negligent tort, and simultaneously permit the actor to go scot free. The other argument against permitting a plaintiff to profit by a full recovery from the wrongdoer is valid, but ought not be conclusive. Nor should the formal contention that, the burden of proof being on the complainant, he fails to make out his case in these situations, prevail over the obvious equities of the case. Drawing, at last, our analogy to the previously considered cases of harmful consequences occasioned by multiple causation, it would seem not altogether infeasible to apply the suggested procedure of separating damage, and on this basis to assess the negligent defendant, who by his tort has deprived plaintiff of an opportunity, albeit it may be a meager one, to recover from an injury not originally inflicted by the defendant, such sums as represent his proportionate contribution to plaintiff's injury. That is, assuming the measure of defendant's liability to be represented by the unknown X, then, as the prospects of recovery are to one-hundred, so will X be to the total of the damages suffered by plaintiff. On this basis of computation defendant would not be punished, for he would be paying no more than his tort cost plaintiff; and plaintiff would not be unduly enriched, since his compensation would be solely gauged with respect to the reasonable worth of his expectancy of recovery under normal circumstances.

ROBERT H. JONES

PARTNERSHIP

DISSOLUTION AND ASSUMPTION OF DEBTS — EFFECT UPON RIGHTS OF CREDITORS

A dissolution agreement was drawn up by Benjamin and David Leiken, partners, operating as the Mansfield Beautician's Supply Co., wherein David Leikin agreed, for a consideration, to take over the assets and assume the obligations of said partnership. The continuing partner operated under the firm name for a five-month period, at the end of which time he was adjudged a bankrupt in a proceeding brought by his creditors. The State of Ohio filed a claim with the referee for sales tax claimed to be due the state, under the authority of Ohio G.C. 5546-9a. Part of said tax accrued prior to the dissolution of the partnership and the remainder subsequent thereto. The trustee contended that if any assessment at all could be made only that part which accrued subsequent to the dissolution was a provable claim against the bankrupt, and that in any case the state was not entitled to priority over general creditors, because the sum due the state was not a tax but a debt. The District Court for

the Northern District of Ohio, Eastern Division, affirmed the finding of the referee and allowed the entire claim as a preferred one under sec. 64-b, subsection 6 of the Bankruptcy Act. *In re Leikin,* (U.S.D.C., N.D. Ohio, E.D.), unreported (1938).

The trustee contended further that the claim should not be allowed because of the doctrine of marshalling assets. In brief, the doctrine may be stated as follows: The partnership creditors shall in the first instance be satisfied from the partnership estate, and separate or private creditors of the individual partners from the separate and private estate of the partners with whom they have made private and individual contracts; and the private and individual property of the partners shall not be applied in extinguishment of the firm debts, until the separate and individual creditors of the respective partners shall be paid, so that neither class of creditors shall be allowed to trespass on the fund belonging to each other, until the claims of that other shall have been satisfied. *Rodgers* v. *Meranda, et al.,* 7 Ohio St. 179 (1857); *Brock, et al.* v. *Bateman, et al.,* 25 Ohio St. 609 (1874). The Bankruptcy Act recognizes the doctrine. 11 (11 U.S.C.A., etc.) U.S.C.A. sec. 23(f).

An acknowledged exception to the rule is where there are not two funds to be administered. *Rodgers* v. *Meranda, supra; Grosvenor* v. *Austin,* 6 Ohio 103, 25 Am. Dec. 743 (1833). In such case under the Bankruptcy Law of 1867, the partnership and individual creditors shared *pari passu* in the individual bankrupt's estate. *In re Lloyd,* 22 Fed. 88, 15 Fed. Cas. 717 (1884); *In re West,* 39 Fed. 203 (1889). Since the Bankruptcy Act of 1898, and recognition therein of the partnership as an entity, the exception does not prevail. *Tumlin* v. *Bryan,* 165 Fed. 166, 91 C.C.A. 200, 21 L.R.A. (N.S.) 960 (1908); *Farmers' & M. Nt. Bank* v. *Ridge Ave. Bank,* 240 U.S. 498, 60 L. Ed. 767, 36 S. Ct. 461, L.R.A. 1917A, 135, 36 Am. Bankr. Rep. 728 (1916). But it has been held that the doctrine does not apply where an individual trades under a firm name and no partnership in fact exists. *Mayes* v. *Palmer,* 208 Fed. 97, 125 C.C.A. 325, 31 A.B.R. 225 (1913); *Johnson* v. *Williams,* 111 Va. 95, 68 S.E. 410, 31 L.R.A. (N.S.) 406, Ann. Cas. 1912A 47 (1910); *Bixler* v. *Kresge,* 169 Pa. 405, 32 Atl. 414, 47 Am. St. Rep. 920 (1879); *Himmelreich* v. *Shaffer,* 182 Pa. 201, 37 Atl. 1007, 61 Am. St. Rep. 698 (1897). The court in the principal case held that the doctrine was in-inapplicable.

