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THE CHARGING ORDER UNDER THE UNIFORM PARTNERSHIP ACT

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One of the most artificial and confusing procedures of the common law was the method by which the creditor of a partner enforced his claim against the interest of his debtor in the partnership. Lord Justice Lindley of the English Court of Appeal, a most eminent authority on the law of partnership, aptly describes the common law procedures in the following language:

When a creditor obtained a judgment against one partner and he wanted to obtain the benefit of that judgment against the share of that partner in the firm, the first thing was to issue a *fi. fa.*, and the sheriff went down to the partnership place of business, seized everything, stopped the business, drove the solvent partners wild, and caused the execution creditor to bring an action in Chancery in order to get an injunction to take an account and pay over that which was due by the execution debtor. A more clumsy method of proceeding could hardly have grown up.¹

Substantially the same procedure prevailed throughout the United States under general execution statutes where the successive steps generally consisted of: (1) seizure of some or all of the partnership property under writ of execution; (2) sale of the debtor partner's "interest in the property"; (3) acquisition of the debtor partner's interest "in the property" by the purchaser at the execution sale, subject, however, to the payment of partnership debts and prior claims to the firm against the debtor partner; (4) compulsory dissolution and winding up of the partnership, and (5) distribution to the execution purchaser of the

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¹ *Brown, Janson & Co. v. Hutchinson & Co.*, 1 Q.B. 737 (1895).

debtor partner's share of any property remaining after the winding up process was completed.²

Two factors combined to bring about this "clumsy method." The first was the difficulty which courts and lawyers had in understanding the nature of a partner's interest in a partnership, that is, that it was an intangible share in the business of the firm rather than a direct interest in the property of the firm. Even when this concept was recognized, as it inevitably was when a separate creditor of a partner seized partnership property, the second factor came into play. The common law had no procedure for the seizure of the partner's intangible interest in the business. The writ of *feri facias*, common law counterpart of the writ of execution, permitted seizure of physical property only.³ Since it was practically inconceivable that valuable partnership interests should be exempt from creditors' claims,⁴ the writ of *feri facias* was employed even though ill suited to the purpose.

We thus find the common law courts enforcing claims against an intangible interest by a procedure commencing with the seizure of property but in its later stages converted into a proceeding whereby the debtor's beneficial interest in the business is made available to his creditor. The final result, however, could be attained only at the expense of the disruption of the business and the compulsory dissolution of the partnership. These consequences were not only unfair to the non-debtor partners but also harmful to the value of the partnership interest which the creditor sought to reach in that good will and going concern value might be impaired or destroyed. In this state of affairs it was inevitable that a demand for reform arose.

In the United States such reform measures as were adopted prior to the Uniform Partnership Act took a variety of forms, which in the main afforded only partial relief. The Texas statute, for example, provided for a symbolic seizure of the partner's interest by exhibiting a copy of the writ of execution at the partnership place of business,⁵ without any interference with the property of the partnership. Other statutes permitted a seizure of partnership property by the sheriff but

² This summary of the American procedure is an approximation of the prevailing rules. As might be expected, the very artificial nature of the proceeding led to the development of many local variations. Probably the best general description of the American procedure is found in BURDICK, *PARTNERSHIP*, 269 to 281 (Third Ed., 1917). In the words of that author (p. 270) the situation was "painfully complicated." See also CRANE, *PARTNERSHIP*, § 43 (Second Ed., 1952); STORY, *PARTNERSHIP*, § 261 *et seq.* (Fourth Ed., 1855).

³ CRANE, *PARTNERSHIP*, § 43 (Second Ed., 1952).

⁴ *Nixon v. Nash*, 12 Ohio 647, 648 (1861).

⁵ *J. M. Radford Grocery Co. v. Owens*, 161 S.W. 911 (Tex. Civ. App. 1913).

forbade him to take the property out of the possession of the partnership.⁶ The Washington statute permitted the non-debtor partners to retain possession on giving bond "to hold and manage the property according to law."⁷ Obviously, none of these early statutes attacked the problem directly. What was needed was a statute giving the creditor the right to resort directly to his debtor's beneficial interest in the partnership rather than to proceed by the wholly artificial process of execution against an ephemeral "interest in property."^{7a}

Such a statutory provision was included in the Partnership Act adopted in England in 1890.⁸ The English statute was, in turn, the model for the comparable provision of the Uniform Partnership Act approved by the Conference of Commissioners on Uniform State Laws in 1914.

Since the two acts are in most respects identical but do have a few significant differences the pertinent provisions of both are set forth. The English Act⁹ provides:

§ 23. Procedure Against Partnership Property for a Partner's Separate Judgment Debt.—(1) After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm.

(2) The High Court, or a judge thereof, or the Chancery Court of the county palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favor of the judgment creditor by the partner, or which the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same.

⁶ Dangler's Appeal, 125 Pa. 12, 17 A. 184 (1889).

⁷ RCW 6.04.120 [RRS § 580].

^{7a} Of the remedial statutes, the most logical appears to have been the Georgia procedure which extended the scope of the writ of garnishment to a partnership interest. *Blakeney v. Franklin*, 26 Ga. App. 305, 105 S.E. 872 (1921); *Citizens' Bank & Trust Co. v. Pendergrass Banking Co.*, 164 Ga. 302, 138 S.E. 223 (1927). The usual writ of garnishment statute does not reach an interest of this character. *Home v. Petty*, 192 Pa. 32, 43 Atl. 404 (1899).

⁸ 7 U.L.A. 256, 259.

⁹ Note 8, *supra*.

§ 33. Dissolution by Bankruptcy, Death, or Charge.

(2) A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

The Uniform Partnership Act¹⁰ provides:

Section 25. Nature of a Partner's Right in Specific Partnership Property. . . .

