LECTURE XLIII.

OF THE LAW OF PARTNERSHIP.

1. *What is a partnership?*—23.

It is a contract of two or more competent persons, to place their money, effects, labor, 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.

2. *What are the two leading principles of the contract?*—24.

A common interest in the stock of the company, and a personal responsibility for the partnership engagements.

3. *To what does the common interest apply?*—24.

To all the partnership property, whether vested in the first instance by their several contributions to the common stock, or afterwards acquired, in the course of the partnership business; and that property is first liable for the debts of the company; and after they are paid, and the partnership dissolved, then it is subject to a division among the members, or their representatives, according to agreement.

4. *What if one party advance funds, and another furnishes his personal services or skill, in carrying on a trade, and is to share the profits?*—24, 25.

It amounts to a partnership. But each party must engage to bring into the common stock something that is valuable; and a mutual contribution of that which has value is of the essence of the contract. And it will be a partnership, though the proportion of profit or loss, on the part of the person contributing his labor or skill, be unequal. It is sufficient that his interest in the profits be not intended as a mere substitute for a commission, or in lieu of brokerage, and that he be received into the association as a merchant, and not as an agent.

5. *Are joint possessors partners?*—25.

A joint possession renders persons tenants in common, but

it does not, of itself, constitute them partners, and, therefore, surviving partners, and the representatives of a deceased partner, are not partners, notwithstanding they have community of interest in the joint stock. There must be a communion of profit to constitute a partnership, as between the parties, though it is not necessary that there be a community of interest in the property itself.

6. *Is a joint purchase, with a view to separate and distinct sales by each person on his own account, sufficient to constitute a partnership?*—25.

It is not.

7. *If several persons, who had never met and contracted together as partners, agree to purchase goods in the name of one of them only, and to take aliquot shares of the purchase, and employ a common agent for that purpose; do they by that act become partners, and answerable to the seller in that character?*—25, 26.

They do not, provided they are not jointly concerned in the re-sale of their shares, and have not permitted the agent to hold them out as jointly liable with himself. The same distinction was taken in the civil law: *qui nolunt inter se contendere, solent per nuntium rem emere in commune; quod a societate longe remotum.* It has been frequently recognized in this country, and may be considered as a settled rule.

8. *What if the purchase be on a separate, and not on a joint account?*—26.

If the interests of the purchasers be afterwards mingled, with a view to a joint sale, a partnership exists from the time that the shares are brought into a common mass. A participation in the loss or profit, or holding himself out to the world as a partner, so as to induce others to give credit on that assurance, renders a person responsible as a partner.

9. *What does a partnership necessarily imply?*—26.

A union of two or more persons.

10. *What if a single individual, for the purpose of a fictitious credit, were to assume a co-partnership name?*—26.

The only real partnership principle that could apply to his

case, would be the preference to be given to creditors dealing with him under that description, in the distribution of his effects. But that would be inadmissible, and contrary to the grounds upon which partnerships are created and sustained: and so the law has been understood and declared in Scotland.

11. *What is the rule in relation to large unincorporated joint stock companies?*—26.

Trading upon joint stock is usually regulated by special agreement; but the established law of the land, in reference to such partnerships, is the same as in ordinary cases, and every member of the company (whatever private arrangement there may be to the contrary between the members, and which is only a mischievous delusion), is liable for the debts of the concern.

12. *What is the rule in relation to incorporated companies?*—27.

That incorporated companies, though constituted expressly for the purposes of trade, are not partnerships, or joint traders, within the purview of the law of partnership, and the stockholders are not personally responsible for the company's debts or engagements, and their property is affected only to the extent of their interest in the company. To render them liable requires an express provision, to that effect, in the act of incorporation.

13. *In what manner may the contract of partnership be formed?*—27.

It need not be in writing; for though there be no express articles of co-partnership, the obligation of a partnership engagement may equally be implied in the acts of the parties; and if persons have a mutual interest in the profits and loss of any business, carried on by them, or if they hold themselves out to the world as joint traders, they will be held responsible as partners to third persons, whatever be the nature of their private agreement. Actual intention is requisite to constitute a partnership *inter se;* and if a person partake of the profits, he is liable for the losses.

14. *Can there be a partnership in other than commercial business?*—28, 29.

