Part B: Partnership (*Societas*)

In Anglo-American law, partnership is a form of enterprise organization. Roman law, however, constructed the contract of partnership (*societas*) differently, as a kind of informal joint venture, in which two or more parties agree to cooperate and pool resources for a common purpose. Although the purpose may be commercial, it need not be. For instance, the parties may agree to share their entire estates (*societas omnium bonorum*); or, at the other extreme, the parties may have only a limited non-commercial end in view. Thus, several persons who agree to share costs while travelling together are partners (*socii*) with regard to their trip. This results in a very different construction of the legal institution. As Reinhard Zimmermann observes (*Obligations* 451, quoting David Daube), *Socii* "are not bent on getting the utmost out of each other; they are, in the first place, 'friends', pursuing their common interests against third parties."

The originally non-commercial nature of *societas* produces one of its most striking legal characteristics: to a very considerable extent, the contract of *societas* has effect as between the partners, but not with respect to the outside world. If one of the partners arranges a contract with a third party, that party can enforce the contract only against the single partner, not against the others (no joint and several liability). However, the affected partner remains tied to the others through *societas*, so he or she can usually bring claims for contribution against them (and vice versa) regarding any profit or loss the partnership may incur, as well as for misfeasance in carrying out the partnership's objectives.

Societas, although thought-provoking as a contract, was poorly conceived for business purposes. This was so both with respect to the question just discussed, and also because *societas* was constructed as a transient arrangement. Nonetheless, despite the obstacles, commercial partnerships flourished during the Roman Empire, perhaps largely owing to the absence of more sophisticated enterprise organizations. Legal and literary sources attest them in agriculture (cultivating land; breeding and grazing livestock), engaging in sales (food staples such as oil, wine, and grain; slaves; clothing; jewelry; tombs), providing services (educating or training free children and slaves; leasing dwellings; operating shops; transporting both on land and sea), and so on. Most of these operations were quite small: only a handful of partners, most often just two. They frequently seem also rather short-term.

As with the real contracts (Chapter III) and mandate (V.C below), the jurists confronted the task of adapting these contracts to make them more commercially viable. They went some distance to achieving this goal, although their efforts seem slight by modern standards. Roman law was more successful for partnerships closely associated with public policy: banking (the *argentarii*) and public contracting operations (*publicani*); for these, some special rules were developed that departed from the individualistic template of *societas*. (This topic will not be explored here, however; in the bibliography, see Andreau and Fleckner.) But more developed enterprise forms, such as private corporations based on separation of stockholders and management, were unknown in Roman commercial law, which in general therefore made little direct contribution to the later development of capitalism.

Case 169: Contributions, Profit, and Loss

Gaius, *Institutiones* 3.148-150

148. Societatem coire solemus aut totorum bonorum aut unius alicuius negotii, ueluti mancipiorum emendorum aut uendendorum. **149.** Magna autem quaestio fuit, an ita coiri possit societas, ut quis maiorem partem lucretur, minorem damni praestet. Quod Quintus Mucius contra naturam societatis esse censuit. Sed Seruius Sulpicius, cuius etiam praeualuit sententia, adeo ita coiri posse societatem existimauit, ut dixerit illo quoque modo coiri posse, ut quis nihil omnino damni praestet, sed lucri partem capiat, si modo opera eius tam pretiosa uideatur, ut aequum sit eum cum hac pactione in societatem admitti. Nam et ita posse coiri societatem constat, ut unus pecuniam conferat, alter non conferat et tamen lucrum inter eos commune sit; saepe enim opera alicuius pro pecunia ualet. **150.**Et illud certum est, si de partibus lucri et damni nihil inter eos conuenerit, tamen aequis ex partibus commodum ut incommodum inter eos commune esse; sed si in altero partes expressae fuerint, uelut in lucro, in altero uero omissae, in eo quoque, quod omissum est, similes partes erunt.

Gaius in the third book of his *Institutes*:

148. We normally enter a partnership either for our entire estates (*societas omnium bonorum*) or for some particular transaction, such as buying or selling slaves.

149. But there was (at one time) a major disagreement about whether a partnership could be entered such that one (partner) took a larger share of profit and paid a smaller one of loss. Quintus Mucius (Scaevola) thought this contrary to the nature of partnership. But Servius Sulpicius, whose view has prevailed, not only thought it possible to enter such a partnership, but held entry possible also in the following way, that one person pay for no loss at all, but receive part of the profit, provided that his services are deemed so valuable that it is fair he be admitted to the partnership on these terms. For it is agreed that a partnership can be entered such that one contributes money, the other not, but nonetheless they share profit, since often one's services are as valuable as money.

150. And this (at least) is settled: if they do not agree (specifically) on sharing profit and loss, they share advantage, like disadvantage, in equal shares; but if the shares were expressed for one purpose, e.g., for gain, but omitted for the other, the shares are the same also for that which was omitted.

