St. Rep. 30 (1889): ". . . the individual members have no interest until the partnership is settled."

See, also, Boyce v. Coster, note 173, *supra;* Rose v. Izard, note 99, *supra;* Jones v. Smith, note 176, *supra.*

As has already been seen, in the discussion of the Partner's Lien, under Section 18, the reduction of a partner's interest to a residual share is brought about through the employment of a so-called lien available to the other partners.

lina cases by the postulate that, until firm debts are paid, there is no separate share in the property which separate creditors can reach; or, to put it another way, only the share which remains after partnership debts are paid is the share of the partner, and that share alone is available to his separate creditors.[734] The priority of firm creditors, though not represented by a specific lien, is a derivative of a partner's right to have firm property applied to firm debts, and any claim of a copartner, or his transferee or creditor, is subordinate to that equity.[735] A creditor of a partner, or an assignee of a partner's interest in specific property or of his interest in the partnership, takes, therefore, subject to the prior rights of firm creditors and the paramount equities of the other partners.[736]

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734. Wardlaw v. Gray, note 369, *supra,* at 113: "The private creditors of a partner cannot go against the partnership funds beyond the debtor's interest in them, which is for the balance left after the payment of the partnership debts"; Wilson v. McConnell, note 380, *supra,* at 510: "The only interest which [the deceased partner's] estate would have in the partnership assets would be his share of the dry balance after the co-partnership debts were paid"; Hutzler v. Phillips, note 176, *supra,* at 150: "The property of the firm is not liable for the separate debts of a member—only the interest of the member is liable, which is nothing until the firm debts are paid"; Jones v. Smith, note 176, *supra,* at 537: ". . . an individual creditor, who is only entitled to participate in what may come back to his debtor after the settlement of partnership debts"; Ex Parte Karish, 32 S. C. 437, 439, 11 S. E. 298, 17 Am. St. Rep. 865 (1889): "There can be no doubt that, until the partnership creditors are provided for, the individual partners have no interest—that is, can claim no individual right in the partnership assets, they being entitled to their shares in whatever may remain after the partnership creditors are provided for"; Calhoun v. Bank, note 18, *supra,* at 365: "No partner has any interest in the partnership assets until all the partnership creditors have been provided for"; Bank of Anderson v. Allen, note 505, *supra,* at 172; ". . . All of the partnership assets . . . were subject to the partnership obligations, and (the partner) was only entitled to an accounting for his interest after payment of all partnership obligations."

The cited cases are given only because they state the theory which prefers firm creditors to separate creditors. The theory is not stated but is inherent in many other cases which involve priorities in the marshalling of firm and individual estates, and they will be hereafter dealt with. Typical and controlling is this statement, from White v. Union Ins. Co., note 307, *supra,* at 559: "The co-partnership effects ought to go to the payment of the co-partnership debts in the first place, and if there be a surplus, then to the private debts of each copartner afterwards, in proportion to his share of the joint funds."

These cases are not to be taken as treating a partner's share as the surplus after firm debts are paid and nothing more: they are concerned with priorities of firm and separate creditors only, and for their purposes the statements are sufficient, but incomplete. Partnership equities—in favor of the partners—take precedence over individual rights, as has already been seen.

735. Jones v. Smith, note 176, *supra,* at 536.

736. Brown v. Smith, note 523, *supra*—transfer of partner's interest in firm, subject to copartners' equities; Boyce v. Coster, note 173, *supra*

In the discussion of the priorities between firm judgment creditors and separate judgment creditors—under the treatment of Effect of Judgment in connection with Section 15 of the Act—it has been seen that a senior judgment creditor of a firm takes precedence in separate property over a later separate judgment creditor. As to firm property, no similar seniority based on antecedence in time is accorded a separate judgment creditor. Hence, even where there has been an execution on firm property by a separate judgment creditor prior to execution on it by a firm judgment creditor, the latter will be preferred.[737] The reason, of course, is the deferred existence of a partner's interest until the payment of partnership debts and the settlement of firm accounts. For that matter, a separate judgment creditor is subordinated to the rights of a firm creditor whose claim has not been reduced to judgment.[738] Although there is this recognition in the South Carolina cases of the prior right of firm creditors as against transferees or separate judgment creditors of an individual partner, a court of law would not give such priority to the firm creditors (at least where they had not already obtained liens), and relief on that score could be afforded only in equity.[739]

The effect of the attempted transfer of a partner's rights in specific firm property and the attempted subjection of

—transfer of partner's interest in specific firm property, subject to copartners' equities; Rose v. Izard, note 99, *supra*—mortgage of partners' interests in specific firm property, subject to firm creditors' and copartners' equities; Schenk v. Lewis, note 151, *supra*—generally, firm creditors superior to separate creditors; Brown v. Bradley, 131 S. C. 268, 127 S. E. 210 (1924)—assignment of partner's interest in funds derived from execution sale of firm property, subordinate to firm creditors. See note, 6 A. L. R. 162.

737. Crawford v. Baum, 12 RICHARDSON'S LAW 75, 77 (S. C. 1859): ". . . his (partner's) quantum of interest is a distributive share of the surplus remaining after the partnership debts are paid." The general rule is in accord: note, 75 A. L. R. 997, 1004.

738. See Brown v. Bradley, note 736, *supra;* Schatzel v. Bolton, 2 McCORD'S LAW 478, 13 Am. Rep. 748 (S. C. 1823); Schatzel v. Bolton, 3 McCORD'S LAW 33 (S. C. 1826); Sniffer v. Sass, 14 RICHARDSON'S LAW 20, 24 (S. C. 1828); Bowden v. Schatzel, BAILEY'S EQUITY 360 (S. C. 1831); Knox v. Shepler, note 563, *supra;* Jones v. Smith, note 176, *supra,* at 536.

739. Wilson v. Bowden, 8 RICHARDSON'S LAW 9 (S. C. 1854)—separate and successive assignments by partners of interests in firm property, held valid at law against firm creditors subsequently attaching; Norris v. Vernon, 8 RICHARDSON'S LAW 13 (S. C. 1854)—same; Hooks v. Byrd, 10 RICHARDSON'S LAW 120 (S. C. 1856)—sheriff selling firm property in execution against individual partner compelled in action at law, over firm creditor's protest, to pay over to separate judgment creditor; Henderson v. Hadden, 12 RICHARDSON'S EQUITY 393 (S. C. 1866)—executions on firm property under separate and firm judgments, no issue on this raised.

firm property to separate debts are specifically dealt with in Section 25(2) (b),(c). The rights and remedies of an assignee of a partner's interest in the partnership and of a judgment creditor of a partner are specially declared in Sections 27 and 28. The South Carolina cases just discussed in which those factual situations have occurred must presently, then, be viewed in the light of these provisions, and consideration will be given them in the treatment of these Sections hereafter.

Conversion of Realty to Personalty. Section 26 declares that "a partner's interest in the partnership is his share of profits and surplus, *and the same is personalty*" (emphasis supplied). It is clear that embraced in the interest is real property; since there would be no point in declaring personal property to be personal property. The provision is tantamount, therefore, to a declaration that partnership real property is converted into personal property. The inquiry then arises as to the limits to which the conversion goes: whether it is total or partial in extent.

Aside from the Act, there is general agreement that firm real estate is converted, in equity, into personal estate; but there has been sharp conflict between American and English law with respect to whether the conversion is only *pro tanto* for partnership purposes—with a resumption or retaining of its original character as real estate thereafter—or whether the conversion is complete for all purposes. The English view is that the conversion is "out and out"—that is to say, for all purposes, including descent and distribution, even after debts are paid and partnership accounts settled: so that after the settlement, the interest passes to the personal representative and not to the heirs or devisees.[740]

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740. The leading English case is Darby v. Darby, 3 Drewry 495 (1856). The rule has been embodied in the English Partnership Act of 1890 (53-54 Victoria, ch. 39), § 22: "Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner) and also as between the heirs of a deceased partner and his executors and administrators, as personal or moveable and not real or heritable estate".

For discussion of the English rule, see MECHEM, PARTNERSHIP, § 163; CRANE, PARTNERSHIP, § 45; TIFFANY, REAL PROPERTY (3d Ed.), § 447; 4 POMEROY'S EQUITY JURISPRUDENCE (5th Ed.), § 1166; note, 25 A. L. R. 389; 68 C. J. S. 512; 40 Am. Jur. 206.

See, also, Schenk v. Lewis, note 151, *supra*, at 244.

The prevailing American view has been that the conversion is not complete, or "out and out," but as stated in the South Carolina case of *Schenk v. Lewis*:[741]

> In America, however, the rule is that to the extent that partnership real estate may be required to pay partnership debts or to adjust equities between the partners in the settlement of the partnership business, and only to that extent is a trust implied, in enforcing which equity treats the real estate as personal property and that when these purposes are accomplished, whatever real estate remains resumes its character as such.[742]

In the South Carolina cases there is no dissent from the rule of conversion, and for the purposes of the partnership real property has been treated as personalty.[743] If the real estate was bought with partnership funds or for partnership purposes, it is, under familiar rules, partnership property, and the conversion takes place;[744] nor does the fact that title may be held by only one, or less than all, of the partners alter the rule.[745] The conversion that takes place, under the South Carolina cases, has been only *pro tanto,* as under the American rule; hence, after the discharge of firm debts and the settlement of accounts, the land resumes its former character.[746] The result, therefore, has been that once the land has been reconverted, dower attaches,[747] and the interest of a deceased partner passes beneficially to his heirs or devisees instead of to his personal representative.[748]

741. Note 151, *supra,* at 244.

742. For discussion of the American rule and its qualifications, see the authorities cited in note 740, *supra.*

743. Winslow v. Chiffelle, note 44, *supra* (discussed but not passed on); Reed v. Kennedy, note 708, *supra* (mentioned in argument of counsel but not discussed by court); Boyce v. Coster, note 173, *supra,* at 30; Bowman v. Bailey, note 706, *supra,* at 553; Wagner v. Sanders, note 183, *supra,* at 197; Schenk v. Lewis, note 151, *supra.*

In Bowman v. Bailey, *ante,* it seems to be suggested that only for the purpose of paying firm debts is the property treated as personalty, but the other cases cited above, except the first two, make it plain that it is for the adjustment of partnership equities as well.

744. Boyce v. Coster, note 173, *supra,* at 30; Bowman v. Bailey, note 706, *supra,* at 553.

745. Schenk v. Lewis, note 151, *supra,* at 245.

746. Wagner v. Sanders, note 183, *supra,* at 197; Bowman v. Bailey, note 706, *supra,* at 553, 554 (at least after firm debts are paid); Schenk v. Lewis, note 151, *supra.*

747. Bowman v. Bailey, note 706, *supra;* Wagner v. Sanders, note 183, *supra;* Schenk v. Lewis, note 151, *supra.*

748. Wagner v. Sanders, note 183, *supra,* at 197; Schenk v. Lewis, note 151, *supra.*

Whether the South Carolina rule of partial conversion as announced in the cases will continue depends upon whether the conversion under Section 26 of the Act is treated as a restatement of the American rule or an adoption of the English rule. On this subject the authorities are already showing a lack of desired uniformity. Section 26 does not spell out a rule of "out and out" conversion in the unmistakable terms of the English Partnership Act;[749] but, on the other hand, it does not prescribe a qualification of reconversion or retention. It should be noticed, also, that what is spoken of as personalty in the Section is the partner's interest, and the interest is his share of profits and surplus. The share of profits and surplus is a remnant of assets *after liquidation;* and this is personalty. What is left to the partner may include an interest in land. It requires no strained construction to conclude that the Section declares a rule of "out and out" conversion.

Of the cases which have construed the Section as following the English rule the most notable is *Wharf v. Wharf,*[750] decided in Illinois. In giving as its reasons for that construction, the court points not merely to Section 26, but to other portions of the Act which round out a picture of total conversion. They are: the disallowance of dower and similar interests under Section 25 (2) (e); the vesting of title on the death of a partner in the survivor, and on his death in his *legal representative*—not his heirs—under Section 25 (2) (d); and the right of a partner on dissolution to have partnership property applied to the discharge of firm liabilities and the surplus applied to pay *in cash* the amount due to the partners—under Section 38 (1). There is no profusion of cases on either side and no such great overbalancing of authority on one side or the other as to call for a court's having to commit itself to a stated position for the sake of uniformity.[751] The view which the South

749. See note 740, *supra.*
750. Note 726, *supra.*
751. Cases which, in addition to Wharf v. Wharf, seem to adopt the "out and out" rule: Hankey v. French, 281 Mich. 454, 275 N. W. 206 (1937); Swirsky v. Horwich, 382 Ill. 468, 47 N. E. 2d 452 (1943); Harmon v. Martin, 395 Ill. 595, 71 N. E. 2d 74 (1947); Cultra v. Cultra, 188 Tenn. 506, 22 S. W. 2d 533 (1949)—the most emphatic of all; Blodgett v. Silberman, 48 S. Ct. 410, 227 U. S. 1, 72 L. Ed. 749 (1928)—construing N. Y. enactment of U. P. A.; Zach v. Shulman, 213 Ark. 123, 210 S. W. 2d 124, 2 A. L. R. 1078 (1948); Mallin v. Schaper, 185 Fed. 2d 1 (C. C. A. 7, Ill., 1950).
Cases which seem to adhere to the American rule: Webber v. Rosenberg, 318 Mass. 768, 64 S. E. 2d 98 (1945); Faust v. Heckler, 359 Pa. 19, 58 A. 2d 146 (1948); In re Perry's Estate, —— Mont. ——, 192

Carolina courts will take of the meaning of Section 26 remains, of course, for future determination and is not the subject of prediction. By the time a direct issue on the point reaches the courts, there may be a considerably greater accumulation of interpretive cases to influence a decision.

While there is a seeming conflict in the cases, the textwriters, on the whole, show an inclination to treat the Act as adopting the rule of "out and out" conversion.[752] No Commissioners' note is attached to Section 26 to elaborate upon or explain the import of the Section, and perhaps none was necessary; but if we may take the word of the draftsman of the Act, the purpose of the Section was to adopt the English rule.[753]

A choice of characterizations of a partner's interest under the Act between conversion for all purposes and one for limited purposes is not simply a matter of unmeaningful terminology. In two respects the matter is of chief importance: devolution on death of the partner's interest, and taxation. If the conversion is "out and out," the real property will pass to the personal representative and not to the heirs or devisees. While in South Carolina the matter is of no great consequence if the deceased partner was intestate—since the heirs and distributees are the same—it is of considerable moment if the partner died testate. The order of application of assets to the payment of debts; abatement and ademption; whether a gift of "personal property" would carry the complete interest in firm real estate; whether, conversely, a gift of "real estate" would not carry it—all these are questions which will hang upon the determination of the character of the interest. From the viewpoint of taxation, if there is such

P. 2d 532 (1948)—case arising before U. P. A. adopted; Hannold v. Hannold, 4 N. J. Super. 381, 67 A. 2d 352 (1948).

The word "seem" in the two preceding paragraphs is used advisedly, since some of the cases are far from clear cut. There are numerous other cases in jurisdictions having the Act in which there is a recognition of the conversion of the interest of a partner to personal property, but they either do not mention the extent of the conversion or are so indeterminate upon the matter as to make it not worthwhile to cite them.

752. See TIFFANY, REAL PROPERTY (3d Ed.), § 444, n. 67; 4 POMEROY'S EQUITY JURISPRUDENCE (5th Ed.), § 1166; POWELL, REAL PROPERTY, § 139; WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION, 616; CRANE & MAGRUDER, CASES ON PARTNERSHIP (Shorter Selection, 1930), 154, n. 10. The conclusions reached by some of these authorities are based on Wharf v. Wharf. See, 32 YALE L. J. 845 (1923); 98 U. of PA. L. R. 269 (1949); 21 TENN. L. R. 202 (1950).

753. 24 YALE L. J. 617, 637 (1915).

conversion, the interest of a deceased partner would be considered an intangible personal asset, subject to an inheritance or succession tax at his domicile, although the firm real estate is elsewhere—*i.e.*, in a state where conversion takes place.[754] "Out and out" conversion in the state of the situs of the firm real estate would be productive of a value on the intangible asset different from that placed on it if the conversion was only partial or not at all.

The working of a conversion, whether partial or total, does not make the land itself anything other than land. A conveyance of the land, even for partnership purposes, could properly be made only by deed.[755] It would be a necessary assumption, also, that a judgment against a firm would on entry, under South Carolina law, constitute a lien on firm real estate as real estate; and that the property itself would be subject to a property tax as real estate.[756]

The substantive effect of the combination of treating a partner's share as a right to participate in the surplus and denominating it as personal property is to make the interest a chose in action[757] and to create in the partner a right to an accounting.[758]

Right to Possession of Firm Property. The provisions of subsections (2) (a) and (2) (d) of Section 25, as they relate to possession of partnership property, are self-evident propositions, when the overall nature of the partner's interests is

754. Blodgett v. Silberman, note 751, *supra*—firm real estate in New York, deceased partner resident in Connecticut, interest taxable in Connecticut. In In re Perry's Estate, note 751, *supra*, the Montana court treated as taxable the interest of a deceased partner domiciled in California in real estate located in Montana. The case, however, arose before the U. P. A. was adopted in Montana.

Cf. Land Title & Trust Co. v. S. C. Tax Comm., 131 S. C. 192, 126 S. E. 189, 42 A. L. R. 432 (1924)—where a direction in a will of a testatrix domiciled in South Carolina to sell land in another state was held to work a conversion of the land into personalty, the situs of which would be in South Carolina and taxable in this state.

755. MECHEM, PARTNERSHIP, § 164; TIFFANY REAL PROPERTY (3d Ed.), § 447; 68 C. J. S. 513.

756. 68 C. J. S. 513.

757. Blodgett v. Silberman, note 751, *supra;* In re Dumarest's Estate, 262 N. Y. S. 450, 146 Misc. 442 (1933); McClennen v. Comm. Int. Rev., 131 Fed. 2d 165 (C. C. A. 1, Mass., 1942); State v. Elsbury, 63 Nev. 463, 175 P. 2d 430, 169 A. L. R. 364 (1946).

758. In re Dumarest's Estate, note 757, *supra;* Clark v. Fiedler, 44 Cal. App. 2d 275, 113 P. 2d 275 (1941); State v. Elsbury, note 757, *supra*. *Cf.* the statement in the South Carolina case of Jones v. Smith, note 176, *supra*, at 536: "The conveyance by one partner carries no more than a right to account."

considered—not merely under the Act, but before it. Whether the ownership might have been treated as joint, with unity of interest, or as in common, with fractioning of interests, the possessory right of each partner has been, and is, equal and not exclusive. No enlightening discussion appears in the South Carolina cases on the point, but it is evident from the course that possessory actions have been taken that the local principle is fundamentally the same as that declared in the Act.[759]

The prescription in subsection (2) (d) that the survivor, or the personal representative of the survivor, has no right to possess firm property except for partnership purposes is followed in the South Carolina cases, but the principle, for the most part, is not stated negatively as the Act states it. Most of the cases state affirmatively the right and duty of the survivor with respect to taking and holding firm property, but in their stressing that such acts are for the purpose of administering the firm estate and in employing the term "trustee," there is necessarily the negative implication directed against the use of firm property for other than partnership purposes.[760]

Assignment of Partner's Interest in Firm Property. Section 25(2)(b), which strikes down assignments of a partner's right in specific partnership property, is a logical sequence to the declaration, in subsection (2)(a), of each partner's equal right to possession for partnership purposes. Theoreti-

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759. See, in the discussion under Section 22, the topic of Possessory Actions, and the cases there cited.

See, also, Boyd v. Munro, 32 S. C. 249, 252, 10 S. E. 963 (1889)—"It was simply an admission that certain assets which W. J. Keenan held, and, as one of the partners, *had a right to hold* (emphasis supplied), did not belong to him individually . . ."

