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Business Associations -- 1955 Tennessee Survey

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BUSINESS ASSOCIATIONS — 1955 TENNESSEE SURVEY

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Nature and Formation of Partnerships: The question whether a contract sued on was a partnership arrangement so as to be cognizable only in equity was considered by the Tennessee Court of Appeals in *Powell v. Bundy*.[1] There Bundy, a real estate broker, sued Powell on the law side to recover $500, alleged to be plaintiff's one-half share of a commission earned by their joint efforts in selling a tract of real estate, but which commission had been collected and wrongfully retained by defendant. Among other defenses interposed was defendant's contention that the contract sued on was that of a partnership arrangement between the parties and that one partner cannot sue another partner at law, exclusive jurisdiction of such a suit being in a court of equity.[2]

Although the question of jurisdiction may not have been squarely before the court,[3] nevertheless the court concluded that the contract was not one of partnership but was a mere agreement of the parties to work together and divide the commissions. The court held that the suit was properly brought on the law side and affirmed a lower court judgment for the plaintiff.

The question whether a business association or arrangement constitutes a partnership may, of course, be important for several reasons.[4]

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1. 272 S.W.2d 490 (Tenn. App. M.S. 1954).

2. See Davis v. Fisher, 27 Tenn. App. 663, 669, 184 S.W.2d 400 (M.S. 1944); GIBSON, SUITS IN CHANCERY § 960 (4th ed. 1937). In this connection see the limitations on this doctrine as pointed out in note 3, *infra*.

3. The court points out in its opinion that there was no demurrer by the defendant challenging the jurisdiction of the court. A Tennessee statute provides that any suit of an equitable nature, brought in the circuit court, where objection has not been taken by demurrer to the jurisdiction, may be transferred to the chancery court of the county, or be heard and determined by the circuit court upon the principles of a court of equity. TENN. CODE ANN. § 10329 (Williams 1934), Metropolitan Life Ins. Co. v. Humphrey, 167 Tenn. 421, 424, 70 S.W.2d 361 (1934).

4. A great number of cases in which the issue of partnership existence is raised, of course, concern a creditor of the business, seeking to impose a personal liability upon an associate. Mosley v. Orr & Co., 6 Tenn. App. 243 (M.S. 1927); Schleicker v. Krier, 218 Wis. 376, 261 N.W. 413 (1935). In a suit for dissolution of the alleged partnership we find another run-of-the-mill reason for deciding whether a partnership exists. Moore v. Du Bard, 318 Mich. 578, 29 N.W.2d 94 (1947). With or without asking for a dissolution of the partnership, a suit may have to do with a partner's right to an accounting as to partnership affairs. Davis v. Fisher, 27 Tenn. App. 663, 184 S.W.2d 400 (M.S. 1944). The question whether a particular business arrangement is a partnership may come up in certain criminal matters, as where the "owner" of a retail beer business is required to have a license and permit to sell beer, the defendant saying he is merely an "employee" and not a partner. Stewart v. State, 190 Tenn. 334, 229 S.W.2d 504 (1950). A right to workmen's compensation may turn on whether claimant is treated as an "employee" or a partner. Thurston v. Detroit Asphalt & Paving Co., 226 Mich. 505, 198 N.W. 345 (1924). By the same token a right to unemployment compensation may hinge on

In the case at hand it was important under the doctrine in Tennessee that one partner can sue another partner only on the equity side.[5] Nor is it always an easy matter to determine whether the business arrangement does satisfy the requisites of a partnership.

Just what is a partnership? Subject to the doctrine that a partnership may result by reason of estoppel,[6] persons who are not partners as to each other are not partners as to third persons.[7] Partnership by estoppel has no application as between alleged partners,[8] and, of course, that doctrine finds no place in the case at hand since the controversy is between members of the association. In determining whether persons are partners as to each other there are certain rules, now crystalized into statutory form, which are helpful for determining the existence of a partnership. As defined by Section 6 of the Uniform Partnership Act,[9] adopted in Tennessee,[10] "[a] partnership is an association of two or more persons to carry on as co-owners a business for profit." The two principal elements embodied in this definition are (1) sharing in the profits of a business carried on by two or more

