District of Columbia, holden in and for the County of Alexandria, and was argued by counsel. On consideration whereof, it is *now here ordered, adjudged, and decreed [*414 by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

JOHN D. MURRILL AND THE BANK OF NEW ORLEANS, APPELLANTS, *v.* ALEXANDER NEILL AND WILLIAM T. SOMERVILLE.

A merchant who owed debts upon his own private account, and was also a partner in two commercial houses which owed debts upon partnership account, executed a deed of trust containing the following provisions, viz.:—

It recited a relinquishment of dower by his wife in property previously sold and in the property then conveyed, and also a debt due to the daughter of the grantor, which was still unpaid, and then proceeded to declare that he was indebted to divers other persons residing in different parts of the United States, the names of whom he was then unable to specify particularly, and that the trustee should remit from time to time to Alexander Neill, of the first moneys arising from sales, until he shall have remitted the sum of $15,000, to be paid by the said Neill to the creditors of the said grantor, whose demands shall then have been ascertained; and if such demands shall exceed the sum of $15,000, then to be divided amongst such creditors *pari passu;* and out of further remittances there was to be paid the sum of $12,000 to his wife as a compensation for her relinquishment of dower, and next the debt due to his daughter, and after that the moneys arising from further sales were to be applied to the payment of all the creditors of the grantor whose demands shall then have been ascertained. In case of a surplus, it was to revert to the grantor.

The construction of this deed must be, that the grantor intended to provide for his private creditors only out of this fund, leaving the partnership creditors to be paid out of the partnership funds.

Under the deed, it was the duty of the trustee to divide the first $15,000 amongst the private creditors of the grantor, and exclude from all participation therein the creditors of the two commercial houses with which the grantor was connected; next to pay the debts due to the wife and daughter; then to pay in full the private creditors, or divide the amount amongst them, proportionally.

The rule is, that partnership creditors shall, in the first instance, be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the partners, with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts, until the separate and individual creditors of the respective partners shall be paid.[1]

The American and English cases respecting this rule examined.

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[1] FOLLOWED. *Davis* v. *Howell*, 6 Stew. (N. J.), 75. CITED. *Bowen* v. *Billings*, 13 Neb., 443. S. P. *Collins* v. *Hood*, 4 McLean, 186; *Matter of Warren*, Daveis, 320; *Matter of Ingalls*, 5 Law Rep., 401; *Ex parte Byrne*, 16 Am. L. Reg., 499; *Inbusch* v. *Farwell*, 1 Black, 566; *Peck* v. *Schuetze*, 1 Holmes, 28; *Crane* v. *Morrison*, 4 Sawy., 138; *Bailey* v. *Kennedy*, 2 Del. Ch., 12; *Cox* v. *Russell*, 44 Iowa, 556; *Bond* v. *Nave*, 62 Ind., 505; *Davis* v. *Howell*, 6 Stew. (N. J.), 72.

THIS was an appeal from the Circuit Court of the United States for the District of Maryland, under the following circumstances.

On the 24th of September, 1839, Luke Tiernan, of the city of Baltimore, and Anne, his wife, made a deed of trust to Charles H. Carroll, of Livingston County, New York, thereby conveying to said Carroll about 5,888 acres of land, part of Tuscarora Tract, in said Livingston County, of which Luke Tiernan was seized in fee simple as his individual property. The property so conveyed is in said deed estimated to be worth about $120,000.

*415] *The deed, among other things, recites that Anne, the wife of Luke, had previously joined in a conveyance of various portions of said tract, the property of said Luke, which before that time had been sold, without receiving for her separate use any consideration therefor.

It also recites, that said Luke was indebted to Anne E. Brien, at the time of her death, in the sum of $4450, which on her death became due to Luke Tiernan Brien, her only child and heir at law.

It also recites, that said Luke "is indebted to divers other persons, residing in different parts of the United States of America, in a large amount of money in the aggregate, but the names of all the persons to whom he is so indebted, and the

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The prior right of the creditors of a firm to its effects cannot be impaired by any consideration having reference to the interests of the individual partners; and anything which defeats this right and hinders or delays such creditors in enforcing payment of their demands against the firm from the firm's property, is a violation of the statute and a fraud upon such creditors. *Schiele* v. *Healy*, 61 How. (N. Y.) Pr., 73.

A judgment against one partner, individually, is a lien upon real estate owned by the firm; but such lien is subject to the payment of the firm debts. *Johnson* v. *Rogers*, 15 Bank Reg., 1.

