Chapter 5: Corporations and Partnerships

Cornelius J. Moynihan
§5.1. Consolidation of corporations: Remedy of dissenting stockholders. The modern corporate world demands a procedure for merger and consolidation. Because the courts formerly held that such a step could only be taken by a unanimous vote of the stockholders, the problem of providing such a procedure by less than a unanimous vote was thrust upon the legislatures. In resolving it,1 the legislatures have in turn handed an exceedingly complex problem of stock evaluation back to the courts by requiring that those stockholders who voted against consolidation should receive payment for their shares from the corporation, but failing to stipulate precisely how the value of these shares should be determined. The Supreme Judicial Court squarely faced this and a number of other practical issues in Martignette v. Sagamore Manufacturing Co.2

In the event that the corporation and the dissenting shareholders cannot agree as to the value of the shares, G.L., c. 156, §46E, by reference to Section 46, provides that "... such value shall be ascertained by three disinterested persons, one of whom shall be named by the stockholder, another by the corporation and the third by the two thus chosen. The finding of the appraisers shall be final, and if their award is not paid by the corporation within thirty days after it is made, it may be recovered in contract by the stockholder from the corporation ..." In the Martignette case the plaintiffs voted their 564 shares3 against consolidation, demanded payment for their shares, and, upon a disagreement with the corporation as to their value, appointed an appraiser, as did the corporation. The two appraisers, however, could not agree upon a third, and upon a bill brought by the plaintiffs

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A considerable portion of the text, as well as the research, was furnished by John J. Madden and Francis J. Lawler of the Board of Student Editors of the Annual Survey.

§5.1. 1 Massachusetts provided the procedure in G.L., c. 156, §46B, which requires a two-thirds vote for consolidation with another firm.
3 Out of a total of 28,295 outstanding shares.
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the court appointed a third appraiser, the parties stipulating that this was to have the same legal effect as though he had been named by the other two.\(^4\)

Making use of balance sheets, profit and loss statements, the dividend record, a breakdown of the inventory, and statements of the market value of the corporation's securities, and of uncollected receivables, a majority of the appraisers determined the value to be $145 per share, a figure that was affirmed by the Superior Court. The defendant appealed from that final decree arguing, inter alia, that it was bad in law in that the figure exceeded the shown market value of the shares. The defendant had introduced evidence of over-the-counter sales of 648 shares at prices of $100 to $119 per share in the months immediately prior to the vote for consolidation.

In first answering the plaintiff's contention that the finding of the appraisers was not reviewable by the Court in the absence of fraud, the Court held that the appraisal, although "final" (G.L., c. 156, §46), was subject to review for errors of law. The Court distinguished the Martignette case from those wherein the parties have agreed between themselves that they shall be paid what others determine they shall be paid,\(^5\) or to be bound by an award of arbitration.\(^6\) Here the parties have been forced into this position by the statute. Thus it follows that they should be paid what the statute means by "value," and it is the Court's function to review possible errors of law to see that there has been compliance with the statute.\(^7\)

The problem of valuation is difficult because the legislature has stipulated only that the "value" of the stock is to be paid the dissenters. Whether this is to be the market value, book value, or any of the myriad other methods of evaluating the worth of shares in a company is left to judicial ascertainment. The statutes of other states are equally unhelpful, specifying "value," "fair value," or "fair cash

\(^4\) The failure of the Massachusetts statute to provide for authorization to the parties to make application to a court for appointment of appraisers in the event that one of the parties refuses to name an appraiser or the two appraisers named cannot agree on a third is one of the more obvious deficiencies in the statute. For a discussion of the practical difficulties facing corporate counsel in applying the statute, see Kaplan, Problems in the Acquisition of Shares of Dissenting Minorities, 34 B.U.L. Rev. 291 (1954).


\(^7\) The opinion leaves open perplexing questions as to the scope of judicial review of the award made by the appraisers and the procedure for obtaining review. For example, to what extent are questions of admissibility of evidence open on review and by what procedure? Here again the oversimplified statute provides no guide. Where the statute provides for ultimate determination of value by the court the area of review is much broader. See, e.g., Del. Code Ann., tit. 8, §262(e), (f) (1953). "Modern statutes tend to dispense with appointment by the parties and provide either for court appointment of an appraiser or appraisers, or for determination of value by the court itself." 2 Hornstein, Corporation Law and Practice §682 (1959).