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. . . .

Section 26. Nature of Partner's Interest in the Partnership. A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

Section 28. Partner's Interest Subject to Charging Order.—(1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(a) With separate property, by any one or more of the partners, or

(b) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(3) Nothing in this act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership.

Section 31. Causes of Dissolution. Dissolution is caused: (1) Without violation of the agreement between the partners, . . .

(c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking. . . .

Section 32. Dissolution by Decree of Court. . . . (2) On the application of the purchaser of a partner's interest under section . . . 28 (the court shall decree a dissolution) (a) After the termination of the specified term or particular undertaking, (b) At any time if the partnership was a partnership at will . . . when the charging order was issued.

A brief comparison reveals that the two statutes are substantially identical. Both forbid the former practice of seizing partnership property as a step in the collection of a separate debt. Both substitute for

¹⁰ 7 U.L.A. 144, 158, 162, 169, 177.

the former procedure an entirely new enforcement measure called a "charging order" to which receivership and sale are possible incidents. Both permit the debtor partners to dissolve the firm if they feel aggrieved by the existence of the charging order. The apparent points of difference between the two statutes rest in the fact that the American statute is somewhat more detailed and specific. It is quite probable, however, that many if not all of the points specifically added by the Uniform Act will be developed judicially in England as and when the occasion requires.

The English Act has now been in effect for more than sixty years. The Uniform Act, promulgated in 1914, was first adopted in Pennsylvania in 1915 and is now the law in thirty-one states and in the Territory of Alaska.¹¹ It was adopted in the state of Washington in 1945.¹² There has therefore been ample time for experience with the new procedure and to warrant an inquiry into its workability.

Judging only from the volume and content of the decided bases both in England and the United States, the statutes have apparently worked very well. There are in fact only two cases in England and fewer than twenty in the United States which are directly concerned with the charging order procedure under the statute. None of these cases raises problems of the complexity which existed under the former procedure and few even suggest the possible existence of difficult questions.

Other evidence, however, suggests that the paucity and serenity of the decisions conceal a number of deficiencies in the statute, particularly in the United States. Casual conversations with American judges and lawyers reveal not only a general unfamiliarity with the statute but also a lack of familiarity with its theory and its meaning on the part of those who try to apply it. Such confusion is wholly understandable. Although the statute, when read generally with some understanding of its background, may appear to be satisfactory, it fairly bristles with unanswered questions when it is closely scrutinized. In contrast to statutes pertaining to more conventional enforcement proceedings such as executions, attachments and garnishments, the charging order statute is couched in most general terms. Neither Section 28 of the Uniform Act nor its English counterpart contains a detailed statement of the procedure for obtaining or the consequences which result from a charging order. The English have something of an ad-

¹¹ 7 U.L.A. (1952 Supp., p. 7).

¹² RCW 25.04.010 to 25.04.430 [REM. SUPP. 1945 § 9975-40 to 9975-82].

vantage in that a "charging order" procedure is prescribed in the Judgments Act of 1838.¹³ Although the problems of enforcement under that act are not identical with those arising under the Partnership Act, the terminology is familiar to English courts and lawyers and some concepts of procedure were in existence when the Partnership Act became effective. Also some procedural problems under the English Partnership Act are covered by court rule.^{13a} In the United States, however, the "charging order" procedure was a complete innovation and none of the procedural doubts has been squarely resolved by statute or court rule so far as the author has been able to ascertain.

What then are the doubts and questions raised by the statute? The more prominent ones under the Uniform Act are: What is a "competent court" empowered to issue the charging order?;¹⁴ what constitutes "due application" to the court?;¹⁵ what is the effect of a "charging order" on the creditor, the debtor partner, the non-debtor partners and the partnership?; when and why should a receiver be appointed?; how far should a court go in the exercise of the power to make such other orders "which the circumstances of the case may require?"; when should a sale of the partnership interest be ordered and by whom and in what manner should it be conducted?; what are the rights of non-debtor partners who redeem or purchase the interest charged?; and, finally, is the charging order procedure the exclusive remedy?

These questions are broadly divisible into problems of substance and of procedure and will be in large part discussed under these two broad classifications. Before entering upon that discussion, some general observations are in order.

It is unfortunate that the Act does not provide more specific answers to the questions listed above. It is generally true that one seeking to enforce a judgment must move expeditiously. The situation ordinarily does not permit the creditor's lawyer or the trial court to take the problem under advisement. If, however, counsel and the court do proceed expeditiously, the possibility of error is substantial. Also, without elaborate research, court and counsel may be left with the haunting feeling that, somewhere in the statutes or in the decisions, the language of section 28 has been construed in a manner quite different from procedure which is being employed by them. One function of this ar-

¹³ 1 and 2 Vict., ch. 110.

^{13a} LINDLEY, PARTNERSHIP, 432 (Tenth Ed.).

¹⁴ The English Act identifies the various courts by name.

¹⁵ This is covered in part by court rule in England. Note 13a, *supra*.

ticle is to allay such possible doubts by reviewing the English and American decisions under the statute. Since, however, as will appear, the decisions make no great headway into the matter and leave many questions unanswered, such a review, in and of itself, will for the most part only provide some assurance of the absence of authority. Therefore, a substantial portion of the discussion to follow will represent the views of the author, based upon what he believes should be the proper construction of the statute, in light of its purposes and general structure.

THE SUBSTANTIVE RESULTS AVAILABLE UNDER THE CHARGING ORDER PROCEDURE

The first, and doubtless the most important question under the statute, concerns the scope and effect of the charging order procedure. Put bluntly, the question is what may the court order contain? How does it enable the creditor to get his money?

