

1892

What Constitutes a Partnership in the State of New York?

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Thesis

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What Constitutes a Partnership in the

State of New York?

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John Connelly Dardess

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The Definition of Partnership.

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"The attempt to define a partnership has been made by very many people, and some of the attempts are collected together in the well-known book of Mr. Lindley. . . . He gives fifteen ~~different~~ definitions of partnership by different learned lawyers : I think no two of them exactly agree, but there is considerable agreement among them ; and I suppose anybody reading the fifteen may get a general notion of what a partnership means." Jessel, M. R. in *Pooley v. Driver*, 5 Ch. Div. 471.

A definition is at most but a test. In determining what constitutes a partnership, a definition of a partnership is of little value. Yet every text-book writer on the subject, except the greatest, has constructed a definition ; so, it may be well to consider

some of them.

There are two prominent New York definitions.

The Civil Code, Sec. 1283, contains the following :

"Partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them." Kent in his Commentaries, Vol. 3, p. 23, gives this : "Partnership is a contract of two or more competent persons to place their money, effects, labour, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions." Mr. Justice Lindley criticises them in being "too wide;" for, "they include not only partnerships in the proper sense of the word, but also many corporations and companies which differ from partnerships in several important respects." Lindley on Partnership, I, 4. These definitions are also criticised in *Poolley v. Driver*, 5 Ch.Div.

458.

Pollock in his "Digest of the Law of Partnership" (ed. of 1890), at pages 3 and 4. says : "Kent's definition was the most business-like, and I still think it was substantially accurate and might well have been accepted with more or less verbal condensation and amendment. The definition given by the Indian Contract Act, Sec. 329, is Kent's in a more concise form, and runs as follows : 'Partnership is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them.'" Kent's definition speaks of partnership as a contract ; the Indian Contract Act, as a contract relation. Is not this difference of terms a substantial difference between them?

To meet all criticisms, Pollock proposes the following definition : "Partnership is the relation which sub-

sists between persons who have agreed to share the profits of a business carried on by all or any of them." This is the best. It embodies the principle of the leading modern English case of Cox v. Hickman, 8 H. of L. 268, which, while it has influenced the courts of New York, is not controlling ; so, perhaps, this definition may not be satisfactory in this State.

It may seem a reflection on the preceding pages to add that the great authority, Lindley, does not attempt a definition.

The Question is One of Law.

What constitutes a partnership is a question of law for the court :Compston v. McNair, 1 Wend. 457 ; while the question as to the constituent elements of a partnership is one of fact for the jury :Meriden Nat. Bank v. Gallaudet, 122 N. Y. 655.

The question as to what constitutes a partnership comes before the court in two ways : first, where one person seeks to establish the rights of a partner against another ; and secondly, where a creditor seeks to fix the liabilities of a partner on a person in some way connected with a business to which he has given credit. In the first instance the question is whether there is a partnership in fact ; in the second, whether there is a partnership as to third persons. If it be admitted that there is such a relation as a partnership as to third persons, the first relation may

be correctly described as a partnership between partners.

Partnership between Partners.

Partnership is a contract relation. An agreement of partnership, like any other contract, must be founded on a consideration either of mutual promises or contributions. Mutual promises are sufficient. See *Coleman v. Eyre*, 45 N. Y. 38, wherein it was held, that, where "in consideration of the agreement by the plaintiffs to account to the defendant for half of the profits in case of success, the defendant undertook to bear half the loss in the contrary event, there was a partnership between the parties." A partnership is never created between parties by implication or operation of law, apart from an expressed or implied intention and agreement to constitute the relation.

To determine whether the relation between persons

constitutes a partnership, their intention in forming it governs. When the facts are given the question is one of law. The intention of the parties will be determined from the effect of the whole contract, regardless of special expressions.

"Whether two or more persons are partners as between themselves, is determinable chiefly by a reference to their own intention." *Salter v. Ham*, 31 N. Y. 327, 328. This is the leading case. Salter loaned to Ham five hundred dollars for a term upon security ; and by way of indemnity for the use of the money, it was agreed that it should be invested in ingredients for manufacturing a medicine (a business which Ham was then carrying on), and upon the manufacture and sale of the article, if any profits accrued over and above the expenses of manufacturing and selling, Salter was to receive one-fourth of such profits. The court says : "Neither in terms nor by implication is any partnership relation

created as between themselves.....The agreement was a mere arrangement for a loan, upon security for a fixed period, with profits by way of interest. It did not impose upon the plaintiff the duties or clothe him with the powers of a partner. There was no joint ownership of the partnership funds according to the intention of the parties. The \$500. loaned under the agreement was not a contribution to the capital of the firm as such, nor was it put into the business at the risk of the business. The plaintiff was, in no event, to participate in the losses of the adventure. With respect to third persons, Salter might be held to be a partner in the particular transaction, but as between himself and Ham the relation was that of debtor and creditor."

In Wyckoff v. Anthony, 9 Daly 426, the judge says: "A mere community of interest in property, or an agreement simply to divide profits, or an agreement to bear

a certain part of the losses, does not necessarily, of itself, create the relation of partners. Whatever may be the effect of the act of parties having a community of interest in property, or agreeing to divide the profits arising from it, or to bear a part of the losses, as respects the rights of third persons, they cannot, as between themselves, be made to assume a relation to each other which they did not intend, because a partnership inter se can result only from the intention of the parties, to be gathered from the contract, if there be one ; or, if not, from their relations to and dealings with the property and with each other. To constitute it, there must be a joint interest in the property; a right to share the profits of the adventure, and a right of control over the property or business, all of which, in the absence of a special contract, are necessary elements to create a partnership, as between the parties."