\(^8\) Connecticut, Delaware, Idaho, Missouri, New York, North Carolina, Vermont.

\(^9\) Maryland, Rhode Island, Tennessee.
value." 10 A minority stipulate "market value." 11 It is arguable that where there is an established market that has been steady during normal times, the market price of the stock is as good an indication of its value as any other figure. And the market price is, after all, the usual measuring stick administered by the courts in other areas such as taxation, the settling of estates, and conversion. 12 However, as the Court pointed out in affirming the appraisal of $145, the very fact of the consolidation itself may have such an effect upon the highly fluid stock market that the market price might not be a true measure of value, and thus although it might be given considerable weight, the appraisers were justified in not confining themselves to it alone. 13

The Supreme Judicial Court has not only aligned itself with the majority of states on this point 14 but found precedent for its holding in a prior Massachusetts case that the defendants had hoped would be distinguished or overruled. Construing this statute in 1916, the Court said in Cole v. Wells: 15 "It is obvious that 'the value of the stock' means not merely the market price if the stock is traded in by the public, but the intrinsic value, to determine which all the assets and liabilities must be ascertained." In accepting the rule of "intrinsic value," the Court admitted that the statement in the Cole case was not necessary to the decision in that case, no market for the stock having been shown. At the same time the Court expressly rejected the further dictum in Cole "that valuation . . . is to be ascertained as if liquidation had been voted" and emphasized the importance of going-concern value. It may be fairly said that on the whole the Court is adopting the "investment value" theory of valuation, with discretion being given to the appraisers in the particular case "to determine the weight of the relevant factors." 16

In addition to holding that unanimity of the appraisers was not required, the Court modified the finding of the Superior Court as to the date from which interest was payable to the dissenters. The

10 Arkansas, Florida, Louisiana, Minnesota, Nevada, Ohio, Virginia.
11 Alabama, California, New Jersey, Pennsylvania.
12 "Market value" as reflected in sales over the counter is far less reliable as an indicator of value than the market price when the sales have been in considerable volume on a national stock exchange. Compare Application of Silverman, 282 App. Div. 252, 122 N.Y.S.2d 312 (1st Dept. 1953) (stock in R. Hoe & Co., Inc.) with Application of Deutschmann, 281 App. Div. 14, 116 N.Y.S.2d 578 (1st Dept. 1952) (stock in American Telephone & Telegraph Co.)
13 The statutes of some states expressly exclude from the determination of value any appreciation or depreciation directly or indirectly resulting from the proposed merger or consolidation. See, e.g., N.Y. Stock Corporation Law §21.
plaintiff dissenters had argued that interest should be paid from August 10, 1956, the date of the vote for consolidation. The Superior Court had allowed interest from September 10, 1956, the date by which the dissenting shareholders had to make a written demand to the corporation for payment pursuant to G.L., c. 156, §46E. The Supreme Judicial Court held that interest should be paid only from October 22, 1958, which is thirty days after the appraisers’ finding and the date on which the statute provides that the dissenters’ contract right shall arise.

The Court’s refusal to award interest on the shares from the date of the vote for consolidation or from the date of demand for payment was based upon the conclusion that the dissenters continue as shareholders until the value of their shares is found by the appraisers. But the Court indicated an awareness that in at least some situations fairness might require that the dissenters be denied some of the rights of assenting shareholders. A distinction might be made, for example, between a right to stock dividends and cash dividends declared in the interval between demand for payment and the payment of the appraisers’ award.17

§5.2. Damages for breach of director’s duty of loyalty. In Anderson Corp. v. Blanch1 the Court was required to deal with the rather difficult problem of damages that arises when a director-officer violates his fiduciary duty by entering into competition with his own corporation. The defendant, Blanch, a director, treasurer, and general manager of the plaintiff, became dissatisfied after he had sold his 50 percent share holdings to his fellow stockholders and proceeded to organize a new corporation to carry on the same line of manufacturing and to sell in the same market as the plaintiff. Not only did he arrange the organization of the new corporation but actively participated in planning and designing products for manufacture and obtaining space and equipment for it. His services to the plaintiff became affected by his disloyalty and his activities on behalf of the new corporation caused a loss to the plaintiff. In addition he acted in bad faith, according to the findings of the master, in ordering useless wire for the plaintiff.

