Agency and Partnership

AGENCY AND PARTNERSHIP

SUIT IN PARTNERSHIP NAME

IN 1940 the legislature in its adoption of the Rules of Civil Procedure transplanted to Texas a rule stemming from Federal Rule 17 (b)[1] which is now formulated as Texas Rule 28:

> "A partnership or other unincorporated association, or an individual doing business under an assumed name, may sue or be sued in the partnership, assumed, or common name for the purpose of enforcing for or against it a substantive right."[2]

Prior to the incorporation of this entity concept in our rules of procedure, the statutes of this state were silent on the point, the most relevant commitment being Article 6133[3] which provided that an unincorporated joint stock company may sue or be sued in its company or distinguishing name, but with no inference or reference as to the suability of a partnership as an entity. The decisions construing the new Rule 28 have been scant, but appear uniformly to have followed the obvious interpretation, which abrogates the common law rule on the matter and recognizes a partnership, at least for purposes of suit, as an identity apart from the members composing it. The most recent Texas case on the point is *Dillard v. Smith*,[4] which concentrates the present procedure rule into simple form:

> "The scope of Rule 28 is purely procedural. In so far as it applies to persons operating a business under an assumed name, it permits such persons to be made parties under the assumed or common name as well as under their individual names. Under a majority of the opinions of the Court of Civil Appeals prior to the adoption of this rule, a person could not be sued under a trade or assumed name; it was necessary that such person be sued under his individual name. Rule 28 was not in-

---

[1] RULES OF CIVIL PROCEDURE FOR DISTRICT COURTS OF U. S. (1934).

[2] Rule 28, TEXAS RULES OF CIVIL PROCEDURE (1940).

[3] TEX. REV. CIV. STAT. (Vernon's, 1925) art. 6133.

[4] ___ Tex. ....., 205 S. W. (2d) 366 (1947).

tended to change the substantive rights of the owners of a business operated under an assumed name. The effect of the rule is simply that such owners may now be sued under the trade or assumed name of the business as well as in their individual names."[5]

A secondary point of importance arising in the case concerns not the style in which suits may be brought by or against the partnership, but the residence of the partnership as determinative as venue. The Supreme Court affirmed the Court of Civil Appeals view that the partnership can have no residence for venue purposes other than the residence of the partners, regardless of whether the partnership be regarded as a legal entity created by Rule 28, separate and distinct from the partners who compose it, or merely as a contractual status between the partners. It assents to the conclusion that though the plea of privilege be filed by a legal entity, the only basis for it is the residence of the partners, since apart from the residence of the partners, the legal entity has no residence. The *Dillard* case was a personal injury suit arising out of a collision involving a vehicle belonging to the defendant transport company. The operation of Rule 28 was invoked when the transport company entered an appearance in the cause as a legal entity under the rule by filing a plea of privilege alleging that it was not a resident of Bexar County, where suit was filed, but that each of the defendant partners was a resident of Edwards County. The Court of Civil Appeals in consideration of such plea, in harmony with orthodox partnership principles, accorded with the rule that the partnership could not have a residence in Edwards County unless the owner or owners of the business reside there, and declared that the plea, if valid as to the transport company, should be construed as asserting that the transport company resided in Edwards County because Coy and Edna Dillard resided in said county and were the owners thereof. Thus while recognizing that Rule 28 ushers in a procedural innovation with reference to suit in the partnership name, the Texas courts still adhere to the common law rule that in matters of venue, regardless of the capacity

[5] *Id.* at 367.

in which the partnership may be sued, the residence of the members of the firm governs and constitutes the only possible residence of the partnership as an entity.

The *Dillard* case follows and clarifies two previous Texas cases subsequent to the enactment of the new rule,[6] and is in accord with a federal case conforming to the entity concept in its construction of a similar rule.[7]

Prior to the adoption of Rule 28 the decisions on the suability of a partnership in its capacity as an entity were uniform in conforming to the traditional common law policy of viewing the association as merely a contractual status and requiring suit to be brought in the names of the members. The new method of procedure is worthy of note as abrogating a venerable line of common law authorities on the point,[8] and establishing for Texas a capacity in contravention of all preceding decisions on the matter.