Vice-Chancellor Gardner in *Chase v. Barrett* (1883)

4 Paige 154, says : "The principle pervades all the cases that can be found upon the subject that there must be a mutual interest in the capital, whether it consists in money, labour or credit, as well as share in the profits, to constitute a partnership between the parties." And the Chancellor said, p.160 : "To constitute a partnership as between the parties themselves, there must be a joint ownership of the partnership funds, according to the intention of the parties ; and an agreement either express or implied, to participate in the profits and losses of the business, either ratably or in some other proportion to be fixed upon by the copartners."

In *Moss v. Jerome*, 10 Bos~~er~~worth 220, several persons engaged in an enterprise, one of them agreeing to assist by advancing money, and to share in the losses, if any, but not to receive any part of the profits,

which were to be divided among the others exclusively. Held, that such one is not to be deemed a partner, between the others and himself ; for, "the arrangement between them lacked the communion of profits without which a partnership inter sese cannot exist."

"To constitute persons partners as between themselves, there must be an interest in the profits, as profits, ; each party must by the agreement participate in some way in the losses as well as in the profits ; an agreement to divide the gross earnings as in this case, does not constitute the parties to it partners." Pattison v. Blanchard, 5 N.Y. 186. Here several persons were engaged in running a line of stages, and by the agreement between them, one was to run at his own expense a certain portion of the route, and the others in like manner, the residue ; each authorized to receive fare from the passengers over the whole or any part of the route ; the parties to settle month-

ly, and the fares so received to be divided between them in proportion to the distance which they respectively transported such passengers ; the party found to have received more than his share to pay over to the other the balance on each monthly settlement. Held, that this did not constitute a partnership as between the parties. "Neither party had by the terms of the contract, any interest in or control over the stock or road of the other ; nor were any expenses upon any part of the route to be borne jointly. The question of their liability to third persons is not here involved. In such a case a different rule prevails from the one which determines whether persons as between themselves are partners."

Rapallo, J. in *Baldwin v. Burrows*, 47 N.Y. 203, says : "To constitute a partnership there must be a reciprocal agreement of the parties not only to unite their stock but to share in the risks of profit or

loss by the disposition to be made of it. Where several parties agree to purchase personal property in the name of one of them, and to take aliquot shares of the purchase without agreeing to resell jointly, there is no partnership ; (and) though goods be bought by several, under an agreement to hold in aliquot shares, but with the intention of subsequently forming a copartnership in respect to them, yet, until, the partnership agreement is actually made, the purchasers are not copartners, but only tenants in common."

An important case is that of Clift v. Barrow, 108 N.Y. 187. Pardee and Clift entered into a written agreement to the effect that Pardee might use the name of Clift in the firm of Pardee & Co. in the business of banking ; "that Clift was not to participate in the profits or losses of said firm except that he was to have for his share of the profits ten per cent. per annum for all deposits he may make in the office."

Pardee also covenanted to keep Clift harmless from all losses, debts, dues or demands that may come against the firm, and upon the dissolution of the firm Pardee was to return to Clift all of his deposits, with the ten per cent. per annum. In an action by Clift as surviving partner upon a promissory note alleged to have been given to the firm, it appeared that Pardee and plaintiff did business under and in pursuance of the agreement until the death of Pardee and that the note formed part of the assets. Peckham, J. said : "In the first place the intention to form a partnership seems to be plain. . . The plaintiff contributes to the firm his name and his liability to pay the debts thereof. . . Looking at the whole instrument it fails to show that plaintiff is not to participate in the profits ; but the language used is simply another way of expressing the idea that the profits which Clift is to be entitled to from this firm are to be measured

by the amount of ten per cent. upon such deposits as he may from time to time make in the banking house. . . . A condition of there being profits is attached to the payment of the ten per cent., both during the existence of the firm and subsequent to the dissolution."

It was accordingly held that the agreement, when acted upon, formed a valid partnership between the parties ; that the agreement to pay the percentage was not absolute but conditional upon there being profits to that amount from which the payment could be made, and whatever sum the plaintiff became entitled to under it was payable to him as profits ; that plaintiff became liable for losses or debts from the moment the agreement was signed and business done under it ; that the covenant against losses and debts was not one to prevent such liability, but merely one of indemnity.

"Two or more persons owning a ship. hold the same as tenants in common, and not as partners, unless they

chance to be general partners, and have the ship as a part of their partnership property, and for partnership purposes. But there may be a special partnership between them in respect to the ship, or particular voyages and adventures in its employment and use. And whenever a general partnership, embracing the ownership of the vessel and the business in which she is engaged, or a particular partnership either in respect to the ship or a particular voyage or adventure exists, all the rules applicable to ordinary partnerships apply, and the rights and liabilities of the copartners are the same as in merchantile or other business copartnerships. . . . The distinction which takes the property in ships and vessels out of the ordinary rules of joint ownership of goods and merchandise is well established and may not be departed from, but the owners of a ship holding and owning it as tenants in common, may become partners as common carriers of goods

upon that ship, with all the rights and liabilities incident to that relation, and the rule which regulates the rights of owners in common of vessels, in their use and employment, ought not to be extended upon any refinement, so as unnecessarily to complicate the law of partnership." Allen, J., in *Williams v. Lawrence*, 47 N.Y. 462.

