proficiency in his preparatory course. We know, too, that some of the members of the profession there are supplying themselves with works of accredited authority in this country. The common law of England and the United States has been authoritatively adopted in Liberia by a statute to this effect: "Blackstone's Commentaries, as revised and modified by Chitty or Wendell, and the works referred to as the sources of municipal or common law in Kent's Commentaries on American Law, vol. 1, shall be the civil and criminal code of law for the Republic of Liberia, except such parts as may be changed by the laws now in force and such as may hereafter be enacted." And, in conclusion, we would express the confident expectation that this interesting community of free and freed men will, by their history, vindicate their claim to be regarded as members of the great family of nations in the fellowship of progress and civilization. E. W.

RECENT AMERICAN DECISIONS.

Court of Appeals of Kentucky.

NORTHERN BANK OF KENTUCKY *v.* C. M. KEIZER *et al.*[1]

Where a partnership firm becomes insolvent, having partnership property and partnership creditors, and also separate property and separate creditors, and the partnership creditors exhaust the partnership property, the separate creditors have a priority of right to receive an equal percentage of their claims out of the separate estates, and if anything remains it is to be distributed among both classes of creditors *pari passu*.

The opinion of the court was delivered by

ROBERTSON, J.—J. W. and W. C. Houghton, who had been partners in the manufacture of bagging and rope, and owned between them much more individual than partnership property, apprehending their inability to pay all their debts, on the 11th of January 1862 assigned all their partnership and individual property to C. M. Keizer in trust to apply the partnership property to the payment of their partnership debts, the individual property to the payment of their individual debts, and then to distribute among all the creditors, pro rata, the residue of the individual fund, if any should remain after full payment of the individual debts.

[1] We are indebted for this case to the courtesy of F. K. Hunt, Esq.—ED. A. L. R.

It appears that, under such a distribution, neither class of creditors would receive their whole debts, but that the percentage of the individual creditors would be much larger than that of the partnership creditors.

The trustee, apprehending difficulty, and wishing to avoid unnecessary responsibility, petitioned the Circuit Court of Fayette to direct the mode of distribution to which all the creditors should be adjudged as entitled.

The partnership creditors, in an answer and cross-petition, charged that the assignment "was made in contemplation of insolvency to prefer one class of creditors, and therefore they prayed for a pro rata distribution of the entire trust-fund among all the creditors, without distinction of class."

The individual creditors demurred to that cross-petition, and the Circuit sustained the demurrer.

That the assignment was made "in contemplation of insolvency" is not denied, and, consequently, if the distribution which it directs, is not such as each class of the creditors was entitled to by law, it does, inconsistently with the spirit of the statute of 1856, prefer one set of creditors over another, and, for that end, must be deemed unavailing, even though the apparent preference was not the voluntary choice of the assignors, but was dictated, as we may presume it was, by a belief that the law itself would make the same distribution, and therefore they could not, if they would, prevent it.

Then the only question is, Does the law make the preferences prescribed by the assignment?

As to partnership property, equity gives to the partnership creditors priority over the individual creditors of the firm.

No doctrine of the modern common law is more conclusively settled, nor on more rational and consistent grounds.

The compensatory and reciprocal priority of the individual creditors, as to the individual property, though not, as the other, universally recognised, is nevertheless, in our opinion, so well settled by both reason and preponderating adjudications as to entitle it to our recognition.

Each partner having an implied lien on the partnership property as a security for the payment of all the partnership debts, no individual creditor of any of the partners can subject his debtor's interest otherwise than *cum onere*, or, in other words,

could not make his debtor's interest available until all partnership debts shall have been paid; and, on the equitable principle of subrogation, each partnership creditor is entitled to the same lien or priority.

This is the law and its reason.

Precisely the same reason does not apply to individual creditors claiming a priority as to the individual property.

