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CREDITORS’ RIGHTS AND THE PARTNERSHIP

By James R. Richardson*

The nature of and the quality of partnership property is the background and basis for some troublesome problems in the law of partnership. Another form of business association, the private corporation, being considered a fictional person, an entity unto itself, has prevented these same problems arising with respect to corporate held property and rights incident thereto. Neither the American nor English decisions have to any extent clothed the partnership with the characteristics of legal personality and the commensurate right to sue and be sued, contract and be contracted with, and hold property (real) in the firm name. True enough, for some purposes and in some instances the courts are prone to treat partnerships as legal entities. However, the result when reached seems to be for reasons of expediency with respect to the facts and circumstances of the particular case, rather than with a view to furnishing a line of cases from which a rule of consistency may be evolved. The situation has been aptly stated thusly: “To what extent partnerships have been or should be treated as possessing legal personality by legislatures and courts has been a matter of considerable dispute.”

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1 Trustees of Dartmouth College v. Woodward, 4 Wheat, 518, 4 L. Ed. 629 (1819), herein appears Justice Marshall’s familiar and oft quoted definition of a corporation, to wit: “An artificial being, invisible, intangible, and existing only in contemplation of law.”

2 A partnership can really own no property. The property of the firm is owned by the members thereof.” Adams v. Blumfield, 27 N.W. 643, 204 P. 60 (1922), but see U.P.A. Sec. 8, “Any estate in real property may be acquired in the partnership name.” Suits affecting partnership affairs must be brought by or against the members of the firm, not in the firm name. Kent v. Nat’l. Sup. Co. of Texas, 36 S.W. 2d 811, (Tex. Civ. App. 1931).

3 Crane on Partnership, Sec. 8, p. 9. Following the rule of the civil law countries a partnership is treated as a legal entity in Louisiana, Clements v. Luby Oil Co., 15 La. App. 384, 180 So. 851 (1930). Liability insurance on a partnership which has been held not effective where the vehicle was not being used on firm business, Hartigan v. Casualty Co. of Amerca, 227 N. Y. 175, 124 N.E. 789 (1919). There is a strong line of cases that accept the “mercantile” view of partnership entity in contra-distinction to the common law. People v. Zangam, 301 Ill. 299, 133 N.E. 783 (1922); Caswell v. Maplewood Garage, 84 N.H. 241, 149 A 746 (1930); Thurston v. Detroit Asphalt Pavng Co., 226 Mich. 505, 198 N.W 345 (1924).
The members of a partnership as regards partnership property have been regarded as joint tenants, and the tenancy in partnership created by the Uniform Partnership Act is an innovation in the common law. It was an outgrowth of this practice of courts to treat partners as joint tenants of partnership property that led to inequitable results, particularly as to joint tenants unrestrained power of disposition. The result was "very great confusion" where separate creditors tried to reach partnership property or where a partner attempted to dispose of it for his own purposes.

From experience which demonstrated necessity the law courts began to distinguish between interests of individual partners and that of the partnership itself in partnership property, a distinction to be found in the Uniform Partnership Act.

I. Rights of Separate Creditors in Partnership Property

Since individuals first began to engage in private commercial enterprises for gain by the pooling of property and skill or abilities as assets for furtherance of their objectives, the partnership has been a favorite form for such venture and was the forerunner of such other business associations as the statutory limited partnership, business trust, joint-stock associations, and private corporations. This form of business association, due to the close associations, agency relationship, and unlimited liability is not recommended for any other than those bound together by ties of friendship and mutual trust, with especial emphasis on the latter.

When men transfer a portion of their assets in a manner to relinquish the individual use and control thereof to some degree, it is inevitable that questions will arise as to the availability of such transferred fund or part thereof to the claims of creditors of the individual partner.

It would be strange indeed if one might by forming or becoming a member of a partnership insulate his personal assets from the just claims of a creditor, and the law does not thus

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5 U.P.A. Sec. 25 (1).
6 Commissioner's Note, 7 U.L.A. 33.
7 U.P.A. Secs. 24-28.
permit a partnership to become a vehicle for the perpetration of a fraud intentional or otherwise. Without dissent the cases are in accord on this point; however, the extent of the right and the manner in which an individual creditor may enforce the right to subject partnership property to the extinguishment of his claim has been the cause of much confusion and disagreement in the decisions of our courts.

A stream can rise no higher than its source; a creditor can acquire no greater interest than his debtor. So it is that the interest of a partner in partnership property is an essential in rationalizing the problem.

