

# Partnerships--Limited Partnership Separate Entity for Purposes of Pleading (Ruzicka v. Rager, 305 N.Y. 191 (1953))

St. John's Law Review

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### Recommended Citation

St. John's Law Review (1953) "Partnerships--Limited Partnership Separate Entity for Purposes of Pleading (Ruzicka v. Rager, 305 N.Y. 191 (1953))," *St. John's Law Review*: Vol. 28 : No. 1 , Article 14.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol28/iss1/14>

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ments in which she referred to herself as *Mrs. Akeson*, even in the instant application, and not as the wife of the decedent-employee. Furthermore, testimony was given to the effect that Akeson had, at various times, lived with claimant and decedent-employee at their home, indicating full knowledge on the part of all parties that the relationship in question was meretricious. This contradictory evidence was further enhanced by testimony showing that the decedent-employee, in his application for employment and later for compensation, stated that he was single, thus indicating that he never considered himself married to claimant nor intended that they contract a common-law marriage. Thus in determining the validity of common-law marriages, the burden of proof rests upon the party asserting the marriage.<sup>19</sup> The sufficiency of this proof, particularly when one of the parties is dead, must be clear, convincing, and consistent, or it will fail,<sup>20</sup> as in the present case.

New York courts, in recognizing the validity of common-law marriages contracted within this jurisdiction prior to April 29, 1933, should, as in the instant case, continue to require a preponderance of positive evidence showing a valid husband and wife relationship, particularly where there is any doubt as to the contractual intent of the parties, or where there is suspicion of a contrary relationship. This reasoning, as a matter of public policy, is necessary to prevent the practice of fraud on the courts in the settling of estates, in claims for compensation, and in other instances involving the matrimonial relationship. That some hardship will result cannot be denied. However, the legislature, in abolishing common-law marriages, correctly asserted the interest of the state in the marriage contract, in order to protect that institution, the parties themselves, and the general welfare of society.



**PARTNERSHIPS—LIMITED PARTNERSHIP SEPARATE ENTITY FOR PURPOSES OF PLEADING.**—In an action by a limited partnership to enforce a partnership claim, defendant counterclaimed a non-partnership liability against members of the limited partnership as individuals. The Court of Appeals decided that the counterclaim was improper, *holding* that a limited partnership is a separate entity for the purposes of pleading and that partners suing in a partnership capacity are not proper adversary parties of counterclaims asserted against them in their individual capacities. *Ruzicka v. Rager*, 305 N. Y. 191, 111 N. E. 2d 878 (1953).

<sup>19</sup> *Matter of Wells*, 276 App. Div. 822, 93 N. Y. S. 2d 354 (4th Dep't 1949), *aff'd mem.*, 301 N. Y. 796, 96 N. E. 2d 95 (1950).

<sup>20</sup> *See Boyd v. Boyd*, 252 N. Y. 422, 428, 169 N. E. 632, 634 (1930); *Matter of Wells*, *supra* note 19 at 823, 93 N. Y. S. 2d at 356.

In cases involving partnerships or partners, many counterclaims or set-offs are generally held improper because of their non-mutuality.<sup>1</sup> Thus, where a partnership sues on a partnership obligation, a counterclaim asserting non-partnership liability against one of the partners is improper;<sup>2</sup> and conversely, in a suit against the partnership, an individual partner cannot counterclaim his private cause of action against the plaintiff.<sup>3</sup> Moreover, in non-partnership suits involving a partner, the partner-defendant's counterclaim of a partnership obligation is not permitted,<sup>4</sup> and a defendant's counterclaim of a partnership obligation against a plaintiff-partner is equally improper.<sup>5</sup> In these cases the counterclaims lack mutuality because they involve setting off a joint obligation against a several obligation<sup>6</sup> and also involve the inequity of applying funds of the partnership to satisfy personal demands against one of the partners.<sup>7</sup> Finally, these counterclaims fail to meet the test of whether the defendant could institute an independent action on his counterclaim.<sup>8</sup>

Where, however, a statute attaches several liability to partnership contracts,<sup>9</sup> or where the partnership is sued in tort,<sup>10</sup> some courts

<sup>1</sup> See *First Nat. Bank of Abbeville v. Capps*, 208 Ala. 207, 94 So. 109, 110 (1922); *Hughes v. Trahern*, 64 Ill. 48, 53 (1872); *Rush v. Thompson*, 112 Ind. 158, 13 N. E. 665, 667 (1887).