The preference of the separate creditors over the firm creditors, in the distribution of individual effects, can only be enforced in equity. The lien of a judgment for an individual debt does not take priority over that of a prior judgment against the same partner for a firm debt. *Gillaspy* v. *Peck*, 46 Iowa, 461.

A division of co-partnership property between the partners in proportion to their interests, for the purpose of protecting the property from seizure by the individual creditors of one of the partners, is not unlawful, and cannot be avoided as a fraud upon the individual creditors. By such a transaction the other partners do not acquire any of the property of the debtor, but only separate their own from his, so that their portion shall not be interfered with for his debt. But even if a fraud is perpetrated, the whole property does not become liable to seizure upon attachment at the suit of an individual creditor; nothing more than the debtor's interest in the property can, in any event, be liable. *Atkins* v. *Saxton*, 77 N. Y., 195, 199.

A transfer of the assets of the firm, for a *bonâ fide* consideration (not made in contemplation of dissolution or bankruptcy), in payment of the individual debt of one of the partners, with the consent of the other partners, —*held* good as against firm creditors. *Schmidlapp* v. *Currie*, 55 Miss., 597. S. P. *Case* v. *Beauregard*, 9 Otto, 119.

amount due to each respectively, the said Luke Tiernan is now unable to specify particularly."

The deed then conveys said land to said Carroll in trust, to sell and convey the same in the manner therein specified, and after paying expenses, including a commission for his services, to remit the net proceeds of the first moneys arising from the sales, in bank checks or drafts, to Alexander Neill, of Maryland, "until he shall have remitted the sum of $15,000, to be paid by the said Alexander Neill to the creditors of the said Luke Tiernan, whose demands shall then have been ascertained; and if the demands so ascertained shall exceed the said sum of $15,000, the same shall be applied in part payment of each of said demands, in the ratio that each of said demands respectively shall bear to the whole sum to be so applied."

After said sum of $15,000 shall have been remitted, then the sum of $12,000 is to be remitted by said Carroll to such person as said Anne Tiernan may designate, which is to be invested for the sole and separate use of said Anne, as a compensation to her for relinquishing her dower in the land by the deed conveyed.

Then the sum of $4450, with interest from the 1st of January, 1841, is to be remitted by said Carroll in payment of the above-mentioned debt due to Luke Tiernan Brien.

"And after the last-mentioned sum shall have been remitted as aforesaid, all the residue of the moneys arising from such sales (after deducting the expenses and commissions as aforesaid) shall be remitted by the said Charles H. Carroll from time to time, as the same shall be received, to the said Alexander Neill, in the manner hereinbefore provided for the remission of the said sum of $15,000, and the same shall be applied by the said Alexander Neill to the payment of the debts due from the said Luke Tiernan to all the creditors of the said Luke, whose *demands shall then have been ascertained by the said Alexander Neill; and in case that the sum so to be applied shall be insufficient for the payment of all such demands, then and in this case the same shall be applied in part payment of each of said demands, in the ratio that each of said demands respectively shall bear to the whole sum to be so applied to that object; and in case the said sum shall be more than equal to the payment of such demands, then and in that case the residue thereof shall be paid by the said Alexander Neill to the said Luke Tiernan, his heirs, executors, administrators, or assigns." [*416

The said Carroll, in pursuance of said deed, proceeded to make sale of various parts of the property thereby conveyed, and from time to time, from the 1st of March, 1841, to the

22d of April, 1844, remitted to said Neill, in various amounts, the whole sum of $15,000, provided to be paid in the first place to said Neill out of the net proceeds of sales as above mentioned. This sum increased in the hands of Neill, by interest and premiums on the drafts in which it was remitted, to $16,440.55.

Luke Tiernan was a partner in the commercial firm of Luke Tiernan & Son, of Baltimore, the only other partner therein being his son Charles Tiernan. This firm was dissolved previously to the death of Luke Tiernan, which occurred on the 9th of November, 1839, and after his death it was conducted under the same name by Charles Tiernan.

Luke Tiernan was also a partner in the commercial firms of Luke & Charles Tiernan, and Tiernan, Cuddy & Co., of New Orleans. The partners of the first-named firm were Luke and Charles Tiernan, and of the second, Luke Tiernan, Charles Tiernan, Calvin Tate, and James McG. Cuddy.

The firm of Tiernan, Cuddy & Co., failed in December, 1835, for a large sum of money. Charles Tiernan was the liquidating partner thereof, and was engaged from April, 1836, to May, 1842, in collecting the assets of the firm. He collected about $100,000, the whole of which, and a good deal more, he paid in satisfaction of the debts of the firm. Calvin Tate, one of the partners, applied for the benefit of the bankrupt law of the United States on the 18th of February, 1842, and obtained his discharge under said application. The amount of debts returned by him as due by Tiernan, Cuddy & Co. was $569,069.49, and the amount as due to said firm was $800,743.47.