Looking to the statute alone, four types of action are indicated: (1) an order "charging the interest" of the debtor partner "with payment of the unsatisfied amount of (the) judgment debt"; (2) the appointment of a "receiver of (the debtor's) share of the profits, and of any other money due or to fall due to him in respect of the partnership"; (3) the making of orders for accounting or other matters which the debtor partner might have made or "which the circumstances of the case may require"; (4) sale of the debtor's interest in the partnership.

The first of these steps—entry of the charging order—is unquestionably a condition precedent to any of the last three, although the second step may, under the express language of the statute, be taken simultaneously with the first. Probably the third and fourth steps also can be taken at the time the charging order is issued.

Does the first step—the charging order—contemplate only a lien on the interest of the debtor partner, requiring one of the other steps as an implementing measure, or may the charging order alone direct the payment of the debt to be made by the partnership out of the debtor partner's share? On principle there appears to be no reason why the court in its charging order could not direct the members of the partnership to pay the debtor partner's share in the profits or other moneys as they fall due. Even if the charging order, technically defined, would not include such a direction, it might be regarded as an

order "which the circumstances of the case may require" under the third step listed above. A rather different view is indicated, however, by Lord Justice Lindley in the leading English case of *Brown, Hanson & Co. v. Hutchinson & Co.*¹⁶ quoted from at the beginning of this article.¹⁷

In that case the distinguished jurist, after quoting the portion of the English statute stating that a court could "make an order charging the partner's interest," said:

What is the effect of that? That has no immediate effect on the co-partners at all. It simply amounts to this—that the interest of their co-partner in the business is charged just as if he had given an equitable charge over his interest. It does not harass or affect the other partners in the least.¹⁸

In substance then, it is Lord Lindley's view that the charging order, standing alone, simply encumbers the interest but does not compel the firm to do anything about paying the creditor. That result is accomplished, in Lord Lindley's view, by receivership as he immediately indicates in the following language:

Then, in order to give effect to that charge, provision is made for the appointment of a receiver for that partner's share and profits. The effect of that is that the appointment of a receiver operates as an injunction against the execution debtor receiving anything from his co-partners, and if his co-partners pay over to him anything with knowledge of the appointment of the receiver they may get into trouble.¹⁹

It thus seems clear that Lord Lindley was of the opinion that the appointment of a receiver is indispensable to the collection of the debtor partner's share of profits or other amounts payable. The validity of this conclusion will presently be put in question.

Lord Lindley continues:

But then that (the appointment of a receiver) does not produce money, except money which the co-partners may hand over, or could hand over to the judgment debtor partner if it were not for the receiver. In order to get the full benefit of the charge, the section proceeds: The Court may direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been in favour of the judgment creditor by the partner, or which the circumstances of the case may require. That means this—that an order may be made to take an account of what is due from the co-partners to the judgment debtor partner, and there is a clause (s. 33, sub-s. 2) which enables the solvent partners

¹⁶ 1 Q.B. 737 (1895).

¹⁷ *Ante*, p. 1.

¹⁸ 1 Q.B. 737 (1895).

¹⁹ 1 Q.B. 737 (1895). The concluding part of this statement is the only language to be found in the cases as to the sanctions which may be imposed on non-debtor partners who disregard the charging order.

to treat that as a dissolution. There is a clause which enables the solvent partners to proceed, if they think fit, to get rid of the judgment debtor. That is the machinery provided.

This particular excerpt from *Brown, Janson & Co. v. Hutchinson & Co.*²⁰ is vague and, in part, inaccurate. Apparently the account to which the judge refers would be only an informational aid to the creditor. That would seem to be its purpose under both the English and American acts. The right which the non-debtor partners have to dissolve the partnership under Section 33 of the English Act²¹ is not, however, as Lord Lindley implies, based upon the taking of an account. Rather, the non-debtor partners may dissolve the partnership at any time after "any partner suffers his share of the partnership property to be charged under this Act for his separate debt."²² Thus the issuance of a charging order and not the taking of an account justifies dissolution by the non-debtor partners. Finally, the last sentence of the foregoing quotation from *Brown, Janson & Co. v. Hutchinson & Co.*²³ suggests that the English Act contains no other procedures than those reviewed although the judge has said absolutely nothing concerning the possibility of a sale of the partnership interest indicated by section 23, subsection 3 of the Act.²⁴

The actual issue in *Brown, Janson & Co. v. Hutchinson & Co.*,²⁵ was whether a charging order could be issued against the English branch of a French partnership. The statements already quoted from the opinion were not, strictly speaking, essential to the decision of that question. They were made only by way of background to the decision on the actual issue rather than as an attempted exposition of the precise and full scope and effect of the statute. These circumstances are mentioned by way of admonition. Otherwise, because of the scarcity of other authority, the judge's eminence as an authority on partnership law and the picturesqueness of his literary style, there is a tendency to read things into the quoted language which are not there,²⁶ or to take too literally statements that are at variance with the statute.

Lord Lindley's rather categorical statements that the charging order, in and of itself, has no effect upon the non-debtor partners and

²⁰ 1 Q.B. 737 (1895).

²¹ Note 9, *supra*.

²² 7 U.L.A. 259.

²³ 1 Q.B. 737 (1895).

²⁴ 7 U.L.A. 256.

²⁵ 1 Q.B. 737 (1895).