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whether claimant will be treated as a partner. *In re* Zeits, 108 Ind. App. 617, 31 N.E.2d 209 (1941). As between partners their dealings in real estate may be treated as personal property. Tutt v. Davis, 13 Cal. App. 715, 110 Pac. 690 (1910). Thus, as between partners, for purposes of inheritance realty may be treated as personalty. Cultra v. Cultra, 188 Tenn. 506, 221 S.W.2d 533 (1949). For purposes of the Statute of Frauds real estate dealings between partners may be treated as personal property dealings. Smith v. Guy, 24 Tenn. App. 352, 144 S.W.2d 702 (E.S. 1940), 16 TENN. L. REV. 885 (1941). In the liquidation of a business arrangement, the priority of creditors will, in part, depend upon whether the business is a partnership. "When partnership property and the individual properties of the partners are in the possession of a court for distribution, partnership creditors shall have priority on partnership property, and separate creditors on individual property . . . ." UNIFORM PARTNERSHIP ACT § 40(h); TENN. CODE ANN. § 7879(h) (Williams 1934). Another instance where the question of the existence of a partnership may arise is in connection with joinder of parties in a suit against an alleged partnership. In a contract action against a partnership, the liability of a partner ordinarily is joint only. UNIFORM PARTNERSHIP ACT § 15 (b). Under this rule all partners should be joined as defendants. CRANE, PARTNERSHIP 308-09 (2d ed. 1952). This rule has now been changed by statute in Tennessee so that all partners are both jointly and severally liable on contract actions. TENN. CODE SUPP. § 7854 (1950).

5. See note 3 *supra*.

6. UNIFORM PARTNERSHIP ACT § 7(4), TENN. CODE ANN. § 7846 (Williams 1934); UNIFORM PARTNERSHIP ACT § 16, TENN. CODE ANN. § 7855 (Williams 1934), Mosley v. Orr. & Co., 6 Tenn. App. 243 (M.S. 1927).

7. UNIFORM PARTNERSHIP ACT § 7(4).

8. Badger v. Boyd, 16 Tenn. App. 629, 65 S.W.2d 601 (M.S. 1933). However, where father and two sons entered into purported partnership agreement providing for sharing of profits, sons who acted for period of years on understanding that they were chargeable with share of losses were estopped after father's death from obtaining from father's estate reimbursement for losses, where sons claimed that agreement did not create a partnership. *In re* Kennedy's Estate, 321 Pa. 225, 183 Atl. 798 (1936).

9. UNIFORM PARTNERSHIP ACT § 6.

10. The Uniform Partnership Act is found in TENNESSEE CODE ANNOTATED §§ 7841-82 (Williams 1934). Section 6 of the act is found in § 7845 of the Tennessee Code. Thirty-four states, plus Alaska, have now adopted the Uniform Partnership Act. See 7 UNIFORM LAWS ANNOTATED 6 (Supp. 1954).

persons; and (2) co-owners of the business. Profit-sharing may make out a prima facie partnership. Thus, under Section 7 (4) of the Uniform Partnership Act,[11] the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business. But this same section of the act further provides that no such inference shall be drawn if such profits were received as payment in certain specified transactions, namely:

(a) as payment of a debt by installments or otherwise;
(b) as wages of an employee, or rent to a landlord;
(c) as an annuity to a widow or representative of a deceased partner;
(d) as interest on a loan, though the amount of payment vary with the profits of the business;
(e) as the consideration for the sale of the good will of a business or other property by installments or otherwise.

