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Partnership Law and the Uniform Partnership Act in South Carolina--Part 4

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PARTNERSHIP LAW AND THE UNIFORM PARTNERSHIP ACT IN SOUTH CAROLINA—Part 4

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SECTION 36. Effect of Dissolution on Partner's Existing Liability.

(1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(4) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts.

Subsection (1), preserving the existing liabilities of partners after dissolution, is a restatement of a general rule which, by decision, dicta or inference, has found approval in many South Carolina cases.[973] Not only does dissolution not

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973. Dorrill v. Steamboat Co., (S. C. Mss. Dec. 1826)—(syll.) "The liability of partners on a partnership contract * * is not affected by the subsequent dissolution of the partnership or change of members—the partners contracting are still liable on their contract." Kendrick v. Campbell, note 585, *supra*, at 525, 526; Kinloch v. Hamlin, note 120, *supra*, at 20; Hart v. Finney, note 261, *supra;* Farrow v. Bivings, note

of itself discharge the partners' obligations, but the partners cannot by arrangement among themselves bring about their discharge. Hence, particularly, when on dissolution the partnership liabilities are assumed by one or more of the partners, the assumption does not relieve the others of responsibility for them.[974] A partner does not, and cannot, throw off obligations incurred while he was a member by wrongful dissolution of the partnership or by wrongful abandonment of it.[975] When dissolution is caused by the bankruptcy of a partner, the other partners remain bound for, and the partnership property is not withdrawn from subjection to, firm demands.[976]

An executory or continuing contract which by its nature or terms depends upon the continued existence of the partnership ceases to be obligatory upon the partners after dissolution.[977]

Although not involving the continued existence of partners' obligations, a pair of related questions should be noticed. While, ordinarily, the obligations of third persons to

552, *supra*, at 30—"A partner cannot exonerate himself from personal liability for the existing engagements of the partnership by assigning or selling out his interest in the concern." McLucas v. Durham, note 400, *supra;* Metz v. Commercial Bank, note 15, *supra;* Reab v. Pool, note 65, *supra;* Allen v. Cooley, note 399, *supra;* Allen v. Cooley, 53 S. C. 414, 31 S. E. 634 (1898); Wright v. Hodges, note 389, *supra;* Welling v. Crosland, note 74, *supra;* Strickland v. Strickland, note 400, *supra;* Binswanger v. Green, note 400, *supra.*

974. McLucas v. Durham, note 400, *supra;* Reab v. Pool, note 65, *supra;* Allen v. Cooley, note 399, *supra;* Allen v. Cooley, note 973, *supra;* Wright v. Hodges, note 389, *supra;* Strickland v. Strickland, note 400, *supra;* Binswanger v. Green, note 400, *supra.*

Where there is assumption, the creditor may nevertheless sue the original debtor-partners and not the assuming partner alone. See the cases cited in note 400, *supra,* and the text in which that note appears.

If the assuming partner becomes bankrupt, filing as a claim against him of a partnership debt does not amount to a novation or otherwise relieve the other partners. Wright v. Hodges, note 389, *supra.*

975. Kinloch v. Hamlin, note 120, *supra,* at 20—"It is true, he had no right to dissolve the partnership, so far as the rights of the defendant were concerned, nor could he exonerate himself from liability to others by any act of his own." Welling v. Crosland, note 74, *supra,* at 142—"While, as between themselves, a member * * may withdraw, subject to accountability for damage done to the others, he cannot by withdrawing or abandonment, relieve himself from obligations assumed while he was a member."

976. Pelzer Mnfg. Co. v. Pitts, note 185, *supra.*

977. Holmes v. Caldwell, 8 RICHARDSON'S LAW 247 (S. C. 1855)—defendants, partners in cotton firm, agreed to give plaintiff all their drayage business. The firm was dissolved by mutual consent and a new firm was formed with some of the old members who refused to give plaintiff its drayage. It was held that the non-employment of the plaintiff by the new firm was not a breach of the original contract.

a firm are not affected by its dissolution,[978] the contract may be of such a character as to be contingent upon the continued existence of the firm, and upon its dissolution performance by the third person may no longer be claimed by the former members or by a successor firm.[979] A guaranty of a partnership's promise to pay for goods to be purchased is vitiated if the goods which are the subject of the guaranty are furnished to a corporation formed by the members, but the guaranty is effective if the guarantor expressly or impliedly consents to such an alteration of the guaranty contract.[980]

Novation and Release. While the partners cannot by their own acts induce discharge of their obligations, their creditor by dealings with some or all of them may bring it about. Subsection (2) presents an instance of strict novation which has that result. It is not to be assumed with reason that only a technical or strict novation, as set out in the subsection, will have such an effect, although it is an obvious method of accomplishing it; and different circumstances of discharge, based on other principles, may work the same result. Instances of novation or similarly effective dealings are to be found in the South Carolina cases. In *Townsend v. Stevenson*,[981] the plaintiff, holder of the notes of a firm, surrendered the notes in return for the individual note of a partner who had assumed the firm debts on dissolution; it was held, under the facts, that the individual note had been accepted in payment of the

978. 68 C. J. S. 862.

979. Anderson v. Holmes, note 790, *supra*—defendants agreed to make advances to firm composed of named plaintiff and another, who agreed to ship naval stores in consideration therefor and gave chattel mortgage as security for undertaking and repayment of advances. The firm was dissolved by withdrawal of the second member, and a new firm was formed by admission of another, the co-plaintiff. In this action for alleged wrongful failure to continue the advances and for wrongful seizure under the mortgage, one of the defenses was that the contract having been made with the dissolved firm, the action could not be maintained by the plaintiffs as a successor firm. This contention was concurred in by the court, but it was held that it was for the jury to decide—as it affirmatively did—whether the contract was renewed with the new firm.

980. Providence Machine Co. v. Browning, note 7, *supra*—guaranty by one of partners of payment for machinery ordered in firm name but shipped to corporation of same name formed by the partners; held question for jury to decide whether guarantor had consented to sale to corporation under terms of guaranty.

Cf. the opposite situation: A continuing guaranty addressed to an individual cannot be acted upon by a firm subsequently formed by the guarantee and another. Sollee v. Meugy, 1 BAILEY'S LAW 620 (S. C. 1830).

981. 4 RICHARDSON'S LAW 59 (S. C. 1850).

firm notes, and the latter were declared extinguished. In *Rowand v. Fraser*,[982] effect was given to an agreement between two partners and a creditor, on dissolution, under which each partner gave to the creditor a bond for one-half of the debt and it was agreed that a chose in action in the hands of the creditor belonging to the firm should be applied to payment of the bonds. Where, on dissolution, a retiring partner left the remaining partners in possession of the firm assets, taking a release of liabilities from them, and the remaining partners compounded firm debts by giving notes endorsed for their accommodation, the endorser, on subsequently paying the notes, was held not entitled to recover from the withdrawing partner.[983] The endorser was regarded as a volunteer, whose voluntary payment of the withdrawing partner's debt could not make him the latter's creditor.

It has already been observed, under Section 15, under the heading of Release of Partner, that at common law the release of one partner released all. Here again notice is to be taken of Section 7038, S. C. CODE (1942), set out under the same heading, which changes the law as it affects partners after dissolution: the effect of the statute being to preserve the liability of the other partners on the release of one, unless a contrary intention is manifested in writing.

Dealing with Assuming Partner. Subsection (3) is a clear recognition of a principal-surety relationship which arises upon the assumption of firm obligations by one or more partners. The assuming partner becomes the principal, and the retired partners sureties. Although the obligations of partners are not discharged by dissolution and assumption, as has been seen, the relation of principal and surety arising out of the assumption agreement is one which the creditor, knowing of the arrangement, is bound to respect. Hence, following familiar suretyship law, a material alteration in the nature or time of payment of the obligation will discharge the retired partners who stand in the position of sureties.[984]

982. 1 RICHARDSON'S LAW 325 (S. C. 1845).

983. Matthews v. Colburn, 1 STROBHART'S LAW 258 (S. C. 1847).

984. That subsection (3) is a recognition of the principal-surety relationship created by an assumption agreement and as such a declaration of the majority rule, see MECHEM, PARTNERSHIP; § 428; CRANE, PARTNERSHIP, § 79. That the subsection is so construed, see Drake v. Hodgson, 194 N. Y. S. 875, 118 Misc. 503 (1922); Stikeman v. Hodgson, 75 N. Y. S. 2d 73, 272 App. Div. 627 (1947), app. den. 76 N. Y. S. 2d 537, 273 App. Div. 827 (1948). Other New York cases take the same

There is comparatively little local law dealing with the new status of the partners as established by an assumption agreement, but there is enough to indicate substantial harmony with the essence of subsection (3)—that the new relation is that of principal and surety.[985]

view. In McClatchy Newpapers v. Robinson, 68 Cal. App. 2d 135, 155 P. 2d 882 (1945), an extension of time to an assuming partner, followed afterwards by a release, was held to discharge the retiring partner, the court applying Section 36. In Lenger v. Hulst, 259 Mich. 640, 244 N. W. 187 (1932), a retiring partner was held discharged by reason of subsequent dealings with the assuming partner falling under the subsection; and the same result was reached in another Michigan case, Wolverine Cigar Co. v. Knoppow, 253 Mich. 243, 235 N. W. 177 (1931), although in this case the court ambiguously declares that the relation was not one of suretyship but that the assuming partner's liability was primary. In Field v. Fishkin, 180 Wis. 149, 192 N. W. 463 (1923), the court admitted that a suretyship relation arose, but held that the creditor did not have to treat the former partners as other than joint principals; no reference is made, however, to subsection (3).

As with conventional suretyship, a reservation of remedies against the partner-surety will keep the latter liable. See Bank of U. S. v. Moscowitz, 268 N. Y. S. 705, 105 Misc. 629 (1934).

985. Allen v. Cooley, note 973, *supra*—holding that because of the relation the retiring partner could, by way of exoneration, compel the application of firm assets retained by the assuming partner to the payment of firm debts. See the dicta in the affirmed Circuit Court decree, at p. 418, to the effect that extension of time to an assuming partner, without consent of the retiring partner, will discharge the latter.

As has already been seen, under Section 15, an assuming partner may be sued alone, his liability being treated as *primary*. As such it is not exclusive, and it is reasonably apparent that suing him alone is not the equivalent of a novation, and the other partners are still liable—just as any surety would be on failure to collect from the principal. See Doty v. Crawford, note 399, *supra;* Allen v. Cooley, note 399, *supra,* and the text in which these notes appear.

A retiring partner who is compelled to pay the debt which his copartner has assumed is, like other sureties, entitled to subrogation. See SIMPSON, SURETYSHIP, § 47 (1950).

It would seem that, under suretyship rules, a creditor's release of the assuming partner would release by operation of law the other partners as well. In Wright v. Hodges, note 389, *supra,* a partner who was sued on a firm debt defended on the ground that, after the assuming partner had become bankrupt, the creditor had filed his claim and participated in a composition. Because of a scarcity of facts as to the course of the bankruptcy proceedings, the court did not go into the defense based upon the composition, holding the defendant liable in the face of other defenses. On general principles it would appear, however, that the bankruptcy of an assuming partner, as with an ordinary principal, does not discharge the other partners, even though the creditor has filed his claim and taken part in a composition leading to the bankrupt partner's discharge. See SIMPSON, SURETYSHIP, §§ 67, 68.

While, under § 7038, S. C. CODE (1942), a composition with a partner after dissolution will not release the others in the absence of a contrary intention, it is believed that the provision has no other purpose than to change the common law rule as to joint debtors, and that it has nothing to do with and is not inconsistent with the new situation produced by an assumption agreement of which the creditor has knowledge. For a holding to this effect under a similar statute in a state in which the U. P. A. is in effect, see Bank of U. S. v. Moscowitz, note 984, *supra.*

Survival of Obligations on Death of Partner. Subsection (4)—up to the language "but subject to the prior payment of his separate debts"—is apparently designed to make it clear that while partnership obligations are joint (as Section 15 (b) declares), the death of a partner does not absolve his estate from obligations incurred while he was a partner. In reality, if this is the purpose of the subsection, it does not state a new doctrine; for while *at law* the whole duty becomes exclusively that of the survivor, English and American decisions alike have granted either immediate or ultimate recourse against the estate of the deceased partner. The English cases have treated partnership obligations so far joint and several in equity as to permit direct and immediate resort to the deceased partner's estate, without prior recourse to the survivors and without the necessity of showing inability to collect from them.[986] Many American cases have virtually followed the same course; and the same result has been reached in some states through statutes principally affecting joint obligations.[987] In contrast, other jurisdictions have permitted the deceased partner's estate to be reached only after a showing of insolvency of the living partners.[988]

These topics have largely been touched upon in the consideration, under Section 15, of Death of Partner as Affecting Actions Against Partners. As to South Carolina law, it has been noticed that, while there have been procedural changes, the estate of a deceased partner never escaped ultimate liability; and that the present state of the law is that there may be a joinder of the survivors and the representative of the deceased partner in a single action without, apparently, a precondition of the survivors' insolvency.[989]

It is reasonable to assume that the subsection does no more than affirm the right of a firm creditor to reach a deceased partner's estate, and that it does not prescribe the procedure

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986. Wilkinson v. Henderson, 1 Myl. & K. 582 (1833). The English Partnership Act of 1890 (§ 9), declaring a partner jointly liable goes on to provide that "after his death his estate is also severally liable in a due course of administration for such debts and obligations."
See MECHEM, PARTNERSHIP, § 411; 4 CORBIN, CONTRACTS, § 930; 2 POMEROY'S EQUITY JURISPRUDENCE (5th Ed.), § 409; note, 61 A. L. R. 1410.
987. See the authorities and annotation cited in note 986, *supra.* For list of the statutes, see 2 WILLISTON, CONTRACTS, § 366.
988. See note, 61 A. L. R. 1410, 1419.
989. Wiesenfeld v. Byrd, note 269, *supra;* and see the discussion further under Section 15.

or the conditions under which such recourse is to be had. There seem to be no cases in jurisdictions having the Act in which this provision has been interpreted, and, specifically, there are none in which it is declared that the method and conditions appropriate for reaching the deceased partner's estate have been altered by the provision.[990] To localize the problem, it is a justifiable assumption that the subsection reflects pre-existing law in its basic principle of the survival of individual liability, and that procedural and remedial requirements and limitations in the enforcement of the liability are not affected.