The plaintiff corporation was held entitled to recover damages in three respects: (1) the difference between the salary paid to the defendant Blanch by the plaintiff from the time his allegedly disloyal acts began and the value of his services to the plaintiff during that period; (2) the damages sustained by the plaintiff as a result of Blanch’s conduct; and (3) the loss sustained by the plaintiff on the purchase of the wire ordered by Blanch.

The plaintiff seems to have pitched its case primarily in terms of breach of an employment contract rather than on the broader basis of


breach by a director-officer of his duty of loyalty. Frequently, the result from the standpoint of damages will be the same, but the duties of a director are not confined to the terms of an employment contract. His affirmative duty to protect the corporation requires something more than abstention from conduct involving corruption, dishonesty, or bad faith. Quite properly, therefore, the Court recast the issue in terms of the defendant’s failure to discharge his fiduciary duties “as a general corporate officer.” And although the Court refused to decree a complete forfeiture of the defendant’s salary because of his breach of duty, it retained a flexible control over the matter of allowable compensation by reaffirming the case-by-case approach adopted in *Lydia E. Pinkham Medicine Co. v. Gove*.

It may be of some significance that the Court in its opinion made no reference to the well-known case of *Lincoln Stores v. Grant*, which involved the problem of competition by directors with their corporation in addition to the question of the appropriation by directors of a corporate opportunity. In *Lincoln Stores* the Court stated: “Directors or officers of a corporation are not, by reason of the fiduciary relationship they bear toward the corporation, necessarily precluded from entering into an independent business in competition with it, but, in doing so, they must act in good faith.” This overly lax concept of fiduciary loyalty with its implied encouragement to conflicts of interest may be in the process of being quietly discarded.

§5.3. Foreign corporations: Solicitation and other limited business activity as a basis for conferring jurisdiction. A perennial and vexatious problem in this Commonwealth for the last thirty-odd years has involved the extent to which a foreign corporation might engage in business activity within this state without subjecting itself to nondomiciliary jurisdiction for the litigation of claims arising out of that activity. That the problem has arisen at all is somewhat anomalous in view of the all-embracing language of the applicable statute. The explanation lies in the fact that the statute has not always been judicially accorded its literal construction. In *Thurman v. Chicago, Mil...*
waukeek & St. Paul Ry. Co., the Supreme Judicial Court, in interpreting an almost identical statute, held that the mere solicitation of interstate business by a foreign corporation was insufficient to confer jurisdiction, despite the fact that the statute expressly authorized service of process when the corporation was soliciting business within the state. The decision there rested upon constitutional grounds, with the Court expressing the fear that such a statute, if interpreted to subject a corporation that was merely soliciting business in the state to the processes of the courts of that state, would be violative of due process. Since then, however, the Supreme Court of the United States has upheld the constitutional validity of similar statutes. This would seem to remove any constitutional obstacle to giving the statute the full scope of its wording, but the rule that mere solicitation would not, without more, subject a foreign corporation to the forums of the state was apparently left undisturbed.

In every instance in which a foreign corporation, served with process pursuant to G.L., c. 223, §§37, 38, defended on the ground of jurisdiction, the Supreme Judicial Court managed to find activity in addition to solicitation which validated the exercise of jurisdiction without requiring an upset of the holding in Thurman.

Massachusetts' exercise of jurisdiction was unsuccessfully challenged twice during the past year, once in a state tribunal and once in the United States District Court for the District of Massachusetts. In the former case, Hub Mail Advertising Service, Inc. v. Inter City Sales, Inc., the established pattern of finding activity in addition to solicitation was adhered to in affirming the jurisdictional basis, while, on the other hand, the District Court in Radio Shack Corp. v. Lafayette Radio Electronics Corp. broke with this seeming tendency and concluded that the rule today in Massachusetts was that mere solicitation did.

2 254 Mass. 569, 151 N.E. 63 (1926).
3 G.L., c. 223, §38, stated, as does the current statute, that "In an action against a foreign corporation . . ., which has a usual place of business in the commonwealth, or, with or without such usual place of business, is engaged in or soliciting business in the commonwealth, permanently or temporarily service may be made . . ." as provided for in G.L., c. 223, §37.
4 254 Mass. 569, 574, 151 N.E. 63, 65 (1926).
furnish a basis for jurisdiction. In *Hub Mail* the Court found the statute\(^{10}\) was satisfied on a showing that in the conduct of its activities in Massachusetts the foreign corporation engaged an employee, negotiated and contracted and bought goods, made payments by check to creditors, and otherwise looked out for and defended its interests. In so doing, the Court reaffirmed the principles laid down in *Wyshak v. Anaconda Copper Mining Co.*\(^{11}\) by upholding jurisdiction where the evidence revealed solicitation plus additional activity. As before, it was not required to pass upon the exercise of jurisdiction based solely and exclusively upon solicitation.