760. White v. Union Ins. Co., note 307, *supra*, at 559; Moffatt v. Thomson, note 562, *supra*, at 160; Wiesenfeld v. Byrd, note 269, *supra*, at 114: "The death of one dissolves the partnership, and the survivor holds the property. He does not hold it, however, for his own use but rather in the nature of a trustee, for the settlement of partnership debts and the winding up of the concern;" Dial v. Agnew, note 488, *supra*, at 459; Boyd v. Munro, note 759, *supra*, at 253; Manship v. Newton, note 550, *supra*, at 264; Schenk v. Lewis, note 151, *supra*, at 242; Elliott v. Flynn, note 499, *supra*, at 395.

In Moffatt v. Thomson, *ante*, a surviving partner who had liquidated the firm's affairs was held to be violating his duty in retaining from the administrator of the deceased partner the latter's share to satisfy an individual debt. In Wiesenfeld v. Byrd, *ante*, a surviving partner was held to be acting improperly in using firm funds to pay his individual debt. Both these cases have been dealt with elsewhere—the first, under Section 18, in the topic of Partner's Lien; the second, under Section 9, in the topic Payment of Individual Debts with Firm Funds.

cally, an assignee, becoming thus a part owner, would become to that extent a partner. But partnership is the result of contract, and the assignee could not become a partner. He could not, therefore, possess any part of the property, since the possession would have to be for partnership purposes. Moreover, the share of a partner, as has been seen, is only the right to participate in a residue. The transfer would at most be a transfer of a part of that share, but what is that part? For the partner's interest in specific property forms a part of a mass of rights and duties, and to transfer only the interest in a component fused into that mass is to undertake to transfer something incapable of reduction to any definite, calculable proportion. It is difficult enough to compute the share of a partner in the partnership; to attempt to delimit the partner's share in specific property extracted from the whole of the partnership compound is practically impossible—an attempt to separate the inseparable. Yet the law heretofore has sanctioned such assignments, even though its eyes have been open to their almost self-defeating character. Desired consistency within the Act, and the purpose to do away with the unsolvable puzzle of what an assignee's interest in specific property amounts to, are responsible for the fiat that a partner's interest is not assignable, except in connection with assignment by the other partners—a collective, though not necessarily a contemporaneous, assignment. (Of course, to revert to a familiar theme, if there is the appearance of personal ownership, a *bona fide* purchaser would be protected.) Accordingly, cases applying the subsection have declared the assignment (including mortgage) by a partner of his interest in specific property nugatory.[761]

The subsection under discussion has been held to have no application to transfer by a partner of his interest in firm property to the remaining partners.[762]

Assignment of a partner's interest *in the partnership* is not forbidden, and the effect of such an assignment is specially dealt with in Section 27. The assignment of a partner's right in all the firm property is an assignment of a share in

761. Windom Nat. Bank v. Klein, 191 Minn. 447, 254 N. W. 602 (1934); Altman v. Altman, 67 N. Y. S. 2d 119, 271 App. Div. 884 (1946); Shapiro v. U. S., 83 Fed. Supp. 375 (D. C. Minn. 1949), aff. 178 Fed. 2d 459 (C. C. A. 8, 1949).

762. Stilgenbauer v. U. S., 115 Fed. 2d 283 (C. C. A. 9, Cal., 1940); Becker v. Hercules Foundries, 33 N. Y. S. 2d, 263 App. Div. 991 (1942).

specific property, but where such an assignment is capable of being construed, under the circumstances, as an intended transfer of the partner's share in the partnership, it will be given effect as such, and controlled by the provisions of Section 27.[763]

Attention has previously been given to the South Carolina cases in which there has been subordination of the assignee of a partner's interest in specific firm property to the rights of firm creditors and the other partners. The main thesis in these cases has been the secondary position of the transferees, and not the effectiveness of the transfer as such, which is sanctioned.[764] So far as the analysis of the partner's share is concerned, those cases are still sound precedent; so far as they impliedly warrant separate transfers, they are no longer so, by virtue of the prohibition of the Act. An assignee of a partner's right in specific firm property will not hereafter be merely deferred or allowed to take subject to outstanding firm debts or equities; he will be excluded at the start.

Attachment and Execution. Section 25(2)(c) makes a partner's right in firm property immune from execution and attachment. This exemption is a necessary accompaniment of —and actuated by the same principle as that concerned with —voluntary assignment under subsection (2)(b). An execution or attachment furnishes the same objection to a third person's intrusion as does a voluntary assignment, and in fact—since ultimately it might lead to a subjection of the interest to sale—may in some cases be treated as virtually equivalent to an assignment.

Aside from the Act, there is general approval of execution or attachment upon the partner's interest in firm property to satisfy his duty, although, in order to accomplish the purpose, seizure of or levy upon the *firm property* has been necessary.[765] On sale, however, what is sold is not the whole prop-

763. Johnson v. Ellis, 49 Idaho 1, 285 P. 1015 (1930); Herman v. Pepper, 311 Pa. 104, 166 A. 587 (1933). See POWELL, REAL PROPERTY, § 139.

764. *Viz:* Boyce v. Coster, note 173, *supra;* Rose v. Izard, note 99, *supra;* Brown v. Bradley, note 736, *supra* (these three cases are specially noted in note 736, *supra*); Wilson v. Bowden, note 739, *supra;* Norris v. Vernon, note 739, *supra.*

765. MECHEM, PARTNERSHIP, §§ 148, 149; CRANE, PARTNERSHIP, § 43; 68 C. J. S. 695, 696 (attachment), 738, 739 (execution); 40 AM. JUR. 447 (execution); 4 AM. JUR. 764 (attachment). There is some difference of opinion as to garnishment of funds due to a partnership on account of demands against an individual partner. See note, 71 A. L. R. 77.

erty, but the partner's share—which, as has been seen, as it is involved in specific property, is practically incapable of calculation. The Act puts an end to the confusion and contradictions arising from subjecting firm property to such processes.

The South Carolina cases, while appreciating the difficulty and clash of interests that execution or attachment under these circumstances presents, nevertheless have permitted seizure or levy to take place. In *Schatzel v. Bolton,*[766] an attachment of partnership credits—debts owed by a third party—by the creditor of some of the partners (all being nonresidents) was sustained, the court saying:

> This [attachment of partnership property for individual debt] has been too often practiced to be now questioned as a general rule; and it is equally well settled that partnership property is liable to be taken in execution upon a judgment obtained against one of the partners. . . . In the case of *Hayden v. Hayden* [a leading English case] the court says, in such cases, the sheriff is to seize and sell a moiety, and the vendee becomes tenant in common with the other partner. In this respect the copartnership property is like any other joint property.

It was further held here that the fact that there were partnership obligations would not prevent such seizure. The interests of firm creditors were recognized and protected by the requirement of a bond, and in sequel cases it was held that the funds of the partnership being money, only half should be taken in attachment and that recourse could be had by firm creditors upon the bond.[767] The same procedure of seizure and security was followed, under similar facts, in *Knox v. Shepler,*[768] where the whole fund was seized. It was there stated (at p. 596):

> That the interest of one partner in the partnership effects may be taken in execution, or may be subject to attachment at the suit of a separate creditor of that partner, is not to be questioned, although there is some

766. Note 738, *supra,* at 480. The principle of this case was approved in Wilson v. Bowden, note 739, *supra,* at 12.
767. Schatzel v. Bolton, (3 MCCORD), note 738, *supra;* Bowden v. Schatzel, note 738, *supra.*
768. Note 563, *supra.*

difference in the manner in which that interest shall be made liable. The plaintiffs have a right to have the fund paid over to them, but they can take it only as the absent defendants had it, subject to the equities of the other partners, and of creditors of the firm.

The cases just dealt with were all cases involving foreign attachments, and the remarks on execution were therefore dicta, except as they may have been used as a justifying analogy; but there are cases, which have been previously discussed, in which the fact of execution of individual judgments against firm property has been present. Here, again, the stress has been upon the ultimate rights of the parties—the relative position of firm and separate creditors—and not the propriety of the execution and seizure, which is taken for granted.[769] The net effect of subsection (2) (c) is not to impugn the validity of the statements in these various cases as to the nature of a partner's share in firm property; but, as with assignments, the consideration of such matters cannot arise again in connection with attempted executions and attachments, since these are ineffectual from the beginning.[770]

769. *Viz:* Crawford v. Baum, note 737, *supra;* Sniffer v. Sass, note 738, *supra;* Hooks v. Byrd, note 739, *supra;* Henderson v. Hadden, note 739, *supra.*

770. Subsection (2) (c) has been consistently applied to prevent execution or levy upon firm property on a claim against an individual partner: Sherwood v. Jackson, 121 Cal. App. 354, 8 P. 2d 943 (1932); Citizens Nat. Trust & Svgs. Bank v. McNeny, 10 Cal. App. 2d, 52 P. 2d 492 (1935); Metropolitan Casualty Ins. Co. v. Ciminio, 108 N. J. L. 243, 157 A. 152 (1931); Northampton Brewery Corp. v. Lande, 133 Pa. Super. 181, 2 A. 2d 553 (1938); Charleston First Nat. Bank v. White, 268 Ill. App. 414 (1932); Rader v. Goldoff, 228 N. Y. S. 453, 233 App. Div. 455 (1928).

There is a difference in application with respect to foreign attachment: *i. e.,* where the partner is a non-resident. Two Pennsylvania cases have allowed such attachment. In Rankin v. Culver, 303 Pa. 401, 154 A. 701 (1931), attachment was permitted, the court stating that it was not the partner's right in specific property which was the subject of attachment and forbidden by subsection (2) (c), but the partner's interest *in the partnership.* The writ was served on the resident partner, who paid over to his copartner his share of the profits as they accrued; for such payment the resident partner was held liable. In Luick v. Luick, 164 Pa. Super. 378, 64 A. 2d 860 (1949), the wife of a partner who had left the state was permitted to attach the husband's share in the firm after dissolution and apparent segregation of the share. In Townsend v. L. J. Appel Sons, Inc., 164 Md. 255, 164 A. 679 (1933), attachment of a truck owned by a partnership to reach the interest of a non-resident partner was held improper.

In Rankin v. Culver, *ante,* the partnership business was conducted in Pennsylvania and the writ issued there. The whole interest of the partner might be regarded as being in that place. If the firm did not do business in the particular state, but instead had credits or funds in the

It is to be remembered, however, in any event, that attachment or execution for firm obligations is specifically preserved: the process and the limitations have already been dealt with in the discussion under Section 15. Since the subsection involved has as its purpose merely the change in the law as related to seizure of firm property for separate obligations, it is not to be thought that the statement that execution and attachment will lie on claims against the firm is intended to change the law with respect to the circumstances under and the manner in which such seizures may take place. For example, it is not the law of attachment or the law of partnership that prevents the attachment of partnership property when one of the partners is a non-resident: it is the presence of those statutes which make partnership property available when all the partners are not served. It is submitted that the rule laid down in *Whitfield v. Hovey,*[770a] discussed under Section 15, is not changed. It is possible, however, that where the liability is in tort—with joint and several liability—the principle laid down in *Campbell v. Hill*[770b] (also discussed under Section 15) may have to undergo modification. If one of the partners is a non-resident, and the asserted liability is in tort, there could be no joinder of him personally as a joint tort-feasor, and resort against him would have to be had severally. To acquire jurisdiction against him—or, to be more precise, against his property—attachment would have to be laid against the firm property; and, while the liability may spring from a tort for which the members of the firm are liable, the particular attachment would be one to satisfy an individual liability arising from the several character of the partner's responsibility. If that is the way one looks at the matter, it might be argued that the subsection in question would operate against attachment of firm property under such circumstances; but this is argument merely and not dogma or prediction.

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hands of a third person, any attempted attachment would necessarily be on specific property and not on the interest of the partner in the partnership. All the South Carolina cases on attachment dealt with the garnishing of debts owed to the partnership by resident debtors. Even conceding the validity of the Pennsylvania cases—and a strong argument may be made against them—they would not apply to that kind of situation.

770a. Note 372, *supra;* and see the text in which note 417, *supra,* appears.

770b. Note 349, *supra;* and see the text in which note 419, *supra,* appears.

It is not to be assumed that individual creditors, judgment and otherwise, have no ultimate claims against partnership property. Such creditors have a right to participate in firm assets if, on a marshalling of firm and individual assets by a court, there is something left for them after firm liabilities are discharged; and these matters are dealt with in Section 40. Judgment creditors of an individual partner, deprived as they are of the right to use execution, are nevertheless afforded a degree of protection by Section 28, which utilizes the device of a charging order on the partner's whole interest to enable the creditor to capture the partner's share of profits coming to him from the partnership. This contrivance is borrowed from the English Partnership Act of 1890.[771] For all practical purposes, such an order is tantamount to a lien upon the partner's interest *in the partnership* and can eventuate in a forced sale of that interest. Extreme flexibility is accorded in the protection of the rights of the judgment creditor, but his right cannot arise above that of his debtor, and, most important, his is a non-interfering right.[772]

Homestead and Exemption Rights. Section 25 (2) (c) denies to a partner, or to his representatives, homestead or exemption in firm property as against attaching firm creditors. The declaration is a restatement of the general rule.[773] The South Carolina rule is in accord, under *Ex Parte Karish*,[774] and is based on the obvious proposition that until firm debts are paid the partner has no separate share which can constitute the basis of an exemption. The partnership itself, of course, is not entitled to an exemption against firm debts, the exemption being allowable only to natural persons.[775] Certainly the South Carolina statutes give no such privilege to partnerships as such, and as much is to be implied from the result in *Ex Parte*

771. § 23(2).
772. But see Section 32(2) of the U. P. A., that dissolution may be effected "on the application of the purchaser of a partner's interest under Sections 27 and 28: (a) After the termination of the specified term or particular undertaking, (b) At any time if the partnership was a partnership at will or when a charging order was issued." The right is given, it will be observed, not to the judgment creditor who has obtained a charging order, but to a purchaser of the debtor partner's interest on a sale resulting from the utilization of the order.
773. MECHEM, PARTNERSHIP, § 316; CRANE, PARTNERSHIP, § 44; 40 C. J. S. 528; note, 4 A. L. R. 300.
774. Note 734, *supra*—firm assets being insufficient to pay firm debts, no exemption allowed to either partner.
775. CRANE, PARTNERSHIP, § 44.

Karish. Nor is there any reason to suppose that on the death of a partner, his wife and children, who are given homestead against his debts,[776] could assert the privilege in firm property against firm creditors.

As against separate creditors, a partner may assert an exemption in his interest in the partnership,[777] although, as has been seen, the determination of his ultimate share—which might or might not be in excess of his exemption—would depend on the prior application to firm debts and equities. Section 28(3) of the Act seemingly covers the situation in the statement—"Nothing in this act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership."

Firm creditors are treated as are separate creditors with respect to homestead and exemptions in individual property. There seems to be no serious dispute that a partner has the same right to applicable exemptions in his individual real and personal property against his partnership creditors as he has against his individual creditors.[778] No South Carolina cases discuss the issue, but there are at least two in which the finding has been that homestead should be awarded in separate property as against the claims of firm creditors.[779]

Dower. Under Section 25(2)(e) "A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin." Curtesy has been nonexistent in South Carolina since 1883,[780] and it is not to be assumed that the Act is designed to re-establish it.[781] Family allowances and allowances for a widow's support do

776. § 9088, S. C. CODE (1942).

777. Moyer v. Drummond, 32 S. C. 165 (1889)—in which it appeared that the firm debts had been paid and the share left to the partner was less than the exemptive amount.

If the partnership assets embrace real estate, the interesting question arises whether the exemption is to be treated as a homestead in real property or as an exemption in personal property. § 9085, S. C. CODE (1942), allows homestead of $1,000 in real estate to the head of a family; § 9090 gives him a personal property exemption of $500. If the debtor is not married, he has an exemption of $300 limited to wearing apparel and the tools and implements of trade. If conversion is "out and out" and strictly applied, the head of a family would not be entitled to homestead and his right would be limited to the $500 personal property exemption.

778. 40 C. J. S. 529; 22 Am. J. 90.

779. Wiesenfeld v. Stevens, 21 S. C. 126 (1883); Chalmers v. Turnipseed, note 295, *supra.*

780. 18 STAT. 339, now codified as § 8577, S. C. CODE (1942).

781. See the comment in note 126, *supra.*

not exist (as they do in some other states by statute) in South Carolina.[782] Subsection (2) (e) has relevance, therefore, only as to dower.

The status of dower in partnership property in South Carolina has had a varied experience. In the earliest of the reported cases in which the question appears, *Richardson v. Wyatt*[783] (an action for partnership accounting), it was held simply that the wife of a deceased partner was not entitled to dower in partnership lands. The syllabus is more extensive than the report in this respect, stating that "the widow of one of the deceased copartners is not entitled to dower in the lands and houses purchased with the copartnership funds, and held in the names of all the copartners, or on their behalf." No authority is cited, and it is not clear whether the conclusion reached is a determination solely for the purposes of the case or is a general statement of law; nor does it appear whether, after paying debts and adjusting firm accounts, there was anything left of the deceased partner's interest to which dower might attach. In *Reed v. Kennedy*,[784] one of two partners, after dissolution, conveyed to the other his interest in lands which had been bought with partnership funds and transferred to the partners jointly. The grantor's wife did not renounce dower. The land subsequently passed to the defendant, and this action was brought by the widow of the partner who had conveyed to the copartner. Although the defendant's position was that the real estate was to be treated as personalty, no discussion of it appears in the opinion. Instead, the court declared that the incident of survivorship having been eliminated by statute from the joint tenancy, the estate of each partner became a heritable one to which dower would attach. No point was made of the position of firm debts and equities in relation to dower, and none of those factual problems appeared. The case, however, does assert positively

782. While the law does not make provision for family allowances as a prior charge—ahead of creditors—upon a decedent's estate, in some cases the personal representative will be allowed credit for expenditures made for the family's support. See Darby v. Darby, 2 McCORD'S EQUITY 451 (S. C. 1827); Ordinary v. McClure, 1 BAILEY'S LAW 7 (S. C. 1828); Hinton v. Kennedy, 3 S. C. 459 (1871); Graves v. Spoon, 18 S. C. 386, 391, 392 (1882). It is not to be assumed here, either, that the purpose of the Act is to create charges or priorities for family allowances or widow's support where none existed before. The comment in note 126, *supra*, is also applicable here.

783. Note 120, *supra*.

784. Note 708, *supra*.

the right of dower and was used afterwards as the basis of the decision in *Bowman v. Bailey.*[785] There, one of two partners sold to the other his interest in partnership land (held in the names of both), with an understanding that the latter was to sell it to the defendant. The selling partner did not make a deed to his copartner, and both partners joined in a deed to the defendant. The plaintiff, wife of the buying copartner, did not renounce dower. It was held that she was entitled to dower in the one-half interest to which her husband had legal title. The court took notice of the conversion to personalty, but seemed to limit it to the extent of necessary application to firm debts; and, since there was no showing of firm debts, and as the contest was not between firm creditors and the wife, but between her and a purchaser, the court declined to deal further with that phase of the problem. The suggestion in this case is that only in favor of firm creditors is dower postponed; and the case might stand for the proposition that the transfer of firm property by partners in the course of business would be subject to unrenounced dower—a proposition which is at odds with numerous cases elsewhere which state that firm conveyances need not be joined in by the wives of the partners.[786]

Later cases look upon dower in a light more in harmony with the prevailing view based on *pro tanto*, or partial, conversion—that after payment of firm debts *and* adjustment of firm equities, dower attaches.[787]

The effect of the Act will be, of course, to change fundamentally the status of dower in partnership property. An acceptance of the "out and out" view of conversion, if that is the interpretation to be given to Section 26, would, naturally, work the result of eliminating dower, initially and finally, from firm real estate. But the express language of Section

785. Note 706, *supra.*
786. MECHEM, PARTNERSHIP, § 165; CRANE, PARTNERSHIP, § 45.
787. Wagner v. Sanders, note 183, *supra,* at 197; Schenk v. Lewis, note 151, *supra*—in which court ordered sale of deceased partner's interest free of dower to survivors at appraised value of interest, and if not bought by survivors then whole of firm real estate to be sold, free of dower. The amount due the deceased partner's estate was held to constitute a *lien;* this can be treated as another instance of the Partner's Lien, discussed in Section 18.
The matter of dower in partnership property has already been touched upon, to some extent, in the discussion of the conversion of real property to personal.
On the whole subject of dower, see note, 25 A. L. R. 389, 411.

