

UNIFORM PARTNERSHIP ACT

(Concluded)

Dissolution of a Partnership 1724m—25.¹ Under the decisions “a mere dissolution has no effect whatever upon the property rights of the partners or their interest in the joint stock or joint rights, or their power over old or existing debts, due to them or due from them; excepting always that they have all entirely lost the power of acting for each other, any further than all joint debtors or joint creditors may do”.²

The section recognizes this and is phrased to draw a distinction between dissolution in the above sense, and dissolution in the sense of termination; a distinction that is uniformly recognized by the courts though not often defined in terms.³

Causes of Dissolution. 1727m—26.⁴ The provisions of subsection 1a and 1b, when the term is fixed and where the partnership is at will have obviously not been questioned.

¹1724m—25. [Dissolution of Partnership Defined.] The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

(2) On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

²Parsons on PARTNERSHIP, (4th ed.) 418.

³Parsons on PARTNERSHIP *supra*; Burdick on PARTNERSHIP, 235.

⁴1724m—26. [Causes of Dissolution.] Dissolution is caused:

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

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

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

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

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

(2) In contravention of the agreement between the partners, where

Subsection 1 (c) at first sight appears out of place under the caption of dissolution without violating the agreement between the partners, since it permits the partners who have not assigned or suffered their interest to be charged to terminate the partnership, although it is for a fixed term which has not expired. The nature of the partner's interest and the methods by which his interest in the firm may be incumbered has already been considered.⁵ It appears from these sections that partners can not force a dissolution by assignment or attachment of his interest, and while the seizure and sale of his interest does not of itself dissolve the firm, it does give an option to the partners who have not incumbered their interests to do so. It would seem therefore that this section should be placed under the sec. 1724m—27, as a cause for dissolution by decree of the court. The English act does not attempt to classify the causes of dissolution in the manner here followed, although it enumerates all the causes that appear in this act.⁶ Subsection 1 (d) recognizes the accepted rule that the majority cannot expel a partner unless express provision is made for it in the articles. The power of a motion, when provided for, must be exercised with the same procedure and safeguards as in cases of Corporations.⁷ The power to expel a partner for misconduct is not implied. Since it amounts to a dissolution of the firm, and necessarily means a termination eventually, the excluded partner, whatever his misconduct may be, and however seriously his conduct has affected the business of the firm, is entitled, subject to damages for such misconduct, to have his interest in the firm protected and accounted for.⁸

Subsection 2 permits a partner to dissolve the firm in contravention of the terms of the partnership, subject, of course, to

the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

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

(4) By the death of any partner;

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

(6) By decree of court under section 1724m—27.

⁵ Vol. I, Wis. Law Rev. 99.

⁶ 53 and 54 Vict. Chap. 39, sec. 33 (2).

⁷ *Wood v. Chamber of Commerce*, 119 Wis. 367.

⁸ *Gilmore on PARTNERSHIP*, 571; *Cash v. Earnshaw*, 66 Ill. 402, 601; *Salomon v. Kirkwood*, 55 Mich. 256, 21 N. W. 336; *Heun v. Walsh*, 2 Ed. Ch. (N. Y.) 129.

liability for damages. This settles a point over which there is much controversy, and on which the authorities are divided.⁸ The English act makes no such provision, and the English decisions are contra. This power to dissolve does not mean a final termination unless the other partners are so minded and are willing to indemnify the objecting partner against possible losses and liabilities due to further firm activities.⁹ The chief consideration in favor of allowing a dissolution, notwithstanding the partnership agreement, is the confidential and intimate nature of the relationship, making it impossible to proceed when this mutual confidence is lacking, and further, the technical point that partnership is based upon mutual agency, and in consequence involves the usual power of the agent to revoke. The latter is the reason given by Mr. Lewis, the draftsman. At bottom, the real reason is the impossibility of forcing men to maintain business relations when they have lost confidence or respect for each other. The grounds for dissolution by order of the court further emphasize this idea. The Supreme Court construed this subsection in *Crossman v. Gibney*,¹⁰ where the partner who had dissolved the firm in contravention of the agreement brought an action of ejectment to recover the possession of the farm, owned by the plaintiff, and on which the partnership business was conducted. The plaintiff's agent had settled all matters except the division of some young stock. The trial court ruled that the plaintiff could not maintain the action until after an account, including the determination of the damages caused by the wrongful termination. The ruling was reversed, the court ruling that the defendant having failed to take the necessary steps to continue the partnership as provided in section 1724m—33,—consequently he had no right to retain possession of the farm after the date fixed for the dissolution in the plaintiff's notice, particularly as the farm was at no time a partnership asset. If the farm had been an asset, the result would be different, since partners have equal right to possession of firm assets, pending an account and dissolution. The remaining causes of dissolution,—unlawfulness of the business, bankruptcy, decree of the court, and death,—were all recognized as a ground for dissolution at common law, and under the Wisconsin decisions so far as the questions have come before the court.¹¹

