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such a recognition of the similarity in these types of action should be carried to its logical and just conclusion.

In the case where Smith wishes to reduce to judgment a contract right against an absentee, Jones, the only objections, it seems, are formal ones. As much justice can be effected, at least, as in the transient motorist cases. In both instances, the defendant is sought to be subjected to civil liability, and the grounds for distingushing them are doubtful. Perhaps the automobile is regarded as a dangerous instrumentality; but that, it seems, might be a basis for criminal jurisdiction. Where the plaintiff seeks money damages, what better position is he in there than if his right were in contract?

In conclusion, we think that judgments *in rem,* at least in some cases, ought to be recognized as vestigial remnants of medieval times, of a time when symbolism was permitted to obstruct the course of justice. We venture to suggest that our times are beyond such formal impediments and that our judges are capable of looking at the interests of the people involved as the final object of any legal decree. Judgments *in personam* and *in rem* should be recognized to be mere formulae, to some degree, at any rate. They are the exteriors of the forms of action which have grown up in our system of jurisprudence, and they should not be allowed to obstruct the path of justice. People, their rights of user in things, and their relationships toward each other are the things which a lawsuit actually controls. The adjudication of these things should not be interfered with by formulary procedure.

MORRIS E. COHN, '29.

WHEN IS A PARTNERSHIP INSOLVENT WITHIN THE TERMS OF THE PRESENT BANKRUPTCY ACT SO AS TO BE ADJUDGED BANKRUPT?

May a partnership be insolvent under the present Bankruptcy Act, when one of the partners is totally solvent *i. e.,* is able to pay his individual debts as well as all of the firm debts? This question is one which many students of jurisprudence consider settled in the negative. However, after a survey of the authorities on the subject, a great conflict presents itself.

Before entering a discussion of this sort, it would be well to draw the distinction between the terms "insolvent" and "bankrupt." The term "insolvent" is defined in the Bankruptcy Act of 1898, as follows: "A person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation, be sufficient in amount to pay his debts."[1] "Bankrupt" is defined in the same Act: " 'Bankrupt' shall include a person against whom an involuntary petition or an application to set composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt."[2] The Act includes partnerships in the term "person,"[3] hence this terminology will give no difficulty.

Of course the primary question to be considered is whether the partnership is an entity in bankruptcy. If it is a complete entity, then the question as to insolvency should be answered in the affirmative. If it is not an entity it cannot be held to be insolvent so long as its own assets, plus those of the partners, are sufficient to pay its debts. The Supreme Court of the United States in *Liberty National Bank v. Bear*[4] settled a thirty year conflict raging in the District and Circuit Courts by laying down the proposition that a partnership could be adjudged a bankrupt irrespective of the adjudication of the partners. On the face of this decision it would seem that a partnership is an absolute entity and may be insolvent even though there is a partner who can pay his own debts as well as those of the firm. However, the common law conception of a partnership with the consequent individual liability of partner, is so firmly established in English and American Jurisprudence that it takes more than one case to overturn it; and, indeed, the Liberty National Bank case did not deny the partners' liability. It simply held that their assets, if necessary, but not they themselves, were drawn into bankruptcy by the adjudication of the partnership.

One of the earliest cases dealing with the subject of insolvency of a partnership is *Vaccaro v. Security Bank of Memphis.*[5] This case was decided merely two years after the passage of the Bankruptcy Act and has been cited and approved innumerable times. The case deals with the firm of A. Vaccaro and Company composed of A. Vaccaro, B. Vaccaro and A. B. Vaccaro. A. Vaccaro, a wealthy man died, and the two survivors carried on the business. A petition in bankruptcy was filed against the firm,

[1] 11 U. S. C., Sec. 1, Art. 15.

[2] 11 U. S. C., Sec. 1, Art. 4.

[3] 11 U. S. C., Sec. 1, Art. 19.

[4] (1928), 48 S. Ct. 252; 72 L. Ed. (Adv.) 255. For the effect of Liberty National Bank v. Bear, see note by writer in 14 ST. LOUIS L. REV. 57.

[5] (1900), 103 F. 436. Other cases in accord with the holding in this case are: Davis v. Stevens (1900), 104 F. 235; Lancing Boiler and Engine Works v. Reyerson (1904), 128 F. 701; In re Samuels (1914), 215 F. 845; In re Kobre (1915), 224 F. 106; In re Griffith (1922), 280 F. 878; In re Russel et al (1926), 13 F (2d) 928.

and the defense was that the estate of the deceased partner was solvent and sufficient to pay all its individual debts as well as all of the firm debts. The defense was held good and the petition was dismissed. The court held that a firm could not be insolvent unless all of its members were also insolvent, on the ground that each partner is liable *in solido* for firm debts, and where there is a partner whose assets are sufficient to pay his private debts as well as firm debts, there is no insolvency under a law which defines insolvency as does the bankruptcy act, *supra.* The court substantiates its decision by finding similarities between the Federal Bankruptcy Act and the Massachusetts Act of 1838, and by citing old Massachusetts cases under the latter act announcing the same rule. The court did not decide whether or not the partnership was an entity under the Federal Act of 1898.