<sup>2</sup> *Yankelewitch v. Beach*, 115 Cal. App. 629, 2 P. 2d 498 (1931); *Ravold v. Fred Beers, Inc.*, 151 Misc. 628, 270 N. Y. Supp. 894 (County Ct. 1933); *Roldan v. Power*, 14 Misc. 480, 35 N. Y. Supp. 697 (Super. Ct. 1895) (alternative holding); see *Peck v. Snow*, 47 Minn. 398, 50 N. W. 470 (1891).

<sup>3</sup> *Omaha Crockery Co. v. Cleaver*, 104 Kan. 642, 180 Pac. 273 (1919); *Hunter v. Booth*, 84 App. Div. 585, 82 N. Y. Supp. 1000 (2d Dep't 1903); *Popham v. Rubin*, 134 N. Y. Supp. 1067 (Sup. Ct. 1912); *Peabody v. Bloomer*, 3 Abb. Pr. 353 (N. Y. Super. Ct. 1856).

<sup>4</sup> *McGuire v. Lamb*, 2 Idaho 378, 17 Pac. 749 (1888); *Dehon v. Stetson*, 50 Mass. (9 Metc.) 341 (1845); *Heinrich v. Kirby*, 64 Mont. 1, 208 Pac. 897 (1922); *Rose v. Motes*, 220 S. W. 2d 734 (Tex. Civ. App. 1949).

<sup>5</sup> *Metcalf v. People's Grocery Co.*, 24 Ga. App. 663, 101 S. E. 768 (1920); *Rush v. Thompson*, *supra* note 1; *Rath v. Kelly*, 246 Mich. 25, 224 N. W. 377 (1929).

<sup>6</sup> See *Second Nat. Bank of Cincinnati v. Hemingray*, 34 Ohio St. 381, 389 (1878); *Spofford v. Rowan*, 124 N. Y. 108, 113, 26 N. E. 350, 351 (1891); *Rosenzweig v. McCaffrey*, 27 Misc. 808, 57 N. Y. Supp. 219 (City Ct.), *aff'd*, 28 Misc. 485, 59 N. Y. Supp. 863 (Sup. Ct. 1899).

<sup>7</sup> See *Omaha Crockery Co. v. Cleaver*, *supra* note 3, 180 Pac. at 274; *Dehon v. Stetson*, *supra* note 4, at 344; see CRANE, PARTNERSHIPS 333-334 (2d ed. 1952).

<sup>8</sup> See *Jones v. Blair*, 57 Ala. 457, 458 (1876); *McGuire v. Lamb*, *supra* note 4, 17 Pac. at 750; see PRASHKER, NEW YORK PRACTICE 267 (2d ed. 1951).

<sup>9</sup> *Merchants' Nat. Bank of Los Angeles v. Clark-Parker Co.*, 215 Cal. 296, 9 P. 2d 826 (1932); *Owsley v. Bank of Cumberland*, 23 Ky. L. Rep. 1726, 66 S. W. 33 (1902); see Note, 5 A. L. R. 1541, 1549-1551 (1920). For a discussion of the joint and several liability of partnerships (N. Y. Partnership Law § 26), see PRASHKER, CASES AND MATERIALS ON THE LAW OF PARTNERSHIP 140-141 (2d ed. 1946).

<sup>10</sup> *Columbia Taxicab Co. v. Mercurio*, 236 S. W. 1096 (St. Louis Ct. of Appeals 1921).

have ruled that an individual claim may be set off against a partnership liability. In both instances the courts reason that the defendants of the suit and counterclaim were both confronted with several liability, hence the requisite mutuality of claims.<sup>11</sup> Some counterclaim statutes, reciting that judgment may be entered for defendants against the plaintiffs or *some* of them,<sup>12</sup> or in favor of defendants or *some* of them,<sup>13</sup> have been construed to permit the setting off of partnership and non-partnership claims; this same result has been reached where the counterclaim may seek relief different in kind from that sought by the plaintiff.<sup>14</sup> Further, in a personal suit against a partner at law, where the other partners have agreed to allow the defendant-partner to counterclaim a partnership debt,<sup>15</sup> or in equity, where the plaintiff is insolvent,<sup>16</sup> a partnership counterclaim is proper.<sup>17</sup>

The instant case is important since the Court, without discussing the aforementioned rules in determining the invalidity of the counterclaim, extended the entity theory of partnership to the area of pleading. Previous decisions in New York have gone only so far as to regard partnerships as entities for purposes of construing agreements and statutes.<sup>18</sup> The Court reasoned that even if the non-

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<sup>11</sup> Merchants' Nat. Bank of Los Angeles v. Clark-Parker Co., *supra* note 9, 9 P. 2d at 827.