Let us first consider a fairly early Tennessee case in which the court discusses the question in a lucid manner. The question before the court was whether specific property, to-wit, a lot of iron pipe and other material belonging to a partnership, was subject to levy for the individual debt of a member of the firm. The court reluctantly answers this question in the affirmative, recognizing that it is bound by its own Supreme Court’s holding. However, the purchaser takes only the interest of the judgment debtor after settlement and adjustment of partnership accounts, the court following the common law rule that partnership property belongs to the partnership and one partner has no interest in it, but his share of what remains after all the partnership debts are paid.

In the ultimate, the substantive rule that an execution cannot reach any higher interest in property than the debtor himself enjoys is recognized. Yet procedurally the execution officer does something the partner has no right to do in taking exclusive possession and jurisdiction over specific partnership property, the partners being in the nature of trustees as to each other with respect to firm property.

This latter fact creates the hardship which the Tennessee court deplores but is constrained to follow. The partners have a contract, the performance of which may well prove profitable,

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9 Pierce v. Jackson, 6 Mass. 242 (1810).
10 "The weight of authority seems to be, that an officer holding a writ of execution or attachment against an individual partner, may levy upon his interest, and may seize and hold partnership property, and may sell the interest of the individual partner in such property." Hershfield v. Chaflin, 25 Kan. 115, 37 Am. Rep. 237 (1881). See discussion, infra.
but the physical levy on essential material can prevent perform-
ance and work an inequitable result on an innocent partner or
partners. The court conceives the law in Tennessee to be as
follows:

1. That partnership property may be levied on by the
creditors for the individual debt of a member of the firm.
2. That specific property may be levied on, and it is not
necessary that the execution be levied on all the prop-
erty of the firm.
3. That the officer may, and that in fact it is his duty to,
take actual possession of the property levied on, and to
retain it until the sale is made.
4. That the purchaser only takes the interest of such judg-
ment debtor after the settlement and adjustment of the
partnership account, or as has been otherwise stated a
mere right to an accounting.
5. That a levy is necessary in order to fix a lien so as to
authorize the filing of a bill.

Undoubtedly the decision in this Tennessee case represents
the minority opinion at common law in holding that a portion
of partnership property may be seized by levy of execution. It
is faulty in that an individual partner's interest is indivisible, as
heretofore pointed out, and hence he can have no specific
interest in chattels subject to levy. Debts due from the joint or
partnership fund must be paid before any partner has the right
to appropriate any thereof to his individual use, and the partner's
creditor cannot claim that which his debtor cannot claim. Per-
haps then in a manner of speaking the Tennessee decision per-
mits that to be done indirectly which cannot be done directly,
certainly that is done involuntarily where it could not be done
voluntarily.

Contrary to the decision in the principal case, the weight
of authority is that an officer who proceeds under a separate
creditor's execution must seize the whole of leviable partnership
property. As has been mentioned, the officer sells only an
interest, the debtor partner's interest, which the purchaser must,

11 "the sheriff must seize all, because the moieties are undivided; for if
he seize but a moiety and sell that, the other will have a right to a moiety
of that moiety; but he must seize the whole, and sell a moiety thereof undivided
and the vendee will be a tenant in common with the other partner." Heydon v.
Heydon, 1 Salk. 392 (1693); Daniels v. Alabama, 70 Ala. 297 (1881); Weber v.
Heitz, 188 Ill. 68, 58 N.E. 676 (1900); Nixon v. Nash, 12 Ohio St. 647, 80 Am.
if he cannot make settlement with the remaining partners, proceed to have determined by a bill in equity for a partnership accounting.\textsuperscript{12}

Certain weaknesses will be apparent in the above set out procedure. At such an execution sale a purchaser acquires only an undetermined and sometimes undivided interest. This perforce will embarrass a sale, deter bidders, encourage collusion and prevent property bringing anything like its true value, as witness the fact that in the Tennessee case pipe reasonably worth fifteen hundred dollars ($1500) sold for only fifteen dollars ($15.00)

Clearly it would be sound procedure to ascertain the debtor's interest before sale and the Ohio court holds that the levying creditor may file a petition and make other partners parties defendant for the purpose of ascertaining that interest before execution sale.\textsuperscript{13} Either the creditor or co-partner may invoke equity jurisdiction to stay the execution in such case. But if neither party so elects the officer executing the writ must sell the apparent interest of the debtor in the chattels levied upon. Upon such eventuality the purchaser and other partners become tenants in common subject to a lien in favor of such partners and firm creditors of the interest of the debtor partner in the hands of the purchaser for any balance due upon final adjustment of the partnership account.

