Chicago-Kent Law Review

Volume 32 | Issue 2 Article 2

March 1954

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PARTNERSHIP OBLIGATIONS AND THEIR ENFORCEMENT

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THE LEGAL RIGHTS, duties, and obligations of individuals have, in general, been sufficiently defined in Anglo-American law, and procedures have been made available to make them effective, without much resort to legal fictions. The corporation and the trust are also well known in law and, while vehicles of procedure may be more complex in those instances, there is little likelihood that there will be a miscarriage of justice in these areas because of technicalities in process, pleading, judgments and the enforcement thereof. Where, however, the law deals with partnerships, voluntary associations, joint stock companies, trade unions and other loosely-knit organizations,[1] pitfalls abound not only as to the nature of the attendant rights and obligations but also as to procedural questions of venue, service of process, judgments and the enforcement thereof so that the real merits are often not reached or discussed and justice has often been caused to miscarry.

Partnerships, in this respect, are chameleons, capable of changing legal color from "aggregate" to "entity," and back again; sometimes with the blessing of a statute, but often with the curse of the adversary party. There should be no need to belabor the difficulties and disappointments which can arise in connection with meritorious attempts to pursue and to collect from partners.[2] It may be noted, however, that while the law has created many fictions[3] and has made use thereof as vehicles

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1 Although this discussion deals primarily with partnership problems, many of the points made are equally applicable to other forms of voluntary association.

2 The reports are full of such cases, and the legal periodicals abound with literature on the subject. See, for example, a comment in 42 Ill. L. Rev. 72, treating mainly with questions of service of process on partnerships, particularly those operating in Illinois.

3 Legal fictions may be logical or fanciful. Compare: (a) in England, the King is always in court, hence cannot be non-suited; (b) in the action of trover the defendant was said to be the "finder" of property belonging to the plaintiff. The first of these fictions comes close to fact; the second is mere diplomacy.

to reach conclusions considered just and equitable, there is a grand crevasse created by certain of the legal ideas used in relation to partnerships. In particular, the gap between the "aggregate" fact and the "entity" fiction has been the source of much legal perplexity. It is probably effrontery to state that the use of more fiction as to the entity of a partnership would have made easier the solution of constantly recurring partnership questions but it is clear that the Uniform Partnership Act, as drawn, has failed in this regard.[4] As a consequence, an exposition of, and some suggested solutions for, the particular problems arising in connection with the nature of partnership obligations, concerning venue, and the acquisition of jurisdiction, as well as the enforcement of judgments affecting partnerships would not be amiss.[5]

I. Partnership Obligation and Liability

At common law and currently, a partnership is considered as an aggregation of individuals jointly owning property and jointly engaged in the use thereof in an enterprise designed for their common profit. Each partner is an agent for the others and, within the express or implied and obvious scope of the business, may create benefits or incur obligations in the permitted area. When an obligation of the several partners has arisen, other than those tortiously incurred, it would be logical to treat the same as a joint obligation and it is so regarded in law. Common law procedure for the enforcement of these joint obligations, however, produced crude and almost unbelievable results,[6] with the dis-

[4] The Commissioner of Uniform Laws were quite troubled, in preparing the Uniform Partnership Act, so as to make it embody both the theory of entity and the aggregate fact. Dean Ames had originally favored the entity theory. His successor, Dean Lewis, leaned toward the aggregate idea but with modifications. The latter view was adopted but not until after the proposed code had been worked over for more than ten years. See prefatory note to Uniform Partnership Act in 7 U.L.A. 1-2.

[5] Although the problems and cases discussed herein will be drawn primarily from Illinois sources, it is quite certain that statutory changes in other states have left many of these problems without satisfactory solution.

[6] Mention might be made of the fact that it was once necessary to proceed to outlaw all partners who could not be served with process before a judgment could be taken against those served. While this English practice never prevailed in the

tinction between joint obligations on the one hand and joint and several obligations on the other persisting for hundreds of years with adverse effect on pleadings, judgments, and justice. Astonishingly enough, the distinction has been preserved in Colorado, Illinois, and New York as to partnership obligations arising from contract, and other states are not wholly free from this historical distinction despite statutes making joint obligations into joint and several ones.