Where all the assets are transferred to one partner in consideration of his promise to pay the liabilities, the validity of the transaction turns upon the law of fraudulent conveyances. If no intent to hinder, delay,

or defraud creditors appears, the creditors can not impeach the transaction, *Stringer* v. *Stevenson*, 240 Fed. 892, 153 C.C.A. 578 (1917); *In re Collier, et al.*, Fed. Cas. 3002 (1874); *Pendleton* v. *Foley*, 21 Ohio App. 118, 4 Ohio L. Abs. 36 (1925); *Tom, et al.* v. *First Nat. Bank of Midland*, (Tex.), 104 S.W. (2d) 130 (1937); and the assets become the individual property of the assuming partner. *In re Long*, Fed. Cas. 8476, 9 N.B.N.R. 373 (D.C. N.Y. 1874); *In re Lehigh Lumber Co., et al.*, 101 Fed. 216, 4 A.B.R. 221, 2 N.B.N. Rep. 512 (1900); 6 Remington on Bankruptcy, sec. 2902; *In re Frazer, et al.*, 221 Fed. 83, 34 A.B.R. 467 (D.C. N.Y. 1915); *In re Hull*, 224 Fed. 796, 34 A.B.R. 447 (1915). Even though such agreements are entirely valid as between the partners themselves, they do not bind the firm creditors unless they consent thereto. No act of the partners alone can modify their liability on firm contracts. *Rawson* v. *Taylor*, 30 Ohio St. 389, 27 Am. Rep. 464 (1876). The Uniform Partnership Act is to the same effect: sec. 36 (1): "The dissolution of the partnership does not of itself discharge the existing liability of any partner * * *."

Several different theories have been employed in construing the effect of such dissolution agreements. England and several of the states have held that such an agreement creates the relation of principal and surety between the partners—the partner assuming the debts being the principal, and the other the surety—and creditors who have notice of this arrangement have been bound to respect the rights of the surety as in other cases of suretyship. *Rouse* v. *Bradford Banking Co.*, [1894] A.C. 586; Lindley on Partnership (10th ed.) 301; *Nelson* v. *Century Indemnity Co.*, 65 Fed. (2d) 765 (1933); *Dean* v. *Collins*, 15 N. D. 535, 125 Am. St. Rep. 610, 108 N.W. 242, 11 Ann. Cas. 1027, 9 L.R.A. (N.S.) 49 and note (1906); *Stanley & Gravitt* v. *Roberts Bros.*, 31 Ga. App. 746, 121 S.E. 878 (1924); *Drake* v. *Hodgson, et al.*, 118 Misc. 503, 194 N.Y. Supp. 874 (1922); *Tillis* v. *Folmar*, 145 Ala. 176, 39 So. 913, 117 Am. St. Rep. 31 (1906).

On the other hand many courts deny that partners may, by any agreement between themselves, alter the relation in which they stood when the obligation was incurred, or impose upon the creditor any limitations or obligations which were not an incident to the original relation. *McAreavy* v. *Magirl*, 123 Iowa 605, 99 N.W. 193 (1904); *Norman, et al.* v. *Jackson Fertilizer Co.*, 79 Miss. 747, 31 So. 419 (1901); *Grotte* v. *Weil & Co.*, 62 Neb. 478, 87 N.W. 173 (1901); *Abernathy Rigby Co.* v. *McDougle, Cameron & Webster Co.*, 187 S.W. 503 (1916).