⁸ 1724m—38, Sec. 2.

⁹ 164 Wis. 395.

¹¹ *Vilas v. Farwell*, 9 Wis. 460 (death); *Moore v. May*, 117 Wis. 193 (death).

Dissolution by Decree of the Court 1724m—27.¹² This provision is obviously taken from the English act of 1890, but its language is stronger, since it provides that the Court *shall* decree a dissolution if it finds any of the grounds enumerated are established, while the English act states that on such finding the Court *may* decree a dissolution.¹³ It is doubtful, however, if the decisions under the two acts will be very different in practice, since, as was pointed out in discussing the causes of dissolution,¹⁴ the courts have always been reluctant to refuse a dissolution where it appears that, by reason of infirmity of person or temper, it will be impossible to continue the association with any hope of success. The Wisconsin cases sustain this view.¹⁵ Subsection 2 recognizes the right of the holder of judgment lien on the partners' interest (sec. 1724m—24) to the aid of the Court in ascertaining the value and the payment of that interest, where the term of the partnership is completed, or where it is at will.

Dissolution Terminates Agency of the Partner 1724m—28.¹⁶ This section is not clearly phrased. The first paragraph states,

¹² 1724m—27. [Dissolution by Decree of Court.] (1) On application by or for a partner the court shall decree a dissolution whenever:

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

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

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

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

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

(f) Other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under sections 1724m—23 or 1724m—24:

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

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

¹³ 53 and 54 Vict. C. 39, sec. 35. On application by a partner the court may decree a dissolution in any of the following cases—(Setting out the causes as stated in the Uniform Act.)

¹⁴ 1724m—26, *supra*.

¹⁵ *Wood v. Beath*, 23 Wis. 254; *Werner v. Leisen*, 31 Wis. 169; *Singer v. Heller*, 40 Wis. 545.

¹⁶ 1724m—28. [Dissolution Terminates Agency of Partner.] Except so far as may be necessary to wind up partnership affairs or to complete

clearly enough, the effect of dissolution on the powers of the partners to represent the firm. In discussing 1724m—25,¹⁷ the difference between dissolution and termination, the extent to which these powers are cut down and varied by dissolution was pointed out. The negative form in which the remaining clauses of the section inserts limitations, dealt with in later provisions of the act, is somewhat confusing. Apparently the meaning is that, except where the partnership is dissolved by judicial decree or mutual agreement, the power of the partner to bind the firm continues, unless it comes within the terms of the immediately succeeding sections 1724m—29, 30.

The Wisconsin decisions recognize the lack of authority in the partners to create new obligations after dissolution.¹⁸

Liability of Dissolving Partner to Partners Continues until Knowledge of Dissolution 1724m—29.¹⁹ This section changes the law. At common law, where the dissolution is caused by bankruptcy or death of a partner, a contract made by a partner after such event, although made in ignorance of the death or bankruptcy, was not binding on the firm, and, since the death or bankruptcy was regarded as a public fact, everyone was bound in law to take notice of it.²⁰ Under this section, the act of a partner is binding on

transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership,

With respect to the partners,

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

When the dissolution is by such act, bankruptcy or death of a partner, in cases where section 1724m—29 so requires.

With respect to persons not partners, as declared in section 1724m—30.

¹⁷ *Supra*.

¹⁸ *Lange v. Kennedy*, 20 Wis. 279; *Clement v. Clement*, 69 Wis. 599, but see *First National Bank v. Larsen*, 146 Wis. 653.

