Chapter 8: Corporations and Partnerships

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§8.1. Stock transfer restriction: Private stockholder agreement. A complete and absolute restriction against transfer of corporate stock has always been invalid as an improper restraint on alienation. Where the restriction, however, is a means of securing corporate control to those who developed and operated the corporation, the purpose is not "palpably unreasonable." The Supreme Judicial Court in Colbert v. Hennessey thus upheld a tripartite agreement which created the restriction. In quoting Chief Justice Holmes that "there seems to be no greater objection to retaining the right of choosing one's associates in a corporation than in a firm," the Court added that effect should be given to "agreements among stockholders in a close corporation just as effect is given to provisions for corporate consent or first options in articles of association or by-laws."

The appellant contended that the agreement did create a complete and absolute restraint. As opposed to the commonly used "first op-

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§8.1. 1 See, e.g., 68 Beacon St., Inc. v. Sohier, 289 Mass. 354, 360-362, 194 N.E. 303, 305-306 (1935); Longyear v. Hardman, 219 Mass. 405, 408, 106 N.E. 1012, 1013 (1914). Both decisions are discussed in the text supported by notes 8-10 infra.

2 1966 Mass. Adv. Sh. 997, 217 N.E.2d 914. This decision also involved the removal of a fiduciary (executor) because of partiality and conflict of interest in his role as executor and as director. Additional aspects of this decision are discussed in other sections of this chapter. The basic facts of this case are as follows: Loew loaned money to the corporation and received as security a mortgage, notes endorsed by Bowser, 25 per cent of the outstanding stock and a pledge of Bowser's stock (a 35 per cent interest). A voting trust agreement was also executed. The corporate by-laws and the trust agreement both contained a stock transfer restriction granting the corporation a first option. Years later Bowser and two other minority stockholders entered into a private agreement requiring their unanimous consent for any transfer. Bowser died leaving his stock to his relatives who subsequently assigned their legacy to Loew. Loew argued the invalidity of the private agreement and the validity of the by-law restriction and the pledge.


5 The agreement, according to the reported facts, provided that no one of the parties or their heirs, executors, administrators, or assigns could transfer or sell his stock without the consent of the other parties.
tion" provision in articles of organization whereby the stock may be transferred if the corporation declines to purchase it. The agreement, in effect, precluded the estate of the deceased stockholder (and party to the agreement) from selling or transferring the stock without consent of the other parties. The appellant emphasized that the stock could be frozen in the estate, leaving little value.

The Colbert decision, involving a private stockholder agreement, is one of first impression for the Supreme Judicial Court. The Court in effect held that its prior decisions pertaining to stock transfer restrictions were not distinguishable but directly applicable. For example, 68 Beacon St., Inc. v. Sohier was cited by the Court. This case involved a non-corporate agreement. A 99-year lease for a cooperative apartment prohibited the transfer of the cooperative stock without consent of the board of directors. Unlike Colbert, however, this restriction was also contained in the corporate by-laws and printed on the stock certificates. In finding the restriction not palpably unreasonable, the Court emphasized that the prohibition was limited to the stockholder's lifetime, again unlike the Colbert case.

Longyear v. Hardman was argued by both sides and cited by the Court in its opinion. In that case the agreement of association prohibited transfer without the consent of three fourths of the capital stock. While it was an "indefinite" restraint, the Court found no objection. Unlike Colbert, in Longyear the restriction was created via the formal corporate process:

The insertion of the restriction upon the right of transfer of the shares of stock in the agreement of association, the initial act in the organization of the company upon which depends all that comes after, is a limitation upon the corporation. It becomes a part of its being and enters into each share of stock as a part of its essence. The corporation comes into existence with this inherent qualifying restraint. It is agreed to by all the original incorporators who in respect of determining the nature of the corporation speak for future stockholders. It must be approved by the commissioner . . . before the charter can issue. A copy of it is a public record . . . . The certificate of stock contains [a] reference . . . .