Shortly after the *Hub Mail* decision was handed down, the exact question which had evaded unequivocal resolution in the state courts was placed squarely before the Federal District Court of Massachusetts by the facts of the *Radio Shack Corporation* case. In that case one of the defendants, Lafayette Radio Electrical Corporation, was a New York corporation engaged in the business of manufacturing and distributing electronic products. The other defendant, Lafayette Radio Corporation of Massachusetts, was a Massachusetts corporation all of whose stock was owned by the New York corporation. The Massachusetts corporation sold electronic products, some of which it obtained from the New York corporation, and also distributed flyers and catalogs, supplied by the New York corporation, which advertised and solicited business and which carried the names and addresses of both corporations as the soliciting firms. Evidence was introduced which justified the conclusion that a considerable amount of business carried on between the New York corporation and residents of Massachusetts was owing to the distribution of the catalogs and flyers throughout the state by the Massachusetts corporation.

By service of process on both the general manager of the Massachusetts corporation and on the Massachusetts Commissioner of Corporations, the plaintiff corporation instituted suit joining both the Massachusetts and New York corporations and alleging unfair competition and a cause of action under the Trademark Act of 1946. The defendant New York corporation moved for dismissal on the ground that no jurisdiction over it could properly be asserted.

The Court on these facts took the position that, through the agency of the Massachusetts corporation's distribution of flyers and catalogs, the New York corporation solicited Massachusetts business, and relied on *Wyshak*\(^{12}\) in reaching the conclusion that solicitation alone was

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\(^{10}\) See note 1 *supra*.

\(^{11}\) 328 Mass. 219, 103 N.E.2d 280 (1952). In the *Hub Mail* case the defendant urged that the rule in Thurman was applicable by analogy: if mere solicitation for sale is insufficient to confer jurisdiction, so too is solicitation for purchase. Brief for Inter City Sales, Inc., p. 10.

\(^{12}\) The Court purported to quote from Wyshak as follows: "We perceive no reason why mere solicitation should be ... insufficient under the statute providing for service upon foreign corporations." But if the omitted words are supplied the sentence takes on a different meaning: "We perceive no reason why mere solicitation should be sufficient to constitute having a usual place of business under the statute
sufficient to confer jurisdiction. It further concluded that service on the Massachusetts corporation’s general manager was statutorily authorized. Thus, for the first time since the Thurman decision there was a judicial pronouncement giving effect to the letter of G.L., c. 223, §38.

The Court in Radio Shack Corporation took the opportunity to go one step further in applying this principle that solicitation of business in a state is, by itself, an adequate basis for jurisdiction. Another statutory method of initiating suit against a foreign corporation doing business within the Commonwealth is by service of process on the Commissioner of Corporations, pursuant to Sections 3 and 3A of G.L., c. 181. These statutes, along with Sections 5 and 12 of G.L., c. 181, were before the Supreme Judicial Court in 1959 in Remington Arms Co. v. Lechmere Tire and Sales Co. There the Court expressed reluctance, in the absence of any legislative action, to broaden the scope of Chapter 181 despite certain decisions of the United States Supreme Court which indicated that legislative power over foreign corporations engaged in interstate commerce need not have been so severely limited. As a result, the Remington decision held, in part, that Sections 3, 5, and 12 of G.L., c. 181, do not apply to foreign corporations engaged solely in interstate commerce. Nevertheless, the Federal District Court in Radio Shack Corporation read this part of the decision as expressive of the state Court’s willingness to distinguish Section 3A of this chapter from Sections 3, 5, and 12 in the light of the Wyshak decision, and accordingly held that mere solicitation of business by a foreign corporation was an adequate basis for service of process under G.L., c. 181, §3A. It may well be that the Federal District Court has read into Remington and Wyshak more than was intended and that the Thurman case, with its restricted view that mere solicitation relating to trustee process but insufficient under the statute providing for service on foreign corporations.” See note 1 supra.