In a recent Florida case the appellant was the purchaser at an execution sale, and filed an equitable action for an accounting and determination of claims of creditors against the partnership assets and distribution of surplus, if any, to the partners entitled thereto.\textsuperscript{14}

The question as styled by the court was, "Whether a judgment debtor's individual interest in a partnership can be reached by execution." In this 1943 decision the court said it knew of no

\textsuperscript{12}Eighth National Bank of City of New York v. Fitch, 49 N. Y. 539 (1872).
\textsuperscript{13}Nixon v. Nash, 12 Ohio St. 647, 80 Am. Dec. 390 (1861). As to whether a creditor of a separate partner may garnishee a debt due the firm, see, Springfield Fire & Marine Ins. Co. v. Huntington National Bank, 299 Ky. 647 17 S.W 2d 726 (1929), and compare situation where plaintiff is a creditor of all the partners on a non-partnership obligation. Boggs v. Brooker 79 S.W 2d 642 (Tex. Civ. App. 1934); McCool v. O'Brien, 289 Ky. 729, 160 S.W 2d 28. Judgment debtor by statute has the right to redeem property within one year where at execution sale it does not bring at least two-thirds of its appraised value.
\textsuperscript{14}B. A. Lott v. Padgett, 14 So. 2d 669 (Sup. Ct. Fla. 1943).
law in this state to aid in answering the question and that there was a diversity of opinion elsewhere. The court expressed the sound proposition that no one partner has a right to possess any partnership property to the exclusion of other partners, thus it seems ruling out by dicta, at least, a levy on specific partnership property. The court accepted and reaffirmed the generally accepted view that the interest of each partner is that undivided portion of partnership assets which may remain after all partnership debts are paid. Once that interest is sold at execution sale, the partnership is at an end, the court states, and the execution purchaser becomes the owner of the property interest of the debtor subject to the burden of its proportionate share of firm debts. The court found that the purchaser might maintain a bill in equity to have this newly acquired property interest adjudicated and determined and the surplus divided between the parties in accordance with their proportionate interests.

The resumé and discussion of the Florida case is included here not because it takes a minority stand or presents a novel situation as it, in fact, presents the normal situation and holding, but rather for the reason that the court points out that as late as 1943 it has no established precedent on the law of the case involving a controversial subject, and for the further reason that the case deals with procedure to enforce the creditor's right on which this article places a degree of emphasis.

Our problem is presented in a different setting in the much discussed case of Doner v. Stauffer In this Pennsylvania case decided well over a century ago, judgments against each of two partners on individual debts, with concurrent levy of execution on each partner's interest in the firm, and sale which united partners interest in one purchaser, resulted according to the court's theory of the case in the whole of the partnership effects being swept away, thereby destroying the rights of the partners to apply firm property to payment of firm debts with consequent destruction of the derivative rights of firm creditors. In the course of the decision it is stated that the preference in favor of a firm creditor is founded on no inherent merit but rather on

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the equity which springs from the nature of the contract between the partners themselves; that a separate execution creditor sells not the chattels of the partnership, but the interest of the partner encumbered by joint debts. How can it be logically contended that a purchaser of a portion takes only an undetermined interest, but a purchaser of all takes the chattel itself so as to cut off claims of creditors?\textsuperscript{17}

Possibly the Pennsylvania court was not convinced of the sound reasoning in the Stauffer case, for when the problem was presented fifty-eight years later it saw fit to restrict the doctrine.\textsuperscript{18} In this case a constable levied executions, issued against the individual members of the firm, upon firm property. \textit{Before sale} the sheriff levied an execution on the firm property, issued on a judgment against the firm. The court recognizes the rule in \textit{Doner v. Stauffer} stating that if partnership property is disposed of by judicial or private sale, the equity of partners to have firm assets applied to firm debts is destroyed. But here the sheriff’s levy created a lien on the property itself not on just an interest and the vendees under the constable’s sale would be entitled to relief only after satisfaction of execution levied by the sheriff.\textsuperscript{10}

If we accept as sound law the generally stated proposition as to what a partner’s individual interest is, it seems unsound then for the court not to distinguish between a voluntary sale of a partnership and a judicial sale of all a firm’s assets by virtue of concurrent levies. A bona fide sale for good consideration leaves the firm assets intact and available to both classes of creditors. A forced sale, even though the purchaser knows he is purchasing not just an interest, advertises that a firm is in financial straits and attracts purchasers looking for a buy at sacrifice prices. The Pennsylvania cases present the minority view in permitting creditor’s equities to be extinguished in such manner.\textsuperscript{20}

We have seen from the discussion and cases cited that a partner’s interest may be levied upon at the instance of an individual creditor of that partner.\textsuperscript{21} Developing the problem