Partners are liable *in solido* for partnership obligations and, quite generally, so are joint contract obligors in other fields of law. Nonetheless, and with the exception of partners, substantially all joint obligors are liable severally as well as jointly. Inasmuch as a joint obligor, even a partner, can individually discharge a joint obligation if he wishes, it is difficult to perceive why the Uniform Partnership Act did not declare all partnership obligations to be joint and several in conformity with statutory provisions dealing with joint rights and obligations such as exist in most jurisdictions,[7] provisions intended to remedy the contrary harsh theory of the common law, with its attendant procedural difficulties. One of the risks which any partner undertakes is that of being personally called upon to pay all partnership obligations. If he does so, he has his own recourse against his fellows. Why, then, should not this ultimate risk be made immediate, and arise at the time of the original undertaking? Why place the burden of seeking out and pursuing hidden or absent partners upon those who deal with partnerships? Why not suit and judgment against any convenient partner, leaving it to him to settle with his fellows?

Modern procedural statutes frequently allow the conduct of an action against a series of joint obligors, with judgment permitted against those served for the full amount, but with a limit

United States, it found a cumbersome counterpart in the necessity of having summons returned "not found," in exhausting the cause of action by judgment against those served, and following up with *scire facias* at a later date as to partners out of the jurisdiction. Justice Bradley, in Hall v. Lanning, 91 U. S. (1 Otto) 160, 23 L. Ed. 271 (1875), remarked on the dilatory nature of proceedings of that character and the desirability of finding some way by which service on one partner should be made to answer for service on all.

[7] See, for example, Ill. Rev. Stat. 1953, Vol. 1, Ch. 76, § 3.

that there shall be only one satisfaction, without loss of the cause of action against those not served.[8] Any attempt to apply this procedure to partners is, in many jurisdictions, blocked by the terms of the Uniform Partnership Act which specifically states that the contractual obligations of partners are joint, not joint and several.[9] Even before Illinois adopted the uniform act in 1917, the state supreme court, in *Fleming* v. *Ross,*[10] had held that partnership contracts were joint in character, so that a judgment taken against those partners served operated to exhaust the cause of action, making it necessary for the creditor to pursue those not served by *scire facias.* That decision having been attained despite the presence of a general joint rights and obligations statute, it is unlikely, although much to be desired, that the state supreme court would declare, in a proper future case, that the presence of a modern procedural provision for the taking of several judgments would be enough to reverse the theory expounded in the Fleming case. It would, then, seem to be necessary to secure further legislation on the point.

Although the objective of the Uniform Partnership Act was to make uniform the substantive law of partnership, no great departure would have been made if it had declared that all partnership civil liability should be several as well as joint in character. To retain joint liability, as that liability was known to the common law, was neither progressive nor enlightened codification. If enlightened procedural provisions are not enough to modify, or in some instances practically to circumvent, the common law theory of joint liability, and if statutory provisions with respect to liability being both joint and several for purpose of suit are inadequate, then something else should be devised. To attempt a summary of current statutes in all American jurisdictions would

[8] Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 151, reads: "When several joint debtors are sued, and any one or more of them shall not be served with process, the pendency of such suit or the recovery of a judgment against the parties served shall not be a bar to a recovery on the original cause of action against such as are not served, in any action which may thereafter be brought. This section shall not be so construed as to allow more than one satisfaction."

[9] U.P.A. § 15(b); Ill. Rev. Stat. 1953, Vol. 2, Ch. 106½, § 15(b).