Renegotiation Act

Although reiterating and applying the well-established principles of accord and satisfaction as constituted by a settlement agreement between partners at dissolution with respect to their contractual obligations incurred by reason of such relationship, the case of *Wallace v. Larson*[9] involves incidentally a consideration of the recent Federal Renegotiation Act,[10] which will no doubt be encountered in determining liability among partners for excess charges under war contracts. The Act, although not disturbing the

---

[6] Heid Bros. v. Mueller-Huber Grain Co., 185 S. W. (2d) 470 (Tex. Civ. App. 1944); Mims Bros. v. M. A. James, 174 S. W. (2d) 276 (Tex. Civ. App. 1943).

[7] *C. f.* E. I. DuPont De Nemours Powder Co. v. Jones Bros., 200 Fed. 638 (S. D. Ohio 1912).

[8] Bubble Up Bottling Co. v. Lewis, 163 S. W. (2d) 875 (Tex. Civ. App. 1942); Road Transport Co. v. Gray, 135 S. W. (2d) 200 (Tex. Civ. App. 1939); Fenner & Bean v. Tatum, 129 S. W. (2d) 490 (Tex. Civ. App. 1939); Pope v. State, 86 S. W. (2d) 475 (Tex. Civ. App. 1935); Payne v. Livingston, 253 S. W. 701 (Tex. Civ. App. 1923); Lawn Production Co. v. Bailey, 244 S. W. 283 (Tex. Civ. App. 1922); First National Bank of Marshall v. Alexander, 236 S. W. 229 (Tex. Civ. App. 1922); Commonwealth Bonding & Casualty Insurance Co. v. Meeks, 187 S. W. 681 (Tex. Civ. App. 1916).

[9] 199 S. W. (2d) 198 (Tex. Civ. App. 1947).

[10] 56 Stat. 245 (1942), 50 U. S. C. A. § 1191 (1947).

fundamental principles for settling liability among partners for firm debts, does at least impose a new type of debt which hitherto has not been encountered in determining partnership liabilities. The Act in essence provides that when the amounts received or accrued under war contracts with governmental departments reflect excessive profits, the Renegotiation Board shall hold conference with the firm and shall endeavor to make an agreement with respect to the elimination of such excessive profits, and in the event of a failure of arbitration shall enter an order determining the amount of such excessive profits and shall furnish the contractor with the statement of such termination. Then the Secretaries of the various departments are authorized to eliminate these excessive profits by (A) reductions in the amounts otherwise payable to the contractor; (B) withholding from amounts otherwise due to the contractor any amount of such excessive profits; (C) recovery from the contractor through repayment, credit, or suit any amount of such excessive profits actually paid to him. This liability is of course only of transitory interest and will be dissolved with the eventual settlement of all accounts resulting from war contracts.

Intent as a Requisite of Partnership

A final 1947 case, which, although presenting no new point of law, is interesting from the factual standpoint as well as the theory contended for by counsel, is that of *Lovell v. Lovell*,[11] a divorce suit in which a complaint was made as to the property settlement involved. The wife in the case had been granted a divorce but shortly thereafter resumed living with her ex-husband under circumstances which she alleged amounted to a common law marriage. Later she contracted a statutory marriage with another man and still later divorced him and formally remarried the original husband. Her attorneys in order to effect a property settlement most favorable to her interest devised the hypothesis that during

[11] 202 S. W. (2d) 291 (Tex. Civ. App. 1947).

her cohabitation with her first husband during the period of alleged common law marriage, which the court found did not exist, her activities in keeping house, doing the cooking, and at times actually looking after the distribution business in which her husband was engaged, entitled her to a partnership interest in such property, commensurate with the amount of her services contributed to its acquisition. The trial court so held, adjudging that she had contributed by her efforts at least 25% in its acquisition and was entitled to this percentage of the value of the business. The Court of Civil Appeals reversed the case and determined that these facts called for nothing more than a simple application of the ancient principle that partnership is a creature of contract, and thus, as between the parties themselves, there must be a voluntary agreement and an actual intention to become partners. Since there was no evidentiary basis for a finding that by express contract or implied understanding did the parties agree to become partners, the intention requisite to constitute such a relationship was lacking. The court granted that in certain situations where the rights of third parties are involved, the court will deem an association a partnership where it has apparently functioned as such if to hold otherwise would be prejudicial to third parties who have relied on such appearance, but where only the rights of the alleged partners themselves are involved, as in this case, there is no basis for exception to the general rule that a partnership can arise only as the result of mutual assent and intention.

