XVI.

DISTRIBUTION OF ASSETS BETWEEN PARTNERS.

WHITCOMB vs. CONVERSE.

Supreme Court of Massachusetts, 1875.

119 Mass. 38, 20 Am. Rep. 311.

Bill in equity by Whitcomb, a partner in the late firm of Converse, Whitcomb & Co., against Converse, Stanton and Bladgen, the other partners, to compel contribution to make good the losses of the firm. The firm was organized January 2, 1871, to continue one year under articles which provided that Converse was to contribute $25,000, receive 7% thereon, give such time to the business as he was able, and receive one-fourth of the net profits; Whitcomb was to contribute $50,000, have 7% interest, give all his time and take one-fourth of the net profits; Blagden and Stanton were each to contribute all his time and receive one-fourth of the net profits. Whitcomb put in $25,000 of the agreed $50,000. The partnership was dissolved by mutual consent March 9, 1871, and Whitcomb was authorized to close up the business. He did so and claimed a loss to the firm was shown of $25,000, for which he claims contribution. Blagden is insolvent and unable to pay any part of the loss. Stanton brought the bulk of the business to the firm, and he contended that he was not liable to make good any of the losses, and, if liable, was not liable to make good any of the amount which Blagden ought to make good. Cause reserved for opinion of supreme court.

C. T. Russell, for plaintiff.

G. O. Shattuck and *O. W. Holmes, Jr.*, for Stanton.

GRAY, C. J. In the absence of controlling agreement, partners must bear the losses in the same proportion as the profits of the partnership, even if one contributes the whole capital, and the other nothing but his labor or services: 3 Kent's Com. 28, 29. Whether a loss of capital is a partnership loss, to be borne by all the partners, depends upon the nature and extent of the contract of partnership.

If, as is not unfrequently the case in a partnership for a single adventure, the mere use of the capital is contributed by one partner, and the partnership is in the profits and losses only, the capital remains the property of the individual partner to whom it originally belonged, any loss or destruction of it falls upon him as the owner, and, as it never becomes the property of the partnership, the partnership owes him nothing in consideration thereof. Story on Partn. §§ 27, 29; *Heron vs. Hall*, 1 B. Monr. (Ky.) 159, 35 Am. Dec. 178.

But where, as is usual in an ordinary mercantile partnership, a partnership is created not merely in profits and losses, but in the property itself, the property is transferred from the original owners to the partnership, and becomes the joint property of the latter; a corresponding obligation arises on the part of the partnership to pay the value thereof to the individuals who originally contributed it; such payment cannot indeed be demanded during the continuance of the partnership, nor are the contributors, in the absence of agreement or usage, entitled to interest, but if the assets of the partnership, upon a final settlement, are insufficient to satisfy this obligation, all the partners must bear it in the same proportion as other debts of the partnership. *Julio vs. Ingalls*, 1 Allen (Mass.) 41; *Bradbury vs. Smith*, 21 Me. 117; *Barfield vs. Loughborough*, L. R. 8 Ch. 1; *In re Anglesea Colliery Co.*, L. R. 2 Eq. 379, 387, s. c. L. R. 1 Ch. Ap. 555; *Nowell vs. Nowell*, L. R. 7 Eq. 538; *In re Hodges Distillery Co.*, L. R. 6 Ch. Ap. 51; 1 Lindley on Partn. (3 Ed.) 696, 827, 828.