On the 29th of May, 1845, the executors of Luke Tiernan, on an account then passed by them with the Orphans' Court of Baltimore County, had in hand a balance in cash to the amount of $506.91. They conjecture that, with this balance, *417] debts may be collected and other assets may be realized, including *the entire real and personal property of said Luke, to the amount in all of about $30,000. None of this amount, however, so far as appears, was ever collected, except said sum of $506.91, and the entire estimate is merely conjectural.

The individual debts of Luke Tiernan, as proved and allowed in this case, amount to $31,586.25.

The partnership debts of all the firms in which Luke Tiernan was concerned as partner, as approved in this case, amount to $295,025.74.

In October, 1843, John D. Murrill, a citizen of the state of Virginia, and the Bank of New Orleans, filed their bill in equity

against Mr. Neill, claiming from him an account of his trust under the deed now described, and a distribution of any fund in his hands among the creditors of Mr. Tiernan. The bill was amended by making William T. Somerville a defendant, as executor, along with Mr. Neill, of Luke Tiernan.

The answer of Neill admits the receipt under the deed of $15,000, increased, by interest from investment, to $16,440.55; and this sum he asks may be distributed among the creditors of Mr. Tiernan who may under the trust have right to it. Testimony was taken to show the insolvency, and the debts and assets, of the partnership in New Orleans, and of Luke Tiernan. The separate estate of the latter in Maryland is shown to have been administered, leaving only $506 in the hands of the executors, and some good debts to be collected, and some unsalable stocks.

The court passed an order for notifying creditors of Luke Tiernan to file their claims, and under it a number of claims have been presented, partnership and individual, against Luke Tiernan. The individual amount to $31,586.25, the partnership to $295,025.74.

The matters being referred to an auditor to report an account upon the claims, he stated two accounts, one applying the fund to payment of only the individual creditors, the other to payment of them and of the partnership creditors *pari passu*.

Upon exceptions taken, the court determined that the individual creditors were to be preferred, and the funds of the trust should go to their satisfaction before any payments should be made to the partnership creditors.

The trustee was therefore directed to proceed to distribute and pay over the funds accordingly. From this decree, the complainants appealed to this court.

The case was argued by *Mr. Mayer* and *Mr. Johnson* (Attorney-General), for the appellants, and by *Mr. Brown* and *Mr. Meredith*, for the appellees.

*The counsel for the appellants, contending that they were entitled to share ratably with the individual creditors in the funds proceeding from the lands conveyed, submitted these propositions:— [*418

1. There is no rule at law, nor in equity, which gives separate creditors a priority of payment over joint creditors, out of separate estates; although the principle is well established that joint, that is (more properly) partnership, creditors are first to be paid out of partnership property. This principle is founded upon the consideration that each partner is interested in the

partnership fund, and concerned to see it applied for his exoneration by its paying the common liabilities; and it is pledged accordingly, not only for partnership debts, in favor of partnership creditors, but from each to the other partner for the indemnity of both. The prior right of partnership claims upon the partnership estate arises, therefore, from the nature of that estate, in reference to the rights of the partners; and does not grow out of any limitation of the rights or remedies of the partnership creditors. Such being the nature of the partnership fund, it is regarded, too, as under a prior lien in favor of the partnership creditors. The principle, then, which gives the priority is not restrictive, but is cumulative, in furnishing a security, by this preferred claim to the partnership property, in favor of partnership creditors. The rule contended for by the appellee has reference only to the marshalling of assets, not to the satisfaction, directly or ultimately, of the joint claims. It is a rule only "of convenience."

2. Whatever may be the rule as to the distinctive appropriation of separate and joint estates of debtors, it is believed to be clear from the authorities, that where there is no joint estate, or it is inadequate, or there are no solvent partners, the partnership creditors are admitted to dividends, with separate creditors, out of the separate estates.

3. Modern decisions in equity regard partnership claims, and satisfy them, as jointly and severally binding the partners. In this respect, equity follows the law, and would virtually make the property here, under that position, legal assets. The whole idea of separate claims having a priority upon separate estates, arose from the impression that the partnership claims should not be treated in equity as joint and several.

4. Whether the proceeds of sales under Mr. Tiernan's deed be regarded as legal or as equitable assets, the terms of the deed demand a distribution among all creditors, without preference to any class.