25(2) (e), without more, accomplishes that end. It is the *right* of the partner in firm real estate which is not subject to dower; and the transfer of such an interest by one partner to another, or their combined transfer to a third person, would be free from any proper assertion of dower, which never attached at the outset. Moreover, the underpinning of dower (as declared in *Reed v. Kennedy*, and followed in *Bowman v. Bailey*—that there is no survivorship, but a severance creating a tenancy in common) is removed by the tenancy in partnership, which, in Section 25(2) (d), specifically puts the deceased partner's right in the survivor. All in all, it can be asserted with a fair amount of assurance that partnership property, even after payment of firm debts and adjustment of firm accounts, is not subject to dower. It is, however, possible that if there has been an *inter vivos* dissolution and the partners have set aside to each other in severalty undivided interests in firm real estate, the respective interests—being no longer firm estate—would become amenable to dower.

If a partner owning real estate in severalty thereafter conveys it, or an interest in it, to the firm, dower would be paramount—not only to the rights of the other partners but to firm creditors as well—since the right of dower had antecedently attached and no subsequent act of the husband partner could affect it.[788]

Assignment of Partner's Interest in Partnership. The assignment of a partner's interest in the partnership, as distinguished from assignment of his right in specific firm property, is not only not forbidden anywhere in the Act but is specifically recognized and controlled by Section 27. That interest, of course, is the share defined by Section 26. According to the Commissioners' note, the chief purpose of Section 27 is to effect a modification of the general rule that an assignment by a partner of his interest in the partnership, whether to a third person or to his copartner or copartners, causes dissolution.[789] The effect, therefore, of the Section is that such an assignment may not of itself and without

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788. MECHEM, PARTNERSHIP, § 165; CRANE, PARTNERSHIP, § 45; 17 Am. Jur. 682; Chase v. Angell, 148 Mich. 1, 108 N. W. 1105, 118 Am. St. Rep. 568 (1906); Shupe v. Rainey, 255 Pa. 432, 100 A. 138 (1917).

789. MECHEM, PARTNERSHIP, § 364; CRANE, PARTNERSHIP, § 78; 68 C. J. S. 852; 40 Am. Jur. 299; note, 69 Am. St. Rep. 416, 417.

The rule has not been so strictly applied when the transfer is by way of security.

more, work a dissolution, although it may furnish ground to the other partners—if the assignment has been to a third person or to some, but not all, the copartners—to compel dissolution through court action. Since partnership is a voluntary relation, it is clear that a partner assigning to a third person cannot, by his act, introduce a new partner into the concern; and the Section sharpens that principle by denying to the assignee the right to interfere in management or administration or to inspect the books.

What the assignee receives during the life of the partnership is only what his assignor would receive—profits, if any. On dissolution he may receive the whole interest of his assignor, as prescribed in subsection (2). While he cannot, ordinarily, bring about a dissolution and thereby accelerate the receipt to himself of the assignor's full share, he may obtain dissolution—under Section 32(2)—if the partnership was one at will, or if being for a definite term or particular undertaking it had terminated or been accomplished.

Nothing in the South Carolina cases operates as a denial of the principle that a partner may assign his interest in the partnership; and it may be said that, with respect to the validity of such an assignment, prior local law is in accord with the Act.[790] But, again, the transfer of the interest carries only the right to participate in the surplus after discharge of firm obligations and settlement of accounts; and while, hereafter, a partner may transfer as effectively as he did before and pass to his assignee his ultimate share, the consequences are to be shaped by the provisions of Section 27.

South Carolina authority on the dissolving effect of an assignment to a third person of a partner's interest in the partnership is meager, but there is fairly clear inference in at least two cases that such a transfer operates to dissolve the partnership.[791] Authority with respect to a partner's transfer to his copartners is slightly more plentiful, and the

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790. Brown v. Smith, note 523, *supra* (which might, perhaps, be regarded more accurately as transfer of partner's interest in specific firm property); Jones v. Smith, note 176, *supra*, at 536. Some or all of the cases in note 764, *supra*, might be regarded as intended transfers of a partner's interest in the partnership.

See, also, Brown v. Foster, note 459, *supra;* Anderson v. Holmes, 14 S. C. 162 (1880).

791. Brown v. Foster, note 459, *supra*—partner sold interest in firm to third person, who apparently succeeded seller in firm; Anderson v. Holmes, note 790, *supra*—partner sold interest in firm to third person, who formed new firm with other partners.

rule seems to be that a transfer to copartners dissolves the partnership.[791a] In both types of cases, however, it appears that no issue was made as to whether or not dissolution had occurred, and that the transfers were regarded by the parties as part of planned dissolution. To a certain extent, because they fit into the discussion of dissolution as such, the effect and significance of partners' transfers will be dealt with again under the Causes of Dissolution.

PART VI.

DISSOLUTION AND WINDING UP

SECTION 29. Dissolution Defined. The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

SECTION 30. Partnership Not Terminated by Dissolution. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

SECTION 31. Causes of Dissolution. Dissolution is caused:

(1) Without violation of the agreement between the partners,

(a) By the termination of the definite term or particular undertaking specified in the agreement,

(b) By the express will of any partner when no definite term or particular undertaking is specified,

(c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking,

(d) By the expulsion of any partner from the business *bona fide* in accordance with such a power conferred by the agreement between the partners;

791a. DeGroot v. Darby, note 470, *supra;* Brown v. Chandler, 50 S. C. 385, 27 S. E. 868 (1897)—holding that agreement to sell at future time does not immediately work dissolution; Huffman v. Huffman, note 65, *supra.*

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of court under section 32.

SECTION 32. Dissolution by Decree of Court. (1) On application by or for a partner the court shall decree a dissolution whenever:

(a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

(b) A partner becomes in any other way incapable of performing his part of the partnership contract,

(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(d) A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(e) The business of the partnership can only be carried on at a loss,

(f) Other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under sections 27 or 28:

(a) After the termination of the specified term or particular undertaking,

(b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

The four Sections set out above are bracketed because they deal with the generating features of dissolution—what it is and how it is brought about. These Sections serve the useful purpose of dispelling a confusion that has always existed in

the law—the identification of "dissolution" with "termination," and the inclusion of "winding up" in the one term or the other. The Commissioners' note to Section 29 states that "In this Act dissolution designates the point in time when the partners cease to carry on the business together; termination is the point in time when all the partnership affairs are wound up; winding up, the process of settling partnership affairs after dissolution."

It is quite clear, from the definition in Section 29, and the express declaration in Section 30, that "dissolution" and "termination," however much they may seem alike, are not terms that may be interchangeably employed and that they denote different things. In the usual case there is the sequence: dissolution—produced by a given event; the intermediate period of winding up; and finally the reaching of that point at the conclusion of the winding up which marks the end of the whole relationship. That is not always so, however; as—for example—the partners, on a voluntary dissolution taking the form of a sale by one partner of his interest to his copartner, may have the dissolution accompanied or preceded by a settlement merged in, and forming the basis of, the dissolution—so that nothing may remain to be done and the partnership affairs are completed.[792] In other words, the winding up may take place before, or at the time of, dissolution instead of after. In such a case, dissolution and termination are contemporaneous.

While the matter may be one of nomenclature rather than of consequence, incidents of diversity of terms and concepts are to be found in the South Carolina cases. In *Fisher v. Tucker*,[793] it is said: "The contract of partnership is *entirely dissolved* (emphasis supplied) by the death of one of the partners." The statement is made in *Carroll v. Alston*[794] that "the partnership *terminated* with the death of either party." In *Schenk v. Lewis*,[795] dissolution and termination are used interchangeably, and the case speaks of death as usually working an "immediate dissolution." In *Sims v. Smith*,[796] which in-

792. See French v. Milholland, 218 Mich. 248, 187 N. W. 254, 21 A. L. R. 1 (1922); McNeny v. Touchstone, —— Cal. ——, 54 P. 2d 1124 (1936).
793. Note 280, *supra*, at 171.
794. Note 120, *supra*, at 12.
795. Note 151, *supra*, at 241, 242.
796. Note 78, *supra*, at 566.

volved a partnership for a particular undertaking, it was declared that "upon the completion of their contract, or the accomplishment of the entire business for which the partnership was formed, it eo instanti terminated." Dissolution has been treated as a sort of continuing process; as in *Kinsler v. McCants*,[797] where it is said that "a partnership is not completely dissolved until its affairs are closed." Elsewhere, and coming closer to the principle stated in Section 30, it is stated, in *Duncan v. Westerlund*,[798] that, after the death of a partner, "the partnership *continued in existence* (emphasis supplied) for the purpose of a final settlement."[798a] It is obvious that the usefulness of purpose that has already been described as flowing from these Sections will work to clear up the conflict of terms and ideas apparent in all these cases.

Causes of Dissolution. It may be stated as a generality that, on the whole, the South Carolina cases treat as causes of dissolution the situations set out in Section 31. The cases do not, however, enumerate, as does the Section, all the situations that may induce dissolution; but the total of the cases furnishes a compilation, so far as they go, of the determinants of dissolution.

DISSOLUTION BY TERMINATION OF TERM OR UNDERTAKING. The subject matter of this topic has largely been anticipated in the discussion, under Section 23, of Continuation of Partnership Beyond Fixed Term. It bears repeating here that the rule announced in Section 31(1) (a), that dissolution is caused "by the termination of the definite term or particular undertaking specified in the agreement," is accepted in the South Carolina cases.[799]

Whether in a given case the partnership is for a fixed term or particular undertaking on the one hand, or is of a different

797. Note 196, *supra*, at 47.
798. Note 565, *supra*, at 98.
798a. See, also, Jones v. Smith, note 176, *supra*, at 532, 534, indicating that the partnership continues until final settlement; Poole v. Gist, note 233, at 261, *supra*, where, in dealing with liability of partners in dissolved law firm, it is said "as between themselves, the partnership was dissolved, but with respect to their engagement to the plaintiff they could not dissolve it;" Meggett v. Finney, 4 STROBERT'S LAW 220, 221 (S. C. 1850)—"the partnership is dissolved as to things future, but as to things past it continues and must always continue;" Metz v. Commercial Bank, note 15, *supra*—to effect that partnership continues so long as there are unpaid partnership obligations.
799. See the cases cited in note 696, *supra*.

character—as at will—on the other, is a matter of factual interpretation. In *Edwards v. Johnson*,[800] the court, in construing the particular agreement on this point, declared: "As there is no definite statement in the agreement as to the date at which the partnership should determine, the term during which it is to continue in existence is a matter of inference from the nature of the engagement between the partners, the contract provision and the facts and circumstances surrounding the parties; but if no such inference of an intention for its continuance for some period can be so ascertained, then the partnership agreement would necessarily be construed as being determinable at the will of any one of the partners, upon notice." If the agreement is for a term, the length of the term may come into dispute, to be ascertained by the triers of fact;[801] but, as usual, a finding not sustained by the evidence will not be upheld.[802] The determination of the extensiveness of the undertaking, where the partnership is for the accomplishment of a particular object, is also a matter for factual analysis, which, if the agreement is not represented by an unambiguous writing or is not otherwise free from doubt, presents, in a law case, an issue for the jury.[803]

DISSOLUTION BY WILL OF PARTNER—PARTNERSHIP AT WILL. Subsection (1) (b) of Section 31 expresses the familiar rule that where the partnership is not formed for a specific term or undertaking, the partnership is at will and may be dissolved by any partner at any time, without liability to the other partners.[804] The rule is followed in South Carolina.[805] There is, however, in South Carolina and elsewhere, the requirement that to accomplish dissolution in this way, notice of such intention must be given to the other partners. The condition is thus expressed in *Edwards v. Johnson*:[806] "While a partnership at will is of course capable of being brought to an end at the will of any partner, this result can only be accom-

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800. Note 80, *supra*, at 95.
801. Brasfield v. Brown, note 662, *supra;* Edwards v. Johnson, note 80, *supra*.
802. Brasfield v. Brown, note 662, *supra*.
803. Sims v. Smith, note 212, *supra*.
804. MECHEM, PARTNERSHIP, § 351; CRANE, PARTNERSHIP, § 74; 68 C. J. S. 843; 40 Am. Jur. 291.
805. Carroll v. Giles, note 119, *supra;* Edwards v. Johnson, note 80, *supra;* McPherson v. Sirrine, note 538, *supra*.
806. Note 80, *supra*, at 97. The partnership was held not to have been dissolved because notice had not been given.

plished by a notice of such determination given by one partner to all the others, and the partnership continues to exist until such notice is actually given." While the subsection under discussion does not in terms prescribe notice, so much is implicit in or inferred from the use of the prior adjective "express."[807]

DISSOLUTION BY MUTUAL CONSENT. In substance Section 31(1)(c) is an affirmation of another familiar rule—that, even though the partnership is one for a definite term or specific undertaking, all the partners may dissolve by mutual consent.[808] The same is, *a fortiori,* true of a partnership at will. The South Carolina holdings are in accord.[809]

The mode of manifesting the mutual consent is not prescribed by law, and the evidence can be pieced together from all the facts.[810] Although it is not necessary, the parties, in their agreement of partnership for a definite term or particular undertaking, may provide for earlier dissolution by consent.[811] Where the articles of partnership are under seal and provide for dissolution under such circumstances, the dissolution, if it takes place, may be shown by parol and need not be evidenced by a writing under seal, since the mutual act is not an extinguishment of the covenant but a performance of it.[812]

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807. That such notice is necessary under the Act, see Bayer v. Bayer, 214 N. Y. S. 322, 215 App. Div. 454 (1926)—notice need not be formal; Graham v. Street, 109 Utah 460, 166 P. 2d 524 (1946); Schneider v. Newmark, 350 Mo. 955, 224 S. W. 2d 968 (1949).

808. MECHEM, PARTNERSHIP, § 450; CRANE, PARTNERSHIP, § 374; 68 C. J. S. 846; 40 Am. Jur. 292.

809. Dickinson v. Bold, note 696, *supra;* White v. Union Ins. Co., note 307, *supra,* at 559.

810. Dickinson v. Bold, note 696, *supra.*

811. Truesdell v. Baker, 2 RICHARDSON'S LAW 351 (S. C. 1846). See, also, McPherson v. Sirrine, note 538, *supra,* where articles of partnership having many members provided any one of them might withdraw at any time; the partnership here was not for a fixed term or undertaking. In Metz v. Commercial Bank, note 15, *supra,* the articles of partnership, which was for a fixed term, provided that if at the end of the first year the business was unprofitable either partner might terminate the partnership upon stated notice.

812. Truesdell v. Baker, note 811, *supra.* The court here had to contend with the ancient rule that covenants under seal can be dissolved or altered only by agreements also under seal—"every contract ought to be dissolved by matter of as high a nature as that which first made it obligatory." It is doubtful that the rule has any present vitality, for it has more recently been held that a sealed instrument may be modified by parol. Koth v. Bd. of Education, 141 S. C. 448, 140 S. E. 399, 55 A. L. R. 682 (1927). See, MECHEM, PARTNERSHIP, § 359: "Even where the partnership was created by written instrument, or by instrument under seal, a dissolution by parol is usually held sufficient."

The fiduciary relation persists between the partners in matters affecting dissolution; and if an agreement of dissolution and settlement is based on calculations which are the result of fraud, misrepresentation, or lack of full disclosure, the agreement may be set aside. In *Badder v. Saleeby*,[813] it is said that "the obligation of good faith is especially imperative, 'where one partner is endeavoring to get rid of another, or to buy him out;'" and "The necessity for good faith applies in the case of a sale by one partner to another of his partnership interest, and such sale will be sustained only when it is made for a fair consideration and upon full disclosure of all important information and value." But from the same case it appears that the agreement need not be set aside as a whole, thereby restoring the partnership, but essential relief may be granted by recasting the settlement and allowing the dissolution to stand.

The subsection under discussion, it is to be noted, allows dissolution by the express will of those partners who have not assigned their interests or suffered them to be charged for their separate debts. It has previously been observed, under Sections 27 and 28, that assignment of a partner's share, or purchase of it under a charging order, will not of itself work a dissolution. A partner who sold his interest to a third party would almost certainly by this act be manifesting an intent no longer to be a partner; and it would seem that the definition of dissolution in Section 29—"ceasing to be associated in the carrying on" of the business—would fit the case. This should be true, although a transfer of interest is not given as a cause of dissolution in Section 31, unless such a transfer could be said to fall within it as being a manifestation of a will to dissolve either without violation or in contravention of the partnership agreement. Nevertheless, Sections 27 and 28 prevent such an automatic dissolution; and whether the partner who has voluntarily or involuntarily assigned his interest is regarded, under the circumstances, as still a member, or the partnership as such is treated as continuing without him, it is only the other partners who may bring about through their concurrence a dissolution of the firm. The assigning partner no longer has power of action, nor does his assignee, to bring about private dissolution, unless the others

813. Note 615, *supra*, at 107.

are willing. Judicial dissolution alone is available to the assignee, under Section 32(2)—where the partnership is at will or the specific term has expired or the particular undertaking has been accomplished. No right to go to court for the purpose is given to the assigning partner.

The same expression of intention not to remain a partner may be seen in the transfer by a partner of his interest in the firm to his copartners. Such a transfer, except when made as security, would, for all practical purposes, produce the dissolution resulting from "ceasing to be associated in the carrying on of the business." If the transfer is to a sole copartner or to all the other partners, as the case may be, the act normally would denote the unanimous will of the partners to dissolve. Yet, aside from the Act, it has been held that this is not necessarily so, if there is no intent to bring the relationship to an end, and such an act may be regarded as merely evidence of dissolution.[814] And it has been held that Section 27 of the Act applies against automatic dissolution where the transfer is to all the remaining copartners, or to a sole copartner, rather to some of the partners.[814a] A stronger case against dissolution is made out where there is a transfer to one or more but not to all the copartners. Section 27 would be more readily operative in such a case; and the observations on assignments to a third person would be appropriate in that respect.

The South Carolina cases that offer instances of a partner's sale of his interest to a third person,[814b] and of a sale to copartners[814c] have already been noted. In all of them the transfer has been treated as a dissolution, but it is fairly apparent in each that the transfer, as between the selling partner and the copartners, was intended to act as, or to be a part of an agreement of, dissolution; and they are, for all major purposes, illustrations of dissolution by mutual consent.

DISSOLUTION BY EXPULSION OF PARTNER IN ACCORDANCE WITH POWER. Section 31(1) (d) deals with a situation that is

814. MECHEM, PARTNERSHIP, § 364; 68 C. J. S. 582; 40 Am. Jur. 299; note, 69 Am. St. Rep. 417.

814a. First Nat. Trust & Svgs. Bank v. Industrial Acc. Comm., 213 Cal. 322, 2 P. 2d 341, 78 A. L. R. 1324 (1931). In Stilgenbauer v. U. S., note 762, *supra*, it is stated that a partnership is dissolved by a partner's transfer of his interest to the remaining copartners, construction here also being of the California Uniform Partnership Act.

814b. See the cases in note 791, *supra*.