\textsuperscript{17} The question may be further pursued through a discussion in \textit{29 Harv. L Rev.} 158, 162.
\textsuperscript{20} \textit{Farley v. Moog}, 70 Ala. 148, 58 Am. Rep. 585.
\textsuperscript{21} \textit{Freeman, Executions} (2d Ed.) Sec. 125, “It is universally conceded
from this point consider this statement, "...confessedly a sale under an execution against one partner does not divest the title of the partnership in the property." Continuing, the court says that the sale transfers only such interest as remains in the judgment debtor upon settlement of the affairs of the partnership. As the rights of the partners are paramount this would seem to preclude the officer serving the writ from taking the property into his exclusive possession, even for the purpose of levy and sale. Practically speaking, this seems sound in that property necessary to furtherance of a partnership venture could remain in the possession of partners subject to orders of the court. In accordance with this statement some courts hold that the sheriff is not entitled to exclusive possession as the debtor partner is not. In such case it is sufficient to declare there is an attachment or execution designating the property levied upon, or otherwise according to local practice. However, we must concede that the majority view seems to be that to guard against intermediate sales and to make the levy effectual the sheriff is required to take possession of the partnership property.

At common law the rule was that the assignment by a partner of his share in partnership property automatically worked a dissolution making winding-up proceedings necessary. It would seem to follow as a logical implication that a levy on one partner's interest, in effect an involuntary assignment, would create the same result. However, the courts do not seem altogether certain on this point. In Hershfield v Kansas the court states:

"...and as the sale of the property must dissolve the copartnership to the extent of that property, so must the

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that, except where some statutory provision to the contrary has been enacted, the interest of the partner is liable to an execution for his individual debts."  

22 Johnson v. Wingfield, supra, footnote 8.  

23 17 Am. & Eng. Encyc. Law, 1340, and cases cited.  

24 Clark v. Cushing, 52 Cal. 617 (1878); White v. Jones, 38 Ill. 159 (1865); Hershfield v. Chaflin, supra footnote 10. An execution by a partnership creditor is effective and entitled to priority as to specific property, Darnall v. State Nat'l Bank, 59 Okla. 204, 158 P. 921 (1916). Other partners may enjoin sale by sheriff on execution against one partner, Williams v. Lewis, 115 Ind. 45, 17 N.E. 262 (1888). Leaving the property in the custody of the other partners is not an abandonment of the levy, except perhaps as against third persons. Morrison v. Blodgett, 8 N. H. 238, 29 Am. Dec. 653 (1873).  

25 Karnick v. Hannaman, 168 U. S. 328, 18 S. Ct. 135 (1897); Moss v. Gleason, 64 N. Y. 204 (1876); McCall v. Moss, 112 Ill. 493 (1885).  

26 Supra, footnote 10.
seizure alone dissolve it, or at least suspend it to the same extent, while the officer holds the property in his custody. Perhaps it would be proper to say that the mere seizure of the property dissolves the copartnership from the time of the seizure, on condition that the property shall afterward be sold."

The conclusion of the court that levy and the seizure of partnership property works a suspension of partnership affairs only pending the actual sale leaves the door open for alternative action by the partners or firm creditors. Possibly the debtor partner can in the meantime raise money to discharge the judgment and stay the execution. Or again, possibly as is set out in *Nixon v Nash* the creditor or other copartners may wish to invoke the powers of equity to stay proceedings under the execution until the beneficial interest of the debtor partner is ascertained. Failing such election followed by sale of goods levied upon the purchaser becomes, not a partner but a tenant in common with the other partners. The court continues to the effect that the seizure and sale is, *pro tanto*, at least, a dissolution of the joint business and calls for an adjustment of the business affairs. The judge who writes the opinion in the Nixon case gives a very clear albeit brief explanation of the procedure in the event of the happening therein and is in accord with the majority holdings.

The discussion herein and comments as to majority decisions has been limited to the law in jurisdictions not adopting the Uniform Partnership Act or prior to such enactment. Let us then consider briefly provisions of the Act and its effect on the individual creditor's rights in firm property

Sections 24-28 of the act are given over to defining the property rights of partners. Section 25 (2) (c) provides as follows:

"A partner's right in specific partnership property is not subject to attachment or execution, except upon a claim against the partnership."

Mr. Crane in his treatise on Partnership states that draftsmen of the Uniform Act in order to reach a solution of our problem

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27 *Supra*, footnote 13.
28 Johnson v. Wingfield, *supra* footnote 8; B. A. Lott v. Padgett, *supra* footnote 14; *Story, Partnership* sec. 263; *Crane, Partnership* sec. 43.
that would protect creditors and partners were directed to proceed on the theory that a partnership was a legal entity. He further states that though this direction was later changed the provisions of the act produced, as to separate creditors, the same result as though the partnership were avowedly a distinct legal person. Further in regard to levy on firm assets at instances of individual creditors he states, "Nothing can be attached or seized on execution by his creditors."

It may be that such was the intent of the framers of the act but it is the contention of the writer to the contrary, that the charging order authorized by Section 28 of the Uniform Act is an alternative remedy to levy on all partnership assets at the instance of an individual creditor.

