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Actions at Law Between Partners in Missouri As Compared with Other Jurisdictions

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THE CONSTITUTIONALITY OF A FEDERAL ANTI-LYNCHING BILL. By Hon. L. C. Dyer and George C. Dyer.

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ACTIONS AT LAW BETWEEN PARTNERS IN MISSOURI AS COMPARED WITH OTHER JURISDICTIONS

Prior to the decision in 1897 of *Willis v. Barron*,[1] it was well settled in Missouri that no action at law could be maintained by one partner against his firm or associate for money arising out of and connected with partnership business until there had been a settlement of the partnership accounts.[2] The reason for the rule was twofold, formal and substantive. The formal barrier to the suit at law grew out of the fact that the partnership, as such, had no judicial existence as distinguished from the persons composing it,[3] and could sue and be sued only in the names of its individual partners joined in the proceeding. To be both plaintiff and defendant involved an inconsistency which the law does not permit. The result would be, moreover, that the law would give force to a contract which a man made with himself, and in the event that he should recover a judgment, he might be called upon as a member of the firm to pay it.

The substantive barrier to the action is the truer and more precise reason.[4] It results from the principle that a partner's interest in the partnership's effects is not his aliquot part thereof, but is his proper share in the balance of the surplus remaining after the payment of the

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[1] 143 Mo. 450, 45 S. W. 289, 65 Am. St. Rep. 673.

[2] Stothert v. Knox, 5 Mo. 112; McKnight v. McCutchen, 27 Mo. 436; Bambrick v. Simms, 102 Mo. 158, 14 S. W. 935.

[3] Willis v. Barron, *supra;* Cutting v. Daigneau, 151 Mass. 297, 23 N. E. 839; Summerson v. Donovan, 110 Va. 657, 66 S. E. 822; Bond v. Bemis, 55 Mo. 524.

[4] Cutting v. Daigneau, *supra;* Mulhall v. Cheatham, 1 Mo. App. 476. In Stoddard v. Wood, 9 Gray 90, the court stated: "The difficulty is not merely a matter of parties; it lies much deeper. A promise by a partner to the partnership is a promise to pay himself with other persons; and it cannot be said that anything is due until the whole is settled, until all the assets are collected, and all the debts paid. Until then, it cannot be known where there is any balance due; still less, what that balance is."

partnership debts and after a settlement of the accounts between the several partners.[5] Ordinarily, in a going concern it is impossible to show without a final settlement of all accounts which partner really owes the firm. It might be that the claimant partner is overdrawn or that firm losses overshadow and exhaust his potential claim completely. Thus, a partner's only remedy has always been to go into equity, praying for an accounting and dissolution. His action at law was barred if the defendant pleaded an unsettled partnership account.[6]

But the decision in *Willis v. Barron* in effect overturned the foregoing doctrine as applied to a partner suing on a promissory note given him by the firm as evidence of an advance made to it. In that case the plaintiff's decedent and the defendant were partners. The firm executed its note to Willis as payee, and his executrix sued the defendant for *one-half* the amount of the note. The defendant pleaded payment, a counterclaim of an unadjusted partnership account, and prayed the appointment of a referee and for an accounting. The court held that the suit on the note was an action at law which was not changed to one in equity by the nature of the defense. The court relied on R. S. Mo. 1889, sec. 2384 (R. S. Mo. 1919, sec. 2155), which provides that "all contracts which by the common law are joint only shall be construed to be joint and several." The court stated:

> The partner holding the firm's note payable absolutely to himself at common law was under no disability save only that the note, being a joint promise, to sue on it he was necessarily compelled to sue himself; but since the statute now makes the note the several contract of each member of the firm, and makes each partner liable *in solido,* the payee is no longer under the necessity of suing himself, and hence so far as the question of parties to pleadings is concerned he can sue either or all of the other partners without infringing the common law rule of pleading. Likewise as the note is the several contract of each partner no legal objection can be raised to the validity of the contract itself, as they are clearly adversary parties capable of contracting each with the other and binding each other. While the payee of such note could not be both debtor to, and creditor of himself at common law, it is not sure that the payee can not be creditor, and the other members of the partnership, who borrow his money and give him a partnership note therefore, cannot be his debtors, each being severally liable thereon for the whole amount of the note.

Granted that the joint debtors' statute, insofar as it has been extended to suits against members of partnerships, has the force of removing the

[5] Ewart v. Mercantile Co., 130 Mo. 112, 31 S. W. 1041; Reyburn v. Mitchell, 106 Mo. 365, 16 S. W. 592; Johnson v. Shirley, 152 Ind. 453, 53 N. E. 459; Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683.