²⁶ For example, see LINDLEY, PARTNERSHIP, 433, note X (Tenth Ed.).

must be implemented by a receivership is of doubtful accuracy when considered in light of the actual language of the statute. The same general observation may also apply to the suggestion that accounting is a measure which follows receivership and in turn is followed by dissolution. Actually the statute apparently contemplates a highly flexible and elastic procedure under which the court may employ a charging order, a receivership of the debtor partner's interest, a sale of that interest, and a wide range of orders for accounting or for other purposes "which the circumstances of the case may require."²⁷ Fundamentally, the act seems to proceed on the theory that the primary method for satisfying the creditor's judgment shall be by means of an order diverting the debtor partner's share of the profits to his creditor in a manner somewhat like that used in garnishment proceedings.²⁸ If this method is ineffectual there is another more drastic course of action mentioned—a sale of the debtor's interest in the partnership.²⁹ The other things provided for—appointment of a receiver and the taking of accounts and the making of such orders as the "circumstances of the case may require"—appear to be designed simply as aids to these two basic methods of collecting. The use of these subsidiary aids to the collecting process certainly should be regarded as permissive rather than compulsory. There is no apparent necessity for the appointment of a receiver, if effective collection would result from the mere issuance of an order requiring the partners to pay directly to the creditor the amounts which otherwise would go to the debtor partner. The receiver in such a case would serve no useful function but would merely add to the expense and complexity of the proceeding.

This broader concept of interpretation appears quite definitely to have been the view of Professor William Draper Lewis, the principal architect of the Uniform Act. Originally the drafting of the Act was assigned to Dean Ames of the Harvard Law School. He died before the task was completed and Professor Lewis of the University of Pennsylvania Law School then took over and completed the job. In a general survey of the Uniform Act, written in the year following its approval by the Conference of Commissioners on Uniform State Laws, he explained the charging order procedure as follows:

²⁷ U.P.A., § 28 (1), 7 U.L.A. 162; RCW 25.04.080 [REM. SUPP. 1945 § 9975-67].

²⁸ No doubt it would have been possible to have achieved the benefits of section 28 by an extension of the garnishment process. This procedure was adopted in Georgia, note 8, *supra*. Georgia has not as yet adopted the Uniform Partnership Act.

²⁹ U.P.A., § 28 (2), 7 U.L.A. 162; RCW 25.04.080 [REM. SUPP. § 9975-67].

After the adoption of the Act, when a judgment is secured against a partner by his separate creditor, all that a creditor will have to do is to apply to the court which gave him the judgment, or any other court, to issue an order on the other partners to pay him the profits which would otherwise be paid to his debtor, or to make any further order which will result in his securing the payment of his judgment without unduly interfering with the rights of the remaining partners in partnership property.⁸⁰

Although this brief statement is of a most general character, it accords with the apparent meaning and intent of the statutory language. Significantly it indicates no approval of the narrower language of *Brown, Janson & Co. v. Hutchinson*⁸¹ which had been decided twenty years earlier and must have been well known to Professor Lewis.⁸²

American case authority on the scope of the charging order remedy is extremely meager. Many of the cases dealing with the charging order statute involve attempts by the creditor to proceed by the outmoded process of execution. In such cases the charging order provisions are referred to usually merely to demonstrate that they supersede the former procedure. In the relatively few American cases where charging orders have been granted, there has as yet been no occasion to consider the problem exhaustively. In short, little if anything can be regarded as conclusively established by the cases. However, meager as they are, the decisions are of some value in indicating what has been and can be done under the statute. Generally the cases appear to proceed on the liberal philosophy of interpretation indicated by Professor Lewis rather than by the apparently narrower views suggested by Lord Lindley.

In *Frankil v. Frankil*,⁸³ the debtor partner conceded that "the plaintiff has a right to a charging order, but contends that the plaintiff is not entitled to an order on the sheriff to sell the right, title and interest of the defendant in the partnership." In support of this position, the defendant quoted the language of Professor Lewis set forth above. It will be recalled that Professor Lewis did not there mention the possibility of selling the debtor partner's interest. The court, however, did not feel that Professor Lewis' omission of any mention of a sale was significant. The court discusses the statutory language which does mention, in a somewhat left-handed way, a possible sale of the debtor's interest, saying:

⁸⁰ 24 YALE LAW JOURNAL, 634 (1915).

⁸¹ *Supra*, Note 1.

⁸² However, the Commissioners' Note to Section 28 contains no reference to *Brown, Janson & Co. v. Hutchinson & Co.*, 7 U.L.A., p. 163.

⁸³ 15 Pa. Dist. & Cy. Rep. 103 (1931).

The defendant, however, fails to recite subsection two of section twenty-eight, which provides several methods of redeeming the interest charged at any time before foreclosure, or in case of a sale being directed by the court. . . . This part of section twenty-eight is meaningless unless it is construed as conferring upon the court the right to direct a sale. Subsection one, moreover, gives the court making the charging order the right to make all other orders . . . which the circumstances of the case may require. There, therefore can be no doubt but that the court has the right to order the sheriff to sell the interest charged.³⁴

The court also had similarly construed the general grant of power contained in the statute when it said that it could "make any further order which will result in his (the creditor's) securing the payment of his judgment without unduly interfering with the rights of the remaining partners in the partnership property."

The court in the *Frankil* case³⁵ concluded by holding that "the rule for the charging order is made absolute"³⁶ and that an order be issued directing that the sheriff sell the debtor partner's interest.

The most thorough survey of the property concepts of the Uniform Partnership Act as they bear on section 28 is found in *Windom Nation Bank v. Klein*.³⁷ There the court had entered "an order charging their (the debtor's) interest in the firm with payment of the judgment debt." The plaintiff was the receiver appointed pursuant to section 28. He brought the action to set aside certain chattel mortgages placed upon partnership property by the debtor partners to secure other separate debts owing from them. The court reviewed all of the property sections of the Uniform Act³⁸ to show that they establish an entity concept under which no partner has an assignable interest in partnership property and that the true separate interest of a partner is his interest in the partnership business. The court accordingly held that the chattel mortgages on partnership property were void. On the rights of a receiver appointed under the charging order provisions of section 28, the court said:

It follows that a receiver . . . of a partner's 'share of the profits' acting under a charging order and section 28 . . . has the right in a proper action to have adjudicated the nullity of any mortgage or other assignment by

³⁴ Note 33, *supra*.