The Problem:

Gaius, a wealthy Roman, and Artemisia, his freedwoman, wish to enter a *societas* in which she will operate a butcher shop. To what extent are they free to set up their partnership in the way most advantageous to themselves?

Discussion:

1. "The Nature of Partnership." Q. Mucius Scaevola (cos. 95 BCE), the earliest important jurist, disallowed agreements that varied the shares of profit and loss. Can you work out what his reasoning might have been? The eventual default rule (given in section 150) was that, unless the parties agreed otherwise, they would share equally in profit and loss; so also Ulpian, D. 17.2.29 pr. Is this irrespective of the relative size of their contributions to the *societas*? Measuring contributions may have been quite difficult, as Gaius indicates; while most partners may have contributed mainly money and property, contributions of labor (including expertise) were also possible. Thus, for instance, one partner might provide capital but then remain relatively passive,

while the other less affluent one operated the partnership on the basis of previously acquired skill and knowledge. See Proculus, D. 17.2.80; Ulpian, D. 17.2.5.1 ("A *societas* can be validly formed between persons of unequal means, since often the poorer one supplies in work what he lacks in comparative wealth. A *societas* is not acceptably entered into as a gift."), 29 pr.; Paul 17.2.30; Justinian, *Inst*. 3.25.2. Do you see the reasoning that led Servius Sulpicius Rufus (cos. 51), Q. Mucius' gifted successor, to relax the constrictive ruling of his teacher?

In Classical law, the parties had considerable legal freedom to shape their partnership as they wished. They could arrange for differing allotments of profit and of loss, and even that the profit be shared while the loss falls only on one partner, provided that this partner primarily contributes his effort (Ulpian, D. 17.2 29 pr.-1; Paul, D. 17.2.30). They could also leave it to a third party to determine their shares (Pomponius, D. 17.2.6: he must use "the judgment of a good man," *boni viri arbitrium*). However, the jurists draw the line when one partner takes all the profit and the other bears all the loss (Ulpian, D. 17.2.29.2); this is a so-called "leonine partnership," after a fable of the Roman poet Phaedrus (1.5). Ulpian describes such a partnership as "exceedingly inequitable" (*iniquissimum*). Can you formulate a better objection?

2. Profit and the *Societas Omnium Bonorum*. It is worth noting that, although Roman partnerships need not be aimed at profit, the jurists usually assume that profit is their primary goal. Ulpian, D. 17.2.7, indicates that, unless partners had specified otherwise, "profit" includes "everything stemming from their business" (*universorum quae ex quaestu veniunt*), including any income from sales or leases; see also Paul, D. 17.2.8. But, absent an express agreement to the contrary (Paul, D. 17.2.3.2), partners could still keep for themselves what they received outside the partnership, e.g., by way of inheritance, bequests, or gifts: Ulpian, D. 17.2.9 (citing Sabinus); see also Pomponius, D. 17.2.60.1; Ulpian and Paul, D. 17.2.10-13. Ulpian, D. 17.2.71.1, gives a case in which two freedmen with the same former master and patron formed "a partnership for profit, business, and income" (*societas lucri, quaestus, compendii*); when their patron's will then left his estate to one freedman and a legacy to the other, neither partner was obliged to share. A similar ruling by Julian, D. 29.2.45.2.

However, profit is probably not the normal motive in one particular form of partnership that Gaius mentions in section 148, in which two or more persons merge all their property (*omnia bona*, a concept widely construed: Paul, D. 17.2.3.1) into a joint ownership. Although in the Roman Empire such a merger may well have been rare, the institution has a long history, and may, in fact, have been the original form of partnership. A fragment of Gaius' *Institutes* (3.154a-b), known only from an Egyptian parchment first discovered in 1933 and published a year later, describes an archaic partnership in which the heirs of a deceased *paterfamilias* by tacit agreement remain together on their undivided familial property; this is called *consortium ercto non cito* ("community in an undivided inheritance"). Scholars widely suppose that this institution, which Gaius treats as obsolete and is only passingly mentioned in other sources, nonetheless had, through *societas omnium bonorum*, a considerable influence on the later (2nd cent. BCE?) development of Classical *societas*, although that contract has a far more individualistic cast.

3. The Action On Behalf of a Partner (*pro Socio*). The model *formula* for the action ran approximately as follows: "Whereas the plaintiff entered a partnership (for all their property) with the defendant, this being the matter under litigation, whatever on this account the defendant ought to give to or do for the plaintiff in accord with good faith (*ex fide bona*), let the *iudex* condemn the defendant to the plaintiff for this; if it does not appear, let him absolve." (Lenel, *EP*[3] 297.) The action, brought by one partner against another, has the effect of dissolving the partnership: Ulpian, D. 17.2.63.10; Paul, D. 17.2.65 pr. (But see Paul, D. 17.2.65.15, noting an exception for public contractors.) As discussed in the following Cases, the action covered any claim rising out of the *societas*. Condemnation led to the ex-partner being branded with *infamia*; see Discussion 3 on Case 62.