¹⁹ 1724m—29. [Liability of Dissolving Partner to Partners Continues Until Knowledge of Dissolution.] Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his co-partners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless

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

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

²⁰ *Marlitt v. Jackman*, 3 Allen, 287, 85 Mass. 287; *Eustis v. Bolles*, 146 Mass. 413, 4 Am. St. R. 327, 16 N. E. 286; *Burdick on PARTNERSHIP* (3rd ed.), 341; *Gilmore on PARTNERSHIP* 263 *et seq.*; *Parsons on PARTNERSHIP* (4th ed.), 397.

the others, where the acting partner does not have knowledge of the act of another partner dissolving the firm, and in case of death or bankruptcy, either knowledge or notice of the fact. The draftsman of the act recognizes that the section departs from the common law rule in partnership, but insists that since the rule has been modified in the law of agency, it should be modified here.²¹ The statement that the law of agency has been modified, and that an agent can bind the estate of his principal by a contract made after the principal's death, of which fact the agent had no notice at the time, is not justified by the authorities. With the exception of the Pennsylvania case,²² none of the decisions cited in the annotation take so broad a ground, and these can be explained on quasi-contractual grounds.²³ Mr. Mechem, after a review of the authorities on this point, concludes:²⁴ "The Pennsylvania case is believed to stand almost, if not quite, alone, in announcing the principle in its broadest scope. The overwhelming weight of authority is to the effect that the death of the principal operates as an instantaneous revocation of the agency where it is a naked power unaccompanied with an interest, and every act of the agent thereafter performed is null, so far as the estate of the principal is concerned."

The English act apparently accepts the Common Law rule.²⁵ The section in substance accepts the Civil Law rule, and is to be commended, since it covers a situation extremely rare, yet which usually involves considerable hardship both to the agent partner and the third parties who have dealt through him.

Partner's Agency after Dissolution 1724m—30.²⁶ This section

²¹ Uniform Partnership Act (pamphlet). Note to Sec. 34.

²² *Cassiday v. McKinzee*, 4 W & S (Pa.), 282.

²³ But see *Lenz v. Brown*, 41 Wis. 172.

²⁴ Mechem on AGENCY (2nd ed.), sec. 664 *et seq.*

²⁵ 53 and 54 Vict. Chap. 39, Sec. 38.—"After the dissolution of a partnership the authority of each partner to bind the firm and the other rights and obligations of the partners continue, notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership and to complete transactions already begun but unfinished at the time of dissolution but not otherwise."

²⁶ 1724m—30. [Partners Agency After Dissolution.] (1) After dissolution a partner can bind the partnership except as provided in subsec. (3)

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

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

as originally drafted and adopted in Wisconsin, was so phrased as apparently to make a dormant partner liable to one extending credit to the firm after his withdrawal,²⁷ a result not intended by the commissioners. The section was redrafted by the commissioners, and the section as redrafted was adopted by the Wisconsin legislature in 1917.²⁸ The section is believed to be in complete accord with the Wisconsin cases.²⁹ The controverted question as to whether the dealings must be on the basis of an extension of

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

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

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

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

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

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

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

(b) Where the partner has become bankrupt; or

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

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

(2) Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in Paragraph 2 subd. b of Subsec. 1.

(4) Nothing in this section shall affect the liability under Sec. 1724m—1B of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business.

²⁷ Uniform Partnership Act, 28 Har. L. Rev. 762 at 783.

²⁸ Chap. 146, Laws of 1917.

²⁹ *Clapp v. Upson*, 12 Wis. 492; *Young v. Tibbitts*, 32 Wis. 79; *Woodruff v. King*, 47 Wis. 261; *Gilchrist v. Brande*, 58 Wis. 184; *Coggswell v. Davis*, 65 Wis. 191; *Benjamin v. Covent*, 47 Wis. 375; *Thayer v. Goss*, 91 Wis. 90.

credits, in order to entitle a former customer to notice, has not been decided in this state. Where the question is whether the plaintiff had actual knowledge or notice, the court has discussed the matter with some minuteness.³⁰ It is not enough that the notice published indicates a change in a firm, the business of which is continued, but it must appear what members have actually retired.³¹

The subdivisions a and b of subsection 2 recognize the right of a dormant partner to withdraw without notice, where unknown to the particular claimant, thus avoiding the vexing question, to what extent the dormant partner must be unknown in order to claim immunity.³² The rule adopted has been approved in substance by the Wisconsin court.³³