With the thought in mind that courts had permitted levy and seizure of all partnership property but had been in conflict as to the right to levy on specific property of the partnership, it is apparent that the act by its express words prohibits such levy and execution and none other.

In a decision involving a construction of the Uniform Partnership Act it was held that the act providing among other things that a partner's right in specific property is not subject to attachment or execution except on a claim against the partnership, where action was brought against a partner for breach of contract made in Switzerland, service of warrant of attachment on a domestic corporation did not effect a valid levy on the partner's interest in stock in the accounts of the partnership. In this case the warrant was served on a company that held a specific interest of the debtor partner, so it is apparent that the court was not called upon to meet the writer's contention head-on.

However, the following statement in the opinion is very significant:

"There is no express provision authorizing the attachment, prior to judgment, of a partner's general interest as distinguished from his right to specific partnership property"

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29 Crane, The Uniform Partnership Act, A Criticism, 28 Harv. L. Rev. 762, 773.

30 Crane, Partnership sec. 43.

This indicates by strong implication the right to a general levy on firm assets at the instance of an individual creditor.

In commenting on Section 25 (c) of the act another jurisdiction says, in part:\textsuperscript{32}

"While the act which contained specific directions for the levy and sale in execution of the interest of the judgment debtor in the partnership has been repealed by the Uniform Partnership Act we are not certain that the general right to proceed against the partner's interest has been taken away"

The opinion continues the discussion by stating that the act (Section 25 (c)) provides that a partner's right in specific partnership property (court's emphasis) is not subject to attachment or execution except upon a partnership claim and that Section 28 provides that a competent court may charge a debtor partner's interest for individual debt.

The court may be further quoted, thusly:

"A desire to secure uniformity of procedure in the law of partnership will not be permitted impliedly to change the long settled law and practice relating to attachments and executions."

The court in the above quotation follows a basic principle of statutory interpretation that a statute which purports to change the existing law will be strictly construed.

We then concede that specific partnership property is not subject to levy and execution, as representing the right or interest of the debtor partner therein, at the suit of an individual creditor,\textsuperscript{33} contending that Section 25 (c) of the Uniform Partnership Act effects uniformity on this point, where enacted into law, and going no further. The answer to this argument is debatable and the writer has not discovered a case where the court meets the issue squarely. Certainly in jurisdictions where the section has not been interpreted the practitioner would be wise to be prepared to argue as his interests may lie.

By the foregoing the writer does not intend to leave the in-


\textsuperscript{33} Specific property, machinery, and materials, of a partnership engaged in construction work is not subject to attachment by individual creditor. Metropolitan Casualty Insurance Co. v. Cimino Co. 108 N. J. L. 248, 157 A 152 (1932).
pression that his position if correct is desirable. It is firmly believed that if a partnership is an accepted part of our economic structure then a wise progressive policy in furtherance of business relations is sponsored by the uniform partnership in seeking to prevent attachments or executions at the instance of an individual creditor. Section 28 of the Uniform Partnership Act in providing for a charging order in such case with appointment of a receiver to handle the debtor partner's share of profits and discharge his judgment debt is a highly equitable solution to a troublesome problem. Such action protects both classes of creditors and the remaining partners. Receivership is always costly, yet a going concern can be preserved with its advantages to the business associates under such procedure. In the event the business is not profitable and the receivership proves not practical, the court may decree a sale without thereby causing a dissolution.

II. Rights of Firm Creditors—Individual Liability of Partners

By way of recapitulation and introduction let it be said generally that the effects of a partnership belong to it so long as it continues in existence and not to the individuals who compose it.

The right of each partner extends only to a share of what may remain after payment of the debts of the firm and the settlement of its accounts. As an integral part of this right there is the corresponding right to have the partnership property applied to payment of partnership debts in preference to the debts of any individual partner. This is an equity the partners have as between themselves and under certain circumstances it mures to the benefit of firm creditors.

The latter are said to have a privilege of preference, sometimes

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34 A charging order against a debtor partner's interest in the firm and appointment of a receiver for his share of the profits contemplates an existing partnership in which the debtor is a member and entitled to receive a share of the profits. Spitzer v. Buten, 306 Pa. 556, 160 A. 444 (1932). The remedy is available to a partner having a tort claim against a co-partner, Sherwood v. Jackson, supra footnote 31. The non-resident defendant owned three-sevenths of a profitably operated partnership. He was proceeded against by writ of foreign attachment, and the garnishee was held personally liable where in defiance of the attachment he paid over to the defendant a share of profits which exceeded amount of debt sued on. Rankin v. Culver, 303 Pa. 401, 154 A. 701 (1931).

35 U.P.A., Section 28 (2).
loosely denominated a lien, to have the debts owing them paid out of a firm in the course of liquidation to the exclusion of creditors of its several members. It is practically a subrogation to the equity of the partner, to be made effective only through him. Hence, if the partner is in no position to enforce it, the firm creditors likewise are not.