In *Nat. Bank v. Van Derwerker*, 74 N.Y. 234, 239, which was an action brought against the shareholders in a joint-stock association which existed under an oral contract, the court remarked that "as to partnerships, although to endure for a longer period than a year, it has been held that they are not within the statute of frauds. *Smith v. Tarlton*, 2 Barb. Ch. 336". The Chancellor in that case, said : "In this State no written articles are necessary to constitute a copartnership which is to take effect immediately, although a written agreement might be necessary to bind the par-

ties to enter into a future copartnership to commence after the expiration of a year." In *Wahl v. Barnum*, 113 N.Y. 37, it was held, that "a contract forming a partnership to be continued beyond one year, is within the section of the statute of frauds which provides that every agreement which by its terms is not to be performed in one year from the making thereof, is void unless it is in writing, and a partnership so formed is a partnership at will."

In *King v. Barnes*, 109 N.Y. 285, it is said : "The validity of a parol agreement between parties to engage in the business of buying and selling lands, and that it is not open to the objection that it violates the statute of frauds was expressly decided by this court in the case of *Chester v. Dickinson*, 54 N.Y. 1." In the latter case it was held that a partnership may exist between speculators in real estate for the purpose of buying and selling lands, and that it is not

necessary to the existence of such partnership that it be evidenced by a written agreement signed by the partners ; it may be created by parol. It is not affected by the statute of frauds, for the reason that the real estate is treated and administered in equity as personal property for all the purposes of the partnership.

An agreement, by which the plaintiff was to furnish the capital, and defendant to give so much of his time and labor as was necessary in planting and gathering oysters for the market, the profits of each venture, after deducting expenses, to be divided equally between them : held not to make them partners, but merely parties in a joint enterprise. *Houseman v. Weir*, 15 Abb. N.C. 415. But a joint enterprise, whether or not technically a partnership, will be enforced and the rights and liabilities of the parties determined upon the same principles as are applied by courts of equity to part-

nership transactions. Wilcox v. Pratt, 125 N.Y. 688 ; King v. Barnes, 109 N.Y. 285 ; Marston v. Gould, 69 N. Y. 225 ; Dyckman v. Valiente, 42 N.Y. 551 ; Campbell v. Sherman, 8 N.Y. Supp. 630.

"It is a violation of the law for corporations to enter into a partnership." People v. North River Sugar Refining Co., 121 N.Y. 623. Here the defendant "helped to create an anomalous trust, which is, insubstance and in fact, a partnership of twenty different corporations".

I need only to suggest that the parties to a partnership contract must be able to contract ; that the contract must be valid ; and that the object of the partnership must be legal.

Under another division of my subject will be found much that is pertinent to this division.

Partnership as to Third Persons.

The question as to what constitutes a partnership comes before the courts most frequently where creditors seek to enforce the liabilities of partners against persons, in some way connected with the business, to which they have given credit. The question may be said to be whether a partnership as to third persons exists. Such a partnership may result in two ways : first, where persons are held liable as partners by reason of sharing profits ; and secondly, where they are held so liable because of "holding out". "These are not true partnerships, but mere cases of liability to certain persons." Bates on Partnership, Vol.I., Sec. 3.

Of course, if there is a partnership in fact between the persons sought to be made liable, each member of the partnership is liable as a partner to third per-

sons ; but the converse is not true. One may have no right to an accounting, and yet may be liable for all the debts of the business.

When the object sought by a plaintiff is the fixing of liability on a person as partner, the first question is, is there a partnership in fact ; if not, is there a partnership as to third persons? The latter relation results either by sharing profits or by holding out.

Sharing Profits.

"In the first place, it matters not that the defendants meant not to be partners at all, and were not partners inter sese. They may be partners as to third persons, notwithstanding. And this effect may result, though they should have taken pains to stipulate among themselves that they will not in any event, hold the relation of partners. Among the reasons given is this,

whether it be strong or weak : that whatever person shares in the profits of any concern, shall be liable to creditors for losses also, since he takes a part of the fund, which in great measure is the creditor's security for the payment of the debts to them." *Leggett v. Hyde*, 58 N.Y. 278.

The rule, so long in vogue, that a sharing of profits made the sharer liable as a partner to third persons, was first announced in *Grace v. Smith*, 2 W. Bl. 998 (1775). Smith and one Robinson dissolved partnership, duly advertising the fact, on terms by which Robinson was to take the business and assume the debts and pay Smith back his original capital and one thousand pounds for profits, and Smith was to let four thousand pounds remain in the business for seven years at five per cent. In an action by a creditor charging Smith as a secret partner, DeGrey, J., said : "Every man who has a share of the profits of a trade ought al-

so to bear his share of the loss. If any one takes part of the profit, he takes a part of the fund which the creditor relies on for payment.... I think the true criterion is to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund for payment."

The jury found that the loan was on general personal security only ; they found for Smith ; and a new trial was refused. Hence the case was rightly decided, but the statements of law contained in the opinion have had a wide influence. Counsel for plaintiff cited *Bloxham v. Pell and Brooke*, (not reported), where under a similar state of facts it was agreed that Brooke should give Pell a bond for the amount which Pell had brought into the trade with interest at 5%. And further that Brooke should pay to Pell 200 pounds per annum for six years, as in lieu of the profits of the trade. Brooke became a bankrupt. Lord Mansfield

held that Pell was a secret partner. "This was a device to make more than legal interest of money, and if it was not a partnership, it was a crime. And it shall not lie in the defendant, Pell's mouth to say, 'It is usury, and not a partnership?'"

Then followed the case of *Waugh v. Carver*, 2 H. Bl. 235(1793). Carver and Son, ship-agents at one place, and Giesler, a ship-agent at another place, agreed to throw business into each others hands and divide commissions and profits, neither to be affected by the others losses or liable for his acts. Eyre, L. C. J., said that it was plain that the parties were not and never meant to be partners, but as they took part of the fund on which creditors rely, they were liable as partners under *Grace v. Smith*.

