

CRITERIA OF PARTNERSHIP.

seems best." And subsequently the statute 28 & 29 Vict. c. 86 was enacted, sanctioning the *ratio decidendi* of *Cox v. Hickman*, and defining specifically what conditions should be held not to constitute the liability of a partner.

The want of scientific certainty and uniformity in the older resolutions on this subject, is doubtless the result of misdirected inquiry as to the perception of profits, instead of seeking out the actual contract of the parties as the true foundation of their liability. For a contract either express or implied, is in fact the only just criterion, whether we regard the intentions or the legal liability of the parties, and unless the circumstances of the case are such as to warrant the presumption or to prove the fact of an agreement, there can be no obligation because there is really nothing to originate it. A contract being, thus the proper subject of investigation, we have no other guidance than that which is furnished by the doctrines of the common law. For, in the language of Mr. Parsons, "as a very large part of commercial business consists in forming and executing contracts which must be governed by the law of contracts generally—and this is a part of the common law—many of the principles applicable to partnership are the same as those which regulate the common transactions of men; and so far the law of partnership may be said to be founded upon the common law."

But is it true that *any* other principles than those which govern contracts generally ought to be applied in seeking to fix upon a person suspected of being a partner, a liability which he has not expressly undertaken? For as early as 1795, in a case where the partners were *known* to the creditor, it was said that "notwithstanding where the person bringing the action has looked to the faith of several partners, who are in business together, and has relied upon their joint credit, though but one only of the partners acted, the proof of the act of one shall charge them all; *yet it must be made out in an action at common law that such debt or contract was joint, before the other partners shall be charged*. For in *assumpsit* against several a joint debt or contract must be proved; otherwise the proof would not correspond with the declaration." *Watson on Part.* (ed. 1795), 59; *Layfield's Case*, 1 Salk. 202; 1 Esp. N. P. 267.

The cases in which the want of some definite and general test is most seriously felt, are those where there is no formal agreement among the parties to be partners, but where they do in fact contract to share a joint or common benefit, and there is a question whether the agreement, such as it is, actually constitutes them partners *inter se*.

In cases of secret, silent, dormant or unknown partners, who agree in the common characteristic of secrecy or concealment in respect to creditors of the firm, the only inquiry is as to the person, and not whether

he is a partner or not, for this he is already, *ex hypothesi*.

On the other hand, where a person so acts as to induce the belief that he is already jointly bound with those who seek and obtain the credit, as in the case of nominal, public or ostensible partners, it seems hardly necessary to call in aid the principle of agency in order to determine their liability. For example, if in the firm A., B. and C., A. and B. are acting partners, and C. a mere nominal partner, it would appear that C. is responsible to the partnership creditor, not because A. or B. may have contracted a debt as his agent, but because C., by appearing in the firm, addresses himself directly to the creditor who is thereupon authorized to clothe him with the full character of an original and immediate contractor. He is not a partner merely because A. or B. may subject him to a joint obligation with themselves, but because by knowingly permitting his name to appear in the firm, he thereby expressly constitutes himself a partner, or rather is estopped from denying that he is a partner, and thus *being* a partner any member of the firm may bind him as an agent. Here it is only necessary to prove that he was *knowingly* represented as a member of the firm, without reference to any agreement made with his copartners. But in the case of one suspected of being a partner, the proof is entirely different, and it is not only admissible but necessary to resort to the common law for the means of establishing the fact of partnership, which being done, the law-merchant comes in to supply the consequences of that relation.

Let us endeavor then to ascertain among the doctrines of the common law, the ultimate principle on which the joint liability of joint contractors is founded, and see if it may not be made serviceable in determining the partnership relation in respect to the creditor. For it must be remembered that we are now called upon to prove the fact of partnership, in the absence of any express agreement to that effect, and perhaps in the face of a denial made under the solemn sanction of an oath. It is therefore requisite to prove a *joint* liability between the party sought to be charged and the party or parties already known to be liable for the debt. And this can be done only by showing that the relations of all the parties to the creditor are identical.

The common law enables us to ascertain this identity of relation by the application of its most familiar elementary principles.

And first there must be a contract.

It may be said generally that wherever the common law gives a remedy for enforcing the payment of money—except in actions *ex delicto*—the right to recover is predicated on the existence of a contract either express or implied. In actions of debt, covenant and *assumpsit*, it is absolutely indispensable to prove that the parties agreed together either in formal terms or by intendment of law,