So long as the equity of the partner remains in him, so long as he retains an interest in the firm assets, as a partner, equity permits firm creditors to avail themselves of this equity and enforce through it the application of those assets primarily to payment of debts due them when the property comes under its administration. It is indispensable to such relief that the partnership property should be within control of the court through bankruptcy, assignment or otherwise. So, if before interposition of the court is sought the property has ceased to belong to the partnership through bona fide transfer the equities of the partners are extinguished and consequently that of creditors.36

Let us at the outset, in discussing rights of firm creditors, consider their rights at law in enforcing contractual obligations of the partnership. First, a partnership, in the absence of an enabling statute cannot sue or be sued in the firm name, not being a legal entity.37 All the partners should be joined in an action against the partnership.38 The generally accepted styling of a case for, or against, a partnership composed of A, B, C, and D is, "A, B, C & D, doing business as partners under the firm name of A B & Co."

It should be noted that to be technically correct, the liability of partners is too often and too loosely spoken of as being joint and several. It is true that each co-partner is bound for the entire amount due on copartnership obligations, and that this obligation is so far several that if he is sued alone and does not plead the non-joinder of his co-partners, a recovery may be had against him for the entire amount due on the obligation, and like-

37 Gingsberg Title Co. v. Farrone, 99 Cal. App. 381, 278 P. 886 (1929); see Jansen v. Mundt, 20 Neb. 320, 30 N.W 53 (1886), where the purpose of the statute was to permit partnership to sue and be sued in its own name as a distinct legal entity.
wise a joint judgment may be enforced against the property of each.\textsuperscript{39}

This means that the liability of each partner is several only insofar as in a suit against him, judgment will be rendered against him for the whole demand, if timely and proper objection is not made to the non-joinder. This would properly be by plea in abatement in common law states, demurrer in the code states or by motion, as local practice requirements may dictate.

It is then the general rule that the partnership creditor having obtained a judgment may at his option proceed against joint or separate property or both by way of levy and execution to enforce his judgment.\textsuperscript{40} It was stated in \textit{Dean v Phillips}\textsuperscript{41} that,

\begin{quote}
"So far as the partner himself is concerned, his separate property is equally liable with the joint property both in law and equity for the payment of joint debts. In connection with this general rule we would iterate and reemphasize the condition of resultant several liability in an action against an individual partner on a firm obligation from failure to object for non-joinder of co-partners."
\end{quote}

There is a line of authority to the effect that on a judgment against a partnership the firm creditor may not proceed against the partners until he has fully pursued his remedies against the partnership.\textsuperscript{42} In the New York case, last above cited, the court said it is fundamental that the liability of co-partners is joint at law and several in equity. The partnership is a joint adventure with joint ownership of assets and joint liability for debts, and

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\textsuperscript{39} Mason v. Eldred et al, 6 Wall 231, 18 L. Ed. 783 (1867); Tappan v. Bruen, 5 Mass. 193 (1809); Hall v. Lanning, \textit{id.}. Uniform Partnership Act, Sec. 15, "All partners are (a) jointly and severally liable for everything chargeable to the partnership under Secs. 13 and 14. (b) jointly for all other debts of the partnership; a partner who has been held on several liability has a right to contribution of prorata share from other partners." Hurwitz v. Melton, 288 Mass. 488, 193 N.E. 25 (1934). Generally the right will not be judicially enforced until after final settlement of partnership affairs. Goff v. Bergeman, 97 Colo. 363, 50 P. 2d 59 (1935).

\textsuperscript{40} The right of firm creditors to levy execution upon separate assets of an individual partner, without first exhausting firm assets is well recognized. Hasmirth v. Epsy, 13 Iowa 459 (S. Ct. Iowa 1869); Randolph v. Daly, 16 N. J. Eq. 313 (1863); Ex Parte Ruffin, 6 Ves. Chanc. 119 (1801).

\textsuperscript{41} 17 Ind. 406 (1861). A partnership debt is the obligation of each individual member thereof and an attachment against individual assets of a partner to secure a firm debt takes priority over a subsequent attachment by an individual creditor. Allen v. Wells, 22 Pick. (89 Mass.) 450 (1839).

\textsuperscript{42} Seligman v. Friedlander, 199 N. Y. 373, 92 N.E. 1047 (1910).
unless the joint property is insufficient to pay the obligation there may be no effective recourse to individual property. The court states its reasons in this manner:

1. The incurrence of a partnership debt presumptively creates partnership assets and should in reason be paid therefrom unless insufficient whereupon individual property may be subjected to the claim.
2. No reason is apparent for leaving partnership assets intact while proceeding against an individual partner on a joint obligation.
3. The inconvenience and injustice of suing half a dozen partners individually in as many separate actions without suing the partnership proper or all jointly is obvious.