Only two cases were cited in the learned argument for the defendant Stanton, in which opinions inconsistent with this view have been expressed. The one is *Everly vs. Durborow*, 1 Leg. Gaz. Rep. 127, a *nisi prius* decision, with no reference to authorities except an early edition of Lindley on Partnership, which has been corrected by the learned author, *ubi supra*, conformably to the adjudged cases. The other is *Cameron vs. Watson*, 10 Rich. (S. Car.) Eq. 64. That was a bill in equity to

settle the affairs of a partnership, to which Cameron had contributed labor and Watson capital. The master, to whom the case was referred, allowed the claim of Watson for so much of the capital as he had not withdrawn during the continuance of the partnership, but disallowed his claim for interest thereon; pp. 68, 73. Cameron excepted to the allowance of Watson's claim for capital, and Watson excepted to the disallowance of interest. The chancellor, before whom the exceptions were heard in the first instance, overruled the exception of Cameron, and also that of Watson as regarded interest before the dissolution of the partnership, but sustained it so far as to allow him interest after the dissolution, pp. 80-90, 95, 96. The court of appeals, although in one part of its opinion appearing to discountenance Watson's claim for capital, ended by confirming the master's report in every particular, pp. 103, 107, 108. So that the final judgment, while it disallowed Watson's claim for interest, established his claim for capital, and was in exact accordance with our conclusion.

In the case at bar, the partnership was not for a single enterprise, but for the transaction of a commission business in New York and Boston for a year. Converse and Whitcomb contributed the whole capital in unequal proportions. Converse was to contribute "such time as he may be able to give"; and Whitcomb and the other two partners, Blagden and Stanton, were each "to contribute all his time to the business." Those partners who contributed the capital did not contribute merely the use thereof, but the capital itself, and were by the express agreement to receive interest thereon at rates specified in the articles of copartnership. The partners were by agreement to receive each one-fourth of the net profits, and by implication of law must share the losses in the same proportion. The capital contributed became the property of the partnership; and the partnership, consisting of all the partners, became liable to Whitcomb and Converse respectively for the amount of capital paid in by them.

Blagden, one of the partners, being insolvent and unable to discharge any part of the obligation, it must rest in equity upon the three solvent partners in equal proportions. *Whitman vs. Porter*, 107 Mass. 522; 1 Lindley on Partn. 789, 790.

Decree for the plaintiff accordingly.

NOTE: See Mechem's Elem. of Partn., §§ 305, 308.
Compare with the following case.

SHEA vs. DONAHUE.

Supreme Court of Tennessee, 1885.

15 Lea, 160, 54 Am. Rep. 407.

Bill for partnership accounting between Shea and Donahue. They became partners under written agreement for one year "as merchants in making, buying and selling all kinds of tinware, stoves, pumps, etc." "And to constitute a fund for the purpose Timothy Shea has paid in as stock one thousand dollars, which will constitute a common stock, to be used and employed between us in buying goods, wares and merchandise. John Donahue being a practical workman and having considerable experience in the above named business, it is agreed that he will give the business his entire personal attention and the benefit of his experience, to place against the cash furnished by said Shea. We are to bear the expenses and losses jointly and share the profits equally. The capital stock is not to be withdrawn by either party until the end of the term, but to be employed as capital unless otherwise mutually agreed between us in writing." The business was in fact carried on for about three years. Upon the settlement, Donahue claimed to be entitled to one-half of the capital advanced by Shea. The chancellor decided against Donahue, and he appealed.

J. W. Green, for complainant.

H. H. Taylor, for defendant.

COOPER, J. (After stating the facts.) The contention of the defendant is, that by the terms of the agreement he was entitled at the end of one year to an equal share of the profits of the business, and to one-half of the capital advanced by his partner, and this, although it goes without saying he would retain all his practical experience which was to be placed against the cash furnished by his partner. But the agreement is that the partners are only to "share the profits equally," not the profits and the capital. And the profits of any business are only what remains after deducting debts and expenses, and the capital paid in. Lindley on Partn. 791, 806. The provision that

the capital stock shall constitute a common stock to be used in buying the materials and wares of their trade, merely designates the mode in which it is agreed that the capital shall be invested. And the further provision that the capital stock shall not be withdrawn by either party until the end of the term, was only intended to restrain the partners from drawing funds from the business so as to trench upon the capital while the partnership continued. There is nothing in the article of agreement to take the case out of the ordinary one of a partnership in profit and loss upon unequal capitals.

