

1895

Limitations on the Power of One Partner over Partnership Property with Particular Attention to the Right to Executive Chattel Mortgages

Clyde P. Johnson
Cornell Law School

Follow this and additional works at: http://scholarship.law.cornell.edu/historical_theses



Part of the [Law Commons](#)

Recommended Citation

Johnson, Clyde P., "Limitations on the Power of One Partner over Partnership Property with Particular Attention to the Right to Executive Chattel Mortgages" (1895). *Historical Theses and Dissertations Collection*. Paper 390.

This Thesis is brought to you for free and open access by the Historical Cornell Law School at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Historical Theses and Dissertations Collection by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

LIMITATIONS ON THE POWER OF ONE PARTNER, OVER
PARTNERSHIP PROPERTY, WITH PARTICULAR ATTENTION
TO THE RIGHT TO EXECUTE CHATTEL MORTGAGES.

A Thesis Presented to the School of Law,
Cornell University for the

DEGREE OF BACHELOR OF LAWS

by

Clyde P. Johnson.

Ithaca, N.Y.

1895.

LIMITATIONS ON THE POWER OF ONE PARTNER OVER
PARTNERSHIP PROPERTY, WITH PARTICULAR ATTENTION
TO THE RIGHT TO EXECUTE CHATTEL MORTGAGES.

Of all associations by men for carrying on businesses, that of a partnership gives to one man, over his associate the greatest power. According to the tendency of modern decisions, one partner it seems may totally ruin his co-partner or partners. Is this right? The justness of this power as between the members themselves is not founded on principle, but it seems to be a necessary evil for the purpose of protecting third parties or strangers dealing with the firm. The doctrine of agency running through the law of partnership requires the binding of the firm by one member.

But notwithstanding the many powers bestowed by a partnership upon the individual members, there is never-

theless one thing which all courts agree he can not do, viz, make an assignment for the benefit of creditors. All text writers on partnership and all courts deny this right to one partner. Authorities may differ as to their grounds for such holding, but the denial of the right is unquestionable. The most popular, and it seems the most reasonable basis, for holding that a partner without the consent of his co-partners, has not the right to make an assignment for the benefit of creditors, is one that runs through the very essence of all partnership agreements, viz, a partnership is not formed to meet with intentional destruction by one of its members. The partnership agreement contemplates no such right. The idea is hostile to all sense of justness, good faith and fair dealing. No act or object tending to destroy the relationship between one partner and his co-partners is, or ought to be, allowed. It is secession and will be sanctioned to no greater extent than it was in the Civil War. The principle is the same, and ^w ~~he~~ will lay this proposition down at the outset that the right of destruction of partnership relation is not connoted^y by the term partnership. This proposition can be supported by au-

thority.

Now as to the right to legally execute chattel mortgages. The right of one partner to sell and mortgage partnership property is recognized and accepted by all authorities on the subject of partnership. But this is only a general rule and like every rule has its exceptions and limitations. Common sense and reason demand it. Call in any merchant within the limits of the city of New York or Cincinnati, and ask him whether he understands that his partner has the right to sell him out, or sell out the business, or even mortgage it as an entirety without consulting him, and see if he would not consider such an act traitorous as well as unlawful and illegal. And if such be the consensus of opinion of merchants how came the opposite doctrine to have any support or foundation, for there seems to be found numerous dicta, and expressions in the adjudicated cases, and perhaps a case to support this anomalous, untenable proposition. Vide *Mabbett v. White* 12 N.Y. 443. The reason is that certain powers allowed^t the partner, have been carried too far, and have been given a wider range of applicability by the law writers than their original scope and intent author-

ize. One partner having as much right and title to firm property as well as his co-partner, it was thought that this power could be extended without limit. But how foolish. This power is unlimited as long as exercised in behalf of partnership business, to enhance its interests, to preserve the partnership. But to carry it further and allow the use of this power as a cloak or an instrument of destruction, and thus tear down the partnership structure, is unjust, and the exercise of the power should be checked. The power exists and ceases only when it is attempted to be exercised with the intent or for the purpose or object of destroying or terminating the partnership, or even as a preliminary step to such destruction or termination. It narrows down to this simple question. Was the act of the partner one intended for the further preservation of the partnership, in order that it might live, or was it one tending toward the destruction of the partnership? If the former, and even if it did happen to destroy the business, the exercise of the power was just and should be upheld. But if it was the latter, then all reason, justice and morality demand the cessation of the power. It will not be hard