[6] McHale v. Oertel, 15 Mo. App. 583; Scott v. Caruth, 50 Mo. 120.

formal barrier to actions at law between partners, nevertheless the substantive barrier still stands.[7] And it must not be overlooked that a long line of legal decisions in both England and America always assigned this as the true reason for not permitting such suits.[8] On principle, it cannot be doubted that the result reached in *Willis v. Barron* may work severe hardship.[9] To consider a specific case: Suppose that A and B are partners in a mercantile business, and A advances a sum of money to the firm upon its note when it becomes financially embarrassed. Before A advances the loan, he is overdrawn, but the loan creates the appearance that the firm is his debtor. In a few days the merchandise in the store, uninsured, is destroyed by fire. A is insolvent individually, while B is a moneyed man. The firm is heavily indebted. According to the principal case if A sued B on the note, A would prevail, despite the fact that his interest in the firm had been exhausted, and despite the fact that he should be paying money into the firm rather than drawing from it or from his co-partner who has been rendered liable individually on the note. The inequitable and unjust effect which the rule works on the co-partner B is obvious and needs no amplification. Thus, the result militates against the well-established proposition laid down in *Reyburn v. Mitchell*[10] that a partner's interest includes "nothing more than the interest of the partner in the surplus remaining after the payment of the firm debts and an adjustment of the partnership matters," since he is permitted to recover far more than any interest which he possesses in the partnership. Instead, it seems that in allowing the plaintiff to recover for one-half the amount of the note, the court in *Willis v. Barron* departed from established law and, first, reverted to the cotenancy idea of a partnership[11] by conceding that each partner owed one-half of the note—a conception which long has been exploded,—and, second, permitted a court of law to make an apportionment,—an act which is equitable in its nature.[12]

An examination of American decisions reveals that a few other jurisdictions have accomplished the same results as did the Missouri tribunal in *Willis v. Barron.* The Indiana court in *Duck v. Abbott*[13] permitted one partner to sue and recover at law from his co-partner money claimed to be due on unsettled partnership accounts. But this was due to the fact that the case was decided in the early days of the operation of the code before courts began to limit what the code accomplished. The Indiana court rested its decision upon the fact that the distinctions between law and equity had been abolished and lost sight of the fact that the substantive principles of each system were still unaltered.[14] This

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[7] Milburn v. Codd, 7 Barn. & Cress. 419; Cansten v. Burke, 2 Harr. & Gill 295.

[8] Cutting v. Daigneau, *supra;* Goldsborough v. McWilliams, 2 Cranch, C. C. 401; Robson v. Curtis, 1 Starkie 78; Richardson v. Bank of England, 4 Myl. & C. 165, 41 Eng. Reprint 65.

[9] Wiles v. Suydam, 64 N. Y. 177.

[10] 106 Mo. 365.

[11] Johnson v. Wingfield, 42 S. W. 203, 205.

[12] Morrison v. Stockwell's Admin., 9 Dana (Ky.) 172.

[13] 24 Ind. 349.

[14] In Russel v. Minnesota Outfit, 1 Minn. 162, the court pointed out that the

decision was followed in a later case[15] where the action was based on a promissory note, but since then the Indiana courts have fallen in line with the weight of authority on the proposition and have recognized the foundation of the *Duck* case to be erroneous.[16]

In *Morrison v. Stockwell's Admin.*,[17] the Kentucky court permitted a recovery upon a state of facts similar to that of the principal Missouri decision, but for the entire amount of the note sued upon. The ingenious reasoning of the court merits reproduction: "An obligation executed by several to one of themselves is of no validity against him, as he could not bind himself to himself; but is good against the others, as their obligation to him. Hence in effect it is merely the note of one partner to the other; and the payee may sue his partner, or his administrator upon it and may recover the *whole* amount—as a court of law cannot apportion the debt." However, the report of the case does not indicate that a set-off was pleaded, and the court intimated that if there was anything wrong in the origin of the note, in consequence of which the party thus legally bound for the whole should only be liable for a part, the remedy was in equity. Since the Kentucky courts have changed their stand on this proposition there is no need of further concern with it.[18]

An Iowa case[19] which permitted one partner to sue his co-partners and firm at law before an accounting, involves a peculiar set of facts. The petitioner applied for a *writ of mandamus* against a partnership board of trustees of which he was a member, and the court of law stated that it would assist the plaintiff, *because he had no remedy in equity.* But Iowa, too, does not at the present time permit one person to sue his co-partner at law either on a note or on open accounts.[20]

