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Service of Summons on Copartnership

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CURRENT LEGISLATION

SERVICE OF SUMMONS ON COPARTNERSHIP.—To effect service of summons upon a partnership at common law, each member of the partnership had to be named individually as a defendant and it was necessary to serve each member separately.[1] The partnership was not recognized as an entity but as an aggregate of persons. Although there still remains the straddle of the entity theory and the aggregate theory of partnership, the common law rules of process have been greatly modified by the entity theory. Today by statute [2] in an action against a partnership, service of summons upon any partner is sufficient service upon the partnership [3] and authorizes judgment against the partnership and against the partners separately served. The execution is issued in form against all the defendants but there is endorsed upon the execution a direction to the sheriff, naming each defendant who was not served, restricting the enforcement of the execution as against such defendants to the property owned by them jointly with the other defendants.[4] An acceptable explanation of the statutory procedure is that jurisdiction over any partner gives the court power to compel that partner to apply partnership property in payment of the partnership debts.[5] The separate property of the partner who is not served cannot be reached because the judgment is not against him personally.[6] But conversely the property of the partner served can be reached.[7]

Formerly under the Code of Civil Procedure,[8] now Section 1197 of the Civil Practice Act, when less than all the partners were served the judgment was enforceable against the partnership property jointly held, and the property of the partners served, if the action was upon contract.[9] Section 1197, by amendment, extended these provisions to tort liability.[10] The present legislation reiterates the propositions

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[1] *In re* Grossmayer, 177 U. S. 48, 20 Sup. Ct. 535 (1899); Romona Oolitic Stone Co. v. Bolger, 179 Fed. 979 (C. C. Pa. 1910).

[2] N. Y. CIV. PRAC. ACT § 229a.

[3] Sternberger v. Bernheimer, 121 N. Y. 194, 24 N. E. 311 (1890); Yerkes v. McFadden, 141 N. Y. 136, 36 N. E. 7 (1894); Schwarzschild & Sulzberger Co. v. Mathews, 39 App. Div. 477, 57 N. Y. Supp. 338 (1st Dept. 1899).

[4] 5 CARMODY, NEW YORK PRACTICE (2d ed. 1933) § 1600.

[5] Oakley v. Aspinwall, 4 N. Y. 513 (1851).

[6] Sugg v. Thorton, 132 U. S. 524, 10 Sup. Ct. 113 (1889); Rowland v. Shepard, 27 Neb. 494, 43 N. W. 344 (1889); Crane v. French, 1 Wend. 311 (N. Y. 1828); Symms Grocer Co. v. Burham, 6 Okla. 618, 52 Pac. 918 (1898); Coughlin v. Pinkerton, 41 Wash. 500, 84 Pac. 14 (1906).

[7] Guy v. Kaulman, 11 Ga. App. 350, 75 S. E. 269 (1912); Rickman v. Rickman, 180 Mich. 224, 146 N. W. 609 (1914); Yerkes v. McFadden, 141 N. Y. 136, 36 N. E. 7 (1894); Heaton v. Schaffer, 34 Okla. 631, 126 Pac. 797 (1912).

[8] N. Y. CODE OF CIV. PROC. § 1932.

[9] Kittredge v. Grannis, 200 App. Div. 478, 193 N. Y. Supp. 84 (1st Dept. 1922), *aff'd*, 234 N. Y. 501, 138 N. E. 422 (1922) (where plaintiff sued parties as joint tort-feasors, a judgment against the partnership and one partner not served was error, the nature of plaintiff's claim making this section inapplicable).

[10] N. Y. CIV. PRAC. ACT § 1197 ("In an action wherein the complaint demands judgment, in whole or in part for a sum of money against two or more

already set forth providing that "in any action, legal or equitable, against a partnership carrying on business in this state or holding property therein, service of the summons upon any partner shall be sufficient to authorize judgment against the partnership and the partners actually separately served * * *." [11]

Prior to the present enactment, an execution against property issued upon a judgment, where service is upon one or more, but not all, of the partners, could be collected out of partnership personal property.[12] The present legislation works a substantive change in the law by providing that a judgment obtained against a partnership by service on less than all the partners shall operate against the *real* and personal property of the partnership.[13]