These five exceptions of Section 7 of the Uniform Partnership Act[12] to a prima facie inference of partnership, resulting from profit-sharing, deal with various transactions which resemble partnerships as to profit-sharing but do not satisfy the fundamental condition of carrying on business as co-owners or the policy of imposing partnership liability.[13]

Section 7 (3) of the Uniform Partnership Act[14] deals with sharing of gross returns, as distinguished from sharing profits, and seems particularly applicable to the case at hand. Under this section of the act the sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.[15]

11. UNIFORM PARTNERSHIP ACT § 7(4); TENN. CODE ANN. § 7846 (Williams 1934).

12. *Ibid.*

13. The line separating a partnership from an association that is not such is often blurred. Co-ownership and development of oil and mining property is a type of enterprise which has given trouble and has been variously classified by the courts. Several cases have held that, lacking evidence of specific intent to become partners, the development of mining property does not change the relationship from that of co-ownership into that of partnership. Transcontinental Oil Co. v. Mid-Kansas Oil & Gas Co., 29 F.2d 323 (5th Cir. 1928); Cecil v. Montgomery, 95 Okla. 184, 218 Pac. 311 (1923); Butler Savings Bank v. Osborne, 159 Pa. 10, 28 Atl. 163 (1893). Likewise, the joint dealing in property acquired for resale has been variously classified by the courts. It has been held that, lacking specific intent to become partners, no partnership is created if property is acquired for joint resale. Clark v. Sidway, 142 U.S. 682 (1892); Magee v. Magee, 233 Mass. 341, 123 N.E. 673 (1919). See, also, Jenkins v. Harris, 19 Tenn. App. 113, 83 S.W.2d 562 (M.S. 1935). However, a partnership has been found to exist where the parties agreed to engage in one or more particular transactions for purchase and sale of real estate for profit. Harmon v. Martin, 395 Ill. 595, 71 N.E.2d 74 (1947). For a more complete discussion of these problems see CRANE, PARTNERSHIP 52-55 (2d ed. 1952).

14. UNIFORM PARTNERSHIP ACT § 7(3); TENN. CODE ANN. § 7846 (Williams 1934).

15. The fact that parties were co-owners of business and shared gross returns therefrom will not, of itself, establish a partnership. *In re* Zeits, 108 Ind. App. 617, 31 N.E.2d 209 (1941); Benton v. White, 185 Ga. 286, 194 S.E. 179 (1937); Moore v. Du Bard, 318 Mich. 578, 29 N.W.2d 94 (1947); Schleicker v. Krier, 218 Wis. 376, 261 N.W. 413 (1935).

In *Powell v. Bundy*, the instant case, about the most favorable finding that the jury could have made from the pertinent, conflicting evidence bearing on the existence of a partnership was that defendant had an office and plaintiff had an automobile. Defendant furnished his office and plaintiff his automobile; and the two of them occasionally worked together in selling property and dividing the commission. They so handled the transaction involved in the present case. Defendant allegedly collected the commission of $500 and refused to pay over plaintiff's half of it.

It can thus readily be seen that about the most pertinent evidence of the existence of a partnership in the case at hand is the sharing of gross returns by plaintiff and defendant; and the Tennessee statute expressly provides that the sharing of gross returns does not of itself establish a partnership.[16] The burden is on the one asserting the existence of a partnership to prove it by competent evidence.[17] Defendant did not carry that burden.

There may or may not have been present in the case at hand the other requisite of a partnership, which is co-ownership of the business. Insofar as the court's opinion discloses, the party claiming the existence of the partnership did not make co-ownership clear. The burden of establishing the partnership relationship was thus not discharged in this respect.[18] Co-ownership of the business by the associates conducting it is taken by the Uniform Partnership Act as a fundamental characteristic of a partnership along with the sharing of profits.[19] But co-ownership does not necessarily mean that the property so used must belong to the partners in common.[20] The property thus used may belong to one or more partners, so that there is no joint property other than in earnings.[21] Co-ownership of a business, in essence, means the proprietary right of sharing in the surplus and profits and perhaps to some extent, in the control of the business, at least in having a possible power of ultimate control as to changes of the contract under which they operate.[22]

16. TENN. CODE ANN. § 7846 (Williams 1934).

17. Cunningham v. Winteroth, 348 Ill. 391, 181 N.E. 340 (1932); Smith v. Maine, 145 Misc. 521, 260 N.Y. Supp. 409 (Sup. Ct. 1932); Badger v. Boyd, 16 Tenn. App. 629, 65 S.W.2d 601 (M.S. 1933).

