

Book IV.  
Title XXXVII.

Concerning (an action on) partnership.  
(Pro socio.)

Bas. 12.1.83; D. 17.2; Inst. 3.25.

Headnote.

Partnership.

In general. A contract of partnership could be entered into for a lawful purpose, by act, by words, or by messenger. D. 17.2.1. It was constituted by a union of funds, or skill, or labor, or a combination of them, for some common purpose or exploitation, which usually had a profit for its aim. C. 4.37.1. The contract of partnership was what is called consensual; the mutual agreement of the parties constituting a contract.

Capital and profits. Each partner was required to contribute something, funds, skill, labor, or a combination thereof. One might contribute the money, another the labor. C. 4.37.1. Their means were not required to be equal. D. 17.2.5.1. If no agreement to the contrary was made as to the division of the profits and losses, an equal division was implied. Inst. 3.25.1; D. 17.2.29 pr. But an agreement might be made under which one of the parties was to have two-thirds, three-fourths, or any other proportion of the profits. We are told in D. 17.2.29 pr. that such an agreement was valid only if the contributions were in the same proportion, without telling us how that matter should be determined. Inst. 3.25.1, in providing that such an agreement should be valid, says nothing of the contributions, and we may well infer that the parties fixing the division of profits also validly thereby presumably fixed the value of the contribution to be in the same proportion. So the parties might agree that one should take, say two-thirds of the profits, but bear only, say, one-third of the loss, the remaining profit and loss to be taken and born by the other—an agreement which had previously been considered unlawful by one of the writers. Inst. 3.25.2. And an agreement that one of the partners should furnish all the capital and that the profits should be equally divided was lawful, for the services of the other might well balance the capital furnished. Indeed an agreement might be made that one of the partners should share in the profits but should bear no part of the loss. The various transactions of the partnership could not, of course, in such case, be separated, so as in any event to give a profit to the partner who was to share in that, but all of the transactions were considered and only the net profit, if any, of all of the transaction together was taken into account. Inst. 3.25.2. But an agreement excluding a partner from all profits was void. D. 17.2.29 pr. Where one's share in loss differed from that in profits, the periods at which accounts were taken would be material. It is commonly held, says Buckland, 506, though we have no textual authority, that account was taken at the end of the partnership, with no doubt interim drawings in a partnership lasting for a long term, corrected doubtless from time to time. The shares in the profits and losses might be left to one of the parties, or to an arbitrator. But inasmuch as the contract of partnership was one of good faith, the shares could not be fixed arbitrarily, but could be corrected by the court. D. 17.2.6; D. 17.2.76-80.

Management of partnership. The texts on this subject are not numerous. We may presume that the parties generally agreed among themselves as to the manner in which the partnership should be managed. In the absence of such agreement, each, doubtless,

was bound to do his share toward the fulfillment of the purposes thereof. D. 17.2.22; Buckland, 506; Girard, 609. The partners, on the other hand, might appoint a manager who was or was not a partner. D. 17.2.24 and 44; Property of the partnership could not, it seems, be alienated by one of the partners without the consent of the other (Arg. D. 17.2.67 pr.), though the consent was surely, it seems, implied in the case of ordinary stock in trade. See Buckland, 506. Contracts, as already seen at headnote C. 4.27, were generally personal to the parties thereto, and they inured therefore, directly only to the benefit of a contracting partner. Thus if one of the partners bought any property for the partnership, it, in theory, became his individual property; but he might be compelled to share in an action on the partnership contract. D. 17.2.74.

Relations to third parties. By reason of what has just been said, the partners were, as to third persons, in general so many individual men; a partnership was not, ordinarily, as with us, a distinct entity, nor was one partner generally the implied agent of the other, as with us. This fact arose out of the imperfect development of agency in the Roman law. If all the partners entered into a contract, then, of course, they were respectively liable to third persons in accordance with the terms of their contract, and the extent of their liability was determined by the fact as to whether the contract obligated them only proportionately or jointly and severally. See headnote C. 8.39.

Ordinarily, however, only the partners who were parties to a contract could sue or be sued thereon. The rule had its limitations, however. Thus where partners, and even owners in common, appointed a captain of a ship or a manager of a commercial enterprise, each of the partners or co-owners were liable for the whole of the debts contracted by such captain or business manager within the scope of his authority. D. 14.1.1 and 25; D. 14.1.2; D. 14.1.4.1; D. 14.3.13; D. 14.3.14. The Roman law, as we already saw at headnote C. 4.25, extended the principles of agency in such enterprises, and the exceptions here noted can be understood on that theory. And we further saw at headnote C. 4.25 that a man might be liable on a contract of a loan made by his procurator. Borrowing money in such case was evidently considered a business and was on the same footing as a commercial venture. That rule was also extended to partnerships. And it is said in D. 17.2.82: "In partnership law, one partner is not liable to incur a debt through another, unless the money received is brought into the common chest." In other words, one partner by borrowing money might make all the partners liable for the debt, if the money was put into the partnership funds. See Munro on D. 17.2, appendix II; McKeldy § 422.