Yes; the essence of the association is that the parties be

jointly concerned in profit and loss, or in profit only, in some honest and lawful business, not immoral in itself, nor prohibited by the law of the land. The proportion of profits may be regulated at will, and if there be no agreement on the subject, the general conclusion of law is, that the profits and losses are to be borne equally; and this, though the contribution between the parties consist entirely of money by one, and entirely of labor by the other.

15. *Is it necessary that every member of the company should, in every event, participate in the profits?*—29.

No; it would be a valid partnership, according to the civil law, if one of the members had a reasonable expectation of profit. So, one partner may retire under an agreement to abide his proportion of risk of loss, and take a sum in gross for his share of future uncertain profits; or he may take a gross sum as his share of the presumed profits, with an agreement that the remaining partners are to assume all the risks.

16. *What is the rule as to the extent of partnership connections?*—30.

That there may be a general partnership at large, or it may be limited to a particular branch of business, or to one subject. There may be a partnership in the goods in a particular adventure, or it may be confined to the profits thereof. If two persons should draw a bill of exchange, they are considered as partners in respect to that bill, though in every other respect they remain distinct.

17. *What is the rule governing dormant partners?*—31.

That they are equally liable when discovered, as if their names had appeared in the firm, and although they were unknown to be partners at the time of the creation of the debt.

18. *Who are nominal partners?*—32–34.

Persons who have no actual interest in the trade, or its profits; but who become responsible as partners by voluntarily suffering their names to appear to the world as partners, by which means they lend to the partnership the sanction of their

credit. There is a just and marked distinction between partnership as respects the public, and as respects the parties; and a person may be held liable as a partner to third persons, although the agreement does not create a partnership as between the parties themselves. Each individual is answerable *in solido* to the whole amount of the debts, without reference to the proportion of his interest, or to the nature of the stipulation between him and his associates. Even if it were the intention of the parties that they should not be partners, and the person to be charged was not to contribute money or labor, or to receive any part of the profits, yet if he lends his name as a partner, or suffers his name to continue in the firm after he has ceased to be an actual partner, he is responsible to third persons as a partner, for he may induce third persons to give that credit to the firm which otherwise it would not receive, nor perhaps deserve. This principle of law inculcates good faith and ingenuous dealing, and it is now regarded by the English courts as a fundamental doctrine. It has been explicitly asserted with us, and is now incorporated in the jurisprudence of this country.

19. *What if executors, in the disinterested performance of a trust, continue the testator's share in a partnership, for the benefit of his infant children?*—33.

They may render themselves personally liable as dormant partners.

20. *May a person receive a part of the profits of a business, without becoming a legal or responsible partner?*—33, 34.

Yes, in certain cases. To allow a clerk or agent a portion of the profits as a compensation for labor, or a factor a percentage on sales, does not render the agent or factor a partner, when it appears to be intended merely as a mode of payment adopted to increase and secure exertion, and when it is not understood to be an interest in profit, in the character of profits, and there is no mutuality between the parties.

21. *Were limited partnerships allowed at common law?*—34, 35.

No; but such partnerships are now permitted by statute in most of the States. The New York statute allows a limited

partnership for the transaction of any mercantile, mechanical, or manufacturing business, within the State, and enacts, among other things, that such partnerships shall consist of one or more persons jointly and severally responsible according to the existing laws, who are called general partners, and one or more who furnish certain funds to the common stock, and whose liability shall extend no further than the fund furnished, and who are called special partners. The names of the special partners are not to be used in the firm, which shall contain the names of the general partners only, without the addition of the word *company*, or any other general term; nor are they to transact any business on account of the partnership, or be employed for that purpose as agents; but they may advise as to the management of the concern.

Before such partnership can act, a registry thereof must be made in the county clerk's office, accompanied by a certificate containing the particulars of the partnership, including the amount of capital put in by the special partner. Publication must also be made for six weeks of the partnership terms.

22. *What is the legal interest of partners in their stock in trade?*—36, 37.

They are joint tenants, but without the *jus accrescendi*, or right of survivorship; and this, according to Lord Coke, was part of the law merchant. On the death of one partner, his representatives become tenants in common with the survivor, and, with respect to *choses in action*, survivorship so far exists at law, that the remedy to reduce them into possession vests exclusively in the survivor, for the benefit of all the parties in interest. The interest of each partner, in the partnership property, is his share in the surplus, after the partnership accounts are settled, and all just claims satisfied.