Because of these distinctions, the Supreme Judicial Court has implied that a private stockholder agreement will be tested with the same standards of reasonableness as utilized in corporate-adopted restric-

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6 See note 3 supra.
7 The Court's response to this point is apparently reflected in its statement that the agreement enabled the estate to sell the stock at a higher price. The block sale carried voting control. As assignee of the residuary interest, the appellant Loew's own position was enhanced, but not as a stockholder.
9 219 Mass. 405, 106 N.E. 1012 (1914).
10 Id. at 409, 106 N.E. at 1014.
§8.2 CORPORATION AND PARTNERSHIPS

The Chief Justice Holmes was correct to a point when he stated that stock "creates a personal relationship analogous otherwise than technically to a partnership." However, incorporation naturally involves certain sacrifices of freedom of action. Is it not reasonable that the private agreement be strictly construed, especially when executed subsequent to the time of incorporation? Should it not at least be analyzed to determine whether it serves the legitimate purposes of the individual? The emphasis in Longyear was on whether it served corporate purposes.

The Colbert opinion did not mention whether the certificates covered by the agreement contained a notice of the restriction. Massachusetts statutes provide that no restriction is enforceable unless at least the existence of the restriction is prominently noted on the certificate. There is an exception, however, when one has knowledge of the restriction, which was apparently the case in Colbert. In addition, the non-corporate aspect of the restriction in Colbert is itself an exception. General Laws, Chapter 106, Section 8-204, applies only to restrictions imposed by the "issuer," i.e., the corporation. And Chapter 156B, Section 27(b), applies only to restrictions imposed by the articles of organization, by-laws, or agreements to which the corporation is a party. Unless the Court resorts to the principle of estoppel, the limited application of these statutory provisions is a more compelling reason for closer scrutiny of private agreements by using a more restrictive standard of reasonableness.

§8.2. Ultra vires: Corporate purchase of voting trust certificates. The Supreme Judicial Court, in Sagalyn v. Meekins, Packard & Wheat, Inc., prohibited the use of corporate funds for the non-corporate purpose of establishing a voting trust designed to perpetuate in office the incumbent management. However, in Colbert v. Hennessey, the Court held that the corporate purchase of voting trust certificates would "not contravene the principle" of the Sagalyn decision. The purpose of the restriction granting the corporation the option to purchase, whether applied to the trust certificates or the stock shares, was the same, i.e., "control entry into the corporation by outsiders."

It is difficult to reconcile the two decisions. By exercising the option upon a proposed transfer, is the corporation buying just voting trust certificates or also redeeming the underlying stock? Is the stock re-

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13 G.L., c. 106, §§-204, comment 1.
deemed as treasury stock; is it cancelled? Regardless of the answers, the corporation cannot "directly or indirectly" vote the stock.³ Therefore, the corporation cannot indirectly vote upon its stock through trustees who hold such stock for the benefit of the corporation.⁴ Is the Supreme Judicial Court holding in Colbert that in purchasing the certificates, the corporation also redeemed the stock? An affirmative answer would seemingly run contrary to the general intent of the trust since redemption would result in less voting power. The voting trust is typically "an agreement among stockholders . . . to make their power felt through combination" of voting strength.⁵

However, in order for the Sagalyn and Colbert decisions to be consistent, the Court must be in effect so holding. Otherwise the corporation would become a party to the voting trust which would be considered objectionable under the Sagalyn decision and would then violate the statutory prohibition against indirect voting.⁶ But, as mentioned, redemption would certainly upset the delicate voting balance created by such trusts. It would seem that this result was not contemplated when the trust agreement expressly imposed the same restrictions on transfer imposed by the articles and by-laws.⁷

§8.3. Voting trusts: Power to sell corporate assets. The Supreme Judicial Court recognized in Massa v. Stone¹ that the protection of creditors is a legitimate reason for the creation of a voting trust. It is the means whereby creditors are assured of "unity and continuity in corporate management policy while [their] . . . indebtedness exists." ² In Massa the trust was created at the direction of the creditor who continuously lent money to the corporation. For years two of the trustees managed the corporation in accordance with his instructions; the third trustee was generally ignored or outvoted. The Court recognized that