Of the few states which have extended the joint debtors' act to partnerships, Missouri is the only one which extends it to actions between the partners themselves.[21] The interpretation of a similar statute in such a case arose in the United States for the first time in the adjudication of *Bailey & Storm v. Bancker*.[22] The defendant was a member of

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code in abolishing the distinction between law and equity did not change the character of the relief to which a party is entitled, but only the form and manner of obtaining it, so that the complaint must, as before the passage of the code, be drawn with a special view to the relief demanded; in consequence of which no action at law can lie between partners to settle any question relating to their business. Gillett v. Chavez, 12 N. M. 353, 78 Pac. 68, presents the same proposition.

[15] Shalter v. Caldwell, 27 Ind. 376.

[16] Meredith v. Ewuing, 85 Ind. 410; Adams v. Shewalter, 139 Ind. 178, 38 N. E. 607.

[17] 9 Dana (Ky.) 172.

[18] Coulson v. Ferree, 27 Ky. Law Rep. 457, 85 S. W. 457.

[19] Cooper v. Nelson, 38 Ia. 440.

[20] McReynolds v. McReynolds, 74 Ia. 89, 36 N. W. 903; Erret v. Prichard, 121 Ia. 496, 96 N. W. 963.

[21] Willis v. Barron, *supra;* Caldwell v. Dismukes, 111 Mo. App. 570, 86 S. W. 270; Short v. Thomas, 178 Mo. App. 400, 163 S. W. 252. In the Caldwell case the plaintiff, assignee of a partner who drew a check on the partnership in his own favor, was permitted to recover from the co-partner.

[22] 3 Hill 188, 38 Am. Dec. 625; Woods v. Ridley, 11 Humph. (Tenn.) 194.

a corporation whose charter provided that "the stockholders shall be jointly and severally personally liable for the payment of all debts or demands contracted by said corporation." The courts of New York had interpreted this and charters of a similar character as placing stockholders on the same footing as though they had not been incorporated and as making them answerable as partners for the debts of the company.[23] Suit was brought on a promissory note by a stockholder, and in denying a right of action the court stated that if the stockholders are to be regarded as partners, it is then quite clear that one member cannot maintain an action against the others for a debt due from the whole. The court then stated expressly that the provision holding the stockholders *severally* as well as jointly does not alter the principle, for it is "still the case of one partner suing another for a debt due from the whole firm."[24] There was a further statement that the "Legislature did not intend" to provide for protection of creditors who were members of the corporation, for they do not come within the reason and the policy of the law, which was made for the protection of third persons dealing with the company and not for the benefit of the very members of the company themselves.[25] "They are left and should in justice be left to such remedies as had already been provided by law for the adjustment of partnership transactions. They may go into Chancery for an accounting and have the claims of all parties settled on equitable principles."[26] The court pointed out that to take a contrary stand and permit the plaintiff to sue his co-partners would effectuate a preposterous result, because when the defendant had paid the debt, he would then stand as the creditor of the partnership with nothing to hinder him from turning around and recovering the same money from the plaintiff as co-partner, with the possibility that the parties might continue to sue each other on the same claim to the end of the chapter. But according to well-settled principles of partnership law, the alarm of the court was quite unnecessary, since a partner who pays demands against his firm cannot maintain an action at law against his co-partners to recover back the whole or any part of the money.[27] Nevertheless the decision as it is could well rest on the proposition that the legislature intended the statute to afford protection to third persons dealing with the partnership, and did not purport to give the partners themselves greater rights than they had had previously.[28]

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[23] Allen v. Sewall, 2 Wendell 327; Moss v. Oakley, 2 Hill 265.

[24] To arrive at this conclusion the court relied on Milburn v. Codd, *supra,* and Cansten v. Burke, *supra.*

[25] *Accord:* Deming v. Pulleston, 33 N. Y. Super. 235; Clark v. Meyers, 11 Hun. 609.

[26] Wiles v. Suydam, *supra.*

[27] In Gridley v. Dole, 4 N. Y. 486, it was held that "If a partner pay demands against the firm, he can not maintain an action at law against his co-partners to recover back the whole or any part of the money. His action in such a case being on an implied promise, would require an accounting to be taken in order to ascertain whether he had paid more than his proportion." *Accord:* Lawrence v. Clark, 9 Dana (Ky.) 257, 35 Am. Dec. 133; Bond v. Bemis, 55 Mo. 357.