[10] 225 Ill. 149, 80 N. E. 92 (1907).

overtax the effort available for this paper.[11] It could be suggested, however, that a clean sweep of the patch work, special procedures, and other exceptions allowed with regard to the common law concept of joint liability could be effected by the adoption of a simple provision similar to the one in use in the District of Columbia.[12]

II. Venue, Service, and Jurisdiction

Clarification of the law with respect to the nature of partnership obligations is but one step, for uncertainties would still exist with respect to their enforcement. Problems of venue arise in part because of the inherent nature of the partnership, as viewed at common law, and in part because of the possibility that the business of the partnership may be transacted through non-partner agents, through one or more resident partners, or with no partners resident in the area of business transaction or in the county and state of the adverse party. Some statutory provisions have been of help in securing venue but others have been declared unconstitutional, or repealed, because of the holding in *Pennoyer* v. *Neff*,[13] even though that case has lost some of its force as authority. In addition, the common law history of venue[14] has tended to prevent a fair appraisal of the fundamental purpose for laying venue. Without that background, the laying of venue should be a matter of attaining a fair balance between the convenience of the plaintiff and that of the defendant, especially since wit-

11 What the law was, and substantially still is, may be seen in a comprehensive annotation appearing in 1 A. L. R. 1601 and in Burdick, "Joint and Several Liability of Partners," 11 Col. L. Rev. 101 (1911). The summaries there provided have changed but little despite the passage of years.

12 D. C. Code 1951, Tit. 16, § 901, states: "Every contract and obligation entered into by two or more persons, whether partners or merely joint contractors, whether under seal or not, and whether written or verbal, and whether expressed to be joint and several or not, shall for the purposes of suit thereupon be deemed joint and several."

13 95 U. S. (5 Otto) 714, 24 L. Ed. 565 (1878).

14 At inception, inquisitions and juries were also the witnesses or, more correctly stated, rendered verdicts on the basis of their own knowledge concerning the parties and the issues. A trial then was, necessarily, a local affair. With the advent of testimony from third persons, required to supply information where direct knowledge on the part of the jury was lacking, and with the development of the concept of a transitory cause of action, the original basis for venue tended to disappear.

nesses can now, quite generally, testify by deposition in civil cases, hence their convenience would seem to be a matter of secondary concern.[15] There should, then, be no overweening difficulty in fixing venue for suit in partnership cases. It is true, however, that venue, service, and the acquisition of jurisdiction are inextricably interwoven, so all of these must be considered in determining the validity of the eventual judgment.

The Illinois Civil Practice Act has provided a reasonable degree of modernization in relation to many aspects of practice and procedure but, so far as venue in suits against partnerships is concerned, which actions lie against the partners as individuals, no special provision has been made to ease the burdens already noted. Venue has been carefully spelled out as to defendants in different counties, as to printers of libel, as to corporations, whether private, municipal, or quasi-municipal, and as to those engaged in the business of insurance,[16] but no equivalent distinctive treatment appears for partnership suits.

There was a time when statutory treatment existed[17] but it did not survive long enough to be incorporated in the present statute. In an early case resting on the former statute, that of *Watson* v. *Coon*,[18] service was had upon an agent of the partnership in a county where one of the firm's several lumber yards was located. Both of the defendant partners were non-residents of the county wherein the resident agent had been served but they were residents of the state. The defendants appeared specially and moved to quash the return of summons. When this motion was denied, they stood by their motion and judgment was entered against them. In affirming, the Supreme Court referred, by analogy, to the provision that a corporation could be sued, and

[15] A different result has been achieved in criminal cases because of the presence of constitutional guarantees on the point, as well as a theoretical intense public interest in the outcome of criminal cases.

[16] Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, §§ 131-3.

[17] See Hurd, Ill. Rev. Stat. 1908, Ch. 110, § 13, which reads: "A co-partnership, the members of which are all non-residents, but having a place or places of business in any county of this State in which suit may be instituted, may be sued by the usual and ordinary name which it has assumed and under which it is doing business and service of process may be had in such county upon such co-partnership by serving the same upon any agent of said co-partnership within this State."