13 G.L., c. 223, §37, as amended by Acts of 1945, c. 306, §1, outlines the manner in which a domestic corporation or a foreign corporation fulfilling the requirements of §38 is to be served. In part it provides that service may be made on an agent in charge of the corporation’s business.

14 See note 1 supra.

15 G.L., c. 181, §3, requires every foreign corporation doing business within the Commonwealth to appoint as its attorney for the service of process the Commissioner of Corporations. G.L., c. 181, §3A, provides that in the event of a failure to make the appointment as required in §3, the corporation will be deemed to have done so.

16 G.L., c. 181, §5, provides: “Every foreign corporation of the classes described in section three, before transacting business in this commonwealth, shall, upon payment of the fee provided by section twenty-three, file . . . a copy of its charter . . . certified . . . by-laws, and a certificate” of certain information as to the corporate officers, meetings, and stock. G.L., c. 181, §12, prescribe the filing of an annual certificate of condition for every foreign corporation, other than one which is required to make annual returns to the Department of Public Utilities.


18 See cases cited in note 5 supra.
§5.4. Ultra vires and the doctrine of implied powers. In this Commonwealth a private corporation is authorized to undertake such activities as are incidental and auxiliary to its main business. Of late, privately owned utility companies, organized to manufacture and sell gas or electricity, have initiated a policy of retailing appliances energized by these fuels. In *Long v. Brockton Taunton Gas Co.*, the corporation's right so to do was challenged via a bill in equity to enjoin a private gas company from continuing to sell or rent gas heaters, stoves, and other appliances. The plaintiffs, minority stockholders in the corporation, claimed such activity was ultra vires under a corporate charter empowering the sale and manufacture of gas. On appeal, the Supreme Judicial Court affirmed the lower court ruling that these retail transactions were fairly incidental to the corporation's main business, and thus within the scope of charter powers.

In an earlier case, *MacRae v. Selectmen of Concord*, it was held that a municipality in the business of supplying electric energy did not possess incidental powers which would authorize the sale of electrical appliances under the then existing statute. The Court there distinguished between a municipality and a private corporation with reference to the incidental powers rule, but implied that the distribution of fuel is an activity entirely disparate from the sale of appliances. The *Long* case allays any fear that this implication might be construed to mean that the retailing of appliances is not a power incidental to the distribution of gas or electricity, and the result reached in *Long* is in accord with other jurisdictions which have had occasion to pass judgment on the issue.

§5.5. Partnerships: Liability of a dormant partner for debts incurred after dissolution. In an era when the corporation is so widely used as the legal form for business enterprises, cases involving partnership law have come before the Supreme Judicial Court only infrequently. But partnership law is complex and when such cases do arise they pose difficult problems. In *Warner v. Modano*, for example, the

4 G.L., c. 164, §34. This was subsequently amended by Acts of 1937, c. 235, §1, which expressly gave to a municipality engaged in the business of distributing gas or electricity the authority to sell, at prevailing retail prices, appliances utilizing gas or electricity.
5 296 Mass. 394, 398, 6 N.E.2d 366, 368 (1937). For the same intimation see Opinion of the Justices, 300 Mass. 591, 593, 14 N.E.2d 392, 393 (1938). And in Lowell Gas Co. v. Dept. of Public Utilities, 324 Mass. 80, 99, 84 N.E.2d 811, 822 (1949), the opinion is expressed that "The sale and servicing of gas appliances constitute a separate business from the supplying of gas."

§5.5. 1 340 Mass. 439, 164 N.E.2d 904 (1960).
Court was required to consider the liability of a dormant partner for postdissolution debts under the complicated provisions of Section 35 of the Uniform Partnership Act.²

The case arose in the form of a suit by the assignee of six trade creditors to recover for goods sold and delivered to the "Napoli Super Market." Prior to June, 1953, the market had been operated by Modano and Acconia as partners, but in that month Modano bought out Acconia's interest and Acconia retired from the firm. Thereupon one Beale, a physician, became a partner with Modano in the operation of the market, and this partnership continued until dissolved by written agreement in September, 1954. Beale was a secret and relatively inactive partner. Modano filed a certificate under G.L., c. 110, §5, stating that the business was being conducted by him. After the dissolution of the Beale-Modano partnership the latter continued to operate the market. Two of the six trade accounts were for goods sold and delivered during the existence of the Beale-Modano partnership, and four of them were for merchandise supplied to the Napoli Market after Beale had retired from the firm. Suit was brought against both Beale and Modano, but the only issue was as to Beale's liability.