Much confusion and uncertainty has existed with respect to the ownership of partnership real property. At common law the legal title to land could not vest in a partnership as such since a partnership was not recognized as a person at law but as a group of individuals carrying on business under a designated name. The legal title to real property had to be conveyed to some person or persons, natural or artificial. Therefore, to convey real property to a partnership it was necessary to name each and every member in the deed. If all were not described, the land was a valid conveyance only to those members of the firm who had been designated as grantees, to hold the same subject to partnership equities.[14] If the realty was in the name of one partner only, he was deemed the sole owner at law.[15] If it was in the names of all the partners, they were deemed joint tenants or tenants in common,[16] according to the terms of the conveyance.[17] However, regardless of in whose name or names the property was held, the real property belonging to the partnership was treated in equity as belonging to the partnership and like partnership personalty to be disposed of and distributed in the same manner. The parties in whose

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defendants alleged to be jointly indebted upon contract, or jointly liable in tort, if summons is served upon one or more but not upon all of the defendants, the plaintiff may proceed against the defendant or defendants upon whom it is served, unless the court otherwise directs; and, if he recovers final judgment, it may be taken against all the defendants thus jointly indebted").

[11] N. Y. CIV. PRAC. ACT § 229a.

[12] N. Y. CIV. PRAC. ACT § 1199 ("* * * an execution against property issued upon such a judgment shall not be levied on the sole property of such a defendant but it may be collected out of personal property owned by him jointly with the other defendants * * *").

[13] N. Y. CIV. PRAC. ACT § 229a ("* * * and the judgment rendered in favor of the plaintiff shall operate against the real and personal property of the partnership * * *").

[14] Riddle v. Whitehill, 135 U. S. 621, 10 Sup. Ct. 924 (1890); Fairchild v. Fairchild, 64 N. Y. 471 (1876); Adams v. Church, 42 Ore. 270, 70 Pac. 1037 (1902).

[15] Cox v. McBurney, 2 Sand. 561 (N. Y. 1849).

[16] Lancaster Bank v. Myley, 13 Pa. St. 544 (1850).

[17] Blake v. Nutter, 19 Me. 16 (1841).

names the legal title stood were held to be trustees of the partnership as *cestui que trust.*[18]

In England land used exclusively for partnership purposes, in the absence of a contrary intention, was considered personalty in regard to the representative of a deceased partner. This principle was based on the theory that a partner's share is a proportion of the assets of the partnership after they have been turned into money and used to satisfy partnership debts. To a very great extent the American decisions have repudiated the English view, the general rule being that in equity partnership realty retained its character as realty except to the extent necessary to settle partnership affairs.[19] However, the partners could by an agreement among themselves provide that the partnership real estate should be deemed personalty for all purposes.[20] In the absence of any such agreement the real property is considered convertible into personalty for the purpose of paying firm debts.[21] In his work on *Real Property,* Tiffany offers a very apt explanation of the theory of conversion of realty into personalty, saying, "It is the share of the partner, and not the land, which is personalty, and such a share is personalty for the reason that what a partner has as regards the firm property is merely a right of action for his share of such surplus assets as remain after an adjustment of the partnership affairs, a mere chose in action which is to be classed with personal property." [22]

Therefore it appears that in equity, under the guise of personalty, partnership real property could be reached to satisfy partnership debts. However, at law since the title to real property was not in the partnership but in some person or persons, a judgment issued against the partnership did not authorize collection of the same out of real property. The Uniform Partnership Act has given to the partnership the right to acquire and convey real property in the firm name.[23] Consequently the present legislation providing for execution against the real property of a partnership is applicable when title is in the partnership. But if the problem should arise where title to partnership real estate is held by one or more of the partners but not all, the present statute would perhaps be inapplicable. It appears to be limited to the real property of the partnership held by the partnership *per se.*

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[18] STORY, PARTNERSHIP (6th ed. 1868) § 92.

[19] Greenwood v. Marvin, 111 N. Y. 423, 19 N. E. 228 (1888).

[20] Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61 (1897); Barney v. Pike, 94 App. Div. 199, 87 N. Y. Supp. 1038 (1st Dept. 1904).

[21] Collumb v. Read, 24 N. Y. 505 (1862); Fairchild v. Fairchild, 64 N. Y. 477 (1876); Liebert v. Reiss, 174 App. Div. 308, 160 N. Y. Supp. 535 (2d Dept. 1916); Kilhoffer v. Zeis, 109 Misc. 555, 179 N. Y. Supp. 523 (1919).

[22] TIFFANY, REAL PROPERTY (3d ed. 1939) 256.

[23] N. Y. PARTNERSHIP LAW § 12(3) ("Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name").