to determine which of these two motives was present in the mind of the partner. Was his act one which was necessary to meet current or existing obligations, or to nip in the bud some act or proceeding which threatened the life of the partnership, or jeopardized its further existence, or tended to destroy its credit or reputation? If so, the power existed and should be and will be upheld. An agent can not act without the scope of this authority, can not act beyond the apparent power bestowed by his principal upon him. A partner is an agent. Certain powers are given him by his principal, he must not go beyond this power given him. And will any one for a moment say that a principal ever gives his agent the right to destroy his business? A man would rather kill himself than give some one else the power to do it. We have been unable to find a single case, with the exception of the Mabbett v. White case and that is not flat footed to support the unlimited exercise of the power to sell and mortgage firm property. Many cases apparently uphold this proposition but upon closer examination it will be found that there were some extenuating circumstances such as the ratification, or acquiescence of the

absent, or non-concurring partner, or that a majority of the partners united in the exercise of this power.

Now to discuss the case of Mabbett v. White 12 N.Y. 443. This case is the only one which seems to support the unlimited exercise of this power, and hold that one partner may sell the entire stock of co-partnership property without the consent of his partner. The decision in this case is clearly against the point we are raising, but the decision was reached through errors of the Judges in following what they supposed other cases have held or decided, when in fact such cases did not, nor did they intend, to lay down the rule so broadly as the Judges in the Mabbett v. White case evidently thought they did. In fine, the Judges in this case drew their conclusions from a misinterpretation of former decisions. But in this case as in many others the dissenting opinion is often the best. It is just here where the distinction between "law" and "the law" comes in. If there was no difference between the two terms we are inevitably drawn to the conclusion that judges are infallible interpreters of law. Many a decision has been handed down which becomes the law of the State or Nation but to say that it is law is wrong. Thus in this case of Mabbett v. White

the decision of the majority of the judges on the point in question is the law, but we think that there is more law in the dissenting opinion of Chief Justice Denio, the brains of that court. The decision is the law, the dissenting opinion is law. This opinion of Chief Justice Denio is a vigorous and unanswerable opinion and is so clearly in point as to our contention, that we can not refrain from incorporating to some length. He says, "I am aware that the authority of each of the several partners as the agent of the firm is very great. It extends to all the goods of the firm, and warrants sales, mortgages, and pledges, and every variety of transactions incident to the business in which they are engaged. But it is not wholly without limitation. It must necessarily be confined to the scope and object of the business, and in the course of its trade and affairs. It is no objection that the tendency and ultimate effect of a transaction entered into by a partner is disastrous or even destructive to its business. But this transfer (X to Mabbett) was made with the deliberate intent and purpose of putting an end to the partnership enterprise, or wholly subvert its objects, and such was its effect.

This is apparent not only from its embracing every portion of its means to carry on business, but from the fact that forcible possession was immediately taken of its books of account and of the store in which the business had been carried on. I have carefully examined the several cases upon this question which were cited at the bar (these were the only cases referred to in the majority of opinion) and such others as I could meet with, and I think there is no well considered judgment which would justify this transfer."

This is certainly a strong and sensible opinion, and one coming from so great a jurist as Justice Denio, should be given due weight. If the courts were to follow his opinion, they would bring the law to a just position and would thus eliminate all opportunities for unfair dealing on the part of one partner, and give greater security to all the partners, and greater stability to partnership. Bates Vol. I sec. 401. Power of one partner over personal property. "Each partner has, by reason of his agency power to sell any specific part of the partnership property which is held for the purpose of sale, and make a valid transfer of the entire title of the firm to it."