Discharge of Existing Liabilities on Dissolution 1724m—31.³⁴ The common law rule recognized the possibility of a novation in the case where a partner retires and the continuing partners agree to assume the firm debts. If the creditor assented to the arrangement at the time, the release of the partner in consideration of the promise of the continuing partners to pay supplied the necessary consideration to discharge the old contract and to create a new one.³⁵ The difficulty in the cases arises, not on question of the

³⁰ *Clapp v. Upson, Benjamin v. Covent, supra.*

³¹ *Thayer v. Goss, supra.*

³² *Grosvenor v. Lloyd*, 1 Metc. (Mass.) 19; *Mill v. Harris*, 124 N. Y. 280, 26 N. E., 541.

³³ *Stubbings v. O'Connor*, 102 Wis. 352.

³⁴ 1724m—31. [Discharge of Existing Liabilities on Dissolution.] (1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

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

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

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

³⁵ *Parsons on PARTNERSHIP* (4th ed.) 421; *Lindley on PARTNERSHIP* (8th ed.) 287.

legal possibility of a novation, but what conduct on the part of the creditor, where there is no express agreement, will serve to raise an implied obligation, or, as is sometimes stated, estop the creditor from denying a novation. Subdivision 2 recognizes the possibility of an implied novation from the course of dealing between the creditor and the continuing partners. Subdivision 3 appears to limit the inference to cases where the creditor has consented to a material alteration in the obligation. The analogy to the case of suretyship has frequently been suggested by the courts, and the act seems to adopt that view.

In *Gates v. Hughes*,⁴⁴ the court held an instruction that the intention to accept notes as payment must be shown by affirmative evidence to be erroneous, and holding that the intention may be inferred from circumstances, and raises, but does not decide the question whether the retiring partner should not be regarded as a surety merely.

In *Brill v. Hoile*,⁴⁷ the court, by way of dictum, asserted that the retiring partner is a surety and discharged by extension of time to the continuing partner. In *First National Bank v. Finck*,⁴⁸ the soundness of this dictum is thrown in doubt. In that case, the partner agreed to hold his copartner harmless on a firm note to the bank, and the latter with knowledge of the agreement afterwards took a demand note of the partner, covering not only the firm debt but individual debts of the maker. The note was found not to have been taken in discharge of the prior obligations but as security. Although this finding would dispose of the case, the court states that an agreement to assume debts of a firm by a partner will as between the partners make the retiring partner's liability that of a surety. The creditor is not affected by it unless he becomes a party to it. While this expression of the court shows a disposition to deny any restrictions on the creditor's right, where he has not assented or received a consideration, it was not necessary to the decision, and the point has apparently not been directly involved in any cases before the court. The decisions are in conflict as to the rights of creditors against the estate of a deceased partner, one view entertained by many courts being that although at law the obligations of the firm survive against the surviving

⁴⁴ 44 Wis. 332.

⁴⁷ 53 Wis. 537.

⁴⁸ 100 Wis. 446.

partners, in equity the creditor's rights are joint and several, and accordingly he may proceed directly against the estate of the deceased partner without exhausting his legal remedies.³⁹ Many courts, including Wisconsin, refuse to follow this view, and hold that the creditor cannot proceed against the estate of the deceased partner until he has exhausted his remedies at law against the survivors, basing their conclusion on the supplemental character of the equitable remedy which does not arise as long as there is a remedy at law.⁴⁰ The rule was changed by a statute in Wisconsin, making the estate of the joint debtor liable for the whole.⁴¹ Since in cases where the estate of the deceased was insolvent, the rule of marshalling postponed the firm creditors until the separate creditors of the deceased partners were satisfied, the right to prove was of doubtful value.

The Wisconsin cases recognize the right of the surviving partners to prove against the estate of the deceased partner to the extent of his obligation to contribute to the debts of the firm, and where the estate has been closed prior to the settlement of the firm business, to proceed against the distributees of the estate.⁴² Subdivision 4 therefore follows the first view and the English act,⁴³ which was the law in Wisconsin as the result of sec. 3848, coupled with the proviso which equity always recognized that the right to take dividends is contingent on the solvency of the decedent's estate.