"The argument involves an obvious fallacy, for first it assumes that the portion of profits which the defendant takes by so much reduces the resources of

the business ; where-as the presumption is that the loan, service or other consideration, in requital of which he is paid, augmented those resources to the extent of his share in the dividend ; and, secondly, if every payment by which the funds of the firm are diminished makes the payee a partner, then every servant and agent of the partnership is responsible for its obligations---a palpable *reductio ad absurdum*....

Unsatisfactory as was the argument for the conclusion, nevertheless, it was long the law of England that an interest in the profits of a partnership imposed a liability for the partnership obligations, and the principle was generally prevalent in the courts of this country. But in 1830 the rule and the reason of it underwent a searching scrutiny in the House of Lords, under the criticism of Lord Chancellor Campbell and the ex-Chancellors Brough^am, Cranworth and Wensleydale, with the result that the doctrine was

a firm as a principal, as one trading on his own behalf as well as in behalf of others, he is a partner. The principal modern English decisions repudiate the distinction between partnerships inter se, and those which are such only as to third persons in consequence of a sharing of profits. Bates, I, Sec. 19.

The most prominent feature of the modern English law may be summed up as follows : A person is not liable as partner to third persons unless he is an actual partner inter se, the case of holding out of course apart. Bates, I, Sec. 23.

Judge Folger in Leggett v. Hyde, 58 N.Y. 280, says : "It is claimed by the learned counsel for the appellant, that the rule announced in Grace v. Smith and Waugh v. Carver, has been exploded, and another rule propounded which shields the appellant. He is correct so far as the courts in England are concerned. Cox v. Hickman, 8 H. of L. Cases 268, and Bullen v.

utterly exploded as a principle of English jurisprudence. (Cox v. Hickman, 8 H. of L. Cases, 238). "--- Pryor, J. in Wilcox Printing Co. v. Bowker, 27 Abb. N. C. 155.

But a share of gross returns in lieu of compensation was early held in the English law not to constitute a liability as partners. It had previously been decided that sharing gross receipts did not constitute a partnership *inter se*. Then a distinction was made between an agreement to receive as compensation a part of the profits and an agreement to receive a sum equal to or in proportion to a part of the profits, the latter not constituting a partnership. Bates on Partnership, Vol. 1, Sec. 13.

The rule that sharing the profits is the criterion of a partnership has been entirely repudiated in England since Cox v. Hickman. The test there is that of mutual agency; that is, if a person is connected with

Sharp, L. R. 1 Com. Pl. 86, affirms that while a participation in the profits is cogent evidence, that the trade in which the profits were made, was carried on in part for or in behalf of the person claiming the right of participation, yet, that the true ground of liability is that it has been carried on by persons acting in his behalf. Those cases were very peculiar in their circumstances. After the judgment rendered in them, the Parliament deemed it needful to enact, that the advance of money by way of loan to a person in trade, for a share of the profits, should not, of itself, make the lender responsible as a partner. (28, 29 Vic. Ch. 86). If the decisions in the cases cited went as far as is claimed, it would seem that the act was supererogatory. Without discussing those decisions and determining just how far they reach, it is sufficient to say that they are not controlling here ; that the rule remains in this State as it has long been, and

that we should be governed by it here until, as in England, the legislature shall see fit to abrogate it".

I shall now attempt to present as briefly as possible the leading cases prior to *Leggett v. Hyde* in which the question whether sharing profits constituted a partnership as to third persons, has arisen or is discussed.

Bostwick v. Champion, 11 Wend. 571. A., B. and C. ran a line of stage coaches from Utica to Rochester ; the route was divided between them into sections, the occupant of each section furnishing his own carriages and horses, hiring drivers and paying the expenses of his own section ; the money received as fare of passengers, deducting therefrom only the tolls paid at turnpike gates, was divided among the parties in proportion to the number of miles of the route run by each. An injury happened to a third person through the negligence of the driver of the coach of A. Held, that a

joint action on the case at the suit of the party injured lay against B. and C. as well as A. Nelson, J. said, "It may be laid down as an established principle of law, that whoever participates in the profits of a trade or business, or has a specific interest in the profits themselves, as such, becomes chargeable as a partner with respect to third persons. . . . It is clear in this case that all the proprietors have a community of interest in the profits, and share in them in proportion to the money, labor and skill ~~br~~ brought into the business. The proceeds from the entire route are thrown into a common fund and divided. Each has the benefit of any peculiar or superior advantage which may appertain to one portion of it over another ; and it was well said by Mr. Justice Bayley, in Langdon v. Pointer, 12 Com. L. R. 321, that 'the horses and driver are found by one to do the work of all, and for the benefit of all', under such circum-

stances. (Is not this the test proposed by Cox v. Hickman?) . . . The defendants as among themselves, by the terms of their agreement, all the provisions of which are binding upon them in relation to one another, may not be partners, and may be liable to each other the same as if their interests were several. This private agreement or understanding, however, can in no way vary the rights of third persons or the public, legally flowing from the general arrangement under which they hold themselves out as jointly interested, and by which they participate in the profits of the concern."

This case was affirmed in *Champion v. Bostwick*, 18 Wend. 175. Here the court said : "It is not necessary to constitute a partnership that there should be any property constituting the capital stock which shall be jointly owned by the partners. But the capital may consist in the mere use of property owned by the in-

dividual partners separately. It is sufficient to constitute a partnership if the parties agree to have a joint interest in, and to share the profits and losses arising from the use of property or skill, either separately or combined. Here the capital stock which each contributed or agreed to contribute to the joint concern, was the horses, carriages, harness, drivers etc., which were necessary to run his part of the route; and to be fed, repaired and paid at his own expense. The only debts or expenses for which they were to be jointly liable as between themselves, were the tolls upon the whole line ; and the joint profits which they were to divide, if any remained after paying the tolls, was the whole passage money received upon the entire line. . . . There is a class of cases in which it has been held, that a person who merely receives a compensation for his labor, in proportion to the gross profits of the business in which he is employed, is not a

partner with his employer even as to third persons.