Relations of partners to each other. Some of the principles under this heading have already been mentioned. A partner having the management of all or a part of the business was bound to use such diligence and care as he employed in his own business. Inst. 3.25.9 says on this point: "It has been doubted whether one partner is answerable to another on the action of partnership for any wrong less than fraud, like the bailee in a deposit, or whether he is not sueable also for carelessness, that is to say, for inattention and negligence; but the latter opinion has now prevailed, with this limitation, that a partner cannot be required to satisfy the highest standard of carefulness, provided that in partnership business he shows as much diligence as he does in his own private affairs." Such partner was bound to give an account of his administration, and pay interest for the money of the partnership which he employed for his private advantage. D. 17.2.38.60 pr. And on the other hand, a partner might claim proportional recompense from each partner

for what he expended of his own property for the benefit of the partnership. D. 17.2.27; D. 17.2.38.1.

The action for the enforcement of these obligations was called *pro socio* (in the character of a partner), commonly here called “on partnership.” However, unless unable to pay through fraud, each partner had against the other the benefit of competence; i.e. he could only be adjudged to pay his indebtedness to his partners to the extent of his ability to pay, a peculiar institution in the Roman law already noticed in note C. 4.26.2 and note C. 5.22.11; D.17.2.63. Condemnation in the action, though it might, as in *mandatum*, be merely based on negligence, involved infamy. Inst. 4. ? 6. 2.<sup>1</sup> Buckland 509, thinks that infamy followed only in cases of fraud.

Sometimes the action was brought to adjust particular points without dissolving the partnership. D. 17.2.65.15. But ordinarily the action was brought but once, to adjust all the affairs of the partnership and acted as a dissolution thereof. D. 17.2.65 pr. The court took account not merely of property in hand, but of debts due to the partnership, liquidated the partnership concern, settled the mutual claims of the partners, took the accounts between them, condemned them to pay one another according to the result, and exacted reciprocal guarantees to be given where future claims were expected. The court did not adjudge any property in ownership to any of the partners. If that was necessary, or the parties desired it, an action for partition could, in the absence of agreement, be brought for that purpose. D. 17.2.43; 2 Roby 132; Buckland 507, 509.<sup>2</sup>

A partnership created relations among the partners in their nature personal. A new member could not, accordingly, be added without the consent of all. If one of the partners took in another as a partner without such consent, and allowed him to deal with the firm business, he was responsible for his acts. D. 17.2.21.23. Buckland 507.

Life and termination of partnership. An agreement for a partnership might be for a single transaction or for a number of transactions, or for a term or for life. D. 17.2.1 pr. If it was formed for the attainment of some particular object, it was terminated when the object was obtained. Inst. 3.25.6. Its continuance depended on the consent of the members; it could be dissolved by renunciation of any one of the partners at any time, notwithstanding an agreement to the contrary. But a breach of the contract might make him liable for damages. If he terminated the partnership fraudulently, so as to keep an impending acquisition for himself or avoid an impending loss, he was required to account. Inst. 3.2.4; D. 17.2 65.3; Gaius 151; Buckland 508. Death of one of the partners generally dissolved the partnership, unless when the contract was made, it was agreed otherwise. Inst. 3.25.5. So, too, forfeiture of the property of one of the partners and bankruptcy had the same effect. Inst. 3.25.7.8. So, too, a partnership was terminated by the voluntary agreement of the parties, or when the term fixed for it arrived, or when its object was destroyed, or, generally, when an action on partnership was brought. D. 17.2.63.10; D. 17.2.65 pr.; 65.3; 65.6.

Kinds and types of partnerships. Persons might enter into a partnership for any lawful business. We hear of partnerships between bankers (D. 17.2.52.5), between an owner of cattle or land and a farmer to pasture the cattle or till the land (D. 17.2.52.2); for the purchase of property (D. 17.2.52.11); contributing horses to make up a team for sale

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<sup>1</sup> This should be Inst. 4.16.2; Buckland cites is thus at 509, and 4.16.2 is apt.

<sup>2</sup> Blume penciled in a question mark along side this sentence.

(D. 17.2.58 pr.); teaching grammar (D. 17.2.71 pr.); carrying on a shop (D. 14.3.13.2); dealing in slaves and others. Girard 606 note. Doubtless partnerships were formed for nearly every branch of business, commerce and industry. A partnership might be formed for a single transaction (D. 17.2.5 pr), or for some one kind of business (D. 17.2.52.4), or for general trade; that is to say, for all gain made by purchase and sale, letting and hiring, and by the exercise of any skill or labor. D. 17.2.7 and 8. Inheritances, legacies, and gifts of any kind did not accrue to a partnership of that kind. But all profits made in line with the partnership business were required to be accounted for, although, if made in a business not connected with the partnership this was not true. D. 17.2.52.5. Two types of partnership need special mention:

- (1) Universal partnership. This was a partnership which included all the property of the partners in whatever manner acquired, generally, or at least frequently including the property acquired in any manner in the future independent of the property already existing. D. 17.2.1.1. As soon as such partnership was formed, all the property of each of the partners became at once the common property, delivery being presumed. D. 17.2.1.1; 2. Where the partnership contemplated property of every kind, whenever and howsoever acquired, it included legacies, inheritances, gifts. D. 17.2.3.1; D. 17.2.73. Thus even the dowry that one of the partners received with his wife was required to be shared with the partners, subject to the obligation for its return attached thereto. D. 17.2.65.16; D. 17.2.66. So the damages obtained by a partner for malicious wrong to his son became part of the partnership property. D. 17.2.52.16. And while accounts due to one of the partners could be sued for only in that partner's name on account of the personal nature of contracts, he was required to account therefor and could be compelled to assign them. D. 17.2.3. On the other hand, all the lawful expenses of such a partnership were required to be paid out of the common fund. Thus even an outlay in honor of the children became a charge upon it. D. 17.2.73. But damages which a partner was compelled to pay for willful misconduct was not so chargeable. D. 17.2.52.18. This did not mean that the creditor would not be paid; but the amount was charged up against the responsible party, the fund apparently containing money belonging to each of the partners individually. The interest of a partner could even be levied upon and sold on execution, which ended the partnership. Buckland 511. This form of partnership seems practice by which heirs, instead of dividing, kept the inheritance together and enjoyed it in common. Buckland, supra.
- (2) Partnership for farming revenues. Revenues in the Roman Empire were frequently farmed. That was true even for municipalities. Contracts for this purpose were at first usually for five years, later for three. C. 4.61.4. These contracts required considerable capital, and companies formed for purposes of this kind stood, accordingly, upon a different footing from the ordinary partnership and were more in the nature of corporations. They were not dissolved by a partner's death, unless in exceptional cases. The heir of the deceased did not become a partner, unless specially admitted, but he succeeded to the profits which the deceased would have received. D. 17.2.59; 63. See Buckland 510; 2 Roby 133. Other similar associations were those for working gold and silver mines, or saltbeds. All such associations had common property, a common chest, and an agent, called actor or syndicus, by

whom the association, if sued, was defended, and who acted as general agent for the association. D. 3.4.1. The guilds which came to be frequent in the empire had, perhaps, a similar organization. The whole population of the empire came to be organized into such guilds; and they were hereditary. Armorers, mintmen, weavers, dyers, purple-gatherers, miners, muleteers in government employ, farmers, members of municipal senates, were fastened to their station, from which it was difficult to escape. All the trades were incorporated into associations under an official charter. See discussion of the subject in Holmes, 1 Age of Justinian and Theodora 194 et seq. and headnote to C. 11.2.

Partnership property and co-ownership in property. It has been stated that partnership was generally formed for purposes of profit. But that was not universally true. Thus if two men jointly bought land at the back of their houses in order to keep it clear of buildings, there was a partnership. D. 17.2.52.13. Hence, the question when there was simply joint ownership or ownership as partners was not always easy to determine. Girard 607. One of the important elements was undoubtedly the intention with which property was acquired and held (Girard, supra), and yet, inasmuch as a partnership could be formed by acts of the parties, that statement does not furnish a complete solution. D. 17.2.31 says: "Property can be treated as held in common without partnership, as for instance where persons come to own a thing in common without any intention of partnership, as may happen when something is purchased by two at the same time, or where people come in for an inheritance or gift in common, or buy independently from two persons their respective shares, without intending to be partners." This led Munro (on D. 17.2) to state, that if the parties did not act upon any concert at all, but either acted independently or did not act at all, but were passive recipients, no partnership was formed. That, however, does not explain, for example, D. 17.2.52.12. Probably all property acquired by joint action of two or more parties was considered partnership property. The point was not of the same importance in Roman law as it would be with us, on account of the limited agency of one partner for another and the fact that questions regarding the property would, accordingly, in most cases arise generally only between the parties, and the further fact that the rules were much the same in regard to partnership property as in regard to property merely held in common. Thus a partner was bound to take the same care of partnership property as he would of his own. The same rule obtained as to property held in common. Headnote C. 3.37. A partner, however, if condemned, became infamous, and was only liable for what he could pay. These rules had no application in ownership in common. See Hunter 519.

4.37.1. Emperors Diocletian and Maximian and the Caesars to Aurelius.

It has been rightly held that a partnership may be formed where one member contributes the money and the other the work.

Given May 5 (293).

4.37.2. The same Emperors and the Caesars to Pannonius.

Since you say that you bought a farm jointly for yourself and your paternal uncle, and that you and he have both been put in possession, the ownership of the farm, according to the rule of law, belongs to both of you. Of course, since you say that the price was paid by you alone, and that you alone have made the customary payments due,

without contribution on the part of your associate, you can recover what he should have paid on that account in an action on partnership.<sup>3</sup>

4.37.3. The same Emperors and the Caesars to Aurelius Victor, a soldier.

Since a contract of partnership is preeminently one of good faith, and it is consonant with equity that benefits also should be equally divided between the associates, the president of the province will,

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<sup>3</sup> [Blume] C. 4.50.1 note.