The case of *In re Forbes*[6] is in line with *Vacarro v. Bank, supra.* Lowell J., says: "So far as I know, the discharge of a partnership as an entity has never been suggested." The decision is clearly based on this non-entity theory.

The next step in favor of the traditional view is found in the case of *In re Perley and Hays.*[7] In this case an involuntary petition was filed against a firm which was insolvent as an entity, but which had one solvent partner. The debt of the petitioner was $3320.00, while the assets of the firm plus the assets of the partner amounted to $6300.00. The court held the firm to be solvent, relying on *Vaccaro v. Bank* and *Davis v. Stevens, supra.* The court recognizes the entity theory but makes no attempt to reconcile it to the decisions. Other cases recognizing the entity theory, but following *Vaccaro v. Bank,* will be found in the footnote.[8]

Coming to the other side of the question, we have an early case, *In re McMurtrey and Smith,*[9] in which the petitioners alleged a preference. The defense was the solvency of one of the partners. The court overruled the defense and adjudicated the firm. The court recognized the existence of the firm entity under the Federal Bankruptcy Act of 1898,[10] and based its decision on this entity theory.

A case which is often cited in this connection is *In re Bertenshaw.*[11] The facts of this case are simple. The Opera House Drug Company, a partnership composed of B. F. Masterman,

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[6] (1904), 128 F. 137.

[7] (1905), 138 F. 927.

[8] In re Perlhefter (1910), 177 F. 299; In re Hensley and Adams (1916), 228 F. 564.

[9] (1905), 142 F. 853.

[10] 11 U. S. C. Secs. 1-110.

[11] (1907), 157 F. 363. Other cases in accord with the holding in this case are: In re Everybody's Market (1908), 173 F. 492; In re Salamon and Carvel (1908), 163 F. 140; Meek v. Beezer (1928), 28 F. (2d) 343.

C. C. Surber, and Charles Joyce, was adjudicated bankrupt. None of the partners were found to be insolvent nor were any of them adjudicated bankrupt. The firm assets were insufficient to pay firm debts, whereupon the trustee filed a petition for an order to have certain individually owned real estate of C. C. Surber applied to firm debts. Surber objected on the ground that the separate real estate of an unadjudicated partner could not be administered by the trustee of the bankrupt firm. The referee upheld Surber's contention. He was affirmed by the District Court and by the Circuit Court of Appeals in the principal case. The case has been overruled as regards the inability of a trustee in bankrupty to reach individual assets, but its importance for the purposes of this discussion lies in a very strong dictum on the question of partnership entity. The court recognizes the line of authority which follows *Vaccaro v. Bank, supra,* in its argument that, under the Bankruptcy Act, firm creditors have recourse to the remainder of the individual property after individual creditors are paid. However, this argument is answered in the following language: "But this is the only recourse such creditors could have, and the same reasoning would more cogently persuade that the bankruptcy of an individual or of a partnership would draw into the court of bankruptcy for adjudication all the property of indorsers and sureties of the bankrupts, for the creditors of such bankrupt may always have recourse to the property of their sureties." This argument may have its fallacies, but it indicates the answer to the contentions of the followers of the other doctrine. The court continues by saying that the Federal Bankruptcy Act recognizes partnerships as entities. Since a partnership is a distinct entity separate from the individuals who compose it, and since its property and its debts are separate from the property and debts of the individuals, it must be insolvent under the Act when the aggregate of its property is not sufficient to pay its debts.

Each rule is supported by a decision of the Supreme Court of the United States. *Francis v. McNeal*[12] upholds *Vaccaro v. Bank, supra,* and *Bank v. Bear, supra,* in effect substantiates *In re Bertenshaw, supra.* Although these cases in their reasoning support contrary doctrines as to the entity theory their results do not conflict and they are both law today.[13] *Francis v. McNeal* cites *Vaccaro v. Bank* and recognizes that the latter conflicts with the *Bertenshaw* case. Holmes, J., in *Francis v. McNeal* closes his opinion by expressly overruling those parts of *In re Bertenshaw* which are inconsistent with the *Vaccaro* case. The Supreme Court did not intend to repudiate the reasoning of the *Bertenshaw* case on the question in hand, however, but over-

[12] (1913), 228 U. S. 695, L. R. A. 1915 E. 706.
[13] See note by writer, 14 ST. LOUIS L. REV. 57.

ruled it on an entirely different point.[14] The case of *Bank v. Bear*, supports the holding of the *Bertenshaw* case, in that it recognizes the entity theory.