The distinction appears to be between the stipulation for a compensation proportioned to the profits, and a stipulation for an interest in such profits so as to entitle him to an account as a partner. 1 Rose R. 91.

A distinction which Lord Eldon says is so thin that he cannot state it as settled upon due consideration.

But, he says, it is clearly settled as to third persons, though he regrets it, that if a man stipulate that as the reward of his labor he shall have, not a specific interest in the business, but a given sum of money, even in proportion to the quantum of profits, that will not make him a partner ; but if he agreed for a part of the profits as such, giving him a right to an account though having no property in the capital, he is as to third persons a partner ; and no arrangement between the parties themselves can prevent it."

Burkle v. Eckhart, 1 Denio 337 (1845). A firm of

merchants engaged in general business and trading, among other things, in provisions, employed a third person to attend to the purchasing and forwarding of produce, who was to act under the orders of the firm, and have as compensation for his services one fourth of the profits arising out of the purchase and sale of produce ; Held, that the person thus employed was not a partner in the business, even in respect to third parties. Bronson, Ch. J.: "It is quite clear that there was no partnership as between the parties to this arrangement, and I think there was none in relation to third persons. There was no community of interest in the capital stock ; and Eckhart did not act as principal trader, but only as the agent or servant of Gibb & Co. He was not clothed with the usual powers, rights or duties of a partner ;" but was subject to the orders of his employers. He had nothing to do with the losses, except as they affected the profits out of which he

was to be paid ; and he was only to take a share of the profits in the lieu of wages, or as a mode of getting compensation for his services. . . . So far as this court is concerned, it has been settled, that a mere agent or servant, who is to obey orders and has no interest in the capital stock, will not be a partner, even as to third persons, merely because he is to be compensated for his services, by receiving a share of the profits which may arise from the business in which he is employed. It is undoubtedly true as a general rule, that a communion of profits will make men partners, and draw after it a liability for losses. But it is abundantly settled that that rule is not universal ; and the exception which will best reconcile the cases, is least liable to abuse, and is so distinctly marked that it can be easily administered, is that which allows one man to employ another as a subordinate in his business, and agree to pay him out of the

profits, if any shall arise, without giving the party employed the rights, and subjecting him to the liabilities of a partner." This case was affirmed in 3 N.Y. 132.

As early as *Vanderburg v. Hull*, 20 Wend. 70, it was decided that a share of the profits for compensation did not make a servant liable as a partner. In that case a person was employed as an agent of a particular business at a salary of \$300. per annum ; in addition thereto he was to have a contingent interest in one-third of the profits ; he was not to be answerable for losses. Held, that he was not a partner, and therefore a competent witness in an action brought by his employer.

Merrick v. Gordon, 20 N.Y. 93. A firm, carriers upon the New York canals, agreed with a firm of carriers upon the Great Lakes for a division in fixed proportions of the total freight which should be received

for the carriage of goods, which having been carried over either of the routes should be carried over the other during the season of navigation. Held, no partnership between the firms, or in respect to third persons. Comstock, J. said : "This case is distinguishable from *Bostwick v. Champion*. In the latter case all the fare from passengers received by any of the parties was to be a common fund and divided according to the number of miles in the section of the line which each occupied. This formed a union in the entire business of carrying which any and all of the partners conducted. Consequently, if the occupant of one of the sections should take a passenger over his own part of the route, who was carried no farther, or should take one over a part of his section, the fare would go into the general fund and be subject to division. . . . The contract in this case was simply that where either of the parties took goods

from the other at Oswego, the termination of both lines---the goods being brought to that place by one or the other under freighting contracts---and carried thence in one direction to New York, Albany, or Troy by the canals or Hudson river, and in the other by the lakes to the ports situated thereon, the gross earnings on those goods should be divided. Entire freights over both lines of conveyance were in contemplation, and those only ; and the division was to be made according to the value of the service which it was supposed each party must perform in earning those freights. The arrangement was, therefore, in principle, like the very common one which is made between different lines of railroad. Arrangements are often made between different companies having lines which connect, adjusting fare or freight on passengers and goods between distant points, and assigning to each a share in the gross earnings according to the service

which each performs in producing the result. No case has gone the length of holding that an agreement of this nature creates a partnership ; and if we were to lay down such a doctrine now, it would be establishing a class of partnerships hitherto unknown to the law."

Manhattan Brass Co.v. Sears, 45 N. Y. 797. This case is often inaptly cited. The judge prefaces his opinion thus : "To constitute one a partner, as to third persons, it is not necessary that he should agree to share in the losses of the business. Sharing in the profits is sufficient." Defendant had contracted for an undivided quarter interest in a patent right. The court found "all the elements of a partnership, as claimed by any writer:; sharing in the profits ; sharing in the losses, at least to the extent of \$4,000, the repayment of the whole of which depended upon the profits ; the right to inspect the books ; a common interest in the stock of the company..... It is plain-

ly a partnership as to third persons, even though expressly agreed that it should not be so between themselves. The best position that can be claimed by defendant, Sears, is that this is a special or limited partnership, as between the parties thereto. In such a case it is general as to the public, or our statute on that subject would be superfluous." Undoubtedly the actual relation, which the parties had assumed towards each other, was that of partners.