The liability of partners in tort being joint and several, there has not been the need for the intercession of equity or for a curative statute in order to reach the estate of a deceased partner on a tort claim. This consideration and the use of "obligations" in subsection (4) would seem to rule out the applicability of the subsection to tort liability. In cases involving the Act as it may have relation to tort liability on a partner's death, the courts have not referred to subsection (4) but to other Sections of the Act, notably Section 13 and Section 15(a). It is the law of abatement and not the law of joint obligations that has controlled the outcome of these cases, and recovery against the estate of a deceased partner has depended upon whether the cause of action survived: if governed by unchanged common law rules the tort liability dies with the partner dying as it might affect his estate; if made to survive by applicable statutory change, the liability can be asserted against his estate.[991] It is quite clear, therefore, that subsection (4) does not ordain a survival of tort liability where it does not otherwise exist. Preexisting South Carolina law is patently in accord with the cases referred to, since as has been seen, under *Brown v.*

990. In Georgian Press Co. v. Hill, 45 N. Y. S. 2d 561, 180 Misc. 548 (1943), affd. 48 N. Y. S. 2d 316, 181 Misc. 464 (1944), it was held that a judgment could not be obtained against the executrix of a deceased partner without showing inability to collect from the survivors, in keeping with New York law. No reference is made to Section 36(4).

991. Sumner v. Brown, 312 Pa. 124, 167 Atl. 315 (1933)); State Bank of Binghamton v. Bache, 282 N. Y. S. 787, 156 Misc. 503 (1935); Kangas v. Winquist, 207 Minn. 315, 291 N. W. 292 (1940); Wallace v. Rankin, 173 Fed. 2d 488 (C. C. A. 9, Cal., 1949). But even where the action may have abated as to the deceased partner, it continues as to the survivors. Kangas v. Winquist, *ante.*

Bailey,[992] a cause of action arising out of a tort not kept alive by the Survival Statute will abate as to a partner's estate upon his death.

The remainder of subsection (4)—"but subject to the prior payment of his separate debts"—presents a problem of priorities between firm and separate obligations which will be considered hereafter under Section 40.

SECTION 37. **Right to Wind Up.** Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the court.

This Section has already been foreshadowed to a considerable degree in other parts of this article, but a recounting of some of the observations already made, together with supplementary or elaborating comments, is in order because of their direct relation to the substance of the Section.

Broadly speaking, the Section is an adequate reflection of pre-existing South Carolina law. There are apparently no South Carolina cases which state in positive terms the coequal right of each partner in a firm not dissolved by death or bankruptcy to wind up the affairs of the firm, but so much is implied in the accepted principle that each partner has the power to do all such acts as may be necessary to wind up.[993]

On dissolution by death, the duty, as well as the right, to wind up passes to the surviving partner or partners.[994] On the death of the last survivor, the duty and right pass to his personal representative.[995] The right of the survivor is exclusive; and the personal representative of the deceased partner has no authority to participate in the liquidation nor is he en-

992. Note 196, *supra*—and discussed under Section 15, Death of Partner as Affecting Actions Against Partners.

993. See under Sections 33 and 35.

994. See, under Section 15, Death of Partner as Affecting Actions by Firm; under Section 35, Powers of Surviving Partner, especially the cases cited in notes 877 and 878, *supra*. See, also, Section 25(d).

995. Dial v. Agnew, note 488, *supra;* Duncan v. Westerlund, note 565, *supra*. See, also, Section 25(d).

titled to the possession of any of the firm assets.[996] Moreover, when on voluntary dissolution one of the partners has been appointed to liquidate, his personal representative does not succeed to his rights or duties on his death; the survivor is clothed with them.[997] The authority of the survivor to wind up does not depend upon any consent of the successors in interest of the deceased partner, and because the right to liquidate does not pass to the deceased partner's personal representative, the survivor is not justified in seeking appointment as administrator of his copartner's estate for liquidating purposes.[998] Neither case law nor statutes give the Probate Court general jurisdiction over the surviving partner so as to compel him to account to it in liquidation, but there is legislation compelling him to file a statement of firm assets and liabilities as part of the record of the administration of the deceased partner's estate.[999]

While the representatives of the deceased partner do not participate in the liquidation, they are of course entitled to an account, and it is the duty of the survivor to account to them.[1000] He is accountable not only for what he has received,

996. Kinsler v. McCants, note 196, *supra;* Manship v. Newton, note 550, *supra.*

997. Kinsler v. McCants, note 196, *supra*—liquidator turned over notes to defendant as attorney for collection; after liquidator's death defendant collected notes and paid over to liquidator's personal representative; defendant held liable to plaintiff, surviving partner, for full amount. See, also, Boyd v. Munro, note 759, *supra*—where firm of three partners dissolved by death of one of them, and one of two remaining partners undertook to collect assets, held that survivor (the third) entitled to the assets on the second partner's death.

998. Rowell v. Adams, note 631, *supra.*

999. § 8988, S. C. CODE (1942): "The survivor or survivors of every firm or partnership shall within twenty (20) days after the death of any member of such firm or partnership, file with the Judge of Probate, having jurisdiction of the estate of such deceased member a sworn statement in writing showing the assets and liabilities of said firm or partnership in detail: Provided, That the Judge of Probate may for good cause shown, enlarge the time for the filing of such statement. The Judge of Probate having jurisdiction shall have the same power and authority to enforce the provisions of this section as he has with reference to the returns of executors and administrators."

In Elliott v. Flynn, note 499, *supra,* at 395, it is stated that the purpose of the statute is to protect the interests of creditors of the firm. It is probable, also, that it is intended to serve the interests of the deceased partner's representatives.

1000. Moffatt v. Thomson, note 562, *supra,* at 160; Schenk v. Lewis, note 151, *supra,* at 248; Crews v. Sweet, note 364, *supra,* at 306. The same thing is implied in the numerous cases which state the duty of the survivor to make a proper distribution among the representatives of the deceased partner after settlement of firm obligations. White v. Union Ins. Co., note 307, *supra,* at 559; Dial v. Agnew, note 488, *supra,*

but what he "ought to have received by reasonable diligence."[1001] The surviving partner is a fiduciary, and he has been denominated a trustee[1002]—certainly for the deceased partner's successors in interest; and there are inferences that he is a trustee for creditors.[1003]

Actions against third persons on obligations to the firm are maintained by the survivor alone.[1004] Where the survivor has died, his personal representative is the party to maintain the action.[1005] Other matters, already touched on, incident to the surviving partner's conduct as liquidator are footnoted below.[1006]

at 459; Schenk v. Lewis, note 151, *supra*, at 242. The list is not exclusive. The proposition is of course implicit in every case in which relief is sought or granted to the deceased partner's representatives against the survivor.

1001. Manship v. Newton, note 550, *supra*, at 266.

As to the survivor's duties generally, see, under Sections 33-35, Powers of Surviving Partner.

1002. Cooper v. Merrihew, note 597, *supra;* Wiesenfeld v. Byrd, note 269, *supra*, at 114; Schenk v. Lewis, note 151, *supra*, at 242; Elliott v. Flynn, note 499, *supra*, at 395. See, further, under Section 21.

1003. Wiesenfeld v. Byrd, note 269, *supra;* Schenk v. Lewis, note 151, *supra*, at 242; Elliott v. Flynn, note 499, *supra*, at 395. The correctness of treating the survivor as trustee for creditors is open to question. While creditors may have derivative equities—to compel the application of firm assets to the prior payment of firm debts—they can hardly be said to have any beneficial interest as such in the property itself, and it is difficult to find any *fiduciary* obligation towards them. It has been said, even as to a firm not dissolved by death, that its funds "are impressed with a trust in favor of the partnership creditors." Brown v. Bradley, note 736, *supra*, at 274. The criticism just made is all the more applicable here. In Allen v. Cooley (53 S. C. 414), note 973, *supra*, at 443, it was said that partnership property in which a partner had transferred his interest to his copartner on assumption by the latter of the firm debts was "impressed with a trust" for the purpose of meeting the debts. Even if it be conceded that there might have been a trust, it would hardly extend to a trust for the benefit of creditors and would logically be confined to the retiring partner.

1004. Kinsler v. McCants, note 196, *supra;* Younts v. Starnes, note 487, *supra;* Dial v. Agnew, note 488, *supra;* Crews v. Sweet, note 364, *supra*. See, further, under Section 15, Death of Partner as Affecting Actions by Firm.

1005. Dial v. Agnew, note 488, *supra;* Duncan v. Westerlund, note 565, *supra*.

1006. As to:

Surviving partner's right to reimbursement for outlays made in liquidation, see, under Section 18, Indemnity.

Profits made after death of partner, see, under Section 18, Division of Profits.

Interest chargeable against survivor in delayed or improper liquidation, see, under Section 18, Interest; and also for interest allowable to survivor.

Compensation of surviving partner, see, under Section 18, Partner's Right to Compensation.

Nature of survivor's title, see Section 25.

The Section does not expressly provide that on dissolution by bankruptcy, the non-bankrupt partner shall have the right to wind up, but since the bankrupt partner is specifically denied the right, the privilege given to all the partners to liquidate must necessarily be given to the non-bankrupt partner or partners. South Carolina law is in accord; the right and duty to wind up are vested in the non-bankrupt partners, whose powers in this regard are substantially the same as those of a surviving partner.[1007]

As the Section indicates, the liquidation—at least where dissolution is by act of the parties—may be controlled by agreement, and the equal right to wind up which each partner possesses may be relinquished to one or more of the other partners. It has already been seen that such agreements are of common occurrence in the South Carolina cases.[1008]

The power of a court to interfere, for cause, with the liquidation by a partner otherwise entitled to the right is recognized in the concluding proviso in Section 37. Although the South Carolina cases do not expressly state the rule, it has been applied frequently. Customarily the process has been through the appointment of a receiver, who takes the liquidation out of the hands of the partner or partners ordinarily entitled to handle it.[1009]

SECTION 38. Rights of Partners to Application of Partnership Property.

(1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by ex-

1007. Crews v. Sweet, note 364, *supra*. See, under Sections 33-35, Powers of Non-Bankrupt Partner. See, also, 11 U. S. C. § 23 (5, i).

1008. See, under Section 33, Liquidating Partner. As to compensation of liquidating partner, see, under Section 18, Partner's Rights to Compensation.

1009. See, under Section 22, Receiver. As to injunctions, see, under the same section, Injunction.

pulsion of a partner, *bona fide* under the partnership agreement and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under section 36(2), he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have,

(I) All the rights specified in paragraph (1) of this section, and

(II) The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2aII) of this section, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:

(I) If the business is not continued under the provisions of paragraph (2b) all the rights of a partner under paragraph (1), subject to clause (2aII), of this section,

(II) If the business is continued under paragraph (2b) of this section the right as against his co-partners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his co-partners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the

partner's interest the value of the good-will of the business shall not be considered.

The greater part of Section 38 is devoted to situations which, as yet, have not appeared in the South Carolina cases, and its effect is to introduce new law. It has already been seen, under Section 31, that a partnership may be dissolved in contravention of agreement, and that the South Carolina cases recognize such a possibility. The cases, as has been seen, do not go beyond the declaration that a partner wrongfully producing dissolution is subject to liability for damages;[1010] they do not state the further consequences. These consequences are detailed in the Section. In addition to prescribing damages for the wrongful dissolution, the Section specifies the wrongdoing partner's rights. It is important to observe that despite dissolution wrongfully brought about, the innocent partners may continue the business, under prescribed conditions.[1011] Although the Section speaks of indemnifying the wrongdoing partner "against all present or future partnership liabilities"—subsection (2)(b)—the choice of the innocent partners in continuing the business can hardly be taken to mean an avoidance of the dissolution; once having taken place, continuance of the business will not avert or undo it.

Division in Cash. Subsection (1) declares that each partner, unless otherwise agreed, "may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners." In their note to Section 38, the Commissioners state, "The right to each partner, where no agreement to the contrary has been made, to have his share of the surplus paid to him in cash makes certain an existing uncertainty. At present it is not certain whether a partner may

1010. See Middleton v. Price, note 10, *supra;* Welling v. Crosland, note 74, *supra.* See, further, the discussion of these cases under Section 31, Dissolution in Contravention of Agreement.

1011. That these conditions must be complied with, see Crossman v. Gibney, 164 Wis. 395, 160 N. W. 172 (1916); Dow v. Beals, 268 N. Y. S. 425, 149 Misc. 631 (1933).