Right to Wind Up 1724m—32.⁴⁴ The provisions of this section have been repeatedly recognized by the Supreme Court.⁴⁵

³⁹ *Thorpe v. Jackson*, 2 Y & C. 553; *Doggett v. Dill*, 108 Ill. 560.

⁴⁰ *Voorhis v. Child's Executor*, 17 N. Y. 354; *Sherman v. Kreul*, 42 Wis. 33; *Blakely v. Smock*, 96 Wis. 611; *Logan v. Dixon*, 73 Wis. 533.

⁴¹ Wis. Statutes, sec. 3848; *W. E. Smith Lumber Co. v. Estate of Fitzhugh*, 167 Wis. 355.

⁴² *Blakely v. Smock*; *Logan v. Dixon*, *supra*.

⁴³ 53 and 54 Vict. C. 39, sec. 9.

⁴⁴ 1724m—32 [Right to Wind Up.] Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the court.

⁴⁵ *Shields v. Fuller*, 4 Wis. 102; *Rogers v. Brightman*, 10 Wis. 55; *Roys v. Vilas*, 18 Wis. 169; *Butler v. Kirby*, 53 Wis. 188; *Peters v. National Surety Co.*, 167 Wis. 131.

Application of Partnership Property on Dissolution 1724m—33.⁴⁶ Subsection 1. The Supreme Court from an early period had adopted the rule of partial conversion. While it admits the general rule that partnership realty is to be regarded as personalty in equity, and has denied the right of a partner to a conveyance of an undivided portion of the realty, except as incident to a dissolution and account,⁴⁷ yet it holds the conversion is not out and out,

^a1724m—33. [Application of Partnership Property on Dissolution.]

(1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, *bona fide* under the partnership agreement and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under (2), he shall receive in cash only the net amount due him from the partnership.

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

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

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

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

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

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

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

II. If the business is continued under paragraph (2b) of this section the right as against his co-partners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his co-partners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered.

⁴⁷ *Kruschke v. Stefan*, 83 Wis. 373.

and where the sale of land is not necessary to pay debts it may be divided, and will pass to the heir of the deceased partner rather than to his personal representative.⁴⁸ The subsection in question changes this rule by giving each partner a right to a sale and division in cash.

Subsection 2. This section makes provision whereby the partners who have not wrongfully caused the dissolution may not only have the firm's affairs wound up and their shares paid, but may also secure damages against the wrongfully dissolving partner. The common law permitted an action at law for damages for the wrongful dissolution in breach of the partnership articles.⁴⁹ The provision here considered does not apparently preclude such an action, but merely provides that such damages shall constitute an item in the account, and thus explicitly recognizes the customary equity rule.

Subdivision IIb, in permitting the continuation of the business by the non-offending partners and in the firm name, on giving security, changes the common law rule. The sale of the good will of the business by one partner to another does not of itself carry the right to use the firm name if it is a personal one, or includes the name of the retiring partner, since its use subjects the latter to liability for the debts of the new business.⁵⁰ The same rule would doubtless be applied in those jurisdictions where the partner can terminate the business in contravention of the partnership agreement. Since the firm name is usually the medium through which the good will of the business is realized, it seems just that the partner who has breached the agreement should not be allowed to withdraw his name. In practice it will be difficult to determine what should be the amount of the indemnity bond which will protect the retiring partner, where the firm is doing a large and perhaps hazardous business. The Wisconsin courts have not dealt with this point. Subsection c, dealing with the rights of the partner who

⁴⁸ *Bird v. Morrison*, 12 Wis. 138, 153; *Fowler v. Bailey*, 14 Wis. 126; *Pierce v. Covent*, 39 Wis. 252; *Martin v. Morris*, 62 Wis. 418, 427; *Kruschke v. Stefan*, 83 Wis. 373, 385; *Wild v. Johnson Mfg. Co.*, 86 Wis. 549, 561; *Kyle v. Carpenter*, 130 Wis. 310, 316.

⁴⁹ *Farwell v. Wilcox*, 175 Pac. 936, 4 A. L. R. 156; *McCollum v. Carlucci*, 206 Pa. 312; *Bagley v. Smith*, 10 N. Y. 489; *Sprout v. Crowley*, 30 Wis. 187; *Tolford v. Tolford*, 44 Wis. 547; *Edwards v. Remington*, 51 Wis. 336; *George v. Benjamin*, 100 Wis. 622.