³ G.L., c. 156, §31: "No corporation shall, directly or indirectly, vote upon any share of its own stock." G.L., c. 156B, §40, is similar.
⁶ G.L., c. 156, §31.
⁷ Because of this provision in the voting trust agreement, the Court did not have to answer the following question: In the absence of a provision in the articles of organization or by-laws making the stock transfer restriction specifically applicable to voting trust certificates, will the certificates nevertheless be subject to the restriction? The agreement stated: "[T]he transfer of said Voting Trust Certificates shall be subject to the same restrictions imposed upon the shares of the Common Stock . . . as provided in its Articles . . . and By-laws with the same force and effect as though the same were included as a condition and agreement herein."

§8.3. ¹ 346 Mass. 67, 190 N.E.2d 217 (1963). This case is reported in 1963 Ann. Surv. Mass. Law §5.2, wherein the author raised and discussed the issue of whether the principles affecting voting trusts should be based on trust law or corporate law. He concluded that the Court followed the former but had failed to resolve this issue.
any voting trustee appointed to serve the interests of a creditor may vote so as to guard the creditor's interests. In doing so, however, he must act reasonably and not favor his or the creditor's interest to the detriment of the corporation or the beneficiaries. The Court found that removal of one of the trustees was justified as his actions went beyond the proper protection of the creditor.

The Court had another occasion to examine this decision in the 1966 survey year case, *Stone v. Massa*. This time the sale of the corporate assets approved by the two trustees was under attack by a bill in equity for declaratory relief. The trustees argued that the sale was proper since it was the only way in which to pay the corporate indebtedness. In rejecting this contention, the Court stated that the principal purpose of the sale was to exclude the other stockholders from any benefit in the business and not to meet the creditor's demand for payment. The opinion, however, is not clear. The Court appears to be holding that the trustees must vote under such circumstances with an impartial and neutral attitude, i.e., not outweigh the creditor's interests. But then it stated an arm's length transaction is not required. It also added that the trustees could not weigh the facts fairly since the creditor, in effect, was making their decisions. The Court seemed to be approaching the position that those in control of a corporation (the creditor "asserted control of 'fundamental management decisions'") owe a fiduciary responsibility to the minority; however, it neither stated this nor alluded to related principles. Had the Supreme Judicial Court reached such a result, *Stone v. Massa* would have been extremely significant. It would have, in effect, imposed fiduciary obligations upon an individual who dominated the corporate management. While the Court has been reluctant to impose such obligations on stockholders inter se, it has taken a progressive attitude toward the doctrine of "corporate opportunity." The basis of this doctrine is the recognition of the fiduciary nature of a director's duty to the corporation. Its application prevents a director from gaining personal benefit from a business opportunity that in fairness should be made available to the corporation. It effectively resolves any possible conflict of interest in favor of the corporation.

In *Durfee v. Durfee & Canning, Inc.* the Court approved the state-

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3 Ibid.
6 See e.g., Mairs v. Madden, 307 Mass. 378, 380, 30 N.E.2d 242, 244 (1940), and cases cited therein.
ment in Ballentine that "the true basis of the doctrine should not be found in any expectancy or property interest concept, but in the unfairness on the particular facts of a fiduciary taking advantage of an opportunity when the interests of the corporation justly call for protection. This calls for the application of ethical standards of what is fair and equitable to particular sets of facts."8 The defendant was thus ordered to pay the corporation his profits from selling gasoline to the corporation which had not been financially able to purchase gasoline directly; he was liable as a constructive trustee of the profits.9 The implication in *Lincoln Stores, Inc. v. Grant*,10 that the doctrine was limited to those situations in which the corporation had a pre-existing right in the opportunity or in which it had an expectancy growing out of an existing right, was repudiated.