<sup>12</sup> Sloan & Co. v. McDowell, 71 N. C. 356 (1874).

<sup>13</sup> Burton v. Blytheville Realty Co., 108 Ark. 411, 158 S. W. 131 (1913) (plaintiff v. partnership; same partners counterclaim personal debt belonging to old firm of which they were members). *But see* Select Theatres Corp. v. Harms, Inc., 273 App. Div. 505, 506, 78 N. Y. S. 2d 159 (1st Dep't 1948) (Section 266 of the New York Civil Practice Act ["A counterclaim may be any cause of action in favor of the defendants or some of them against the plaintiffs or some of them . . . ."] ". . . has not abolished the rule that the debts asserted between plaintiff and defendant must be mutual, and, to be mutual, the debts must be to and from the same persons in the same capacity . . . .").

<sup>14</sup> Abraham v. Selig, 29 F. Supp. 52 (S. D. N. Y. 1939). In construing Federal Rules of Civil Procedure 13(c), the court also stated that a partnership is not strictly a legal entity and that its decision would forestall a multiplicity of suits.

<sup>15</sup> Hall v. Allen, 80 Mo. 286 (1883); Edelman v. Scholl, 65 Pa. Super. 357 (1916).

<sup>16</sup> Hughes v. Trahern, 64 Ill. 48 (1872); Burns v. Lopez, 256 N. Y. 123, 175 N. E. 537 (1931); Second Nat. Bank of Cincinnati v. Hemingray, 34 Ohio St. 381 (1878).

<sup>17</sup> See PRASHKER, CASES AND MATERIALS ON NEW YORK PRACTICE 536-538 (4th ed. 1953) for other examples.

<sup>18</sup> See Geitner v. U. S. Fidelity & Guaranty Co., 251 N. Y. 205, 167 N. E. 222 (1929) (entity for construing insurance agreement); Bank of Buffalo v. Thompson, 121 N. Y. 280, 24 N. E. 473 (1890) (entity for construing mortgage agreement); Matter of Schwartzman, 262 App. Div. 635, 30 N. Y. S. 2d 882 (3d Dep't 1941), *aff'd mem.*, 288 N. Y. 568, 42 N. E. 2d 22 (1942) (entity for construing state unemployment insurance law); *see* Hartigan v. Casualty Co. of America, 227 N. Y. 175, 179, 124 N. E. 789, 790 (1919). *But see* Williams v. Hartshorn, 296 N. Y. 49, 69 N. E. 2d 557 (1946).

partnership counterclaim asserted a cause of action against the partners individually, it did not include the party plaintiff, the limited partnership, and hence such a counterclaim was invalid.<sup>19</sup> The individual partners were not deemed party plaintiffs upon the theory that a partnership is a legal person, distinct from its members, rather than an aggregation of joint obligors.<sup>20</sup>

Moreover, since the entity concept denies the identification of the individual partners as the partnership, the Court, in holding that a partner serves in two distinct capacities, individual and partnership, extended to the law of partnerships the rule—already applied to trustees,<sup>21</sup> executors and administrators<sup>22</sup> by statute—that a person suing in one capacity should not be subject to counterclaims in another capacity.<sup>23</sup> The dual capacity concept as applied to partnerships, however, is not altogether new, since New York statutes distinguish between a partner's private creditors and partnership creditors.<sup>24</sup>

A prime consideration in deciding these cases should be to prevent appropriation of partnership assets to satisfy a private debt of the partner. Since such an allocation could possibly jeopardize the partnership's financial standing, it would be inequitable to other partners, partnership creditors, and even employes of the partnership. In fact, to allow such a non-partnership counterclaim would be contrary to the New York Partnership Law which provides that partnership property is not subject to attachment or execution for collection of a partner's individual debts.<sup>25</sup> The instant decision, in by-passing considerations of mutuality and of the joint or several nature of partnership obligations, simplifies the rule on counterclaim. The holding, if also applied to general partnerships, abolishes the setting off of partnership against non-partnership claims, even if they are mutual. Because the partnership is an entity distinct from its members, non-partnership claims against its individual members are improper, and likewise, partnership counterclaims by a partner against the plaintiff belong to the entity, not the partner.