Mr. Bates now goes on to say that cases and many of the dicta seem to apply this rule to chattels of every kind, whether held by the firm for purposes of sale or not. Citing *Clark v. Rives* 33 Mo. 579. But Mr. Bates continues, "I have no doubt but that the power of sale must be confined to those things held for sale, and that the scope of the business does not include the sale of property held for the purposes of business and to make a profit out of it, and that this is the only true rule. Citing the steam-boat case of *Hewitt v. Sturdevant* 4 B. Mon. 453 and *Caytar v. Hardy* 27 Mo. 536 when one partner attempted a sale of working oxen which were used in farming, this sale was held void, also *Mussey v. Holt* concerning a lease by one partner of partnership real estate.

Has a partner power to sell the entire partnership effects? The right to do this is commonly asserted and backed up by many authorities. We can not see the justness of so broad a proposition. If this proposition now laid down as follows, we might assent to it." One partner has the disposal of all the personal property of the firm provided he does not use any of that property upon which the transaction of the firm business depends, or if his use of the property was to further the interests of

the partnership." This would be a reasonable and necessary implication to make. The very essential element of partnership demands as much power as this, but to carry it any farther is contrary to the law of partnership, or to what is necessary for carrying a business by such an association as a partnership is. Thus in *Halstead v. Shepherd* 23 Ala. 558, particularly on p. 573, Gibbons J. expressly says "one partner acting within the scope of the ordinary business of the firm, has the right to sell and dispose of the property of the firm to the extent of the entire stock." Also in *Williams v. Barnett* 10 Kas. 455, it is held that each member of a partnership has, in the absence of stipulations to the contrary the right to dispose of all partnership property, but that right is subordinate to the obligation to make all dispositions for the benefit of the partnership.

Each partner has the power to do, within the scope of the business, what all unitedly might do, but where the transaction is unusually large and should excite suspicion, if malafide it would not bind the other partners. *Stegal v. Coney and Rice* 49 Miss. 761. A forced sale by one partner of the firm property, not in the course of its business, and of a nature to break it up, confers no

title on the purchaser who buys with notice of the whole nature of the transaction. Wallace v. Yeager 4 Phila.

251. In Drake v. Thyng 37 Ark. 228 where the partnership was engaged in the brick making industry, and one partner sold out the whole concern, it was held that the purchaser would be a trustee for the other partner.

That although selling was part of the firm business, only that which was held for sale could be sold, and not the business itself, or the effects necessary for the carrying it on.

Also in this connection see Myers v. Moulton 12 Pac. 505, ont. Cayton v. Hardy 27 Mo. 546 (referred to above), Crossman v. Shears 3 Ont. app. 583, Blaker v.

Sands 29 Kas. 551. Shellito v. Sampson 61 Ia. 40, Hunter v. Maywick 67 Ia. 555. Henderson v. Nicholas 67 Cala.

152. Some of these cases will probably be referred to later in the discussion of the right of one partner to execute chattel mortgages on firm property without the consent of his co-partner or partners. Bates I. 405.

"The power to sell even property held for sale must be exercised in the course of the business; hence if the

dissent of a co-partner in a firm of only two is known to ^{the} _^

buyer, the power is revoked." Dickinson v. Legare 1

Desaus. 537, cited.

Having discussed now to some length the general powers of and limitations upon partners with respect to their right to sell partnership property, let us revert now to the main subject of this paper, viz.- the right of one partner, without the consent of his co-partner, to legally execute chattel mortgages upon all the firm property, and thereby cause a dissolution and destruction of the partnership. We have already referred to the exceptional case of Mabbitt v. White and the dissenting opinion of Chief Justice Denio. Let us see what Bates, who is the latest and probably the best writer on the subject of partnership has to say with reference to this particular point. "A partner has power to mortgage the whole stock, subject to the same limitations, doubtless, as in selling the whole." Many cases holding that there are no limitations on this right can be found. There is a case now pending before the Supreme Court of Ohio and it was because of the unreasonable holding of the lower Courts, as it seems to the writer, that he became first interested in this point. The case is styled Cowen v.

