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Legal Department.

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Some Suggestions for Withdrawing Partners.

It is an old and established rule that the members of a partnership can not convert a firm debt into a separate debt of one of their members without a contract to that effect with the creditor; accordingly, if a firm is dissolved and its members agree that one shall take the assets in consideration of his assuming and paying its debts, this agreement does not discharge the retiring partner from liability to firm creditors; but a retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself, as one party, and the members of the firm as newly constituted, or the individual, association, or corporation carrying on the business, as the second party, and the creditors as third party; and this agreement may be expressed either orally or in writing, or may be inferred as a fact from the course of dealing between the creditors and the firm as newly constituted. The agreement to substitute the obligation of the successor to the old partnership for the joint and several obligation of the old partners need have no further consideration to support it, to make it binding as a contract upon the creditors, than the mere promise of the successor or successors to assume the liability. It may be noticed, therefore, that there is no possible way of withdrawing from the firm and escaping liability for its debts except by a contract express or implied to which the creditors are a party. An agreement with the remaining partner to relieve the retiring partner from liability is binding on the remaining partner only, and such a contract is no better than the word of the remaining partner, plus his ability to perform his obligations to the creditors. In case a contract is made between the partners that one shall pay the firm debts upon taking the firm assets, the relation of principal and surety is created between the purchasing and selling partners. It will be necessary, however, for the retiring partner to give due notice to all the firm creditors. Now, the retiring partner’s position as surety differs from that of an ordinary surety in this, that he can not compel the creditors to sue the remaining partner. (If he were in the position of an ordinary surety he could demand the creditors to sue at once, and if they did not proceed he would be discharged by their neglect to go ahead promptly.)

But the retiring partner would be discharged from all liability if the remaining partner assumed the liability, if the creditors had been given notice of this fact, and if the creditors did one of the following acts:

1. Extended time for payment of the debts by making a valid agreement with the assuming partner, such as, for instance, accepting his note, which act would prevent the creditors from suing until the note came due (a mere verbal promise from the creditors to extend time for payment
without a valuable consideration for the promise would not constitute a valid contract and therefore would not operate to discharge the retiring partner); 2. Voluntarily compromised the debt of the old firm; 3. Released securities of the old firm held by the creditors. Of course, any one of these acts committed by one creditor will affect his claim only, and the claims of the other creditors against the retiring partners will still be enforceable.

It will be seen, therefore, that the retiring partner must have the consent of the creditors before he can discharge himself of the firm's liabilities. This consent may be expressed or may be implied from the acts of the partner, such acts, being, for example, the compromise of claims with the assuming partner.

Now, if it is impossible or inexpedient to get the consent of the creditors the retiring partner may secure his discharge by securing the performance of the promise of the remaining partner to pay the debts of the firm. This can be done in any one of the following ways:

1. By paying the creditors immediately by a loan made to the assuming partner, on which loan the latter solely will be liable.

2. By placing in the possession of the retiring partner securities, such as a mortgage on personalty or realty, conditioned on the full payment of the firm debts by the remaining partner on or before a specified time. (This method is recommended where the remaining partner has all his property in the name of another person, for example, his wife.)

3. By procuring an indemnity bond of a company, individual or group of individuals, who have power to give such a bond, or by any agreement of guaranty or suretyship. For example, a note may be made out to the firm by the assuming partner payable, say, in six months, or on demand (or at any time at the expiration of which it is fair to assume that the debts should be paid). This note then should be endorsed by one or more responsible parties or signed by them as surety, or they should guarantee its payment. Of course, care must be taken to see that these parties shall be properly bound. At maturity, the note could be sued upon if the debts were not paid, or in case a demand note were given, demand could be made at any time the creditors actively pushed their claim. If such a note were given, and its existence were brought to the attention of impatient creditors, the very fact of its existence might be enough to avoid a crisis.

Notes of Recent Cases.

Compensation of Unlicensed Accountants.

The Appellate Division of the First Department of the State of New York has handed down two decisions which, while not bearing directly on the profession of the accountant, are of interest as indications of what the Court would say were an accountant who had not complied with Chapter 312 of the Laws of 1896 to sue for the recovery of a fee. The first case is that of People vs. Christian, reported in volume 122 of the Appellate Division Reports at page 842, in which the Court declined to
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lay down a hard and fast rule as to what acts constitute the practice of medicine. The Court has usually held in similar cases where it has been sought to charge a person with carrying on a profession in violation of the statute requiring as a condition precedent, the procuring of a license that the question was one for the jury—Smith vs. Lane, 24 Hun, 31. In most jurisdictions it would be necessary for the licensee, be he physician, auctioneer, or accountant, to prove in an action for his fee that he had procured his license. In New York State there is a presumption that a license has been procured until the contrary is shown. McPherson vs. Chesdell, 24 Wend. 15; Thomson vs. Sayre, 1 Denio 175. See contra Adams vs. Stuart, 5 Harr. (Delaware) 144.

The statutes of some states make the procuring of a license an unqualified condition precedent to the recovery of a fee. In most other jurisdictions the courts have held to the same effect. Fox vs. Dickson, 34 New York State Reporter 710.

The other case to which we referred at the beginning of these notes is that of Fox vs. Smith, 123 Appellate Division 369, in which it was held that an individual who without a license, undertakes for hire to act as a private detective for the purpose of securing evidence is not entitled to recover his disbursements or the agreed price of the services rendered, notwithstanding the fact that the plaintiff was not conducting a regular business, but was suing for the services rendered in a single instance. This case is a close one and can hardly be reconciled with Smith vs. Lane above referred to. The Court was divided three against two and the prevailing opinion was based upon the fact that the Court took judicial notice of the fact that many private detectives, especially those who were not thoroughly established and had no reputation to lose, were apt to be "dishonest and dishonorable persons" who "have been quite unable or unwilling to resist the temptation to resort to perjury and blackmailing."

Were the question to arise involving the right of a public accountant, who had not complied with the statute, to collect his fee, it is very probable that the Court would follow the line of decisions laid down in connection with physicians and surgeons.

It may be well by way of conclusion to state that where a license employs a student to render services the licensee may recover for those services although the actual person rendering the services is not yet qualified under the statute. People vs. Monroe, 4 Wend. 200.