



NORTH CAROLINA LAW REVIEW

Volume 31 | Number 4

Article 5

6-1-1953

Bankruptcy -- Partnerships -- Partnerships in Bankruptcy

Roger B. Hendrix

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>

 Part of the [Law Commons](#)

Recommended Citation

Roger B. Hendrix, *Bankruptcy -- Partnerships -- Partnerships in Bankruptcy*, 31 N.C. L. REV. 457 (1953).

Available at: <http://scholarship.law.unc.edu/nclr/vol31/iss4/5>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

the conclusion that an action for damages can be maintained under it.²⁰ Although the Borah-Van Nuys Act was undoubtedly intended to be used primarily as a criminal statute, indications are that it will not be used at all for this purpose but will probably be employed occasionally in civil litigation.

VIRGINIA D. QUINLIVAN

Bankruptcy—Partnerships—Partnerships in Bankruptcy

Approximately fifteen years have elapsed since the Chandler Act became law and amended the Bankruptcy Act. That Act, in making substantial changes to the partnership section, seems to have produced a relative tranquility over the years in that area of the law. But while the amended partnership section reconciled some earlier conflicts, it left others to be decided by the courts. This would appear, therefore, to be an appropriate occasion to take cognizance of the existing law, its development, and its conflicts.

Since a partnership is not defined in the Bankruptcy Act,¹ its existence in fact² must depend upon the applicable state laws. A partnership is generally looked upon as "an association of two or more persons to carry on as co-owners a business for profit."³ In fact, this is the precise definition under the Uniform Partnership Act.⁴ Every partner is an agent of the partnership for the purpose of its business and the acts of a partner in the ordinary course of the business binds the partnership and the partners. Also, partners are liable jointly for the debts and obligations of the partnership, and liable jointly and severally for a tort or breach of trust of another partner in the course of the partnership business. Because of these ordinary principles of partnership law, the "aggregate theory" is usually applied in describing the legal significance of a partnership.

The Bankruptcy Act, however, does not strictly adhere to the

²⁰ 80 CONG. REC. 9420 (1936). "Mr. Hancock of New York: 'If a vendor is found guilty of discrimination as provided in this bill (Borah-Van Nuys) is he subject to the aggrieved party for damages or has he committed a crime and subjected himself to penalty?' Mr. Celler: 'If he violates the Borah-Van Nuys provision or other provision of the bill, he is subject to penalties of a criminal nature and has committed an offense.' Mr. Hancock: 'Would he also be liable for triple damages?' Mr. Celler: 'And he would also have to respond in triple damages under the provisions of the Clayton Act. Anyone aggrieved can sue.'"

¹ A partnership is included within the meaning of the term "person" in the Bankruptcy Act. 11 U. S. C. § 1(23) (1947).

² It must be proved that there is a partnership in fact and not a mere partnership by estoppel, and the burden of such proof falls upon the petitioner. *Buckingham v. First Nat. Bank*, 131 Fed. 192 (6th Cir. 1904).

³ N. C. GEN. STAT. § 59-36 (1943 Recomp. 1950).

⁴ *Id.* See also N. C. GEN. STAT. § 59-37 (1943 Recomp. 1950) for rules in determining the existence of a partnership.

"aggregate theory." In the famous case of *Francis v. McNeal*,⁵ Mr. Justice Holmes, by strong dicta, is said to have committed the United States Supreme Court to the "aggregate theory." However, in the later case of *Liberty National Bank v. Bear*,⁶ the court recognized the "entity theory," and is said by some commentators to have adopted it,⁷ even though the Supreme Court, in the latter case, explicitly stated that "the conclusion stated is not in conflict with the decision in *Francis v. McNeal* . . ."⁸ Instead of the constant haggling over the question of which theory the Supreme Court has adopted, it would be better to reconcile the cases by limiting their application to the narrow issues of each case, for the result in each is well recognized today.

By the "entity theory" it is meant that a partnership owns its property, and owes its own debts, apart from the individual property of the members which it does not own and apart from the individual debts of its members which it does not owe. The Bankruptcy Acts of 1898 and 1938 are recognized as generally following the "entity theory," but the Act of 1938 follows the "entity theory" only on certain particulars, and not in all phases of partnership bankruptcy. An adequate system of bankruptcy involves an adoption of both theories for different purposes.