[28] In Clark v. Cable, 21 Mo. 223, which held that the joint debtors' statute in

Section 6229 of the Arkansas Statutes of 1921, Crawford & Moses Digest, provides that "Joint obligations shall be construed to have the same effect as joint and several obligations, and may be sued on, and recoveries had thereon in like manner." By judicial interpretation this section has been applied to partners.[29] But the Arkansas decisions reach a result contrary to *Willis v. Barron,* which seems to be better founded on principle. In *Houston v. Brown,*[30] it was held that an action will not lie upon an instrument of writing acknowledging the receipt of money by defendant from plaintiff, specifying its payment on account of a partnership concern, unless the plaintiff prove that there is not an existing unsettled partnership account. And it was stated more specifically in a later case[31] that the only action that can be maintained between partners upon a partnership transaction before a settlement of the partnership affairs is a suit for an accounting.[32] Kentucky courts, following a similar statute,[33] reversed *Morrison v. Stockwell's Admin., supra,* and went still further in the direction of the Arkansas courts, holding that where a partner buys a firm note, he cannot sue his co-partners and obtain a judgment at law;[34] his only remedy being to commence an action for the settlement of the partnership wherein the rights of all parties can be adjudged.[35] In Minnesota the joint debtors' act has been interpreted to give rights to creditors against the partners individually,[36] but the courts have adhered to the proposition that as a general rule one partner cannot sue another in an action at law on any form of partnership obligation. And a similar statute has likewise been held not to affect the rights of partners between themselves in Mississippi, where a court of law has no jurisdiction of an indebtedness arising out of unadjusted partnership dealings.[38]

In West Virginia the question arose when one of two partners sued the other on a note to recover one-half the cost of the equipment for the joint enterprise furnished and installed by the plaintiff, under an

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Missouri could not be extended to plaintiffs and that joint obligors who wish to enforce an agreement must join in their action, the court said: "There is nothing in the present practice act which affects the law of joint contracts. That act deals only with the mode of procedure, and does not affect the law of contracts, as it existed prior to its enactment." The same could be said logically regarding the law of partnership.

[29] Bradford Rainwater & Co. v. Toney, 30 Ark. 763.

[30] 33 Ark. 333.

[31] King v. Moore, 72 Ark. 469.

[32] Missouri courts held the same in Stothert v. Knox, 5 Mo. 112; Springer v. Cabell, 10 Mo. 640; McKnight v. McCutchen, *supra;* Smith v. Smith, 33 Mo. 577; Scott v. Caruth, 50 Mo. 120.

[33] The Kentucky Joint Debtors' statute was held applicable to partnerships in Williams v. Rogers, 14 Bush (Ky.) 776.

[34] Deavenport v. Green River Deposit Bank, 138 Ky. 352, 128 S. W. 88.

[35] Sebastian v. Booneville Acad. Co., 22 Ky. Law Rep. 186; Coulson v. Ferree, *supra.*

[36] Fryklund v. Great Northern Railway Co., 101 Minn. 37, 111 N. W. 727.

[37] Reis v. Reis, 99 Minn. 446, 109 N. W. 997; Masterman v. Lumberman's National Bank, 61 Minn. 299; 63 N. W. 723.

[38] Evans v. White, 31 So. 833; Ivy v. Walker, 58 Miss. 253.

agreement that the defendant should reimburse him to the extent of one-half, but the court stated that the plaintiff could not sue until an accounting, and the joint debtors' statute was not deemed to be applicable.[39]

Nevertheless, despite the holding in *Willis v. Barron* and its far reaching effect, Missouri courts have not held as yet that there can be a suit at law between partners on a general account or on parallel matters,[40] but have limited it merely to suits on notes. They recognize that litigation is apt to breed hard feelings, foment discord, and lead to dissolution.[41] Hence they do not enter into a consideration of mere partnership squabbles; and whenever these are the subject of the suit the general common law rule barring the action applies. However, even at common law, one was allowed to sue his co-partner in certain situations despite the absence of an accounting and winding up of partnership affairs.[42] And insofar as those exceptions to the general rule constitute the weight of authority, Missouri adheres to them. It might be pointed out in advance that the nature of these exceptions reveals that the common law, with all of its tenacity for hanging on to form, considered the substantive barrier as the true bar to such a suit. Sometimes, for example, a controversy between partners will appear on first view to have arisen out of a transaction connected with the firm's business, when really it stands on an independent footing and may be the subject of a legal action between the partners. *Bierman v. Braches*[43] illustrates this. And *Byrd v. Fox*[44] is authority for the generally accepted proposition that an action at law may be maintained by a party to an executory agreement to form a partnership, to recover damages for the breach. This rule likewise is well-founded, for the plaintiff's rights come not from the business itself, but from the defendant's breach of agreement to enter the business contemplated. Obviously there would be no partnership affairs requiring a settlement.