The Section may affect the rule of the decision in Kinloch v. Hamlin, note 120, *supra*—where a partner who wrongfully abandoned the business before the end of the term was held not entitled to profits afterwards. See discussion of this case under Section 31, Dissolution in Contravention of Agreement; and under Section 18, Division of Profits.

not insist on a physical partition of the property remaining after third persons have been paid."[1012] It would seem that the language of subsection (1) and the Commissioners' explanation indicate with reasonable clarity that a partner, or his representative, does not have the right to demand a partition in kind even after the payment of debts to third persons. The conclusion is rendered almost inevitable by the provision that a partner may have the *surplus* applied to pay him in cash—that is to say, the surplus *after* the payment of firm debts. Despite this seemingly plain language, however, some of the cases apparently take the position that if partnership debts have been paid, a physical partition may be compelled, even though all the partners or their representives are not willing that it shall take place.[1013] In taking this course, which either overlooks the subsection or declines to accept it at its face value, these cases have followed a generally accepted rule which, while recognizing the right of the partners to demand the payment of their respective interests in cash, tacks on a qualification that if firm debts have been paid partition in kind may nevertheless be decreed.[1014]

While consideration of the problem in the South Carolina cases is not extensive, they seem to indicate, on the whole, that the process of winding up contemplates the reduction of all the firm property to cash.[1015] One case seems apposite to the point involved and to conform to the rule of the subsec-

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1012. So also is the draftsman's comment: 24 YALE L. J. 617, 629.

1013. Watterson v. Knapp, 35 Cal. App. 283, 95 P. 2d 154 (1939)—Section 38 not mentioned; Hooper v. Barranti, ______Cal.______, 184 P. 2d 688 (1947)—Section 38 not mentioned; Rinke v. Rinke, ___ Mich.______, 48 N. W. 2d 201 (1951)—Section 38 referred to, but court declares that, taken with other Sections of the Act (which ones are not mentioned), it was not the intention of the legislature in adopting the Act to deny the right of partition in kind where firm debts had been paid.

There are other cases which, while not referring to Section 38, deny the right to physical partition, unless the partners are willing or have effectually agreed upon it. Weisman v. Jenkin, 154 Pa. Super. 12, 34 A. 2d 907 (1943); Webber v. Rosenberg, 318 Mass. 768, 64 N. E. 2d 98 (1948).

1014. 68 C. J. S. 901, 902; 40 Am. Jur. 104; note, 77 A. L. R. 300.

1015. Moffatt v. Thomson, note 562, at 160—by surviving partner; Schenk v. Lewis, note 151, *supra*—by surviving partner. Where the firm is being wound up by a receiver, the course taken has been to sell all the property and divide the proceeds. Wilson v. Wilson, note 24, *supra;* Kennedy v. Hill, note 529, *supra*—in which there is the inference that on dissolution assets shall be converted into cash, but that the parties may agree otherwise. In actions for accounting and settlement, the practice seems to be to direct a sale and division of proceeds. Gee

tion. In *Schenk v. Lewis*,[1016] which was an action by the survivors of a firm against the representatives of the deceased partner for settlement and accounting, and in which it appeared that there were no outstanding firm debts, the court, in considering the method of utilizing the property of the late firm to satisfy the respective interests, declared (at p. 248):

> The assets being equitable, in the control of the court, and impressed with a trust, neither the survivors of the partnership nor the heirs at law of the deceased partner have the right, as tenants in common of the real estate, to demand a partition in kind or a sale for partition; the equity of applying the assets to the above purposes is superior to the right of partition.

In adjusting the equities of the parties the court declared that the fairest method would be by appraisement rather than sale, and directed that the interest of the deceased partner's representatives (which was only 8%) be offered to the survivors at the appraisement of the interest;[1016a] in the event the privilege of purchase was not exercised, the property should be exposed to public sale. This equitable latitude, it is believed, is not a veiled acquiescence in a right of partition—particularly in view of the quoted language and a further observation by the court that the survivors, as liquidators, had the power to sell the property themselves or to apply to the court for permission to sell.

There is the interesting possibility that, even without the prescription of subsection (1), the nature of the partners' ownership, as declared by the Act, may forestall compulsory

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v. Humphries, note 549, *supra;* Stephens v. Stephens, note 7, *supra;* Heretis v. Taggs, note 61, *supra.*

In Jones v. Smith, note 176, *supra,* the partnership property was ordered "sold for partition" on a showing that there were no debts; the issue, however, was whether the property in suit was firm property or not, and did not touch the question of physical partition. Selling for partition is, of course, not physical partition, and what it really amounts to is division in cash. For similar decree ordering partition by sale, see McBrayer v. Mills, note 825, *supra.*

1016. Note 151, *supra.*

1016a. In Kennedy v. Hill, note 529, *supra,* where the liquidation was by a receiver, one of the partners was allowed to take certain property at its appraised value, the court, however, stating that it would have been more logical if the receiver had disposed of it along with other assets by sale.

partition in kind. If the local partition statutes[1017] are a chart of the tenants to whom partition as such is available, the statutes' designation of tenants in common and joint tenants as the persons among whom partition may be had may rule out compulsory partition among the partners. Under Section 25 of the Act, it will be remembered, partners are tenants in partnership; they are not tenants in common nor joint tenants.[1018]

In any event, nothing prevents the partners or their representatives from effecting physical division if they all desire it; and the qualifying words "unless otherwise agreed" in subsection (1) recognize this possibility.

SECTION 39. Rights Where Partnership is Dissolved for Fraud or Misrepresentation. Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled,

(a) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

(b) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(c) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership.

It is to be noticed that while the heading of Section 39 uses the term "dissolution", the term is not used in the body

1017. §§ 8826-8829, S. C. CODE (1942). A court of equity has independent and inherent power to effect partition. Holley v. Glover, 36 S. C. 404, 15 S. E. 605, 16 L. R. A. 776, 31 Am. St. Rep. 883 (1891).

1018. See Webber v. Rosenberg, note 1013, *supra*, where this conclusion was reached in construing a partition statute, but the debts having been paid and the partners having agreed on a division, the court treated the tenancy in partnership as having been succeeded by tenancy in common, which was the subject of partition.

of the Section. It speaks of rescission. While the effect of rescission is to nullify the partnership *ab initio*,[1019] the partnership contract in the meantime is treated as voidable and not void. Hence, until the time of the decree the partnership has existence, during which it may have engaged in business, incurred liabilities, and so on. For all practical purposes, rescission by decree puts an end to the partnership—even though it is by relation back—as effectively as dissolution by decree. If the purpose of the Section is to treat rescission as a species of dissolution, the power of a court to dissolve for fraud or misrepresentation in the inception may be located under Section 32(f), which provides for dissolution by decree "whenever other circumstances render a dissolution equitable."

The Section is substantially a representation of prior law.[1021] The basis of subsection (c) is the voidable character of the partnership contract. Until rescission the firm has such an existence as will render the defrauded partner liable on obligations to third persons. These are not cast off by a rescission which destroys the partnership relation as from the beginning. It is against such liabilities that the defrauded partner is entitled to indemnity.[1022]

Little appears in the South Carolina cases concerning fraud or misrepresentation in the formation of a partnership; and the Section is useful in newly spelling out some of the rights of the partner who has been imposed upon. It is to be observed that the Section expressly declares that the rights it affords are without prejudice to any other right which the defrauded partner may have. The only South Carolina case, apparently, which deals with facts or alleged facts appropriate for rescission, is *Walker v. McDonald*,[1023] which holds that there cannot be in the same action a joinder of a cause of action for return of money paid into a fraudulently formed partnership and a cause of action for a partnership accounting;[1024]

1019. MECHEM, PARTNERSHIP, § 373; 68 C. J. S. 423.
1020. CRANE, PARTNERSHIP, § 86; 68 C. J. S. 421, 422.
1021. MECHEM, PARTNERSHIP, § 373; CRANE, PARTNERSHIP, § 86; 68 C. J. S. 422, 423; 40 Am. Jur. 303, 304.
1022. See Grossman v. Lewis, 226 Mass. 163, 115 N. E. 236, Ann. Cas. 1918A 739 (1917).
1023. Note 641, *supra*. This case has been discussed under Section 22. See the text in which notes 646 and 664, *supra*, appear.
1024. For a similar holding see Davis v. Horan, 263 N. Y. S. 270, 273 App. Div. 761 (1933).

there must be an election between them. It is clear that the procedural principle announced in this case is not out of harmony with the Section.[1025]

SECTION 40. Rules for Distribution. In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(a) The assets of the partnership are;

(I) The partnership property,

(II) The contributions of the partners necessary for payment of all the liabilities specified in clause (b) of this paragraph.

(b) The liabilities of the partnership shall rank in order of payment, as follows:

(I) Those owing to creditors other than partners,

(II) Those owing to partners other than for capital and profits,

(III) Those owing to partners in respect of capital,

(IV) Those owing to partners in respect of profits.

(c) The assets shall be applied in the order of their declaration in clause (a) of this paragraph to the satisfaction of the liabilities.

(d) The partners shall contribute, as provided by section 18(a) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

(e) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause (d) of this paragraph.

(f) Any partner or his legal representative shall have

1025. As to rescission or reformation of dissolution agreement induced by fraud, see Badder v. Saleeby, note 615, *supra;* and discussion of it in the text in which notes 688 and 813, *supra,* appear. As to reformation of written dissolution and assumption agreement on account of mistake, see McLucas v. Durham, note 552, *supra.*

the right to enforce the contributions specified in clause (d) of this paragraph, to the extent of the amount which he has paid in excess of his share of the liability.

(g) The individual property of a deceased partner shall be liable for the contributions specified in clause (d) of this paragraph.

(h) When partnership property and the individual properties of the partners are in possession of a court for distribution. partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.

(i) Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order:

(I) Those owing to separate creditors.

(II) Those owing to partnership creditors,

(III) Those owing to partners by way of contribution.

Section 40 is multifarious, but many of the rules it contains are applications and corollaries of much of what has gone before. In some respects comments which are made upon the Section are repetitive of earlier statements.

Contribution. Subsections (d), (e), (f), (g) are amplifications of Section 18(a) as that relates to the duty of each partner to contribute for the purpose of satisfying firm liabilities. The topic of contribution has already been discussed under Section 18;[1026] and it has been seen that the duty of contribution, under suitable circumstances, is called for by the South Carolina cases. Subsection (d), in its reference to the ratio of contribution when any of the partners is insolvent, is paralleled in the local law;[1027] but no cases appear in which the ratio as affected by non-residence is involved. While there seem to be no cases in which an assignee or person appointed by the court has sought contribution as such (as authorized

1026. See, under Section 18, Sharing of Losses, Indemnity, Contribution, Partner as Creditor, Partner as Debtor. All these topics either directly involve or are related to contribution.

1027. McLucas v. Durham, note 552, *supra*—in which it also held that exoneration may be sought to compel contribution. This case has been touched upon, under Section 18, in the topic of Contribution.

by subsection e), there are cases in which an assignee or receiver has been declared entitled to treat, and claim, as a firm asset obligations owing by a partner to the firm.[1028] The principle which allows such an appointee to utilize a partner's debt to the firm is not materially different—if different at all—from the subsection's declaration that contribution may be sought by the appointee.

Subsection (f) states the elemental right of contribution available to a partner or his legal representative. The South Carolina cases which have previously been noted are principally those in which a partner has sought contribution from his copartner,[1029] but there are instances among them in which the legal representative of a partner has recovered contribution from the survivor.[1030] The rule of subsection (g) allowing the recovery of contribution from the estate of a deceased partner is likewise a reflection of local law.[1031]

Contribution as Affecting Firm's Insolvency. Subsection (a) (II) pronounces as a firm asset the "contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this paragraph." The Commissioners' note explains that the adoption of the subsection "will end the present confusion whether the contributions of the partners are partnership assets or not"; and, after citing Federal bankruptcy cases in which conflict appears, the note states that, "The Commissioners believe that the opinion that such

1028. Wilson v. McConnell, note 380, *supra*—assignee; Kennedy v. Hill, note 529, *supra*—receiver.

1029. Simpson v. Feltz, note 102, *supra*—discussed under Section 18, Sharing of Losses; Coleman v. Coleman, note 552, *supra;* Farrow v. Bivings, note 552, *supra;* Eakin v. Knox, note 552, *supra;* McLucas v. Durham, note 552, *supra.* The last four cases are noted under Section 18, Contribution.

1030. Brown v. Smith, note 523, *supra;* Gee v. Humphries, note 549, *supra.* These cases are noted under Section 18, Contribution.

1031. Stokes v. Hodges, note 65, *supra*—mentioned under Section 18, Indemnity.

See the comment in note 552, *supra,* as to the common law right of contribution in favor of a survivor who had been compelled to pay a firm debt when the estate of a deceased partner could not be sued.