Adjudication as a Bankrupt. The first instance in which the Act follows the "entity theory" is in providing that a partnership may be adjudged a bankrupt, as a legal entity separate and distinct from its partners, either during its continuation or after its dissolution, but before winding up.⁹ The "dissolution" of a partnership is the change in

⁵ 228 U. S. 695 (1913). The question involved in the case was whether the trustee of the adjudged partnership could administer the individual estate of a non-adjudicated partner. In deciding in the affirmative it was stated by way of dicta that "the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the owners of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshalling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the bankruptcy act." *Id.* at 696.

⁶ 276 U. S. 215 (1928). The question here was whether a judgment against the partnership and the individual partners, which was acquired within four months of adjudication of the firm, but not within four months of the adjudication of the individual partner, could be annulled as against the partners. Holding in the negative, the Court emphasized that the partnership is a separate entity under the Act and that the adjudication of the firm could not involve the adjudication of a partner as an individual.

⁷ See McLaughlin, *Aspects of the Chandler Bill to Amend the Bankruptcy Act*, 4 U. OF CHI. L. REV. 369, 378 (1937).

⁸ *Liberty Nat. Bank v. Bear*, 276 U. S. 215, 218 (1928).

⁹ 11 U. S. C. § 23(a) (1947). The section provides in full: "A partnership, including a limited partnership containing one or more general partners, during the continuation of the partnership business or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt either separately or jointly with one or more of its general partners."

the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.¹⁰ There are many causes of dissolution, all of which are brought out in the Uniform Partnership Act, which has been adopted in North Carolina.¹¹ Suffice it to say that the bankruptcy of a partner causes a dissolution of the firm. An adjudication of the firm is allowed up to the time of winding up because until then the partnership is not terminated.¹²

In order to have a partnership involuntarily adjudged bankrupt, it must be shown that the partnership has committed one of the acts of bankruptcy.¹³ While, of course, every partner is an agent of the partnership for the purpose of its business, he cannot bind the partnership where he is not apparently carrying on in the usual manner the business of the partnership, or where he has in fact no authority to act for the partnership and the third party has knowledge that he has no authority.¹⁴ Rarely, therefore, will a partner, without the consent of the other partners, be able to commit an act which will constitute an act of bankruptcy by the firm. Thus, the fact that one partner of a copartnership embezzles the funds of the firm, and absconds and conceals himself, constitutes no act of bankruptcy of the firm.¹⁵ Nor is it an act of bankruptcy for which a firm may be adjudged bankrupt if one of its members, out of his individual estate, prefers one of his own or one of the firm creditors.¹⁶ A partner, without the consent of all partners, cannot make an assignment of partnership property for the benefit of creditors,¹⁷ nor appoint a receiver,¹⁸ nor admit in writing the inability of the firm to pay its debts and its willingness to be adjudged a bankrupt.¹⁹

Directly related with the problem of adjudicating the separate firm

¹⁰ N. C. GEN. STAT. § 59-59 (1943 Recomp. 1950).

¹¹ See N. C. GEN. STAT. § 59-61 (1943 Recomp. 1950).

¹² N. C. GEN. STAT. § 59-60 (1943 Recomp. 1950). As to when there has been a "winding up," see *In re Pinson*, 180 Fed. 787 (N. D. Ala. 1910); *Holmes v. Baker & Hamilton*, 160 Fed. 922 (9th Cir. 1908).

¹³ The acts of bankruptcy are enumerated in 11 U. S. C. § 21(a) (1947).

¹⁴ N. C. GEN. STAT. § 59-39 (1943 Recomp. 1950).

¹⁵ *Davis v. Davis*, 104 Fed. 235 (S. D. S. D. 1900).

¹⁶ *Mills v. J. H. Fisher Co.*, 159 Fed. 897 (6th Cir. 1908). Where the partner applies his separate estate to the payment of a creditor of the insolvent firm, he thereby gives such creditor a preference over others of the same class, and commits an act of bankruptcy, which may be made the basis of a petition by other firm creditors to have him individually adjudged bankrupt.

If a partner commits a firm act of bankruptcy with firm assets, this will also be considered an individual act of bankruptcy by the partner. *In re Meyer*, 98 Fed. 976 (2d Cir. 1899).

¹⁷ N. C. GEN. STAT. § 59-39 (1943 Recomp. 1950).

¹⁸ N. C. GEN. STAT. §§ 59-39(2), (3) (a) (1943 Recomp. 1950).