But the principle of equality and the equitable doctrine of marshalling assets do apply to their case, and entitle them to say to the joint creditors "You have kept us out of the partnership effects, and we have a compensatory right to be indemnified out of the separate property of our individual debtors." This accords with the well-settled rule that, when one creditor has a right to resort to two funds, and another creditor is restricted either by him or the law to only one of them, the creditor so excluded from one fund has an equitable right to priority as to his only resource, *co-extensively with his privation.* As to the principle and the extent of this rule as applicable to this case, there is some diversity among jurists, a small minority denying such priority to any extent, and a very large majority concurring in its existence, and apparently to the whole extent of the individual property, if all of it shall become necessary for full payment of the individual indebtedness.

The ground occupied by that minority is, in our opinion, indefensible on either principle or authority; and that occupied by the majority is so well maintained by both principle and adjudged cases as to command the recognition of it as the only true ground *to some extent.*

But, between those extremists, we are satisfied that, while one class is altogether wrong, the other class is not altogether right.

The *rationale* of the individual priority neither requires nor authorizes an extension of it, under all circumstances, to the whole of the individual property until the entire individual debt shall have been paid, nor the application of it at all when the partnership *creditors do not assert, but waive, their priority as to the partnership property and thereby leave the whole estate, of all classes, unincumbered and subject to all creditors alike, without distinction of class.*

If the exhaustion, by the partnership creditors, of the partnership property should pay only fifty per cent., and the individual

property should be sufficient to pay the whole of the individual debts, why should the class having an unqualified right to resort to both funds be required to accept only half of their debt and the class having a more restricted right be adjudged entitled to the whole of their debt? Were this the law, it would be an anomaly without either analogy or reason. But the doctrine of equal reprisal is the only one that is either consistent or sustained by controlling or satisfactory authority.

It is not true, as sometimes said, that the reason of those relative priorities is that the partnership creditors trust the partnership property, and the individual creditors trust the individual property.

The truth is that each class of creditors look to both classes of property, and unless they conflict, each have a right to subject both individual and partnership property.

Looking at the philosophy of the law, we do not doubt that the individual priority exists to the extent of the individual loss when partnership effects are taken or claimed by partnership creditors, and that it extends no further.

We are also satisfied that the few adjudged cases and many *obiter* sayings which, on a superficial analysis, might seem to carry it further, do so on no recognised or consistent principle, and in a very indefensible manner, and should not be regarded as settled authority in this court. We therefore feel that it is both our judicial privilege and duty to recognise and apply what, on a survey of multitudinous cases and dicta, we believe to be the true doctrine, which is, that, if partnership creditors exhaust the partnership estate without full payment, the individual creditors have the reciprocal right to make as much of their debt out of the individual estate, and, if then any individual property should remain undisposed of, it shall be distributed *pari passu* among all the creditors, regardless of class.

Consequently, as the assignment in this case directs a distribution, essentially different from that just defined as legally rightful among all the creditors, the distribution must be made according to law, as herein indicated.

Wherefore the judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

The question as to what rule should govern the application of the assets of an insolvent partnership firm, where a contest had arisen between their part-

nership and their individual creditors, made its appearance in the English equity courts at an early day. In *Twiss* v. *Massey*, 1 Atkyns 67, decided in 1737, Lord Chancellor HARDWICKE settled the rule that the partnership assets should be primarily liable for partnership debts, and that the private debts of the partners should have a like priority as to the private property of the partners. This principle had already been acted upon much earlier, in 1693, by Lord SOMERS, in *Richardson* v. *Gooding et al.*, 2 Vern. Ch. 293; in 1715 by Lord HARCOURT, in *Ex parte Crowder*, 2 Vern. Ch. 706; and in 1728 by Lord KING, in *Ex parte Cook*, 2 P. Wms. 500; but Lord HARDWICKE announced the reasons for it, that each class of creditors should look first to the property to which they gave the credit, and therefore it is frequently called Lord HARDWICKE'S rule. This rule prevailed without question until the time of Lord THURLOW, who altered somewhat the practice as to proving claims under separate commissions (*Ex parte Hodgson*, 2 Brown's Ch. 5), and is commonly said to have changed the rule, though this is denied by PERLEY, J.: *Jarvis* v. *Brooks*, 3 Foster 142. In *Ex parte Elton*, 3 Vesey 343, and *Ex parte Abell*, 4 Ves. 837, Lord LOUGHBOROUGH restored the old rule, and, after much consideration, Lord ELDON adhered to it as settled: *Ex parte Clay*, 6 Ves. 813; *Dutton* v. *Morrison*, 17 Ves. 207. The rule is adopted without question by all the English text-writers: Gow on Partnership, pp. 339 *et seq.*; Lindley 1001 (Law Library ed. vol. 103); Collyer, sect. 920 *et seq.*; and is now established in England by the statute 6 Geo. 4, c. 16, s. 62.