The court is apparently mescapably sound in its first two reasons for its rule while it seemingly has in the third reason overlooked the fact that a partner sued individually on a firm debt may properly object to nonjoinder of his co-partners. Nevertheless, it is submitted that the New York court has adopted the more logical holding. Too, the Uniform Partnership Act tends to this view in limiting joint and several liability to specific instances set out in Sections 13 and 14 as heretofore noted. By these sections torts, penalties and breaches of trust are joint and several while contractual obligations of the partners thereby become joint only. Objections may arise that the New York, and minority, rule errs in attributing characteristics of legal entity or quasi-corporate form to the partnership. Actually, however, there is hereby no semblance of limited liability created but rather an orderly process or procedure for reaching assets of the parties.

With respect to judgments, at common law a judgment against all members of a firm for a firm debt is both joint and several and execution thereon may be levied either on firm property or the property of any partner. But where a statute permits suit against a partnership in the firm name a judgment in an action so brought is generally enforceable against firm property only.

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48 Latta v. Olson & Longman, 187 Iowa 1288, 172 N.W 162 (1919). Judgment against partnership not showing defendant's membership, not otherwise established, did not constitute a lien on defendant's property. Summer v. Hogsed,
In a recent New York case it was stated that under the Uniform Partnership Act the obligation of partners on a partnership debt based on contract is joint and not joint and several.\(^45\) So it was at common law the court says, nevertheless joint creditors may at law satisfy an execution out of the joint property and also out of separate property of any one of debtors where it is shown firm assets are insufficient or it is insolvent, and in an action on a partnership debt a warrant of attachment may be levied upon individual property of a partner.\(^46\)

It has been said that, "There is no doubt that at law the judgment for a partnership debt attaches and becomes a lien upon the real estate of each of the partners, with the same effect as if the judgment were for the separate debt of such partner."\(^47\)

It is obvious that such statement is sound if the jurisdiction is one in which a judgment, as such, creates a lien without necessity of and prior to, recording judgment or by levy pursuant thereto. Priority of judgments is discussed at length in a Virginia case where a number of judgments were rendered against a partnership and the members individually.\(^48\) Virginia has a statute providing that, "Every judgment for money granted in this state shall be a lien", and the court therem finds that a joint judgment against the several partners on a partnership debt is a lien on the partnership property and also upon that of the partners.

Continuing, the court says that as such judgment against the partnership creates a lien against partners individually it will take priority over subsequent judgments rendered on the individual debts of that partner.\(^49\) But the converse is not true. In the absence of statutory provisions a judgment against a part-

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41 Ga. App. 207, 152 S.E. 260 (1930). Where partnership is sued and service had on partners or they appear and defend, property of partners as well as partnership assets is subject to execution issuing on judgment entered thereon. Ragan v. Smith, 49 Ga. App. 118, 174 S.E. 622 (1934).


43 Firm creditors may attach and hold the separate property of any partner in a suit against the firm or against him. In some jurisdictions this is qualified by condition that firm assets be insufficient to meet its obligations or that there is ground for belief that the firm is insolvent. 47 C. J. pp. 979, 980, Sec. 513. Where partnership property is attached by several creditors of the same class the proceeds should be applied in order of attachment. Gay v. Johnson, 32 N. H. 167.


ner on his individual obligations is as to partnership property, subordinate to junior judgments of partnership creditors.\textsuperscript{50}

In concluding, other questions on rights of creditors in firm property may be treated briefly. A dormant partner who accepts benefits of an association is bound by a judgment against it though his name does not appear therein.\textsuperscript{51} And the defense of infancy and nonresidence are personal and of no avail against creditors of a firm who are entitled to have firm obligations satisfied out of firm assets.\textsuperscript{52}

The Uniform Partnership Act covers the obligations of incoming partners very clearly in that:

"A person admitted into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property"\textsuperscript{53}

The incoming partner is not at common law liable on old firm debts.\textsuperscript{54} It will be noted that the Uniform Act imposes such liability on him only to the extent of his share in the partnership. In order to render an incoming partner liable to the creditors of the old firm there must be some agreement, express or tacit to that effect entered into between him and the creditors, and founded on some sufficient consideration. If there be any such agreement, the incoming partner will be bound by it, but his liabilities in respect of the old debts, will attach by virtue of the new agreement, and not by reason of him having become a partner.\textsuperscript{55}

As to the outgoing partner, he is not released from existing


\textsuperscript{51}Gaines v. Gaines, 194 Okla. 343, 151 P. 2d 393 (1944).

\textsuperscript{52}Peterson v. W. Davis & Sons, 216 Minn. 60, 11 N.W. 2d 800 (1943).