814c. See the cases in note 791a, *supra*.

comparatively infrequent. It is presented apparently in only one South Carolina case, *McPherson v. Sirrine,*[815] in which the articles of partnership authorized the expulsion of any member by the other members for any cause which they deemed reasonable, and prescribed the settlement to be made upon such a contingency. The plaintiff there sued alleging wrongful expulsion—as for being unreasonable and without cause. Because his action was predicated upon, and relief was sought under, the contract provisions, he was held bound by the stipulations affecting severance of the relationship as it might occur. The action not being for damages for wrongful expulsion, but for claimed rights under the contract, it was held that no inquiry into the motives of the other partners in expelling the plaintiff could be had. There is intimation—or at least consideration of the possibility—that an action for bad faith expulsion might lie, if properly brought, against the other partners as individuals. Even so, the court seems to treat the particular partnership as at will, saying (at p. 207): "The view of the situation above set forth is accentuated when recourse is had to the fundamental fact that the partnership agreement does not fix any definite time for the termination of the partnership status, but leaves the time element to be governed by contingencies such as the one that arose in the present case. Under such circumstances, the partnership is for all practical purposes a partnership at will, subject to dissolution by the act of one or more of the partners at any time."

There is no conflict, it is believed, between *McPherson v. Sirrine* and the rule in the subsection. Both recognize the propriety and effectiveness of a provision for ouster; and to that extent pre-existing law falls into the Act. The necessity of good faith, while not passed upon in the case because it could not influence the decision, could, on common sense principles, be said nevertheless to be inherent in the older law.

An expulsion in bad faith would be ineffectual as expulsion under the agreement of partnership, but it would nonetheless be effective as a dissolution, on principle, because of the manifested will of the ousting partners. As a dissolution in contravention of the agreement, it would fall under Section

815. Note 538, *supra*.

31(2). The property rights of a partner *bona fide* expelled from the firm are detailed in Section 38(1).

DISSOLUTION IN CONTRAVENTION OF AGREEMENT. The Commissioners' note to Section 31(2), which makes for dissolution by express will of a partner even in contravention of agreement, states that its provisions are designed "to settle a matter on which at present considerable confusion and uncertainty exists. The paragraph as drawn allows a partner to dissolve a partnership in contravention of the agreement between the partners. This is supported by the weight of authority. . . . The relation of partners is one of agency. The agency is such a personal one that equity cannot enforce it even where the agreement provides that the partnership shall continue for a definite time. The power of any partner to terminate the relation, even though in doing so he breaks a contract, should, it is submitted, be recognized."

The weight of authority mentioned by the Commissioners has, since the appending of the note, become even heavier.[816] The result, of course, is that while a partner, because of his contract, may not have the right to dissolve the partnership, he has the *power* to do so. It has sometimes been said that no partnership is indissoluble[817]—which is something very much like the truism that no will is irrevocable, even though to revoke it would be in violation of contract.

There is no doubt that the pre-existing South Carolina view is in accord with the weight of authority and within the rule of the Act. In *Price v. Middleton*,[818] approval is given to the following language from probably the leading American case on the particular subject, *Karrick v. Hannaman*:[819]

> No partnership can efficiently and beneficially carry on its business without the mutual confidence and co-operation of all the partners. Even when, by the partnership articles they have covenanted with each other that the

816. MECHEM, PARTNERSHIP, §§ 353-358; CRANE, PARTNERSHIP, § 76; 68 C. J. S. 844; 40 Am. Jur. 292. The English view is different. MECHEM, PARTNERSHIP, § 358; CRANE, PARTNERSHIP, § 76.
817. MECHEM, PARTNERSHIP, § 355; 68 C. J. S. 842; 40 Am. Jur. 298. In Atha v. Atha, 303 Mich. 611, 6 N. W. 2d 897 (1943), it is said that "The right of a partner to dissolve is a right inseparably incident to every partnership." As used here "right" is to be taken as meaning "power".
818. Note 10, *supra*, at 111.
819. 18 S. Ct. 135, 168 U. S. 328, 335, 42 L. Ed. 484, 489 (1897).

> partnership shall continue for a certain period, the partnership may be dissolved at any time, at the will of any partner, so far as to put an end to the partnership relation and the authority of each partner to act for all; but rendering the partner who breaks his covenant liable to an action at law for damages, as in other cases of breach of covenant.

In *Price v. Middleton*, the court, after determining that the relationship between the plaintiff and the defendants was that of partners and not that of employee and employer, paraphrased the quoted language in its application to the case (at p. 114): "It is to be considered, too, that the law regards the partnership dissolved by the expulsion of one member, only because it is impossible to force the parties to continue in a relation implying so much confidence." Dissolution by act in breach of contract is further recognized in *Welling v. Crosland*, [820] in which it is said, concerning the effect upon liability to third persons of abandonment of an enterprise by some of its members: "While, as between themselves, a member . . . *may withdraw, subject to accountability for damage done to the others* (emphasis supplied), he cannot, by withdrawing or abandonment, relieve himself from obligations assumed while he was a member."

Although subsection (2) does not mention liability or the consequences of wrongful dissolution, liability in damages is specifically recognized and preserved in Section 38, as are other consequences, rights and liabilities.

In *Kinloch v. Hamlin*,[821] a partner—the plaintiff's testator—in a firm organized for a term of ten years, withdrew much of his capital and otherwise failed to carry out his continuing part of the bargain after three years. The defendant, the other partner, continued to operate the business. A recovery of profits made by the defendant after the other partner's abandonment was denied to the plaintiff. It is not clear whether the court treats the conduct of the violating partner as a dissolution, although for all practical purposes it was so, but this language from the case is relevant: ". . . he has no right to withdraw from the partnership. It is true, he has no right to dissolve the partnership, so far as the rights of the

820. Note 74, *supra*, at 142.
821. Note 120, *supra*, at 19.

defendant were concerned. . . . But surely it was competent for him to abandon his interest in the concern, to forfeit his share of the profits." It is to be noticed that the defendant was not suing for wrongful breach, but the representative of the wrongdoer was the suing party. There seems to be an inference here that even in the face of acts tantamount to dissolution, the innocent party may continue the business. In Section 38(1) (II) (b), the right is given to the partners who have not wrongfully caused dissolution to continue the business during the agreed term of the partnership, subject to prescribed safeguarding provisions.

DISSOLUTION BY SUPERVENING ILLEGALITY. Section 31(3), dissolving a partnership by reason of subsequent events rendering the business unlawful, embodies a rule which is generally followed.[822] The rule contemplates such situations as a business becoming unlawful by reason of change in the law, or a change in the personal status of a partner which would render it unlawful for him to continue. No South Carolina cases touch upon the issue of illegality arising after the formation of the partnership. The only case bearing a resemblance to the problem is *Belcher v. Conner*,[823] noted in the early pages of this article in connection with the question of illegality in the creation of a partnership. There, a partnership formed to buy and sell slaves was dissolved by the death of one of the partners in 1859, and an action for accounting, begun in 1860, and reaching appeal in 1867, terminated in favor of the plaintiff in the face of a defense of illegality. Since dissolution had occurred by death before slavery became illegal, no question could arise as to dissolution being caused by change in the law.

DISSOLUTION BY DEATH OF PARTNER. Section 31(4), declaring dissolution by death of a partner, states an ancient principle of law. Whether the partnership is for a definite term or particular undertaking, or at will, dissolution results not only as between the deceased partner and his copartners but as between the survivors as well.[824] The rule has found

822. MECHEM, PARTNERSHIP, § 370; CRANE, PARTNERSHIP, § 376; 68 C. J. S. 854.
823. Note 40, *supra*.
824. MECHEM, PARTNERSHIP, §§ 361; CRANE, PARTNERSHIP, § 77; 68 C. J. S. 848; 40 Am. Jur. 326.

frequent approval and application in the South Carolina cases.[825]

It would seem, from the nature of things, that death would produce dissolution immediately, without regard to subsequent events, prior agreements, or the nature of the partnership. Yet, in *Schenk v. Lewis*[826] appears the following:

> While it is true, as a general rule, that the death of a partner effects an immediate dissolution of the partnership, it is not always so. If there was any special skill or capacity in the deceased partner, the partnership would, of course, cease to exist from the time of his death. But if the business was for the purpose of keeping the dead partner's capital invested in the business, there is no reason why his death would necessarily terminate the relation. 2 Story Eq. Jur. (14th Ed.), Sec. 916.[827]

This statement by the court was made in considering the question of liability for profits made by the surviving partners who had continued the business instead of liquidating it. The solution of this problem does not entirely depend upon whether the partnership is regarded as dissolved at once or afterwards. Too, the statement is largely dictum because of the fact, as the court concedes, that the parties in the litigation had proceeded upon the theory that the firm had been instantly dissolved.[828] There is, perhaps, some justification even in the earlier South Carolina law for the view taken in *Schenk v. Lewis*. In *Carroll v. Alston*,[829] the representative of

825. White v. Union Ins. Co., note 307, *supra;* Fisher v. Tucker, note 280, *supra;* Jones v. McMichael, note 47, *supra;* Carroll v. Alston, note 120, *supra;* Wiesenfeld v. Byrd, note 269, *supra;* Tompkins v. Tompkins, note 550, *supra;* McBrayer v. Mills, 62 S. C. 36, 39 S. E. 788 (1901); Schenk v. Lewis, note 151, *supra;* Crews v. Sweet, note 364, *supra.* The list is not exclusive, as there are many more cases involving the death of a partner in which the fact of dissolution is taken for granted, although the term may not be used. The cited cases are merely those which state the proposition.

826. Note 151, *supra,* at 241.

827. The quoted language is referred to, though not necessarily with approval,—and differentiated from an *inter vivos* dissolution—in Karres v. Pappas, note 578, *supra.*

828. Professor Crane, in his work on Partnership (§ 77, n. 39), comments that "in Schenk v. Lewis * * * it is suggested, as a dictum, that dissolution would not necessarily follow the death of a partner who was not expected to furnish any services. It is submitted that this should not be true, unless there is not only concentration of management in elected representatives, but in transferability of shares, as in a joint-stock company."

829. Note 120, *supra.*

a deceased partner in a firm to which the partners contributed skill and services as well as property was denied participation in profits made by the survivor. The reason was given (at p. 12):

> The partnership terminated at the death of either party. Can the right to net profits survive that event? The consideration of the agreement, in the present case, was the mutual skill and services of the partners, for the profits of the business did not depend upon capital, but upon skilled labor, and, accordingly, ceased with the death of either of the copartners. . . . It would be virtually declaring as the intent of the parties, that, in the event of the death of one of the parties, his interest should continue for the benefit of his representatives, free from the necessity of either contributing to the common interest or liability for its losses.

There may be here a reverse inference of suspended dissolution under different circumstances; but whatever the force of these two cases might have been as stating, by direction or indirection, that death does not in such instances dissolve the partnership, the Act now deprives them of vitality in these respects. In addition to the flat declaration in the subsection that death dissolves the partnership the definition in Section 29 makes the result inevitably so—since a dead partner is the obvious one who ceases to be associated in the carrying on of the business.[830]

Difficulty has arisen in some of the cases where there have been special agreements that the partnership shall continue after a partner's death, or other agreements designed to have the same effect. In some of the jurisdictions in which the Act is in force, there are statements to the effect that death will cause dissolution in the absence of special agreement—or, negatively, that dissolution will not take place if there is a special agreement to the contrary.[831] On the other hand, many

830. In Zeibach v. Nasser, 12 Cal. 2d 1, 82 P. 2d 375 (1938), the court, without adverting to the Act, in force in the state, held that where a partner had a small investment in the firm and took no active part, the firm was not dissolved upon his death. The authority cited in support is Schenk v. Lewis. No other case in a U. P. A. jurisdiction makes a similar assertion.

831. Underdown v. Underdown, 279 Pa. St. 482, 124 A. 159 (1924); Gerding v. Baier, 143 Md. 520, 122 A. 675 (1924).

other cases treat the dissolution as automatic, although binding force in the agreement may be permitted.[832] The problem, outside of South Carolina, is not new. Agreements which are designed to prevent the disruption of a business and to insure or allow its continuity take various forms: the partners may agree that the business shall be continued after the death of one; it may be agreed that the capital of a deceased partner shall remain in the firm; it may be provided that the survivor shall purchase, or have the option to purchase, the interest of the deceased partner. Or a partner may provide in his will that his executor or a legatee shall take his place in the business. All such arrangements may be given effect, but the holding has generally been, nevertheless, that the firm is dissolved by death. If there is more than one survivor continuing the business, or if the representative or legatee of the deceased partner, by virtue of testamentary sanction or original agreement, joins with the survivor as a participant in the business, a new firm is formed.[832a] What happens is that the *business* continues and not the old firm—except as it is kept alive for purposes of settlement.[833]

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832. Benedict v. Price, 38 Fed. 2d 309 (D. C., N. Y., 1929)—agreement that business be carried on and profits paid to estate of deceased partner; Wolbach v. Commr. Corpns., 268 Mass. 367, 167 N. E. 677 (1929)—agreement to continue business; Darcy v. Commr. Int. Rev., 66 Fed. 2d 581 (C. C. A. 2, N. Y., 1933)—agreement providing that in computing share of partner income between time of partner's death and end of business year should be included, court stating: "That agreement * * * did not, and could not keep the partnership in existence with a dead man as partner;" Abel v. O'Hearn, —— Cal. App. ——, 218 P. 2d 827 (1950)—agreement to continue business.

832a. The bequest by a testator of his interest in a partnership does not make the legatee a partner with the survivor, unless the survivor and the legatee enter into a contract of partnership. Nor does the payment of profits to the legatee in consideration of the sale of the interest. Dulany v. Elford, note 57, *supra;* Dulany v. Elford, note 105, *supra.* See the discussion under Section 7(3) (c).

833. MECHEM, PARTNERSHIP, § 361; CRANE, PARTNERSHIP, §§ 73, 77—"Where courts have said that the rule may be varied by agreement, what is meant is that in such cases, the dissolution is not followed immediately by the usual consequences of dissolution, *i. e.*, winding up the business."

See, also, FULLER, *Partnership Agreements for Continuation of Enterprise After Death of Partner*, 50 YALE L. J. 202 (1940); 40 Am. Jur. 327; note, 73 A. L. R. 983.

Continuance of the business is specially dealt with in Sections 41 and 42 of the Act, which is a fair recognition by implication of the propriety of such arrangements. Where such agreements are made, the Act is said to control the *liquidation* of the partnership. In re Eddy's Estate, 26 N. Y. S. 2d 115, 175 Misc. 1011 (1941); Wood v. Gunther, 89 Cal. App. 2d 718, 201 P. 2d 874 (1949).

Under the Act it is difficult to see, whatever may be the practical effect of special agreements, how *dissolution*—as distinguished from winding up and termination—can be prevented by such agreements. There is not, as there is on other points elsewhere in the Act, a qualification that the result shall be subject to, or altered by, agreement.[834] Strangely, agreements designed to keep a business going, while they are actually fairly common in South Carolina, do not seem to have gotten into the cases, and judicial contact with them is yet to be established—at least, so far as their effect is concerned.[835]

DISSOLUTION BY BANKRUPTCY OF PARTNER OR PARTNERSHIP. Section 31(5) is a restatement of the well-established rule that bankruptcy of any partner or of the firm produces dissolution.[836] Authority in South Carolina, while scarce, is in accord—at least as to the adjudication of the bankruptcy of a partner.[837]

OTHER CAUSES AND FEATURES OF DISSOLUTION. Section 31 does not embrace all the causes of dissolution as they are usually regarded as existing at common law. Nor does any other Section furnish a supplement of causes, other than Section 32 which enumerates the grounds for dissolution by judicial decree. It has already been noted that the sale of a partner's interest to a third person or to some or all of his copartners is not a prescribed cause of dissolution, although the circumstances might indicate the sale was an expression of a will to dissolve. The sale or transfer *by the firm* of all the

834. The North Carolina version of the Uniform Partnership Act has an amendatory provision to subsection (4): "unless the partnership agreement provides otherwise." G. S. §§ 59-61.

835. In McPherson v. Sirrine, note 538, *supra*, provisions for various contingencies, including death of a partner, appear in the articles of partnership—that on the voluntary or involuntary withdrawal of a partner, or upon his death, his interest in the firm as such should not continue, and payment to him or his estate to be made dependent upon the circumstances of his severance from the firm; and a special recital that "the intent of the agreement is to insure the name and continuance of the organization." The break in association in this case was not caused by death.

In Metz v. Commercial Bank, note 15, *supra*, it was provided that upon the death of one partner, the survivor should have the option of purchasing the decedent's interest. Dissolution was not caused by death.

836. MECHEM, PARTNERSHIP, § 362; CRANE, PARTNERSHIP, § 77; 68 C. J. S. 850; 40 Am. Jur. 305.

837. Crews v. Sweet, note 364, *supra*. There are other cases in which the fact or allegation of the bankruptcy of a partner appears, but no treatment is given of the dissolving effect of the bankruptcy. Pelzer Mnfg. Co. v. Pitts, note 185, *supra;* Wright v. Hodges, note 389, *supra*.

firm property is not given in the Act as a cause of dissolution, but aside from the Act, such a disposition is generally regarded as bringing it about.[838] For all practical purposes, however, such concerted action might be regarded as dissolution upon the termination of a particular undertaking or by mutual consent; and the event would thus fit into the Act. Little mention is made in the South Carolina cases of disposal of the entire assets of a firm as dissolution, but it is intimated in one case that it is not. In *Metz v. Commercial Bank*,[839] it is stated that "to part with a part of the partnership property does not destroy it [the partnership]. Indeed, to sell all the property will not do so, for more may be bought, or a change of some kind may be made." While this may be true, it ought to be admitted that the attendant circumstances may indicate the contrary, and one may readily suppose that such a complete disposal of firm property was intended, nothing else appearing, as a closing out not only of business but of the firm as well. That such an event may realistically be looked upon as dissolution is to be seen in another South Carolina case, *McBrayer v. Mills*,[840] which involved a partnership accounting, where it was said that (at p. 42) "[the partner] died in December, 1891, and this worked a dissolution of the partnership, even if the partnership was not practically dissolved in January, 1884, when [the firm] sold out their stock and ceased to do business."

