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## Effect of Judgement against Only One Partner on Partnership Property

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sell the chattel at a public sale, and (c) to apply the proceeds on the mortgage debt. The mortgagor has the right (a) to redeem at any time before the sale, (b) to have the rents and profits applied to the mortgage debt, and (c) to take the surplus proceeds from the sale. Also, if the mortgage is not recorded, it is void as against creditors of the mortgagor, and as against subsequent mortgagees and purchasers in good faith.<sup>14</sup>

In the instant case the chattel was sold for about one-half of the mortgage debt; but suppose it had been worth twice the mortgage debt, or that it was unrecorded and the mortgagor has sold it to a good faith purchaser? Could it then be said that the delivery of the truck could not constitute consideration for an accord and satisfaction if it was so agreed, or that the bank's interest as owner of the truck was not different from what it was under the power of sale mortgage? Therefore, whenever the mortgagor transfers possession to the mortgagee in full satisfaction of the mortgage debt, he sacrifices the above rights; and also, if the mortgage is unrecorded, the mortgagee gains the further advantage of having his interest in the property fully secured. The giving up of these rights by the mortgagor is sufficient consideration to support the mortgagee's agreement to cancel the mortgage debt, regardless of the relative value of the chattel to the mortgage debt.

WALTER SCOTT.

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EFFECT OF JUDGMENT AGAINST ONLY ONE PARTNER ON  
PARTNERSHIP PROPERTY

Plaintiff brought an action against two defendants doing business as partners to recover on a note executed by one of the partners in the name of the partnership. No service of process was obtained on one of the defendants. Garnishment process was served on a garnishee and it answered that it owed the partnership a sum certain. Thereafter judgment was entered against both partners and the garnishee was ordered to pay the money into court in satisfaction of the judgment. Failing to do so, a petition was filed by the plaintiff against the garnishee to satisfy the judgment against the partners. The garnishee answered that the District Court was without jurisdiction to render judgment against the partners, or either of them, and was without jurisdiction to enter any judgment against the garnishee. Trial court entered judgment in favor of plaintiff against the garnishee, and on appeal, *Held*, affirmed. *L. C. Jones Trucking Co. v. Superior Oil Co.*, 234 P. (2d) 802 (Wyo. 1951).

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<sup>14</sup> Wyo. Comp. Stat. 1945, sec. 59-105.

The original action was an action against the parties as individuals and not against the partnership. On appeal, the principle question of law for the Court's determination involved the satisfaction of the judgment, binding against only one partner, from the joint property of the partnership.

The difficulty, according to the Court, with reference to this question involves the doctrine of the 'merger', that is, whenever two or more persons are jointly liable; a judgment against any less than the whole number of those so jointly bound merges the entire cause of action.<sup>1</sup> The obstacle presented is explained in the following language: "The obligation of the firm being merged in the judgment against one partner, as to all members of the firm, and the judgment being against one only, it logically follows that the execution cannot be broader than the judgment and can only be levied on the property of the judgment debtor; hence cannot be levied on the partnership property."<sup>2</sup>

The Court found this doctrine to have been abolished in Wyoming by Wyo. Comp. Stat. 1945 Sec. 3-3901 which states: "When judgment is rendered in this state on a joint contract . . . parties to the action who were not summoned . . . at the rendition of the judgment, may be made parties thereto by action in the same court, if they can be summoned in the state. . . ."

The principal source of authority for the proposition that a judgment against only one partner for a partnership obligation will support an execution against the partnership property is found in jurisdictions having statutes to that effect. These statutes in general permit a joint judgment against all partners whether all are served with process or not, prohibiting execution under the judgment against the individual assets of those not served, and providing for execution against the partnership property.<sup>3</sup> The Wyoming statutes contain no such provisions.

The general constitutionality of these statutes is unanimously sustained with reference to the provisions for judgment against parties not served. The principal objections in the reported cases are made with respect to the inclusion in the judgment of the partners not served with process, that such defendants 'have not had their day in court'. Typical language in support of constitutionality may be found in a Michigan case<sup>4</sup>

1. *Mason v. Eldred*, 6 Wall. 231, 18 L.Ed. 783 (U.S. 1868); See also *Freeman*, *Judgments*, secs. 567, 568 (5th Ed. 1925); 2 *Williston*, *Contracts*, secs. 330, 337 (Rev. Ed. 1936); *Restatement*, *Judgments*, sec. 101 (1) and comment (a).
2. *Rich v. Solari*, 6 Mackey 371, 17 D.C. 371, citing *Ex Parte Christy*, 2 Deac. & C. 155; *Bradley v. Millar*, 1 Rose 273.
3. 2 *Williston*, *Contracts* sec. 336 enumerates some 38 states modifying the common law rules by statute, commonly referred to as 'Joint Debtor Acts'. The most complete form of these is perhaps illustrated by the New York Act. N.Y. Civil Practice Act 72-1185, 73-1197 et seq.
4. Quoting *Brooks & Ellis v. McIntyre*, 4 Mich. 316 (1856) citing *Mason v. Denison*, 11 Wend. 612 (N.Y. 1834); *Harker v. Brink*, 24 N.J. L. 383 (S. Ct. 1854); *Oakley v. Aspinwall*, 4 N.Y. 513 (Ct. of Apps. 1851).

pointing out that the joint debtor act was intended to supercede the necessity of plaintiff's proceeding to outlawry against those not found or brought into court. In outlawry, the absent defendant was pronounced beyond the protection of the law, his goods and the profits of his land were forfeited to the crown, and the plaintiff recovered his debt, not by way of judgment and execution, but out of the proceeds forfeited to the crown as punishment for his contumacy in not appearing to the plaintiff's suit. This proceeding was essential before judgment could pass against those served with process. In that joint debtor acts supercede the outlawry process, the courts conclude that it is difficult to conceive how a process older than the Constitution, and know to the law before Magna Carta, could be held "not due process."