It has been seen that, under § 7038, S. C. CODE (1942)—see, under Section 15, Release of Partner, and also note 985, *supra*—it is provided that a composition by a creditor with a partner after dissolution does not discharge the non-compounding partner. § 7039, however, protects the non-compounding partner by declaring that he "may require the compounding debtor to contribute his ratable proportion of the joint debt or of the partnership debts, as the case may be, as if the latter had not been discharged."

contributions are assets is supported by the better reasoning." The draftsman of the Act makes a similar comment, adding that the subsection will end the confusion "which in the Bankruptcy Act has rendered it possible in some districts to put a partnership containing a solvent partner into bankruptcy."[1032] The uncertainties in the Federal bankruptcy law to which the Commissioners and the draftsman refer have been largely dispelled, and the present state of the law seems to be that a firm cannot be insolvent so long as there are any solvent members—*i.e.*, that if the firm assets plus the separate assets of the partners, after satisfying their individual obligations, are sufficient to discharge partnership obligations, the firm is not insolvent.[1033] Of the cases which state the proposition the most positive in pronouncement is *Mason v. Mitchell*,[1034] which denied a partner's petition for voluntary bankruptcy of the firm on a showing by the other and resisting partner of his (the latter's) solvency. In commenting upon this case Professor Crane remarks that "It would seem that in the case of a partnership subject to the U.P.A., the principal case [Mason v. Mitchell] would be followed, as, under Section 40(a), the assets of a partnership include both the partnership property and the contributions of the partners necessary for payment of liabilities. If partners are able to make such contributions, after taking care of their separate creditors, the assets of the partnership are sufficient to meet its liabilities."[1035]

South Carolina authority has not precisely dealt with contribution as an asset as it may relate to the question of a firm's insolvency, but the available sources indicate that a firm will not be so insulated as an entity from its members as to preclude consideration of their private assets in determining whether the firm is insolvent. In *Whilden v. Chap-*

1032. 24 YALE L. J. 617, 629.
1033. Francis v. McNeal, 228 U. S. 695, 33 S. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E 706 (1913)—holding that individual assets are drawn into the bankruptcy administration of the firm as a sole bankrupt, and stating as dictum that "ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available for that end." Titus v. Maxwell, 281 Fed. 433 (C. C. A. 6, Mich., 1922); Mason v. Mitchell, 135 Fed. 2d 594 (C. C. A. 9, Cal., 1943); Kaufman-Brown Potato Co. v. Long, 182 Fed. 2d 59 (C. C. A. 3, Pa., 1950). See, also, CRANE, PARTNERSHIP, § 91, and cases cited p. 399, n. 16.
1034. Note 1033, *supra*.
1035. CRANE & MAGRUDER, CASES ON PARTNERSHIP (2d Ed., 1951), 572, n. 7.

man,[1036] the court, in denying the appointment of a receiver at the instance of creditors (although permitting it on motion of one partner on a showing of misconduct by the other), declared (at p. 89):

> . . . a creditor of a copartnership in order to maintain an action for the appointment of a receiver of partnership assets must show that he has no adequate remedy at law, that is, that he cannot enforce payment by judgment and execution. It is, therefore, necessary for him to allege and prove not only the insolvency of the partnership as such, but the insolvency of the copartners as individuals.

There have been other instances of the appointment of a receiver for a firm on a showing of its insolvency, although no point has been made as to the insolvency of the partners as a prerequisite;[1037] but as *Whilden v. Chapman* remains uncriticized, it still must be taken as representing the law in its holding that a firm cannot be regarded as insolvent unless the members are also insolvent. Since that holding is consistent with the Act, the validity of *Whilden v. Chapman* continues unimpaired.

Application of Firm Assets to Liabilities. Subsection (b) is an ordering of the duties imposed by Section 18(a), (b), which directs payment of liabilities to third persons (by inference) and to partners. Subsection (b) also ties in with Section 26, which treats a partner's interest in the partnership as his share of profits and surplus.

The South Carolina cases have not in terms set down the order of application of firm assets to liabilities, but there is hardly any doubt that the result of the cases is in conformity with the order prescribed in subsection (b). The various levels can be put into place by deduction from statements which set the position of particular claims against firm assets. There is, to begin with, the uniform recognition in a

1036. Note 492, *supra*.

1037. Jennings v. Automobile Sales Co., note 35, *supra;* Ex Parte Planters' Bank, 122 S. C. 241, 115 S. E. 299 (1922). In the last case a receiver was appointed for the firm; none was appointed or asked for the partners as individuals. It was held that a lower court order enjoining suits against the individual partners was in error. It does not appear whether both firm and separate creditors were thus allowed to sue, or only separate creditors.

host of decisions of the paramount position of firm creditors with respect to those assets.[1038] The dominant status of firm creditors is not by reason of a lien—they have none by virtue of their being such creditors[1039]—but by derivation through the partners' rights to have the joint property applied to the payment of firm obligations.[1040] It is this equity which the subsection recognizes.

There is, as has been seen, the liability to repay capital,[1041] and the liability to pay over profits only after capital has been returned.[1042] The duty to indemnify for or to repay advances is not so clearly marked out as to its place in the order of application, but it is fairly apparent that it is ahead of return of capital and the division of profits.[1043] With the primacy of firm debts, the lowest station of profits, immediately preceded by liability to repay capital, it becomes manifest that the South Carolina order of application of firm assets corresponds to that declared by subsection (b).

1038. White v. Union Ins. Co., note 307, *supra*, at 559; Winslow v. Chiffelle, note 44, *supra*, at 31; Bowden v. Schatzel, note 738, *supra*, at 313; Ancker v. Levy, 3 STROBHART'S EQUITY 197, 210 (S. C. 1849); Wilson v. Bowden, note 739, *supra*, at 11; Farrar v. Haselden, note 407, *supra*, at 337; Crawford v. Baum, note 737, *supra*, at 77; Kuhne v. Law, note 196, *supra*, at 27; Rose v. Izard, note 99, *supra*, at 471; Jones v. Smith, note 176, *supra*, at 537; Brown v. Bradley, note 736, *supra*, at 274.

In addition, see the cases cited in note 734, *supra*.

All the cases which are cited hereafter in the topic, Priorities Between Firm and Separate Creditors, make the same point. See, particularly, the cases cited in notes 1051 and 1059, *infra*.

1039. Wilson v. Bowden, note 739, *supra*, at 11. See, MECHEM, PARTNERSHIP, §§ 439-441.

1040. Wardlaw v. Gray, note 369, *supra*, at 94: " . . . as between the parties themselves the very nature of the contract of partnership implies that the separate property of the partners shall not be taken for partnership purposes—that the partnership shall pay its own debts, and not subject the individual partners to that liability." Kuhne v. Law, note 196, *supra*, at 27: " . . . partnership creditors must be satisfied before any portion of a partner's share of the surplus can go to his creditor; for the separate creditor can sue but one, whereas to partnership creditors all are bound, and it is the right of the partners who are not indebted to the separate creditor, that the partnership debts shall be paid." Jones v. Smith, note 176, *supra*, at 536: " . . . until the final settlement of the account * * * each partner has a vested right, which no dissolution can destroy, to apply the firm property to the payment of the firm debts."

The equity to compel payment of firm debts and to satisfy partnership debts is protected by the so-called partner's lien. See, under Section 18, that topic.

1041. See, under Section 18, Repayment of Capital and Advances, and the cases noted in note 536, *supra*.

1042. See, under Section 18, Division of Profits, and cases cited in note 529, *supra*.

1043. See Wilson v. Wilson, note 24, *supra*.

It will be observed that the rule of the subsection does not preclude the partners in settling accounts from varying or disregarding the order prescribed, and the qualification is expressed in the rule itself that it is subject to agreement to the contrary. It is consistent here with the allowance of qualifying agreements in Section 18.

There is one seeming exception to the local rule stating these priorities which may appear to conflict with the rule of the subsection. Subsection (b) (II), in listing as second in line obligations to partners other than for capital and profits, makes no distinction as to the nature of such obligations or how they arose—whether for money advanced, property furnished, services rendered for stipulated compensation, or for firm debts paid by the partner with his own funds. A partner who pays firm debts out of his own pocket has been declared to be subrogated to the rights of the paid creditor.[1044] At first impression it would seem that a partner who thus paid firm debts would be allowed to compete with other firm creditors and share *pro rata* with them, but the South Carolina cases in which subrogation has been decreed do not present factual situations of contest between unpaid firm creditors and the subrogated partner. Actually, the South Carolina rule of subrogation is in accord with the general rule—*i.e.*, that subrogation is allowed,[1045] but the subrogated partner is uniformly denied the right to compete with other firm creditors.[1046] Subrogation may keep alive a debt which the partner—although primarily liable—may have had to pay, and it may place him in a preferred position in relation to liabilities for capital and profits, but it is not to be used as a means of putting him on a parity with third persons having claims against the firm. In any event, the deferred position of the partner in subsection (b) (II), covering *all* obligations to him other than capital and profits, would appear to rule out any lifting to first rank of a partner who has paid firm debts with his individual means.

The liabilities of a firm do not, it will be observed, embrace the liabilities of a partner to his separate creditors. The firm's assets are not a fund for the purpose, whether the

1044. Stokes v. Hodges, note 65, *supra;* Rose v. Izard, note 99, *supra;* Gee v. Humphries, note 549, *supra.*
1045. 68 C. J. S. 649; 50 Am. Jur. 725—which seems to limit right to payments made after dissolution.
1046. 68 C. J. S. 649; 40 Am. Jur. 410.

separate creditor be a third person or a copartner, although ultimately on a marshalling of firm and separate assets or by a charging order under the Act[1046a] the interest of a partner—the surplus after the payment of firm debts and settlement of partnership accounts—may be reached by his separate creditors. Hence, a surviving partner does not have the right after all firm debts and accounts have been satisfied to apply the balance due the deceased partner's estate to the payment to himself of a debt of the deceased partner not connected with the partnership business.[1047]

Priorities Between Firm and Separate Creditors. It has already been pointed out that firm creditors have the dominant position in the distribution of firm assets;[1048] and since, as has also been noticed, a partner's share which his separate creditors can reach is the surplus remaining after payment of firm debts and the adjustment of the partners' respective demands,[1049] it follows that, on a marshalling of assets, separate creditors cannot share in firm assets until firm creditors have been paid. The important converse question is as to the right of unpaid firm creditors to participate in the separate estates of the partners. Subsection (h), which gives firm creditors priority in firm assets, and separate creditors priority in separate assets, is in accord with the majority rule, the Bankruptcy rule, and the English rule.[1050] The subsection changes prior South Carolina law, which had not followed the majority rule or the other rules mentioned. The earlier cases (from 1797 to 1827) were, however, harmonious with the majority rule embodied in the subsection[1051]—a rule sometimes called a "rule of reciprocity".[1052] This older rule was thus expressed:

1046a. Section 28.

1047. Moffatt v. Thomson, note 562, *supra*. This case has been discussed under Section 18, Partner's Lien.

1048. See the cases and references to cases in note 1038, *supra*.

1049. See the cases cited in notes 733 and 734, *supra*.

1050. MECHEM, PARTNERSHIP, § 453; CRANE, PARTNERSHIP, § 94; 68 C. J. S. 639; 40 Am. Jur. 402-404. The Bankruptcy rule is embodied in Sec. 5(g), 11 U. S. C. § 23.

1051. Dickinson v. Legare, note 287, *supra;* Tunno v. Trezvant, 2 DESAUSSURE'S EQUITY 264 (S. C. 1804); Woddrop v. Price, 3 DESAUSSURE'S EQUITY 203 (S. C. 1811); Winslow v. Chiffelle, note 44, *supra;* Hall v. Hall, 2 MCCORD'S EQUITY 269 302 (S. C. 1827); Sniffer v. Sass, note 738, *supra*.

1052. See Blair v. Black, note 733, *supra*, at 357. Informally it has been called the "jingle rule": partnership to partnership, separate to separate.

> Where there are different classes of creditors, with respect to the joint and separate estates of copartners, each estate shall be applied exclusively in the first instance to the payment of its own creditors, and neither the joint creditors shall come upon the separate estate, nor the separate estate upon the joint, but only upon the surplus of each that shall remain after each has fully satisfied its own creditors.[1053]

The first breaking away from this earlier rule seems to have occurred in 1832, in the case of *Gowan v. Tunno*,[1054] in which, while not declaring the rule in terms, the court allowed the judgment creditor of a firm subsequently dissolved by death, after a showing of insufficiency of firm assets, to participate in the deceased partner's estate ahead of a junior separate judgment creditor under the applicable statutory law stating the order of payment of a decedent's debts. In *Perman v. Tunno*,[1055] decided five years afterwards, a creditor holding a joint and several bond of the partners was allowed to recover from a deceased partner's estate on the basis of the deceased partner's several liability, without first resorting to the firm assets; but it is not clear whether the court had the older rule in mind or the rule that might be inferred from *Gowan v. Tunno*. Shortly afterwards, in the same year, the newer rule was put into the form of a stated proposition in the case of *Wardlaw v. Gray*;[1056] and the pronouncements in this case were taken as the basis thereafter of the newer rule. Despite some noncommittal observations and expressions of doubt in a pair of cases[1057]—later discountenanced or explained[1058]—the newer rule became solidly entrenched and was consistently adhered to thereafter.[1059] The principles governing the rights and priorities of firm and

1053. Winslow v. Chiffelle, note 44, *supra*, at 30.
1054. Note 381, *supra*.
1055. Note 374, *supra*.
1056. Note 369, *supra*.
1057. Kuhne v. Law, note 196, *supra*—where the rules are discussed but no position taken; Adickes v. Lowry, 15 S. C. 128 (1880).
1058. Hutzler v. Phillips, note 176, *supra*, at 149, 150; Blair v. Black, note 733, *supra*, at 358.
1059. Fleming v. Billings, note 184, *supra;* Farrar v. Haselden, note 407, *supra;* Gadsden v. Carson, 9 RICHARDSON'S EQUITY 252 (S. C. 1857); Wilson v. McConnell, note 380, *supra;* Hutzler v. Phillips, note 176, *supra;* Trumbo v. Hamel, note 15, *supra;* Jones v. Smith, note 176, *supra;* Blair v. Black, note 733, *supra;* Calhoun v. Bank of Greenwood, note 18, *supra;* Middleton v. Taber, 46 S. C. 337, 24 S. E. 282 (1885).

separate creditors have been stated in this summary:

> Under the repeated decisions of the court of last resort in this State, the following propositions of law may be said to be firmly established: Partnership assets are primarily liabile to the payment of partnership debts. No partner has any interest in the partnership assets until all partnership debts have been paid. The individual debts of a partner can only be paid from that partner's share of partnership assets which remains after the full payment of the partnership debts. Partnership creditors have the right to participate in the distribution of the assets of each individual partner along with the individual or separate creditors of the estate of each partner, due regard being had to liens thereon. Separate creditors of an individual who, as a partner is also indebted to partnership creditors, have an equity to compel partnership creditors to first exhaust partnership assets before participating with such individual creditors in the assets of the individual debtor.[1060]

It will be noticed that under this rule allowing ratable sharing by partnership creditors with separate creditors, the latter nevertheless had an equity to compel firm creditors to resort first to partnership assets. The equity thus afforded to separate creditors was based on the two-fund doctrine: the firm creditors having at their disposal the partnership fund and the separate fund, and the separate creditors only one (including the "dry balance" after payment of partnership debts and settlement of firm accounts),[1061] the separate creditors could force the firm creditors to look first to the firm assets.[1062] The simplest application of the rule appears

1060. Calhoun v. Bank of Greenwood, note 18, *supra*, at 365. The meaning of "along with separate creditors" is *pro rata*. See the other cases cited in note 1059, *supra*.