*419] 5. But those proceeds are to be regarded as legal assets, and *the partnership creditors can no more rightfully be excluded from them than they could have been denied, after judgment against all the partners, the privilege of levying an execution on the lands, if they had not been conveyed. So far as the deed provides for creditors generally, it does but what the law had ordained, in subjecting the lands to all creditor claims. Equity here must follow the law in applying the avails of this property. That is the true equity.

Under the first proposition, the following authorities were relied upon. 5 Cranch, 34; 5 Serg. & R. (Pa.), 78; Eden on

Bankruptcy, 169; 3 Ves., 238; 4 Id., 838, 437; 6 Id., 813, 9 Id., 118, 124, 125; *Ex parte Haydon*, 2 Bro. C. C., 5; 14 Ves., 447; 15 Id., 496; 17 Id., 210; 5 Johns. (N. Y.) Ch., 60, 74; 2 P. Wms., 500; 2 Russ., 191, 194, 196; 1 Har. & G. (Md.), 96; 8 Pet., 271; 4 Johns. (N. Y.) Ch., 525; 3 Madd., 229; *Buck's Cases in Bankr.*, 227; 2 Madd. Ch. Pr., 464; 3 Kent, 43, 64, 65; 8 Law Rep., 273, Judge Ware's Decision; Story on Partn., 363; *West* v. *Skip*, 1 Ves. Sr., 239.

Under the second, the cases from Vesey and 2 Bro. C. C., 5; 2 Madd., 464; 5 Serg. & R. (Pa.), 78, cited under the first proposition, were relied on.

Under the third proposition, 1 Story Eq., 626, § 676; 1 Myl. & K., 582; 1 Meriv., 539, 572; 2 Johns. (N. Y.) Ch., 508; 1 P. Wms., 682; 3 Ves., 238; 4 Id., 838; 1 Har. & G. (Md.), 96; 2 Russ. & Mylne, 495; 1 Keen, 219; 1 Gall., 371, 630; 2 Vern., 292; 2 Ves., 100, 371.

Under the fourth proposition, Ram. on Assets, 317 (8 Law Lib.); 1 Vern., 63, 101; 2 Id., 61, 763.

Under the fifth, 1 Vern., 63, 410, 411; 2 Id., 764; 1 Story Eq., 521, § 553; 22 Pick. (Mass.), 450, 454, 455.

The counsel for the appellees contended,—

1st. That the language of that clause in the deed of the 24th September, 1839, which directs that the first $15,000 remitted by the trustee shall be paid to "the creditors of the said Luke Tiernan," throws upon the appellants the *onus* of showing that the creditors of the partnership firms of Tiernan, Cuddy & Co., and L. & C. Tiernan were meant to be included. *Thomas* v. *Beynon*, 12 Ad. & Ell., 431.

2d. That, for the purpose of determining the meaning attached by the grantor to the language of the provisions of said deed, and to ascertain what he intended by the same, the court, by means of extrinsic evidence, will place itself in his situation, by inquiring into all the collateral facts and circumstances that can be made ancillary to those objects. Wigram's Extrinsic *Evidence, (2 Lib. of [*420
Law and Eq.,) Introductory Observations, § 9; the whole of Proposition V., with the notes, and especially §§ 61, 62, 71, 72, 73, 74, 77, 78, 79, 95, 96; the whole of Proposition VII., with the notes, and particularly §§ 150, 151, 152; General Conclusions, §§ 211, 212, 213, 214, 215. Broom's Legal Maxims, 262, 263, 294 (1 Lib. of Law and Eq.); Gresley's Evidence in Equity, 203; *Cheyney's case*, 5 Co., 68; *Altham's case*, 8 Co., 155; *Counden* v. *Clark*, Hob., 32; *Smith* v. *Jersey*, 2 Brod. & B., 473; *Doe* v. *Harvey*, 8 Bing., 239; *Gord* v. *Needs*, 2 Mees. & W., 129; *Hiscocks* v. *Hiscocks*, 5 Id., 367, 368;

Allen v. *Allen*, 12 Ad. & Ell., 451; 1 Greenl. Ev., §§ 286, 287, 288, 290, 297; *Blackwell* v. *Bull*, 1 Keen, 176; *Doe* v. *Morgan*, 1 Cromp. & M., 235; *Shore* v. *Wilson*, 5 Scott, N. R., 1037, 1038; *Bradley* v. *Steam Packet Co.*, 13 Pet., 89; *Barry* v. *Combe*, 1 Id., 640; *Barkley* v. *Barkley*, 3 McCord (S. C.), 269; *Doe* v. *Roe*, Ga. Dec., Part I., 80.