Before discussing the conduct of the trustees in selling the assets in *Stone v. Massa*, the Court had to consider whether voting trustees had the power to sell the corporate assets. In finding this power it cited *Bullivant v. First National Bank of Boston*,11 wherein the Court had held that the trustees could vote in favor of a proposed plan of reorganization. Quoting persuasive authority, the respondent (in the bill for declaratory relief) argued that the trust agreement would have provided for such powers if intended. The Ohio Supreme Court has stated that while a voting trust "agreement might grant specific authority for sale by the trustees here, the grant of 'full power' to vote the stock for a limited time is clearly inconsistent with a power to destroy the beneficial ownership [retained by the stockholder] by sale."12 Using basic contract rules of construction, it would seem that

8 Ballentine, Corporations 204 (rev. ed. 1946), cited at 323 Mass. 187, 199, 80 N.E.2d 522, 529 (1948). It is interesting to note that in *Stone v. Massa* the Court did in effect consider the fairness of the sale of assets. While the sale was improper the Court did not set it aside. Most of the corporate assets had been destroyed before the sale, and the present assets were in a very great part created by efforts made since the sale. (The profits, however, had been growing during the several years preceding the sale.)


11 246 Mass. 524, 141 N.E. 41 (1923). The trustees were given "full management . . . of the . . . shares, with the full . . . right to vote . . . and exercise as to the same any rights which an owner might exercise consistently with and subject to the terms hereof." The terms of the voting trust agreement in the Stone case are not reported, but are presumably similar.

§8.4 Pledge of voting trust certificates: Delivery. Although legal title may fail to pass to a transferee owing to the lack of indorsement, the Supreme Judicial Court has frequently held that the delivery of the stock constitutes transfer of equitable title. The same conclusion was reached under the now repealed Uniform Stock Transfer Act, even under circumstances of non-compliance with the transfer provisions of the act and even though the act purported to provide for the only methods of transfer. In *Whitney v. Nolan* the Court reached the same result involving a pledge of unindorsed shares of stock, and held that the pledgee was entitled to indorsement of the shares and even a stock dividend received after transfer of the equitable rights. The theory of these decisions is that a technical defect, such as the lack of indorsement, will not prevent transfer of equitable title when the facts show that the owner intended to transfer the stock. The Uniform Stock Transfer Act was construed as being inapplicable to the transfer of equitable title.

The most recent step in this area involved the recognition of an equitable pledge of voting trust certificates. The Court reached this result in *Colbert v. Hennessey* by strongly emphasizing the apparent intent of the pledgor. His stock had been delivered to the pledgee who in turn transferred it to a voting trust. The voting trust certificates were then issued to the pledgor, and were never delivered to the pledgee. However, on subsequent occasions, the pledgor referred to the certificates as being pledged. In effect, then, the Court must have been holding that the delivery of the stock was sufficient to transfer the equitable title to the subsequently issued voting trust certificates, this having been intended by the pledgor.

Article 8 of the Uniform Commercial Code, which replaced the Uniform Stock Transfer Act, provides in Section 8-307 that as between the transferor and transferee "a security in registered form" may be transferred by delivery without indorsement; and that the transferee shall have a specifically enforceable right to have any necessary indorsement supplied. This provision applies to voting trust certificates because of the definition of "security" in Section 8-102. Since Section 8-307 specifically adopts the Nolan-type decisions, the Code may preclude continued judicial circumvention of the statute (as was the case under the Uniform Stock Transfer Act). Therefore, if the Code had been applicable to the pledge in Colbert, the Court might not have reached the same result owing to the absence of actual delivery.

§8.5. Corporate resolutions: Waiver of stock transfer restriction. A broadly drafted corporate resolution in Colbert v. Hennessy almost produced an unanticipated result. The resolution was as follows: "To suspend the operation of the restrictions on the transfer of stock . . . to permit any original transfer made by . . . Bowser [the deceased] . . . and the original transfer . . . of any voting trust certificate . . . issued in exchange for the . . . stock . . . ." Literally interpreted the resolution waived all restrictions on the Bowser holdings. It was argued, therefore, that the stock under the private stockholder agreement was not subject to the corporation's first option. On its face the apparent intent was to give Bowser a free hand, with the other stockholders being bound to the restriction. The Court, however, held that the agreement constituted a relinquishment of his rights under the waiver. Since the resolution did not apply to the other parties to the agreement, the Court opined that the purpose of the agreement would have been nullified when two of the three were bound to offer the stock to the corporation.