The Ohio cases have expressed both views. Some hold that the

creditor is bound to recognize the suretyship relation. *Paul, Dempsey & Paul* v. *Ellison,* 1 Ohio Dec. Rep. 67, 1 W.L.Gaz. 452 (1844); *Little* v. *Quinn & Co.,* 1 Cin. S. Ct. Rep. 379, 13 Ohio Dec. Rep. 609 (1871). However, the better considered Ohio cases hold that mere notice does not reuire a firm creditor to recognize the surety relation. *Rawson* v. *Taylor, supra; Butler* v. *Birkey,* 13 Ohio St. 514 (1862). The Uniform Partnership Act adopts the view that the obligation of the retiring partner is discharged by the creditor's consenting to a material alteration, provided he knows of the assumption agreement. U.P.A. sec. 36 (3). In effect, this binds the creditor to recognize the suretyship relation.

All however agree that, if the creditor consents thereto, he accedes to a conversion of the joint obligation into a suretyship. It has been held that bringing an action is sufficient acceptance, *Muller Lumber Co.* v. *McCaffrey,* 141 Iowa 730, 118 N.W. 903 (1909), and acquiesence may be after the continuing partner or firm becomes bankrupt. *Regester* v. *Dodge,* 6 Fed. 6 (1881). The creditor may pursue his remedy against his debtor. *Carpenter* v. *Park,* 19 Cal. App. (2d) 567, 66 P (2d) 224 (1937). The trustee, as representative of the principal, can not insist, in the principal case, that the creditor, the state, first seek recourse against the surety.

As a second theory, the rights and duties of a firm creditor may be so changed by the assumption as to create not a surety relation, but a novation with the new obligation of the assuming partner substituted for the former joint obligation. *In re Lehigh Lumber Co., et al., supra.* To constitute a novation, a creditor must have expressly or impliedly consented to the discharge of the retiring partner and accepted the promise of the assuming debtor. *Andres* v. *Morgan,* 62 Ohio St. 236, 56 N.E. 875, 78 Am. St. Rep. 712 (1900); *Peters* v. *Kanzenback,* 175 Wis. 602, 185 N.W. 197 (1922); *Reclamation Co.* v. *Western Brokerage & Supply Co., et al.,* 57 S.W. (2d) 274 (Tex. 1932); *Schloss Bros. & Co.* v. *Bennett, et al.,* 260 N.Y. 243, 183 N.E. 376 (1932); *City. Nat. Bank of Huron, S. D., et al.* v. *Fuller,* 52 Fed. (2d) 870 (1931). If consent is found, a genuine novation takes place, and instead of assuming the position of surety, the retiring partner is completely released. *Chase* v. *Brundage,* 58 Ohio St. 517, 51 N.E. 31 (1898); *First Nat. Bank* v. *Green,* 40 Ohio St. 431 (1884). The consent need not be express or formal. It may be inferred from words or conduct reasonably justifying the conclusion that he has released the retiring partner and accepted the continuing one in his stead. It is a question of fact for the jury. *First Nat. Bank* v. *Green, supra; Walstrom* v.

Hopkins, 103 Pa. 118 (1883); *Bowyer* v. *Knapp & Martin*, 15 W. Va. 277 (1879); *Nightingale* v. *Chafee*, 11 R. I. 609, 23 Am. Rep. 531 (1877). "And by the great weight of authority, the release of the original debtor may be subsequent to the agreement." L.R.A. 1918B, 113, and cases cited.

It has been held that the mere institution of an action by the creditor against the new debtor is not sufficient to establish his consent to the novation and the intent to discharge the original debtor. *Leckie* v. *Bennett*, 160 Mo. App. 145, 141 S.W. 706 (1911); *Styron* v. *Bell*, 53 N. C. 222 (1860); *North Western Mutual Life Ins. Co.* v. *Eddleman*, 247 Ky. 116, 56 S.W. (2d) 561 (1932), unless a demand of payment preceded the institution of the suit. *Leckie* v. *Bennett*, *supra*; *Wood* v. *Moriaty*, 15 R. I. 518, 9 Atl. 427 (1887); *Tysen* v. *Somerville*, 35 Fla. 219, 17 So. 567 (1895). But other authorities hold that the bringing of such an action is a sufficient assent to the agreement. *Rawle* v. *Skipworth*, 19 La. 207 (1841); *Dunn* v. *Clinchfield Ry.*, 19 Fed. (2d) 810, *aff'd*, 40 Fed. (2d) 586 (1927).