[18] 247 Ill. 414, 93 N. E. 289 (1910).

jurisdiction obtained, in any county in the state, by service on the corporation's agent. The court expressed the belief that it had been the intention of the legislature to place partnerships upon a basis similar to corporations and that, while the term "non-resident" could mean one non-resident of the state, it meant, as used in this statute, one who was a resident of the state but a non-resident of the county in which venue had been laid and where business had been transacted by the non-partner agent.

Twenty years after the Watson case, the Supreme Court of Illinois, in the case of *Werner* v. *W. H. Shons Company*,[19] had further occasion to analyze this statute, this time with respect to a judgment which had been entered in favor of the plaintiff against "W. H. Shons Co." The validity of service of process was the direct issue and it turned on a return which stated that the sheriff had served the summons by reading it to an agent, and by delivering a copy thereof to him, inasmuch as "the said W. H. Shons Company or any member of said firm" had not been found in the county. With a penetrating analysis as to the facts of service and of the precise language of the statute, the Supreme Court, on this occasion, came to the conclusion that no valid service had been made, hence there was no jurisdiction present to support the judgment. It noted that the statute in question authorized a form of substituted or constructive service in those cases where the partnership was composed of those who were non-residents of the county where the firm had carried on business provided they were, nonetheless, residents of the state. It was said, however, that there was nothing in the return, or in the record, to show the character of "W. H. Shons Company" or to disclose whether that name designated an individual using a trade name, a partnership, or a corporation. Since strict compliance with the statute would require the giving of this information, the service was invalid for lack thereof.[20]

[19] 341 Ill. 478, 173 N. E. 486 (1930).

[20] An argument by plaintiff that the entry of a judgment created a presumption in law that jurisdiction had been acquired was defeated by defendant's special appearance for the sole purpose of testing service. It was also stated that a recital in a judgment of the fact of proper service would not stand up in the face of an official return showing a want of service. On that point, see Galpin v. Page, 85 U. S. (18 Wall.) 350, 21 L. Ed. 959 (1874).

While subject to a narrow construction, the statute referred to in the Watson and Werner cases did serve a salutary purpose. It passed out of existence, unfortunately, with the adoption of the present Civil Practice Act, so it is no longer possible to rely thereon. Instead, the present statute makes it possible to lay venue in any county where one or more of the defendants reside, or in which the transaction or some part thereof arose.[21] It is of help where partners reside in different counties, provided all live within the boundaries of the state, but it does not expressly cover the case of partners living without the state nor does it sanction service on a local agent of the firm. These two deficiencies call for a measure of correction but, as they involve constitutional issues of due process, they form the most difficult part of the problem of enforcing partnership obligations.

There is no provision in the Uniform Partnership Act for substituted or constructive service[22] and this omission could be expected in view of the fact that the act was aimed to make uniform the substantive, rather than the procedural, law relating to partnerships. A few states have, therefore, adopted statutory provisions for substituted or constructive service upon non-resident partners, meaning those who reside outside the boundaries of the state where the suit is brought, provided service of summons can properly be had within the jurisdiction of suit upon the agent who has conducted the partnership business for it in the state of venue.[23] It is unlikely that a personal judgment against the non-residents thus served would be recognized in the sister states. Such is the view taken in the case of *Flexner* v. *Farson*,[24]

21 Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 131. The concluding sentence thereof reads: "If all defendants are non-residents of the State, an action may be commenced in any county." It, however, does no more than fix possible venue.

22 Section 4 of the Uniform Partnership Act, providing for rules of construction, does state: "(1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act." It continues: "(3) The law of agency shall apply under this act." Little attention appears to have been given to the possible impact of these words on the instant problems.

23 No statute is needed with respect to the acquisition of jurisdiction over property within the state for purpose of an *in rem* proceeding, but many such statutes also exist.