For discussion of the reasons for the South Carolina rule and the opposing rule, see Kuhne v. Law, note 196, *supra;* Hutzler v. Phillips, note 176, *supra;* Blair v. Black, note 733, *supra.*

For discussion elsewhere of the two rules, see Rodgers v. Meranda, 7 Ohio St. 179 (1857); Robinson v. Security Co., 87 Conn. 268, 87 Atl. 879, Ann. Cas. 1915C 1170 (1913); In re Wilcox, 94 Fed 84 (D. C. D. Mass., 1899).

1061. Gadsden v. Carson, note 1059, *supra*, at 337; Wilson v. McConnell, note 380, *supra*, at 510.

1062. Gowan v. Tunno, note 381, *supra;* Wardlaw v. Gray, note 369, *supra*, at 113; Gadsden v. Carson, note 1059, *supra;* Wilson v. McConnell, note 380, *supra;* Hutzler v. Phillips, note 176, *supra;* Blair v. Black, note 733, *supra;* Calhoun v. Bank of Greenwood, note 18, *supra.*

in the cases in which partnership creditors, after using up firm assets, were allowed to come in *pari passu* with separate creditors in the separate estate, subject to the order of priorities as prescribed by statute if the estate was that of a deceased partner.[1063] In other cases the rule was involved in assignments for the benefit of creditors. Assignments of firm and separate properties which directed payment to creditors at variance with the rule were treated as illegal preferences;[1064] those which conformed to it were sanctioned.[1065]

These various results based on the pre-existing rule now, of course, go into discard with the adoption of the Act; but as a practical matter, except where the estate of a deceased partner is involved, the effects are not so sweeping as one might conjecture. The use of the assignment for the benefit of creditors has no current vogue, and insolvency is more frequently a matter of bankruptcy administration than a concern of the state courts. And in bankruptcy, as has been seen, the rule of the Act has long been the law.

1063. Gowan v. Tunno, note 381, *supra*—estate of deceased partner; Wardlaw v. Gray, note 369, *supra*—same; Wilson v. McConnell, note 380, *supra*—same; Hutzler v. Phillips, note 176, *supra*—same; Fleming v. Billings, note 184, *supra*—estate of living partner. In Farrar v. Haselden, note 407, *supra*, where a firm creditor had obtained a judgment against the resident members of the firm and the judgment had been returned *nulla bona* as to the resident partners and the firm assets, the creditor was allowed to sue in equity to reach the interest of the non-resident partner in a fund within the state on calling in other creditors to establish their claims; the court stating in effect the equal right of the firm and separate creditors to share in the fund.

1064. Blair v. Black, note 733, *supra*—assignment which directed firm property to be applied first to firm debts and separate property to separate debts; Middleton v. Taber, note 1059, *supra*—assignment of firm and separate properties which provided for equal participation among all creditors.

1065. Gadsden v. Carson, note 1059, *supra*—assignment of individual property to pay firm and separate creditors, but held fraudulent on another ground; Trumbo v. Hamel, note 15, *supra*—assignment of firm property alone for payment of firm debts, not fraudulent as to separate creditors. A separate creditor cannot, of course, compete with firm creditors in assigned firm assets. Calhoun v. Bank of Greenwood, note 18, *supra*. In that case an individual conducted two businesses under distinct firm names, and he made advances to one business out of the funds of the other. Later he took another person into the borrowing business as a partner under an agreement that the new firm was to assume all its liabilities. Thereafter the assets of the firm and of the individual partner in his other business were separately assigned, and the assignee of the latter sought to participate as a firm creditor in the assigned property of the firm. It was held that the initial transactions of borrowing and lending were not those between separate entities (see discussion of this case under Section 6, Partnership as Entity), and that the assumption of debts by the new firm did not include those which the partner owed himself; and that, therefore, the assignee of the individual partner was not a firm creditor, if a creditor at all.

Double Proof Against Firm and Separate Estates. Nothing precludes a partner either at common law or under the Act[1066] from adding his separate promise to a firm obligation. When this occurs the creditor is both a firm creditor and a separate creditor, and in the latter character he is as much a separate creditor as any separate creditors and entitled to participate in individual assets along with them. He thus obtains the advantage of double proof—*i.e.*, proving against and sharing in both estates. Certainly this is true when by a distinct contract a partner comes under additional liability, as when he is surety, guarantor or endorser for firm obligations.[1067] The law is not so clearly settled as to the availability of double proof where the obligation is represented by a single instrument binding the partners jointly and severally, but the weight of authority appears to allow it.[1068]

South Carolina law on the point is scarce, but one case seems to indicate that if there is a joint and several obligation of the partners, the several promises make the creditor a separate claimant entitled to participate as such in the individual estates. It has already been seen, under *Perman v. Tunno*,[1069] discussed a few paragraphs back, that the holder of a bond signed by the partners jointly and severally was entitled to payment out of the separate estate of a deceased partner without compelling him to look to the firm assets. The basis of the decision was the view that by binding himself severally also a partner becomes a separate debtor as

1066. See Section 15(b)— ". . . any partner may enter into a separate obligation to perform a partnership contract."

1067. MECHEM, PARTNERSHIP, § 458; CRANE, PARTNERSHIP, § 95; 6 REMINGTON, BANKRUPTCY (4th Ed.), § 2917; Mitchell v. Hampel, 276 U. S. 299, 48 S. Ct. 308, 72 L. Ed. 582 (1928)—surety, bankruptcy; Simmons v. Simmons, 215 Iowa 654, 246 N. W. 597 (1933)—guarantor; Fourth National Bank v. Mead, 216 Mass. 521, 104 N. E. 377, 52 L. R. A. (N. S.) (1914)—endorser; Buckingham v. First Nat. Bank, 131 Fed 192 (C. C. A. 6, Tenn., 1904), *cert. den.* 195 U. S. 630, 25 S. Ct. 788, 49 L. Ed. 352 (1904)—endorser, bankruptcy.

1068. MECHEM, PARTNERSHIP, § 458; CRANE, PARTNERSHIP, § 95; 6 REMINGTON, BANKRUPTCY (4th Ed.), § 2917; Ex Parte Nason, 70 Me. 363 (1880); Robinson v. Seaboard Nat. Bank, 247 Fed. 669 (C. C. A. 3, Pa., 1918), 10 A. L. R. 842, aff. In re W. S. Kuhn Co., 241 Fed. 935 (1918), *cert. den.* 248 U. S. 567, 39 S. Ct. 9, 63 L. Ed. 425 (1918); In re R. P. Brown & Co., 8 Fed. 2d 53 (D. C. Ga., 1925); Bank of Reidsville v. Burton, 259 Fed. 418 (C. C. A. 4, N. C., 1919). *Contra,* In re Mosier, 112 Fed. 138 (D. C. Vt., 1901). Other than the first case, all are bankruptcy cases, but their logic is applicable to state-controlled insolvencies. In re Mosier, *ante,* seems at present ineffective.

See, also, CRANE & MAGRUDER, CASES ON PARTNERSHIP (2d Ed., 1951), 592. n. 14; note, 10 A. L. R. 851.

1069. Note 374, *supra.*

well as a joint one, and the creditor acquires distinct rights. Whether the rule of distribution followed in *Perman v. Tunno* was the older rule (now embodied in the Act) or the later rule (now superseded by the Act) the recognition of the dual character and rights of such a creditor is compelling—or at least persuasive—precedent that simultaneous proof may be had in both the firm and separate estates. The advantage of securing the additional separate promises—usually endorsement—has long been understood and appreciated in South Carolina, but with an eye principally to bankruptcy. The less favorable position to which a partnership creditor has been reduced by the Act—that is, less favorable than under the replaced rule of distribution—makes such added promises all the more useful locally, particularly in asserting claims against a deceased partner's estate.

No South Carolina cases deal with the provability of tort claims for which partners may be liable. Elsewhere the view has been taken that since such liability is joint and several, the claimant may assert his claim against the separate estate without being deferred to any balance after satisfaction of separate creditors.[1070]

Priority of Liens. Subsection (h), while according priority in the firm and separate estates to the respective classes of creditors, specifically saves and preserves the rights of lien creditors. The priorities which are afforded are in the nature of equities which cannot disturb prior legal liens; and the reservation of the subsection is manifestly a restatement of general law.[1071]

South Carolina authority, under both the earlier and later rules of distribution, concedes the superiority of liens over the equities possessed by the respective creditors. Thus,

1070. In re Peck, 206 N. Y. 55, 99 N. E. 258, 41 L. R. A. (N. S.) 1223, Ann. Cas. 1914A 798 (1912). This case was decided before the adoption of the U. P. A., but since its adoption the same result was reached in another case. Matter of Seybel, 207 N. Y. S. 765, 124 Misc. 297 (1925). The logic of these cases extends to joint and several promises.

In bankruptcy, the construction of the Bankruptcy Act as it relates to liquidated claims may work a different result. Reynolds v. Reynolds, 188 Fed. 611 (C. C. A. 1, Mass.,), 39 L. R. A. 391 (1911); Schall v. Camors, 251 U. S. 239, 40 S. Ct. 135, 64 L. Ed. 247, 10 A. L. R. 846 (1920).

See CRANE, PARTNERSHIP, § 95.

1071. MECHEM. PARTNERSHIP, § 463.

it has been stated in several cases under the now displaced rule that while partnership creditors had the right to share *pro rata* with separate creditors after exhausting firm assets, the right was subject to liens in favor of others in the separate property.[1072]

It has already been observed, in discussing the topic of Effect of Judgment—under Section 15—that a judgment against the members of a firm for a partnership debt takes precedence, when perfected as a lien, in separate property over a subsequent judgment lien based on a separate debt. In *Kuhne v. Law*,[1073] where such a factual situation was present, the court announced such a priority of liens—firm over individual—and stated that since the action was one at law, it could not consider (although there was academic discussion) any equities which the junior lienor might have. It is manifest that whatever rule of distribution might be followed an unsecured or general individual creditor could not compel a partnership creditor with a lien on the separate property to resort first to the firm property. Whether, however, a junior separate lienholder could compel such prior resort to firm property (assuming that the partnership creditor also had a *lien* on the firm property) is a more difficult question, the solution of which would depend upon whether the two-fund doctrine could be invoked. The major premise in the displaced rule of distribution that compelled a firm creditor to look first to firm property was that the firm creditor had two funds, the separate creditor only one. It has also been stated, as previously noticed, that because of the two-fund doctrine a purchaser from a partner of separate property subject to a firm judgment could compel recourse to firm property subject to the judgment.[1074] If the two-fund doctrine applies to separate and firm estates, it would appear that a junior separate lienor could compel a senior partnership lienor having a lien also on partnership property to go first against the firm property. The difficult question remains, however, whether, conceding that there are two funds to which the firm

1072. Fleming v. Billings, note 184, *supra*—individual judgment creditors entitled to priority in separate property over firm creditors; Hutzler v. Phillips, note 176, *supra*, at 148; Calhoun v. Bank of Greenwood, note 18, *supra*, at 365.

1073. Note 196, *supra*. See discussion of this case under Section 15, Effect of Judgment.

1074. Stoney v. Schultz, note 385, *supra*—discussed under Section 15, Effect of Judgment.

lienor can look, they are funds to which the doctrine properly applies. The fact that there are two funds is not enough, since it is elemental that the funds must belong to the same debtor.[1075] It has been decided elsewhere that in the case of separate and firm estates, the two funds do not belong to the common debtor, and that therefore the junior separate lienor cannot compel the senior firm lienor to proceed first against the firm property.[1076] In this there is a fair amount of logic, for while the firm creditor may have two funds to look to, the partnership property is not the property of the individual partner; and though the individual partner is the co-owner of the firm property, what the firm creditor proceeds against when he resorts to firm property is not alone the interest of the partner but that of his copartner. He is in effect being compelled to exercise a right against the property of another debtor. Since, however, the doctrine has been the basis of the pre-existing rule of priorities, it may be that, despite the outside authority mentioned, the junior separate lienor might be allowed to demand the equity. It must be remembered at all events, however, that "in the administration of legal liens, equity follows the law, and gives them rank according to their legal priorities,"[1077] and that accordingly the senior judgment lien remains a senior lien. It must be borne in mind, too, that even if the two-fund doctrine is available in the abstract, it cannot be applied when to do so would prejudice the senior lienor, or drive him to litigation or to a doubtful security.[1078]

Of decided infrequency is the case where a separate creditor has a senior lien upon firm property. One such case, however, appears in South Carolina. In *Winslow v. Chiffelle*,[1079] a partner transferred his interest in a tract of land to his copartner. Both partners thereafter acquired the remaining

1075. See Norman v. Norman, 26 S. C. 41, 11 S. E. 1096 (1886); Pace v. Still, 160 S. C. 258, 158 S. E. 120 (1931). But in suretyship it is well recognized that the surety may compel the creditor to resort to security of the principal. Central R. R. v. Claghorn, SPEER'S EQUITY 545 (S. C. 1844); Bank v. Campbell, 2 RICHARDSON'S EQUITY 179 (S. C. 1846); Canaday v. Boliver, 25 S. C. 547, 552 (1886).