Case 170: The Common Fund

D. 17.2.58 pr.-1 (Ulpianus libro trigensimo primo ad Edictum)

pr. Si id quod quis in societatem contulit exstinctum sit, videndum, an pro socio agere possit. Tractatum ita est apud Celsum libro septimo digestorum ad epistulam Cornelii Felicis: cum tres equos haberes et ego unum, societatem coimus, ut accepto equo meo quadrigam venderes et ex pretio quartam mihi redderes. Si igitur ante venditionem equus meus mortuus sit, non putare se Celsus ait societatem manere nec ex pretio equorum tuorum partem deberi: non enim habendae quadrigae, sed vendendae coitam societatem. Ceterum si id actum dicatur, ut quadriga fieret eaque communicaretur tuque in ea tres partes haberes, ego quartam, non dubie adhuc socii sumus. 1. Item Celsus tractat, si pecuniam contulissemus ad mercem emendam et mea pecunia perisset, cui perierit ea. et ait, si post collationem evenit, ut pecunia periret, quod non fieret, nisi societas coita esset, utrique perire, ut puta si pecunia, cum peregre portaretur ad mercem emendam, periit: si vero ante collationem, posteaquam eam destinasses, tunc perierit, nihil eo nomine consequeris, inquit, quia non societati periit.

Ulpian in the thirty-first book on the Edict:

pr. If property that one person contributed to the partnership is lost, let us see whether he can sue on partnership. Celsus, in the seventh book of his *Digests*, handled the matter thus in responding to a letter of Cornelius Felix: You have three horses and I have one. We enter a partnership for you to take my horse and sell a four-horse team, and (then) to return to me a fourth of the price. If my horse then dies before the sale, Celsus says that he does not think the partnership continues, nor is a share owed (to you) from the price of your horses, since the partnership was not formed to have a four-horse team, but to sell it. But if the arrangement is said to have been that a four-horse team be created and shared, with you to have a three-quarter share in it and me a quarter, we are undoubtedly still partners (after my horse dies).

1. Celsus also discusses (this problem): if we had contributed money for purchasing goods and my money had been lost, who bears this loss? He says that, if the money is lost after its contribution (to the common fund), which would not occur unless the partnership had been formed, both bear the loss; e.g., if money, when it is carried abroad for buying goods, is lost. But if it is lost before its contribution but after you set it aside (for this purpose), you will get nothing on this account, he (Celsus) says, because it was not the partnership that suffered loss.

Discussion:

1. A Four-Horse Team. This contract is typical of the one-off partnerships mentioned by Gaius in Case 169 (section 148: *societas … unius alicuius negotii*); see also Ulpian, D. 17.2.52.7 and 12-13; Paul, D. 17.2.65.2, 71 pr. The partners' premise here is that a quadriga, sold as a team, will be more valuable than the four horses sold separately; see, e.g., Paul, D. 9.2.22.1.

Although there is no requirement that partnerships have a "common fund," *res communis*, that is comprised of money or material property contributed by the partners, such a fund seems to have occurred quite often (Ulpian, D. 17.2.14, 45, 47 pr.; Paul, D. 17.2.38.1; *et al.*), and doubtless almost invariably when a business partnership was capitalized. When I add my horse to your three horses, Celsus, whom Ulpian follows, holds that, if my horse dies (presumably of natural causes and not owing to any fault of yours) before the quadriga can be sold, I bear the loss because our

aim was only to sell the team, not to use it for, e.g., chariot racing in the Circus. Does this effectively mean that, because of our intent to sell the team, my horse and yours were not melded into a common fund despite the horses being grouped together for purposes of the sale? Reconstruct, if you can, Celsus' reasoning. Did he get it right?

2. Contributions of Money. Celsus' example here illustrates the different treatment given to money. Here, so long as the money is being used for partnership purposes (and, as we shall see, so long as the partner handling it acts with reasonable care), its loss is apportioned to the partners; the money must, however, have been actually contributed, and not just committed for this purpose. (See further Case 174.) Money is a standard example of a fungible, and its passage into the common fund evidently results in the contributing partner's loss of ownership; it becomes common property, out of which all partnership debts can be paid (Case 173). Ulpian, D. 17.2.14, indicates that an agreement between partners barring division of the common fund before an agreed date is ineffective if for whatever reasontheir partnership is subsequently dissolved before that date.

During the partnership, the partners each have "ownership of the entirety, undivided (and) *pro parte*" (Ulpian, D. 13.6.5.15, citing Celsus). Upon dissolution, partners have available, besides the action on partnership, an action for dividing common property, the *actio communi dividundo*: Paul, D. 10.3.1, 17.2.17 pr. Division, which is largely discretionary with the *iudex,* is based upon the actual property held in common, any damage it has sustained, and any loss or gain a partner has had from the common fund: Ulpian, D. 10.3.3 pr. For the jurists' efforts to separate the concept of common property from *societas*, see Paul and Gaius, D. 17.2.31-34.