The trial judge ruled that Beale was liable on all six accounts as though he were an actual member of the partnership under G.L., c. 108A, §16 (1) (a), because by reason of his words and conduct he had represented himself as a partner in the business in a public manner. It is apparent that the trial judge confused the status of a dormant partner with that of a partner by estoppel. Since it had been found as a fact that Beale had become an actual partner, the provisions of Section 16 of the Uniform Partnership Act were not relevant to the case. That section deals exclusively with partnership by estoppel. Beale could not be simultaneously an actual partner and a partner by estoppel. Yet the Supreme Judicial Court also dealt with the question of Beale's liability as though Section 16 were pertinent to the issue. It held that Beale was not liable under Section 16 for the four debts contracted after dissolution because no representation had been made to the creditors that Beale was a partner. The Court could have disposed of the Section 16 problem by pointing out that Beale was not a partner by estoppel.³

Since Beale was found to be an actual partner, he was clearly liable on the two trade accounts contracted during the continuance of the business, and the Court so ruled. The fact that he was a dormant, silent, or inactive partner would not relieve him from liability.⁴ Whether he was liable for the four postdissolution debts depended on the application of Section 35 of the act to the facts found. That section

² G.L., c. 108A.
³ There was no finding that Beale after the dissolution agreement represented himself as a partner or consented to such representation. If he had done so, he would have become a partner by estoppel under Section 16 of the act. G.L., c. 108A, §§35(4).
⁴ G.L., c. 108A, §9; Crane, Partnership 111 (2d ed. 1952).
is the controlling statutory provision on the liability of a partner after dissolution, and the plaintiff properly relied upon it in the effort to reach Beale. Section 35 makes a distinction between active and dormant partners with respect to liability on postdissolution transactions. A retiring active partner is personally liable on any transaction which would bind the partnership prior to dissolution if the other party to the transaction had extended credit to the firm prior to dissolution and had no knowledge or notice of the dissolution or even if such party had not so extended credit but had known of the partnership prior to dissolution, was without knowledge or notice of the dissolution, and the fact of dissolution had not been advertised in a local newspaper. But a dormant partner is liable on such transactions only to the extent of firm assets if he was unknown as a partner to the creditor and was "so far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it." 8

None of the postdissolution creditors knew of Beale's relationship to the business; therefore, the decisive issue was whether the business reputation of the firm was "in any degree" due to Beale's connection with it. The Court held that the qualification of "reasonableness" must be read into the statute and that the question to be determined was whether it could "reasonably" be concluded that there was a causal connection between Beale's participation in the business and the business reputation of the firm. On the evidence, Beale was not known as a partner in the business community, had never ordered merchandise, had not worked in the market nor directed the operations and did not keep its books. But there was also evidence that Beale was not completely inactive in the business; he engaged employees, appeared regularly to examine the books, purported to discharge the manager in a letter signed by him as "co-partner," and warned a salesman for a supplier not to accept an order from the manager. The Court conceded that some persons in the business community may have heard of Beale's connection with the business but held that on the evidence a ruling was required that the reputation of the market could not reasonably be found to have been in any degree due to his connection with it. The final decree was ordered to be modified by limiting Beale's obligation to the two accounts for goods sold to the market while Beale was a partner. 6

When a question so difficult of factual ascertainment as "business reputation" and its sources is in issue, the matter of burden of proof may well be decisive. Yet it is not clear from the opinion whether the Court thought that this burden rested on the plaintiff or on Beale.

6 It would seem that more properly the decree should also have adjudged Beale liable on the four postdissolution accounts, with the liability to be satisfied only out of partnership assets. This would establish the right of the plaintiff to reach firm assets with respect to these accounts on an equal basis with firm creditors. Cf. G.L., c. 108A, §§35, 40.
Although it has been held elsewhere that a retiring active partner has
the burden of proving that notice of dissolution was given to prior
creditors,\(^7\) it does not necessarily follow that the same rule should be
applied to retiring dormant partners. Where the retiring partner had
been known and active in firm affairs, prior creditors are entitled to
rely upon a continuance of the same state of affairs in the absence of
knowledge or notice of dissolution. But where the retiring partner
was generally unknown and inactive prior to dissolution, it would
seem reasonable to cast upon the creditor the burden of establishing
the necessary elements of an estoppel.\(^8\)

\section*{§5.6. Liability of a limited partner.} Due to a lack of Massachusetts
decisions, the Court of Appeals for the First Circuit, in \textit{Plasteel Products Corp. v. Helman},\(^1\) was forced to call on cases from other jurisdictions in an effort to construe a section of the Uniform Limited Partnership Act.\(^2\) The plaintiff, a Pennsylvania corporation, sued the
defendants for an unpaid balance for goods sold and delivered to them,
and attempted to predicate liability upon Section 7 of the act, which
provides: "A limited partner shall not become liable as a general
partner unless, in addition to the exercise of his rights and powers as a
limited partner, he takes part in the control of the business."