It has frequently been stated that any change in the personnel of a firm works a dissolution.[841] Hence, to begin with, the retirement or withdrawal of a member from the firm has that effect. It was so before the Act, and since the Act it is equally so, as it falls within the defining character of a partner's ceasing to be associated in the carrying on of the business, under Section 29.[841a] Retirement or withdrawal of a partner may be based on mutual consent, exercise of the power where the partnership is at will, or even in violation of agreement; in all such cases the disappearance of the partner from the

838. MECHEM, PARTNERSHIP, § 372; CRANE, PARTNERSHIP, § 74; 68 C. J. S. 851; 40 Am. Jur. 299; note, 69 Am. St. Rep. 416.
839. Note 15, *supra*, at 246.
840. Note 825, *supra*.
841. CRANE, PARTNERSHIP, § 88; 68 C. J. S. 853; 40 Am. Jur. 298.
841a. Laudeman v. Beyler, 34 Ill. App. 16, 57 N. E. 2d 518 (1944); Egner v. State Realty Co., 222 Minn. 305, 27 N. W. 2d 464, 170 A. L. R. 500 (1947).

firm is a dissolution under the Act, even though the word "retirement" or "withdrawal" may not be used. Normally the words indicate facts suggestive of mutual consent, and the usual "retirement" or "withdrawal" is accompanied by, or results from, a partner's selling his interest to his copartners, who may or may not assume firm debts. The South Carolina cases in which there has been retirement and sale of interest to the copartners, with dissolution accepted as a fact, are too numerous, and not sufficiently important, for citation. It seems to be taken for granted, in any event, that retirement or withdrawal, as such, is a cause of dissolution.[841b]

Although the Act does not in terms make change in personnel a cause of dissolution, the general declaration has been made in some cases involving partnership law in states where the Act is in force that a change in firm composition works a dissolution.[842]

If change in personnel produces dissolution, not only would retirement or withdrawal accomplish it but the *admission* of a new member into an existing firm would bring it about as well; and so, outside of the Act, is the general rule.[843] The definition in Section 29—built around a severance of association—would seem to rule out admission of a member alone as a suitable determinant of dissolution. Moreover, the entry of a new member is not mentioned in Section 31 as one of the causes of dissolution. Nevertheless, there appears in some of the cases from jurisdictions having the Act the statement that dissolution is effected by admission of a new member.[844] But the language of the Act is declared elsewhere as changing the law. In *Helvering v. Archbold*,[845] a tax case, in which the New York Uniform Partnership Act was considered, it was declared that "whatever was the rule at common law, the entrance of a new partner with the consent of all the old partners is not now a cause of dissolution under the Partnership Law of New York." Cited is the section of the New York laws

841b. See Hart v. Finney, note 261, *supra;* Karres v. Pappas, note 578, *supra.*
842. Security State Bank v. Nelson, 171 Minn. 332, 214 N. W. 151 (1927); Comm. Int. Rev. v. Shapiro, 125 Fed. 2d 532, 144 A. L. R. 349 (C. C. A. 6, 1942)—involving Tennessee law.
843. MECHEM, PARTNERSHIP, § 372; CRANE, PARTNERSHIP, § 88; 68 C. J. S. 853; 40 Am. Jur. 298.
844. Ellingson v. Walsh, 15 Cal. 2d 673, 104 P. 2d 507 (1940); Comm. Int. Rev. v. Shapiro, note 842, *supra.*
845. 70 Fed. 2d 720 (C. C. A. 2, N. Y., 1934), cert. den. 55 S. Ct. 109, 293 U. S. 594, 79 L. Ed. 688.

corresponding to Section 31 of the Act. But hard on the heels of this statement is another one by the court that there is in such cases a *de facto* dissolution. In this concession there is considerable substance, for, dissolution or not under the Act, the firm with the new member is not the same as the firm with the old ones; and it is hardly to be assumed that two firms exist under such circumstances.

The Act deals with incoming members in several places. To Section 17, which deals with the liability of an incoming partner, the Commissioners' note remarks that when a new partner is admitted to a firm without liquidation "the present theory of the common law is that a new partnership is formed." Nothing in the remainder of the note indicates a purpose to change the law in this respect: the design is to declare the rights of creditors in such an event. In dealing further with the rights of creditors where a new partner is admitted into a firm which does not liquidate following the admission, the Commissioners' note to Section 41(1) states that "It is universally admitted that any change in membership dissolves a partnership, and creates a new partnership. *The section as drafted does not alter that rule* (emphasis supplied)." In his comment on Section 41, the draftsman puts this case: "A, B and C are partners. E *et al.* are their creditors. Without any notice to E *et al.*, or any settlement with them, D is admitted as a partner in the business. At the common law, *as under the proposed Act* (emphasis supplied), the admission of D dissolves the first partnership and creates a second partnership, composed of A, B, C and D."[846] If it were not for such distinguished authority as *Helvering v. Archbold,* one might rationalize—with a kind of pressured logic—that the definition of dissolution in Section 29 is met in that the members of the old firm have ceased to be associated in the carrying on of the business of the *old firm,* and that by admitting a new member they have expressed their will to dissolve the old firm, thereby fitting the case into Section 31. In aid of this conclusion the comments of the Commissioners and of the draftsman might, of course, be hauled into supporting position.

So far as pre-existing South Carolina law is concerned, authority is scant, but the proposition that admission of a new

846. 24 YALE L. J. 617, 635.

partner into the firm causes dissolution seems to be accepted.[847] Its continuance or discard as law depends upon the interpretation to be given the Act in that respect.

Whether in a given case the partners have by their acts dissolved their partnership is a question of fact.[848]

DISSOLUTION BY JUDICIAL DECREE. Section 31(6) and Section 32 are essential recognition of the elemental rule that dissolution may be effected by a decree of court. So far as South Carolina law is concerned, the number of cases in which dissolution has been sought or effected is sufficient to disclose the existence of the power of a court of equity to decree dissolution, although they disclose no controversy as to the inherent jurisdiction of the court for the purpose.[849] When the partnership is at will, there is little or no need for asking a court to do what the complainant could himself bring about, but such an action has been maintained.[850] And, under the Act, it has been held that a partnership at will may be dissolved through judicial proceedings.[851]

Section 32 is valuable from an overall point of view because it distinguishes the *grounds* for dissolution by judicial action from the *causes* of dissolution. The events which may furnish the grounds for dissolution are not events which themselves, and automatically, produce it. Further value is afforded by the enumeration of grounds and the addition of the catch-all provision in subsection (1) (f). The importance locally of the Section—in addition to the useful features just mentioned—is that it supplies a standard for dissolution by judicial decree where none existed before. In some of the cases no reasons

847. Roach v. Ivey, note 652, *supra.*

848. Martin v. Walton, 1 MCCORD'S LAW 16 (S. C. 1821); Hammond v. Aiken, note 243, *supra;* Brown v. Chandler, note 791a, *supra;* Simmel v. Wilson, 121 S. C. 358, 113 S. E. 487 (1922).

849. The following are cases in which dissolution has been sought or decreed: Jones v. Webb, note 682, *supra;* Wilson v. Wilson, note 24, *supra;* Kennedy v. Hill, note 529, *supra;* Lyles v. Williams, note 679, *supra;* Pendarvis v. Berry, note 39, *supra;* Heretis v. Taggs, note 61, *supra.* This list is probably not exclusive.

850. See Wilson v. Wilson, note 24, *supra.* The action was not only for dissolution but accounting. In some of the cases cited in note 849, *supra,* it does not appear whether the particular partnership was at will or for a term or undertaking.

851. Lacey v. Ritter, 458 Pa. 502, 57 A. 2d 679 (1948). But see, apparently contra, Gerstein v. Teitelbaum, 77 N. Y. S. 2d 502, 273 App. Div. 886 (1948). In any event, it would seem that under Section 32 dissolution would not be ordered merely because the complainant desired it—since the Section prescribes the grounds on which relief is to be granted.

are given why the relief is sought, or, at least, they do not appear.[852] In others, there are allegations of mismanagement, misappropriation, or neglect,[853] grounds which would now fall within subsections (1) (b) and (1) (c)—a partner's misconduct.[854] Nowhere, however, does there appear a recital or detailing of the circumstances under which a court of equity will decree dissolution; but the cataloguing of grounds by the Act will make it possible hereafter for a court to condition its action.

SECTION 33. General Effect of Dissolution on Authority of Partner. Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership,

(1) With respect to the partners,

(a) When the dissolution is not by the act, bankruptcy or death of a partner; or

(b) When the dissolution is by such act, bankruptcy or death of a partner, in cases where Section 34 so requires.

(2) With respect to persons not partners, as declared in Section 35.

SECTION 34. Right of Partner to Contribution From Copartners After Dissolution. Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his copartners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless

(a) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or

(b) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy.

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852. Wilson v. Wilson, note 24, *supra;* Kennedy v. Hill, note 529, *supra*—but there was a showing of irreconcilable differences; Pendarvis v. Berry, note 39, *supra.*

853. Jones v. Webb, note 682, *supra;* Lyles v. Williams, note 679, *supra;* Heretis v. Taggs, note 61, *supra.*

854. As to misconduct by partner or dissension among partners as grounds for dissolution, see note, 118 A. L. R. 1421.

SECTION 35. Power of Partner to Bind Partnership to Third Persons After Dissolution. (1) After dissolution a partner can bind the partnership except as provided in Paragraph (3)

(a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;

(b) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

(II) Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

(2) The liability of a partner under paragraph (1b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution,

(a) Unknown as a partner to the person with whom the contract is made; and

(b) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution

(a) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

(b) Where the partner has become bankrupt; or

(c) Where the partner has no authority to wind up partnership affairs; except by a transaction with one who

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or

(II) Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in paragraph (1bII).

(4) Nothing in this section shall affect the liability under Section 16 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business.

The three Sections above are grouped because they relate to the essentials of the authority of partners as affected by dissolution.

Effect on Authority Generally. The central principle in Section 33 and the negative implications of Section 35 are that the dissolution of a partnership terminates the authority of a partner to bind the partnership. The exception is as to those acts relating to the completion of unfinished transactions and to the winding up of the affairs of the partnership. The rule of terminated authority declared in the Act is a restatement of the general rule.[855]

The doctrine affirmed in the Act is abundantly supported by local decisions. The principle as it runs through the South Carolina cases is variously expressed. It is said that upon dissolution the mutual agency of the partners ceases;[856] that a partner no longer has the power to bind the others;[857] and, most frequently, that a partner cannot bind the partnership by any new or original obligations or contracts.[858] Of course, as with the agency when the partnership is in existence, actual or express authority may supply the power to act where none

855. MECHEM, PARTNERSHIP, §§ 423-425; CRANE, PARTNERSHIP, § 80; 68 C. J. S. 862; 40 Am. Jur. 318.

856. Myers v. Huggins, 1 STROBHART'S LAW 473, 477 (S. C. 1847).

857. Foltz v. Pourie, note 197, *supra*, at 43; Lamb v. Singleton, 2 BREVARD'S LAW 490 (S. C. 1811) — reporter's note; Chardon v. Oliphant, 3 BREVARD'S LAW 183, 2 TREADWAY'S REP. 685, 6 Am. Dec. 572 (S. C. 1815); White v. Union Ins. Co., note 307, *supra*, at 561; Fisher v. Tucker, note 280, *supra*, at 170; Poole v. Gist, note 233, *supra*, at 260.

858. White v. Union Ins. Co., note 307, *supra*, at 560; Union Bank v. Hall, HARPER'S LAW 245, 250 (S. C. 1824); Veale v. Hassan, 3 MCCORD'S LAW 278, 279 (S. C. 1825); Kendrick v. Campbell, 1 BAILEY'S LAW 522, 526 (S. C. 1839); Steele v. Jennings, 1 MCMULLAN'S LAW 297, 298 (S. C. 1841); Tompkins v. Tompkins, note 550, *supra*, at 21, 22.

exists by implication.[859] Whether express authority has been conferred is a question of fact.[860] If such authority has been given, it need not be manifested in any particular mode, and no writing is necessary.[861] Although no South Carolina cases touch the point, it is clear that, as in other cases of unauthorized acts, ratification may validate an unauthorized act of a partner after dissolution.[862]

Authority in Winding Up. The declaration in Section 33 by way of exception, and the positive statement in Section 35(1)(a) that authority exists in the partners to bind the partnership by acts necessary or appropriate for winding up firm affairs and completing unfinished transactions, are an embodiment of the general rule.[863] In both respects does this represent South Carolina law—the power to bind with respect to uncompleted transactions,[864] and the power to perform undertakings connected with winding up.[865] The corollary is that if the act is not necessary or appropriate for winding up or is not for the purpose of completing a binding transac-

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859. Foltz v. Pourie, note 197, *supra;* Bank of S. C. v. Humphreys, 1 McCORD'S LAW 388 (S. C. 1821); Loomis v. Pearson, note 313, *supra;* Galliott ads. Bank, 1 MCMULLAN'S LAW 209, 36 Am. Dec. 256 (S. C. 1841); DeGroot v. Darby, note 470, *supra,* at 122; Heckheimer v. Allen, 89 S. C. 453, 71 S. E. 1033 (1911).

860. Foltz v. Pourie, note 197, *supra;* Bank of S. C. v. Humphreys, note 859, *supra;* Myers v. Huggins, note 856, *supra.*

861. Myers v. Huggins, note 856, *supra.*

862. 68 C. J. S. 869; 40 Am. Jur. 322.

863. MECHEM, PARTNERSHIP, § 423; CRANE, PARTNERSHIP, § 80; 68 C. J. S. 863; 40 Am. Jur. 318.

864. Poole v. Gist, note 233, *supra;* Kendrick v. Campbell, note 858, *supra;* Meggett v. Finney, note 798, *supra;* Tompkins v. Tompkins, note 550, *supra.*

865. The principle appears in the cases not so much in the form of positive statement as it does by inference. See Kinsler v. McCants, note 196, *supra,* at 47: "After dissolution *inter vivos,* the joint interest of the partners continues in the partnership property; and the mutual agency is prolonged * * until the affairs of the partnership are administered." See, also, Metz v. Commercial Bank, note 15, *supra* — to effect that agreement to wind up business authorized acts creating liability in connection therewith.

The matter arises indirectly in cases in which a surviving partner seeks to charge or asks credit for expenses incurred in winding up the business. In Tompkins v. Tompkins, note 550, *supra,* and Schenk v. Lewis, note 151, *supra,* it is made clear that expenses incurred in liquidation and for the preservation of the property are proper items chargeable to the estate of the deceased partner in an accounting between the survivor and the deceased partner's representatives. If third persons furnished services or goods for purposes incident to the winding up, they would have realizable claims against the estate of the deceased partner; although liability might be enforced only indirectly against the estate, since the contracts would have been made only with the sur-

tion, liability against the other partner or his estate cannot be created.[866]

The usual rules of agency which apply when the firm is a going concern apply after dissolution; so that when a partner acting within the scope of his authority after dissolution is serving his private purpose or misapplies funds properly received, his copartners are bound, in the absence of knowledge of the intended misapplication;[867] otherwise, when such intention is known.[868]

Liquidating Partner. Section 37 of the Act declares, in substance, that all the partners have an equal right to wind up partnership affairs, unless otherwise agreed. An exception, under Section 37 and Section 35(3)(b), is made denying the right to a partner who has become bankrupt. The authority of each partner, therefore, to bind the firm by engagements necessary or appropriate to winding up follows as a matter of course, and the provisions of Sections 33 and 35 are thus concordant with those of Section 37. The allowable agreement to the contrary usually takes the form of the partners' selecting one of their number to liquidate, with exclusive authority for that purpose. The competence of such an arrangement is unquestioned, and many South Carolina cases furnish instances of it.[869] The selection of a partner as sole liquidator is an exclusion, of course, of the implied authority of the others; and persons knowing, or charged with notice of, the restrictions are bound by it, and take the risk involved in participation in an unauthorized act.[870] This is the principle declared in Section 35(3)(c), which declares that the partner-

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vivor, who strictly could not be said to have an agency. See MECHEM, PARTNERSHIP, § 402, n. 6.

Specific acts which illustrate the applicability of the rule of power to perform acts necessary for winding up are treated in the text hereafter under Particular Acts.

866. Wiesenfeld v. Byrd, note 269, *supra;* Tompkins v. Tompkins, note 550, *supra.*

867. Poole v. Gist, note 233, *supra* — partner in dissolved firm of attorneys who received money on execution for client and did not pay over, other partner bound.

868. Sims v. Smith, note 78, *supra.*

869. Lamb v. Saltus, 3 BREVARD'S LAW 130 (S. C. 1813); Foltz v. Pourie, note 197, *supra;* Martin v. Walton, note 848, *supra;* Montgomery v. Montgomery, note 652, *supra;* Gowan v. Tunno, note 381, *supra;* Beckham v. Peay, note 264, *supra;* White v. Murphy, note 225, *supra;* Myers v. Huggins, note 856, *supra;* Kinsler v. McCants, note 196, *supra;* Cameron v. Watson, note 113, *supra*; Cothran v. Knox, note 595, *supra.* The list is probably not exclusive.

870. Beckham v. Peay, note 264, *supra.*

ship is not bound by the act of a partner who has no authority to wind up firm affairs—with qualifications afterwards prescribed.

The appointment of a liquidating partner is not an enlargement of the powers beyond those implied in each partner, but is merely a restriction upon the right of the others to exercise those powers. Hence, a liquidating partner can do no more than he could do if he had not been selected.[871] But the liquidator's authority may be added to by express agreement;[872] and the manifested enlargement of authority will not be affected by an undisclosed limitation upon it.[873]

If the fact that a partner has been appointed to liquidate is unknown to a third person dealing with the other partner, or partners, after dissolution his dealings with the latter will be shielded.[874] The requirements for the protection of a third person dealing with a partner who does not have authority to wind up partnership affairs are set out in Section 35(3) (c) (I) (II). It will be noted that protection will be afforded to such third person under two sets of circumstances: (1) that he had extended credit prior to dissolution and had no knowledge or notice of want of authority, or (2) if he had not extended credit and had no knowledge of the want of authority, there had not been constructive notice of dissolution by advertisement as called for by subsection (1) (b) (II). A situation of the kind contemplated in these provisions of the Act is to be found in *White v. Murphy*.[875] There, notice of dissolution and of the arrangement that one partner alone was authorized to collect the debts of the firm was published in a

871. Foltz v. Pourie, note 197, *supra;* Fisher v. Tucker, note 280, *supra,* at 173; Martin v. Walton, note 848, *supra;* White v. Union Ins. Co., note 307, *supra,* at 561.

The general rule is in accord. 68 C. J. S. 868; 50 Am. Jur. 325; MECHEM, PARTNERSHIP, § 426: "The effect of such an agreement is not to enlarge the authority of the settling partner, but to exclude the others from participation."

872. Myers v. Huggins, note 856, *supra* — published authority to one partner to settle firm affairs and use firm name for purpose, held to give authority to renew firm note.

873. Myers v. Huggins, note 856, *supra* — agreement that liquidating partner should apply assets to payment of particular note, and partner renewed note instead, the renewal having been held to be within the scope of the express authority, held that limitation not effective as to payee.

874. Gadsden v. Fayolle, note 225, *supra* — (syll.) "Any partner is authorized to receive the debts of the concern, either during the existence of the copartnership, or after the dissolution, unless a different arrangement is made and notice given of it."

875. Note 225, *supra.*

newspaper. The defendant, without actual notice of dissolution and of the arrangement for collection, paid a debt owing the firm to the partner not authorized to collect. The defendant was protected in the payment, because of lack of actual notice of the want of authority in the partner to whom he made payment. To the extent that the case stands for the proposition that an unknown restriction on authority is not effective, it still is good law; but the result would be different under the Act in view of the limiting of protection to those who had extended credit, and to those who, though they had not extended credit, did not have *constructive* notice by newspaper publication. As will be seen hereafter, in the treatment of Notice of Dissolution, a *debtor*, under the Act, is not entitled to actual notice of dissolution; under prior South Carolina law, any person, including a debtor, having had previous business dealings with the firm was entitled to actual notice or was affected only by knowledge. It was this view of the law that accounts for the protection of the debtor in *White v. Murphy.* Under the Act the publication would constitute sufficient notice to the debtor to deal only with the liquidating partner.

The Act in this respect is not altogether satisfactory. Debtors whose accounts are unpaid on the books of the firm at the time of dissolution are placed at the mercy of constructive notice which, in the ordinary course of events, will hardly ever be transformed into knowledge by reading—something which will occur even less frequently where the newspaper is published in a place where the debtor does not reside. The foundation for published, instead of actual, notice to persons other than prior creditors under the Act is (as will be more fully set out hereafter) the non-disclosure of such persons on the books of the firm. Debtors of the firm at dissolution are not in this category; and since the means are at hand for knowing who the debtors are, consistency ought to require direct notification to them. As a practical matter, that is what a liquidating partner ought to do in any event.

Powers of Surviving Partner. It has been pointed out from time to time in earlier parts of this article that on the death of a partner the survivor (and on his death his personal representative) comes under the duty of liquidating the affairs of the dissolved firm. Hereafter, under Section 37, other fea-

tures of the rights, duties and accountabilities of the survivor will be dealt with. The right and the duty to liquidate comprehend the possession of all such powers as may be needed for the purpose. Generally, the survivor's rights and duties are defined as follows, in *Schenk v. Lewis*:[876]

> The surviving partner immediately becomes a trustee of the entire partnership property for the purpose of liquidating the affairs of the partnership, and as expeditiously as the circumstances of the partnership will permit, to convert the assets into cash, pay off the liabilities, adjust the equities between the parties and distribute the remainder of the estate to the surviving partner and the representative of the deceased partner according to their respective interests.
>
> In order to discharge this trust, a surviving partner is clothed with the power of disposing of the assets of the partnership by converting them into cash.