18. See textual material supported by cases in note 17 *supra*.

19. See Commissioner's notes, UNIFORM PARTNERSHIP ACT § 6.

20. Co-ownership of the business, as distinguished from co-ownership of the assets, is the important thing. Toner v. Sobelman, 86 F. Supp. 369 (E.D. Pa. 1949). Also, in a partnership association, it is competent for one person to contribute services, while another contributes money or property. *Cf.* Ruta v. Werner, 1 N.J. Super. 455, 63 A.2d 825 (1948); Sheldon v. Little, 111 Vt. 301, 15 A.2d 574 (1940); see Eppes v. Eppes, 169 Va. 778, 195 S.E. 694 (1938).

21. Brown v. Fairbanks, 121 Cal. App.2d 432, 263 P.2d 355 (1953); Thurston v. Detroit Asphalt & Paving Co., 226 Mich. 505, 198 N.W. 345 (1924); *cf.* Memphis Natural Gas Co. v. Pope, 178 Tenn. 580, 161 S.W.2d 211, *aff'd*, 315 U.S. 649 (1942).

22. The element of control is one that is now given much emphasis. See CRANE, PARTNERSHIP 62-63 (2d ed. 1952). "To state that partners are co-

The court thus seems justified in concluding that the agreement sued on was not a partnership contract so as to be cognizable only in equity.

Some question can be raised, however, concerning one line of authority on which the court relies. The court cited the *Hackney Co.* case and the *Stewart* case[23] for the proposition that "sharing of profits of a business as compensation for personal services does not constitute a partnership."[24] That proposition is entirely too broad for the rationale of those cases. Both cases dealt with specific exceptions where the Uniform Partnership Act expressly provides that the sharing of profits does not give rise to an inference that the business arrangement was a partnership. Both cases construed the exception which says that no inference as to the existence of a partnership shall be drawn if the profits were received "as wages of an employee or rent to a landlord."[25] Pretty clearly this specific exception of the act does not warrant the court's broad conclusion that "sharing of profits of a business as compensation for personal services does not constitute a partnership," for the act expressly provides that, subject to certain named exceptions, "the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business."[26]

Nature of Partner's Interest in Partnership Property—For Purpose of Claims Against His Interest: United States v. Worley[27] is the consolidation of a bankruptcy case and a case to enforce a tax lien of the federal government, in which the federal court of appeals was concerned with the nature of partnership property. More specifically, the court was concerned with whether an assignment by an individual partner of his partnership interest was valid, and also with whether a federal tax lien would attach to the partnership property for the individual taxes of the partner. It was necessary for the court to decide between the priority of these claims, on the one hand, and the claim of a trustee in bankruptcy on the other hand. Although the partnership in question later was organized into a corporation, which is the bankrupt in the case at hand, nevertheless while it was still a partnership one of the partners made a separation agreement with his wife in which he executed what the court treated as an assignment of one-half of the individual partner's drawing account, one-half

owners of a business is to state that they have the power of ultimate control." Notes of Commissioners, UNIFORM PARTNERSHIP ACT § 7. In addition, see cases cited notes 20, 21 *supra*.

23. Hackney Co. v. Robert E. Lee Hotel, 156 Tenn. 243, 300 S.W. 1 (1927); Stewart v. State, 190 Tenn. 334, 229 S.W.2d 504 (1950).

24. Powell v. Bundy, 272 S.W.2d 490, 492 (Tenn. App. M.S. 1954).

25. UNIFORM PARTNERSHIP ACT § 7(4)(b).

26. Note 24 *supra*.

27. 213 F.2d 509 (6th Cir. 1954). There was also a point concerning the suability of the federal government. That point is not covered in the present discussion of the case.

of his profits and one-half his capital interest in the event of dissolution of the partnership. The wife's was one of the claims whose priority was asserted over the trustee in bankruptcy claiming the assets as a representative of creditors. While the organization was still a partnership the same partner incurred some individual tax liabilities to the federal government for which it asserted a tax lien in one of the consolidated cases in the matter at hand. The Government, too, claimed a priority over the trustee. A mortgage on partnership real estate in question was executed by the partnership, but the purported assignment and the tax claim both arose before the date of the mortgage. The trustee in bankruptcy conceded the priority of this mortgage claim. The trustee, however, claimed all proceeds from the sale of the realty over and above the mortgage in his capacity as representative of creditors.