The limited partnership agreement in this case named a general
partner, who contributed services but no cash and who was to receive
an initial 10 percent of the net profits, and also named the defendants
as limited partners, who were described as trustees of three trusts, with
one trust contributing $100 and participating in 25 percent of the
balance of the profits and with the remaining two trusts contributing
$5000 each and each participating in \(\frac{37}{3}\) percent of the balance of the
profits. In addition the agreement named the father of the bene-
ficiaries of the first trust as general sales manager and authorized
execution of various financial powers by the general partner only
when he acted jointly with the sales manager. However, there was also
evidence that the general partner could have discharged the sales
manager at any time, thus leaving the general partner in sole control.

The plaintiff appealed from an allowance by the District Court of
a motion for summary judgment on behalf of the trustees of Trusts 2
and 3, finding that they were only limited partners. The Court of
Appeals affirmed, holding that their mere signing of the agreement pro-
viding for such terminable joint action was not taking "part in the
control of the business" within the meaning of Section 7 of the act.

This decision follows cases in other states that have adopted the act

\(^7\) Credit Bureaus of Merced County, Inc. v. Shipman, 167 Cal. App. 2d 673, 334
P.2d 1036 (1959); Johnson Tire Co. v. Maddox, 188 Utah 626, 221 S.W.2d 948 (1949).
creditor seeking to hold liable retiring active partner has burden of proving he knew
of existence of partnership prior to dissolution where he had not extended credit
prior to dissolution).

\section*{§5.6.} 1 271 F.2d 354 (1st Cir. 1959).
2 G.L., c. 109, §7.
in liberally construing Section 7. Thus, it is not "control" where the
limited partner gives his opinions and suggestions to the general
partner, especially when they are sought by the latter, or if the limited
partner is on the board of directors but the testimony shows that he
never functioned as a director. The line of limited liability is
crossed, however, when the signatures of the purported limited partners
were necessary to the issuance of any checks and, indeed, where they
could issue checks without the general partner's approval. Obviously
the saving factor in the present case was the terminable quality of the
sales manager's position. The court analogized it to a California
case, wherein the limited partner was authorized to co-sign the checks,
but they also could be signed without him.

The court refrained from citing earlier Massachusetts decisions that
applied statutes in force prior to the Uniform Limited Partnership
Act, pointing out that the very reason for the existence of the new act
was to overcome the strict interpretations which were frustrating the
purpose of statutory limited partnerships. These cases have been
soundly condemned in that they had the effect of attaching the un­
limited liability of a general partner to the "limited" partner for the
slightest deviation from the statutory norm.

Factually, the case presents an unusual but not unique combination
of a limited partnership and a trust as a device for investment in a
business enterprise with limited liability. Even under the liberal
escape clause from unlimited liability, provided by Section 11 of the act
for persons contributing capital in the erroneous belief that they are
limited partners, the shadow of contingent unlimited liability over­
hangs the limited partner. The trust has been said to be "an insur­
mountable barrier" between creditors of the partnership and the trust
beneficiaries. But the trustees themselves are limited partners and
under Section 7 of the act become liable as general partners if they
take part in the control of the business. At the District Court level the
trustees in the Plasteel Products case unsuccessfully contended that the
trust estates became limited partners. The trial judge rejected this
claim on the ground that a trust is not a legal entity and further held
that the trustees of Trusts 2 and 3 became limited partners in their
individual capacities. The Court of Appeals found it unnecessary to
review this holding, but it would clearly seem to be in accordance with
Massachusetts law.

8 Gilman Paint & Varnish Co. v. Legum, 197 Md. 665, 80 A.2d 906 (1951); Rathke
U.S. 553, 44 Sup. Ct. 157, 68 L. Ed. 441 (1923).
Mass. 352, 185 N.E. 44 (1933).