Case 171: The Standard of Conduct for Partners

D. 17.2.52.1-3 (Ulpianus libro trigensimo primo ad Edictum)

1. Venit autem in hoc iudicium pro socio bona fides. **2.** Utrum ergo tantum dolum an etiam culpam praestare socium oporteat, quaeritur. Et Celsus libro septimo digestorum ita scripsit: socios inter se dolum et culpam praestare oportet. Si in coeunda societate, inquit, artem operamve pollicitus est alter, veluti cum pecus in commune pascendum aut agrum politori damus in commune quaerendis fructibus, nimirum ibi etiam culpa praestanda est ... Quod si rei communi socius nocuit, magis admittit culpam quoque venire. **3.** Damna quae imprudentibus accidunt, hoc est damna fatalia, socii non cogentur praestare: ideoque si pecus aestimatum datum sit et id latrocinio aut incendio perierit, commune damnum est, si nihil dolo aut culpa acciderit eius, qui aestimatum pecus acceperit: quod si a furibus subreptum sit, proprium eius detrimentum est, quia custodiam praestare debuit, qui aestimatum accepit. Haec vera sunt, et pro socio erit actio, si modo societatis contrahendae causa pascenda data sunt quamvis aestimata.

Ulpian in the thirty-first book on the Edict:

1. In the lawsuit on partnership (*pro socio*), at issue is good faith (*bona fides*). **2.** Question arose whether a partner should be liable just for deceit (*dolus*) or also fault (*culpa*). Celsus wrote in book 17 of his *Digests* as follows: partners should be liable between themselves for deceit and fault. If, he says, in entering a partnership, one person promised a skill or services—e.g, when we give a herd for common grazing, or land to a cultivator for joint raising of crops—obviously here there is liability also for *culpa* ... But if a partner harmed common property, he (even) more allows that *culpa* is at issue here.

3. Partners are not forced to bear losses that are unforeseeable, i.e., unavoidable losses. And so if a flock is given along with an assessment (of its value) and it perishes through brigandage or conflagration, the loss is shared if this does not occur by the *dolus* or *culpa* of the person receiving the flock with an assessment. But if it was stolen by thieves, the loss falls on the person who ought to provide safekeeping (*custodia*) and took it with an assessment. These rules are correct and there will be an action on partnership, provided that the animals, although with an assessment, were given for pasturing on the basis of a partnership contract.

Discussion:

1. **Liability for Deceit and Fault.** It is certain that a partner was liable at least for *dolus*, deceitful conduct: Paul, D. 2.13.9 pr., apparently referencing the Praetor's Edict; also Pomponius, D. 17.2.59.1. Gaius, D. 17.2.72, also describes a liability for *culpa,* "i.e., idleness and carelessness" (*desidia atque neglegentia*), but not "extreme carefulness" (*exactissima diligentia*). Other late sources, including this Case, support this view: see Paul, D. 17.2.65.9; *Pauli Sent.* 2.16 (postclassical); Justinian, *Inst.* 3.25.9 (from Gaius). However, also as in this Case, these sources concentrate on potential harm to common property or to the material interests of other partners: a common herd, land given over to joint cultivation, and so on. So it may be that a higher duty was imposed only when such property was involved. Recall the general "Benefit Principle" discussed in Case 64, where *societas* is mentioned. To some extent, for instance, a bailment element is present when one partner's property is consigned to another. What should the Classical rule have been with regard to such property? It's worth noting that a partner who harmed common property might also be liable in delict for wrongful loss: Ulpian, D. 17.2.47.1.

If this limitation is correct, a partner's liability for *culpa* may not have extended to, for instance, conduct of partnership business with third parties. Should it have? See the following Case. Is it fair to say (as Gaius does in the fragment cited above) that: "Anyone who takes on a less than diligent partner has only himself to blame"?

2. Liability for *Custodia*? The logic in section 2 of this Case may strike you as more than a bit strange. Ulpian starts out by deriving from Celsus a partner's liability for *dolus* and *culpa*. Then he goes on to say that if "one person promised a skill or services … obviously here there is liability also for *culpa*" (*nimirum ibi etiam culpa praestanda est*). But what does the "also" mean, if the partner is already liable for *culpa*? And the following sentence ("But if a partner harmed common property, he (even) more allows that *culpa* is at issue here.) has the same problem. Romanists have long supposed that Justinian's compilers altered this text, and that Ulpian established an even higher liability for *custodia*, namely that a partner in these two situations was liable for all property loss short of unavoidable force; the compilers then replaced *custodia* with *culpa*, in line with their general view that this should be the limit on liability (see Justinian, *Inst.* 3.25.9). What do you think? Should one partner be liable to the others for lack of skill if he holds himself out as having that skill, or for enhanced responsibility if he deals with common property?

3. Liability and *Bona Fides*. At least in this fragment as it is preserved, Ulpian, without further explanation, links the personal liability of partners to the good faith action on partnership. What is the legal connection between the two ideas?