\textsuperscript{53}U.P.A., Section 17.

\textsuperscript{54}Wood v. MacAfee, 172 N. Y. S. 703 (Supp. 1918). "It is universally conceded that when a new member is admitted to a firm he becomes one of the firm for the future and not for the past." Wolff v. Madden, 6 Wash. 514, 33 P. 975 (1893).

\textsuperscript{55}Wolff v. Madden, supra footnote 54. The party seeking to rebut the presumption of non-assumption of old debts by the incoming partner has the burden of proving it, Sternberg v. Callanan, 14 Iowa 251 (1862). Where one partner retires and conveys his interest to the remaining member without reference to discharge of firm debts, a promise to assume them is implied, Cobb v. Benedict, 27 Colo. 342, 62 Pac. 222 (1900), Anno. 9 L.R.A. (N.S.) 49-121.
obligations, even though he and the remaining partners so agree, in the absence of a novation between these parties and creditors.\(^5\)

III. Marshalling of Assets

As we have seen from the foregoing discussion a creditor of a partnership can look to partnership property primarily to satisfy his claim, or he can, at his option enforce his judgment by direct levy upon the property of any partner, disregarding the assets of the partnership. We further saw that a creditor of a partner individually has no claim on partnership property. His right at best is to proceed against the interest of his debtor in the partnership property, which may be by levy only on the whole according to the majority view at common law, or a charging order under the Uniform Partnership Act. However, when the insolvent estate of a partner is being administered in equity or bankruptcy, the creditors of the partners are given a priority over the creditors of the partnership. It is a well settled rule of equity that as between the joint and separate creditors of partners, the partnership property is to be first applied to the payment of the partnership debts, and the separate property of the individual partners to the payment of their separate debts, and that neither class of creditors can claim anything from the fund which belongs primarily to the other class until all the claims of the latter are satisfied.\(^6\) This briefly is the equitable doctrine of marshalling assets, and it should be considered with the question in mind as to whether a doctrine that deprives a partnership creditor of legal rights in and to the separate estate of his debtor can be logically defended. It may be argued that the rule giving firm creditors preference in distribution of firm assets should of itself give rise to a preference for in-


\(^6\) Murrill v. Neill, 8 (Howard) U.S. 414, 12 L. Ed. 1135 (1850). Meech v. Allen, 17 N.Y. 300, 72 Am. Dec. 465 (1858). It is a precept of equity that the assets of a debtor should be apportioned in such a manner as to secure protection to the rights of each of a group of creditors, Shoemaker v. White-Dulaney Co., 181 Wash. 347, 230 P 162 (1924). This is a doctrine prevailing in equity and not generally enforceable in courts of law, being applicable where neither firm nor separate creditors can reach assets to have satisfaction by execution of law. Abbott v. Anderson, 265 Ill. 285, 106 N.E. 782 (1914). Being primarily an equitable remedy, the rule will not be invoked to disturb existing legal liens (Meech v. Allen).
individual creditors in individual assets.\(^{58}\) This may be defended by argument that primary liability attaches to a fund on which credit was given, or that joint and separate property are presumed to be increased to the extent credit is extended to the one or the other. Such arguments fail to give consideration to actualities. One who extends credit to a partnership takes into account the resources of those who make up the firm, and the same is true with respect to consideration one gives all assets of an individual in extending credit to him. It is also common knowledge that business men borrow money on their own for the planned purpose of putting it in a joint venture. Does either class of general creditors then have a more meritorious claim as to any particular fund? Should not in equity then the joint and individual assets be pooled and commingled without distinction between separate and firm creditors? It is the writer's contention that such course should be followed and this is consistent with the position that a partnership is not a legal entity and that firm creditors' priority is a defeasible derivative one only.

It has been contended that there is no equality in permitting firm creditors, who have realized 75 percent out of the joint fund, to come in *pan passu* with separate creditors of a partner whose assets will not pay 20 percent. The answer is that the percentages may be reversed and the same inequality would result, and that marshalling does not achieve equality which is the aim of equity.\(^{60}\)

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\(^{58}\) Rodgers v. Meranda, 7 Ohio St. 179 (Sup. Ct. of Ohio, 1857). The right of firm creditors of primary resort to firm assets, in postponement of individual creditors' is derivative and may be defeated by a bona fide waiver by the partners, but the partners may not transfer or divert assets to defeat the right. Gallagher v. Appeal, 114 Pa. St. 353, 7 Atl. 237 Darby v. Gilligan, 83 W Va. 246, 10 S.E. 400. See U.P.A. 40 (1) on rank of claims against estate of an insolvent partner.

\(^{60}\) See Northern Bank of Kentucky v. Kezer, 63 Ky. 169 (1865) for a somewhat different approach and application of the doctrine.