McGrath. Mrs. Cowen was a widow woman who had been left by a deceased husband his share in the shoe firm of Cowen and McGrath. After Mr. Cowen's death, the firm still continued to do business under the old style and had been doing business at the time of the suit for several years. McGrath was an unmitigated rascal and did about as he pleased with the business regardless of Mrs. Cowen's protest. McGrath wished to make an assignment for the benefit of creditors; Mrs. Cowen objected and said the firm could continue to do business if properly managed. McGrath now filed a petition for the dissolution of the partnership and the appointment of a Receiver. Simultaneously with the filing he, without the consent of Mrs. Cowen, and knowing that she would object, then executed chattel mortgages upon all the tangible firm property consisting of merchandise and store fixtures, to secure debts now yet due. In a suit to set aside these mortgages, the Common Pleas Court decided against Mrs. Cowen. The case is now before the circuit court and will be taken before the Supreme Court by which ever side loses.

By this case and many others we can see that the

right of one partner to act in certain matters against the wish and consent of his co-partner, is not at all a settled question. It seems to be a great hardship to an honest partner to be placed at the mercy of a dishonest and unscrupulous co-partner. The right to allow one partner to so act as to destroy the firm, and do it intentionally is certainly not a just one. We find also many authorities to support our claim that a partner has no such right. Besides Bates, Collyer on Partnership Section 179 holds with us.

As to cases we will first mention that of Osborne v. Barge 29 Fed. Rep. 725. This is one of the latest authorities, and squarely supports our position as regards the invalidity of chattel mortgage of firm property made by one partner without the consent of his co-partner. This case being so strongly in favor of our position that we will cite at length from it. Shiras J. gives the opinion "If a mortgage," says Judge Shiras, "is given upon the stock in trade of a partnership and under such circumstances that the giving thereof practically terminates the business of the firm, no reason is perceived why

the assent of both partners is not as essential to give validity to such an instrument, as in the case of a general assignment. The mortgage executed to complainants covered practically all the stock of the firm, came due twenty-four hours after its date, and gave the mortgagees full power to take immediate possession of the property, and sell the same for the payment of the mortgage debt. The practical effect therefore of the instrument, if enforced, would terminate the business of the firm, and to hand over the control and right of the disposition of the partnership property to a third person. The right to thus destroy the life and business of the firm is not possessed by one of the partners, and to be valid it must appear that such an instrument was executed by the authority of all the partners."

In another part of the opinion Judge Shiras lays down the general rule on the question with its limitations and opinions. "As a general rule it is held that each member of an ordinary partnership has authority as agent of the firm to do such acts as are necessary or usual in the transaction of business in the ordinary way; but that, as to acts not in the furtherance of the business in the

ordinary way, but which may put an end to the same, or the natural result of which is to take the control and management ^f of the firm business and property from the partners, it is necessary to sustain the validity of such acts, that it appear that the same were done with the assent of all the partners." Thus we can see the watch word is preservation and not destruction. In looking over the authorities, on both sides of this nice question we find a late case which from the syllabus would seem to be in point against us. I refer to the Union National Bank case in 136 U. S. 225. But upon closer examination of the case we do not find that the two cases of Osborne v. Barge and the Union National Bank case are at all inconsistent. One is based to some great extent upon the Statute on this question in Missouri. Besides the case of Osborne v. Barge, we find numerous others that wholly or partly sustain our position. Some we will quote from in substance. Blaker v. Sands 29 Kan. 551. Here was a partnership existing for the purpose of sheep breeding and raising, intending to sell only the fleeces of the sheep. One partner attempted to dispose of the whole flock, but the court held that he had no

right to entirely destroy the firm by selling its very essential elements necessary for its existence.

Hunter v. Mayvick 37 Ia. 565. In this case there was a partnership formed for retail grocery business, and one partner attempted to sell the whole plant. The court held that he had no such right notwithstanding the fact that his co-partner was seventy-five miles away, but the court said that in as much as there was a daily mail between the two cities and a telegraph, he should have consulted his co-partner. Now these cases are all examples of a partner selling firm property. But where is the difference between selling and mortgaging where possession is given practically and simultaneously with the execution and delivery of the mortgages to the mortgagees. Outside of the before mentioned case of Mabbett v. White which we claim to be erroneously decided, all cases lead irresistibly to the conclusion that there is no difference between selling the entire partnership property and mortgaging the same, when the latter act terminates, ipso facto, the business of the firm. The only difference is that the mortgagor has an equity of redemption. But what is an equity of redemption to one who has been