4. Limits on Liability. The liability of *socii omnium bonorum* was restricted to what they could afford, with no account taken of money owed to them but still unpaid: Ulpian, D. 42.1.16. However, Ulpian, D. 17.2.63 pr., citing Sabinus, restricts the liability of all types of partners "to what they are able to do, or to what they do not deceitfully obstruct their own ability to do," i.e., their liability is usually restricted to their means to pay. Ulpian justifies this by arguing that: "*societas* has a certain inherent law of brotherhood, *ius fraternitatis*." Is this justification sufficient?

Case 172: Liability for One's Slaves

D. 17.2.23.1 (Ulpianus libro trigesimo ad Sabinum)

Idem quaerit, an commodum, quod propter admissum socium accessit, compensari cum damno, quod culpa praebuit, debeat, et ait compensandum. Quod non est verum, nam et Marcellus libro sexto digestorum scribit, si servus unius ex sociis societati a domino praepositus neglegenter versatus sit, dominum societati qui praeposuerit praestaturum nec compensandum commodum, quod per servum societati accessit, cum damno: et ita divum Marcum pronuntiasse, nec posse dici socio: "Abstine commodo, quod per servum accessit, si damnum petis."

Ulpian in the thirtieth book on Sabinus:

He (Pomponius) asks whether the profit accruing because a partner has been admitted should be offset by the loss he causes through his fault (*culpa*). He says it should be offset, but that is incorrect. For Marcellus also writes, in book 6 of his *Digests*, that if one partner's slave was set in charge of the partnership by his owner and (then) acted carelessly, the owner who set him in charge is liable to the partnership, nor should the profit accruing to the partnership through the slave be offset by the loss; and so, too, the deified Marcus (Aurelius) determined. Nor can a partner be told: "If you claim (compensation for) loss, surrender (through offset) the profit that accrued through the slave."

Discussion:

1. Offset of Gains with Losses. Although the situation described by Marcellus is not entirely clear, the likeliest scenario is that a number of free persons formed a partnership and one partner then placed his slave in charge of partnership business. The slave made money for the partnership (the profit), but also caused it some loss through his carelessness (*neglegentia*). (The nature of the loss, *damnum*, is unfortunately indeterminate, but it probably involved damage to common property.) The question raised by Marcellus, and partially answered also by the pronouncement of Marcus Aurelius, is this: If the other partners seek their shares of the profit, must this profit be offset by the loss the slave caused?

The answer is no. The slaveowner must make up the loss, thereby replenishing the common fund; and afterwards the other partners can take their shares. The implication is that the slaveowner is liable for his slave's act, ostensibly because it was he who picked the slave for this role (*culpa in eligendo*); compare Discussion 2 on Case 153, and also Ulpian, D. 17.2.19, 21. Do you get the logic behind this decision? How does this logic carry over into the hypothetical posed by Pomponius, in which a partner himself causes the loss through his *culpa*? Compare Paul and Ulpian, D. 17.2.25-26.

Case 173: Compensation for Partnership Debts

D. 17.2.27 (Paulus libro sexto ad Sabinum)

Omne aes alienum, quod manente societate contractum est, de communi solvendum est, licet posteaquam societas distracta est solutum sit. Igitur et si sub condicione promiserat et distracta societate condicio exstitit, ex communi solvendum est: ideoque si interim societas dirimatur, cautiones interponendae sunt.

Paul in the sixth book on Sabinus:

All debt that was contracted while the partnership continued must be paid from the common fund (*de communi*), even if it has to be paid after dissolution of the partnership. Therefore if he (a partner) promised under a condition and the condition occurred after the partnership was dissolved, it must be paid from the common stock; and so, if a partnership is dissolved in the meantime, guaranties (*cautiones*) should be interposed (for eventual payment of the debt).

Discussion:

1. "Debt." Ulpian, D. 50.16.213.1: "Debt (*aes alienum*) is what we owe to other people." In this Case, Paul intends all the legitimate debts owed by the partnership to third parties, even if they were arranged by individual partners. As he says, these debts remain the partnership's even if they do not become due until after its dissolution. In practical terms, the third-party creditor who became entitled to collect when the condition occurred would seek it from the partner who made the promise, and, if payment was declined, would sue that partner, not the partnership as an entity nor other partners individually. But the debt would ultimately be paid from the partnership's common fund, which might well require contributions from the other partners or, if the common fund had already been distributed, from the ex-partners. In this sense, the common fund can have a "virtual" existence even while the partnership lasts (see Discussion on Case 170) and extending beyond it.

2. Some Examples. In D. 17.2.65.14, Paul describes a partnership in which the common fund consists of money held by one partner, while a second holds none of it. So Paul determines, a third partner who sues *pro socio* must direct his suit only against the partner holding the money. After the claimant is paid (assuming his claim is legitimate), "all the partners can sue for what is owed to each from the remainder." That is, the second partner's claim for recompense has priority over all the partners' claims to their shares. Is this consistent with the present Case?