A. J. R.

Agency as Determining Venue

Texas Power and Light Co. v. Adamson[12] held that the term "agency or representative," as used in the Texas general venue statute,[13] which provides that suits against a private corporation may be brought in any county in which such corporation has an agency or representative, does not include "servant or employee."

---

[12] 203 S. W. (2d) 275 (Tex. Civ. App. 1947).

[13] Tex. Rev. Civ. Stat. (Vernon's, 1925) art. 1995, subdiv. 23.

The facts relied upon by the plaintiff, Adamson, to maintain venue of a personal injury suit in Cherokee County, after defendant had filed a plea of privilege were that two persons, both of whom operated small stores in Cherokee County as their principal business, were authorized by defendant to collect bills owed to defendant, stamp the bills "paid" with a stamp furnished by the defendant, and to accept checks and deposit them in the bank to the defendant's account and mail the deposit slips to defendant's home office in Dallas County.

In sustaining defendant power company's plea of privilege, the court said,

> "In legal contemplation, 'representative' . . . connotes the use of at least some discretionary authority; the taking the place of the principal and acting in furtherance of his business; the power to bind the principal in a contractual sense."[14]

The court held, in effect, that within the meaning of the venue statute, these persons who collected the bills were "servants or employees," as distinguished from agents, when considered in the light of the legislative intent of the statute.

The court, in this case, follows its prior decisions under this subdivision of the venue statute,[15] but it is submitted that the holding should be limited to this type fact situation and to the question of venue.

In the older Texas cases, a master has not been termed a principal, although in more recent cases, a master has been defined as a kind of principal.[16]

In a recent case,[17] the court quotes verbatim the definition of "master" as found in the *Restatement of the Law of Agency*.[18]

---

[14] 203 S. W. (2d) 275, 276 (Tex. Civ. App. 1947).

[15] Talley *et al.* v. Shasta Oil Co., 146 S. W. (2d) 802 (Tex. Civ. App. 1940); Humble Oil & Refining Co. v. Bell *et al.*, 172 S. W. (2d) 800 (Tex. Civ. App. 1943).

[16] RESTATEMENT, AGENCY, § 2 (1) (Texas Annotations) (1933).

[17] R. E. Cox Dry Goods Co. *et al.* v. Kellogg *et al.*, 145 S. W. (2d) 675 (Tex. Civ. App. 1940), *writ of error refused.*

[18] RESTATEMENT, AGENCY, § 2 (1) (1933): "A *master is a principal* who employs another to perform services in his affairs and who controls, or has the right to control, the physical conduct of the other in the performance of the service." (Italics supplied.)

Therefore, it would appear that the Texas courts have abandoned the former distinction between the relationships of "Principal and Agent" and "Master and Servant," for the purpose of general agency law and consider the master a *type* of principal.[19]

In the instant case, for example, while the collectors of the electric bills have been held to be "servants or employees" for purposes of the venue statute, could it be said that they were not "agents" in a contract action between one of the subscribers to the electric service and the power company in regard to an electric bill? Clearly, payment to the collector would discharge the subscriber's debt to defendant.[20]

On the basis of the foregoing, it will be noted that the courts have placed a more narrow construction upon the term "agency" within the meaning of the venue statute than for purposes of general agency law.

W. M. S.

---

[19] *Ibid.*

[20] 2 C. J. S. 1270; 3 C. J. S. 218; Bailey v. Williams, 223 S. W. 311 (Tex. Civ. App. 1920).