stripped of his last farthing by the very act which bestows upon him this equity? All his available resources may lie wholly within the partnership, and when that is gone, he is penniless. Now, we claim is there any difference between a mortgage on all the firm property, and an assignment for the benefit of creditors. The latter is not allowed and the former should not be. Possession in both cases is lost to the co-partner. The only difference as we said before is in this naked good for nothing right of redemption. What an invaluable right this is to one who has nothing. His equity of redemption is tantalizing, is mere mockery. And the courts which hold that because of this right of equity of redemption, one partner may destroy his co-partner, are throwing a straw to a drowning man. To redeem the mortgage all that is necessary is to pay the debt, to raise the assignment, all that is necessary is to pay the debts. Now where is the difference as far as the debtor is concerned. Both tend toward dissolution and when two men enter into a partnership, does any one suppose that they are entering with an agreement whereby power is given to one to intentionally destroy? Justice Hoffman in the case of Peter

v. Orser 6 Bosw. 123, says "The power (of one partner) is justly implied to do everything which tends to aid, strengthen and protect. Many of the leading objects of a partnership, the augmentation of capital, the combination of the varied skill of different persons, etc. etc., can be attained without the transmission of the whole authority of the firm to each member, for either the acquisition or disposition of property. In short, whatever tends to preserve may well be deemed to be inherent, and essential, what presupposes or produces dissolution is not merely not inherent but really repugnant to the abstract idea of a partner's power. The union of wills created the relation, ~~the~~ union of wills seems necessary to destroy it." Now is the right to execute chattel mortgages upon all the firm property with the intention to kill the partnership, as was done in the Owen v. McGrath and the Mabbett v. White cases inherent to the partnership agreement? Did the partnership ~~ship~~ vest each other by force of the partnership union, with such power? Does it not undermine the one great object contemplated in the partnership agreement, "the sacred bond," as Jus-

tice Hoffman says, viz the "furtherance of the partnership objects so long as they can be attained." The delivery of possession of the property to the mortgagees by one partner without the consent of his co-partner, is a complete abdication of his power as a partner, and a termination of his implied agency on behalf of his co-partner.

Thus to conclude, we see that the question before us is a very close one, the authorities on the subject being well balanced against each other. The great difficulty in fixing the law is this. The judges on the one hand limit the partner's power because they fear a too far encroachment upon the partner's power. The very essence of partnership requires great latitude to be given one partner and the Courts are cautious about limiting the exercise of the partnership rights. On the other hand the judges see the unjustness and very apparent unfairness done in giving one partner so much power and they thus desire to limit it somewhat without abridging his general right as a partner.

CASES CITED OR DISCUSSED.

- Mabbett v. White 12 N.Y. 443.
- Clark v. Rives 33 Mo. 579.
- Hewett v. Sturdevant 4 B. Mon. 453.
- Cayton v. Hardy 27 Mo. 536.
- Halstead v. Shepherd 23 Ala. 558.
- Williams v. Barnett 10 Kas. 455.
- Stegal v. Coney etc. 49 Miss. 761.
- Wallace v. Yeager 4 Phila. 251.
- Drake v. Thyng 27 Ark. 228.
- Myers v. Moulton 12 Pac. 505.
- Crossman v. Shears 3 Ont. App. 583.
- Blaker v. Sands 29 Kas. 551.
- Shellito v. Sampson 61 Ia. 40.
- Hunter v. Mayvick 67 Ia. 555.
- Henderson v. Nichols 67 Cala. 152.
- Dickinson v. Legare 1 Desaus. 537.
- Cowen v. McGrath (unreported)

Osborne v. Barge 29 Fed. Rep. 725.

Union Nat. Bank. Case 136 U. S. 225.

Blaker v. Sands 29 Kas. 551.

Petter v. Orser 6 Bosw. 123.

TEXT BOOKS.

Bates on Partnership. Vol. I, Sec. 401, 405, 403, 404.

Collyer on Partnership, Sec. 179.