³⁵ Note 33, *supra*.

³⁶ The Pennsylvania equivalent of a show cause proceeding in Washington.

³⁷ 191 Minn. 447, 254 N.W. 602 (1934).

³⁸ U.P.A. §§ 24 to 28; RCW 25.04.240 to 25.04.280 [REM. SUPP. 1945 § 9975-63 to 9975-67].

some but not all of the partners of their interest in specific property of the partnership less than the whole. Such a receiver is entitled to any relief under the language of the statute 'which the circumstances of the case may require' to accomplish justice under the law. Obviously, a part of such relief is the avoidance of any unauthorized attempts to dispose of partnership property. Such a receiver is entitled to the 'share of the profits and surplus' (section 26 . . .) of the partner who happens to be the judgment debtor. While he is not entitled to share in the management of the firm as a partner, the receiver would be of little use if he could not protect 'profits and surplus' by preventing such unauthorized and illegal dissipations of firm assets as the complaint alleges in this case. While the procedure for his appointment is statutory, the language of the law is so broad that, when it comes to a question of the relief needed by such a receiver, the usual broad principles of equity jurisprudence ought to control. Hence a receiver of the interest of one partner is entitled to any relief needed to conserve all partnership property for the payment so far as necessary of the partnership creditors. Judicial aid may become necessary even to insure to a partner or his receiver his share of the profits, either from the going business or upon its dissolution. Such are the purposes of the statute. They are not to be frustrated by any construction which will deny it its intended scope.

While the precise issue dealt with concerned only the right of the receiver to attack the chattel mortgages, the Minnesota court thus makes it clear that the broad language of the statute is to be liberally construed to achieve the purpose of the statute. Of interest also is the court's statement that a receiver does not become a partner or participate in the management and that he would be of little use if he did not have some other functions than the mere receipt of the debtor partner's share of the profits and surplus.

In the Oregon decision of *Scott v. Platt*³⁹ the creditor of a partner first proceeded by execution and garnishment. Later, and after the debtor was adjudicated bankrupt, the creditor applied for a charging order. In order to avoid the effects of the intervening bankruptcy proceeding, the creditor contended that the execution and garnishment proceedings effected a lien which he was entitled to foreclose by the charging order procedure. This contention, tenuous at best, was rejected because it in fact appeared that the creditor had abandoned the execution and garnishment proceedings. The case thus actually decides nothing more than this lack of factual connection between the pre-bankruptcy and post-bankruptcy proceedings. Nevertheless, the court

³⁹ 177 Ore. 515, 163 P. 2d 293 (1945).

considered the provisions of the Uniform Act and made the following comment:

As will be observed from the review of the pleadings . . . , this proceeding is based upon . . . section 28 of the Uniform Act. . . . It specifies a simple, effective method whereby a judgment creditor may have the latter's interest in the partnership applied upon the judgment debt. The operation of (section 28) is not dependent upon whether or not a writ of execution, a notice of garnishment or any like process has been procured. Whether the judgment creditor obtained the issuance of a writ of execution or had a notice of garnishment served upon someone is wholly immaterial to (section 28). The procedure inaugurated by that section of our laws is not in aid of execution, attachment or garnishment; nor does it constitute a means by which a lien may be foreclosed.

In *Wyoming National Bank v. Bennett*⁴⁰ the court refused to grant a charging order where the partnership business had been changed to corporate ownership and operation long before plaintiff's judgment was obtained. The court, however, said:

A receiver appointed under this act would not have the usual powers of a receiver, possessing the rights of the insolvent for the purpose of administering his estate for the benefit of creditors under the direction of the Court. His right under this Act is not to administer but simply receive the share of the insolvent partner in the profits of the concern.⁴¹

The four preceding cases are the only American decisions which cast any real light upon the substance and scope of the charging order procedure. The other decisions which deal with Section 28 of the Act do no more than quote the statutory language verbatim or paraphrase it in terms so general as to add nothing.⁴² Out of the small total of

⁴⁰ 32 Luzerne Leg. Reg. Rep. 371 (Pa. 1938).

⁴¹ The limited nature of the receiver's rights and, particularly, his inability to participate in or assume the management of the business is also recognized in *Brown, Janson & Co. v. Hutchison & Co.*, note 1, *supra*, and *Windom National Bank v. Klein*, note 37, *supra*.

⁴² In the following cases the creditor proceeded by execution against partnership property after the adoption of the Uniform Act and the court cited or quoted from Section 28 of the Act to show that execution is not only forbidden by Section 25 but superseded by the charging order procedure of Section 28: *Sherwood v. Jackson*, 121 Cal. App. 354, 8 P. 2d 943 (1932); *Rader v. Goldoff*, 223 App. Div. 455, 228 N.Y.S. 453 (1928); *Northeastern Real Estate Securities Corp. v. Goldstein*, 267 App. Div. 832, 45 N.Y.S. 2d 848 (1944). In *Dalinda v. Abegg*, 175 Misc. 945, 25 N.Y.S. 2d 612 (1941) the same two sections of the Uniform Act were relied on to defeat an attachment of specific partnership property for the purpose of acquiring jurisdiction *in rem* as to a non-resident debtor partner. In *Townsend v. L. J. Appel Sons*, 164 Md. 255, 164 Atl. 679 (1933) and in *Metropolitan Casualty Co. v. Cimino*, 108 N.J. Law 243, 157 Atl. 152 (1931) executions were defeated on the authority of Section 25 (c) alone without mention of Section 28. In *Ribero v. Callaway*, 87 Cal. App. 2d 135, 196 P. 2d 109 (1948) and *Cameron v. Superior Court*, 88 Cal. App. 2d 597, 199 P. 2d 450 (1948), potentially interesting problems were not decided for collateral reasons. In the *Ribero*

decision and dictum in the four cases, we find one case, decided by an inferior court of Pennsylvania, holding that the sheriff may be ordered to sell the interest of the debtor partner;⁴³ two cases favoring a liberal interpretation of the broad language of the statute;⁴⁴ two cases discussing the functions of a receiver under the statute;⁴⁵ one case holding the receiver can sue to set aside the void assignment of a partnership asset⁴⁶ and one case declaring that the charging order procedure is entirely independent of execution, attachment or garnishment.⁴⁷