Numerous other cases state the proposition that upon the survivor or survivors devolve the duty and the right to liquidate,[877] and most of them spell out the survivor's powers in substantially the same way as does *Schenk v. Lewis*.[878]

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876. Note 151, *supra*, at 242.

877. White v. Union Ins. Co., note 307, *supra;* Kinsler v. McCants, note 196, *supra;* Moffatt v. Thompson, note 562, *supra;* Knox v. Shepler, note 563, *supra;* Wiesenfeld v. Byrd, note 269, *supra;* Rowell v. Adams, note 631, *supra;* Dial v. Agnew, note 488, *supra;* Younts v. Starnes, note 487, *supra;* Boyd v. Munro, note 759, *supra;* Manship v. Newton, note 550, *supra;* Duncan v. Westerlund, note 565, *supra;* Crews v. Sweet, note 364, *supra;* Elliott v. Flynn, note 499, *supra.*

878. Power to pay debts: White v. Union Ins. Co., note 307, *supra,* at 559; Moffatt v. Thomson, note 562, at 160; Wiesenfeld v. Byrd, note 269, *supra,* at 114; Dial v. Agnew, note 488, *supra,* at 459; Crews v. Sweet, note 364, *supra,* at 306.

Power to collect assets, receive payment, and sue therefor: Kinsler v. McCants, note 196, *supra;* Moffatt v. Thomson, note 562, *supra;* Dial v. Agnew, note 488, *supra;* Younts v. Starnes, note 487, *supra;* Duncan v. Westerlund, note 565, *supra;* Crews v. Sweet, note 364, *supra.*

Power to sell firm property: White v. Union Ins. Co., note 307, *supra;* Tompkins v. Tompkins, note 550, *supra,* at 21, 22; Crews v. Sweet, note 364, *supra.* As to the power to give title to property sold, see the discussion under Section 25.

These are the usual powers, but it is clear from Schenk v. Lewis that other acts may be done for the purpose of winding up — such as incurring expenditures for the preservation of firm property.

In Rowell v. Adams, note 631, *supra,* and Crews v. Sweet, note 364, *supra,* the court speaks of the survivor having the authority to *continue* the business. What is obviously meant is continuance, so far as is necessary, for the liquidation of the business, and not its continuance as a going concern. That this is so, see Wiesenfeld v. Byrd, note 269, *supra;* Tompkins v. Tompkins, note 550, *supra;* Schenk v. Lewis, note 151, *supra*

The generalization previously made that a partner after dissolution cannot bind the partnership by new obligations is applicable to the surviving partner.[879] And the other main generalization—that there is the power to complete unfinished transactions—also applies to him.[880]

Under the heading of Particular Acts, and subdivisions, attention will be given to the question of the existence or non-existence of powers to do specific acts. The rules stated there are applicable to surviving partners as well as to partners after *inter vivos* dissolution, unless otherwise noted; and in some cases the application to surviving partners will be specially mentioned. In other words, the scope of limitation of powers as they affect surviving partners is not confined to the material just discussed in this topic.

Powers of Non-Bankrupt Partner. Upon the dissolution of a partnership by adjudication of the bankruptcy of a partner, the duty to liquidate devolves upon the non-bankrupt partner or partners.[881] The duties and powers of the non-bankrupt partner are substantially the same as those of a surviving partner.[882]

Particular Acts. Neither the Sections under discussion nor other portions of the Act point out particular acts as being authorized or unauthorized after dissolution. The negation of authority with respect to particular acts under Section 9(3) is not duplicated elsewhere with respect to authority after dissolution. It is doubtful whether the negative provisions of Section 9(3) are intended to apply after dissolution, since the whole of Section 9 seems to have as its aim the integrity of the firm as a going concern. If it should be said that these express restrictions on authority are confined to existing partnerships, it does not follow, by a form of reverse reasoning, that the powers there denied are permitted if there has been dissolution. If the conclusion is that the Section relates only to the firm prior to dissolution, it would follow that the spe-

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879. See the cases cited in note 858, *supra*. Of them a surviving partner is involved in White v. Union Ins. Co., note 307, *supra*, and Tompkins v. Tompkins, note 550, *supra*. See, also, Wiesenfeld v. Byrd, note 269, *supra*.

880. See the cases cited in note 864, *supra*, of which Tompkins v. Tompkins, note 550, *supra*, concerns a surviving partner.

881. Crews v. Sweet, note 364, *supra*. The duty is also imposed by the Bankruptcy Act: 11 U. S. C. § 23 (5, i).

882. Crews v. Sweet, note 364, *supra*.

cific denials of authority in Section 9(3) (particularly subsection (3) (c)—"do any other acts which would make it impossible to carry on the ordinary business of a partnership"—which is necessarily confined to existing partnerships, and can have no relationship to dissolution) are not the source of prohibitions of authority to do similar acts after dissolution; nor will Subsection 9(3) work to deny authority to do similar acts if the power to perform them after dissolution exists at common law.

Since the Act offers only general principles as to authority, in which local law concurs, and since, as has been seen, there is no specification of authorized and unauthorized acts, local law must be regarded as continuing precedent for the particular situations involved. Some of the acts to be dealt with have already been touched upon in contrasting them with similar acts prior to dissolution (under Section 9), but because of their special relevance at this point they are repeated.

Each partner upon dissolution has the implied authority to collect and receive payments of firm debts, and give receipt therefor.[883] He has the authority also to pay firm debts.[884]

While the authority of a *surviving* partner to sell firm property, as has already been noted, is clear, the authority to sell when dissolution is by act of the parties is not so readily discernible. In one early case it is stated that on such dissolution neither partner can sell more than his interest in the partnership property.[885] Other than this statement there is a lack of authority on the point. If each partner has an equal

883. Gadsden v. Fayolle, note 225, *supra;* Poole v. Gist, note 233, *supra;* Beckham v. Peay, 1 BAILEY'S LAW 121 (S. C. 1828); Kendrick v. Campbell, note 858, *supra;* Myers v. Huggins, note 856, *supra;* Sims v. Smith, note 78, *supra.* The authority may be denied to all but the liquidating partner. The cases cited under the topic of the Liquidating Partner imply the power in each partner to receive payment.

A fortiori, authority given to a partner to sell property of the firm carries with it authority to receive payment. Lamb v. Saltus, note 869, *supra.*

In Sims v. Smith, note 78, *supra,* it was held that notice given by a partner, after dissolution, not to pay the other subjected the debtor to double payment; but as has already been pointed out, under Restrictions by Dissent, under Section 9, the payment there was made to a partner who the debtor knew intended to misapply it. The general rule is that, in the absence of the appointment of a liquidating partner, one partner may receive payment from a firm debtor despite communication of dissent by the other. 68 C. J. S. 866.

884. White v. Union Ins. Co., note 307, *supra;* Kendrick v. Campbell, note 858, *supra;* Myers v. Huggins, note 856, *supra.*

885. Lamb v. Saltus, note 869, *supra.*

right to wind up, it would seem that the power to sell would necessarily be included. Under the Act, it would appear almost certainly to be so, especially in view of Section 38, which gives the right to each partner to be paid off in cash. The general rule is that the power to dispose of firm stock is possessed by each partner.[886]

There is a conflict of opinion as to whether a partner has the implied authority to borrow money to pay firm obligations.[887] The cases which deny the power do so on the elemental ground that after dissolution a partner has no authority to enter into new obligations; those which sanction it appear to do so on the ground that it may be necessary or appropriate to winding up. The general prohibition against the making of new obligations exists, as has been seen, in South Carolina; and the fact that the new contract may have relation to an old one is not enough to vacate the prohibition[888]—a point particularly demonstrated hereafter in the denial of validity to renewals of firm obligations.

On the power to borrow money, South Carolina authority is comparatively sparse. In at least two cases it seems to be stated as law that borrowing money for the purpose of discharging firm debts is not an allowable power.[889] In contrast, a third case seems to permit it, but other factors there—the possible continuance of the firm by agreement after the term had expired; the failure, if there was dissolution, to apprise the public of the fact; the prolonged appearance of firm existence—dilute the effectiveness of the holding in this respect.[890]

Local authority is also scarce with respect to the authority of the partners after dissolution to effect compromises. The general rule appears to be that each partner has the power to enter into compromises of firm claims and liabilities.[891] In *Union Bank v. Hall*,[892] a partner of a dissolved firm which

886. MECHEM, PARTNERSHIP, § 423; CRANE, PARTNERSHIP, § 80; 68 C. J. S. 869; 40 Am. Jur. 318.
887. CRANE, PARTNERSHIP, § 80; 68 C. J. S. 868; 40 Am. Jur. 318. As to a surviving partner's power to borrow money, see 40 Am. Jur. 341.
888. See DeGroot v. Darby, note 470, *supra*, at 122: "[The partner] could not, after the dissolution, have bound his former associates on an original contract, nor was he competent to bind them in a new one, although based on an old one, unless some special authority had been conferred for the purpose."
889. Lamb v. Saltus, note 869, *supra;* Wiesenfeld v. Byrd, note 269, *supra.*
890. Metz v. Commercial Bank, note 15, *supra.*
891. CRANE, PARTNERSHIP, § 80; 68 C. J. S. 867; 40 Am. Jur. 322.
892. Note 858, *supra.*

during its existence had endorsed the notes of a third person was held to have the power to consent to the release of the maker upon a compromise agreement between the maker and the holder. The court's justification was that the whole transaction was a benefit to, and lessened the liability of, the partners; although the effect of the consent was to continue the liability of the partners. The underlying premise, however, on which the case is based may be faulty, since it is stated (at page 250) ". . . after the dissolution of a co-partnership, one of the partners cannot create any new liability but he may keep alive an old one . . . here no new liability has been created but an act done which lessens a liability which did exist. Where the act is done for the benefit of all, his assent is implied." If keeping alive an old contract really involves making a new one, the prohibition against the latter would control. Such attempts to keep a contract alive have been discountenanced as they relate to the effect of the Statute of Limitations, since they may amount to a new contract; and the same is true as to renewal of existing obligations. Of these matters, there will be more discussion later.

Where, after dissolution, a partner promises to pay a higher rate of interest on a firm debt than the original rate, the promise is not binding on the late firm.[893]

The restraint against new contracts after dissolution extends to contracts under seal[894]—which, as has been seen under Section 9, are unauthorized during the existence of the partnership. With respect to conveyances by the surviving partner, however, it would seem that the whole interest having vested in him, he could transfer firm real estate by deed. This would be the only effectual method of disposing of real estate as a means to or incident of winding up. A transfer by the survivor alone is the necessary consequence of the change in the law introduced by Section 25 of the Act—as to which a full discussion has already been had.

A partner of a dissolved firm does not have the authority to accept service, or authorize an appearance, for his former partners.[895]

893. Wiesenfeld v. Byrd, note 269, *supra* — promise by surviving partner.

894. Fisher v. Tucker, note 280, *supra* — bond given by surviving partner.

895. Loomis v. Pearson, note 313, *supra*. See, under Section 9, the same topic.

Under the Negotiable Instruments Law, presentment to one partner is sufficient to bind the others, even after dissolution;[896] and so is notice of dishonor.[897]

BILLS AND NOTES. Because it would be the making of a new contract, a partner after dissolution—whether *inter vivos* or caused by death—has no power to make, accept or endorse commercial paper. The authority which he may have had as a member of a trading firm to perform these various acts expires upon the dissolution of the firm. The cases in South Carolina on the point are plentiful.[898] The fact that the making or endorsing partner is the one appointed to liquidate does not change the rule.[899]

RENEWALS. Although they have relation to and are based on existing obligations, renewals of firm debts are nonetheless new obligations and fall within the rule preventing imposition of liability in such events. Hence, in whatever way the renewal may be manifested—by a new or a renewal note,[900] by a new endorsement,[901] or by a bond[902]—it will be ineffective to fasten liability on the non-acting partner or the estate of a deceased partner.

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896. § 6828, S. C. CODE (1942) — "Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm."

897. § 6850, S. C. CODE (1942) — "Where the parties to be notified are partners, notice to any partner is notice to the firm, even though there has been a dissolution."

898. Foltz v. Pourie, note 197, *supra* — giving promissory note; Martin v. Walton, note 848, *supra* — drawing bill or giving promissory note; Bank of S. C. v. Humphreys, note 859, *supra* — giving promissory note; Loomis v. Pearson, note 313, *supra* — same; Irby v. Vining, 2 McCORD'S LAW 379 (S. C. 1823) — same; White v. Union Ins. Co., note 307, *supra* — endorsement, by surviving partner; Fisher v. Tucker, note 280, *supra*, at 170 — endorsement; Galliott ads. Bank, note 859, *supra* — same.

In the cases hereafter noted under Notice of Dissolution in which a non-assenting partner has been held liable on commercial paper because of lack of due notice, the inference is plain that the act would not have bound the partner otherwise. Lamb v. Singleton, note 857, *supra* — giving note; Hammond v. Aiken, note 243, *supra* — giving note.

899. Martin v. Walton, note 848, *supra*. And see Foltz v. Pourie, note 197, *supra*, at 43, 44; Fisher v. Tucker, note 280, *supra*, at 171. These cases have already been noted under the topic of the Liquidating Partner.

900. Foltz v. Pourie, note 197, *supra;* Martin v. Walton, note 848, *supra;* Bank of S. C. v. Humphreys, note 859, *supra;* Hammond v. Aiken, note 243; *supra;* Heckheimer v. Allen, note 859, *supra* (disapproving Burris v. Whitner, 3 S. C. 510 (1872) stating the contrary.).

901. White v. Union Ins. Co., note 307, *supra* — by surviving partner; Galliott ads. Bank, note 859, *supra*.

902. Fisher v. Tucker, note 280, *supra* — by surviving partner.

In addition to the proscription of the cases, denial of the power to renew is declared by statute:[903]

> No acknowledgment, payment or part payment or renewal of any debt or obligation of a firm, made after notice of dissolution of the copartnership shall have any force and effect to bind any member of the firm or continue his liability to pay said copartnership debt, other than the person by whom such acknowledgment, payment, or part payment or renewal shall be made, or in any wise affect their right to plead the Statute of Limitations or the presumption of payment from lapse of time.

The authority to enter into renewals may be expressly conferred, and it has been held that authority given to a liquidating partner to use the firm name may be construed as embracing the authority to make a renewal note.[904] A request to a bank by a firm to renew notes until the expiration of a certain time is not authority to a partner to execute a renewal note after dissolution, even though the dissolution takes place before the end of the requested period.[905]

PAYMENT OF INDIVIDUAL DEBT WITH FIRM FUNDS. It has already been seen, in the discussion under Section 9, that South Carolina law appears to sanction a partner's paying his individual debts by using firm funds, and to allow a partner to use a firm claim as a setoff against his individual liability to the firm debtor. The cases, however, limit the power, if it does exist, to transactions prior to dissolution or notice of dissolution. To put it another way, a partner, after dissolution, has no authority to pay individual debts with firm funds either directly or through the medium of a setoff.[906] The principle is especially applicable to a surviving partner; and if he pays over firm funds to a firm creditor who is also a separate creditor of the survivor, the funds must be applied to the firm debt even without direction as to its application.[907] And where a surviving partner has entered into an unauthorized contract and has thereby become personally and singly

903. § 369, S. C. CODE (1942), enacted 1900, 23 STAT. 349.
904. Myers v. Huggins, note 856, *supra*.
905. Bank of S. C. v. Humphreys, note 859, *supra*.
906. Halls v. Coe, note 196, *supra;* Beckham v. Peay, note 264, *supra;* Sims v. Smith, note 78, *supra;* McGhee v. Montgomery, note 100, *supra*.
907. Wiesenfeld v. Byrd, note 269, *supra*.

liable, the person with whom he has dealt cannot retain by way of setoff any funds which he owes to the firm.[908]

ASSIGNMENT FOR BENEFIT OF CREDITORS. An assignment for the benefit of creditors is one of the unauthorized acts mentioned in Section 9(3); and it has been observed that South Carolina law has been changed by that Section. The rule adopted in Section 9(3) (a) represents the previously prevailing view, which seems not to be different where dissolution has taken place *inter vivos*. The great weight of authority, however, gives to the surviving partner of a firm dissolved by death the authority to make such an assignment, on the ground that it can properly fall within the duty and the power of disposing of firm property and paying debts.[909] The South Carolina view is in accord;[910] and while it is based to some degree upon the power of a partner to make an assignment prior to dissolution, the liquidating duties and powers of the survivor are independently sufficient to sustain his authority to assign. Unless Section 9(3) is to be treated as a denial of the power—and, as has already been seen, the more reasonable view is that it does not apply after dissolution—the survivor's authority in this respect remains intact.

ADMISSIONS AND DECLARATIONS. Since the agency of the partners persists to a limited extent after dissolution, it would seem that declarations and admissions made by a partner would be competent to charge the others to the extent that they relate or have reference to matters within the scope of his limited authority; or, if he had been given special authority, to matters falling within the sphere of that authority. Section 11 of the Act is broad enough to apply to admissions made after dissolution—"An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this Act is evidence against the partnership." That conclusion is borne out by the statement in the Commissioners' note: "Admissions before dissolution concerning a particular matter bind the partnership only where the partner has authority to act in the particular matter; *and after dissolution only if necessary to*

908. White v. Union Ins. Co., note 307, *supra.*
909. MECHEM, PARTNERSHIP, § 403; 68 C. J. S. 774; 4 Am. Jur. 346.
910. White v. Union Ins. Co., note 307, *supra.* Such assignments appear elsewhere without mention of the authority of the survivor to make it. Wilson v. McConnell, note 380, *supra.*

wind up the business (emphasis supplied). Where the partner has no authority to act and the person with whom he is dealing knows he has no authority, *or where the admission is made after dissolution and is not for the purpose of winding up partnership affairs* (emphasis supplied), it should not affect the partnership."

The general implication in the Commissioners' note that admissions relating to liquidation made by a partner having implied authority to wind up are evidence against the partnership is reflected in South Carolina law.[911] Conversely, where a partner, by agreement, does not have the authority to wind up, a statement by him concerning matters incident to winding up is not competent to affect the other partners.[912]

The principal difficulty in applying the general rule as to admissions arises in connection with transactions prior to dissolution. American cases are in conflict, but perhaps a majority do not allow admissions or declarations relating to such transactions.[913] The South Carolina cases follow an irregular course. In some of the earlier cases such admissions are treated as incompetent by their very nature.[914] Others take an opposite view, holding such statements competent without qualification.[915] One case treats the evidence as competent but not conclusive.[916] Finally, and representing the last word on the subject, it has been held that the evidence is admissible only if there is other evidence of the transaction which the admission involves.[917] The rule is thus laid down in *Fripp v. Williams*:[918]

> . . . while the general rule is that the statements or admissions of one partner, made after the dissolution of the partnership, as to what occurred during the existence

911. Beckham v. Peay, note 883, *supra.*
912. Beckham v. Peay, note 264, *supra.*
913. See note, 73 A. L. R. 447, 459.
914. Chardon v. Oliphant, note 857, *supra* — acknowledgment of receipt of goods, stated not to be admissible of itself; White v. Union Ins. Co., note 307, *supra,* at 561 — "If one partner, who is authorized to adjust the debts, acknowledges a bill due from the copartnership, it will not bind his copartner."
915. Simpson ads. Geddes, 2 BAY'S LAW 533 (S. C. 1804) — acknowledgment of debt; Kendrick v. Campbell, note 858, *supra* — admission of promise to accept bill of exchange; Allen v. Owens, note 53, *supra* — admission of debt.
916. Fisher v. Tucker, note 280, *supra.*
917. Meggett v. Finney, note 798a, *supra;* Fripp v. Williams, note 201, *supra.*
918. Note 201, *supra,* at 506.

of the partnership, are not competent evidence against a copartner, yet when such evidence is offered after there has been other evidence adduced of the fact of the partnership and of the existence of the debt or liability referred to in such statements or admissions, they then become admissible.