24 268 Ill. 435, 109 N. E. 327 (1915), affirmed in 248 U. S. 289, 39 S. Ct. 97, 63 L. Ed. 250 (1919).

wherein plaintiff began an action in Kentucky against a non-resident partnership which had done business in that state. Service was had upon one who had been agent of the partnership at the time of the transaction but who was no longer agent at the time of service of summons.[25] Plaintiff had judgment in Kentucky and then began proceedings on the judgment in Illinois, where the partners resided. The Illinois Supreme Court refused to give full faith and credit to the judgment so rendered for the reason that no jurisdiction had been acquired over the Illinois residents and consent to jurisdiction could not be implied. The Supreme Court of the United States, speaking through Mr. Justice Holmes, affirmed that decision.

Notwithstanding this, and comparable results attained in other cases of similar import, there is occasion to believe that there is not only ample room for improvement in the law but that a change could be justified both equitably and constitutionally. In the first place, if a partnership, whether composed of domestic or foreign partners, were to be treated as a legal person, under the entity theory, even though not of the same clay as a corporation, a statute authorizing substituted or constructive service upon the firm, by service upon an agent in charge of the transaction or on one charged generally with the conduct of the firm business, would provide an analogy extremely close to the one found in the case of the foreign corporation which has done business in the state. In this assumed situation, the firm could be required to designate an agent for purpose of service before being permitted to do business in a state other than the one of its residence.

To counteract the argument that a state may not constitutionally, in the face of an equal privileges and immunities clause, forbid or condition the conduct of ordinary business transactions by individual non-residents, or by groups or aggregates of such individuals, it could be suggested that the non-resident individuals, or aggregations of them, otherwise free from personal service in the jurisdiction where the "foreign" transactions have

[25] This weak link in the chain appears to have had no bearing on the final outcome of the case, for the final decision was reached without emphasis on the point.

been carried on, would, under such a statute, be given a treatment no different than that accorded to residents. Residents engaged in business are subject to the process and jurisdiction of local courts. If "outlanders" are not, they receive not equal but favored treatment. To bring them within the reach of process, through their agents, would not produce discrimination but would erase a discrimination now visited against local inhabitants.

Recourse, if necessary, may be had to decisions dealing with the acquisition of jurisdiction over non-resident motorists who use the highways of the state.[26] The approach there has been not that the driver is excluded from entering the foreign state but that, by voluntarily driving upon the highways thereof, he consents to the imposition of reasonable conditions, those which condition the right of all or at least place all upon the same basis with regard to being amenable to suit for wrong doing. Business jurisdiction over non-residents would seem to have an even broader basis for justifiable conditions reasonably applied.

It is worthy of notice in that connection that, as early as 1934, Pennsylvania produced a land-mark decision in the case of *Stoner* v. *Higginson,*[27] one which could be said to have shaken, or at least disturbed, those who believe in the rule of *Flexner* v. *Farson.*[28] At the time of the action, Pennsylvania had a "Fictitious Name" statute[29] under which the true owners of a business, trading under a fictitious name, were required as a prerequisite to engaging in business in any county in the state, to designate a local agent upon whom service could be had. The defendants there concerned were partners doing business under a fictitious

[26] Hess v. Pawloski, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927). The fictional theory of voluntary appointment of an agent for purpose of service, originally indulged in to make the non-resident motorist statutes constitutionally palatable, appears to have gone by the board: Olberding v. Illinois Central R. Co., —U. S. —, 74 S. Ct. 83, 98 L. Ed. (adv.) 7 (1953), and Ogdon v. Gianakos, 415 Ill. 591, 114 N. E. (2d) 686 (1953).

[27] 316 Pa. 481, 175 A. 527 (1934).

[28] 268 Ill. 435, 109 N. E. 327 (1915), affirmed in 248 U. S. 289, 39 S. Ct. 97, 63 L. Ed. 250 (1919).

[29] Purdon's Pa. Stat. Ann., Tit. 54, § 28.1 et seq.

name, were actually residents of and living in New York, and service was had upon an agent who had been designated as such pursuant to this statute. Another Pennsylvania statute provided for substituted or constructive service.[30] Process in the case also complied with this statute. The defendants appeared specially, moved to quash the summons, and attacked the validity of the return, relying particularly on an alleged lack of due process and a claimed "absolute" right, as individuals or an aggregation of individuals, to do business without hinderance or condition.