In addition there are two more cases⁴⁸ which, while not expounding the substance of the charging order procedure, hold that it may be used to attack a dissolution of the partnership attempted for the purpose of defeating the creditor's claim.

In the somewhat doubtful state of the law,⁴⁹ the following proposi-

case, the non-debtor partners opposed a sale of the debtor's interest. The court held that only the debtor partner, who had not appealed, could raise this question. In the *Cameron* case, the trial court had granted a charging order and "an order foreclosing the charging order and directing a sale" of the debtor's interest. The creditor's judgment was reversed on appeal, causing automatic destruction of the charging order process. In *DeMartini v. Industrial Accident Commission*, 90 Cal. App. 2d 139, 202 P. 2d 828 (1949), no problem of creditor's rights was involved but the property sections of the Uniform Act, including those pertaining to the charging order process, were discussed to show the existence of an entity concept in this phase of partnership law.

⁴³ *Frankil v. Frankil*, note 32, *supra*; see also *Ribero v. Callaway*, note 42, *supra*, and *Cameron v. Superior Court*, note 42, *supra*, for instances in which sales were ordered by trial courts but propriety thereof was not ruled on by appellate court.

⁴⁴ *Frankil v. Frankil*, note 32, *supra*, and *Windom National Bank v. Klein*, note 37, *supra*.

⁴⁵ *Windom National Bank v. Klein*, note 37, *supra*, and *Wyoming National Bank v. Bennett*, note 40, *supra*.

⁴⁶ *Windom National Bank v. Klein*, note 37, *supra*.

⁴⁷ *Scott v. Platt*, note 39, *supra*.

⁴⁸ *Spitzen v. Buten*, 306 Pa. 556, 160 Atl. 444 (1932) and *First National Bank of Charleston v. White*, 268 Ill. App. 414 (1932). The essential problem in both cases appears to be in the field of fraudulent conveyances. The Pennsylvania court remanded the case with a recommendation that fraud be alleged and the proceeding carried forward on principles expressed in Section 41 (9) of the Uniform Partnership Act. The Illinois court held the dissolution invalid because it occurred after the entry of judgment and issuance of an unsatisfied execution thereon. The partnership act is most liberally and questionably interpreted to make the charging order effective as of the earlier date of the unsatisfied execution. Perhaps a better procedure would be the type of adversary procedure indicated by *Windom National Bank v. Klein*, note 37, *supra*. An English decision dealing with a similar problem is *Edmondson v. Harrison*, 41 Sol. Jour. 128 (1896).

⁴⁹ No substantial aid to specific interpretations of the statute is obtained from the texts or other non-judicial literature. See *CRANE, PARTNERSHIP*, § 43 (Second Ed., 1952); *LINDLEY, PARTNERSHIP*, 431 to 435 (Tenth Ed.); *BURDICK, PARTNERSHIP*, 269 to 280 (Third Ed., 1917); 27 *COL. L. REV.*, 436; 5 *TEMPLE LAW QUARTERLY*, 278. The hazard of positive predictions is indicated by the last of these articles in which the author rather dogmatically stated, on the somewhat questionable authority of *Brown, Janson & Co. v. Hutchinson & Co.*, note 1, *supra*, that a sale of the partnership interest would probably be ordered only where the business of the partnership business was being conducted at a loss. Almost contemporaneously with the publication of this law review article, the decision in *Frankil v. Frankil*, note 32, *supra*, also appeared in.

tions seem to accord best with the language and purpose of the statute and the philosophy of the American courts with respect thereto.

First, the charging order may enjoin the members of the partnership from making further disbursements of any kind to the debtor partner, except such payments as may be permissible under a legal exemption right properly asserted by the debtor.

Second, the charging order may formally require the members of the partnership to pay to the creditor any amounts which it would otherwise pay to the debtor partner, exclusive of any amounts payable to the latter under a properly asserted legal exemption right.

Third, the appointment of a receiver is not indispensable to the collection of the claim out of the debtor partner's share. A receiver should be appointed only where he has some useful function to serve such as the maintenance of a lawsuit,⁵⁰ the conduct of a sale or the representation of competing creditors of the debtor partner. It may be that even in such a case, no receiver is necessary since there is no insuperable reason why these services cannot be obtained by some other method. Certainly the court should not appoint a receiver where he would serve no useful purpose while adding to the expense of the proceeding.

Fourth, the debtor's interest should be sold if, and only if, the court is convinced that the creditor's claim will not be satisfied with reasonable expedition by the less drastic process of diverting the debtor's income from the partnership to the payment of the debt.⁵¹ Even in the case of a wholly solvent partnership, the creditor's claim may be so large in relation to the current income of the debtor from the firm as to require sale as the only alternative to long delay in payment.