II. In America, however, the same rule has not been received without a good deal of discussion and hesitation.

1. Chancellor KENT, 3 Comm. 65, adopts it as a general rule of equity, and declares that, notwithstanding Judge STORY'S objections, he feels no hostility to it, and thinks it, upon the whole, reasonable and just. On the other hand, STORY declares that it "rests on a foundation as questionable and as unsatisfactory as any rule in the whole system of our jurisprudence," but admits that, such as it is, "it is for the public repose that it should be left undisturbed:" Partnership, sects. 377, 382.

Notwithstanding this expression of dislike by so high an authority as Mr. Justice STORY, a very large majority of the courts of this country have felt bound, either on general principles or on authority, to follow Chancellor KENT, and establish the rule as declared by Lord HARDWICKE; but his lordship's reasons, the credit given respectively to the different estates, have not been regarded as at all satisfactory. Indeed, the matter of credit, as a practical fact, is disposed of unanswerably by the remark of GIBSON, J., in *Bell* v. *Newman*, 5 S. & R. 92, that, "in the usual course of transactions, each class indiscriminately trusts to the whole estate, both joint and separate." The ground of the first part of the rule, the priority of partnership creditors, is the clear right of the partners themselves to have their joint property appropriated to the payment first of their joint debts. To this right their joint creditors are equitably entitled to be subrogated, and it has been constantly held that the creditors can work out this equity only through the right of the partners themselves. This is the reasoning of all the cases. But, on the other hand, there is not precisely the same ground for the converse proposition which gives the separate creditors the priority as to separate property. The true ground of this rule is the natural inclination of equity to give reciprocity. It is not at all maintainable that the rule produces exact equality

in individual cases; indeed, the cases where it does are probably rare exceptions; but, as the advantage of the partnership creditors, on the one hand, seems founded on irresistible reasoning, the best that equity can do for the individual creditors, on the other, is to give them a reciprocal advantage as to the private estate.

2. Such being the reasons given for the rule, we proceed to the authorities.

The earliest well-argued case on the subject is *Bell* v. *Newman*, 5 S. & R. 78, where the Supreme Court of Pennsylvania, partly on general principles and partly on the statute of that state directing an equal distribution of the assets of decedents, declared the rule to be, as it is given in the principal case, that the separate creditors should receive the same percentage of their claims out of the separate estate as the partnership creditors had of theirs out of the partnership estate, and then both classes should come upon the remaining private property *pari passu*. In this case was shown the fundamental diversity of opinion as to the origin of the English rule. The chief justice (TILGHMAN) and DUNCAN, J., regarded it as a rule of bankruptcy only, and adopted chiefly for convenience. GIBSON, J., regarding it as a general rule of equity, and thinking the statute of distribution not applicable to the case, dissented from so much of the opinion as allowed the partnership creditors to come on the separate funds before full payment of the individual creditors. His argument in favor of the English rule on the ground of reciprocity and equity is perhaps the most forcible to be anywhere found, and has received the sanction of the same court in subsequent cases, *Andrews* v. *Miller*, 3 Harris (15 Pa. State) 316; *Walker* v. *Eyth*, 1 Casey (25 Pa. State) 216; *Singizer's Appeal*, 4 Casey 524; and *Black's Appeal*, 8 Wright (44 Pa. State) 503; and *Houseal & Smith's Appeal*, 9 Wright 484, in the former of which THOMPSON, J., gives the subject a full and final examination, and settles the law of Pennsylvania in accordance with that of England and the majority of the United States, that each class of creditors has a right to be satisfied in full out of its respective estates, and the residue only to be applied to claims of the other class.