The Pennsylvania Supreme Court struck down the points so raised by indicating that due process called primarily for notice and an opportunity to defend, which requisites had been observed. It looked with a jaded eye upon "absolute" rights generally, stating that "absolute," in the instant case as in most, if not all, instances, meant no more than "in a lawful manner and subject to reasonable regulation." The imposition of reasonable conditions to the doing of business within the state was said to differ in no essential way from those conditions required of local businesses, the owners of which were subject to local venue and service of process. Public policy was also said to buttress the requirement for the naming of an agent for service.

The query might well now be posed whether decisions of the character to be found in *Hess* v. *Pawloski*[31] and in *Stoner* v. *Higginson*[32] have not theoretically overruled the holding in *Flexner* v. *Farson*[33] by bringing to bear, upon the facts and the law, the additional weight of a public policy intended to make remedies both effective and available. If so, is not one solution to the

30 Ibid., Tit. 12, § 297, states: "When any person or persons, not being residents of this commonwealth, shall engage in business in any county of this commonwealth, it shall and may be lawful for the officer charged with the execution of any writ of process issued out of any of the courts of this commonwealth to serve the same upon any clerk or agent of such person or persons, at the usual place of business or residence of such agent or clerk, with like effect as though such writ or process was served personally upon the principal."

31 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927).

32 316 Pa. 481, 175 A. 527 (1934).

33 See citation in note 28, ante.

problems involved in the enforcement of partnership obligations the wholesale enactment of statutes comparable to the two existing in Pennsylvania?[34]

Continuing a step beyond the fictitious or trade name situations, the analogies and the arguments advanced seem a little less certain. Where the firm name contains less or more than the true names of all of the owners, it may then be said to be fictitious. But would similar classification and conditions apply to the case of one, or more than one, trader where the full true name, or names, appeared in the title under which business was transacted? Suppose, for example, that John Doe was a sole trader who had done business in his own true name through a local agent but was actually a non-resident. Would he come within the purview of a statute similar to the one found in Pennsylvania? If both John Doe and Richard Roe, co-partners, being non-residents, had transacted their business through a local agent, using their own true names, would they fall within the reach of either a fictitious name or a constructive service statute?

These queries propound a hard nut not easily cracked, with a negative answer likely to cut the ground from under the arguments heretofore advanced. Resort to broad concepts of public policy, based on a claim for fair dealing and equality between local claimants and their adversaries, whether local or non-resident, would deserve consideration. Under previously established, well-hardened constitutional principles calling for actual personal service within the jurisdiction as a prerequisite to a personal judgment, it must be admitted that discrimination operated against the local claimant and the local trader where, despite the presence of local transactions, the owners of a competing business were non-residents. Here it is, then, that some lively and legal fiction could be indulged in to bring about greater justice in shorter time than is possible under the awkward and cumberous principles of

[34] Ill. Rev. Stat. 1953, Vol. 2, Ch. 96, § 4 et seq., dealing with fictitious names, is inadequate in that, by Section 7 thereof, partnerships operating under a name which "shall include the true, real name of such person or persons transacting said business or partnership" are excluded from the operation of the statute. It is also deficient in that it fails to provide for any method of substituted or constructive service of process.

the common law, present by inheritance rather than by affirmative acquisition.