1076. Savings & Loan Corp. v. Bear, 155 Va. 312, 154 S. E. 587, 75 A. L. R. 980 (1930).

1077. Farmers & Merchants Bank v. Halliday, 108 S. C. 116, 124, 93 S. E. 33 (1917).

1078. Witte v. Clark, 17 S. C. 313 (1881); Davis v. Butler, 107 S. C. 548, 93 S. E. 193 (1917).

1079. Note 44, *supra*.

interest, and the whole property was, as the court found, appropriated to the partnership. At the time of the first transfer, the transferring partner's interest was subject to the lien of judgments obtained against him. It was held that the partnership creditors' rights in the firm property were subordinate to the lien of the judgments, but that the judgment-holders should first exhaust the separate estate of their debtor.

The rendition or recovery of a judgment does not *per se* create a lien.[1079a] Accordingly, in the application of firm assets to the payment of firm debts where the property is in possession of a court for distribution, priority is not to be accorded to a judgment creditor over general creditors of the firm unless the judgment has been perfected as a lien. The preference which is given by statute to judgment creditors over simple creditors in the settlement of a decedent's estate is not applicable to, or paralleled in, the application of the property of a defunct partnership.[1080]

Claims Against the Separate Estate. Subsection (i) deals with the order of claims against the separate estate, a matter not entirely covered by subsection (b) which deals only with the relative position of firm and separate creditors in the respective estates. In postponing firm creditors to separate creditors, subsection (i) is necessarily congruous with subsection (h). As subsection (i) may affect the estate of a deceased partner, it is consistent with Section 36(4), which provides that the individual property of a deceased partner shall be liable to partnership obligations "but subject to the payment of his separate debts."

Insofar as the whole of subsection (i) relates to the estate of a bankrupt partner—and, for that matter, insofar as the whole of Section 40 does also—its provisions are not to be regarded seriously, as it is patent that, whether or not they are

1079a. As to real estate, on entry. § 743(1), S. C. CODE (1942). But while effective as a lien only from date of entry, the duration of the lien is marked from the date of its rendition. Harvey v. Gibson, 190 S. C. 98, 2 S. E. 2d 385 (1939). As to personal property, judgment constitutes lien from time of levy (following entry and execution). § 744(1), S. C. CODE (1942). See Powers v. Fidelity & Dep. Co., 180 S. C. 501, 186 S. E. 523 (1936). Prior to the adoption of the Code of Procedure of 1870, the lien on personal property was created by lodgment of execution. See State v. McCary, 120 S. C. 361, 113 S. E. 275 (1922); Warren v. Jones, 9 S. C. 288 (1877).

1080. Chalmers v. Turnipseed, note 295, *supra*. For the terms of the statute, see note 1086, *infra*.

consistent with the Bankruptcy Act (and on this score no comment is made), the Federal law will control.[1081] The Uniform Partnership Act and the Bankruptcy Act may furnish useful analogies for each other, but in its own field each is dominant.

Looking first to the relative position of firm and separate creditors in the separate estate, it is manifest that the considerations concerning them under Priorities between Firm and Separate Creditors will govern. Hence, it may be said that, as to South Carolina law, the older rule which preferred separate creditors to firm creditors has been restored, and the later pre-Act rule has been superseded.[1082]

Among the separate creditors who are given priority by subsection (i) (I) are to be included partners whose claims arise out of transactions not connected with, or arising out of, the partnership. That they may thus compete with other separate creditors under the circumstances is a necessary deduction from subsection (i) (III), which puts in the least favored position the claims of partners by way of contribution.[1083] South Carolina law is probably changed by the Act since it has been held that a claim by a partner for contribution against a deceased partner's estate,[1084] and the claim of an assignee of partnership assets against such an estate for obligations owing to the firm,[1085] have equal rank with those of other separate creditors. With the passage of the Act, partners can share with separate creditors only if they have claims not referable to the partnership; if their claims arise out of firm transactions, they are relegated to the inferior position set by subsection (i) (III).

In the distribution of a deceased partner's estate, the important question arises as to the effect of the change in priorities introduced by the Act upon the statutory order of

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1081. See Titus v. Maxwell, note 1033, *supra.*

1082. For the earlier cases, see note 1051, *supra;* for the later cases, now superseded by the Act. see note 1059, *supra,* and the text.

1083. That partners are included in subsection (i) (I) where the claim is based on a non-partnership concern, see MECHEM, PARTNERSHIP, § 456; CRANE, PARTNERSHIP, § 95; CRANE, *The Uniform Partnership Act, a Criticism,* 28 HARV. L. R. 762, 787 (1915); LEWIS, *The Uniform Partnership Act, a Reply,* 29 HARV. L. R. 291, 307 (1916).

1084. Stokes v. Hodges, note 65, *supra*—partner entitled to subrogation and contribution on paying firm debts. As to subrogation, see under Priorities between Firm and Separate Creditors, this Section.

1085. Wilson v. McConnell, note 380, *supra.*

payment of the debts of a decedent.[1086] The statute which fixes the order bases priority upon the nature of the obligation, and does not disturb antecedent liens—that is, liens created before death.[1087] The importance of the problem lies in determining whether a firm obligation of a higher rank under the statute—for example, a judgment debt—would take precedence over a separate creditor's claim of inferior rank—such as a simple contract debt.

At a time when the pre-existing rule allowing partnership creditors to share *pro rata* with separate creditors was in force, it was held that a firm creditor whose claim had been reduced to judgment was superior to a separate judgment creditor whose judgment was subsequent in point of time.[1088] The result, of course, was logical since firm creditors were treated as equal with separate creditors. Under the earlier rule, however, it was held that the statute stating priorities for a decedent's debts did not govern priorities as between separate and firm creditors, and that a firm creditor's demand of a normally higher rank than that of the separate creditor would give way until separate debts were paid. The reason given was that although the statute "requires the debts [of the decedent] to be paid in a particular order, it does not meddle with the fund out of which they are to be paid, and all that can be required is that each particular class should be paid out of its appropriate fund, according to the terms of the Act."[1089] The practice, according to the case from which the quoted language is taken, was one of long and unques-

1086. § 8995, S. C. CODE: "The assets which come to the hands of an executor or administrator, after proper allowance to the executor or administrator, in a due course of administration, shall be applied to the payment of his debts in the following order, that is to say: (1) Funeral and other expenses of the last sickness, charges of probate, or letters of administration. (2) Debts due to the public. (3) Judgments, mortgages, and executions—the oldest first. (4) Rent. (5) Bonds, debts by specialty, and debts by simple contract. Mortgages, however, not to be entitled to priority over rents and debts by specialty or by simple contract, except as to the particular parts of the estate affected by the liens of such mortgages. No preference shall be given among the creditors in equal degree, where there is a deficiency of assets, except according to legal priorities."

1087. The cases on this point are numerous. See Weatherly v. Medlin, 141 S. C. 290, 139 S. E. 633 (1927); McConnell v. Barnes, 142 S. C. 112, 140 S. E. 310, 57 A. L. R. 483 (1927); Purdy v. Strother, 184 S. C. 210, 192 S. E. 159 (1937).

1088. Gowan v. Tunno, note 381, *supra*. Under subsection (3) of § 8995, which was then of force also, an older judgment takes precedence over a later one.

1089. Sniffer v. Sass, note 738, *supra*, at 25.

tioned standing. Thus, it was held that firm creditors whose claims were represented by judgments would not prevail over separate creditors where claims were represented by bonds.[1090] And it was also held that a firm debt represented by a judgment could not take precedence over separate creditors whose claims ranked as simple contract debts.[1091]

The restoration of the earlier rule of distribution by subsections (h) and (i) must have the inevitable effect of making the statute governing application of a decedent's assets inappropriate in favor of partnership creditors until *all* separate debts of whatever character and level have been paid, due regard being had to perfected liens of firm creditors. To put it another way, the restoration of the older rule of distribution revives at the same time the rule denying partnership creditors the benefit of the statutory order of payment until separate creditors have been satisfied. But aside from reaching this conclusion on the assumption that the reinstatement of the older rule carries along with it the revival of the subordinate rule deferring partnership creditors without regard to the nature of their demands, the language of subsections (h) and (i), and that of Section 36(4), in their positive declaration that separate creditors have priority in the separate estate would appear to fashion the same result. If the statute and the Act are of doubtful consistency (and it was stated in one of the earlier cases that the rule of priorities as between firm and separate creditors is "not incompatible" with the statute),[1092] the Act, as the latest expression of the legislative will and by virtue of its repealer clause, must be regarded as overriding the statute as it affects priorities between the two classes of creditors.

During the existence of the now repealed rule of priorities, a firm creditor, while compelled to resort first to firm assets before being permitted to share ratably with separate creditors, proved his claim against the deceased partner's estate

1090. Woddrop v. Price, note 1051, *supra*. This case, decided in 1811, states that on the point "a Judge sitting here is not at liberty to doubt." Under subsection (3) of § 8995, a judgment debt is, and was then, superior to a bond debt. Prior to 1874 bond debts were superior to simple contract debts. In that year bond and specialty debts were put on a parity with simple contracts (15 STAT. 609), and both have equal rank to-day.

1091. Sniffer v. Sass, note 738, *supra*. Judgment debts are now, and were then, superior to simple contract debts.

1092. Sniffer v. Sass, note 738, *supra*, at 25.

for the full amount. The reason was that under the statute prescribing the order of payment of a decedent's debts, demands against the estate were presentable in the condition in which they existed at the date of the decedent's death.[1093] It is probable that the same course would be followed today, since there is the same general requirement as to the condition of the demand in relation to the time of its determination—*i.e.*, the time of the debtor's death. Filing a demand for the full amount would not be a double proof—for, as has been seen, that term denotes distinct demands. In any event, payment out of the estate would await the prior satisfaction of individual debts, and amounts realized on the application of firm assets would have to be placed to the reduction of the claim.

Since a firm creditor is a creditor of the individuals comprising the firm, it is obvious that presentment of a claim against the partnership estate does not debar a claim against the separate estate; but even where the demand is actually an individual—and not a partnership—demand, the filing of it as a claim against the partnership of which the deceased individual partner was a member does not prevent its being proved against the separate estate.[1094]

SECTION 41. Liability of Persons Continuing the Business in Certain Cases.

(1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

(2) When all but one partner retire and assign (or

1093. Wilson v. McConnell, note 380, *supra*.

1094. McIntyre v. McClenaghan, 12 S. C. 185 (1879)—partner in firm of attorneys appointed agent of assignees for benefit of creditors and failed to account. A claim was filed against the firm after the agent's death, and a claim was also filed against his estate. Held, latter claim provable, except that if the claim as filed against the firm estate had been paid in full it would not be provable against the private estate.

the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

(3) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in paragraphs (1) and (2) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

(4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of Section 38(2b), either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(6) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(7) The liability of a third person becoming a partner in the partnership continuing the business, under this section, to the creditors of the dissolved partnership shall be satisfied out of partnership property only.

(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner,

have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business, on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

(9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership.

In their comment to this Section the Commissioners state that, "The Section as a whole deals primarily with the rights of creditors when a new partner is admitted, or a partner is expelled or dies, and the business is continued without liquidation of the partnership dissolved by the change in personnel." The Section while lengthy is in the main a breakdown into factual situations to meet a common thesis: that on a continuance of the business without liquidation all the creditors of the business—those before dissolution, and those during its continuance—are to be treated alike. "The Uniform Partnership Act proposes, in general, to regard all of the creditors at the various stages as creditors of the business at any stage, when the business is in fact continuous, notwithstanding the changes in the personnel of the members."[1095] In treating as unimpaired the rights of partnership creditors despite changes in personnel, the Act, by this Section, follows closely an entity concept.[1096]

1095. MECHEM, PARTNERSHIP, § 462. The draftsman's comment is that "In short, the Section recognizes the fact that the business has been one business from the start, and that those who have extended credit to the different partnerships continuing it should all, on the failure of the business, have equal rights in the property devoted to the business." LEWIS, *The Uniform Partnership Act*, 24 YALE L. J. 617, 636 (1915). See CRANE, PARTNERSHIP, § 88: "Under [the U. P. A.] the old creditors are on a parity with the new in that they can bring suit against the new firm, levy execution on property, and share in its distribution in the event of insolvency."

1096. CRANE, PARTNERSHIP, § 3, n. 30.

The Section is designed to remove uncertainties in the law as it deals with the rights of the creditors of the dissolved firm when the business is continued without liquidation. Its promulgation is dictated by the unsatisfactory results flowing from the theory that every change in the membership of a firm works a dissolution—a matter that has already been discussed—and that unless there has been assumption of firm liabilities by the new firm as a firm, the equity of the creditors of the dissolved firm in the partnership property (now owned by the new firm) is at an end. Under this theory all that is left to the old creditors is the personal liability of the original partners; and as between the creditors of the dissolved firm and the creditors of the new, the firm assets would be available preferentially to the latter, the former being remitted solely to the character of separate creditors of whatever partners remained in the continuing business. These and similar inequitable effects the Section removes.

South Carolina authority on the legal problems disposed of by the Section is non-existent. Some of the factual combinations are present in the cases: the retiring and the assuming partner; the incoming partner; the retiring and the incoming partner; the continuance of business by the surviving partner. These occurrences have already been observed. In none of the cases, however, is the issue of the status of the old creditors as to the property of the new firm presented. The Section therefore furnishes fresh, not different, law on the problems. Since the matters the Section covers are not dealt with locally, it may be worthwhile to comment on some portions of the Section, the comments being largely extracted from the Commissioners' note to it.