Fifth, the courts should liberally employ the general language of the act concerning "orders, directions, accounts and inquiries . . . which the circumstances of the case may require." By this means information as to the nature and extent of the debtor's interest in the partnership can be obtained and the whole range of unusual problems which are bound to arise may be dealt with as the occasion demands. Included in this general power should be the power to prescribe the manner in

Pennsylvania and directed a sale of the interest without any suggestion of such limited availability of the remedy.

⁵⁰ See *Windom National Bank v. Klein*, note 37, *supra*.

⁵¹ There is actually no authority whatsoever as to when a sale should be ordered. Necessarily the order must fall in the area of those "which the circumstances of the case require." The apparent situations in which sale would be necessary are those in which, owing to the size of the claim or the absence of current liquid income, an order to pay over the debtor partner's share of current income and other moneys would not be effective.

which a sale of the partnership interest is to be made.⁵²

One other question prominently posed by both the English and American statutes and not touched upon by any decision in either country since the adoption of the respective acts goes to the rights of a non-debtor partner who redeems or purchases the interest of a debtor partner. Both statutes expressly recognize the right to redeem and, in the event of a sale being ordered, the right to purchase at the sale. The American statute is somewhat more detailed, specifying that the right to redeem exists "before foreclosure."⁵³ and that a purchase or redemption may be made with separate property of the redemptioner or, if all of the non-debtor partners consent, with partnership property. Both statutes present the question whether a non-debtor partner who redeems or purchases thereby acquires the interest of the debtor partner free and clear of the latter's claim or in trust for him.

Considering the statute only, a possible distinction between the redemption and purchase situations can be urged. The price realized on a competitive sale theoretically represents the full value of the thing sold, although in practice this ideal result is seldom achieved. Upon a redemption before sale, however, there is not even a theoretical logical connection between the redemption price and the value of the redeemed interest. Normally the redemption price would be the amount of the creditor's claim and any identity between the amount of the claim and the value of the interest would be merely a coincidence.

Under these circumstances it might be maintained with some force that the non-debtor partners who purchase at a sale held under the statute acquire the debtor partner's interest absolutely⁵⁴ whereas the non-debtor partner who redeems has merely advanced moneys for the

⁵² The statute is utterly silent as to the procedure to be followed in making a sale. In *Frankil v. Frankil*, note 32, *supra*, the court directed that the sale be made by the sheriff. Whether that official can be called on to make judicial sales in the absence of a special statutory provision is questionable. Unless the receiver contemplated by Section 28 is to be regarded as limited to the express duties mentioned in the statute, the logical procedure would be for him to conduct the sale on such notice and terms as the court might fix. As to the plenary power of a court to prescribe the terms of a receiver's sale in the absence of explicit statutory requirements, see *Yakima Finance Corp. v. Thompson*, 171 Wash. 309, 17 P. 2d 908 (1933); *Chapman v. Schiller*, 95 Utah 514, 83 P. 2d 239 (1938).

⁵³ No definition of these words appears elsewhere in the Act or in the cases decided thereunder. Doubtless the language would mean before sale or before the expiration of a redemption period fixed by the court in its order of sale. There appears to be no unqualified right to a redemption period extending after sale, the matter being controlled by the court's discretion. See *Chapman v. Schiller*, note 52, *supra*.

⁵⁴ Upon this theory, it would be immaterial whether separate or partnership funds were used by the non-debtor partners. The debtor would have received the full value of his interest in either event.

benefit of the debtor and holds the interest in trust for him. The theory would be that, in the former situation, the debtor's interest is entirely represented by the purchase money while, in the latter case, the value of the interest and its relation to the redemption price can be determined only by an accounting.

More likely, however, the courts would in all cases invoke principles of fiduciary relationship which are so deeply rooted in the law of partnership and would in every instance require the non-debtor partners to account for the full value of the debtor partner's interest, less the amount paid by way of redemption or purchase. Such a view was most emphatically advanced in two cases⁵⁵ which arose in England under the old procedure prior to the Partnership Act. While both of these cases contained substantial evidence of bad faith on the part of the non-debtor partners, the scope and force of the fiduciary doctrine is such that bad faith would not seem essential to the debtor partner's case against his associates.⁵⁶

PROCEDURE FOR OBTAINING CHARGING ORDER

The statute, as already noted, contains only a very general description of the procedure to be followed in getting a charging order. It requires (a) that the applicant be a judgment creditor and (b) that he apply to a "competent court" which may be "the court which entered the judgment . . . or any other court." This identification of the appropriate court is somewhat ambiguous and will necessarily vary from state to state.⁵⁷ As applied to the judicial system of the state of Washington, the natural assumption is that the "competent court" is the Superior Court as the only state trial court of general jurisdiction. However, the specific provision giving the right to the "court which entered the judgment" would appear to empower the Justice Courts to issue charging orders where the judgments are entered in such courts. The "any other court" language is somewhat puzzling. It can scarcely be taken so literally as to empower any court, regardless of its normal functions, to act. A possible conclusion is that the language was intended only to permit courts of general jurisdiction in other portions of the state to act, as for example, to permit the Superior Court for Spokane County to issue a charging order on the strength of a judgment rendered by the Superior Court of King County or by a Justice

⁵⁵ *Prens v. Johnson*, 3 Sm. & G. 419 (1857); *Helmore v. Smith*, 35 Ch. Div. 436 (1887).

⁵⁶ Note 55, *supra*; *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928).

⁵⁷ The English Act specifies the appropriate English courts by name.

Court in King County. It must be confessed, however, that the precise meaning of this portion of the statute is open to argument. We have here an example of the dangers inherent in using general procedural language in Uniform Acts.⁵⁸ Since there are no Washington decisions construing any portion of section 28, the question of court jurisdiction in unusual situations is wide open in this state.

