

CRITERIA OF PARTNERSHIP.

the question, who are partners as to third persons?"

All the cases where there is no express contract of partnership among the parties, may be reduced to the following formula:—

A contract between A. and B., C., having a legal claim against A., assumes that B. is subject to the same liability by reason of his contract with A.:

In construing the agreement between A. and B., the real question is, whether or not it raises the presumption of a contract between B. and C. According to the rule of *Cox v. Hickman*, it must appear that A. was the agent of B. in contracting the debt to C., and the agency is sufficiently proven by showing that the trade carried on by A. was in fact carried on in behalf of A. and B. We think the proposition is better stated thus:—A. being indebted to C. for a benefit moving directly and simultaneously from C. to A. and B., the same cause which makes A. a debtor necessarily makes B. a debtor also, and therefore they are partners.

In *Hesketh v. Blanchard*, 4 East 144, Lord Ellenborough held, in accordance with the prevailing doctrines on the subject, that a man might be a partner as to third persons, though so far from being a partner with his immediate contractor, that he might bring an action against him on their contract. This class of cases is thus disposed of by Bramwell, J., in *Bullen v. Sharp*, *ubi sup.* 124:—"Partnership means a certain relation between two parties. How, then, can it be correct to say that A. and B. are not in partnership as between themselves, they have not held themselves out as being so, and yet a third person has a right to say they are so as relates to him? But that must mean *inter se*, for partnership is a relation *inter se*, and the word cannot be used except to signify that relation." Now the "*relation inter se*" must always depend upon the contract *inter se*, and place the parties in the same relation to the creditor, for otherwise A.'s contract with C. cannot be B.'s contract with C.

There is a class of cases where the contract between A. and B. (adopting the foregoing formula) is one of bargain and sale, and the stipulation for profits is only intended to designate a mode of paying the price. The case of the bargain for a house* stated by Mr. Parsons is one of this kind, and shows to what extravagant lengths the rule of *Waugh v. Carver* may be carried. The idea of a partnership between A. and B. in such a contract as this, we venture to say, would never have entered any reasonable mind that was

not misled and prejudiced by the unwarranted significance with the word *profits* gradually acquired on the authority of judicial interpretation.

The case of *Barry v. Nesham*, 6 C. B. 641, may be cited an illustration, and the following arrangement will simplify the meaning of the contract.

1. There was a sale of a newspaper by B. to A. for £1,500, payable in seven annual instalments; 2. B. guaranteed A. a clear annual profit of £150; 3. A. agreed in consideration thereof to pay B. all the profits in excess of the £150, until they reached the sum of £500; 4. If the surplus profits should amount to £500 during the seven years the instalments had to run, then A. agreed to pay in addition to what he had already promised, the existing liabilities of the paper, not exceeding £250; 5. B. should receive such surplus profits only until they amounted to £500; 6. A. might pay off all the purchase-money, assume all the liabilities of the paper, and become entitled to all the profits at any time; 7. B. might withdraw his guaranty of £150 at any time.

The question was whether B. was liable as a partner for goods supplied to the newspaper on A.'s order, and the court held that he was, on the ground that he was still the *owner of the owner*, and *participated in the profits*, as stated in the opinion of Maule, J.

Now, if B. continued to own the paper there can be no doubt of his liability for its debts; but whether as a partner or not, is another question. For if there was no sale, A. was in fact nothing more than a "salaried agent receiving a definite sum out of the profits as a compensation for services," and in this case he could have no interest in the surplus profits. But it seems that there *was* a sale, that all the subsequent stipulations had reference only to the mode of payment, and that the surplus profits did actually go to help pay what A. owned B. Nor was payment confined to profits alone, for A. might at any time have paid the whole price and become entitled to all the profits, or B. might have withdrawn the guarantee, and in either case there would have remained a simple undisguised contract of bargain and sale. It was not even a conditional sale, for B. retained no ownership in or claim upon the newspaper, nor was there a provision that he should take it back in any contingency.

If he was a partner then, it was because of the agreement that a third of the debt (£500) might *possibly* be paid out of the profits, and we say *possibly*, for this part of the agreement might have been rescinded. Was the mode of participation viewed in connection with all the circumstances, such as to constitute a partnership between A. and B.? We conclude that it was not, and we do so with the less hesitation because the decision of this case was expressly founded on the principle of *Waugh v. Carver*. Wightman, J., in *Cox v.*

* If two men were bargaining for a house and the seller says, "Your business is so prosperous, you can afford to pay me all I ask;" and the buyer replies, "You mistake, the profits of my business are not so large as you think;" and the seller rejoins, "Well, I will, at all events, take one-fourth of your next year's profits for the house," and a written contract is executed on these terms, it would be simply absurd to contend that this sale of a house made the seller liable for all the business debts of the buyer: *Parsons on Part.* 71.