¹⁹ *In re Wellesley*, 252 Fed. 854 (N. D. Cal. 1917). Cf. N. C. GEN. STAT. § 59-41 (1943 Recomp. 1950) ("An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this article is evidence against the partnership.")

an involuntary bankrupt is the question of the effect of one of the partners being an exempt party under the Act. That is, under the Act neither a wage earner nor a farmer may be involuntarily adjudged bankrupt.²⁰ Although, however, one of the partners may be a wage earner or a farmer, it is settled that the partnership may be adjudged an involuntary bankrupt.²¹ "One who combines with others in a partnership enterprise becomes bound for the payment of the partnership debts, and his assets will be drawn in to satisfy the partnership debts even though he may not be a subject of involuntary bankruptcy."²² The result of adjudicating the firm despite the exempt status of a partner is a natural consequence of adherence to the "entity theory." If, however, the firm itself is engaged in farming, it is not "wholly free from doubt"²³ whether the firm can or cannot be involuntarily adjudged.²⁴ It would seem that the policy which exempts farmers should be extended to exempt a partnership engaged in farming, despite the strict logic that may be applied to the literal terms of the Act.

Additional questions are whether the partnership can be adjudged bankrupt as a firm if one of the partners has died; if one of the partners is insane; or if one of the partners is an infant. It is understood that individually, the estate of a deceased person cannot be adjudged a bankrupt.²⁵ It is questionable, because of a conflict of authority, whether a partnership, one of whose members has died, can be so adjudged.²⁶ There would seem to be no objection to it other than a possible interference with the state court's administration of the estate of the deceased partner. It has been suggested that even though it be held that there can be no adjudication, that the rights of firm creditors are not jeopardized. That is, even if the firm cannot be adjudged bankrupt, the surviving partner might be individually adjudged bankrupt, thereby obtaining jurisdiction of the firm property.²⁷ As to an insane person, it has been held that his insanity does not preclude the partnership, of which he is a member, from being adjudged bankrupt, even

²⁰ 11 U. S. C. § 22(b) (1947).

²¹ *In re Disney*, 219 Fed. 294 (D. Md. 1915); *Dickas v. Barnes*, 140 Fed. 849 (6th Cir. 1905).

²² *Dickas v. Barnes*, *supra* note 21 at 453.

²³ 1 COLLIER, BANKRUPTCY ¶ 5.10 (14th ed. 1940).

²⁴ *H. D. Still's Sons v. American Nat. Bank*, 209 Fed. 749 (4th Cir. 1914) held that a partnership engaged in farming is exempt. This decision is criticized in Note, 12 MICH. L. REV. 483 (1914) on the theory that the exemption in the Act extends only to a "natural person" engaged in farming, and that a partnership could hardly be construed to be a "natural person."

²⁵ See 1 COLLIER, BANKRUPTCY ¶ 5.07 (14th ed. 1940). The Act has no express provision to this effect. Section 8 of the Act, however, provides that the death or insanity of a bankrupt shall not abate proceedings that have already begun.

²⁶ Compare *In re Fackelman*, 248 Fed. 565 (S. D. Cal. 1918) with *In re Wells*, 298 Fed. 109 (S. D. Ohio 1924).

²⁷ 1 COLLIER, BANKRUPTCY ¶ 5.07 (14th ed. 1940).

though his insanity affects his adjudication as an individual.²⁸ The same is true where one of the partners is an infant.²⁹ Generally speaking, therefore, a partnership may be adjudged bankrupt regardless of the status of a particular partner. This practice is in line with the "entity theory" of a partnership.

As to who may file a petition in bankruptcy, there is no authorization to be found in the Bankruptcy Act for the involuntary adjudication as bankrupt of a partnership save upon the petition of qualified creditors.³⁰ However, as to a voluntary adjudication, it is settled by statute that all or less than all the partners, without the joinder or consent of the remaining partners, may file, and the petition is deemed voluntary insofar as it is filed on behalf of the partnership.³¹ No act of bankruptcy is required upon the filing of a voluntary petition, but there exists the requirement "that where a petition is filed in behalf of a partnership by less than all of the general partners, the petition shall allege that the partnership is insolvent."³² The term "insolvent" has caused some difficulty in the partnership field. While its definition is set out in the Bankruptcy Act,³³ its application to a partnership has been left to judicial determination. It is now the weight of authority that "in determining the question of insolvency, the individual property of the partners should be considered. Where the assets of a partnership, together with the individual properties of each partner exceed the liabilities, the partnership is not insolvent."³⁴ Hence, under a voluntary petition by less than all the partners,³⁵ or under an involuntary petition

²⁸ *In re Stein & Co.*, 127 Fed. 547 (7th Cir. 1904).