The South Carolina view as thus expressed is a minority one, although that group is large.[919] If the statement in the Commissioners' note that only declarations relating to winding up are allowable is to be accepted as the meaning to be given to Section 11, then South Carolina law would probably undergo a change, since the admission of the creation of an obligation during the partnership is not an admission made for the purpose of winding up. But it must be remembered that the Commissioners' statement is a reflection of a majority interpretation given to the common law rule expressed in Section 11. The rule as stated in the Section is respected by both the minority and majority groups; the application of the rule differs. It would perhaps be not too much to say that Section 11 does not change pre-existing law, and that despite the comment of the Commissioners as to its scope, jurisdictions previously adhering to the rule of admissibility (whether absolute or qualified) could continue to follow it without misinterpreting the Section or violating the mandate of uniformity. Strangely, there has been little litigation on the point in jurisdictions having the Act—that is, after the Act had been adopted. What little there is reveals an adherence to the view previously accepted by the particular court.[920]

The ban against the evidence offered in connection with past transactions is, as with other types of admissions, directed against extra-judicial statements, and does not preclude testimony by the partner in an action in which the copartner is a party.[921]

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919. See note 73 A. L. R. 447, 465. Most of the jurisdictions in the minority group hold that the rule against admissions does not apply to things past and allow declarations as to past transactions without, apparently, requiring substantiating proof as under the South Carolina rule.

920. Bell v. Porter, 261 Mich. 97, 246 N. W. 93 (1932) — admission held competent, reference made to Section 11 and other portions of the Act and to older Michigan law; Lieberman v. Dubin, 62 N. Y. S. 2d 880, —— Misc. —— (1946) — admission held incompetent, no reference to Act or other authority cited.

921. Allen v. Owens, note 53, *supra;* Corrie v. Calder, note 56, *supra.* The former partner can take the stand to deny as well as to admit. Kendrick v. Campbell, note 858, *supra.*

POWER TO WAIVE OR TOLL STATUTE OF LIMITATIONS. The problem of the power of one partner after dissolution to make an acknowledgment, new promise or part payment which would operate to waive or toll the Statute of Limitations has been affected to a large extent by the same considerations as those governing admissions—since an acknowledgment would be an admission—and by the rules affecting joint debtors. It would be an unprofitable and needlessly time-consuming enterprise to trace the changes in the law as to the effect of the acts of joint debtors upon the Statute. Suffice it to say, that law has undergone marked change, and with it to a large extent has the law as to the effect of acts of the partners.[922]

It would seem that payments and acknowledgments made by a partner before dissolution would bind the other partners, at least if the debt had not already been barred,[923] because of the agency of the partners. The South Carolina case law on acts after dissolution shows an even greater irregularity than the law governing admissions, and it has been, in fact, complicated by the latter. In the earliest of the cases it was held that an acknowledgment by a partner after dissolution would revive against all the partners a debt already barred by the Statute.[924] It was later held that a promise made by a partner after dissolution could not, as against the other partners, revitalize a debt already barred at the time of dissolution.[925] Finally, it was held, in *Meggett v. Finney,*[926] that acknowledgment of a debt not barred at the time it was made would toll the Statute, provided the existence of the debt was otherwise proved than by the admission of the partner.[927]

922. For a comprehensive discussion of the effect of acknowledgments and part payments by a debtor of a joint obligation, see Walters v. Kraft, 23 S. C. 578, 55 Am. Rep. 44 (1885).

923. Glenn v. Caldwell, note 556, *supra,* at 178; Sullivan v. Sullivan Mnfg. Co., 20 S. C. 79 (1883); Zaks v. Elliott, note 59, *supra.*

924. Higginson v. Air, note 683, *supra* — acknowledgment by surviving partner; Veale v. Hassan, note 858, *supra* (does not appear whether debt barred at time).

925. Steele v. Jennings, note 858, *supra.* See, also, Fisher v. Tucker, note 280, *supra.*

926. Note 798a, *supra.*

927. In Bulcken v. Rohde, note 681, *supra,* the acknowledgment of two of three partners after suit had been brought that a barred debt was just and unpaid was denied effectiveness as to all because of the rule that an acknowledgment, new promise or payment made after the bringing of an action upon the debt is not sufficient to remove the statutory bar. A *fortiori,* the third partner could not be bound in any event. It does not clearly appear whether, at the time of the acknowledgment, the parties had dissolved the partnership or there had been dissolution by judicial decree.

It would seem that, in view of the prohibition against new contracts by partners after dissolution, an acknowledgment or part payment would not bind the non-acting partners, whether the Statute had or had not run at the time of dissolution. The reason is that, whenever they are made such acts are deemed new contracts and not simply evidence rebutting a presumption of payment.[928] The complete exposition of this view was not made until after the cases given above were decided. But there is no need to dwell upon the force of these cases, for the reason that the recognition of the rule that all such acts are new obligations—forbidden to partners after dissolution—is now declared in substance by statute. Attention is again directed to Section 369, S. C. Code (1942)—set out under Renewals above—which makes acknowledgments and payments by a partner after dissolution binding only upon the partner making them. No distinction is made, it will be observed, between debts already barred and those which are not; and the effect must therefore be that after dissolution (unless there is not due notice of the fact), one partner has no power to bind the other by acknowledgment, part payment or new promise, whether the Statute has completely run or not.

Notice of Dissolution. Although the agency of the partners is terminated upon dissolution, except for purposes of fulfilling existing obligations and winding up, it is elemental that in some cases former members of a firm may nevertheless be bound by unauthorized transactions of a partner after dissolution, as if dissolution had not occurred. The failure to give due notice of dissolution to persons entitled to it may offer the appearance of continued existence of the firm. As to such persons the partnership is, for all practical purposes, regarded as existing. The basic reason is estoppel: the semblance of continued existence and reliance upon it. The principle is thus stated in the South Carolina case of *Simmel v. Wilson*:[929]

> That rule, correctly understood, is merely a branch of the doctrine of equitable estoppel, which precludes a person from denying a state of facts which he has permitted another to believe continues to exist, when to do so would work a fraud on the other party. . . . Obviously, the object of giving notice is to remove the impression which has

928. See Walters v. Kraft, note 922, *supra*.
929. Note 848, *supra*, at 362, 363.

been created in the minds of those who have dealt with or had knowledge of the firm, that certain persons continue to compose it.

The exposition in Section 35 of the necessity for notice and its ingredients, and the effect of due notice—or lack of it—may be summarized as follows:

1. Persons who have knowledge or notice of dissolution, however acquired, and whatever may have been their relation to or dealings with the firm prior to dissolution, cannot hold the partnership for the unauthorized acts of a partner. The term "knowledge" and "notice" are used as defined in Section 3 of the Act.

2. Persons who have extended credit to the partnership prior to dissolution are entitled to special or particular notice. Failure to give it creates liability, in the absence of knowledge.

3. Persons who have not extended credit to the partnership but who had knowledge of its existence prior to dissolution, whether there were or were not dealings of another kind with the firm, are not entitled to actual notice. As to them publication of the fact of dissolution—as prescribed—is sufficient to cut off future liability.

It is not clear what is meant by the language "known of the partnership prior to dissolution," in subsection (1) (b) (II) —whether the third person must have known only that he was dealing with a *firm,* or that he must have known who the members of the firm were. Assuming that the rule reflects majority opinion, it should be the former.[930] The rule in subsection (2) relating to the dormant partner, who alone of the partners is not required to give notice, would seem to strengthen this conclusion. Moreover, a person is not a dormant partner because he is not known to the persons dealing with the firm—there must be both secrecy and passivity.[931] Hence, it is possible to know of the partnership without knowing who compose it.

4. Persons who have neither extended credit to the firm nor had knowledge of its existence are not entitled to either actual or newspaper notice. As to such persons no liability is

930. See MECHEM, PARTNERSHIP, § 397, n. 25; 68 C. J. S. 876.

931. See the definition in the South Carolina case of Allen v. Davids, note 15, *supra*: ". . . a partner who takes no part in the business and whose connection with it is unknown." As to the liability of dormant partners see that topic under Section 9.

created against the non-assenting partners. This conclusion does not affirmatively appear in the Act, but it is a necessary implication, as such persons are not mentioned as parties who may hold the partnership for unauthorized acts in the absence of notice.

5. Dormant partners—as used in the strict sense, and so substantially defined in subdivisions (a) and (b) of subsection (2)—need not give actual or newspaper notice to escape personal liability for subsequent acts. The partnership assets must, however, respond if notice is not given as prescribed in subsection (1) (b). The relaxation of the requirement of notice in the case of a dormant partner is due essentially to the fact that since his connection with the firm is unknown, there is no basis for estoppel. But the prerequisite for dispensing with notice is not merely that the partner be unknown but so far inactive in the firm's affairs "that the business reputation of the partnership cannot be said to have been in any degree due to his connection with it." There may be a degree of inconsistency in invoking an estoppel where the fact of membership is unknown but the partner is active—the latter circumstance being one which may not be a cause of inducement to or reliance by third persons. But the rule as stated represents the prevailing American view; and if the partner is not strictly dormant in the sense used, avoidance of liability can be had only under the conditions detailed in subsection (1) (b) and its subdivisions.

Matching up South Carolina case law with the numbered paraphrased rules, the decisions appear to take these positions:

First. They hold substantially as in the first numbered item: knowledge of dissolution prevents liability from attaching against the non-assenting partner, whatever may have been the previous relation of the third person to the firm.[932] Obviously, the party cannot complain that he has been misled.

932. Martin v. Walton, note 848, *supra* — prior creditor, newspaper notice only; Bank of S. C. v. Humphreys, note 859, *supra* — prior creditor, newspaper notice only; Irby v. Vining, note 898, *supra* — generally; Galliott ads. Bank, note 859, *supra* — prior creditor, newspaper notice only; Steele v. Jennings, note 858, *supra* — prior creditor, no special or published notice; Simmel v. Wilson, note 848, *supra* — generally, no special or published notice, no prior knowledge of or dealing with firm; Goodrich v. Barron, note 95, *supra* (diss. op.).

In the cases in which there was newspaper notice only and the party was entitled to special notice, proof that the published notice was read or must have been read furnished the proof of actual knowledge, which

Second. The local decisions are in accord with the second of the rules: persons previously extending credit to the firm are entitled to actual—or as some of the cases put it, special or particular—notice.[933] Newspaper advertisement is not sufficient,[934] nor are other attempts at notice which are not brought home to the prior creditor.[935] Nor is general or public notoriety sufficient if the fact is that the creditor does not know of the dissolution.[935a]

Third. The South Carolina cases are not wholly in accord with the Act as to those persons who are affected by newspaper notice alone. It will be observed that, under the Act, special notice has to be given only to those who have extended credit. The Commissioners' note to Section 35 states as the reason for excluding those who have not extended credit, although they may have had other business transactions with the firm, "the practical impossibility of the partners knowing, by any feasible system of bookkeeping, all the persons with whom they have dealings, unless credit has been extended." The South Carolina cases call for actual notice to all who have had prior dealings, whether as creditors or cus-

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was sufficient. While publication is not of itself notice where special notice is required, the fact of publication is a pertinent element of proof as to the existence of knowledge. Martin v. Walton, note 848, *supra;* Galliott ads. Bank, note 859, *supra;* White v. Murphy, note 225, *supra;* Simmel v. Wilson, note 848, *supra.* Even where there is no newspaper publication, a report of dissolution to a commercial agency, if read, is sufficient; and notification of dissolution to such an agency is evidence. Simmel v. Wilson, note 848, *supra.*

933. Lamb v. Singleton, note 857, *supra;* Brown v. Foster, note 459, *supra;* Simmel v. Wilson, note 848, *supra.* In the cases cited in note 932, *supra,* in which the creditor was held bound by knowledge although there was only newspaper notice, the inference is plain that, in the absence of knowledge, special notice must be given. Where there is neither special notice nor newspaper notice to a person entitled to special notice, the case is, of course, even stronger in his favor. Halls v. Coe, note 196, *supra;* Burris v. Whitner, note 900, *supra;* Brown v. Foster, note 459, *supra;* Lamb v. Singleton, note 857, *supra.*

934. The fact that the creditor is a subscriber to the paper in which the notice of dissolution appears is not sufficient to charge him with notice, although it is evidence on the question of knowledge. Burris v. Whitner, note 900, *supra.* See, also, Martin v. Walton, note 848, *supra.*

935. Hammond v. Aiken, note 243, *supra.* Posting of notice of sale of business including statement of dissolution at firm's store not sufficient. Although here the third person was not entitled to special notice because there had been no previous dealings and was entitled to only newspaper notice, which was not given, the principle would cover both cases. But posting of a notice is an important admissible fact, especially where the parties reside in the same community. Irby v. Vining, note 898, *supra.* The plaintiff here was entitled to special notice; he had neither that nor newspaper notice.

935a. Lamb v. Singleton, note 857, *supra.*

tomers.[936] To the extent, therefore, that prior dealers entitled to special notice may have included those who have not extended credit, the Act changes the law: such persons are not entitled to special notice and are bound by newspaper publication.

As it affects the remaining class of persons—those who have had knowledge of the firm but no previous dealings with it—South Carolina law coincides with the Act: such persons are entitled to and are affected by newspaper notice alone.[937]

The rule and its rationale are thus stated, in *Hammond v. Aiken*:[938]

> The severance of the partnership should be made as notorious as the partnership itself was. Accordingly, it has been decided that particular persons such as those having had dealings with the firm, must have particular knowledge. If sufficient notice is not given, all the members will be held liable for the contracts made by their copartner. . . . Notice in the gazette is sufficient to those who have had no previous dealings with the firm.[939]

Under the Act the only effective equivalent of newspaper advertisement to those affected by it is knowledge or actual notice; no other constructive substitute for the "general notice" which publication produces is offered by the Act. (An exception might be present in a case where no newspaper was published at the place of business of the partnership.) In this respect there may be a change in the older law, for it seems

936. Irby v. Vining, note 898, *supra;* White v. Murphy, note 225, *supra;* Hammond v. Aiken, note 243, *supra.* See, also, Simmel v. Wilson, note 848, *supra,* at 363. Some of the cases speak of persons having "dealings" as entitled to notice, although the particular litigant there involved was a creditor. Martin v. Walton, note 848, *supra;* Bank of S. C. v. Humphreys, note 859, *supra.*

937. Martin v. Walton, note 848, *supra;* White v. Murphy, note 225, *supra;* Hammond v. Aiken, note 243, *supra;* Simmel v. Wilson, note 848, *supra.* In these cases, except Hammond v. Aiken, there is the statement, or at least the intimation, that published notice is conclusive as to persons who have had no prior dealings with the firm.

The failure to give publication notice is evidence on the question of whether there was dissolution in fact. Metz v. Commercial Bank, note 15, *supra.*

938. Note 243, *supra,* at 121. The quoted language is still sound law except as to the change separating prior dealers into creditors and those having other business relations.

939. See, also, Simmel v. Wilson, note 848, *supra,* at 364: "Unquestionably, strangers to the firm, who had not dealt with it, but who had knowledge of it, would be entitled to as definite notice of its dissolution as they had of its existence."

to have been held that other ways of making the fact publicly known were sufficient to charge such persons. It has been said that ". . . advertisement in a newspaper is not the exclusive test of compliance with the outgoing partner's obligation to give 'general notice.' As pointed out in *Lovejoy v. Spafford*, 93 U. S. 430, 23 L. Ed. 851 [1876]: 'It is not an absolute, inflexible rule that there must be a publication in a newspaper to protect a retiring partner. Notice of the dissolution in any other public or notorious manner is proper to be considered on the question of notice.' "[940] Even if the Act changes the law in this particular, it is quite clear that public notoriety may nevertheless be a relevant circumstance bearing on the question of knowledge.

Fourth. The rule deduced in item 4 is a logical answer to the elements necessary to invoke estoppel: persons who have had no dealings with or knowledge of the firm cannot show the preliminary fact on which reliance can be based. Only one case of the kind appears in the South Carolina reports—*Simmel v. Wilson*[941]—and it is full and to the point, stating the proposition that a person who had never dealt with the firm nor knew of its existence and who its members were, was not entitled to either actual or newspaper notice. The case follows the undoubted weight of authority.[942] It will be noticed that the rule of *Simmel v. Wilson* contemplates lack of knowledge not merely of the firm, but of those who compose it. Whether knowledge of the *membership* of the firm continues to be a requisite under the Act is a question to be considered in the light of the observations made in item 3 in connection with the language in subsection (1) (b) (II)—"known of the partnership."

Fifth. One South Carolina case deals with the undisclosed partner. In *Brown v. Foster*,[943] a partner termed a "secret" partner was held liable for purchases made by his copartner after the former's retirement from the firm—there being neither special nor newspaper notice. It does not appear whether, in addition to being generally unknown, the partner was active or not; but the case is decided basically on the

940. Simmel v. Wilson, note 848, *supra*, at 364. Undoubtedly this has been the general rule. MECHEM, PARTNERSHIP, § 394; CRANE, PARTNERSHIP, § 81; 68 C. J. S. 879.

941. Note 848, *supra*.

942. MECHEM, PARTNERSHIP, § 393; CRANE, PARTNERSHIP, § 81; 68 C. J. S. 876; 40 Am. Jur. 310, 311.

943. Note 459, *supra*.

ground that the "secret" partner's membership in the firm was known to the creditor, with whom he had had dealings in the obtaining of credit. The rule of this case cannot be said to be in conflict with the Act, since even though he might have been a dormant partner, he was not one so far as the particular creditor was concerned—a situation covered precisely by subsection (2) (a); nor does it run counter to the general rule, which has it that even with a dormant or secret partner, notice must be given to persons who knew of his connection with the firm.[944]

Some incidental observations are in order on the question of notice. Whether in a given case knowledge has been acquired or due notice given is a question of fact triable by a jury.[945] If the evidence, or lack of it, points only one way, the issue of course is no longer for the jury's consideration.[946] General or public notoriety, or other circulation of the fact of dissolution, is a relevant factor bearing on the issue of actual knowledge;[947] but testimony of a witness that the dissolution was known to the community is regarded as calling for an expression of opinion, and incompetent as hearsay.[948] The notice by which a party is to be charged must be given to, or acquired by, the party himself or one authorized to receive it; and notice given to the selling clerk of a merchant who had previously extended credit is not proper notice.[949] Where a partnership is formed for a single transaction notice of dissolution may be inferred if the transaction for which it was formed has been completed.[950]

The effect of the failure to give due notice, where knowledge is absent, is to make the non-assenting partner liable for any act which was within the scope of the acting partner's authority as if there had been no dissolution. Thus, the non-assenting partner has been bound by a payment made to the

944. MECHEM, PARTNERSHIP, § 397; CRANE, PARTNERSHIP, § 81; 68 C. J. S. 875; 40 Am. Jur. 259.

945. Martin v. Walton, note 848, *supra;* Irby v. Vining, note 898, *supra;* White v. Murphy, note 225, *supra;* Brown v. Foster, note 459, *supra;* Simmel v. Wilson, note 848, *supra;* Goodrich v. Barron, note 95, *supra* (diss. op.).