It has also been held that if the assuming partner becomes insolvent, and the creditor proves his claim against his separate estate, as in the principal case, he thereby elects to treat him as his sole debtor, and discharges the other partner. *Bucklin* v. *Bucklin*, 97 Mass. 256 (1887); *Osborn* v. *Osborn, et al.*, 36 Md. 42 (1877); *Baum, et al.* v. *Fryrear*, 85 Mo. 151 (1884). Upon the basis of the foregoing authorities, the court could reasonably have held that the State of Ohio novated the debt by filing its claim with the referee.

As a third solution, the assumption agreement is occasionally construed as a promise to pay the debt of the promisee, and the firm creditor is permitted to sue the promisor under the third party beneficiary doctrine. *North Western Mutual Life Ins. Co.* v. *Eddleman*, *supra*. This promise runs to the promisee, whereas in the case of a novation the promise runs directly to the creditor. The general rule is that, even though acceptance is to be deemed necessary, the bringing of an action by a third person is sufficient. *McCoy* v. *McCoy*, 32 Ind. App. 38, 69 N.E. 193, 102 A.L.R. 223; *Peterson* v. *Chicago, etc. R. R.*, 119 Wis. 197, 96 N.W. 532, 100 Am. St. Rep. 879 (1903); *Smith* v. *Pfluger*, 126 Wis. 253, 105 N.W. 476, 110 Am. St. Rep. 911, 2 L.R.A. (N.S.) 783 (1905); *Reclamation Co.* v. *Western Brokerage & Supply Co., et al.*, *supra*.

The assuming partner, therefore, became severally liable on the new promise, and the creditor as beneficiary may hold him thereon. *In re Downing*, Fed. Cas. 4044 (1870). The creditor need not be desig-

nated. *Bessemer Savings Bank* v. *Rosenbaum Grocery Co.*, 137 Ala. 530, 34 So. 609 (1902). See annotation 71 Am. St. Rep. 176.

Ohio has recognized contracts for the benefit of third persons, *Thompson* v. *Thompson*, 4 Ohio St. 333 (1854); *Emmitt* v. *Brophy*, 42 Ohio St. 82 (1884), but they have not done so as yet in cases involving assumption of partnership debts. This argument was advanced in the principal case, and it could have reasonably been the basis of the decision had the court seen fit to so use it.

It was essential for the State of Ohio to evade the doctrine of marshalling assets in order to share with the individual bankrupt's creditors, and to prove the entire claim against the assuming partner's estate. The evasion could have been accomplished on any one of the three aforementioned theories; that is, upon the theory that the retiring partner became a surety, on the theory that the retiring partner was discharged by reason of a novation, or on the theory that the state became a third party beneficiary by reason of the assumption agreement.

MARGARETTA BEYNON

PRIVACY

THE RIGHT OF PRIVACY

Maxine Martin, an actress, sued the F.I.Y. Theatre Company for damages on two causes of action: (1) "Violation or breach of the right of privacy;" (2) Libel. She alleged that her picture was, without her permission, displayed by defendant in front of a burlesque house along with other pictures of "lewd and nude burlesque actresses"; that she was not under contract to defendant and did not intend to appear in his or any other burlesque theatre. She further alleged that the reputation of burlesque shows is of a low type both in her profession and in the public mind, and that such unauthorized display of her picture injured her in her profession. The Common Pleas Court of Cuyahoga County sustained a demurrer to the first cause of action, without disposing of the second cause, taking it for granted that plaintiff might proceed with her action for libel.[1] In sustaining the demurrer, the court, speaking through Judge Merrick, decided, in the absence of any authority in Ohio, that privacy was a personal and not a property right, and that "it does not exist under any theory where the person has become prominent, notorious or well-known so that by his very vocation or conduct he has dedicated his life to some continued contact with the public and thereby

[1] *Maxine Martin* v. *F.I.Y. Theatre Co.*, 10 Ohio O. 338 (1938)