

We have seen that according to the articles of co-partnership, the proportion of profits due the complainant, after the payment of the liabilities of the firm, was to have been paid him in merchandise at the cost thereof, and, consequently, assuming that the merchandise mentioned in the balance-sheet, or settlement, on the 31st of January, 1843, are properly valued, and no attempt has been made to show the contrary, the complainant instead of being a creditor is a debtor to the firm.

It appears, however, that upon the dissolution of the partnership, the defendants took possession of the merchandise and other assets of the old firm, of which the plaintiff was a member, and carried the merchandise into a new firm, styled Hamilton Easter & Company, at the prices at which it was put down in the settlement, mixed it with new stock, purchased from time to time, and sold it indiscriminately with such new stock, and that from such sales made from day to day profits to some extent were realized, and it is supposed, and the Auditor has proceeded upon that hypothesis, that of these profits the complainant is entitled to a proportionate share.

The evidence, it may not be amiss to remark, shows that it is far more probable that a loss was sustained by the defendants in the sales of this stock of goods than that profits were realized, and we are instructed in the same way that of the debts due to the firm, and which, in the settlement, were all assumed to be solvent, many were wholly insolvent. The presumption, therefore, is very strong, not to say irresistible, that if the merchandise on hand at the time this partnership was dissolved, had been at once pressed upon the market and sold, and the other assets converted into cash, the balance due from the plaintiff would have been materially increased.

It is said, however, that as the defendants did not pursue this course, but carried the stock of the old into the business of the new firm, exposing it to all the perils of such new adventure, the complainant is entitled to treat the new trade as a continuation of the old business, and to claim such proportion of the profits of the former as he might have claimed if the old trade had been continued, and this is said to be the equitable rule in such cases.