946. Lamb v. Singleton, note 857, *supra;* Galliott ads. Bank, note 859, *supra.* See, also, Bank of S. C. v. Humphreys, note 859, *supra;* Steele v. Jennings, note 858, *supra.*

947. Lamb v. Singleton, note 857, *supra;* Hammond v. Aiken, note 243, *supra;* Simmel v. Wilson, note 848, *supra.*

948. Brown v. Foster, note 459, *supra.*

949. Brown v. Foster, note 459, *supra.* The requirements for notice under the Act are set out in Section 3.

950. Williams v. Connor, note 59, *supra.*

other by setoff of a firm claim against the acting partner's individual debt;[951] by notes and renewals;[952] by purchases;[953] by the payment to one other than the liquidating partner.[954] In contrast, where the act is not within the scope of authority during the life of the partnership, no liability is created, even though due notice is not given.[955]

Having observed the principles announced in the South Carolina cases, and the respects in which they may have been affirmed or modified by the Act, it remains to be considered how these principles and the Act are affected by other statutory law. Here we must contend with a statute that has been a source of embarrassment and uncertainty before the passage of the Act and that will undoubtedly prove even more so since its adoption. In the article of the Code in which the Firm Name Statutes are embraced[956] appears the following:

> In case there be any change in the owner or owners, proprietor or proprietors, of any such mercantile or industrial establishment, any person retiring from such ownership or proprietorship shall file in the office of the clerk of court of the county in which the principal place of business of such mercantile or industrial establishment is located, a notice of such change, and shall have the sign or signs herein changed, and until both such notice shall be filed and such change made on such signs, such person shall be liable for all debts and contracts of such mercantile or industrial establishment according to the interest he or she formerly had therein.[957]

Only a single case deals with the meaning and operation of this statute. In *Goodrich v. Barron*,[958] the defendants had

951. Halls v. Coe, note 196, *supra*.
952. Lamb v. Singleton, note 857, *supra;* Hammond v. Aiken, note 243, *supra;* Burris v. Whitner, note 900, *supra*.
953. Brown v. Foster, note 459, *supra;* Goodrich v. Barron, note 95, *supra*.
954. White v. Murphy, note 225, *supra*.
955. Hamond v. Aiken, note 243, *supra* — note in firm name to secure individual debt.
956. Art. 3 of Chap. 155 (§§ 7825-7828), S. C. CODE (1942).
957. § 7826, S. C. CODE (1942), enacted 1918, 30 STAT. 879. § 7828, S. C. CODE (1942) makes it a misdemeanor to fail to comply with the requirements for filing notice of composition of the firm and notice of dissolution or change and fixes the penalty therefor.
958. Note 95, *supra*.

been partners doing business under the name "B & M Motor Company." They dissolved the partnership. The named defendant continued to operate the business under the same firm name and bought goods from the plaintiff, for the purchase price of which the action was brought against both former partners. The record shows that there was no published notice of dissolution, and that there was no prior filing of notice of the membership of the firm in the office of the clerk of court. Both the record and the report show that there was no filing of notice of dissolution. The trial judge directed a verdict in favor of the plaintiff, apparently because of the failure to file notice of retirement, but later set it aside, with the explanation that he had misconstrued the statute. On appeal, the Supreme Court reversed, ordering the reinstatement of the verdict in the plaintiff's favor. The court declared (at p. 343), "This is a case of statutory construction, pure and simple;" and (at p. 344), "The admitted facts are that no notice was filed, and the original order directing a verdict was correct and it was error of law to set aside the verdict." The court had *Simmel v. Wilson*[959] before it in argument but reached its conclusion without reference to it or other authority and only on the basis of the statute, declaring that none of the cases cited by the respondent had construed the statute. Concurring in the majority opinion was the Justice who wrote the opinion in *Simmel v. Wilson.* Although there was a conflict in the testimony as to actual knowledge of dissolution, that issue was not sent back for a new trial. The record does not clearly reveal whether the plaintiff had had previous dealings with the firm or knew of its existence before dissolution. Here, therefore, seem to be a point-blank assertion that the failure to file a certificate of dissolution *ipso facto* and conclusively renders a non-assenting former partner liable. The statute as applied in *Goodrich v. Barron* and the provisions of Section 35 of the Act raise these questions:

(1) Is the statute in *pari materia* and harmonious with the Act, or has it been repealed by the Act? (Section 44 contains the usual repealer clause.) It may well be that since the Act is, with respect to notice, largely a declaration of pre-existing law, the statute retains its original vigor so far as it relates to partners. On the other hand, it may be argued that the Act

959. Note 848, *supra.* The statute had been adopted before the appeal in this case, but dissolution had taken place before its adoption.

being the latest expression of the legislative will, its prescription as to notice in Section 35 is exclusive and overrides the statute.

(2) If the statute is treated as not repealed:

(a) Is the statute to be limited to cases where there has been a filing of a certificate of membership and no filing of certificate of dissolution? Apparently not, since in *Goodrich v. Barron* no prior certificate of membership had been filed.

(b) If special notice had been given to a prior creditor of the firm's dissolution, does a failure to file certificate of dissolution nevertheless impose liability? It would be difficult to justify such liability, since the creditor would know that he was not dealing with, and had not made a contract with, the retiring partner. Yet, if the statute is regarded as other than remedial that might occur, under *Goodrich v. Barron.*

(c) If the third person had known of the firm prior to dissolution but had not extended credit, and newspaper notice had been given, would failure to file the certificate create liability? The answer would seem to be in the affirmative, if the logic of *Goodrich v. Barron* is accepted.

(d) If due notice is not given by direct notification or newspaper publication to one entitled, as the case may be, would actual *knowledge* of dissolution preclude liability despite the statute? The answer should be based on the same observations as in (b). In *Goodrich v. Barron* the issue of knowledge never reached the jury; and the net effect was to cut off any inquiry into the existence of knowledge once the showing of non-filing was made.

(e) What is the effect of the statute upon the dormant partner? Under the Act he need not give notice. Must he, nevertheless, file the certificate of dissolution? The logic of *Goodrich v. Barron,* which is not based on principles of estoppel, might demand an affirmative answer. In practice it is less than likely that a partner who has cloaked his association with the firm would now reveal it by publicizing in the clerk of court's office the fact of dissolution. Nothing, however, would prevent him from doing so any more than his "playing safe" by giving newspaper notice. After all, he may not be as dormant as he thinks.

(f) If the third person seeking to hold the non-assenting partner had no previous dealings with or knowledge of the

firm, would failure to file notice subject the partner to liability? Would the result under facts identical with those in *Simmel v. Wilson* be different if the notice was not filed? There might be such a difference if *Goodrich v. Barron* is logically followed out, although the result would be conspicuously unjust.

(g) Is the doctrine of *Goodrich v. Barron* limited to transactions where, as there, the business had been conducted in a distinctive firm name and the contract on which liability was sought was also made in that name? A court, realizing the harsh consequences of pushing the logic of the case to its extreme, might draw the line against its application to a different set of facts; but the result would have to be explained away by more than a mere distinction in the facts.

(h) Would filing of a certificate of dissolution be sufficient in itself, if actual notice or newspaper publication had not taken place? It would be unreasonable to assume that it would; to do so would nullify the provisions of Section 35. Moreover, such a filing should be no more constructive notice of the dissolution than filing of the notice of membership is constructive notice of that fact—which it is not.[960]

Whatever may be the answers to the questions posed, it is clear that there are uncertainties and potential harassment in the co-existence of the statute and the Act. If the letter of the Act is not violated by the statute, its spirit undeniably is: the Act being based on just principles of estoppel. The only reasonable relation of the imposition of liability by the statute to a set of facts is where the facts consist of the filing of a prior certificate of membership which is unchanged after dissolution and reliance is had on the resulting appearance of unaltered membership. Other than this, there is no rational justification for creation of liability in favor of one who extends credit to the unauthorized former partner. Penalizing provisions, which do not give the third person a windfall, are found elsewhere.[961] The matter of changing the sign offers its own set of nagging perplexities, and virtually the same questions already asked might be put in this connection, plus a few others. These suggest themselves.

NOTICE OF DISSOLUTION TO PARTNERS. Section 34 deals with infrequent situations. The situation presented in subsection

960. Franklin Savings Bank v. Riddle, note 96, *supra*.
961. § 7828, S. C. CODE (1942), mentioned in note 957, *supra*.

(a) may be illustrated as follows: A, B and C are partners. The partnership is dissolved by A, acting in accordance with the partnership agreement or in contravention of it. B, in ignorance of the dissolution, enters into a contract in the ordinary course of business. Both A and C are, and should be, liable to contribute to B. Such situations are bound to be rare, because where dissolution is by act of the parties the chance of any one of the partners not knowing of it is remote. If the partnership is at will, dissolution at the will of a partner does not occur until all have been notified; if the partnership is for a specific term or undertaking and dissolution is by mutual consent, clearly all the parties must know of it. Even where the dissolution is in breach of the agreement, it is only the "express will" of the breaching partner that produces it. But there may be "notice" without "knowledge"; and it is only "knowledge", as that is defined in the Act, that will disable the acting partner to recover contribution. The infrequency of the situations contemplated by Section 34(a) is revealed by the fact that there are no cases since the first state adoption of the Act that deal with them. No South Carolina cases touch on the problem, and the Act therefore introduces new law.

The Commissioners' note states that subsection (b) makes a change in the law. The common law rule is that the death or bankruptcy of a partner is a fact of which every member of the public must take notice, including the other partners; in effect, that death or bankruptcy of a partner in itself constitutes constructive notice of that fact, and with it the fact of dissolution. Accordingly, to illustrate the rule, if A, of the firm of A, B and C, dies or becomes bankrupt, the public—including B and C—is charged with notice of the fact. If B, not knowing of A's death or bankruptcy, enters into a contract in the ordinary course of business he would be performing an unauthorized act for which neither C nor the estate of A would be liable and on account of which B would not be entitled to indemnity or contribution from C or the estate of A. The rule as thus illustrated coincides with the agency rule, which denies indemnity to an agent who incurs liability in ignorance of the termination of the agency.[962] Under the Act, however, if B, in the case given, had neither notice nor knowl-

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962. RESTATEMENT OF AGENCY, §§ 120, 451. But otherwise if there is agreement to indemnify. § 386.

edge of A's death, he could obtain contribution from C. The subsection *apparently* does not go so far as to allow B to obtain contribution from A's estate. The language is "each *partner* (emphasis supplied) is liable to his copartners." This would seem to exclude the estate of a deceased partner and the estate of a bankrupt partner. Moreover, the Commissioners' note, in referring to the case of a bankrupt partner, declares: "What has been said of the death of a partner also applies to the bankruptcy of a partner. If there are a number of partners, and one of them becomes bankrupt, and another having no knowledge or notice of this fact makes a contract in the ordinary course of business, there appears no reason why he should not be able to call on his other partners *not bankrupt or deceased* (emphasis supplied) to contribute toward any loss which his separate estate may sustain on account of the contract."

The basic change in the law to which the Commissioners refer in their note occurs in the rule of effective termination of authority on death—the absolute destruction of power without regard to whether the acting partner or the person with whom he deals knows of the copartner's death. This is, of course, the agency rule as well, subject to the "agency coupled with an interest" exception.[963] The note states that the change consists in the adoption of the modification which appears in *some* of the agency cases,[964] and enacted into law by the statutes of some of the states. The chief tenor of these cases and statutes is that protection is afforded to third persons who deal *bona fide* with an agent in ignorance of the principal's death. The note lists among the statutes a South Carolina one —Gen. Stat. (1882), Sec. 1302.[965] But while the Commission-

963. RESTATEMENT OF AGENCY, § 120.

964. See MECHEM, OUTLINES OF AGENCY (3d Ed.), § 209; note, 39 Am. Dec. 81.

965. Now § 7018, S. C. CODE (1942): "Act of Agent Good, Though Principal be Dead. If any agent, constituted by power of attorney or authority, shall do any act for his principal which would be lawful if such principal were living, the same shall be valid and binding on the estate of said principal, although he or she may have died before such act was done. Provided, the party dealing with such agent dealt with such agent *bona fide*, not knowing at the time of the doing of such act that the principal was dead." This statute was enacted in 1828: 6 STAT. 359. An amendment, not included above, was added in 1945 to cover special cases of persons in military service. 44 STAT. 60. The statute does not seem to have been interpreted, and specifically, there are no cases holding it applicable to partnerships.

There is a similar statute protecting a third person dealing *bona fide* with an agent after the principal's death where the agent has trans-

ers' thesis purports to conform to a modified rule which binds the principal's estate it will be observed again that, as the Commissioners explain it, the subsection goes no further than to give an indemnifying or contributory right against the living partners. It is submitted that actually the modified agency rule is not followed substantially. The point of resemblance is a continuance of authority after a partner's death by reason of the acting partner's lack of knowledge or notice; but here the resemblance stops, and the main force of the modified rule which is directed against the deceased principal's estate is not exerted. If these conclusions be true, it follows that, in the event of the death or bankruptcy of A—of the firm of A, B and C—B can obtain contribution from C but not from A's estate. And, by the same token, if the firm consists of only A and B, and B in ignorance of A's death contracts a new obligation, there could be no recovery at all. The likelihood of one of the partners in a firm of two not knowing of the other's death is, of course, very small.

NOTICE TO THIRD PERSONS OF DISSOLUTION CAUSED BY DEATH OR BANKRUPTCY. It has always been the accepted rule that dissolution caused by operation of law, as distinguished from dissolution caused by act of the parties, carries its own notice. The event—death, bankruptcy, subsequent illegality, war—is deemed a matter of which the public must take notice; and, unlike dissolution by act, no notice is necessary, to prior creditors or others, to relieve the other partner or the estate of the deceased or bankrupt partner from liability for future unauthorized acts. Particularly, with dissolution caused by death, not only is the deceased partner's estate absolved from future liability, but the other survivors are as well.[967]

Section 35 of the Act makes no exception in its requirements for notice where the firm is dissolved by death or bankruptcy. It puts subsequent illegality into an excepted category by subsection (3) (a); so that when a firm is dissolved by reason of such illegality the fact that a third person dealing with one of the partners may not know of the supervening

ferred a bill or note made or endorsed by the principal. It has not been construed. § 7019, S. C. CODE (1942), enacted 1828, 6 STAT. 359.

966. MECHEM, PARTNERSHIP, § 388; CRANE, § 81; 68 C. J. S. 875; 40 Am. Jur. 309.

It has been said that dissolution by judicial decree falls in this category. MECHEM, PARTNERSHIP, § 388; Commissioners' note to Section 34.

967. The leading American case is Marlett v. Jackman, 3 Allen 287 (Mass. 1861).

circumstance which has thus put an end to the partnership will not furnish him an otherwise valid ground to hold the other partners. This exception has been criticized as arbitrary and unfair.[968]

The failure to specifically take dissolution by death or bankruptcy out of the general requirements of notice, and the particularizing of subsequent illegality as not affected by the requirements for notice, apparently indicate an intention to put dissolution by death or bankruptcy in the same class as dissolution by act of the parties so far as necessity for notice is concerned.[969] This being so, notice of death or bankruptcy (what of dissolution by judicial decree?) is not imputed to the public. Yet, even so, there is some murkiness here. If we take the case of the firm of A, B and C, which has been dissolved by the death of A, an unauthorized transaction by B with D in the ordinary course of his business would bind C. It is assumed that D is a person entitled to direct notice as a creditor or to newspaper notice as a person having knowledge of the firm prior to dissolution, and that due notice has not been given and he has no knowledge of A's death. The imposition of liability against C is symmetrical with the imposition of similar liability under Section 34. But is A's estate liable to D? At first blush, it would seem that it would be. Yet who is to give the notice? It is true that notice is effective no matter who gives it, provided it is duly given. But if the survivor does not give notice of dissolution caused by A's death, does a duty fall upon A's representative—who does not have possession of the firm books—to give notice in order to protect the estate in his charge from future liabilities? It would be fantastic to suppose that an advertisement directed to the deceased's creditors would be constructive notice to future firm creditors whose claims would arise only after the partner's death. The surviving partners? One of them might give notice to protect himself against the unauthorized acts of his co-survivors; but he would hardly do so to protect anyone but himself. And if the firm consisted of only two partners, the partner violating a duty toward the estate of his copart-

968. CRANE, PARTNERSHIP, § 81; CRANE, *The Uniform Partnership Act. a Criticism*, 28 HARV. L. R. 762, 782 (1915).
969. At least that is what eminent authorities seem to believe: MECHEM, PARTNERSHIP, § 388; CRANE, PARTNERSHIP, § 81; 28 HARV. L. R. 762, 782 (1915).

ner by incurring unauthorized liabilities would not, out of character, give notice to protect against his own act.

In the event of bankruptcy, would the trustee be under a duty to give notice to creditors who were not and could not be listed? Would official published notice by the trustee constitute constructive notice to those persons of the dissolution of the firm? It will be noted that under Section 35(3)(b) the partnership is not bound in any event where the partner acting is bankrupt. Notice is imputed by this subsection to the person with whom he deals of the acting partner's bankruptcy. Why should notice be imputed here and not when the non-acting partner is bankrupt? The possibilities and probabilities of the third person's knowledge are as great, or as small, in one case as in the other.

Further, if we accept as correct the premise that Section 34(b) does not give a partner incurring liability in ignorance of the death or bankruptcy of a copartner the right to contribution against the deceased or bankrupt partner's estate, then to allow a third person to recover against the estate of one or the other would produce a major contradiction. Thus, as has been seen, B, having no knowledge or notice of A's death or bankruptcy, can recover contribution from C, the living copartner, but not from A's estate; or if the firm is that of A and B, he cannot recover at all. Can D, a third person with whom B deals, recover from A's estate, while B, who might equally be out of pocket if he paid D, is to be denied the right?

No cases in jurisdictions in which the Act is in force have up to now dealt with this phase of the problem of notice, and one must be resigned to the obscureness of the Act in this respect. Nor do the Commissioners' notes offer any comment on this point unless the comments to Section 34—which have been touched upon—are intended to carry over into Section 35. There are no South Carolina cases that deal with the matter. The South Carolina statute which has already been noted as offering protection to persons dealing *bona fide* with an agent and in ignorance of the principal's death can scarcely be stretched into a formula for partners.[970]

Holding Out as Partner After Dissolution. Subsection (4) of Section 35 emphasizes that the principle of estoppel by

970. See note 965, *supra*.

holding out is not affected by Section 35. Thus, even if there has been dissolution, an estoppel may arise where a former partner holds himself out, or allows himself to be held out, as a partner, and a third person relies upon it. The case would hardly arise if there had been actual notice to, or knowledge by, a prior creditor or other party of dissolution: if he knew of dissolution, he could hardly be deemed to rely upon appearances to the contrary. If there was holding out, that might, as to such persons, create the impression of a new partnership, but not a well-founded belief of continuance of the old one. But with persons affected by newspaper notice, and those entitled to no notice at all, estoppel could easily arise out of such conduct. The continued use of the firm name, the employment of the firm stationery without change, failure to alter the firm sign, seemingly conducting the business as a going concern—are all elements to be considered. They are relevant on the question of whether there was dissolution in fact—since their prolonged use might be a circumstance bearing upon the continuance of the partnership;[971] but even where dissolution has concededly taken place, these courses of conduct may well lead others to believe that it had not occurred. No South Carolina cases deal directly with estoppel after dissolution by holding out, although there are facts in some of them that could have constituted the basis of controversial issue on the point if the cases had not been decided on other grounds.[972]

(To be concluded)

[EDITOR'S NOTE: *Due to limitations of space the concluding portion of Professor Karesh's article will appear in the next issue of the* QUARTERLY.]

971. Metz v. Commercial Bank, note 15, *supra.* See, also, Simmel v. Wilson, note 848, *supra.*

972. See Metz v. Commercial Bank, note 15, *supra* — no change in firm name or use of sign, and continuity of business; Simmel v. Wilson, note 848, *supra* — continued use of firm name and stationery, latter, however, showing only name of partner continuing business following firm name; Goodrich v. Barron, note 95, *supra* — continued use of firm name and stationery. In the last two cases, there is no development of facts as to whether the retiring partner consented to the continued use of the firm name.