Of course the articles of a partnership may expressly provide for an equal division of the assets, upon a dissolution, notwithstanding an unequal advance of capital by the respective partners. The same result may follow a continuous course of dealing upon a basis which implies such equal division. For if there is no evidence from which any different conclusion as to what was agreed can be drawn, the shares of all the partners will be adjudged equal, upon the favorite maxim of chancery, that equality is equity. But, as Mr. Lindley tells us, the rule is when the partners have advanced unequal capitals, and have agreed to share profits and losses equally, without more, that each partner is entitled to his advance before division, and a deficiency in the capital must be treated like any other loss, and borne equally by the partners. Lindley Partn. 807.

The only authorities adduced by the learned counsel of the defendant, in support of his contention in this case, are to the effect that property brought into the partnership business by the members of the firm, or bought with capital advanced, becomes partnership property, and may be disposed of as such by one of the partners under his general powers as a member of the firm. And so it does beyond all question, for the very object of contributing capital, either in property or money, is to secure a partnership stock for the purpose of carrying on the common business. But this fact has nothing to do with the settlement between the partners of their accounts at the end of the partnership. "By the capital of a partnership," says Mr. Lindley, "is meant the aggregate of the sums contributed by its members for the purpose of commencing or carrying on the partnership business. The capital of a partnership is not therefore the same as its property; the capital is a sum fixed by the agreements of the partners, whilst the actual assets of the

firm vary from day to day, and include everything belonging to the firm and having any money value. Moreover, the capital of each partner is not necessarily the amount due to him from the firm; for not only may he owe the firm money, so that less than his capital is due to him, but the firm may owe him money in addition to his capital, *e. g.*, for money loaned. The amount of each partner's capital ought therefore always to be accurately stated, in order to avoid disputes upon a final adjustment of accounts; and this is more important where the capitals of the partners are unequal, for if there is no evidence as to the amounts contributed by them, the shares of the whole assets will be treated as equal." Lindley Partn. 610. [1 Ewell's Lindley, 2d Am. Ed. 320.] The same author adds in another place: "When it is said that the shares of partners are *prima facie* equal, although their capitals are unequal, what is meant is that the losses of capital, like other losses, must be shared equally, but it is not meant that on a final settlement of accounts capitals contributed unequally are to be treated as an aggregate fund which ought to be divided between the partners in equal shares." Lindley, Partn. 67. On the contrary, in his chapter devoted to partnership accounts [2 Lindley, Partn. 2d Am. Ed. 402], he expressly tells us that the assets of a partnership should be applied as follows:

"1. In paying the debts and liabilities of the firm to non-partners.

"2. In paying to each partner ratably what is due from the firm to him for advances as distinguished from capital.

"3. In paying to each partner ratably what is due from the firm to him in respect of capital.

"4. The ultimate residue, if any, will then be divisible as profit between the partners in equal shares, unless the contrary can be shown."

In accordance with these principles, the following decision has been made by the supreme court of New York in a case cited in a note to page 610 of Lindley on Partnership: "Where by the terms of the agreement the defendant furnished the capital stock, and the plaintiff contributed his skill and services, and the profits of the copartnership were to be equally divided, the plaintiff is not entitled to any part of the capital stock on a settlement of the affairs of the partnership. He has no interest

in any part of the capital excepting so far as in the progress of the business the same may have been converted into profits." *Conroy vs. Campbell*, 13 Jones & Sp. 326. The case, it will be noticed, is exactly in point. And to the same effect in principle are *Whitcomb vs. Converse*, 119 Mass. 38, 20 Am. Rep. 311. *ante; Knight vs. Ogden*, 2 Tenn. Ch. 473, and *Shepherd, Ex parte*, 3 Tenn. Ch. 189. No case has been found to the contrary.

Chancellor's decree affirmed.

NOTE: See Mechem's Elem. of Partn., §§ 305-308.