Ontario Bank v. Hennessy, 48 N.Y. 552. " The agreement executed by the defendants made them partners. It provided for a joint business, to which McDonald was to give his personal attention, and Hennessy was to furnish \$800. This \$800 was not a loan, but was to be furnished as capital, as no provision is made for its repayment. H., however was to incur no further risk nor assume any further responsibility than the \$800. This was placed in

peril and might be lost, and if the loss should be greater than the \$800, M. was, as between him and H., to bear it. If there was any net profit, H. was to have one-quarter of it. It thus appears that H. was to share in the profits of the business as profits, not as a compensation for wages he was to earn, or interest or money loaned to M., but in consideration of his share of capital invested and imperiled in the joint business. Whatever the intentions of the parties may have been, this, as to the third person, made him a partner. Here, within the meaning of the authorities, was a communion of profits, and hence a partnership."

An agreement, by which one employed to purchase grain is to receive for his service one-half the profits realized on the grain purchased, does not constitute him a partner so as to make him a necessary party plaintiff in an action brought by his employer

upon a contract in reference to the grain so purchased.
 Lewis v. Greider, 51 N.Y. 231.

Kent said : "The test of partnership is a community of profit ; a specific interest in the profits, as profits." 3 Kent's Comm. p.25, note b. "There have been from time to time certain exceptions established to this rule in a broad statement of it ; but the decisions, by which these exceptions have been set up, still recognize the rule that, where one is interested in profits, as such, he is a partner as to third persons. These exceptions deal with the case of an agent, servant, factor, broker or employe, who with no interest in the capital or business, is to be remunerated for his services, by a compensation from the profits or by a compensation measured by the profits ; or with that of seamen on whaling or other like voyages, whose reimbursement for their time and labor is to finally depend upon the result of the whole voyage. There

are other exceptions, like tenants of land, or a ferry, or an inn, who are to share with the owners in results, as a means of compensation for their labor and services. The decisions which establish these exceptions do not profess to abrogate the rule---only to limit it." Leggett v. Hyde, 58 N.Y. 280.

In that case Judge Folger found the prominent and important facts to be that defendant and appellant, Hyde, "loaned the firm a sum of money to be employed as capital in its business, and that, therefore, he was entitled to have and demand from it one-third of the profits of the business every half-year." H. had loaned to a firm \$2000. to be used in the business for one year, under an agreement that he was to receive one-third of the profits, which were to be settled half-yearly, and at the end of the year if he did not conclude to become a partner, he was to be repaid his \$2000. out of the concern. Held, that the money so in-

vested was used by the firm for the benefit of H.; that he had an interest in the profits as such, not as a measure of compensation, but as a result of the capital and industry ; and that as to the creditors of the firm he was a partner, and jointly liable with the others for the partnership debts. "It was one-third of the profits that he was to have, and not a sum in general, equal to that one-third. So that he was to take it as profits, and not as an amount due ; not as a measure of compensation, but as a result of the capital and industry."

To me this distinction seems superfine, impractical ; and necessarily, a decision one way or the other must be arbitrary. There is no reason to the rule laid down in *Waugh v. Carver*, etc. The exceptions to it are numerous. The cases since *Leggett v. Hyde* have gone still farther. I shall now endeavor to present the leading cases since that decision. Instead of dis-

cussing them in my own words, I shall often let the judges who delivered the opinions speak.

It was observed in the Supreme Court of Michigan in the case of Beecher v. Bush, 45 Mich. 188, 195-6, that in ~~the~~ New York the doctrine that participation in profits created the liability of partners had been closely adhered to, and that the courts were hampered by their own early decisions and had not followed Cox v. Hickman to the full extent. This statement is questioned : Bates on Partnership, I., p.27.

Bager v. Crawford, 76 N.Y. 97. Defendant C. advanced to defendant G. money to purchase the stock and fixtures of a business, which G. stated he could pay soon. C. was secured by chattel mortgage upon the property, conditioned that the sum loaned should be paid on demand, and G. agreed to pay over to him one-half of the net receipts of the business. In an action by a creditor of G., who sought to charge C. as a part-

ner, held, that C. could not be held liable ; that the legal presumption was, that the share of the receipts so paid over was to be applied in payment of the loan.

"Leaggett v. Hyde does not hold that, where money is loaned and to be refunded absolutely without regard to profits, a partnership exists. To have that effect the payment must depend upon the profits. If the lender is to be paid at all events, the contract does not create a partnership : Everett v. Coe, 5 Denio 180."

Then, not to have that effect, all that one must do, is to stipulate for a return of the money at all events. Is there much left of the "sharing profits" test? If one does not stipulate for a return of the money advanced, he does not make a loan ; he contributes capital ; and by agreement he is entitled to a share of the profits. Then I think the courts in this State would hold that the parties to the agreement were partners among themselves.

Richardson v. Hughitt, 76 N.Y. 55. Defendant H. entered into an agreement with B. Bros. & Co., by which that firm agreed to manufacture and deliver to H. 200 lumber wagons ; he agreed to advance fifty dollars on each ; the wagons were to be sold and H. to receive one-fourth of the profits and his advance, with interest at five and one-fourth per cent. In an action to charge H., as a partner, with a debt of the firm, held, that the agreement did not constitute a partnership, but was a contract for a loan, the provision as to profits being merely a mode of providing a compensation for the use of the money advanced. "In Leggett v. Hyde, the money was advanced with a view to a partnership, and for the benefit of Hyde himself. It was not a loan, and no interest was to be paid on the same." It seems to me that the only way by which Leggett v. Hyde can be reconciled with the two preceeding cases, is by holding that the defendants in Leggett v. Hyde

were partners *inter sese*. No doubt they were.