3d. That the deed *per se*, without looking beyond it, or out of it, ought to be construed to include only the creditors of Luke Tiernan, on his own individual account. Broom's Legal Maxims, (1 Lib. of Law and Eq.,) pp. 120, 126, 127, 128, 140, 141, 150, 151; 1 Preston's Shep. Touch., ch. 5; 30 Law Lib., 150 *et seq.*

4th. If this construction be not correct, they will maintain that the money in question in this case, which consists of the $15,000 first mentioned in the deed, with the increase thereof, should be divided solely among the individual creditors, and that the partnership creditors of said Luke Tiernan, if embraced at all in said deed, are secured by the subsequent part thereof, which provides that the residue of the proceeds of sales shall be divided among *all* the creditors of said Luke.

5th. And if neither of said constructions shall be sustained by the court, they will further maintain that said Luke Tiernan, if all his debts, both individual and partnership, be taken into consideration, made said deed with reference to the rule common both to courts of equity and bankruptcy, that individual creditors shall first be paid out of individual property, and partnership creditors out of partnership property, and that all the property conveyed by said deed, being the individual property of Luke Tiernan, must be applied in the first instance to the payment of his individual debts.

They relied on the decree of Lewis H. Sanford, Assistant Vice-Chancellor of the First Circuit of the state of New York, made with reference to this deed, in the case of *Slatter* v. *Carroll*, 2 Sandf. (N. Y.) Ch., 573; Cary on Part., 220, (5 *Law Lib.); Id., 296; Gow on Part., 386; Story on Part., §§ 363–366, 376; 3 Kent, 64, 65 (4th ed.); Collyer on Part., 337–341; 3 Bland (Md.), 356; *McCulloh* v. *Dashiell*, 1 Har. & G. (Md.), 97; *Pierce* v. *Tiernan*, 10 Gill. & J. (Md.), 253; *Tuckers* v. *Oxley*, 5 Cranch, 44, 45; *United States* v. *Hack*, 8 Pet., 271; *Wilder* v. *Keeler*, 3 Paige (N. Y.), 171; *Payne* v. *Matthews*, 6 Id., 19; 1 Story Eq., § 675; Eden on Bankruptcy, 169 *et seq.*, 34 Law Lib.

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Mr. Justice DANIEL delivered the opinion of the court.

The original bill in this case having been framed upon a palpable misapprehension of the position of the parties, and

of the facts connected with and entering into their rights or their obligations, reference to that bill beyond this remark is deemed unnecessary. The object of the amended bill filed by the complainants on behalf of themselves and others, creditors of the mercantile houses of Luke Tiernan and Charles Tiernan of Baltimore, and of Tiernan, Cuddy, & Co., of New Orleans, is to procure an appropriation to those creditors of the sum of $15,000, remaining in the hands of the defendant Alexander Neill, and derived to him from Charles H. Carroll, the trustee in the deed from Luke Tiernan, filed as an exhibit with the answer of Neill in this cause. This controversy depends, first, upon the construction of those clauses of the deed above mentioned, which direct the payment by the trustee to Alexander Neill, and the application by the latter of the sum so paid, and, secondly, upon the operation of the rules of law, as controlling such application in reference to the rights of the separate creditors of Luke Tiernan, and of the joint creditors of the firms of Luke & Charles Tiernan, and of Tiernan, Cuddy & Co.

In other words, whether the separate creditors of Luke Tiernan have a prior right of satisfaction from the subject of the trust constituting the separate private estate of said Tiernan, or have the right to claim against that separate estate *pari passu* only with the several creditors of the mercantile houses of which Luke Tiernan was a partner. The facts of this case are few and simple, and are scarcely in any respect controverted; the cause turns, as has already been remarked, upon the construction of the deed, and upon the rules of equity as applicable to the position of the grantor, in relation to the different classes of his creditors, at the period of its execution. The language of the deed, as indicative of the intention of the grantor, will in the first place be adverted to. And in considering this language, it may be remarked, that it nowhere speaks of debts due from Luke Tiernan, as a member of the firms of Luke & Charles Tiernan, or of Tiernan, Cuddy, & Co., nor mentions *nor alludes to those [*422 firms, nor to any other mercantile firms whatsoever. This deed recites the facts of the relinquishment by Mrs. Tiernan of her dower right in a large amount of property previously sold by her husband, and of her consent to a similar relinquishment in future sales to be made by the trustee, Carroll; it recites also a debt due from the grantor to Mrs. Anne E. Brien, deceased, which was still unpaid, and was due and owing to her son, Luke Tiernan Brien. It then proceeds to declare,—"That whereas the said Luke Tiernan is indebted to divers other persons, residing in different parts of the