The court held that, because of the nature of partnership property, there could be no valid assignment by the individual partner to his wife. And it further held that, because of the nature of partnership property, there could be no valid tax lien on partnership property for taxes owed by the individual partner. The decree awarded all the proceeds of the sale, after the payment of the mortgage, to the trustee for payment of debts of the bankrupt.

While a trustee in bankruptcy takes title to the property of a bankrupt debtor so he can pay the bankrupt's debts,[28] nevertheless his title may be subject to valid assignments made by the debtor,[29] or valid liens against the property.[30] So the pivotal points in the case at hand revolve around the questions whether the purported assignment by an individual partner of partnership property takes priority over the claim of a trustee in bankruptcy and whether the Government's tax claim for taxes owed by the individual partner is entitled to priority over the trustee. To keep these points in clear perspective, we should not lose sight of the fact that the successor business organization to the partnership is a corporation which is in bankruptcy and was organized by the partners to take over the partnership property and business. The court's opinion does not make it clear, however, whether the partnership was insolvent at the time it sold out to the corporation.

In dealing with attempted assignments by individual partners of their respective rights as co-owners, there arises the question as to what power the partner has to make dispositions of his share of specific partnership property. The Uniform Partnership Act,[31] adopted in

28. Bankruptcy Act § 70, 30 STAT. 565 (1898), 11 U.S.C.A. § 110 (1953).
29. *In re* Rosen, 157 F.2d 997 (3d Cir. 1946).
30. Only judicial liens obtained within four months before the filing of the petition in bankruptcy can be annulled. Bankruptcy Act § 67, 30 STAT. 564 (1898), 11 U.S.C.A. § 107 (a) (2) (1953).
31. At common law, prior to the Uniform Partnership Act, a partner's share was assignable, but the assignee took subject to the equitable right of co-

Tennessee,[32] provides that a partner's right in specific property is not assignable except in connection with the assignment of rights of all partners in the same property.[33] All that the assignee is entitled to receive, under the Uniform Partnership Act, is the assigning partner's share in profits.[34] Hence, because of the very nature of the partner's separate interest in partnership property, a purported assignment of partnership property by an individual partner does not affect the partnership ownership in the property and its availability for partnership creditors.[35]

Nor is a partner's right in specific partnership property subject to attachment or execution, except upon a claim against the partnership.[36] As a remedy for the separate creditor of the partner, however, the Uniform Partnership Act provides a charging order to reach the interest of the debtor partner in the partnership.[37] The charging order is intended to take the place of attachment by the separate creditor, the attachment not being permitted under the act.[38] Moreover, we must not forget that a partner's interest in the partnership is only his share of the profits and surplus after all partnership debts have been paid.[39]

Since a partner's interest is only his share of the surplus after partnership debts are paid, that surplus alone is liable for separate debts of each partner.[40] Thus, if there are no profits, there would seem to be nothing that the creditor can reach, just as the purported assignee could reach nothing but the profits, if any, to which the assigning partner would otherwise be entitled.[41] Partnership creditors must first be satisfied out of partnership assets before there would be any dis-

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partners to have the property applied to partnership purposes. CRANE, PARTNERSHIP § 42 (2d ed. 1952).

32. TENN. CODE ANN. §§ 7841-82 (Williams 1934).

33. TENN. CODE ANN. § 7864 (2) (b) (Williams 1934); UNIFORM PARTNERSHIP ACT § 25(2)(b).

34. TENN. CODE ANN. § 7866(1) (Williams 1934); UNIFORM PARTNERSHIP ACT 7 U.L.A. § 27(1).

35. The Commissioners' Note to section 25 of the Uniform Partnership Act purports to tell us why the individual partner cannot make an assignment of specific property. If the law were to recognize the possibility of such a transfer of specific partnership property by an assignment, the assignee would pro tanto become a partner in the partnership, for the rights of the assignee would be to possess the chattel for a partnership purpose, the same as the assigning partner. A partnership is a voluntary relation and the non-assigning partners cannot have a partner thrust upon them without their consent. Mr. Crane also points out that while the earlier cases protecting the partnership from the separate creditors were based on the non-debtor partners' equities in the partnership property, many later decisions have expressed the theory that the ownership of specific partnership property is in the partnership as a distinct legal person. CRANE, PARTNERSHIP 207 (2d ed. 1952).