The case of *Burnett v. Snyder*, 91 N.Y. 550, repudiates the doctrine of *Cox v. Hickman*. "We have in this State," says Judge Andrews, "adhered to the general doctrine established by the earlier English cases, and although it proceeds upon reasons which have not been considered entirely satisfactory, it was applied by this court in the recent case of *Leggett v. Hyde*, 58 N.Y. 272. But the participation in the profits of a trade which makes a person a partner as to third persons is participation in the profits as such, under circumstances which give him a proprietary interest in the profits before division as principle trader, and the right to an account as partner, and a lien on the partnership assets in preference to individual creditors of the partner." Accordingly, in this case it was held, that a contract between one of two or more partners and a third person, with the knowledge and assent

of the other partners, by which the third person is to share in the profits and losses, in the firm business, of the parties with whom he contracts, does not constitute such a participation in the profits as will make the third person a partner, or liable for the partnership debts." "Thus the opinion denies *Dox v. Hickman*, and adopted^S~~ed~~ it in full immediately afterwards". Bates on Partnership, I, 27, note 2.

The case of *Curry v. Fowler*, 87 N.Y. 33, was similar in its leading aspects to the case of *Richardson v. Hughitt* (supra), and followed its decision.

Cassidy v. Hall, et al., 97 N.Y. 159. Defendants, Hall, Nicoll, and Granberry, as parties of the first part, entered into a contract with defendant, the United States Reflector Company, which recited that the parties of the first part contemplated assuming control of said company, when, if ever, they should be satisfied that its business was a profitable one, and that

it was expedient some arrangement should be made whereby that question might be determined, in consideration whereof and of the mutual covenants and agreements it was agreed that the parties of the first part, to enable the company to fill its orders, for goods manufactured by the company, should make advances upon assignments of such orders as they should approve ; said parties of the first part to collect each of the orders so assigned, and out of the proceeds retain the sum advanced thereon with interest and a proportion of the profits made by the company, the same to be not less than ten per cent of the face of the order. The company also executed to H. N. and G. a chattel mortgage upon its property to secure such advances. In an action to recover for goods sold to the company, held, that the contract did not constitute a copartnership between the parties, either *inter sese*, or as to third persons. "The case of Richardson v. Hughitt is directly in point, the

same principle is involved and there is a striking analogy in the facts which renders it applicable to the question now considered. We are unable to perceive any such distinction existing between the two cases which authorizes ^{a holding} that the case cited is not in point."

For my own part, I cannot reconcile this case with Leggett v. Hyde. In each case money was advanced to a firm for use in the business of said firm, the parties in each case advancing the money contemplating becoming partners in the future. In Cassidy v. Hall the parties of the first part to the agreement were, out of assigned orders when collected, to retain of the proceeds the sums advanced with interest and a proportion of the profits made by the company. In Leggett v. Hyde, ~~the~~ the defendant was to receive one-third of the profits, which were to be settled half-yearly, and at the end of the year if he did not conclude to become a partner, he was to be repaid his \$2000. out of the concern,

but without interest strictly as such. The judge in Richardson v. Hurrhitt says : "In Leggett v. Hyde, the money was advanced with a view to a partnership, and for the benefit of Hyde himself." The same judge in Eager v. Crawford, 76 N.Y. 101, says : "Leggett v. Hyde does not hold that, where money is loaned and to be refunded absolutely without regard to the profits, a partnership exists. To have that effect, the payment must depend upon the profits. If the lender is to be paid at all events, the contract does not create a partnership." Does not the first quotation apply as well to Cassidy v. Hall? Does the second quotation apply to the facts in Leggett v. Hyde? Was not the \$2000. to be repaid absolutely, notwithstanding profits? Profits were to be received in that case ; why not as a measure of compensation? To my mind because the judge arbitrarily said that they were to be received as profits. I can only reconcile the cases discussed, satis-

factorily to myself, by maintaining that in *Leggett v. Hyde* the defendants were partners *inter se*. If they were not partners *inter se*, then in the light of subsequent decisions the case was decided erroneously.

In *Hacket v. Stanley*, 115 N.Y. 629, the late Chief Judge Ruger said : "The application of the rule that participation in profits renders their recipient a partner in the business from which profits are derived, as to third persons, has been somewhat restricted by modern decisions, but we think that the division of profits must still be considered the most important element in all contracts by which the true relations of parties to a business is to be determined. We think this rule is founded in strict justice and sound policy. There can be no injustice in imposing upon those who contract to receive the profits of an adventure, a liability for credit contracted in its aid, and which are essential to its successful conduct and prosecution.

This liability does ^{not} and ought not, to depend upon the intention of the parties in making their contract to shield themselves from liability, but upon the ground that it is against public policy to permit persons to prosecute an enterprise, which, however successful it may for a time appear to be, is sure in the end to result in advantage to its secret promoters alone, and to the ruin and disaster of its creditors and others connected with it. Expected profits being the motive which induces the prosecution of all commercial and business enterprises, their accumulation and retention in business is essential to their success ; and if persons are permitted, by secret agreement, to appropriate them to their own use and throw the liabilities incurred in producing them upon those who receive only a portion of the benefits, not only is a door opened to the perpetration of frauds, but such frauds are rendered inevitable. Exceptions to the rule are, however,