In subsection (1) there is an assortment of facts. The start is made with the firm of A, B and C. The addition of D to the firm creates a new firm. The creditors of A, B and C are also the creditors of A, B, C and D, and participate equally with the new creditors of that firm. D as incoming partner is liable personally only if he has assumed payment of the former firm's debts (see Section 17, and subsection (7) of this Section), but whether he assumes or not, his contribution to the new firm is subject to the old obligations. If all the members of the new firm thus formed assume the payment of the old firm's debts, the question whether their liability is that only of individuals or as a firm is settled by the

subsection, in that whether they assume as one or the other the property of the firm is available to the old creditors along with the new.

Further in subsection (1) is the case of the retiring and assigning partner, or the assigning representative. A, of A, B and C, assigns to B and C (or A's representative so assigns). The new firm is B and C. Or A (or his representative) assigns to B and C and D; or he assigns to B and D; or to C and D. In these situations the new firm is B, C and D. The creditors of the dissolved firm are also the creditors of the new firm of B and C; or of B, C and D.

Subsection (2) deserves the Commissioners' comment nearly in full: "When all the partners assign to one partner, the partnership creditors are, under this paragraph, the separate creditors of the partner continuing the business, where he continues the business alone, whether such partner promises to pay the debts of the dissolved partnership or not. If he takes one or more partners and they continue the business with property of the dissolved partnership, the creditors of the dissolved partnership are the creditors of the partnership continuing the business." Thus, if A and B (or the representative of a deceased one of them), of the firm of A, B and C, assign to C, the old creditors continue as the creditors of C with or without assumption of debts by him. If A and B (or the representative of a deceased one of them) assign to C and D, the creditors of the dissolved firm become the creditors of C and D as a firm with or without assumption. D's personal liability depends upon whether he has assumed the old debts.

Subsection (3) is declared by the Commissioners to be an extension of the principle of the first and second subsections, and for the purpose it treats as tantamount to an assignment the consent of the retiring partner or the representative of a deceased partner. It is not clear whether by "consent" the Commissioners mean consent without an intent to assign, or consent as indicative of an intent to assign unaccompanied by present assignment; for in their note they speak of the situation produced when there is no "formal asignment" and say, "The *neglect* (empasis supplied) of the retiring partners or the representatives of the deceased partner should not as at present create inexecrable confusion between the credi-

tors of the first and second partnership in regard to the respective rights in the property employed in the business."[1096a]

As a collateral matter, the question of the right of the personal representative of a deceased partner to assign or consent arises in connection with subsections (1), (2), (3). Undoubtedly, if the will of a deceased partner authorizes his executor to dispose of his interest, such an assignment could be made without more; and it is quite probable that if the deceased partner had agreed in the partnership articles that his interest should be transferred to the surviving partners, at the choice of the latter, the executor or administrator could, without prior judicial approval, make the necessary assignment. Absent these permissive features, the executor or administrator could, of course, seek the sanction of a court to assign or consent for the interests of the estate. Whether without court approval he could make the assignment depends on the law of administration of estates. While at common law the representative had the unfettered power to dispose of the personal assets of his decedent, the right in South Carolina has been restricted by statute, and it is necessary that prior judicial consent be obtained to such a sale (except in the case of an executor authorized by the will to sell).[1097] The statutes have been held, however, to apply only to "personal chattels or visible effects," and not to choses in action.[1098] If it be considered that the interest of a deceased partner in the firm is a chose in action (and it has been indicated previously that it may be),[1099] the representative would need no judicial authorization to assign, or to give his consent to a continuance of the business. It must be admitted, however, (and recommended) that until the matter

1096a. In Zach v. Shulman, 213 Ark. 213, 210 S. W. 2d 1242, 2 A. L. R. 2d 1078 (1948), it was held that the continuation of a business by the surviving partner by agreement with the deceased partner's representative gave no right to the survivor to demand an assignment. The court was construing Section 42, which ties in with Section 41. It would appear, therefore, that consent need not be identified with an agreement to assign.

1097. §§ 9059-9061, S. C. CODE (1942).

1098. Rhame v. Lewis, 13 RICHARDSON'S EQUITY 269 (S. C. 1867); Reynolds v. Reese, 23 S. C. 438 (1885); Chapman v. City Council, 30 S. C. 549, 9 S. E. 591, 3 L. R. A. 311 (1888).

1099. See, under Section 26, Conversion of Realty to Personalty, concluding paragraph.

is more clearly defined the representative should seek court approval.[1100]

Subsection (4) deals with transfers by all the partners or their representatives to one or more third persons who assume the debts of the firm. Without such an assumption, of course, neither the assignees nor the assigned property are liable for the old debts; the validity of the transfer would depend only upon the law of fraudulent transfers or the Bulk Sales Act.[1101] If the purchasers assume payment of the firm debts, they become liable to the creditors, a result which in a third party beneficiary jurisdiction (such as South Carolina) follows as a matter of course. The subsection is designed to establish that where the transfer is made to third persons as partners, who promise to pay firm debts, there is created in the creditors not merely the right to sue but the right to look to the transferred property on a parity with new creditors of the firm and to the exclusion—or to the subordination—of the separate creditors of the members of the new firm.

Subsections (5) and (6) are not commented upon by the Commissioners but their substance is clearly compatible with the remainder of the Section, for in both cases the business continues without liquidation. If A, of the firm of A, B and C, wrongfully dissolves the partnership and the business is continued by B and C; or if A is expelled and the business is continued by B and C—in each of these the rights of the creditors of the dissolved firm continue in the firm property.

The comment of the Commissioners to subsection (8) states the purpose to remove existing uncertainties in the law. The allocation to the old firm's creditors of the retiring partner's or the representative's right of payment in preference to the separate creditors, or the representative, is justified on the ground that there has been a sale of the "property rights in the partnership before settling with the credi-

1100. In Blumer Brewing Corp. v. Mayer, 223 Wis. 540, 269 N. W. 693, 111 A. L. R. 1087 (1937), the court, in applying subsection (3), declared that at common law such consent would exist, basing it on the common law right to assign. In South Carolina it would seem that the extent to which the representative could consent would depend upon the extent to which his common law power to assign has been affected or curtailed by statute.

1101. Commissioners' note to subsection (4); CRANE, PARTNERSHIP, § 79. Subsection (9) specifically provides that nothing in Section 40 shall be held to modify the rights of parties to set aside any assignment on the ground of fraud.

tors of the partnership, and, therefore, the creditors should have an equitable lien on the consideration of the sale as against the separate creditors of the retiring partner, or as against the representatives of a deceased partner who have sold the rights of their decedent to the persons continuing the business." Professor Crane explains the matter by saying that, ordinarily, a former partner who is a creditor of a partnership for the purchase price of his interest is entitled to distribution in the partnership estate on a parity with other creditors, but that the situation is complicated by the existence of unpaid creditors of the old partnership where claims by assumption or otherwise become obligations of the new partnership, "and being creditors of the retired partner, they have grounds to object to his competing with his own creditors. The Uniform Partnership Act has provided that any dividend credited to the retired partner, or deceased partner's estate, shall be distributed to the unpaid creditors of the former partnership."[1102]

SECTION 42. Rights of Retiring or Estate of Deceased Partner When the Business is Continued. When any partner retires or dies, and the business is continued under any of the conditions set forth in section 41 (1, 2, 3, 5, 6), or section 38(2b), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by section 41(8) of this act.

1102. CRANE, PARTNERSHIP, § 93.

It has been stated that the provisions of Section 42 are a restatement of prior law;[1103] and it has also been said that while the subsections to which the Section refers as containing the conditions for its involvement are based on consent, the Section also applies where there has been no consent of the retiring partner or the representative of a deceased partner to the continuance of the partnership business.[1104] The rule which the Section asserts is a rather obvious—though greatly extended—use of the principle in the law of trusts that gives a beneficiary the choice of interest or profits on the use of the trust property by the trustee, or its mingling with his own.[1105] It is to be noted that the profits optionally available are not computed on the basis of the original agreement of partnership for sharing profits but are to be calculated according to the capital employed.

South Carolina law on the subject, as it is dealt with under the precise factual events of the Section, is meager; but there is substantial agreement with the rule affording the choice of interest or profits when the business is continued on the death of a partner. In *Schenk v. Lewis*,[1106] where the surviving partners instead of expeditiously liquidating the business continued it, the court said:

> "If the surviving partner, instead of reasonably performing this duty [prompt liquidation], should continue to conduct the business, he may be compelled to account for the profits thereof. 'If they (surviving partners) go on with the business under the credit, and risking the effects of the firm, and profits result, they will be bound to account for those profits as belonging to the firm, and they are liable to be so charged with interest on the funds they use, though no profits, or even a loss, is made.' *Riddle v. Whitehill*, 135 U. S. 621; 10 Sup. Ct. 924; 34 Ed. 283."

The demand in this case was for interest, and under the rule announced interest was allowed instead of unasked for profits.

1103. Cahill v. Haff, 248 N. Y. 37, 162 N. E. (1928). See note, 2 A. L. R. 2d 1084, 1086, 1095.
1104. Froess v. Froess, 289 Pa. 69, 137 Atl. 124 (1927). See note, 2 A. L. R. 2d 1084, 1095.
The cases in which Section 42 has been construed are collected in 2 A. L. R. 2d 1084.
1105. In re Eisenlohr's Estate, 258 Pa. 431, 102 Atl. 115 (1917).
1106. Note 151, *supra*, at 244.

Where profits earned after dissolution are attributable to skill rather than the use of capital, there is no choice of interest or profits, and for that matter the representative of a deceased partner cannot demand a division of such profits.[1107]

SECTION 43. Accrual of Actions. The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary.

The purpose of Section 43 in stating when the right to account accrues is to fix the starting point for the Statute of Limitations against an action to account by a partner or his representative against the surviving or winding up partner or the person or partnership continuing the business. Accordingly, the Statute begins to run upon dissolution, and it is not postponed until some subsequent period, such as a reasonable time after dissolution, or the rendering of an account, or so long as partnership affairs are unsettled.[1108] The importance of the Section lies in the fact that although the winding up partner and the surviving partner are fiduciaries—or trustees—the rule in trusts denying the applicability of the Statute of Limitations in actions by beneficiaries against trustees is not followed.[1109]

Since the Section deals only with the winding up and surviving partners and the continuing persons or partnership, it may be well to look into the larger field—embracing the partners generally—as it appears in South Carolina.

An action for accounting is an equitable action, and it has been stated in one South Carolina case that because it is equitable the Statute of Limitations is not applicable,[1110] but

1107. Carroll v. Alston, note 120, *supra;* Carrere v. Whaley, note 534, *supra.* See discussion of these cases under Section 18, Division of Profits, and other material on the subject under the same topic.

1108. CRANE, PARTNERSHIP, § 87; 29 HARV. L. R. 291, 309 (1916).

1109. 28 HARV. L. R. 762, 786-788; (1915); 29 HARV. L. R. 291, 309 (1916). In the former article Professor Crane objects to the rule of the Section on the ground that it vitiates the principle applicable to trustees; in the second article, Dr. Lewis, the draftsman, admits the relationship but asserts that the purpose nevertheless was as stated—to accrue the action on dissolution.

1110. Wagner v. Sanders, note 60, *supra,* at 89.

the observation was made as a concession in argument, and in the light of the numerous cases in which the Statute has been entertained the remark is not to be taken as a statement of the law. The law is to the contrary: the Statute of Limitations can be interposed as a defense.[1111] During the existence of the partnership, however, the Statute—and it is the general Statute of Limitations—has no currency. Its commencement is upon dissolution.[1112] The reason for its inapplicability while the partnership is undissolved and for its operation afterwards is thus stated in *Montgomery v. Montgomery*:[1113]

> It is perfectly obvious that, so long as the partnership continues, the possession of one is the possession of both, and consequently the Statute of Limitations cannot be interposed by either. So soon as the partnership is dissolved, this joint tenancy is ended, and the partners then stand as other individuals in society, each claiming for himself.

It is clear from the language quoted that on voluntary dissolution, where there is no appointment of a liquidating partner, the Statute begins its operation. Section 43, while it does not mention such a case, cannot be opposed to it, for if the Statute commences in favor of a winding up or liquidating partner, on dissolution *a fortiori* a non-liquidating partner will be in the same position.

While the Statute will run as between non-liquidating partners from the time of dissolution, it would appear that where a partial settlement is made at the time and other settlements are made thereafter the currency of the Statute is destroyed by each settlement or account, very much as an acknowledgment acts to toll it.[1114] And where after dissolution a partner offers to arbitrate or to render an account, this is not

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1111. Montgomery v. Montgomery, note 652, *supra;* Boyd v. Munro, note 759, *supra;* McBrayer v. Mills, note 825, *supra.* All the other cases noted under this topic in which the Statute has been involved necessarily imply the same proposition.