²⁹ *In re Duiguid*, 100 Fed. 274 (E. D. N. C. 1900) ("... it would be idle, however, for creditors to prove their debts against the infant during his minority for he could disaffirm them upon reaching his majority.") The case presents a *quaere* as to whether a debt for necessities would support a petition of bankruptcy against the infant.

³⁰ *Kaufman-Brown Potato Co. v. Long*, 182 F. 2d 594 (9th Cir. 1950). It is doubtful if a partner *qua* creditor can file or join in filing an involuntary petition against his partnership. Cf. *Meek v. Centre Banking Co.*, 268 U. S. 426 (1925), noted in 25 Col. L. Rev. 963 (1925).

³¹ 11 U. S. C. §23(b) (1947), *Kaufman-Brown Potato Co. v. Long*, 182 F. 2d 594 (9th Cir. 1950).

The Act provides for service of the petition and writ of subpoena upon the non-joining partners. 11 U. S. C. § 41(a) (1947).

³² 11 U. S. C. § 23(b) (1947).

³³ "A person shall be deemed insolvent within the provision of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts." 11 U. S. C. § 1(19) (1947).

³⁴ Note, 14 St. L. L. Rev. 179, 183 (1929). Strangely enough, exempt assets will be included in determining partnership insolvency. See McLaughlin, *Aspects of the Chandler Bill to Amend the Bankruptcy Act*, 4 U. OF CHI. L. REV. 369, 373 (1937).

³⁵ *Mason v. Mitchell*, 135 F. 2d 599 (9th Cir. 1943), noted in 29 CORN. L. REV. 244 (1943). This is the leading recent case on this proposition.

alleging an act of bankruptcy where insolvency is a requirement,³⁶ it must be shown that none of the partners are solvent in the sense of being able to pay both his own and the firm debts. Clearly this view applies the "aggregate theory" and indicates that the Act does not purport to follow any one theory in a strict sense.

Since a partnership can be adjudged bankrupt as a separate entity, it naturally follows that the partners as individuals can be adjudged under either an involuntary or a voluntary petition. The Act has taken the procedure one step further, and thereby settled a conflict of authority,³⁷ by expressly providing that a partnership may be adjudged bankrupt either separately or jointly with one or more or all of its general partners.³⁸ A more workable practice is thus allowed by giving the option of a separate or a joint petition. If a separate petition is filed against the partnership, this may be made into a joint petition against the partnership and the individuals by amendment.³⁹

There is one instance, however, under the Act when a firm will be adjudged bankrupt without a specific petition against the partnership. If *all* the general partners are adjudged bankrupt as individuals, this will automatically cause an adjudication of the firm.⁴⁰ It is logical and proper that this result should follow. By the adjudication of the individuals, the total of the interests of the partnership has been drawn into the administration of the bankruptcy court, hence the practical consequences take on a formal recognition under the Act. Note that under this rule "it is possible, in effect, for a partnership to be an involuntary bankrupt even though it has not committed an act of bankruptcy. This result follows where each of the partners has committed an individual act of bankruptcy, as distinguished from a firm act of bankruptcy, and has in consequence been the subject of an involuntary petition and adjudication. In such a situation the firm also would be adjudged a bankrupt."⁴¹ Again it is evident that the Act does not strictly adhere to the "entity theory" for this rule is a wholesome application of the "aggregate theory."

Administration of Estates in the Bankruptcy Court. Adjudication

³⁶ Acts of bankruptcy Nos. 2, 3 and 5 require that the partnership be insolvent at the time the act is committed. 11 U. S. C. § 21(a) (1947). Note that act No. 5 uses "insolvency" in both the bankruptcy and the equity sense.

³⁷ See Comment, 87 U. PA. L. REV. 105 (1938).

³⁸ 11 U. S. C. § 23(a) (1947) (involuntary petition); 11 U. S. C. § 23(b) (1947) (voluntary petition).