United States, in a large sum of money in the aggregate, but the names of all the persons to whom he is indebted, and the amounts due to each respectively, the said Luke Tiernan is now unable to specify particularly. And whereas the said Luke Tiernan is desirous of conveying the lands hereinafter described, in trust that the same shall be sold, and the proceeds thereof applied in the manner hereinafter particularly specified." The deed then, after directing a sale by the trustee, provides, that he shall remit from time to time, as the same shall be received, "to Alexander Neill of Maryland, and payable to his order, of the first moneys arising from such sales, until he shall have remitted the sum of $15,000, to be paid by the said Alexander Neill to the creditors of the said Luke Tiernan whose demands shall then have been ascertained; and if the demands so ascertained shall exceed the said sum of $15,000, the same shall be applied in part payment of each of the said demands, in the ratio that each of said demands shall respectively bear to the whole sum $15,000, so to be applied." The deed then provides, out of further remittances arising from sales to be made by the trustee, for the payment of $12,000 to Mrs. Tiernan, in compensation for her right of dower; and next, for the payment of the debt due to the son of Mrs. Anne E. Brien, and then declares, that after the last-mentioned sum (i. e. the sum due to Mrs. Brien or to her son) shall have been paid, all the moneys arising from such sales (after deducting expenses, &c.) shall be remitted by the trustee to the said Neill, and the same shall be applied by the said Neill to the payment of the debts due from the said Luke Tiernan *to all* the creditors of the said Luke, whose demands shall then have been ascertained by the said Alexander Neill; "and in case that the sum so to be applied shall be insufficient for the payment of all such demands; then, and in this case, the same shall be applied in part payment of each of said demands, in the ratio that each of said demands respectively shall bear to the whole sum to be so applied to that object; and in case the said sum shall be more than equal to the payment of *such demands, then, and in that case, the residue thereof shall be paid by the said Alexander Neill to the said Luke Tiernan, his heirs," &c.

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We have already adverted to the circumstance, that the grantor in this deed has nowhere alluded to any mercantile concern with which he was associated; that he was disposing of a subject confessedly his own separate property; that he has not said, that whereas Luke Tiernan & Son, or Tiernan, Cuddy & Co., but that Luke Tiernan, was indebted to Mrs.

Tiernan and to Mrs. Brien, and to divers other persons residing in different quarters of the country. This would not be the language of a merchant, (still less of a practiced and extensive merchant,) when intending to designate the firm of which he makes a part. On such occasions he never mentions himself individually, unless he intends expressly to distinguish between himself and his house, and would always be so understood by established mercantile acceptation. And again, if, in the construction of this deed, the name of Luke Tiernan is to be taken as synonymous with Luke Tiernan & Son, and Tiernan, Cuddy & Co., we should be driven to the conclusion that these several firms were indebted to Mrs. Tiernan in consideration of her relinquishment of her dower in her husband's estate, and to Mrs. Brien for the private debt due to her,—for all these creditors are grouped in the same category. Their claims originate in the same source,—in the obligations of Luke Tiernan. The language of the deed is, that *Luke Tiernan* is indebted to Mrs. Tiernan, and to Mrs. Brien; and the same Luke Tiernan it is who is also indebted to divers other persons residing in different parts of the United States. Such a construction of the deed involves, we think, a violation of the plain meaning of the terms of the instrument, and leads to confusion and absurdity.

It has been insisted for the appellants in this case, that the admission by the grantor of a large amount of claims against him, of the diversity of the residence of his creditors, and of the inability on his part at once to designate those creditors and their demands, should be received as proof that the deed was never intended to be limited to the private creditors of the grantor, who, it is contended, must, as well as the extent of their claims, have been known; but was designed to embrace all his partnership liabilities. We have just stated that such an interpretation of the deed is inconsistent with the meaning of its language. But if we look beyond the deed, to the position of the parties at the time of its execution, is there any probability arising from that position, which can justify the conclusions *urged in this respect for the [*424
appellants? The grantor in this deed appears to have been at one time the possessor of great wealth; the deed made an exhibit in this case shows that he was the possessor of an unusual extent of property. It is almost certain, too, from the character and situation of the subject of this conveyance, as well as from other circumstances disclosed by the record, that its owner must have been the proprietor of many other constituents of a large estate, both within and without the city and state of his residence. That a man thus situated

