Washington Law Review

Volume 1 | Issue 1

6-1-1925

The Administration of the Property of a Deceased Partner

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THE ADMINISTRATION OF THE PROPERTY OF A DECEASED PARTNER—The descent of property to heirs or devisees is a right conferred by society and the statutes governing administration and distribution must, as a general rule, be strictly complied with. The case of the administration of a deceased member of a partnership, however, deals with property which does not belong to the deceased alone, but in which the surviving partners have a common and often equal or superior interest. Furthermore, the obligations incurred by the firm, through its members, bind the members jointly, it being remembered that a partnership is not an entity in the eyes of the law, but a mere aggregation of individuals. Because of this liability of the surviving partners for all of the firm debts, it was held as a matter of right, at common law, that the surviving partners succeeded to the absolute control of partnership property upon the death of one of the partners.[1] It followed, then, that the partnership property of the deceased did not come within the control of the executor or administrator of the deceased's estate, and since he therefore was possessed of no funds with which to meet firm obligations, the remedy of the creditors of the firm was confined to actions against its surviving members.[2] That being true, it was not necessary that such creditors file their claims with the general administrator of the deceased's estate. Nor need they file them with the surviving partner, for he is presumed to be familiar with all the details of the business, including knowledge as to who are its creditors.

The question we meet, then, is: How far do our statutes on this subject supersede or displace the common law?

Our first statute was passed in 1862 and provided[3] that the *personal representatives of deceased* should have the right to have someone other than a surviving partner wind up the affairs of the firm, or to have such survivor give proper security There was no provision in the statute authorizing the surviving partner himself to set in motion the machinery provided therein, and for that reason our Supreme Court, in the noted case of *Dyer v. Morse*[4] held that the statute was not exclusive of the common law, but only in aid thereof; that the legislature did not intend to hold the surviving partners (who are still jointly liable for the satisfaction of firm obligations) liable to satisfy firm debts out of their own funds, without recourse to the firm property of the deceased unless his personal representatives invoked the aid of the statute.

By a statute passed in 1869[5] the liability of a joint debtor was made to survive against his personal representatives, thus doing away

1 Barlow & Shepherd v. Coggan, 1 Wash. Ter. 258; Brigham-Hopkins Co. v. Gross, 20 Wash. 218, 54 Pac. 1127.

2 Barlow & Shepherd v. Coggan, supra.

3 L. '62-'63 pp. 225 et seq.

4 10 Wash. 492, 39 Pac. 138, 28 L. R. A. 89.

5 L. '69 p. 165, sec. 659, Rem. Comp. Stat. sec. 967. Donnerberg v. Oppenheimer, 15 Wash. 290, 46 Pac. 254; Olson v. Seldovia Salmon Co., 89 Wash. 547, 154 Pac. 1107.

with the common-law doctrine that the sole remedy was against the surviving debtor, and thus giving a creditor of a partnership a right of action against the estate of a deceased partner, in the event of the partnership's assets being insufficient to meet its liabilities.

The act of 1862 was superseded by the act of 1873[6] which was similar to our present statute passed in 1917 By these subsequent acts, the surviving partner may invoke the operation of the machinery therein provided, as will shortly be seen. It was therefore held in *Brigham-Hopkins Co. v. Gross*[1] that since the statute takes away from the surviving partner the unqualified right to administer the partnership estate, the reason for sustaining an action against such survivor no longer exists, unless the firm estate be insolvent. Therefore, an action at law could not be maintained against the survivors, pending settlement of the partnership estate, on debts due from the firm. This for the reason that ordinarily partnership assets should first be subjected to payment of partnership debts, before the individual property of a partner is subjected thereto. Of course the surviving partners are liable individually for any deficiency, and it was held in the same case upon a subsequent appeal[7] that a firm creditor could maintain an action against the surviving partners, after the settlement of the partnership estate, when firm assets were insufficient to pay all the firm debts. The common law is changed then, only to the extent that the remedy of creditors is postponed pending settlement of the estate, and running of the statute of limitations is suspended during such period.

State ex rel *Keasel v. Superior Court of Pierce County*[8] overruling the case of *In re Alfstad's Estate*,[9] held that the probate court, being a court of original jurisdiction, and being clothed with power to settle partnership estates, is necessarily competent to determine the question of the existence of a partnership, when such existence is not conceded and when such determination is necessary before there can be a proper administration of the estate.

The statutes now covering this subject[10] read as follows:

"The whole of the partnership property shall be administered by such executor or administrator, unless the surviving partner shall within five days from the filing of the inventory, or such further time as the court may allow, apply for the administration thereof.[11] If he so apply he shall be entitled to administer the partnership property if the court find him to be qualified. If letters of administration be issued to such partner, he shall give such bond as the court may re-

6 L. '73 pp. 276 et seq.

7 30 Wash. 277, 70 Pac. 480.

8 76 Wash. 291, 136 Pac. 147.

9 27 Wash. 175, 67 Pac. 593.

10 Rem. Comp. Stat. secs. 1458 to 1461, inc.

11 Applied in Simon v. Levy 114 Wash 556, 195 Pac. 1025, State ex rel Simon v Superior Court, 117 Wash. 376, 201 Pac. 25 and the same, 120 Wash. 398, 207 Pac. 960.

quire. He shall be denominated the administrator of the partnership and shall give such notice to the partnership creditors as general administrators are required to give and shall settle the partnership estate in the same manner as is or shall be provided for the settlement of estates of deceased persons except he shall account to the general executor or administrator for the interest of the deceased in the partnership property."