§8.6. Corporate name: Similarity and unfair competition. In Massachusetts Mutual Life Insurance Co. v. Massachusetts Life Insurance Co., the petitioner, Mass. Mutual, sought to enjoin Mass. Life from doing business under its name. Relief was prayed upon three
bases: common law equitable principles;2 General Laws, Chapter 110, Section 7A;3 and General Laws, Chapter 155, Section 9.4 The Supreme Judicial Court proceeded to clarify the distinction between these two statutory bases. Under Section 9 of Chapter 155, the State Secretary "considers only the abstract likelihood or possibility of one name being mistaken for another because of literal similarity, and a court acting under the same statute can do no more."5 Under Section 7A of Chapter 110, however, a court may proceed to determine "whether the location or the manner of the use of the name may result in 'injury to business reputation or . . . dilution of the distinctive quality of a trade name.'"6 An injunction can therefore be granted under Section 7A regardless of whether the names in the abstract appear so similar or alike as to be mistaken one for the other.

In addition, Section 7A is not intended as the exclusive prescription of remedies for unfair competition. The Court noted that Massachusetts decisions have indicated that the section is merely a supplement to the common law rights.7 Thus, the Court has reversed the apparent

2 A common law remedy is available to "one whose trade name has acquired a secondary meaning in the minds of the public . . . to prevent another from using the same name or a name so similar as to mislead the public into buying the defendant's goods in the belief that they . . . [are] buying those of the plaintiff and from palming off his goods as those of the plaintiff to the injury of the latter." Monroe Stationers & Printers, Inc. v. Munroe Stationers, Inc., 332 Mass. 278, 280-281, 124 N.E.2d 526, 527 (1955).

3 This statutory provision deals with injunctive relief in certain cases of trade mark infringement or unfair competition and is known as the "anti-dilution" statute. It reads as follows: "Likelihood of injury to business reputation or of dilution of the distinctive quality of a trade name or trade mark shall be a ground for injunctive relief in cases of trade mark infringement or unfair competition notwithstanding the absence of competition between the parties or of confusion as to the source of goods or services."

The recent decision of Food Center, Inc. v. Food Fair Stores, Inc., 356 F.2d 775 (1st Cir. 1966), is typical of the complex situations arising under, and reflects the broad discretion available to a court under Section 7A. The District Court decision, 242 F. Supp. 785 (D. Mass. 1965), is reported in 1965 Ann. Surv. Mass. Law §5.9.

4 This statutory provision deals with administrative approval of corporate names and concurrent judicial remedy. Part of the opinion in the Massachusetts Mutual case involves the interpretation of this section. In cases of insurance companies the Commissioner of Insurance must give his approval but the Secretary of the Commonwealth retains the statutory control of such proceedings. Therefore, the Court held that the State Secretary was in error when he stated that he lacked jurisdiction to hear the protest of Massachusetts Mutual filed in regard to the name of Massachusetts Life. The hearing held by the Commissioner approving this name was a nullity. This conclusion was essential to Massachusetts Mutual. While the Court did not so hold, Massachusetts Mutual probably would have been bound to exhaust its administrative remedy by pursuing it to final determination; it had failed to do so. However, it is uncertain whether this failure would foreclose only the relief available under Section 9 or would affect the other two bases as well.