The same rule was adopted in MARYLAND in the early and well-considered case of *McCulloh* v. *Dashiell*, 1 Harr. & Gill 96, 1 American Leading Cases 460, affirmed in *Simmons* v. *Tongue*, 3 Bland 341, and *Gleim* v. *Gill*, 2 Md. 1: in NEW YORK, *Wilder* v. *Keeler*, 3 Paige 167; *Payne* v. *Mathews*, 6 Paige 19; *North River Bank* v. *Stewart*, 4 Brad. 254; s. c. 4 Abbott's Pr. Rep. 408; *Jackson* v. *Cornell et al.*, 1 Sandf. Ch. 348; *Kirby* v. *Carpenter*, 7 Barb. 373; and *Ganson* v. *Lathrop*, 25 Barb. 455: in NEW HAMPSHIRE, *Jarvis* v. *Brooks*, 3 Foster 136; *Crockett* v. *Crain*, 33 N. H. 542; *Holton* v. *Holton*, 40 N. H. 77; *Treadwell* v. *Brown*, 41 N. H. 12: in MASSACHUSETTS, by Statute of Insolvency 1838, ch. 163, sect. 21, though it is a matter of some doubt how far the courts would have recognised the rule independently of the statute; *Newman* v. *Bagley*, 16 Pick. 570; *Allen* v. *Wells*, 22 Pick. 450; *Sparkawk* v. *Russell*, 10 Metc. 305: in RHODE ISLAND, *Tillinghast* v. *Champlin*, 4 R. I. 173: in NEW JERSEY (*it seems*), *Cammack* v. *Johnson*, 1 Green, Ch. 163; *Wisham et al.*, v. *Lippincott*, 1 Stockton, Ch. 353; *Linford* v. *Linford*, 4 Dutcher 113: in OHIO, *Rodgers* v. *Meranda et al.*, 7 Ohio State 179, one of the fullest and best cases on the subject, overruling the previous case of *Grosvenor et al. v. Austin's Adm.*, 6 O. 103: in INDIANA, *Weyer* v. *Thornburgh*, 15 Ind. 124: in ILLINOIS, *Morrison* v. *Kurtz*, 15 Ill. 193: in GEORGIA, *Cleghorn* v. *Bank*, 9 Ga. 319; *Baker et al.*

v. *Wimpee et al.*, 19 Ga. 87; *Toombs* v. *Hill*, 28 Ga. 371: in ALABAMA, *Emanuel* v. *Bird*, 19 Ala. 596; *Smith et al.* v. *Mallory's Exr.*, 24 Ala. 628; *Bridge* v. *McCullough's Adm.*, 27 Ala. 661: in SOUTH CAROLINA, *Woddrop* v. *Ward*, 3 Desaus. 203; *Hall* v. *Hall*, 2 McCord, Ch. 302, though the recent cases of *Fleming* v. *Billings*, 9 Rich. Eq. 149, and *Gadsden* v. *Carson et al.*, Id. 252, seem to be in conflict with the previous ones: and in the Supreme Court of the United States, *Murrill* v. *Neill et al.*, 8 How. 414. The same rule was also adopted in the United States Bankrupt Law of 1841, 5 Stat. 440, 448, § 14; *In re Warren*, Daveis 320.

On the other hand, the rule is discarded in VERMONT, *Waskburn* v. *Bank*, 19 Vt. 278; *Bardwell* v. *Perry*, Id. 292: in CONNECTICUT, *Camp* v. *Grant*, 21 Conn. 41: and in MISSISSIPPI, *Dahlgren* v. *Duncan et al.*, 7 Sm. & Marsh. 280; but in Connecticut the decision is based partly, and in Mississippi entirely, on the statutes of those states.