Resort to fiction would not really be required if the several states would enact statutes similar to one found in Iowa[35] and relied on in the cases of *Davidson* v. *Doherty*[36] and *Doherty* v. *Goodman*.[37] In the last mentioned case, the plaintiff commenced an action in Iowa against Doherty, a resident of New York, on a cause of action arising out of a transaction carried on in Iowa, where the defendant maintained an office. Service was had upon an agent in charge of the local office. The defendant appeared specially, challenged the jurisdiction of the court, and stood by his plea. Judgment went against him and, on appeal, the Supreme Court of the United States affirmed, holding the Iowa statute to be valid and constitutional. It must be acknowledged that the business transacted concerned the sale of securities, a business affected with a public interest to a greater degree than would be true, for example, of one concerned with meats and vegetables. This difference, however, should be thought of as one of degree only and any distinction based thereon could well yield before the important consideration of an announced public policy designed to place local traders and non-resident traders on an equal basis. The price for permitting non-residents to enjoy the fruits of doing business locally should be that of requiring these non-residents to be, by some lawful process, equally amenable to local suits.

If constitutional objections are advanced against a system which would require the advance registration of business owners and which would compel the designation of agents on whom substituted service might validly be had, it should be noticed that the Supreme Court of the United States, in the Doherty case,

[35] Iowa Code 1931, § 11079, declared: "When a corporation, company, or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be had on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency." With some revision, the text thereof now appears in Iowa Code 1946, Vol. 2, p. 2150, as Rule 56(f) and (g) of Rules of Civil Procedure.

[36] 214 Iowa 739, 241 N. W. 700, 91 A. L. R. 1308 (1932).

[37] 294 U. S. 623, 55 S. Ct. 553, 79 L. Ed. 1097 (1934).

drew these propositions from the case before it, to-wit: (1) the statute was applicable to the residents of any other county than that in which the business occurred, whether living within or without the state; (2) the statute treated residents of the state exactly the same way it treated residents of all other states; and (3) the non-resident who received the protection of the laws of the state with regard to the transaction of his business there ought to be amenable to the laws of the state with respect to problems growing out of that business. Any statute drafted to cover the situation should, then, be made applicable only if the defendant has an office or agency in the county where the suit is started, if the suit is conducted in a county other than the one in which the defendant resides, if the action grows out of, or is connected with, the business of that office or agency, and then only provided the agent upon whom service is to be made is one employed in that office or agency. Other aspects of due process could be met if the statute made it clear that the agent should actually receive notice of the suit and there was certainty, to a moral degree, that the principal defendant or defendants would also receive such notice and be given ample time in which to appear and defend.[38]

III. Enforcement of Obligations

There would still remain the problem of enforcing the judgment founded upon partnership liability. Since a judgment must be satisfied out of the property belonging to the person against whom it is directed, it should follow therefrom that, if the original complaint is directed against the partnership as an entity, only firm property could normally be taken. This would involve some risk of identification, with the peril for mistake or wrongful seizure on the creditor. If, on the other hand, the action looked toward the rendition of a personal judgment based on a partner-

[38] Resort could be had, for this purpose, to the method laid down in Ill. Rev. Stat. 1953, Vol. 2, Ch. 95½, § 23, with respect to non-resident motorists, or Vol. 2, Ch. 110, § 137, as to substituted service on residents not found.

ship obligation, firm property as well as that of the individual judgment debtor may be subjected to execution.[39]

These are risks which the partners knew they must assume, whether immediately or ultimately. Why, then, should satisfaction of the creditor be blocked by technical barriers? If a partner dies after becoming obligated on a partnership debt, there would seem to be no good reason why his estate may not be reached even though the surviving partners are capable of paying the debt.[40] To force the creditor to attempt collection from the survivors before claiming against the dead partner's estate would again seem to be a relic of a very ancient common law rule. If more is needed, the treatment accorded to joint debtors, under which suit against one or all is permitted with the possibility of the rendition of several judgments against those served,[41] should be made applicable to partners, for they are joint debtors to the same extent as those who are jointly liable even though not partners.

To the extent that partnerships, or individual partners, have property within the state in which the judgment is rendered, local rules for the enforcement thereof should control. If enforcement elsewhere becomes necessary, it has already been noted that a greater degree of liberality in the matter of giving full faith and credit to existing judgments would accomplish much in the way of providing relief in the areas here discussed. In addition thereto, a wider adoption of the uniform act for the enforcement of foreign judgments[42] should aid in the matter of making partnership obligations fully enforcible.