Eminent text writers are also at odds on the subject. Remington,[15] writes as follows: "A partnership is not to be deemed insolvent unless the aggregate of all of its own property, together with all the individual property of its members in excess of their respective individual indebtedness, is less than its liabilities." He cites but two cases to verify his view.

Collier says,[16] "In determining the question of insolvency the individual property of the partners should be considered. Where the assets of a partnership, together with the individual properties of each partner, exceed their liabilities, the partnership is not insolvent. It has been well said that this principle is at variance with the universal doctrine that under the present bankruptcy act a partnership is a legal entity, separate from the partners who compose it. But it is now well settled by the weight of authority that if the act of bankruptcy charged is one involving insolvency, the individual property of the partners must be combined with the property of the partnership in determining the insolvency of the partnership; and that a partnership is not bankrupt so long as one of the members who compose it is individually solvent." Collier here at least recognizes the existence of the other rule.

Mechem[17] says, "The United States Bankruptcy Act of 1898 does undoubtedly to a limited extent treat the partnership as an entity, but the somewhat extreme views, as to the effect of this statute, announced by some of the circuit and district courts have been disapproved by the United States Supreme Court." Here again the other view is given recognition.

Burdick favors the view of the *Bertenshaw* case, saying[18] that to permit a partnership to be adjudged bankrupt when one or more of the partners is solvent gives full effect to the entity theory of partnership, which theory is clearly provided for by the Federal Bankruptcy Act.

So stand the authorities. Ultimately the Federal courts will have to decide either to retain the old or to adopt the new con-

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[14] Horner v. Hamner (1918), 249 F. 134. In this case the court quotes a clause from In re Bertenshaw, upholding the entity theory of the partnership with its consequent results. Of this the court says, "We are not inadvertent to the language found in the concluding sentence of the opinion of Mr. Justice Holmes in Francis v. McNeal, but do not think it effects the clause quoted——."

[15] Remington, BANKRUPTCY (2d Ed.) Sec. 1348.

[16] Collier, BANKRUPTCY (12th Ed.) p. 173.

[17] Mechem, ELEMENTS OF PARTNERSHIP (2d Ed.) p. 11.

[18] Burdick, PARTNERSHIP (2d Ed.) p. 306. Also see note by Burdick, "Some Judicial Myths," 22 HARV. L. REV. 393, l. c. 397.

ception. The old idea is still the weight of authority, and is backed by the non-entity theory of the common law and by the argument that Congress did not intend to cut off the common law liability of partners by passing the bankruptcy act. But these arguments may be met by others. The common law is constantly changing and adapting itself to modern conditions. The modern trend is for stability of business, one proof of this being the extraordinary growth of corporate business. Even the slow moving common law, depending on *stare decisis,* a system which tends to impede progress rather than to encourage it, has weakened to recognize joint stock companies and Massachusetts Trusts. Why then should not the common law give a little more in the face of a Federal Statute which clearly provides for a partnership entity?

The purpose of this article is not to advance any new and startling development of the law nor to upset certain fundamentals of the common law, but merely to bring out the fact that such a change as herein suggested is possible under the Federal Bankruptcy Act. The whole idea of firm insolvency and bankruptcy while one of the partners is totally solvent, presents an anomaly—the bankruptcy of a firm which is able to pay its creditors one hundred per cent of their claims.[10] The theory is a new one and in order to have it function properly, a radical change in the common law of partnership, *i. e.,* the abolition of the partners' personal liability for firm debts, is necessary. The common law is perhaps not ready for such a deviation from its traditional view, and today the doctrine that a partnership is an entity in bankruptcy is probably too far out of accord with it. If so, it cannot be pushed to the limit suggested.

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SURVIVAL OF CAUSES FOR PERSONAL INJURIES AND RELATED WRONGS IN MISSOURI

Although it is important to know the common law on a subject such as the survival of actions, it is equally important to know how far that law has been superseded by statutes and judicial interpretations of those statutes in a particular jurisdiction. It is here proposed to consider briefly the Missouri law as to the survival of causes of action for personal injuries not resulting in death and of related causes. At common law, of course, the doctrine was that the death of either the injured party or the wrongdoer ended the matter, or, as it was then expressed, *"actio personalis moritur cum persona."* This common law rule is in effect unless changed by statute.

[10] Incidentally this would open the Federal courts to suitors who desired to stay out of the state courts and give them full satisfaction in the Federal courts through the machinery of bankruptcy.