36. TENN. CODE ANN. § 7864(2)(c) (Williams 1934); UNIFORM PARTNERSHIP ACT § 25(2)(c).

37. TENN. CODE ANN. § 7867 (Williams 1934); UNIFORM PARTNERSHIP ACT § 28.

38. See CRANE, PARTNERSHIP 213 (2d ed. 1952).

39. TENN. CODE ANN. § 7865 (Williams 1934); UNIFORM PARTNERSHIP ACT § 26.

40. Adler v. Nicholas, 166 F.2d 674, 678 (10th Cir. 1948).

41. Authorities cited note 8 *supra*.

tributable surplus to the individual partner to which the Government could look for the satisfaction of the individual tax liability of the partner, or to which the assignee could look for the satisfaction of his claim.[42]

So, in the case at hand, so long as the business organization remained a partnership (before it became a corporation) it would seem that there was nothing to which the purported assignment could attach, if there was no profits to which the assigning partner was entitled. By the same token, it is difficult to see how the federal government could acquire a tax lien under its statute which provides for a lien in favor of the United States upon property *belonging* to the taxpayer, if there were no profits to which the tax defaulting partner was entitled.[43] The opinion does not make it clear whether such profits were available when the partnership was reorganized into a corporation. If profits to which the partner was entitled existed, there apparently would have been nothing to prevent both the assignee[44] and the Government[45] from realizing their claims, had they taken timely and appropriate steps before the partnership assets were all spent by the successor corporation which, at some stage of the game, became bankrupt.

Winding Up of Insolvent Partnership—Distribution of Assets: Smith v. Shetter[46] was a suit to wind up an insolvent two-man partnership. The issue in the case concerned the distribution of the partnership property where the facts as found showed that one member of the partnership had contributed $1,279.75 more to the partnership than the other partner. In modifying the chancellor's decree, the Tennessee Court of Appeals held that the partner who contributed the larger amount by $1,279.75 was entitled to recover one-half that amount from the other partner. The court adjudged one-half the costs against each of the partners.

The distribution of partnership assets in the process of winding up of a dissolved partnership requires, first of all, the payment of creditors other than partners.[47] After that come the claims of partners other than those for repayment of capital contributions or profits, such as claims for advancements made by partners.[48] Then partners are en-

42. See Adler v. Nicholas, 166 F.2d 674, 678 (10th Cir. 1948).
43. INT. REV. CODE OF 1954 § 6321.
44. In case of dissolution of the partnership, an assignee is entitled to receive his assignor's interest and may require an accounting. TENN. CODE ANN. § 7866(2) (Williams 1934); UNIFORM PARTNERSHIP ACT § 27(2). The transfer of partnership property to the corporation was a dissolution.
45. See Adler v. Nicholas, 166 F.2d 674, 678-79 (10th Cir. 1948).
46. 277 S.W.2d 464 (Tenn. App. M.S. 1955).
47. UNIFORM PARTNERSHIP ACT §§ 18(a), 40; TENN. CODE ANN. §§ 7857, 7879 (Williams 1934).
48. *Ibid.* Partnership assets are, before any distribution to individual partners, subject to reimbursement of one partner for advances made by him to the firm's capital, in behalf of the other partners, beyond the amount for which he may be obligated. Valley Springs Holding Corp. v. Carlson, 56 S.D. 163, 227 N.W. 841 (1929).

titled to the return of their respective capital contributions.[49] If there is not sufficient partnership property to repay capital contributions, the loss is to be shared by the solvent partners, like other losses, in the proportions in which they would share profits.[50] Finally, if there remains any balance of partnership property it is distributable as profits.[51] Of course, the partners, as between themselves, have a right to make such disposition of the partnership property as they deem fit, if no rights of creditors are involved.[52]

In the case at hand the partnership was insolvent and the pivotal point was the share of capital contributions where one partner paid in more than the other partner. In awarding the partner a recovery against the other partner of one-half the extra amount he had contributed in the case at hand, the case seems to represent no departure from the rules for determining the rights of the partners.