The possibility of using attachment or some similar forms of procedure for the collection of demands against partnerships has not been overlooked, not because such measures are unavailable

[39] No attempt has been made to go into problems of marshalling of assets or of treatment to be accorded to firm and private creditors who may come into competition with one another.

[40] Compare Pope v. Cole, 55 N. Y. 124, 14 Am. Rep. 198 (1873), with Doggett v. Dill, 108 Ill. 560, 48 Am. Rep. 565 (1884). See also Uniform Partnership Act, § 36(4).

[41] See, for example, Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, §§ 151 and 174.

[42] 9 U.L.A. pp. 376-83; Ill. Rev. Stat. 1953, Vol. 1, Ch. 77, § 88 et seq.

but rather because they may prove to be inappropriate, tardy, or otherwise inadequate to reach more than a minimum amount of assets at the place of venue. Lack of uniformity of procedure, the peril of wrongfully attaching property mistakenly thought to belong to the firm, the cost of such proceedings, and the reluctance of custodians to guard carefully the property seized often outweigh theoretical advantages. Any *in rem* judgment so secured would, of course, be of no value in the event further action should become necessary to collect the balance of the demand.[43]

IV. Summary

If illustration be needed to demonstrate how fictions could be utilized to improve existing law, reference might be made to the one developed with respect to the acquisition and transfer of partnership interests in real estate.[44] While similar results have been obtained in some jurisdictions through use of the equitable conversion doctrine and, in a few earlier cases, it had been held that dower or homestead would not attach to partner's interest in firm real estate until after firm debts had been paid or the partners had voluntarily partitioned by agreement, the adoption of the innovations made under the applicable sections of the Uniform Partnership Act provide evidence that the free use of a creative imagination could greatly improve other areas of partnership law. Illinois has furnished the nation with leading cases dealing with the application of these statutory innovations.[45] It could well take the lead again by adopting reforms of the kind here indicated.

In an effort to alleviate the hardships encountered by claimants against partnerships, and endeavoring to place the adversary parties in a more evenly balanced position with regard to their litigation, the suggestion is offered that statutory reform be made

[43] Salmon Fall Mfg. Co. v. Midland Tire & Rubber Co., 285 F. 214 (1922).

[44] Uniform Partnership Act §§ 8 and 25; Ill. Rev. Stat. 1953, Vol. 2, Ch. 106½, §§ 8 and 25.

[45] See Wharf v. Wharf, 306 Ill. 79, 137 N. E. 446 (1923), and First Nat. Bank of Charleston v. White, 268 Ill. App. 414 (1932).

so as to include all partnership obligations under a comprehensive statute designed to make all obligations joint and several;[46] that venue and process statutes be enacted to provide for substitute service on non-resident owners or partners by delivery of process to their duly appointed local agents or, upon failure to appoint, upon a designated public official;[47] that the saving provision with respect to judgments against some joint debtors be retained;[48] that the law be made clear as to the right to seize the individual property of any partner immediately to satisfy a partnership debt, leaving that partner to seek any appropriate reimbursement from his fellow partners; and that, in the event fictitious name statutes should seem appropriate, they should be extended to provide for the registration of all owners, partners not excluded.

If, in addition to a nation-wide uniform adoption of this legislative program, the courts of the several states would come to recognize the judgments of sister states, except in those instances where there is a clear public policy against recognition, these suggested reforms in law, already partly in effect in some jurisdictions, would simplify the enforcement of claims against partners without placing them under burdens any greater than those carried by their adversaries.

[46] The provision of the District of Columbia, set out in note 12, ante, could well be borrowed in its present precise form. To avoid misconstruction, a provision should be added for the repeal of all other acts inconsistent therewith.

[47] The Iowa statute referred to in note 35, ante, is probably an outstanding example. It could be revised in the fashion suggested in note 38, ante.

[48] Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 151.