23. *What is the legal interest of partners in real estate acquired with partnership funds?*—37–39, *notes.*

A joint tenancy in law, yet equity will hold it to be a tenancy in common, and as forming part of the partnership fund; and the better opinion would seem to be, that equity will consider the person, in whom the legal estate is vested, as trustee for

the whole concern, and the property will be entitled to be distributed as personal estate. In New York, it has been held that in equity such real estate is chargeable with partnership debts, and with any balance due from one party to the other on winding up the affairs of the firm ; and that the surplus, as between the personal representatives and heirs at law of a deceased partner, is to be considered as real estate.

24. *How are ship-owners considered?*—39, 40.

In *Nicol* v. *Mumford*,* it was held that ship-owners were tenants in common, and were not to be considered as partners, nor liable each *in solido*, nor entitled to the settlement of accounts on the principle of partnership. Yet ships, as well as other chattels, *may* be held in strict partnership, with all the control in each partner incident to common civil partnerships.

25. *In what acts may a partner bind his firm?*—40–43.

The act of each partner, in transactions relating to the partnership, and within the scope of the business of the firm, is considered the act of all, and binds all. One partner can buy and sell partnership effects, and make contracts in reference to the business of the firm, and pay and receive, and draw and endorse, and accept bills and notes, and assign *choses in action*. The act of one partner, though on his private account, and contrary to private arrangement among themselves, will bind all the parties, if made without knowledge in the other party of the arrangement, and in a matter which, according to the usual course of dealing, has reference to business transacted by the firm.

In all contracts concerning negotiable paper, the act of one partner binds all ; and even though he signs his individual name, provided it appears, on the face of the paper, to be on partnership account, and to be intended to have a joint operation. But if a bill or note be drawn by one partner, in his own name only, and without it appearing to be on partnership account, the partnership is not bound by the signature, even though it was made for a partnership purpose. If, however, the bill be drawn by one partner, in his own name, upon the firm, on partnership account,

* 4 Johns. Ch., 522.

the act of drawing has been held to amount, in judgment of law, to an acceptance of the bill by the drawer in behalf of the firm, and to bind the firm as upon an accepted bill.* And though the partnership be not bound, at law, in such a case, it is held that equity will enforce the payment of it, if the bill was actually drawn on partnership account. And negotiable paper of the firm, given by one partner on his private account, issued within the general scope of the authority of the firm, and passing into the hands of a *bona fide* holder, who has no notice, either actual or constructive, of the consideration of the instrument, will bind the firm.

26. *What is the rule with respect to the power of each partner over the partnership property?*—44.

It is settled that each one, in ordinary cases, and in the absence of fraud on the part of the purchaser, has the complete *jus disponendi* of the whole partnership interests, and is considered to be the authorized agent of the firm. He can sell the effects, or compound or discharge the partnership debts. A like power, in each partner, exists in respect to purchases on joint account ; and it is no matter with what fraudulent views the goods were purchased, or to what purposes they were applied by the purchasing partner, if the seller be clear of the imputation of collusion.

27. *In what cases may a partner pledge the partnership effects?*—46

A partner may pledge, as well as sell the partnership effects, in a case free from collusion, if done in the usual mode of dealing, and it has relation to the trade in which the partners are engaged, or when the pawnee had no knowledge that the property was partnership property. But this principle does not extend to part owners engaged in a particular purchase ; for they are regarded as tenants in common, and no member can convey to the pawnee, a greater interest than he himself has in the concern. If one member acts fraudulently with strangers in a matter within the scope of the partnership authority, the firm is, nevertheless, bound by the contract.

* But see *Babcock* v. *Stone*, 3 McLean's R., 172.

28. *How far may a partner bind his co-partners by guaranty?*—46, 47.

It was formerly understood that one partner might bind his co-partners by a guaranty, or letter of credit, in the name of the firm; and Lord Eldon considered the point too clear for argument. But a different principle seems to have been adopted; and it is now held, that one partner is not authorized to bind the partnership by a guaranty of the debt of a third person, without a special authority for that purpose, or one to be implied from the common course of the business, or the previous course of dealing between the parties, unless the guaranty be afterward adopted by the firm. The guaranty must have reference to the regular course of business transacted by the partnership, and be confined to advances made, or credit given, to the partnership as then constituted, and not extended to new advances or credits, after a change of any of the original partners by death or retirement, and then it will be obligatory upon the company; and this is the principle on which the distinction rests.

29. *In what cases may a partner bind his firm by deed?*—47–50.