⁵⁰ *Williams v. Farrand*, 88 Mich. 473; *Knoedler v. Glaenzer*, 55 Fed. 895; *Vonderbonk v. Schmidt*, 44 La. Ann. 264.

wrongfully dissolves the firm, is merely the converse of the propositions discussed under the preceding subsection.

Adjustment of Rights on Dissolution for Fraud 1724m—34.⁵¹

Where a person has been induced to enter a partnership by fraud, four courses are apparently open to him: (1) he may ignore the fraud and stand by the contract, (2) he may sue at law in an action for deceit, (3) he may treat the fraud as a ground for dissolution, (4) he may rescind the agreement. The present section deals with his rights where he chooses the last alternative. Owing to the fact that the contract of partnership involves a highly confidential relationship, and thus requires the utmost good faith, the false representations or fraud need not be sufficient to justify an action for deceit in order to entitle the plaintiff to relief by rescission.⁵²

The section states the established rules of equity in adjusting the rights of parties in the case of a formal rescission,⁵³ and is identical in its provisions with the English partnership act.⁵⁴

Settlement and Distribution on Dissolution 1724m—35.⁵⁵ This section adopts the generally accepted rule as to the order of pay-

⁵¹1724m—34. [Adjustment of Rights on Dissolution for Fraud.] Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled,

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

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

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

⁵²Lindley on PARTNERSHIP (8th ed.), 365; Pollock's DIGEST OF PARTNERSHIP (10th ed.), 132; Pollock on CONTRACTS (8th ed.), 584, 585.

⁵³Gilmore on PARTNERSHIP, 589; Lindley on PARTNERSHIP (8th ed.), 557. Pollock's DIGEST OF PARTNERSHIP (10th ed.), 131; *Smith v. Everett*, 126 Mass. 304.

⁵⁴53 and 54 Vict. C. 39, Sec. 41.

⁵⁵1724m—35. [Settlement and Distribution on Dissolution.] In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(a) The assets of the partnership are:

I. The partnership property,

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

ment of claims against the estate.⁵⁶ It also adopts the rule of marshalling as between joint and separate creditors that is followed in most states, and which is adopted by the Bankruptcy Act.⁵⁷ The section has been criticised⁵⁸ since, although it defines the assets of the firm as the partnership property and the contributions of the partners necessary to pay firm liabilities, it proceeds in subdivision h

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

- I. Those owing to creditors other than partners,
- II. Those owing to partners other than for capital and profits,
- III. Those owing to partners in respect of capital,
- IV. Those owing to partners in respect of profits.

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

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

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

(f) Any partner or his legal representative shall have the right to enforce the contributions specified in clause (d) of this paragraph, to the extent of the amount which he has paid in excess of his share of the liability.

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

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

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

- I. Those owing to separate creditors,
- II. Those owing to partnership creditors,
- III. Those owing to partners by way of contribution.

⁵⁶ Pollock's DIGEST OF PARTNERSHIP, (10th ed.), 159; Bates on PARTNERSHIP, Secs. 810, 817; *Groth v. Kersting*, 23 Colo. 213; 47 Pac. 393; Sec. 1724m—15, a, b, and notes vol. I, Wisconsin Law Rev. 90.

⁵⁷ Section 5, f. Vol. I, Federal Ann. St. 587; *Rodgers v. Miranda*, 7 Oh. St. 180; *Davis v. Howell*, 33 N. J. Eq. 72; *Rollins v. Humphrey*, 98 Wis. 66; *Thayer v. Humphrey*, 91 Wis. 276; *Tiepner v. Tiepner*, 135 Wis. 380; *Pendleton v. Beyer*, 94 Wis. 31.

⁵⁸ 28 Harv. Law Rev. 762, 785. See reply 29 Harv. Law Rev. 291, 306.

to adopt the bankruptcy rule, excluding firm creditors from the separate estates of the partners until the separate debts have been discharged. Logically, if the claim for contribution is a firm asset, proof should be allowed, and such is the rule in civil law countries, and in a minority of the American states.⁵⁹ The history of the bankruptcy rule is discussed *In re Wilcox*,⁶⁰ and *Robinson v. Security Co.*⁶¹

The Commissioners have followed the bankruptcy rule for the practical reason that it represents the prevailing view in most states, and is the bankruptcy rule which, in any event will be controlling in the distribution of the great majority of insolvent partnerships.