If only one matter or item is in dispute between the partners, an action at law may be maintained on that item, though there has been no settlement of the firm's affairs.[45] And if the partnership is formed for the purpose of carrying out a single transaction or venture, there being no involved or complicated accounts, one partner may sue his co-partner for his share of the profits or losses of the venture.[46] It also has been held that a suit at law is the proper remedy for breaches of personal covenants, as where one partner expressly indemnifies the plaintiff for

[39] Jones v. Rose, 94 S. E. 41; Summerson v. Donovan, 110 Va. 657, 66 S. E. 822, accord.

[40] Brockman v. Fehrenbach (Mo. App.), 238 S. W. 1087; Boyce v. Howell (Mo. App.), 210 S. W. 89. [41] Lord v. Hull, 178 N. Y. 9, 70 N. E. 69.

[42] Preston v. Strutton, 1 Anstr. 50, 145 Eng. Reprint 797; Radenhurst v. Bates, 3 Bing. 463, 130 Eng. Reprint 591.

[43] 14 Mo. 24; also Seaman v. Johnson, 46 Mo. 117; Russell v. Grimes, 46 Mo. 410; Stone v. Wendover, 2 Mo. App. 247. [44] 8 Mo. 574.

[45] Boyce v. Howell, *supra;* Byrd v. Fox, *supra;* Whetstone v. Shaw, 70 Mo. 575; Johnson v. Ewald, 82 Mo. App. 276.

[46] McNeally v. Bartlett, 123 Mo. App. 58, 99 S. W. 767.

any losses that should occur in the business during a stipulated period.[47]

When the plaintiff's right of recovery arises out of a contract of settlement between the partners, by which the defendant is to pay for his partner's interest in the partnership properties, the suit is not in equity but at law.[48] And where the plaintiff's right to the amount sued for did not grow out of a partnership arrangement between him and the defendants, but out of a contract by which they were to pay him that sum as the purchase price for a sale to them of a part interest in the properties, the suit is not one in equity.[49]

One partner may sue another at law for fraud in inducing the partnership. In the case of *Gilliam v. Loeb,*[50] one of several partners induced the others to contribute a share of money for the purpose of buying property, misrepresenting to them the purchase price so that they paid more than the property cost, and he pocketed the excess. The court held that each of the partners so defrauded could bring a separate suit to recover the excess of his contribution to the purchase price, without any joinder of parties. It was pointed out that where fraud entered into a proposition the latter is thrust onto an independent footing and segregated from all partnership affairs at the option of those defrauded. Furthermore, as Judge Goode intimated, the whole firm was not defrauded, but only the individual partners.

All in all, the cases examined, directly or by way of inference, point to the conclusion that until an accounting is had and a balance struck, the relation of debtor and creditor does not exist between partners so as to permit an action at law between them, (1) unless by their mutual agreement the partners have dealt with each other in such a way that the subject of their agreement is so segregated from partnership affairs that each man deals solely as an individual, or (2) unless there never has been an occasion for accounts to arise, or (3) unless one partner by acts which are wrongful to his co-partners in their individual capacities affects a segregation of any item. Insofar as *Willis v. Barron* is apposite this conclusion, it is hoped that the Missouri courts, which have cited it almost religiously on every question affecting the relations between partners, will reverse themselves and declare the intention of the legislature in passing the joint debtors' statute to give new rights to third persons, but not to joint obligors themselves.

ABRAHAM E. MARGOLIN, '29.

INDIVIDUAL LIABILITY OF HOLDERS OF SHARES IN BUSINESS TRUSTS

Men are ever seeking means of doing business which involve the least possible financial risk to themselves. The trust, which is of ancient lineage, is now enjoying the favor of many business men, under the

[47] Whiteheill v. Shickle, 43 Mo. 537; Stone v. Windover, 2 Mo. App. 247.
[48] Bigham v. Tinsley, 149 Mo. App. 467.
[49] Crocker v. Barteau, 212 Mo. 350.
[50] 131 Mo. App. 70; also Nicholas v. Haddock, 180 S. W. 31.