However, a more difficult constitutional issue is presented with reference to subjecting the partnership effects to execution under the judgment. Can the judgment be enforced against the partners so as to deprive the defendant not served with process of his undivided interest in the property? This effect of the judgment is amply sustained in the decisions, including those of the United States Supreme Court;<sup>5</sup> however the theoretical justifications of this effect differ and are in most cases not clear and definite. The proceedings is clearly one in personam, lacking any attachment of property at the outset.<sup>6</sup> It has been suggested that the statutes involve a recognition of the partnership as a legal entity<sup>7</sup> and this theory seems positively adopted by Oklahoma, and by the United States Supreme Court in considering the constitutionality of the Texas statute.<sup>8</sup> In other states, the courts applying the Joint Debtor Acts have said that the partnership is not an entity, although the opinions often distinguish between suits and judgment against the partnership and against the partners,<sup>9</sup> as does the Wyoming Court in the case at hand. It would seem that all the partners are joined as parties to the suit and to the judgment merely to satisfy the common law rule as to suits on joint obligations and the rule that the

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5. *Sugg v. Thornton*, 132 U.S. 524, 10 S.Ct. 163, 33 L.Ed. 447 (1889).

6. *Magruder & Foster, Jurisdiction over Partnerships*, 37 Harv. L. Rev. 793 (1924); *Warren, Corporate Advantages Without Incorporation*, 240 (1929); *Hoffman v. Wight*, 1 App. Div. 514, 37 N.Y. Supp. 262 (1896); see also effect of *Cooper v. Reynolds*, 10 Wall. 308 (U.S. 1870).

7. *Magruder & Foster*, supra note 5; *Warren*, supra note 6.

8. *Heaton v. Schaeffer*, 34 Okla. 631, 126 Pac. 797 (1912); *Sugg v. Thornton*, supra note 5.

9. See *Crane, Handbook of the Law of Partnership* 257 et seq. (1938); *Johnston v. Albritton*, 101 Fla. 1285, 134 So. 563 (1931) holding that a co-partnership may be brought into court by service on anyone of its members, but to be effective service, process must be sued out in name of all persons composing the partnership; and *Thomas v. Nathan*, 65 Fla. 386, 62 So. 206 (1913) saying, "The court had jurisdiction of the subject matter of the action, and the partnership relation and the statute made service on one partner a sufficient service on the other partner not personally served to authorize a judgment covering the partnership property of all. The judgment is not void."; and see *Walsh v. Kirby*, 228 Pa. St. 194, 77 A. 452 (1910) "... service upon one or more members of a partnership in a suit instituted against the firm is good service for the purpose of affecting the partnership with notice and in the event of recovery of binding the partnership property." These are actions instituted against the partners as individuals rather than under 'common name' statutes.

execution should follow the judgment.<sup>10</sup>

The reasoning of the Wyoming Court is sensibly taken from the Pennsylvania Rule,<sup>11</sup> which is substantially as follows: A partner has the power to dispose of the joint effects by his separate act;<sup>12</sup> and the partner has a right to insist that the goods belonging to the partnership shall be used to pay the partnership debts so that his individual property will not be taken for such debts.<sup>13</sup> When a judgment is obtained against a single partner upon a partnership obligation, and the personal assets of the firm are taken on execution to satisfy the judgment, such levy must be regarded as an application by the partner, through legal process, of the joint fund to the satisfaction of a joint debt.<sup>14</sup> The law compels him to make the same application of the joint funds to the joint debts, that it was undoubtedly competent for him to make voluntarily.<sup>15</sup>

Such is now the law of Wyoming.

WILLIAM J. NICHOLAS.

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10. Crane, *supra* note 9, at 262.
  11. See Note, 20 Ann. Cas. 1238 (1911).
  12. Harper v. Fox, 7 Watts & S 142 (Pa. 1844).
  13. Boyd v. Thompson & Coxe, 153 Pa. 78, 25 A. 769 (1893); Harper v. Fox, *supra* note 12; Grier v. Hood, 25 Pa. 430 (1855); Ross v. Howell, 84 Pa. 129 (1877); McCleery v. Thompson, 130 Pa. 443, 18 A. 735 (1889).
  14. Powers v. Braley, 41 Mo. App. 556 (St. L. Ct. of Apps. 1890).
  15. Taylor and Fitzsimmons v. Henderson, 17 Serg. & R. 453 (Pa. 1828).