6 Id. at 1168, 218 N.E.2d at 569-570.

§8.7  Partnerships: Expulsion of partner and confiscation of interest. The Supreme Judicial Court has always taken the attitude that it will not sanction forfeitures or confiscations of an individual's interests. In *Walsh v. Atlantic Research Associates*, the Court stated that "a partner does not lose his rights in the accrued profits of a firm by reason of breaches of the partnership articles, whether or not committed in bad faith, although . . . he will be subject to charges for all unexcused breaches in the final accounting." This attitude is again reflected in the recent decision in *Fisher v. Fisher*. The partnership agreement provided that "in the event any partner wishes to withdraw . . . his interest shall revert equally to the remaining partners." It also contained a similar provision in reference to death of a partner. The plaintiff, who was seeking dissolution and a partnership accounting, had failed to account to the partnership for moneys which he had received. The defendants contended that by breaching the partnership agreement, he had in effect withdrawn from the partnership, and that, therefore, they were justified in expelling him from the partnership and claiming his interest therein. The Supreme Judicial Court, in rejecting the contention, stated that neither the agreement nor the Uniform Partnership Act contained a provision making breach equivalent to withdrawal.

In reaching its decision in *Fisher*, the Court was faced with the equitable doctrine of "clean hands." Clearly, the plaintiff was guilty of improper conduct. The purpose of the doctrine, according to the

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3 Id. at 64, 71 N.E.2d at 585.


5 G.L., c. 108A.

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7 Massachusetts Life argued the principle of failure to exhaust administrative remedies. See note 4 supra.
§8.7 CORPORATIONS AND PARTNERSHIPS

Court, "is to prevent a party from benefiting by his dishonesty." It then remarked that "the plaintiff's claims do not arise out of his improper conduct." The decision therefore clarifies any dictum to the contrary in Ferrick v. Barry that an improperly acting partner would be barred from seeking equitable relief.

In trying to reach an equitable basis for an accounting, the Court found that the plaintiff's conduct was sufficient ground for the other partners to seek a dissolution under General Laws, Chapter 108A, Section 32(1)(d). However, in suspending the plaintiff and dividing his interest among them, the defendants' own actions also constituted a breach, thereby giving the plaintiff ground to seek a decree of dissolution. When equity and the furtherance of justice so require, the Supreme Judicial Court held, a partnership may be dissolved under Section 32 as of a date earlier than the decree of dissolution. Such a decree may be entered nunc pro tunc. Therefore, while the conduct of the defendants constituted the ground for dissolution, the conduct of the plaintiff determined the date of the dissolution.

The General Laws provide in Chapter 108A, Section 31(1)(d), that dissolution is automatically caused "without violation of the agreement . . . (d) by the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between partners." This section was discussed in Kurtzon v. Kurtzon, an Illinois decision, wherein the court stated that "the enumeration in this section of causes of rightful dissolution . . . precludes dissolution for any other cause, such as partner's withdrawal, not included in such enumeration." The Fisher agreement covered withdrawal but failed to provide for expulsion.

The probably unfortunate aspect of the Fisher case is that it allows a partner to avoid forfeiture of his interest by improper conduct when such a forfeiture may have been the original intention of the partners. As previously noted, the agreement provided for retention of interest in event of withdrawal or death. It also prohibited sale or assignment of interests without consent. The business was a family one. Apparently, as happens in the formation of many partnerships, no thought may have been given to possible bad faith by any partner and the agreement therefore did not provide for such a situation. Neverthe-

8 The statute reads as follows: "On application by or for a partner the court shall decree a dissolution whenever: . . . (d) A partner willfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him."
9 G.L., c. 211, §3.
less, while the clear intent may have been defeated, *Fisher v. Fisher*, based on partnership law, is sound.

§8.8. Partnerships: Wrongful dissolution and damages for breach of agreement. General Laws, Chapter 108A, Section 38(2), provides:

(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have . . .

II. The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement. (Emphasis supplied.)

In *Fisher v. Fisher,* the Supreme Judicial Court stated that the plaintiff "is entitled to receive from the partnership such sums as may be determined to be due him . . . in accordance with . . . §38." In not referring to the specific subsection in Section 38, it is uncertain whether the Court would hold that the plaintiff is entitled to damages. It had held that the defendants were guilty of wrongful action. The answer may be found in the opinion itself since the Court stated "from the partnership." Damages are not payable from the partnership; they are recoverable against the particular partner.