1112. Burden v. McElmoyle, note 693, *supra;* Montgomery v. Montgomery, note 652, *supra;* Mills v. Carrier, note 644b, *supra;* Jones v. Smith, note 176, *supra;* McBrayer v. Mills, note 825, *supra.*

1113. Note 652, *supra.*

1114. Eakin v. Knox, note 552, *supra.*

such an acknowledgment of indebtedness as will give the Statute a new starting point.[1115]

The status of the winding up partner in South Carolina is apparently changed by Section 43. In *Montgomery v. Montgomery,*[1116] it is stated that although on dissolution the partners "stand as other individuals in society", a "direct" trust may be created by the designation of a partner to liquidate as to which the Statute will not run, but that when an account purporting to be final is furnished by the liquidator the trust is thereupon at an end and the Statute commences. Similarly, in *Boyd v. Munro,*[1117] where one of two surviving partners of a firm of three undertook to collect the assets of the firm (including certain notes) and acknowledged that he held them for the benefit of himself and the other partner, it was held that even if the assumed obligation to collect made the partner a technical trustee, the filing in the Probate Court by the administrator of his estate of an inventory showing the particular notes in suit as belonging to the deceased partner was an avowed and open repudiation of the trust which would put the Statute in motion. In these cases it is apparent that when a liquidator is appointed, the Statute has no operation until there has been a purported termination of the trust or its repudiation; under the Act, the Statute starts in favor of the liquidator at dissolution. It should be added, however, that, even under the Act, if an account were rendered by the liquidator showing an indebtedness by him, the Statute would be tolled and the trust obligation recognized or decreed.[1118]

On dissolution by death of a partner, the Statute of Limitations goes into operation.[1119] Certainly this is true as to an action by the survivor against the deceased partner's representatives.[1120] The law is not so clear as to causes of action against the survivor, although there is a fair intimation from

1115. Burden v. McElmoyle, note 693, *supra.* For a similar result where the partner offered to arbitrate but denied liability, see Montgomery v. Montgomery, note 652, *supra.*

1116. Note 652, *supra.*

1117. Note 759, *supra.*

1118. 29 HARV. L. R. 291, 311 (1916). This is the draftsman's comment.

1119. Mills v. Carrier, note 644b, *supra.* See note, 96 A. L. R. 441; 157 A. L. R. 1114.

1120. Mills v. Carrier, note 644b, *supra;* McBrayer v. Mills, note 825, *supra.* There is a difference of opinion as to the effect of non-claim statutes upon the claim of a surviving partner against the deceased partner's estate. See note, 96 A. L. R. 441, 449; 157 A. L. R. 1114, 1117.

general language employed that the Statute is operative on death in favor of the survivor as well as in favor of the representatives of the deceased partner.[1121]

In *Duncan v. Westerlund,*[1122] a firm was dissolved by the death of one of the partners, the plaintiffs' intestate, in 1880. In 1887 the administratrix of the deceased partner brought an action for accounting against the survivor. The proceedings resulted, unfortunately for the administratrix, in a judgment for the survivor for a balance shown to be due him. In 1917 the United States paid the representative of the surviving partner a sum owing the firm as compensation for the use of the firm's premises by the Federal authorities in the "War Between the Sections." The claim was not reckoned in the prior judicial accounting. In this action to recover one-half of the amount so paid, the plaintiffs contended that their estate's liability to pay the amount adjudged due to the survivor was barred by the Statute. It was held that the survivor's representative had the right to retain the whole amount on the ground that the plaintiffs, whose indebtedness exceeded the portion sought, should first pay the amount due the survivor, the court applying the doctrine of equitable retainer—or something analogous to it—to allow the assertion of a claim by the survivor which might have been barred by the passage of time. It is to be noted here that the court did not dispose of the case by declaring the Statute of Limitations to have run in favor of the survivor—and it was not necessary to do so—, and it is possible that this case contains an inference that so long as there are unsettled debts due to the partnership the Statute does not run in the survivor's favor. Under Section 43 it would seem that the survivor could interpose the Statute as a bar.[1123]

As in other equitable actions, the relief sought through accounting may be lost by laches in unreasonable and prejudicial delay.[1124]

1121. McBrayer v. Mills, note 825, *supra.*

1122. Note 565, *supra.*

1123. The draftsman says, "Where the property is received by a winding-up or surviving partner more than the statutory period, if any, after dissolution, the claim is barred, as it should be barred, if the partner making the claim has never insisted on an account." 29 HARV. L. R. 291, 311 (1916).

1124. Wagner v. Sanders, note 60, *supra*—laches a bar to action brought in 1895 where death dissolved firm in 1872 and administratrix appointed in 1873; Brown v. Smith, note 523, *supra*—laches bar to re-

Where relief is denied in a partnership action because of laches, the denial may be made by the court on its own motion, without the laches being pleaded or urged by the defendant.[1125] When, however, the Statute of Limitations is to be used as a defense, it must be pleaded.[1126]

PART VII.

MISCELLANEOUS PROVISIONS

SECTION 44.[1127] When Act Takes Effect. This Act shall take effect on the_____day of______________, one thousand nine hundred and______________.

SECTION 45. Legislation Repealed. All Acts or parts of Acts inconsistent with this Act are hereby repealed.

As pointed out in the opening pages, the Act became effective on its approval by the Governor on February 13, 1950. It should be noted that neither Section 44 (45 in the South Carolina Act) nor any other Section states that the Act is to be effective only as to partnerships formed after its adoption. Section 4(5) provides that the Act shall not impair obligations of contracts entered into before its effective date nor affect "any action or proceedings begun or right accrued before this Act takes effect." The Act, accordingly, does operate upon partnerships formed before as well as after its approval, subject to the limitations imposed by Section 4(5). There will, of course, be difficulty in given cases involving pre-Act partnerships in determining whether particular transactions —between the partners or with third persons—fall within the limitation of Section 4(5), as well as whether they run counter to constitutional prohibitions against impairment of contracts. The difficulty—as severe as it may be—is no more

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covery of interest on balance struck. In other cases the defense of laches was not sustained on the facts. Eakin v. Knox, note 552, *supra;* Jones v. Smith, note 176, *supra;* Edwards v. Johnson, note 80, *supra.*

1125. Wagner v. Sanders, note 60, *supra.*

1126. Karres v. Pappas, note 578, *supra.*

1127. In the Act as adopted by the South Carolina General Assembly Sections 44 and 45 are transposed. Section 44 in the South Carolina version reads as Section 45 in the original Act, except that the heading is simply "Repeal." Section 45 in the South Carolina Act is captioned "Time Effective" and reads: "This Act shall take effect upon the approval of the Governor."

extraordinary than that in other types of retrospective legislation and is to be resolved in the same manner.

As of this writing, five cases have been decided in the South Carolina Supreme Court on partnership matters since the approval of the Act. Four of them[1128] make no mention of the Act; and in none of these was that necessary, since the litigation was in progress before the Act's inception, and by Section 4(5) the Act does not apply to proceedings instituted before its effective date. The fifth case[1129] was started after the Act's passage, and related to a transaction between a third person and alleged partners. The Court's notice was directed to the Act (apparently on oral argument), and it disposed of the matter by saying merely, "Attention is called to the Uniform Partnership Act * * * which, however, does not affect this case since the transaction arose prior to its passage." In its setting, and for the purposes of the case, the statement is undoubtedly correct, but it is not to be taken as a formula to test the application of the Act. To have *every* transaction before the Act's adoption fall without its operation would be virtually to limit the Act to partnerships formed after its effective date, for even the formation of the partnership in itself constitutes a transaction. The amenability of any transaction to the Act, whether before or after its passage, will depend upon whether the Act's application would impair rights accrued or contract obligations existing before it became law.

In many parts of this article consideration has been given to relevant statutes. Where there has been seeming or possible inconsistency between a particular statute and the Act, notice has been taken of it. Conclusions as to the impact of the Act upon the various statutes can be drawn from the context of the material in which the respective statutes are referred to or considered.

1128. Trexler v. McIntrye, note 7, *supra;* Heretis v. Taggs, note 61, *supra;* Virginia Hotel Co. v. Dusenberry, note 77a, *supra,* now reported in 218 S. C. 524, 63 S. E. 2d 483; Romanus v. Biggs, note 138, *supra.*

1129. Nachman-Rhodes, Inc. v. Lightner, note 375a, *supra,* now reported in 219 S. C. 167, 64 S. E. 2d 393.

SUPPLEMENT

This supplement is actually a collection of *errata* and *addenda.* The installments of this article were submitted for publication piecemeal and not as parts of a completed manuscript. Only after the respective installments (other than the last) appeared in print did the errors, some of them fairly obvious, come to light, having escaped detection in copy and proof. Additional material is inserted either to supply omissions or as supplement. Changes and additions are in both footnotes and text.

Footnote No.

6. *Add*: Section numberings in the official version of the Act are retained in the South Carolina version, except that Sections 44 and 45 are transposed. The language in the Section headings as they appear in this article is that used in the official version. The language in the Section headings of the South Carolina version is not identical with the official version but is a paraphrase.
42. *Add*: Trexler v. McIntrye, note 7, *supra.*
43. *Omit* 12 Am. 649.
52. *Change* Wilson v. Wilson *to* Ex Parte Wilson.
99. *Add to cases*: Schenk v. Lewis, 125 S. C. 228, 252, 118 S. E. 631 (1923).
106. *Add*: Edwards v. Johnson, note 80, *supra,* at 95: "The test of a partnership is the agreement to engage in a common business or adventure and to share the profits therefrom, as well as the expense or losses incident thereto."
142. *Add*: Latham v. Harby, 50 S. C. 428, 27 S. E. 862 (1897)—principal and agent.
149. *Change* 59 *to* 57.
186. *Add as second sentence*: For like result under similar facts, see Wilson v. McConnell, 9 RICHARDSON'S EQUITY 500, 510, 511 (S. C. 1857).
195. *Change* Jeffery v. Ehrhardt, 200 S. C. 519, *to* Jeffery v. Ehrhardt, 210 S. C. 519.
196. *Add*: Edwards v. Johnson, note 80, *supra,* at 99.
237. *Change* 233 *to* 236.
269. *Change* Wiesenfeld v. Stern *to* Wiesenfeld v. Byrd.
295. *Change* Chambers v. Turnipseed *to* Chalmers v. Turnipseed.
342. *Change* § 685 *to* § 6850.
355. *Insert at beginning*: Halls v. Coe.
388. *Add*: Allen v. Cooley, 53 S. C. 77, 30 S. E. 721 (1898).
470. *Change* DeGroot v. Steinmyer *to* DeGroot v. Darby.
488. *Add*: See, also, Kinsler v. McCants, note 196, *supra,* at 48.
521. *Add*: Huffman v. Huffman, note 65, *supra.* Although these are cases in which a new partner was admitted into the firm, the fact is that in each the new partner succeeded a retiring partner. Roach v. Ivey, 7 S. C. 434 (1875) is a true case of an incoming partner without retirment of any other partner.
531. *Add*: as to earnings by receiver liquidating firm, see Kennedy v. Hill, note 529, *supra,* at 468, 469.
539. *Add*: But while a partner may be entitled to return of capital, property bought by the partnership with the capital he has furnished does not belong to him but to the firm. Metz v. Commercial Bank, note 15, *supra,* at 240.

548. *Add*: Gadsden v. Carson, 9 RICHARDSON'S EQUITY 252, 268 (S. C. 1857).
549. *Add as second sentence*: These cases are cases equally involving contribution.
555. *Add*: McBrayer v. Mills, 62 S. C. 36, 39 S. E. 788 (1901)—note by firm to partner.
641. *Add*: Latham v. Harby, 50 S. C. 428, 27 S. E. 862 (1897).
646. *Add*: As to action to rescind for fraud, see Section 39.
647. *Add*: In Latham v. Harby, 50 S. C. 428, 27 S. E. 862 (1897), where the plaintiff alleged a partnership and asked an accounting, and the proof showed no partnership existed but that there was another relation, it was held error to dismiss the complaint for want of equitable jurisdiction, as under the allegations the plaintiff was entitled to judgment on the law side of the court and jurisdiction should have been retained for that purpose.
664. *Add*: As to rescission for fraud, see Section 39.
681. *Add*: Boozer v. Webb, note 186, *supra.*
684. *Change* Note 399 *to* 53 S. C. 414, 31 S. E. 634 (1898).
688a. *Add*: Brown v. Chandler, 50 S. C. 385, 27 S. E. 868 (1897); McLucas v. Durham, not 552, *supra.* The partners may, subject to the rules, bind themselves by arbitration. Coleman v. Coleman, note 552, *supra.* But where the rules are not conformed to or the arbitration is not impartial, the award is not binding. Cothran v. Knox, note 595, *supra.*
692. *Add as second citation*: Cothran v. Knox, note 595, *supra.*
718. *Add*: Duncan v. Westerlund, note 565, *supra.*
837. *Add*: Brown v. Bradley, note 736, *supra.*

(References are to pages. (3) and (4) denote volume of SOUTH CAROLINA LAW QUARTERLY)

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(3) 229. *Line 5, change* conduct in the agency of the business *to* agency in the conduct of the business.

(3) 381. *Line 11, strike out* not.

(3) 387. *3d and 2d lines from bottom, change* Hall v. Young *to* Hull v. Young.[300a]

Add footnote 300a: Note 216, *supra.*

(3) 409. *Insert at end of second paragraph*: In Bates v. Cobb,[383a] where a judgment was obtained against only one partner on a firm debt (why it was not recovered against the other partner does not appear) and *nulla bona* returned, it was held that it was not necessary that the judgment creditors exhaust their legal remedies against the other partners before resorting to an action to set aside a fraudulent conveyance by the judgment debtor.

Add footnote 388a. 29 S. C. 395, 7 S. E. 343, 13 Am. St. Rep. 742 (1888).

(3) 410. *Line 12, change* subsection (b) to subsection (h).

(3) 442. *5th line from bottom, after "contract", add* 535a.

Add footnote 535a: For further treatment of this case, see, under Section 31, Dissolution in Contravention of Agreement.

(3) 451. *Insert as next to last paragraph*: A partner who after dissolution is compelled to pay a firm debt is entitled to interest on the contributive share of the other partners from the date of payment.[585a]

Add footnote 585a: Eakin v. Knox, note 552, *supra.*

(3) 463. *3d line from bottom, change* law of equity *to* law or equity.

(4) 65. *In heading of Section 28, change* Changing *to* Charging.

(4) 105. *Line 8, change* 38(1)(II)(b) *to* 38(2)(b).

[THE END]