in the same right and in the same subject-matter. Otherwise the contract cannot be presumed as between the supposed partner and the partnership-creditor.

The view here taken justifies the reasoning of Lord Eldon in *Ex parte Hamper*, 17 Ves. 404, where he makes a distinction between a stipulation for a proportion of the profits as a compensation for labor, skill or services, and an agreement to receive a sum of money equal to such a proportion of the profits and actually paid out of them; holding that the former constituted a partnership and the latter did not. And the distinction is obvious notwithstanding Mr. Justice Bramwell thought there was no "difference except in words, at least so far as creditors are concerned:" *Bullen* v. *Sharp*, L. R. 1 C. P. 126. The real difference consists in the different legal consequences of the two contracts. Where the agreement is to receive a proportion of the profits in consideration of services, these latter are to be regarded as component parts of the partnership stock belonging to, and being under the control of the firm, and the party who contributes them is thereby made a partner, in the absence of any special restriction to the contrary. While he labors to produce profits for others, he is at the same time producing them for himself and thus he has the same interest in his own services, as if he contributed only *money* to the partnership stock and bore his share of the expense which the firm would have to incur if it employed the labors of a hired servant, instead of his own. Moreover he derives his interest directly from the joint use of the partnership stock and is therefore an *immediate* debtor to the partnership creditor. But where it is expressly agreed that a sum of money *equal* to a proportion of the profits should be paid as a *reward* for services, the very words forbid the supposition of a partnership and merely provide a contingent measurement for the compensation to be paid, the payee not sharing the direct use and control of the partnership property, but receiving his interest through an intermediate party in whom the *ownership* had previously vested. And here we have an illustration of Mr. Parsons' favourite criterion of "ownership in the profits before they are divided" deduced from a rule which he himself denies.

But our conclusion as to the necessity of *homogeneity* in the interests of the parties as above explained, in order to create the partnership relation as to third persons as well as *inter se*, is only the ultimate development of the reasoning upon which the case of *Cox* v. *Hickman* was decided. The case was substantially as follows;—a manufacturing concern being heavily indebted conveyed all their property to trustees to carry on the business and out of the profits to pay off the debts. The trustees, in process of time, became involved, and *their* creditors attempted to fix a joint liability with the trustees upon the other creditors because they received the profits. But every consideration of common sense and common justice plainly urged the repudiation of a rule which led to so absurd a consequence, and the court realizing the necessity of finding some escape from its extravagant conclusions, boldly renounced and attacked the rule itself, holding that inasmuch as the trustees could not be regarded technically as the *agents* of the first creditors in contracting the subsequent liabilities, no partnership existed between them.

The necessity of founding the partnership liability upon a *direct and immediate contract* with the creditor, is thus distinctly recognised. The party to be charged *must* be shown to have made a contract, and if it does not appear that he contracted in person, the next naturally and logically is, did he make the contract through an agent? If neither, then he is not liable as a partner.

So there must be an *identity of relation* between the supposed partners in respect to the creditor, and hence the newly adopted rule requiries that the relation of principal and agent shall be *mutual*, so that the contract of one shall be the contract of both.

Whether the party actually contracting should be regarded as an agent *quoad hoc* is a question not more easily answered in many cases than the question of partnership itself, and herein, anywhere, the insufficiency of the rule is exposed.

Reasoning upon the principles which we have contended for above, in their application to the case in question, it would appear that the relation of the *first* creditors and that of the trustees to the *subsequent* creditors were entirely different, and the difference is too obvious to be specifically point out. The legal title and actual ownership of the profits was in the trustees intervening between them and the first creditors, and so the legal ownership of the profits was likewise in the trustees, before they were actually paid over to the beneficiaries under the deed. There was no immediate relation or privity, and consequently no contract between the first and second creditors because the benefit conferred by the subsequent creditors did not move *directly* but *mediately* through the trustees, to the former creditors. The interest of the first creditors and that of the trustees not being homogeneous, the relation of partnership did not exist between them.

As a matter of course, many of the old adjudications will be found erroneous in the light of these later decisions, but it is useless to go into a consideration of them. Mr. Parsons, after citing numerous cases, admits the very manifest "difficulty, if not impossibility, of drawing from the decisions any definite principle, or rule applicable with certainty to

ing the interest of partners than the words *common* and *community*, which are usually employed for that purpose. This may have been the idea of Mr. Parsons when he said "the distinction taken is between different *kinds* of interests in or claims upon profits:" Pars. Part. 75, in note.