Are damages available under Section 38(2)(a)(II) when dissolution is decreed under Section 32(1)(d)? Subsection 38(2) is predicated upon dissolution caused "in contravention of the partnership agreement." This language is found only in Section 31 which states that

Dissolution is caused: . . .

(2) In contravention of the agreement . . . where circumstances do not permit a dissolution under any other provison in this section, by the express will of any partner at any time; . . .

(6) By decree of court under section thirty-two.

A reading of Sections 31(1), 31(2), 31(6), 32 and 38(2)(a) together produces a literal but illogical proposition that damages may be assessed in those instances where there has been a "wrongful" dissolution of the partnership only when such dissolution is caused in contravention of the agreement pursuant to Section 31(2). This interpretation leads to the anomalous situation in which damages cannot be assessed for intentional misconduct.

This proposition has been refuted in a California decision, *Zeibak v. Nasser.* In this case the partnership was to terminate upon incorporation of the business, and the plaintiff negligently refused to ex-
execute the agreement required for incorporation. The court held that “although the actual dissolution was effected by decree of court, nevertheless such dissolution was caused by the wrongful conduct of plaintiff ‘in contravention of the partnership agreement’ within section 38.” The court, in its decision, did note that the trier of fact had found that the plaintiff’s conduct was in contravention of the agreement and that dissolution was decreed because of wrongful conduct.

The best answer is found in a New York decision, *Schnitzer v. Josephthal*. “If the partner bringing about a dissolution would have been able to secure a dissolution by decree of court, because of the other partner’s breach of his agreement, the latter is not entitled to damages.” He can only claim what was rightfully his at the time of expulsion; and the court added, he must show his own substantial performance of essential conditions in his claim for damages for breach. A decision to the contrary would result in a partner benefiting by his dishonesty. The doctrine of “clean hands” could then apply to bar relief for that partner.  

Intentional activities by a partner in *Johnson v. Kennedy* were not wrongful; therefore his other partners were merely entitled to an equal share in the assets and were not entitled to their share of the fair value of the business (damages). The case involved a bill in equity for an accounting and damages. An insurance partnership was formed under an oral agreement which was silent as to duration. After a few years the defendant partner secretly withdrew all of the firm’s cash, records and furniture, and established his own insurance business. “However unseemly in manner and method,” the Court stated, his termination was not a legal wrong. Under General Laws, Chapter 108A, Section 31(1)(b), dissolution is caused without violation of the agreement “by the express will of any partner when no definite term . . . is specified.”

Since dissolution is automatic under Section 31(1), the date of dissolution was that of the defendant’s acts. According to the facts as reported he used all the assets thereafter in his own business and retained the same business name until changed four months later. The Supreme Judicial Court has held that profits made by the remaining partners (the defendant) subsequent to dissolution, through the employment of partnership assets, must be accounted for to the partner who has retired and has not been paid his share of the assets. Thus, in

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6 This doctrine was not applicable in the Fisher case, 349 Mass. 675, 212 N.E.2d 222 (1965), see §8.7 supra, since the plaintiff’s claim did not arise out of his improper conduct.
Steele v. Estabrook\textsuperscript{10} the Court stated that “in as much as the interest of the plaintiff in the partnership property . . . was wrongfully used by the defendants . . . in carrying on the same kind of business as that which had been carried on by the partnership before it came to an end, the plaintiff was entitled to the profits which his [interest] earned in the business thereafter carried on.” Apparently, in the Johnson case, the plaintiffs failed to establish these profits\textsuperscript{11} or, conversely, the Court may have felt that they were not entitled to any profits.\textsuperscript{12}

§8.9. Partnerships: Joint ventures. Massachusetts has continuously recognized joint ventures even though founded merely on an oral basis.\textsuperscript{1} However, recognition alone has not solved the difficulty of suitably enforcing the venture. Lawless v. Melone\textsuperscript{2} represents such recognition but more importantly, it may suggest an equitable alternative to enforcing a personal relationship. Lawless sought specific performance of an oral agreement in order to obtain 50 per cent of the corporation which was formed under the venture. In denying specific performance, the Superior Court awarded him damages based upon the asset value of the corporation. The Supreme Judicial Court reversed the final decree and ordered further proceedings but only upon the issue of damages. The Court felt that the issue should have been the fair value of the promised stock interest as of the date of demand, i.e., the value of his lost opportunity.