In most jurisdictions, an exception was recognized to this rule, where there is no joint estate or living solvent partner,⁶² but as no provision has been made for such an exception, it is not likely it would be allowed. It has been held that such an exception may be allowed under the bankruptcy act.⁶³

Subdivision i, in ranking claims against the separate estate of an insolvent partner, apparently introduces some changes in the law, as established by a majority of the courts.⁶⁴

There is confusion in the decisions, due largely to the failure to apply consistently any one theory as to the nature of the firm. The adherents of the entity or commercial theory of a partnership claim that the Bankruptcy Act recognizes the firm as a person, since section 5a of the act provides that "a partnership during the continuation of the partnership business or after its dissolution and before the final settlement thereof may be adjudged a bankrupt." This view has some judicial support.⁶⁵ The Supreme Court of the United States in *Francis v. McNeal*⁶⁶ disapproved this interpreta-

⁵⁹ The Separate Estates of Non-Bankrupt Partners, 20 Harv. Law Rev. 588, 592; *Robinson v. Security Co.*, 87 Conn. 268, 87 Atl. 879; *Barton National Bank v. Atkins*, 72 Vt. 33; 47 Atl. 176; *Webb v. Gregory*, 49 Tex. Civ. App. 282; 108 S. W. 478.

⁶⁰ 94 Fed. 84.

⁶¹ 87 Conn. 268, 87 Atl. 879.

⁶² *Harris v. Peabody*, 73 Me. 262; *In re Marwick*, 2 Ware 229. Fed. Cas. No. 9181; *Thayer v. Humphrey*, 91 Wis. 276.

⁶³ *In re Green*, 116 Fed. 118; *Courader v. Cohen*, 12 Fed. 801; *In re Jones*, 128 Fed. 527; *In re Dillon*, 100 Fed. 627: But see *Re Wilcox*, 94 Fed. 84; *McNabb v. Bank of LeRoy*, 198 U. S. 553 (*contra*).

⁶⁴ See comment by Mr. Crane, 28 Harv. L. Rev. 762, 786, and reply by Mr. Lewis, 29 Harv. Law Rev. 291, 307.

⁶⁵ *In re Bertenshaw*, 157 Fed. 363.

⁶⁶ 228 U. S. 695.

tion of the statute, and held that insolvency of the firm cannot coexist with solvency of any member of the firm. If the entity theory be accepted, the problem would be fairly simple, as is the case in corporations.

In marshalling the separate and joint estates, the courts have laid down the rule that a partner cannot compete with his own creditors. Consequently a solvent partner cannot prove and take dividends against the bankrupt partner's estate, even though the claim arose out of a distinct transaction,⁶⁷ where the assets of the separate estate will exceed the separate debts if the partner's claim is not allowed. It is not clear, however, whether this rule applies where the debt arose prior to the claimant's entry into the firm.⁶⁸ The solvent partner who has paid the debts of the firm is entitled to prove against the separate estate of the bankrupt partner for his contribution.⁶⁹

Subdivision i apparently permits the proof by a partner against the separate estate of the bankrupt where his claim arises out of a separate transaction, and this changes the rule, laid down in *Amsick v. Bean*.⁷⁰ It likewise prevents a solvent partner who has paid the firm debts from sharing dividends with the creditors of the separate estate, a right recognized by numerous decisions.⁷¹ If this be the effect of the section in question, it would seem to be quite as undesirable and futile as the adoption of a rule of marshalling not recognized by the bankruptcy act or the decisions under it, since the latter will be controlling when the insolvent estates are settled, as most of them are, in the federal courts.⁷²

Rights and Liabilities on Continuing Business after Dissolution without Dissolution 1724m—36.⁷³ This section provides that

⁶⁷ *Amsick v. Bean*, 22 Wall. 395, 402; Collier on BANKRUPTCY, (11th ed.) 186.

⁶⁸ *Matter of Strawbridge*, 25 Am. B. R. 55.

⁶⁹ *In re Carmichael*, 96 Fed. 594; *In re Dillon*, 100 Fed. 627. But see *In re Dunning*, 114 Fed. 219; *In re Hirth*, 189 Fed. 926.

⁷⁰ Note 67 *supra*.

⁷¹ Note 69, *supra*.