III. The English rule has some exceptions, which will be found in the text-writers *ubi supra*, but we have not thought it worth while to notice them, as they have been characterized as "eccentric," *Murrill* v. *Neill*, 8 How. 426, and are not generally adopted by the courts of this country.

IV. To the rule, as thus established in a very large majority of the American states, the principal case only partially assents. In point of authority the decision arrived at is supported only by the now overruled case of *Bell* v. *Newman*, 5 S. & R. 78. In point of principle, we may be permitted to express a doubt whether the balance of abstract equity is so decidedly in its favor as to justify a departure from so well-settled and universal a rule. That the mode of division declared in it is conducive to equality in the particular case, is undeniable, but no general rule has yet been devised which will produce practical equality in even a majority of cases, and the foundation of the prior claim of the separate creditors to the separate property is rather an equitable reciprocity than an actual equality hitherto unattainable.

As an abstract question in ethics, it is not easy to see why either class of creditors should have any preference where the loss is the misfortune and not the fault of either. The partnership creditor becomes such, as a general rule, in the course of business and with the expectation of profit. The risk of loss, therefore, is one which enters into his calculations, and hence it may be argued that he ought to suffer the loss rather than a private creditor whose claim may have arisen otherwise. On the other hand, the private creditor may equally have become so in expectation of profit, and, whether he did or not, it is for the public welfare that the law should encourage trade. Much, therefore, might be said on both sides, and a conclusion which favored either class would certainly fail to be satisfactory in all cases. The preference of the partnership creditors as to partnership property is, however, founded on incontrovertible grounds of law and equity, and therefore the rule, as generally received, is perhaps as satisfactory as any that can be devised. The practical effect of the departure from it, in the decision in the principal case, is to throw the separate property into hotch-pot in favor of the joint creditors wherever it is, proportionably to its debts, greater than the joint property, without giving the separate creditors any reciprocal advantage when the partnership estate is, as it commonly is, proportionably the larger.

V. The rule, as above discussed, is to be understood as applicable only on equitable distribution. Whether a credit-

or of either class who has obtained a *legal* hold, by execution or otherwise, on either kind of property, can be defeated in his right by this rule, is a different question, on which we have not space to enter. The tendencies of the cases are strongly in favor of the partnership creditors, both by supporting their liens when first acquired against separate property, and by postponing the liens of separate creditors on joint property, though prior in time.

J. T. M.

District Court of Kansas.

DAVID MEDE *v.* JOHN HAND.

The constitutional convention or legislature of a state may modify or change the remedy of a creditor; the only limit imposed upon these bodies by the national constitution is, that the change or modification shall not be such as to impair the obligation of the contract.

Laws, exempting a reasonable amount of the property of a debtor from execution, are valid as to prior contracts.

The validity of appraisement and exempting laws, with reference to the provision of the constitution of the United States forbidding any state to pass a law impairing the obligation of contracts, discussed by GILCHRIST, J.

ON March 10th 1858 John Hand executed to David Mede a note, in the following words and figures, to wit:—

"March 10th 1858.

"$1000.00.

"One day after date I promise to pay to David Mede, or order, one thousand dollars, with 12 per cent. interest, until paid. Value received.

[Signed.] "JOHN HAND."

On the fifth of July 1861, Mede commenced an action upon the note in the Shawnee county District Court. On the first day of the October Term, the plaintiff, Mede, took a judgment against Hand for $1390, debt and interest.

On the first of March 1862, the sheriff of Shawnee county levied an execution upon the south-east quarter of section four, town thirteen, range thirteen, east of the third principal meridian, as the land of the defendant, Hand, upon which he then lived. Hand notified the sheriff, at the time of the levy of the execution, that he claimed said land as exempt from sale, under execution, by virtue of the 9th section of Article 15th of the Constitution