In a footnote the Court cited Air Technology Corp. v. General Electric Co.,\textsuperscript{3} wherein it had held that “whatever may be the difficul-
ties in proving damages, . . . recovery cannot be less than the higher of . . . the value reasonably expended by [plaintiff] . . . in the performance of the joint arrangement,\(^4\) [or] . . . the fair value of [his] . . . contribution to that arrangement.”\(^5\) As emphasized by the Supreme Judicial Court in both decisions the court must appraise the fair value of the lost opportunity in light of the uncertainties. Therefore, in \textit{Lawless}, the Superior Court should have considered the corporation “with no past record of earnings and only a speculative, experimental, and uncertain future;” and in \textit{Air Technology}, “the probability of successful negotiations and Air Force approval” and the approximate realized amounts from anticipated contracts should have been considered. Naturally, consideration would probably not produce all that was expected by Lawless from stock ownership. However, a more equitable basis for recovery is thereby available especially since only “a reasonable approximation will suffice.”\(^6\) This is particularly so “where the difficulties in determining damages arise in large part from [defendant’s] . . . own failure . . . [to perform] in accordance with the joint undertaking.”\(^7\) Moreover, it should not be overlooked that the redetermination of damages ordered in the \textit{Lawless} case cannot lawfully result in a lesser recovery since the Superior Court had held that the damages awarded were also equivalent to the fair value of the services performed for the defendants by Lawless.\(^8\)

The oral joint venture arrangement carries with it the same responsibilities as the written. “While the enterprise continues, joint venturers, like partners, owe to one another the utmost good faith and loyalty.”\(^9\) Therefore, if during the existence of the relationship, one member acquires property for himself that he was under a duty to obtain for the enterprise, courts will impose a constructive trust.\(^10\) The Supreme Judicial Court stated in \textit{Barry v. Covich}\(^11\) that a trust will be imposed “where there has been the wrongful use of information confidentially given to one for a particular purpose and where

\(^4\) See, as to the remedy of recovery of reasonably incurred expenses, \textit{Robie v. Ofgant, 306 F.2d 656, 660-661 (1st Cir. 1962); Lynch v. Culhane, 237 Mass. 172, 174, 129 N.E. 717, 717-718 (1921); Corbin, Contracts §1031 (1964 Replacement).}


\(^6\) \textit{347 Mass. 613, 627, 199 N.E.2d 538, 548 (1964).}

\(^7\) See also \textit{Noble v. Joseph Burnett Co., 208 Mass. 75, 82, 94 N.E. 289, 289-290 (1911) (a fair and equitable share of the net profits not too indefinite as a basis for an accounting). See also all the cases cited by the Court at \textit{347 Mass. 613, 627, 199 N.E.2d 538, 548 (1964).}}


instead it has been employed for an entirely different purpose to the gain of the one receiving the information and the detriment of the other." This was apparently the case in the recent decision of *DeCotis v. D'Antona*.\(^\text{12}\) No trust was imposed, however, since on the facts the joint venture had terminated prior to the property acquisition.

§8.10. **New Business Corporation Law: Amendments.** The new Business Corporation Law,\(^\text{1}\) which became effective on October 1, 1965, was the subject of two minor amendments during the 1966 survey year. The State Secretary, by amendment to Section 107 of General Laws, Chapter 156B, must send notice of dissolution to the corporation at its last address as appearing in his records.\(^\text{2}\) Prior to the amendment, the notice was sent to the person last shown to be serving as clerk of the corporation.

Filing fees for articles of amendment are now set at $25 for each amendment, under the revised Section 114(b)(5) of General Laws, Chapter 156B.\(^\text{3}\)


\(^\text{3}\) Id. §2.