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<sup>19</sup> *Hillary Holding Corp. v. Brooklyn Jockey Club*, 273 App. Div. 538, 78 N. Y. S. 2d 151 (1st Dep't 1948); *Kelvin Engineering Co. v. Knott*, 212 App. Div. 413, 208 N. Y. Supp. 729 (1st Dep't 1925); *Williams v. Tompkins, Inc.*, 208 App. Div. 574, 204 N. Y. Supp. 168 (1st Dep't 1924); N. Y. CIV. PRAC. ACT § 271.

<sup>20</sup> For explanation of entity and aggregate theory, see Williston, *The Uniform Partnership Act, With Some Remarks on Other Uniform Commercial Laws*, 63 U. OF PA. L. REV. 196, 207 (1915).

<sup>21</sup> N. Y. CIV. PRAC. ACT § 267(3).

<sup>22</sup> *Id.* § 269.

<sup>23</sup> *Select Theatres Corp. v. Harms, Inc.*, 273 App. Div. 505, 78 N. Y. S. 2d 159 (1st Dep't 1948); *Binon v. Boel*, 271 App. Div. 505, 66 N. Y. S. 2d 425 (1st Dep't 1946), *aff'd mem.*, 297 N. Y. 528, 74 N. E. 2d 466 (1947).

<sup>24</sup> N. Y. PARTNERSHIP LAW §§ 51(2)(c), 51(2)(e), 71(h).

<sup>25</sup> *Id.* § 51(2)(c).

Moreover, as regards limited partnerships, since the limited partners are akin to corporate stockholders and since limited partnerships are statutory creations, there is good reason to regard them as legal entities.<sup>26</sup> In any event, for those who fear the inroads of the entity theory in the law of partnerships,<sup>27</sup> the decision does not relieve the partners from their full individual liability for *partnership* debts.



STATUTE OF LIMITATIONS — CONTRACT PERIOD APPLIED TO BREACH OF IMPLIED WARRANTY.—A cowboy suit, which decedent's mother had bought from the defendant, caught fire and fatally burned the child. In an action by the father, as administrator of his infant son's estate, on the theory of breach of implied warranty of fitness for use, the negligence statute of limitations was pleaded as a defense, since more than three years had elapsed from the happening of the accident. In affirming the lower court's denial of an order to dismiss the complaint, the Court of Appeals *held* that the six-year contract limitation period is applicable to actions for breach of implied warranty. *Blessington v. McCrory Stores Corp.*, 305 N. Y. 140, 111 N. E. 2d 421 (1953).

New York decisions have indicated that the form in which a complaint is framed, whether *ex contractu* or *ex delicto*, is immaterial in determining the applicable statute of limitation. The deciding factor is the true gravamen of the action.<sup>1</sup> In *Schlick v. New York Dugan Bros., Inc.*,<sup>2</sup> the three-year negligence period of limitation was held applicable to breach of implied warranty actions. The court clearly indicated the reasoning which motivated its decision when it stated that "[a]n action to recover damages for personal

<sup>26</sup> See *Lanier v. Bowdoin*, 282 N. Y. 32, 38, 24 N. E. 2d 732, 735 (1939); *Skolny v. Richter*, 139 App. Div. 534, 537-538, 124 N. Y. Supp. 152, 154-155 (1st Dep't 1910) (shows how a special partner is related in a "detached and impersonal" way to the partnership); see N. Y. PARTNERSHIP LAW §§ 91 (permitting creation of limited partnership), 115 (limited partner not a proper party to proceeding by or against a partnership); CRANE, PARTNERSHIPS 117-120 (2d ed. 1952).

<sup>27</sup> See Williston, *The Uniform Partnership Act, With Some Remarks on Other Uniform Commercial Laws*, 63 U. OF PA. L. REV. 196, 208-209 (1915).

<sup>1</sup> *Webber v. Herkimer & Mohawk St. R. R.*, 109 N. Y. 311, 16 N. E. 358 (1888); *Loehr v. East Side Omnibus Corp.*, 259 App. Div. 200, 18 N. Y. S. 2d 529 (1st Dep't 1940), *aff'd mem.*, 287 N. Y. 670, 39 N. E. 2d 290 (1941); *Hermes v. Westchester Racing Ass'n*, 213 App. Div. 147, 210 N. Y. Supp. 114 (1st Dep't 1925); *Burrell v. Preston*, 54 Hun 70, 7 N. Y. Supp. 177 (Sup. Ct. 1889).

<sup>2</sup> 175 Misc. 182, 22 N. Y. S. 2d 238 (N. Y. City Ct. 1940).