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Insolvency of Firm and Partners, Marshalling of Assets, Joint and Several Claims

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In *State v. Flynn*,¹⁸ the defendant in a bastardy case brought habeas corpus to be discharged from the order of commitment founded on the testimony of the mother both as to her adultery with defendant and non-access of her husband. The court agreed that the mother was incompetent, under the "well settled rule," but held that defendant had waived it by his cross-examination.

The dissenting opinion argued that the doctrine of waiver should not be applied to this incompetency based on public policy. In the whole field of evidence, there are few, if any, rules so universally accepted on so unsatisfactory a foundation. But apparently legislation alone can rid the law of this absurdity.

E. W. HINTON.

PARTNERSHIP—INSOLVENCY OF FIRM AND PARTNERS—MARSHALLING OF ASSETS—JOINT AND SEVERAL CLAIMS.—[North Carolina] It is the well known general rule, in equity, that, in the distribution of the estates of insolvent partnerships and partners, the firm creditors have a first claim upon the partnership assets, and the individual creditors have a first claim upon the individual assets.¹ This is also the rule in bankruptcy.²

What the foundation of this rule is has been much disputed. It is commonly said to be a rule of general equity, designed, to some extent, to even up the advantages of the individual creditors as compared with the partnership creditors.³ The rule obviously produces different results from those reached by legal process. While the partnership obligation is so far joint that, if the creditor sues one partner only, the latter may usually plead the non-joinder of the others in abatement,⁴ yet, as soon as judgment is obtained in a suit against all, the creditor may cause execution to be levied upon the property of one, leaving him to get contribution from his co-partners later.⁵ In the case of the death of one partner before action is brought, still other rules apply which it is not necessary to notice here.⁶

These different consequences have sometimes been sought to be explained by saying that, while partnership contractual obligations are joint at law, they are joint and several in equity.

18. (1923) 193 N. W. (Wis.) 651.

1. See *Rodgers v. Meranda* (1857) 7 Ohio St. 180; *Hundley v. Farris* (1890) 103 Mo. 78, 15 S. W. 312, 23 Am. St. R. 863, 12 L. R. A. 254; *Hawkins v. Mahoney* (1898) 71 Minn. 155, 73 N. W. 720; and many others.

2. See section 5, sub. f, of the Bankruptcy Statute.

3. See *Rodgers v. Meranda* supra.

4. See *Rice v. Shute* (1770) 5 Burr. 2611, 2 Wm. Bl. 695.

5. See *Rice v. Shute* supra. It is true that it was said by Lord Mansfield, in that case, that contracts with partners are always joint and several, but it is clear, as has often been pointed out, that he was speaking only of the procedural aspect, i. e., that it was so far joint that a single partner, sued alone, could plead the non-joinder of the others in abatement, but that if he did not so plead it, he waived it, and could be held alone. He also said, as has often been stated, "If the action be brought against *all*, the plaintiff may take out execution against any *one*."

In several states statutes have been passed purporting to make contractual obligations incurred by several persons at the same time joint and several. These general statutes have some times been held to apply to partnership obligations,⁷ and the contrary has also been held.⁸ In a number of states statutes have specifically made partnership obligations joint and several.⁹ In a variety of cases the creditor has attempted to secure much the same result by obtaining, not only the partnership obligation, but the separate obligation of the individual partners as well. This has been attempted in several ways, as, for example, to get the partners to sign a conceded partnership contract in their individual names; or, more frequently, to secure both the firm signature and the individual signatures. Another form has been to have the partnership contract in terms made joint and several. In a number of these cases it has been held that both the joint and the several obligation of the partners may be secured, for some purposes at least.¹⁰

In the recent case of *Virginia-Carolina Chemical Co. v. Walston*,¹¹ which seems to be largely a case of first impression, the Supreme Court of North Carolina had before it the question whether the general rule in equity first referred to should apply in a state whose statutes made partnership obligations joint and several. The court conceded that the general rule in equity would give the individual creditors priority in the individual assets, but said "this reasoning does not obtain with respect to general partners where, by statute, as with us, they are made jointly and severally liable for the debts of the partnership, for the very good reason that the force and effect of the statute, to all intents and purposes, is to convert the creditors of the firm into individual creditors of each member of the partnership. Where the liability of general partners is joint and several, and the firm assets are not sufficient to pay the firm debts, the creditors of the partnership are entitled to have their claims allowed in full, both as against the assets of the firm and

6. Compare *Doggett v. Dill* (1884) 103 Ill. 560, 48 Am. Rep. 565; *Pope v. Cole* (1873) 55 N. Y. 124, 14 Am. Rep. 198.

7. See *Hamilton v. Buxton* (1845) 6 Ark. 24; *Ryerson v. Hendrie* (1867) 22 Iowa 480; *Gates v. Watson* (1874) 54 Mo. 585; *Williams v. Rogers* (1879), 77 Ky. 776.

8. See *Sherburne v. Hyde* (1900) 185 Ill. 580, 57 N. E. 776; *Thompson v. White* (1898) 25 Colo. 226, 54 Pac. 718.

9. See the article by Professor F. M. Burdick, in Col. L. Rev. XI 101. Professor Burdick states that twenty-three states have, in one way or another, changed the general rule. (If I may say so, with all respect to my deceased friend, it seems to me that part of Professor Burdick's condemnation, in this article, of the decision in *Seligman v. Friedlander*, is based upon a misconception of what the court was talking about. It seems to me, from the cases cited, that the court was speaking of one situation, and Professor Burdick of another. Both seem to me to be right, but to be discussing different situations.)

10. See *Williams Nat. Bank v. Hall* (1893) 160 Mass. 171, 35 N. E. 666; *Winslow v. Wallace* (1888) 116 Ind. 317, 17 N. E. 923, 1 L. R. A. 179; in re *Gray* (1888) 111 N. Y. 404, 18 N. E. 719, among others.

As to whether this can be done under the Bankruptcy Act, compare In re *Mosier* (1901) 112 Fed. 138, with in re *Davis* (1922) 280 Fed. 136.

11. (1924) N. C. 123 S. E. 196.

also as against the individual assets of a partner, to the end that they may thus concurrently enforce the two liabilities and obtain their ratable share of each fund."

The only case which the court cited, outside of North Carolina, was *Matter of Peck*,¹² where, in an action for *tort*, the court held that the equity rule did not apply. It is significant, however, that in *Leggat v. Leggat*¹³ the same court had already held that the New York statute, making partners jointly and severally liable, had not changed the rule prevailing in that state (contrary to the rule prevailing in many other states), that, where one partner has died, the creditor cannot proceed against his estate until he has first exhausted the joint estate.

Any one who feels that the equity rule is an unfair one, because it deprives the partnership creditor of one of the resources upon which he relied in extending the credit, will make no complaint against the conclusion reached by the North Carolina court; but whether that is to be accepted as the general result of the now numerous statutes making partnership contractual obligations joint and several is not so clear.

FLOYD R. MECHEM.

12. (1912) 206 N. Y. 55, 99 N. E. 258, 41 L. R. A. (n. s.) 1223, Ann. Cas. 1914A 798.

13. 79 App. Div. 141, aff'd 176 N. Y. 590.