A partner can not charge the firm by deed, with a debt, even in commercial dealings. But one partner may, by the special authority of his co-partners under seal, and if in their presence, by parol authority, execute a deed for them in a transaction in which they were all concerned. The more recent cases have very considerably relaxed the former strictness on this subject; and while they profess to retain the rule itself, they qualify it exceedingly, in order to make it suit the exigencies of commercial associations. An absent partner may be bound by a deed executed on behalf of the firm by his co-partner, provided there be either a previous parol authority, or a subsequent parol adoption of the act.

One partner may, by deed, execute the ordinary release of a debt belonging to the co-partnership, and thereby bar the firm of a right it possessed jointly. A release by one partner to a partnership debtor, after the dissolution of the partnership, has been held to be a bar of any action at law against the debtor. So, also, in bankruptcy, one partner may execute a deed, and do any other act requisite in proceedings in bankruptcy. The acknowledgment of a debt by a single partner, during the continuance of the partnership, will bind the firm. But one partner can not bind the other by submission to arbitration, and it is now settled in New York, in several of the other States, and by the Supreme Court of the United States, that the acknowledgment of one partner, after the dissolution of partnership, will not take a partnership debt out of the statute of limitations.

30. *How may a partnership be dissolved?*—52, 53.

If a partnership be formed for a single purpose or transaction, it ceases as soon as the business is completed. If it be for a definite period, it terminates of course when the period arrives. It may be dissolved by the voluntary act of the parties, or of one of them, and by the death, insanity, or bankruptcy of either, and by judicial decree, or by such change in the condition of one of the parties as disables him to perform his part of the duty. It may also be dissolved by operation of law, as by reason of war between the governments to which the partners respectively belong, rendering the business carried on by the association impracticable and unlawful.

31. *What is the rule as to dissolution by the voluntary act of the parties?*—53, 54.

The established principle is, that, if the partnership be for an indefinite period, any partner may withdraw at a moment's notice, or when he pleases, and dissolve the partnership. The civil law contains the same rule on the subject. The existence of engagements with third persons, does not prevent the dissolution by the act of the parties, or either of them, though those engagements will not be affected. But if the parties have formed a partnership by articles, for a definite period, in that case it is said, that it can not be dissolved without mutual consent before the period arrives. In New York, it has been held, that the voluntary assignment by one partner of all his interest in the concern dissolved the partnership, though it was stipulated in the articles, that the partnership was to continue until two of the partners should demand a dissolution, and the other partners wished to continue the partnership.

32. *What effect has the death of a partner?*—56.

It is *ipso facto* a dissolution of the partnership, however numerous the association may be.

33. *What is the effect of insanity?*—58.

It does not *ipso facto* work a dissolution of the partnership. That depends upon circumstances, under the sound discretion of a Court of Equity.

34. *What effect has the bankruptcy of a partner?*—58, 59.

Bankruptcy or insolvency, either of the whole of the partnership, or of an individual member, dissolves the partnership. A *bona fide* voluntary assignment by a partner of all his interest in the partnership stock, has the same effect. The dissolution takes place, and the joint tenancy is severed, from the time that the partner, against whom the commission issues, is adjudged a bankrupt, and the dissolution relates back to the act of bankruptcy. If all the interest of a partner be seized and sold on execution, that fact will likewise terminate the partnership.

35. *May partnership be dissolved, by judicial decree, in any other case than that of lunacy?*—60.

Yes; it may be dissolved, at the instance of one partner, against the consent of the rest, when the business for which it was created is found to be impracticable, and the property invested liable to be wasted and lost, or when the association is found to be visionary, or founded on erroneous principles, or when the original agreement between the partners is tainted with fraud.

36. *What are the consequences of a dissolution of a partnership?*—62–64.

When a partnership is actually ended by death, notice, or other effectual mode, no person can make use of the joint property in the way of trade, or inconsistently with the purpose of settling the affairs of the partnership, and winding up the concern. The power of one partner to bind the firm ceases immediately upon its dissolution, provided the dissolution be occasioned by death, or bankruptcy, or by operation of law; though

in cases of voluntary dissolution, notice is requisite for the benefit of third persons; and the partners from that time become distinct persons, and tenants in common of the joint stock. One partner can not indorse bills and notes previously given to the firm, nor accept a bill previously drawn upon it, so as to bind it. A dissolution is in some respects prospective only, and either of the former partners can receive payment of debts due to the firm, and give a release. On a dissolution by death, the surviving partner settles the affairs of the concern. The good will of a trade is not partnership stock. It has been decided to be the right of the survivor. But it was afterwards doubted, whether the good-will did survive, and could be separated from the lease of the establishment, and especially if the survivor continued the trade with the joint funds.