Another question is as to what constitutes "due application" under the statute. The charging order procedure is for the purpose of enforcing a judgment in a case which, normally, the sole parties are debtor partner and his judgment creditor. The charging order procedure, however, necessarily contemplates some disturbance of the relationship between the debtor partner and the non-debtor partners although the statute is designed to keep that disturbance at a minimum. It certainly is necessary to give the non-debtor partners notice of the application if they are to be required to withhold the debtor partner's profits from him and pay them over to the creditor.

Insofar as any procedure can be said to have developed in other states, the practice appears to be for the judgment creditor to obtain an order to show cause directed to all of the partners requiring them to appear at a time certain in opposition to the charging order, if they so desire. Service is then effected on all of the partners. The non-debtor partners are thus brought into the primary proceeding for the first time much like a garnishee defendant on a writ of garnishment issued after judgment. This show cause procedure, conventionally followed in other states, is used in this state in comparable situations and appears well adapted to the procedural aspects of the charging order statute. However, comparison of the very general language of section 28 with the detailed statutory and court rule material covering conventional attachments, executions and garnishments suggests the desirability of some definite procedural implementation of section 28.

IS THE CHARGING ORDER PROCEDURE THE EXCLUSIVE REMEDY

The statute makes it perfectly clear that the charging order supersedes the former procedure of attachment of or execution against the *partnership property* by expressly forbidding both such attachments and executions.⁵⁹ However, since the act does not specifically say that a *partner's interest in the partnership* cannot be taken on attachment

⁵⁸ Modern uniform acts usually leave name of court in blank to be supplied by the local legislature.

⁵⁹ U.P.A., § 25 (2) (c).

or execution, courts in a few cases have suggested the possibility of employing an attachment or execution of the intangible interest as an alternative to the charging order procedure.⁶⁰ Such a question assumes of necessity that the local attachment and execution statute either expressly or by judicial interpretation will permit the use of these procedures to reach an intangible interest such as that held by a partner.⁶¹

In all probability, courts will be disposed to hold that section 28 of the Act supersedes any right to levy execution under an earlier statute.⁶² The charging order statute appears to occupy fully the field of satisfaction of the claims of judgment creditors against a partner's interest and thus to constitute a repeal by implication of any previous procedures designed to accomplish the same result.

A somewhat different situation exists as to attachments. Section 28 does not concern itself with any sort of procedure prior to judgment. If attachment of the debtor partner's interest prior to judgment cannot be had, there appears to be no method by which a creditor who institutes suit can be assured that the partnership interest will be available for him when he gets his judgment. In this light there is a practical argument in favor of continuing an existing right under the attachment statute and there is no clear design in the Act to repeal such a right. If it be assumed that the attachment statute permitted a seizure of a partner's intangible interest before the Uniform Partnership Act, a repeal by implication could be supported only on the theory that it is the policy of Section 28 to limit enforcement proceedings to the period after judgment. This proposition is questionable in view of the basic concept that repeals by implication are not favored.

It is most probable that in most instances the right to attach a partner's interest would be denied on an historical basis. Prior to the Uniform Partnership Act creditors did not attach intangible interests of debtor partners. They attached physical property of the firm. This procedure was expressly repealed by Section 25(c) of the Uniform Act. Consequently it is doubtful if a court would now discover that a prior attachment statute now permits attachment of the partner's intangible

⁶⁰ *Northampton Brewery Corp. v. Lande*, 133 Pa. Super. 181, 2 A. 2d 553 (1938); *Dalinda v. Abegg*, 175 Misc. 945, 25 N.Y.S. 2d 612 (1941); *Scott v. Platt*, 177 Ore. 515, 163 P. 2d 293 (1945).

⁶¹ In Washington a rather liberal interpretation of execution statutes applies as to intangible property. See *Johnson v. Dahlquist*, 130 Wash. 29, 225 Pac. 817 (1924).

⁶² In *Bressler v. Averbuck*, 322 Mass. 139, 76 N.E. 2d 146 (1947), the pre-U.P.A. statute was employed. The Uniform Act is not mentioned and may have been overlooked by court and counsel.

interest where such a power, although theoretically present, was never recognized before the adoption of the Act.

In considering the exclusiveness of the Uniform Act, it should be remembered that the Act only purports to cover the claims of conventional judgment creditors. There are of course unusual situations where it is important to reach the interest of a partner in the partnership for the benefit of one who is not a creditor in the strict sense, as, for example, to enforce the claim of a wife for support. The courts in such cases can and do draw upon other powers to reach the partnership interest.⁶⁸

CONCLUSION

Although the Uniform Act is not perfect in the respects here discussed, it is a substantial improvement over the awkward and illogical common law procedure. Despite the many apparent deficiencies of section 28 and its procedural vagueness, no strong movement has developed to change the basic design of the charging order procedure. It would doubtless simplify the task of the practitioner if the procedural steps were formalized by statute or court rule. Until that is done, the ingenuity of courts and lawyers will no doubt provide workable means to accomplish the objective of the statute. Once the essential nature of the problem is recognized, that is, that the proceeding is one to subject an intangible interest in a business rather than a direct interest in the property of the business to the satisfaction of the creditor's claim, the working out of details of procedure should not be too difficult.

⁶⁸ *Luick v. Luick*, 163 Pa. Super. 378, 64 A. 2d 860 (1949), proceeding by a wife to get support from partnership interest of deserting husband; *Rankin v. Culver*, 303 Pa. 401, 154 Atl. 701 (1931), use of a "foreign attachment," essentially a sort of continuing garnishment under the Pennsylvania statute, to get jurisdiction *in rem* over a non-resident debtor. The U.P.A. is not mentioned in this case. But see *Dalinda v. Abegg*, 175 Misc. 945, 25 N.Y.S. 2d 612 (1941).