

that date. No such letter is known to Mr. B. Lyman, or to the witness Clare, who would have seen it had it been on the office desk as stated. The Plaintiff never mentioned neither the agreement or his acceptance of it to his fellow clerk, Clare, and has not in any way adverted to it as part of his case, it is not referred to in his declaration, no copy of that letter of acceptance was transmitted by him to the firm under cover of his letter of the 16th of April, 1859, nor is it mentioned in any part of his correspondence with the firm or made known to them until after his proceeding at law against them. The copy offered in evidence by Plaintiff is not proof; it is only secondary evidence which cannot be admitted without first showing the previous existence of the original, and its non-production after notice. The discrepancy in Mr. Spence's testimony as to the Sunday on which he says he saw this copy is not important except as to the exact date of the letter of acceptance. It might have been the second Sunday or some time after, but not the first Sunday. The agreement was written on Saturday the 4th of April, it was written in the afternoon, and the Plaintiff consulted several of his friends: the answer would scarcely be the 5th of April. The Plaintiff's counsel have presented this agreement to the Court and Jury as a proposal of agreement if so it only becomes binding and absolute upon its proved acceptance which has not been shown; if it was such a proposal it was competent for the proposer to retract and withdraw it until after its acceptance—until that event it was imperfect as an agreement. It is a clear principle of law that the parties to a mutual contract or bargain must mutually consent and that consent must be made known in some way or manner recognized by the law. The terms of the agreement show its imperfectness as a co-partnership contract, the principal elements of such a contract are wanting, the terms, conditions and duration of the co-partnership, the shares of the partners respectively their advances or otherwise to the business, the partnership name, and all this moreover with the statement written in the agreement itself, that the Plaintiff's admission was on terms to be agreed upon. The Plaintiff's counsel has also qualified it as an offer for entertaining a proposal of co-partnership, but so again it is not a contract and manifestly it is not a contract absolute in itself and in its own terms. Upon this first issue therefore it is my duty to tell you that the paper wanting, produced in support of the Plaintiff's action is not in the face of the agreement binding in law upon the firm of Lyman, Savage & Co., or upon the Defendants.

We have now reached the second issue which embraces a very interesting point of co-partnership law, which the jury will receive from the Court, inasmuch as but little matter of fact that is uncontradicted, is connected with it, and is, that the proposal was written by B. Lyman, the senior partner of the firm, and that it was signed with the co-partnerships name. This issue involves the entire question of the nature and establishment of partnerships, the powers of individual partners particularly to introduce third persons into their subsisting co-partnerships, and to use the co-partnership name. The law which is clear and explicit upon all these points will be found in standard au-

thorities which will be given in their own language as more explicit and plain than my own. It must be premised that a general concurrence of opinion exists among law writers upon the subject, in England and Scotland, France, the United States and this province. The contract of partnership is defined by Story on Co-partnership—Sect. 2—to be "a voluntary contract between two or more competent persons to place their money, effects, labour and skill or some or all of them in lawful commerce or business with the understanding that there shall be a communion of profits thereof between them."—Pothier Contrats de Societe, Nos. 5, 11, 12—"C'est un Contrat, &c.—it is a contract formed by the consent alone of the parties:—it is essential to the contract that the partnership be established for the common interest of the parties, each hoping to have a share or part in proportion to what he shall have brought into it"—Delangle Tr. de la So. No. &c., "La Societe naît de la volonté des parties, &c." Similar authorities will be found in Domat Bk. 1 tit. 801—Code Civ. art. 1842. Collyer on Partnership, part 182.

The contract of partnership being therefore especially and altogether dependent for its existence upon the consent of each of the parties, is eminently exclusive in its nature and character; hence it is an established principle of law (Story No. 5) "that as it can only commence by the voluntary consent of the parties, so when it is once formed no third person can be afterwards introduced into the firm as a partner, without the concurrence of all the parties who compose the original firm. It is not sufficient to constitute the new relation that one or more of the firm shall have assented to this introduction, for the dissent of a single partner will exclude him, since it would in effect amount to a right of one or more of the partners to change the nature, the terms and obligations of the original contract and to take away the *delectus persone* which is essential to the constitution of a co-partnership." So also Collyer No. 8—"And first, the contract must be voluntary, therefore no stranger can be introduced into a firm as a partner without the concurrence of the whole firm: this *delectus persone* is so essentially necessary to the constitution of a partnership that even the executors and representatives of a deceased partner themselves do not as such succeed to the state and condition of partners"—a special contract to that effect is required. So also is the law of Scotland—Bell's Comments—Pothier No. 91, says:—"Chacun des Associes, &c., each of the co-partners having the right to dispose of the partnership effects only for his own share therein, he may in consequence, without the consent of his co-partners, unite to himself a third person in his own share of the partnership, but without their consent, he cannot unite him with the co-partnership. Wherefore, if I think proper to unite a third person to myself, he will be my partner in my share of the partnership which was established between us, but having no right to bring him into our partnership without your consent, except for my own part, he will not be your partner, because the rule of Law *socii mei socius meus socius non est*. In No. 95, Pothier goes on to say that "even if the partner had the sole and entire management of the business, he cannot of himself make a third person a partner"

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