37. *What is the rule as to payment of debts?*—64.

The joint creditors have the primary claim upon the joint fund, in the distribution of the assets of bankrupt or insolvent partners, and the partnership debts are to be settled before any division of the fund takes place.

38. *What is the rule as to notice of the dissolution?*—66–68.

To render the dissolution safe and effectual, there must be due notice given of it to the world; and a firm may be bound, after the dissolution of the partnership, by a contract made by one partner, in the usual course of business, and in the name of the firm, with a person who contracted on the faith of the partnership, and had no notice of the dissolution. What shall be a sufficient implied notice has been a vexed question in the books. A notice, in one of the public and regular newspapers of the city or county where the partnership business was carried on, is the usual mode of giving information, and may, in ordinary cases, be quite sufficient. As to persons who have been previously dealing with the firm, it is requisite that actual notice be brought home to the creditor, or, at least, that notice be given under circumstances from which actual notice may be inferred. If the facts are all found or ascertained, the reasonableness of notice may be a question of law for the court, but generally it will be a mixed question of law and fact. When a single partner retires from the

firm the same notice is requisite, and if due notice be given, yet, if the retiring partner willingly suffers his name to continue in the firm, he will still be holden. A dormant partner may withdraw without giving public notice.

LECTURE XLIV.

OF NEGOTIABLE PAPER.

1. *Are promissory notes and bills of exchange governed by the same rules?*—72, 73.

Yes; the statute of 3d and 4th Anne made promissory notes, payable to a person, or to his order or bearer, negotiable like inland bills, according to the custom of merchants; and by the statutes of 9 and 10 William III., c. 17, and 3 and 4 Anne, inland bills are put upon the footing of foreign bills, except that no protest is requisite. These statutes have been generally adopted in this country, either formally or in effect, and promissory notes are everywhere negotiable. The effect of the statute is to make notes, when negotiated, assume the shape and operation of bills, and to render the analogy between them so strong, that the rules established with respect to the one apply to the other.

2. *What is a bill of exchange?*—74.

It is a written order or request, and a promissory note a written promise, by one person to another, for the payment of money, absolutely and at all events. If A, living in New York, wishes to receive one thousand dollars, which await his order in the hands of B, in London, he applies to C, going from New York to London, to pay him one thousand dollars, and take his draft on B, for that sum payable at sight.

3. *By what terms are the parties known in law?*—75.

A, who draws the bill, is called the *drawer*. B, to whom it

is addressed, is called the *drawee*, and, on acceptance, becomes the *acceptor*. C, to whom the bill is made payable, is called the *payee*. As the bill is made payable to C, or his order, he may, by indorsement, direct the bill to be paid to D, and, in that case, C becomes the indorser, and D, to whom the bill is indorsed, is called the indorsee, or holder.

4. *What is the character of a check?*—75.

It is, in form and effect, a bill of exchange. It is not a direct promise by the drawer to pay, but it is an undertaking, on his part, that the drawee shall accept and pay, and the drawer is answerable only in the event of the failure of the drawee to pay. A check payable to bearer passes by delivery, and the bearer may sue on it as on an inland bill of exchange.

5. *What are the principal requisites of a bill of exchange?*—75-78.

It is not confined to any set form of words. A promise to *deliver*, or to be *accountable*, or to be responsible for so much money, is a good bill or note; but it must be exclusively and absolutely for the payment of money. In England, negotiable paper must be for the payment of money in specie, and not in bank notes. In this country, it has been held that a note payable in bank bills was a good negotiable note within the statute, if confined to a species of paper universally current as cash. But the doctrine of these cases has been met and denied, and it seems the weight of argument is against them, and in favor of the English rule. The payment must not rest upon any contingency, except the failure of the general personal credit of the person drawing or negotiating the bill. It is not necessary that the note should be made at home. Foreign, as well as inland notes, are negotiable. The instrument must be made payable to the payee, and to his order or assigns, or to bearer, in order to render it negotiable. It must have negotiable words on its face, showing it to have been the intention of the parties to give it a transferable quality. Without them it is a valid instrument as between the parties, and entitled to the three days of grace. If the name of the payee or indorser be left blank, any *bona fide* holder may insert his own name as payee. The words *value*