Section 1459 provides for the purchase by the surviving partner, if he wishes to, of the interest of the deceased in any or all of the *personal* property of the partnership. Under Sec. 1460 the court may authorize the administrator of the partnership to continue operation of the business pending *settlement* of the estate *or purchase* by the survivor. And if a surviving partner is not appointed administrator of the partnership property, then under Sec. 1461 administration thereof shall devolve upon the general executor or administrator, to whom the court may compel the surviving partner to deliver the firm property.

Whether a surviving partner may purchase the firm real estate is not decided, unless inferentially. Of course, firm realty stands in the name of one or more of the members of the firm and legal title thereto therefore descends to the heirs of the partner dying so possessed. But such heirs take in trust for the firm and subject to the debts of the firm, and the survivors can get the legal title only by deed from such heirs or by application to a court of equity.[12] But it was held in the case of *State* ex rel *Bogey v. Neal,*[13] that in equity, partnership real estate will be considered as personalty so far as payment of debts and the *adjustment of partnership rights* are concerned, and for those purposes, sale of firm realty could be made under the rules governing sales of personalty.

It was held in *State* ex rel *Keasel v. Superior Court, supra,* that the surviving partner need not wait until the inventory has been filed by the general executor before the surviving partner may apply for letters, the statute intending only to fix the limit beyond which application may not be made unless extension of time be granted.

There remain to be discussed one or two points touching the rights of creditors upon the death of a member of a partnership. The affairs of the firm may be of such a nature that it require a year or more to wind them up. Having filed claims against the partnership estate, as by statute required,[14] how may a creditor safeguard his right to hold the separate estate of the deceased partner, in the event of the partnership's assets being insufficient? The answer, according to a Montana decision,[15] seems to be that "a contingent claim" must be filed in the deceased partner's estate along with the filing of the

12 Hannegan v. Roth, 12 Wash. 65, 40 Pac. 636.

13 29 Wash. 391, 69 Pac. 1103.

14 Rem. Comp. Stat. sec. 1458 provides for administration "in the same manner as is provided for the settlement of the estates of deceased persons" which requires that all claims be filed within six months. (Rem. Comp. Stat. sec. 1477.)

15 Mares v. Mares (Mont), 199 Pac. 267.

claims in the partnership administration proceedings, or at least within the permitted six months. Although I am unable to find that Washington has passed expressly upon this point, yet it is clearly inferrable from the cases of *Andrews v. Kelleher* and *Barto v. Stewart*,[16] that contingent claims not only *may* be filed, but *must* be filed, within the six months, or the claim is barred.

But under the doctrine of joint liability does a creditor waive his right to move against the surviving partner if he files a claim against the deceased member's estate? There is no ready answer to this question and it has not been passed upon by our supreme court. We do know, however, that he must so file to protect his claim that he must abide the accounting in the partnership estate, and that if he moves against either of the joint debtors he releases the other. It seems reasonable to consider that the mere filing of his claim is *not* an action against one of the joint debtors, but only a preservation of a possible right of action, and that it is no bar to his election, at the proper time, as to which of the joint debtors he will seek to hold. And if such creditor would seek to hold all the joint debtors his method of procedure is prescribed in Rem. Comp. Stat. sec. 236.

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[16] Andrews v. Kelleher, 124 Wash. 517, 214 Pac. 1056, Barto v. Stewart, 21 Wash. 605, 59 Pac. 480. The Andrews case was one where the testator had, in his lifetime, guaranteed certain bonds. It happened that the first of those bonds would not mature until after the statutory time for filing claims in the deceased's estate would have expired. The court reached the conclusion above intimated, since Rem. Comp. Stat. secs. 1547, 1548 and 1549 impliedly recognized the validity of contingent claims. These sections appear in the division of the probate code relating to accounts of executors and payment of debts. They provide, in general, for the withholding from distribution of sufficient funds of the estate to cover "contingent or disputed" claims.

Incidentally the Andrews case is authority for the proposition that a contingent claim need not be verified as "justly due," as sec. 1478 Rem. Comp. Stat. provides, for in such case it is impossible to truthfully follow the wording of the Statute.

In the Barto case, the testator was a stockholder in a bank which became insolvent, and his liability on his stock was ultimately determined to be nearly $4,000. Meanwhile he had died and the time had elapsed for presentation of claims. To an action against the testator's executors by the liquidation of said bank, defendants pleaded the statute of limitations. The plaintiff argued that this was not a claim within the meaning of the statute; that the statute referred only to legal demands and was not intended to apply to a liability of a purely equitable nature, which the liquidator must go into equity to enforce; that while the statute was running, the claim was an uncertainty and the presentation of a claim in such case would be an idle ceremony which the law will not require. It was also argued that the affidavit to the claim would not be made as the statute required. Nevertheless recovery was denied because of the failure to present a claim, even though contingent, in the decedent's state, before the statute had run. Hence the conclusion that a creditor's or a surviving partner's claim against the separate property of deceased would be barred unless filed in his estate, even though the actual winding up of the partnership estate may long exceed the running of the statute.