should necessarily be engaged in a variety of transactions; should employ numerous agents; that many of his transactions, both as to persons and contracts, should be conducted by agents; that his knowledge with respect to persons and undertakings should in their detail be dependent on information to be derived from agents thus employed,—are circumstances, in our view, falling within the range of daily experience, and such as not only may explain the language of an instrument intended to embrace the transactions of one so situated, but which in fact render such language proper, in order to bring it within the bounds of experience and truth. The daily habits of one so situated must imply, to some extent, an ignorance of the precise detail of all that may be consequent upon them. We think it natural, (nay, with a due regard to truth, inevitable,) that one so situated, if called upon on an emergency, should admit his inability to enumerate all that he had done,—all that he had authorized to be done through others,—and every consequence which might flow from the one or the other. The language of Mr. Tiernan we consider, therefore, as not more comprehensive than was appropriate to embrace his private liabilities. The debts due to his wife and to Mrs. Brien were strictly domestic obligations, necessarily within his knowledge; were regarded as of a peculiarly sacred character; and therefore were provided for, exempt from the contingency of an ultimate insufficiency of funds. But even these claims, however sacred they may have been deemed, were not permitted absolutely to precede a contribution at least to other creditors whose condition might be known; but they have been postponed to these *pro tanto*. The language of that portion of the deed which, after the payment directed to be made to Mrs. Tiernan and to Luke Tiernan Brien, and after distribution of the first fifteen thousand dollars received from the trustee, directs the application of the subsequent proceeds of the trust subject to all the creditors of the grantor then ascertained, and, in the event of a surplus, the payment of that surplus to the grantor, has
*425] been earnestly pressed on our attention. It has been argued upon *this provision of the deed, either that it is expressive of the intention of Luke Tiernan to let in all his creditors, social as well as individual, or that it is fraudulent, as interposing a hindrance on one or the other class, or on both the classes of his creditors, by an attempt to retain the proceeds of the land, in opposition to their rights. We cannot yield to this argument the ends it was designed to accomplish. We think that the terms of this latter provision, so far from enlarging the meaning of the former, so as to let

in upon the trust subject the creditors of the firms before mentioned, tend rather to strengthen the limit presented by the former provision when standing alone. For although the distribution of the money to be received by Neill is to be made amongst *all* the creditors, they are still the creditors of the said Luke Tiernan before spoken of, and the creditors of no other person. This mode of expression, coming from an individual practiced in the habits and language of merchants, we regard as a confirmation of the intention previously expressed, rather than as proof of a departure from that intention. Next, as to any evidence of fraud resulting from the direction to pay over to the grantor in the deed any surplus which might remain after satisfying the separate creditors; we can perceive no proof of fraud, no attempt to hinder or delay the creditors in this direction. Nothing is more probable than that Luke Tiernan might have considered the effects of Luke Tiernan & Son and of Tiernan, Cuddy & Co., represented to be of a large amount, as adequate to meet the joint responsibilities of those firms; or, at any rate, he might have insisted upon his right to refer the partnership creditors to the partnership funds in the first instance, and, until these should be shown to be insufficient, to retain possession of his separate private estate. The argument then appears to be defective in either aspect in which it is applied.

The second principal position assumed for the appellant is this: that, conceding the fifteen thousand dollars in controversy to have been ever so clearly appropriated by Luke Tiernan to his separate creditors, still, under principles of equity, such an appropriation cannot be maintained; but that those principles authorize the partnership creditors of Tiernan & Son, and of Tiernan, Cuddy & Co., to charge that fund *pari passu* with the separate creditors of said Tiernan.

The rule in equity governing the administration of insolvent partnerships is one of familiar acceptation and practice; it is one which will be found to have been in practice in this country from the beginning of our judicial history, and to have been generally, if not universally, received. This rule, *with one or two eccentric variations in the English practice which may be noted hereafter, is believed to be identical with that prevailing in England, and is this:—That partnership creditors shall in the first instance be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the partners with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of

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partnership debts, until the separate and individual creditors of the respective partners shall be paid. The reason and foundation of this rule, or its equality and fairness, the court is not called on to justify. Were these less obvious than they are, it were enough to show the early adoption and general prevalence of this rule, to stay the hand of innovation at this day; at least, under any motive less strong than the most urgent propriety.

This rule may be traced back in England, with certainty, to the cases of *Ex parte Crowder*, in 2 Vern., 706, (in 1715,) and of *Ex parte Cook*, 2 P. Wms., 500, (in 1728,) nearly a century and a half since. It was affirmed by Lord Hardwicke in *Ex parte Hunter*, in 1 Atk., 228, (in 1742,) and continued unchanged until the year 1785, when a material innovation was made upon it by Lord Thurlow, in the case of *Ex parte Hodgson*, 2 Bro. Ch., 5. By the decision last mentioned, the established practice then of sixty years was so changed, and the distinction between joint and separate creditors so broken up, that the former were permitted to come in, and to receive dividends *pari passu* with the latter, from the separate estate.