Where a joint involuntary petition is filed, it would seem that the requirements as to the number of creditors and the amount of debts would be satisfied where the allegations are adequate as to the firm itself. See *Mills v. J. H. Fisher Co.*, 159 Fed. 897 (6th Cir. 1908).

³⁹ *In re Russell*, 7 F. 2d 508 (D. Del. 1925). For details as to the form of the petition, see 1 COLLIER, BANKRUPTCY ¶ 5.12 (14th ed. 1940).

⁴⁰ 11 U. S. C. § 23(i) (1947).

⁴¹ 1 COLLIER, BANKRUPTCY ¶ 5.13 (14th ed. 1940).

as a bankrupt is not always a prerequisite to the administration of an estate in the bankruptcy court. In other words, it is settled that the trustee of a bankrupt partnership may administer the estate of a non-adjudicated partner.⁴² It has been suggested that the administration of the non-adjudicated partner's estate is compulsory upon the firm trustee.⁴³ To date this point has not been decided, but it would seem that in the usual instance it would be highly desirable to so administer the estate. Only in this manner can the firm trustee effectively determine what assets are available for the firm debts and what assets must be returned to the partner for distribution to his separate creditors.

Where, however, an individual partner or less than all the partners are adjudicated bankrupt, the trustee of the individual estates may not administer the estate of other partners,⁴⁴ nor may he administer the partnership property in bankruptcy.⁴⁵ There is this exception: Where there is consent on the part of the non-bankrupt partner or partners, the partnership property may be administered in the bankruptcy court even without its adjudication.⁴⁶ That is, where one or more, but not all of the partners are adjudged bankrupt and the other partner or partners are solvent, the firm remains out of bankruptcy and its property does not come in except by express or implied consent of the solvent member or members.⁴⁷ Whether there has been consent will depend upon the facts of each case, but where the solvent partner allows the trustee to take possession of the partnership property without asserting his claim, he will be held to have consented to the administration in the bankruptcy court.⁴⁸ Even though there is no consent, and consequently no administration of the firm assets in the bankruptcy court, the non-bankrupt partners are directed to "settle the partnership business as expeditiously as its nature will permit and account for the interest of the general partner or partners adjudged bankrupt."⁴⁹ This naturally follows since the bankruptcy of a partner dissolves the partnership and gives the non-bankrupt partners the right to wind up the

⁴² Francis v. McNeal, 228 U. S. 695 (1913).

⁴³ Note, 29 COL. L. REV. 1134 (1929).

⁴⁴ Marnet Oil & Gas Co. v. Staley, 218 Fed. 45 (5th Cir. 1914).

⁴⁵ 11 U. S. C. § 23(i) (1947). This provision does not conflict with other statutory allowances that a partnership may be adjudged bankrupt either separately or jointly with one or more or all of its general partners. This provision deals with the problem where a partner but not the firm is in bankruptcy. In this situation the problem facing the court is getting jurisdiction, not of the firm, but of the partner's interest in the firm.

Nor does subsection (i) conflict with subsection (d) for the latter is merely permissive in nature.

⁴⁶ *Id.*

⁴⁷ Sturn v. Ulrich, 10 F. 2d 9 (8th Cir. 1925); *In re Filman*, 177 Fed. 170 (7th Cir. 1910).

⁴⁸ Kaufman-Brown Potato Co. v. Long, 182 F. 2d 594 (9th Cir. 1950).

⁴⁹ 11 U. S. C. § 23(i) (1947).

partnership affairs in a state court without the interference of the bankruptcy court.⁵⁰

There is no problem concerning the administration of estates where all partners are adjudged bankrupt for it has been previously indicated that in that instance the firm is also adjudged bankrupt.

Trustees. The provision in the Act pertaining to the appointment of trustees underwent a substantial overhauling under the Chandler Act in 1938. The amended section provides:

The creditors of the bankrupt partnership shall appoint the trustee, who shall be the trustee of the individual estate of a general partner being administered in the proceeding: *Provided*, however, that the creditors of a general partner adjudged a bankrupt may, upon cause shown, be permitted to appoint their separate trustee for his estate. . . .⁵¹

It is to be noted that before the firm creditors can exercise the prerogative which is granted them, the partnership must have been adjudged bankrupt. Also, even where special circumstances are shown for the appointment of a separate trustee for an individual bankrupt, a prior adjudication of the individual partner is a condition precedent to the authorization of a separate trustee. On the other hand, the non-adjudication of the individual partner is ineffective to prevent an administration of his estate by a trustee appointed by the firm.⁵² Unless an unusual circumstance is shown, it would ordinarily be in the interest of an orderly and unified administration that only one trustee be appointed. It has been held, however, that if the interests of the partnership and partner estates are in substantial conflict,⁵³ or if the assets of the separate estate have so far been depleted that firm creditors have no possible concern therein,⁵⁴ a separate trustee may be allowed.