What happens if the holder of the common fund makes use of it for non-partnership purposes? Paul, D. 17.2.67.2, discusses a partner who lends common fund money at interest to a third party. If he lent it on behalf of the partnership, he must share the interest from the loan; but if on his own account, he can keep the interest but bears the risk of the principal being lost. Does this outcome make sense? Compare Pomponius, D. 17.2.59.1: "Any loss a partner sustains from gambling or adultery he will not recover from the common fund. If, indeed, a partner incurs some loss through our deceit (*dolo nostro*), he may reclaim it from us."

After the partnership's dissolution, a partner's contribution to the common fund cannot be recovered by an action *pro socio* because there is no longer a partnership; but the partner can use the action for division of property: Paul, D. 17.2.65.13, see also D. 10.3.1.

Case 174: Compensation for Expenses

D. 17.2.52.4: (Ulpianus libro trigensimo primo ad Edictum)

4. Quidam sagariam negotiationem coierunt: alter ex his ad merces comparandas profectus in latrones incidit suamque pecuniam perdidit, servi eius vulnerati sunt resque proprias perdidit. Dicit Iulianus damnum esse commune ideoque actione pro socio damni partem dimidiam adgnoscere debere tam pecuniae quam rerum ceterarum, quas secum non tulisset socius nisi ad merces communi nomine comparandas proficisceretur. Sed et si quid in medicos impensum est, pro parte socium agnoscere debere rectissime Iulianus probat. Proinde et si naufragio quid periit, cum non alias merces quam navi solerent advehi, damnum ambo sentient: nam sicuti lucrum, ita damnum quoque commune esse oportet, quod non culpa socii contingit.

Ulpian in the thirty-first book on the Edict:

Some men formed a cloth business. One of them, while travelling to buy goods, met up with brigands and lost his own money; his slaves were wounded, and he lost his own property (as well). Julian says that the loss is shared, and so by the action on partnership (*pro socio*) the (other) partner should take responsibility for half of the money and also of other things that the partner would not have taken with him had he not travelled to buy goods on the common account. But also if there was some expense on doctors, Julian quite rightly approves the (other) partner taking responsibility for a share. Hence if something was lost in a shipwreck, both (partners) experience loss if the goods were not usually conveyed except by ship. For just as profit must be shared, so too (must) such loss as does not occur because of a partner's fault (*culpa*).

Discussion:

1. The Victim of Brigandage. Gangs of brigands (*latrones*) the jurists treat as a form of *vis maior*, "higher force," that individuals cannot successfully resist: e.g., Gaius, D. 13.6.18 pr.; Maecian, D. 35.2.30 pr.; so also the emperor Alexander, C. 4.34.1 (234). (It is reasonable to infer that this was an enduring problem in the Roman empire.) The cloth buyer who was waylaid lost his own property, including money presumably intended for the purchase as well as for travel expenses, as well as other personal property; and his slaves were also wounded in the attack. Ulpian, citing Julian, makes the other partner liable to the victim for half of all of these losses, including the expenses for the slaves' medical expenses. Is Julian presuming that the partners had agreed on an even division of losses? What is the meaning of "things that the partner would not have taken with him had he not travelled to buy goods on the common account"? Is the test here simply a "but for" one, such that, for instance, the victim's baggage is included? Or must the property be clearly related to the partnership?

Pomponius, D. 17.2.60.1, citing Labeo, posits that a partner in a slave-trading venture was wounded when the slaves attempted to escape and the partner resisted. Labeo's view is that the partner cannot charge his medical expenses to the partnership "because the expenditure, although made because of the partnership, is not for the partnership" (*quia id non in societatem, quamvis propter societatem impensum sit*). Here, it seems, "but for" causation is not enough. Is this holding consistent with the present Case? Could the partner argue that his attempt to stop the escape was essential to the partnership's goals?

Compare Ulpian, D. 17.2.52.15 (a partner travelling on partnership business can receive compensation for the cost of fares and for hotel or stable outlays, plus the hire of pack animals and carts for himself, his baggage, and his goods); Paul, D. 17.2.67.2 (he also is compensated for interest paid on necessary loans, or the interest lost if he pays with his own money).