This change led to the practice of filing a bill on behalf of the separate creditors, to restrain the order in bankruptcy whenever there was a joint estate, and by this means the rights of the joint and separate creditors on their respective funds were maintained; a proceeding which could rest on no other foundation, than the peculiar equities of these different parties with respect to the funds with which they had been respectively connected. In consequence of the inconvenience of Lord Thurlow's rule, and of the injustice it was thought to involve, Lord Loughborough re-established the practice that had so long previously existed, with the single modification of permitting the joint creditors to prove under a separate commission; but denying to them any right to dividends, until after the separate creditors were satisfied. The reasoning of his Lordship, as going to show that his decision is founded in pure principles of equity, is peculiarly forcible. Speaking of
*427] the rule of Lord Thurlow, he says,—"The difficulty that has struck me upon *it is, that what I order here sitting in bankruptcy, I shall forbid to-morrow sitting in chancery; for it is quite *of course* to stop the dividend upon a bill filed. The plain rule of distribution is, that each estate shall bear its own debts. The equity is so plain, that it is of course upon a bill filed. The object of the commission is to distribute the effects with the least expense. Every order I make to prove a joint debt on a separate estate, must produce

a bill in equity. It is not fundamentally a *just* distribution, nor a convenient distribution. Every creditor of the partnership would come upon the separate estate. The consequence would be, the assignees of the separate estate must file a bill to restrain the dividend upon all these proofs, and make the partners parties. But there is another circumstance. It is a contrivance to throw this upon the separate estate." Again his Lordship says,—"It is not stated as a case where there are no joint funds. Here it is only that there are two funds. Their proper fund is the joint estate, and they must get all they can from that first. I have no difficulty in ordering them to be permitted to prove; but not to receive a dividend." This doctrine of Lord Loughborough, deduced, as he tells us, not less from fundamental principles of equity, than from convenience in the administration of bankrupts' estates, appears to have been followed in England ever since. The numerous cases chiefly before Lord Eldon going to sustain this position, would, if quoted, unnecessarily encumber our opinion; they are collected in note 1 to the case of *Elton, Ex parte*, 3 Vesey by Sumner, p. 242. It may be proper in this place to mention the two departures permitted by the Court of Chancery in England from the general rule pursued by that court, which departures were adverted to in a previous part of this opinion. The first is presented in the instance in which the *petitioning creditor*, though a joint creditor, is permitted to charge the separate effects *pari passu* with the separate creditors, because, as it is said, his petition, being prior in time, is in the nature of an execution in behalf of himself and the separate creditors. The second is that in which there are no joint effects at all. In this last instance it is said that the joint creditors may come in for dividends *pari passu* on the separate effects; though if there be joint effects, though of the smallest possible amount, this privilege would not be allowed. These exceptions it seems difficult to reconcile with the reason or equity on which the general rule is founded; they are but exceptions, however, and cannot impair that rule. They do not, for aught we have seen, appear to have been recognized by the courts of this country. The case of *Tucker* v. *Oxley*, 5 *Cranch, 34, was a case at law, and [*428 the court in that case, whilst they admitted the joint creditors to prove and to receive dividends against the separate estate, explicitly recognized the authority of *Ex parte Elton*, and the power and the duty of a court of chancery, upon application thereto, to prevent the diversion of the separate fund. The latter exception above referred to was considered by the Court of Appeals of Maryland, in the case of *McCulloh* v. *Dashiell*,

1 Harr. & G. (Md.), 97, and by that court expressly repudiated.

The doctrine upon this question of distribution, as illustrated both in the English and American decisions, will be found to be ably treated in the case of *Murray* v. *Murray*, 5 Johns. (N. Y.) Ch., 72 *et seq.;* and by Archer, Justice, in the case of *McCulloh* v. *Dashiell*, in 1 Harr. & G., pp. 99 to 107; and the authorities, both English and American, are collated in a learned note in the third volume of Kent Commentaries, beginning on p. 65 of that volume.

The proper conclusion from these authorities we deem to be this, as is stated also by Justice Story in his treatise on Partnership, p. 376, where he says,—"It is a general rule, that the joint debts are primarily payable out of the joint effects, and are entitled to a preference over separate debts of the bankrupt; and so, in the converse case, the separate debts are primarily payable out of the separate effects, and possess a like preference; and the surplus, only after satisfying such priorities, can be reached by the other class of creditors."

Upon a full consideration of this cause, we are of the opinion that, upon either ground of objection urged to the decree of the Circuit Court, that decree should be affirmed, and it is hereby accordingly affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

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