⁷² 29 Harv. Law Rev. 291, 306.

⁷³ 1724m—36. [Rights and Liabilities on Continuing Business After Dissolution Without Liquidation.] (1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

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

where a continuous business is carried on with changing personnel, but without liquidation, all the creditors of the business, regardless of the group or individual carrying on the business, at the time the claim accrued, shall have equal rights in the property

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

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

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

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

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

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

(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business, on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

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

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

embarked in the business. This changes the law. The common law regarded any change in the personnel of the firm, either by death, retirement, or the addition of new members, as creating a new firm.⁷⁴ Where the new firm assumes the debts of the old, the creditors could proceed against the new firm under the rule of *Lawrence v. Fox* or by a novation expressed or implied.⁷⁵ It is to be noted that the right of the various groups of creditors to share in the property used in the business does not deprive the creditors of the right to look for payment to the group with whom they actually contracted, since subdivision 8 provides that the firm creditors are to be preferred as against the representatives of the deceased or retiring partner, as to any property or undertaking which the continuing partners have given or promised to give the retiring partner for his interest in the firm. Thus, where A, B, and C are partners, A and B purchase C's interest, assuming the debts, and giving a mortgage or bond in payment of C's interest. The creditors of the firm of A-B-C are preferred over the separate creditors of C in this asset. Presumably this preference would be defeated if a novation is made out. The query is also suggested as to the right of the creditor of the old firm to come against the property of the present firm, and at the same time claim the preference as against C's separate creditors, as provided in subdivision 8.

Right of Retiring or Deceased Partner 1724m—37.⁷⁶ Nothing in the preceding provisions which permits the continuation of the business after the retirement of a partner, negatives the right of such partner or his representatives to have his right determined

⁷⁴ *Ex parte Ruffin*, 6 Ves. 119; *Harris v. Meyer*, 84 Wis. 145; *Thayer v. Humphrey*, 91 Wis. 276; *Clasgens v. Selbin*, 93 Wis. 579; *Reddington v. Franey*, 124 Wis. 590.

⁷⁵ See discussion under Sec. 1724m—14, Vol. I, Wis. Law Rev. 20. Also Sec. 1724m—31 (2) *supra*.

⁷⁶ 1724m—37. [Rights of Retiring or Deceased Partner.] When any partner retires or dies, and the business is continued under any of the conditions set forth in subsections (1, 2, 3, 5, 6) of section 1724m—36 or subdivision (b) of subsection 2 of section 1724m—33, without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the

and the amount found due paid. This section therefore sets out in terms the rights which otherwise would be implied.⁷⁷

Right to Accounting Accrues on Dissolution 1724m—37.⁷⁸ Sec. 1724m—19⁷⁹ provides for an account at the instance of the partner under certain circumstances, while the firm is a going concern. This section states the general rule, allowing an account on the dissolution of the firm. The section has been criticised by Mr. Crane in his comments on the Act⁸⁰ as not treating the liquidating partner as a fiduciary, and also as subjecting him to the liability to suit when he is properly performing his functions. Mr. Lewis, the draftsman, in reply⁸¹ denies this, since the act, in its earlier provisions treats the partner as a fiduciary.⁸² The rule applied in other situations where the holding is not adverse, obtains here and consequently the statute of limitations does not run until an account has been had and a balance struck.⁸³

The present section is in substance the same as the provision in the English act,⁸⁴ which has been interpreted in the manner contended for by Mr. Lewis.⁸⁵

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separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by subsection 8 of section 1724m—36.

⁷⁷ *Jennings v. Chandler*, 10 Wis. 21; *Roys v. Vilas*, 18 Wis. 169; *Lawrence v. Vilas*, 20 Wis. 381.

⁷⁸ 1724m—38. [Right to Accounting Accrues on Dissolution.] The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary.

⁷⁹ See comment, Vol. I, Wis. Law Rev. 94.

⁸⁰ 28 Harv. Law Rev. 762, 786.

⁸¹ 29 Harv. Law Rev. 291, 309.

⁸² 1724m—18, Vol. I, Wis. Law Rev. 94.

⁸³ 30 Cyc. 720.

⁸⁴ 53 and 54 Vict. c. 39 sec. 42.

⁸⁵ Pollock's DIGEST OF PARTNERSHIP (10 ed.), 131.