found. in cases where a share in profits is contracted to be paid, as a measure of compensation to employees for services rendered in the business, or for the use of moneys loaned in aid of the enterprise ; but where the agreement extends beyond this and provides for a proprietary interest in the profits as a compensation for money advanced and time and services bestowed, as a principle in its prosecution, we think that the rule still requires the party to be held as a partner." Certainly, the division of profits must still be considered an important element in considering the true relation of parties to a business. But it is not too much to say,, that the doctrine that a person takes a share of the profits on which creditors rely, and therefore should be liable as a partner, is not only restricted but well-nigh exploded in this State. The judges may recite the old rule, but they do not apply it. Virtually, the rule of Cox v. Hickman is applica-

ble in this State. This case of Hackett v. Stanley, was one wherein defendants entered into an agreement by which, in consideration of the loan of \$750. from S. to G. "for use in the business of heating, ventilating", etc., which sum was secured by the note of G., by the assignment of a policy of insurance and by chattel mortgages, and in further consideration of the services of S. in securing sales, and any other sums he might at his option advance, G. agreed to divide equally with him the net profits of the business. The court said: "We think such an agreement, within all authorities, constitutes a partnership as to third parties. By it Stanley had an interest in the general business of the concern ; a right to require a quarterly account of its transactions ; authority to make contracts in its behalf, and an irrevocable right to demand one-half of the profits of the business. That the original loan was secured to be repaid does not preclude the conclu-

sion that they were partners, for it is entirely competent for one partner to guarantee another against loss, in whole or in part, in the partnership business, if the parties agree." Without doubt, the parties were partners in fact, and so were liable.

"It is the law of this State, as declared by the Court of Appeals, that a right to a share in the profits in compensation for services rendered to the partnership does not involve a liability for the partnership engagements. And so of a loan of money to the partnership, for a share of the profits. There is no difference in principle between the letting of a chattel and the loan of money or the hire of services."

Wilson Printing Ink Company v. Bowker, 27 Abb. N.C.153.

Partnership by Holding Out.

Mr. Parsons in his work on Partnership, page 119, says : "Where a creditor sues a firm, and seeks to put the liability of a partner upon one who is only a nominal partner, it ^{is} a somewhat difficult question whether the plaintiff can recover without proof that he himself believed the person whom he seeks to charge to be a partner. The authorities on this question are far from unanimous, some holding that one put forth to the world as a partner, is liable as such to every creditor of the firm ; while others hold that he is thus liable only because he was a partner in fact and in interest, or because the plaintiff regarded him as one, and dealt with the firm in some degree, at least , on his credit. Perhaps a reasonable rule might be stated thus : Where one is held forth to the world as a partner, the first question is, was he so held out by his own authority, consent or connivance, or by his negligence. If by his

authority, consent or connivance, the presumption is absolute that he was so held out to every creditor or customer. If so held out by his negligence only, ~~he~~ he should be held only to a creditor who had been actually misled thereby."

The above rule is approved by the court in the case of Poillon v. Secor, 61 N.Y. 462. Here defendant, for a valuable consideration, authorized the use of his name in the copartnership, as if he was a member thereof; held, that he was liable as a partner to a subsequent creditor of the firm, although the creditor was ignorant of the arrangement, or that the name represented such nominal partner, and did not give credit on the faith of his apparent connection with the firm."

"The sound rule would seem to be, that a person who deliberately agrees that his name shall be used in a partnership, must be conclusively presumed to intend the consequences which naturally flow from such an act.

It would be contrary to public convenience to require affirmative proof that dealers with the firm knew who was represented by the fictitious name."

Several persons engaged in an enterprise, one of them agreeing to assist by advancing money, and to share in the losses, if any, but not to receive any part of the profits, which are to be divided among the others exclusively. Although such one is not to be deemed a partner as between the others and himself, nevertheless, if he holds himself out or allows himself to be held out as a partner, to a third person, who under the belief that he is such, enters into a contract with them, he is liable on such contract.

Moss v. Jerome, 10 Bosw. 220.

Where a partnership is publicly and notoriously known, all the partners are responsible for the contracts of each, within the scope of the partnership, until public notice of the dissolution is given; but

it is otherwise of a dormant partner. Actual dissolution without notice will protect him. *Kelly v. Hurlburt*, 5 Cow. 534.

Where the relations of a partner to his copartners have been terminated, yet his name was continued in the name and style of the firm formed by his former copartners with his knowledge, sanction and approval, held, that he was liable on the contract and obligations of the firm so using his name as if he had actually continued as a member and partner thereof, "as to all creditors who had dealings with them, without notice of their actual relations to each other." *Freeman v. Falconer*, 44 N.Y. City Sup. Ct. 132.

Publication of the notice of the dissolution of a partnership in a newspaper, at the place where the business is carried on, is not sufficient to relieve a retiring partner from liability for subsequent transactions in the firm name with one having dealings with

the firm prior to the dissolution ; in such case notice must be brought home to the dealer, or it must appear that facts came to his knowledge sufficient to advise him, or give him reason to believe that a dissolution has taken place. *Austin v. Holland*, 69 N.Y.571.

De facto Corporations.

Under my subject I might treat of this phase : the liability of members of a *de facto* corporation. But this would lead me into fields not contemplated, into regions foreign to my purpose. Moreover, this subject has been ably discussed in a thesis by Henry Lake Woodward, '91, who, in his recapitulation, says : "I think the following propositions, founded in reason and established by authority, may be safely laid down with reasonable certainty of maintaining them :

1. Persons, who, by contracting with a *de facto* corporation, recognize and acknowledge its corporate

capacity to so contract, are estopped from afterwards denying such corporate capacity, and as to them it stands upon the same footing as a corporation *de jure*;

2. Persons who have not so estopped themselves may, in any proceeding where it would be pertinent, question the regularity of the corporation collaterally, and to them the members may be made liable individually as copartners or joint tort-feasors, as the case may be.