Case 175: Ending a Partnership

Gaius, *Institutiones* 3.151-154

151. Manet autem societas eo usque, donec in eodem <con>sensu perseuerant; at cum aliquis renuntiauerit societati, societas soluitur. sed plane si quis in hoc renuntiauerit societati, ut obueniens aliquod lucrum solus habeat, ueluti si mihi totorum bonorum socius, cum ab aliquo heres esset relictus, in hoc renuntiauerit societati, ut hereditatem solus lucri faciat, cogetur hoc lucrum communicare; si quid uero aliud lucri fecerit, quod non captauerit, ad ipsum solum pertinet. mihi uero, quidquid omnino post renuntiatam societatem adquiritur, soli conceditur. **152.** Soluitur adhuc societas etiam morte socii, quia qui societatem contrahit, certam personam sibi eligit. **153.** Dicitur etiam kapitis deminutione solui societatem, quia ciuili ratione kapitis deminutio morti coaequatur; sed utique si adhuc consentiant in societatem, noua uidetur incipere societas. **154.** Item si cuius ex sociis bona publice aut priuatim uenierint, soluitur societas. …

Gaius in the third book of his *Institutes*:

151. A partnership lasts so long as they continue with the same agreement. But if one (partner) renounces the partnership, it is dissolved. Obviously, if one renounces the partnership in order that he alone have some impending profit—e.g., if a partner in entire estates (*socius totorum bonorum*), when he has been left as heir from someone, renounces his partnership with me so that he alone profits from the inheritance—he is forced to share the profit with me. But if he otherwise profits, he alone acquires what he does not obtain (deceitfully). But whatever is acquired after the partnership is renounced is allotted to me alone.

152. Additionally, a partnership is also dissolved by a partner's death, since a person contracting a partnership chooses a specific person for himself. **153.** It is also said that a partnership is dissolved by change in citizen status (*capitis deminutio*), since by Civil Law reasoning a change in citizen status is equivalent to death; still, if the parties still agree on the partnership, a new partnership is held to arise (in that event). **154.** Likewise, if one partner's property is publicly or privately sold, the partnership is dissolved. …

Discussion:

1. Renunciation. Paul, D. 17.2.1 pr.: "A *societas* can be entered either permanently, i.e., for their lifetime, or for a period of time or from a time or under a condition." However, during its existence it is terminated, as Paul indicates, by a partner's death (see below), but also by one partner "renouncing" the partnership. (On opportunistic renunciation, see the following Case.) In section 151 Gaius ties renunciation closely to cessation of the agreement, *consensus*, on the basis of which the partnership was originally formed; so also Diocletian and Maximian, C. 4.37.5 (294); Justinian, *Inst*. 3.25.4. However, if the partnership involved more than two persons, would Gaius allow for its more or less automatic renewal through the agreement of the remaining partners (see 153)? Renunciation cannot be barred through the terms on which the *societas* was formed, and it is effective even when it is made at an inopportune time, although it may result in liability: Ulpian, D. 17.2.14, citing Pomponius; Paul, D. 17.2.65.3-6. Obviously, a partnership is also dissolved if the partners fall into irreconcilable disagreement, *dissensus:* ibid. 3.

Renunciation is not a formal legal act; it may be accomplished fairly casually, for instance through one's representative such as a *procurator* (see Chapter VII.C): Paul, D. 17.2.65.7-8.

2. Death. Paul, D. 17.2.65.9, elaborates Gaius' point: "By one partner's death a *societas* is dissolved even though it was formed with everyone's *consensus* and the other partners survive, unless they agreed otherwise in forming the *societas*. A partner's heir does not succeed him; but subsequent gain from the common fund must be provided to the heir, who is also liable for (the decedent's) deceit and fault (*dolus et culpa*) in prior acts." (The 'unless' clause is probably interpolated.) Are you convinced by Gaius' rationale for this rule, that the other partner or partners chose the decedent for himself? Why should the death of one partner automatically lead to the dissolution of the entire partnership? Partners were actually barred from agreeing that the eventual heir of one of them could join the partnership: Pomponius, D. 17.2.59 pr.; Ulpian, D. 17.2.35.

What might be thought of as a partner's "civil death"—his loss of freedom or citizenship, or his bankruptcy—has the same consequence; see also Modestinus, D. 17.2.4.1. Ulpian, D. 17.2.58.2, citing Julian, has an interesting discussion of the possible complexities that can arise from a change in a partner's status. A partnership is also ended if one partner sued another *pro socio*: see Discussion 3 on Case 169.

The abiding question, in this long list of ways in which partnerships could come to an untimely end (see also Ulpian, D. 17.2.63.10), is whether the Roman law of *societas* founders on its overt, highly individualistic voluntarism, the belief that individual resolve should be the fundamental, or at least the dominant, factor in constructing the law. The counterargument is mainly one of practicality, that business organizations are thereby rendered transient and vulnerable to chance. What do you think?