It is apparent that whenever both the partnership assets and individual assets are being administered together, the trustee or trustees should keep separate accounts of the different properties. The Act so provides.⁵⁵ The real purpose of such a rule is to enable the determination of what amount of the assets of each type of property will be available for firm or individual debts.

Marshalling and Distribution of Assets. The Act provides that the bankruptcy court "may marshal the assets of the partnership estate

⁵⁰ N. C. GEN. STAT. § 59-67 (1943 Recom. 1950).

⁵¹ 11 U. S. C. § 23 (c) (1947).

⁵² See note 42 *supra*.

⁵³ *In re Currie*, 197 Fed. 1012 (E. D. Mich. 1910) (allowed under the equitable powers of the court prior to the amended subsection).

⁵⁴ *In re Wood*, 248 Fed. 246 (6th Cir. 1918) (allowed under the equitable powers of the court prior to the amended subsection).

⁵⁵ 11 U. S. C. § 23(e) (1947).

and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates."⁵⁶ This provision is procedural and is applicable only to estates that are being administered.⁵⁷ The substantive rules of distribution under the Bankruptcy Act⁵⁸ are in line with the rules in the Uniform Partnership Act,⁵⁹ which follow the theory that partnership creditors shall have priority on partnership property and separate creditors on individual property. Prior to adoption of the Uniform Partnership Act the North Carolina Supreme Court held that firm creditors could share equally with individual creditors in the partners' estates,⁶⁰ the theory being that since the statute at the time made the general partners jointly and severally liable for the debts of the partnership,⁶¹ the effect was "to convert the creditors of the firm into individual creditors of each member of the partnership."⁶² The clear and unequivocal language of the present statutes would surely warrant an opposite result today. At least there is no indication that a bankruptcy court in North Carolina would follow any rule other than that provided in the Bankruptcy Act.

In each instance of the marshalling of assets there naturally arises the problem of differentiating firm assets from individual assets, and firm debts from individual debts. No concrete rule can be set forth for every situation but it is true that "all property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property";⁶³ and "unless the contrary intent appears, property acquired with partnership funds is partnership property."⁶⁴ As to the differentiation of the debts, much will depend upon the use of the benefits derived from a debt and the determination of whether credit was given to the firm or the individual. The problem of distinguishing the debts is naturally made more complex by the retirement of a partner, the sale of an interest by a partner, and the death of a partner.⁶⁵

⁵⁶ 11 U. S. C. § 23(h) (1947). The term "preference" undoubtedly has the same meaning as that term in § 60(a) of the Act.

⁵⁷ *In re McConnell v. Williams*, 32 A. B. R. 589 (1914).

⁵⁸ 11 U. S. C. § 23(g) (1947).

⁵⁹ N. C. GEN. STAT. § 59-70 (1943 Recomp. 1950).

⁶⁰ *Virginia-Carolina Chemical Co. v. Walston*, 187 N. C. 817, 123 S. E. 89 (1924); *Rankin v. Jones*, 55 N. C. 169 (1855); *Hassell v. Griffin*, 55 N. C. 119 (1855).

⁶¹ Under the present statutes the partners are liable jointly and severally for the torts and breaches of trust of a partner, and liable jointly for all other debts and obligations of the partnership. See N. C. GEN. STAT. § 59-45 (1943 Recomp. 1950).

⁶² *Virginia-Carolina Chemical Co. v. Walston*, 187 N. C. 817, 821, 123 S. E. 89, 92 (1924).

⁶³ N. C. GEN. STAT. § 59-38 (1943 Recomp. 1950).

⁶⁴ *Id.* For a discussion of the problem of differentiating the assets, see 1 COLLIFR, BANKRUPTCY ¶ 5.29 (14th ed. 1940). For a related problem and its remedies, see Note, 49 YALE L. J. 686 (1940).

⁶⁵ For pertinent statutory provisions see N. C. GEN. STAT. § 59-71 *et seq.* (1943 Recomp. 1950).