Winding Up of Solvent Domestic Corporation—ex rel. *Proceedings: State* ex rel. *v. Breedlove*[53] had to do with the problem of liquidating a domestic private corporation. The record showed that the corporation was organized for a purpose the court treated as illegal (Naturopathy); that the defendant officers had conveyed to themselves almost all of the assets of the corporation, much of which were transferred without consideration and fraudulently; and that the corporation had ceased to be a going concern and was in the process of liquidation. The suit was filed in the name of the State of Tennessee by the District Attorney General on relation of five preferred stockholders. The bill of complaint asked: (1) for an injunction to prohibit the sale of the property; (2) for an accounting; (3) for a liquidation of the corporation; (4) for the recission of the conveyances of the real estate to the defendant officers; and (5) for the sale of all property for the benefit of those entitled to the proceeds. By way of defense the defendants took several positions: (a) that the preferred stockholders could not maintain a bill to wind up a corporation, (b) that the bill could not be maintained because the corporation was not insolvent, and (c) that the court was without jurisdiction. The Tennessee Court of Appeals overruled all the objections and granted relief.

It has frequently been declared as a general proposition that unless

49. The Uniform Partnership Act expressly provides that the rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules: "Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property . . . ." UNIFORM PARTNERSHIP ACT § 18(a); TENN. CODE ANN. § 7857 (Williams 1934). See also UNIFORM PARTNERSHIP ACT § 40; TENN. CODE ANN. § 7879 (Williams 1934).

50. UNIFORM PARTNERSHIP ACT §§ 18(a), 40, TENN. CODE ANN. §§ 7857, 7879 (Williams 1934).

51. *Ibid.*

52. Stroh v. Dumas, 117 Vt. 13, 84 A.2d 408 (1951).

53. 270 S.W.2d 582 (Tenn. App. E.S. 1953).

jurisdiction is conferred by statute, courts of equity have no authority to decree the winding up of a solvent corporation, or to appoint a receiver to distribute its assets and liquidate its affairs at the suit of a minority shareholder.[54] It is now becoming widely recognized, however, that there are circumstances under which a court of equity, in the absence of other adequate remedy, will afford relief to shareholders against fraud and gross mismanagement by an appointment of a receiver and the winding up of even a solvent corporation.[55] Also, where a corporation has ceased to function, or has become insolvent, or where it is impossible to attain the objects for which it was formed, a stockholder may wind up the corporation.[56] The court does not make it clear whether the corporation was insolvent, but that would not seem to be crucial here. The practical consequences of winding up or liquidation in equity will be to put an end to the business life of the corporation, although it does not ipso facto terminate its legal existence or cause a dissolution.[57]

In the case at hand we have an *ex rel.* proceeding in the name of the state, but really for the benefit of the shareholders. The Tennessee law does provide that a suit can be brought in the name of the state against corporations and their officers for various reasons, including the exercise of powers not conferred by law.[58] The corporation in the instant case was engaged in the practice of Naturopathy which the court held to be prohibited by statute, thus making the purpose for which the corporation was formed illegal.

Although there appears to be reason and authority for the *ex rel.* proceeding, it seems that the bulk of the relief granted was more akin to that granted in a suit for the benefit of the stockholders than in the ordinary *ex rel.* proceeding.

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54. BALLENTINE, CORPORATIONS § 304, pp. 714-15 (1946); 16 FLETCHER, CORPORATIONS § 8080 (1942).
55. *Ibid.*
56. Orman v. Bransford Realty Co., 168 Tenn. 70, 73 S.W.2d 713 (1934).
57. BALLENTINE, CORPORATIONS § 304, p. 715 (1946). See Notes, 91 A.L.R. 682 (1934), 61 A.L.R. 1212 (1929), 43 A.L.R. 309-11 (1926).
58. TENN. CODE ANN. § 9336 (Williams 1934).