Case 176: Untimely Renunciation

D. 17.2.65.3-5 (Paulus libro trigensimo secundo ad Edictum)

3. Diximus dissensu solvi societatem: hoc ita est, si omnes dissentiunt. Quid ergo, si unus renuntiet? Cassius scripsit eum qui renuntiaverit societati a se quidem liberare socios suos, se autem ab illis non liberare. Quod utique observandum est, si dolo malo renuntiatio facta sit, veluti si, cum omnium bonorum societatem inissemus, deinde cum obvenisset uni hereditas, propter hoc renuntiavit: ideoque si quidem damnum attulerit hereditas, hoc ad eum qui renuntiavit pertinebit, commodum autem communicare cogetur actione pro socio. Quod si quid post renuntiationem adquisierit, non erit communicandum, quia nec dolus admissus est in eo. **4.** Item si societatem ineamus ad aliquam rem emendam, deinde solus volueris eam emere ideoque renuntiaveris societati, ut solus emeres, teneberis quanti interest mea: sed si ideo renuntiaveris, quia emptio tibi displicebat, non teneberis, quamvis ego emero, quia hic nulla fraus est: eaque et Iuliano placent. **5.** Labeo autem posteriorum libris scripsit, si renuntiaverit societati unus ex sociis eo tempore, quo interfuit socii non dirimi societatem, committere eum in pro socio actione: nam si emimus mancipia inita societate, deinde renunties mihi eo tempore, quo vendere mancipia non expedit, hoc casu, quia deteriorem causam meam facis, teneri te pro socio iudicio. Proculus hoc ita verum esse ait, si societatis non intersit dirimi societatem: semper enim non id, quod privatim interest unius ex sociis, servari solet, sed quod societati expedit. Haec ita accipienda sunt, si nihil de hoc in coeunda societate convenit.

Paul in the thirty-second book on the Edict:

3. I held that partnership is dissolved by disagreement; this is true if they all disagree. But what if (only) one person renounces it? Cassius wrote that a person who renounces a partnership does indeed free his partners from himself, but does not free himself from them. This should be the rule, in any case, if the renunciation was made deceitfully (*dolo malo*); for instance, if we created a partnership of our entire estates (*omnium bonorum societas*) and an inheritance came to one person, on account of which he renounced. And so if in fact the inheritance brings loss, it is borne by the person who renounced; but by the action on partnership he is forced to share (any) profit. But if he acquired it after the renunciation, it will not have to be shared, since there is no *dolus* in this.

4. Likewise, if we enter into a partnership to buy something, and you then decide to buy it alone and therefore renounce the partnership in order to buy it alone, you will be liable for the extent of my interest. But if you renounce it because you disliked the purchase, you will not be liable even if I buy it, since there is no fraud here. This is Julian's view as well.

5. But in his *Posthumous Writings*, Labeo wrote that if one partner renounced a partnership at a time when (another) partner had an interest in the partnership's not being dissolved, he is liable in an action on partnership. For if we create a partnership to buy slaves, and you then renounce it to me at a time when it is inconvenient to sell slaves, in that case you are liable in an action on partnership because you made my situation worse. Proculus says that this is correct if there was a partnership interest in their partnership not dissolving. For what is always protected is not the private interest of one partner, but the benefit to the partnership. These rules should be accepted unless they (the partners) agreed (otherwise) about this matter in forming the partnership.

Discussion:

1. Opportunism and Continuing Liability. Paul gives two examples. The first concerns a *societas omnium bonorum* in which the partners share their entire estates; one partner learns that he has received, although he has not yet accepted, a fat inheritance, and he repudiates the partnership so he can keep it all to himself. If the inheritance is in fact profitable, he is obliged to share it even though the partnership has already ended; but if the inheritance is overburdened with debt, he bears the loss himself. How does this illustrate Cassius Longinus' maxim that: "a person who renounces a partnership does indeed free his partners from himself, but does not free himself from them"? Is the partnership also dissolved as to the remaining partners?

The second and more telling example involves a partnership to buy something (say, a work of art being sold at auction), where one partner then repudiates in order to buy it for himself; his conduct is treated as fraud (*fraus*) and he is then liable for the other party's interest. But this would not be true if the partner simply had second thoughts about the desirability of the purchase—in which case, of course, presumably he would not then buy it. The central question, therefore, is whether the repudiator's conduct can be described as *dolus*, a deceitful attempt to seize advantage that properly belongs to the partnership. As elsewhere Julian is also cited as observing, much here may depend on whether the original agreement to cooperate is interpreted as an actual *societas*, rather than just a casual coalescence of desires: Ulpian, D. 17.2.52 pr.

In many circumstances, however, a partner may be justified in pursuing his own interests when renouncing the partnership. Some examples are given by Ulpian and Pomponius, D. 17.2.14-16 pr.: failure of a condition for the partnership; the injurious conduct of another partner; not receiving enjoyment of the benefit that the partnership was formed to provide; or the necessity of going abroad on state business.

2. Ill-timed Renunciation. Even when renunciation is justified, it may come at a time when the erstwhile partnership was already executing its plan in reliance on the repudiating partner's participation, so that the other partners suffer loss as a consequence. In section 5, Paul, citing Labeo and Proculus, requires the repudiator to pay compensation for this loss, so long, at any rate, as a "partnership interest" in repudiation not occurring can be identified; the interests of the partnership take priority over those of individual partners. Likewise, if the partnership had a definite term and a partner renounced before the term had expired, the repudiator receives no subsequent profit but is responsible for his share of any resulting loss unless his renunciation arose out of some necessity: Paul, D. 17.2.65.6. Paul suggests that this early repudiation is deceitful (*dolus*) unless justified.