It is recognized that in some cases there may be a joint and several liability on the part of the partners so that a creditor may file proof against both the partnership assets and individual assets. Thus, where notes are made by the bankrupt firm and indorsed by an individual partner, also a bankrupt, they are debts provable against both firm and individual estates.⁶⁶ The same is true where the individual partner is joint maker with, or surety for, the partnership,⁶⁷ or where all the partners signed in their individual names an obligation executed in connection with a partnership transaction.⁶⁸ Where there exists this joint liability, the creditor may share in the individual estates of the several partners on an equality with exclusively individual creditors,⁶⁹ and the creditors, after the receipt of a dividend from the partnership estate, might prove for the balance of his claim against the bankrupt estate of the individual partners that were individually liable.⁷⁰

The reduction of a partnership debt to judgment against the partnership and the individual members does not change the inherent character of the debt, nor make it "joint and several" so as to enable the creditor to share on an equality with the individual creditors in the individual estates.⁷¹

Effect of Discharge of the Partnership on Unadjudicated Partners. "[T]he discharge of a partnership shall not discharge the individual general partners thereof from the partnership debts."⁷² This rule is justly the subject of severe criticism.⁷³ "A discharge of the firm 'entity,' leaving the partners fully liable at law is a plain absurdity; and under the doctrine of administration of all separate estates, there is no reason why the unadjudicated partners should not be granted a discharge."⁷⁴ Since the partners' estates are considered in measuring firm solvency, and the partners themselves submitted to most of the burdens of bankruptcy through the administration of their estates in the firm proceedings, it does seem incongruous to deny the discharge of a non-adjudicated partner from the firm debts after all creditors' rights have been satisfied. The existing rule "will have the practical effect of forcing the individual member to seek protection in the less desired form of adjudication under voluntary proceedings."⁷⁵

⁶⁶ *Robinson v. Seaboard Nat. Bank*, 247 Fed. 667 (3rd Cir. 1918).

⁶⁷ *Bank of Reidsville v. Burton*, 259 Fed. 218 (4th Cir. 1919).

⁶⁸ *Robinson v. Seaboard Nat. Bank*, 247 Fed. 667 (3rd Cir. 1918).

⁶⁹ *Globe Indemnity Co. v. Keeble*, 20 F. 2d 84 (4th Cir. 1927).

⁷⁰ *In re McCoy*, 150 Fed. 106 (7th Cir. 1906). This method is disapproved in 6 REMINGTON, BANKRUPTCY § 2917 (4th ed. 1937).

⁷¹ *Cutler Hardware Co. v. Hacker*, 238 Fed. 146 (8th Cir. 1916).

⁷² 11 U. S. C. § 23(j) (1947).

⁷³ See Comments, 87 U. PA. L. REV. 105, 112 (1938); 49 YALE L. J. 908, 924 (1940).

⁷⁴ Comment, 49 YALE L. J. 908, 924-5 (1940).

⁷⁵ Comment, 87 U. PA. L. REV. 104, 114 (1938).

Where a partner is *adjudged* bankrupt there is specific statutory authority enabling him to get a discharge from both his individual *and* partnership debts.⁷⁶ Adjudication is therefore a condition precedent to discharge. An important objective of the Act is achieved under this rule, *viz.*, to enable the debtor to start anew unhampered by old obligations.

ROGER B. HENDRIX

Constitutional Law—Taxation—Federal Excise and Occupational Tax on Wagering

The occupational tax provisions of the Revenue Act of 1951¹ which levy a tax on persons engaged in the business of accepting wagers and require such persons to register with the collector of internal revenue were recently upheld by the United States Supreme Court as a valid

⁷⁶ 11 U. S. C. § 23(j) (1947).

¹ INT. REV. CODE § 3285:

"(a) Wagers. There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

"(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

"(e) Exclusions for tax. No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267."

INT. REV. CODE § 3290:

"A special tax of \$50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable."

INT. REV. CODE § 3291:

"(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable under subchapter A, the name and place of residence of each such person."

INT. REV. CODE § 3294:

"(a) Failure to pay tax. Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than \$1,000 and not more than \$5,000.

"(c) Willful violations. The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter."

INT. REV. CODE § 2707 provides that willful violations such as failure to give the information required by law, shall subject such person to a fine of \$10,000 or imprisonment of from one to five years or both.