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Action Against Partnership in Name-Effect of General Denial

ACTION AGAINST PARTNERSHIP IN FIRM NAME—EFFECT OF GENERAL DENIAL.—The plaintiff brought an action for money had and received against a partnership, designating the defendants as "—— Thompson whose christian name is unknown, and —— McKinnon whose christian name is unknown, doing business under the style and firm name of Thompson and McKinnon." Service of process was made upon the office manager of the partnership of Thompson and McKinnon in the description of the above caption. After a filing and then a withdrawal of a special and limited appearance by fourteen named and designated parties to quash the summons, the defendants answered in general denial in the manner of the above caption. Evidence was excluded of the death of a Mr. Thompson which occurred more than four years before this cause of action accrued. From a verdict and judgment for the plaintiff against the defendant named as above, the defendant appealed. Held, that the judgment was contrary to law in that the individual partners were not sufficient designated, and that it was reversible error to have excluded the above evidence; new trial granted.[1]

The well known common law rule that a partnership cannot be sued in the firm name alone, but that the individual names of the members thereof must be set out in the complaint was early adopted in Indiana.[2] This rule has been continually followed in actions against a partnership as a type of business organization.[3] In this respect it is consistent with the status of the law in the majority of the states,[4] except where recent statutes have enabled unincorporated associations to sue and be sued in the association name. The reason for the rule is to render judicial proceedings certain and conclusive as between the parties, and to give full force and effect to the doctrine of res judicata.

However, not only have recent statutes in several jurisdictions changed this common law rule, but also there are many states which have changed it without the aid of a statute by recognizing the partnership as a legal entity for the purposes of suing and being sued.[5] Probably the first case to go this

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[8] In re Duncan (1920), 73 Ind. App. 270, 127 N. E. 289; Birdsell Mfg. Co. v. Tripp (1923), 80 Ind. App. 450, 141 N. E. 252; Clark v. Woods (1933), 95 Ind. App. 530, 183 N. E. 804.

[1] Thompson v. Corn (1936), 200 N. E. 737 (Ind. App.).

[2] Hays v. Lanier (1833), 3 Blackf. 322 (Ind.).

[3] Livingston v. Harvey (1858), 10 Ind. 218, Adams Express Co. v. Hill (1873), 43 Ind. 157, Pollock v. Dunning (1876), 54 Ind. 115, Karges Furniture Co. v. Amalgamated Union (1905), 165 Ind. 421, 75 N. E. 877

[4] Conn v. Sellers (1917), 198 Ala. 606, 73 So. 961, Hotchkiss v. Di Vita (1925), 103 Conn. 436, 136 Atl. 668, International Harvester Co. v. Clements-Middleton Co. (1931), 35 S. W (2d) 462 (Tex. Civ. Appeals), Pope v. State (1935), 86 S. W (2d) 475 (Tex. Civ. Appeals); Wilson v. Guess Dry Cleaning Co. (1934), 5 Fed. Supp. 762 (Miss.).

[5] Johnson v. Smith (1841), Morris Reports 105 (Iowa), People v. Zangain

far said that there were in reality no very weighty arguments against allowing suits in the partnership name and to do so would encourage and facilitate the operations of mercantaile traffic.[6] It is this social interest in facilitating rapid and easy method for suing partnerships that has caused courts and legislatures to dodge, disregard, and modify the difficulties of the common law rule. This tendency seems to be gaining strength in the cases.

Almost as early as the above common law rule was adopted in Indiana, it was also held that an action against or a judgment in the partnership name was not void but only irregular, and that a timely objection must be taken to the defect or otherwise it will be considered waived.[7] Since this early case the doctrine that a judgment by or against a partnership in the firm name is not a nullity but only a defect of parties seems firmly established by the rather large number of cases in Indiana which have affirmed it.[8] When faced squarely with the issue in a comparatively recent case, the Indiana Supreme Court in summarizing the previous cases said, "A judgment in favor of or against a firm in its firm name, or in favor of or against a person by his surname alone, or by a name in which an initial letter is used instead of his christian name, is not void but is merely irregular.[9] It is then held that the proper objection to this defect is by a plea in abatement, and where such plea was not made, but the opponent answered by general denial, going to trial on the merits of the case, there was a waiver of the defect.[10] The situation is likened to the case of the ordinary misnomer of a party defendant, which, both in Indiana and elsewhere, has from earliest adjudications been held to be a proper matter only for plea in abatement.[11] Upon the doctrine that judgments by and against the partnership in the firm name are not void but only irregular, and that the defect of the suit commenced in that manner can be waived by a failure to plead in abatement, the weight of authority of other jurisdictions is in accord with the Indiana rule.[12]

(1921), 301 Ill. 299, 133 N. E. 783, Jensen v. Wiersma (1919), 185 Iowa 551, 170 N. W 780; Thurston v. Detroit Asphalt Co. (1924), 226 Mich. 505, 198 N. W 345; Bankers Trust Co. v. Knee, Sheriff (1935), 263 N. W 549 (Iowa).

[6] Johnson v. Smith (1841, Morris Reports 105 (Iowa).

[7] Thatcher v. Coleman (1839), 5 Blackf. 76 (Ind.). This case seems analogous to the principal case in that the judgment was recovered against the defendants in their surnames only. The court held that the objection founded on the omission of the christian names was waived by the defendants' appearance and confession of judgment.

[8] Jones v. Martin (1840), 5 Blackf. 351 (Ind.); Peden's Adm. v. King (1868), 30 Ind. 181; Adams Express Co. v. Hill (1873), 43 Ind. 157; Hopper v. Lucas (1882), 86 Ind. 43; Meyer v. Wilson (1906), 166 Ind. 651, 76 N. E. 748.

[9] Meyer v. Wilson (1906), 166 Ind. 651, 76 N. E. 748.

[10] Peden's Adm. v. King (1868), 30 Ind. 181, Meyer v. Wilson (1906), 166 Ind. 651, 76 N. E. 748; Jones v. Martin (1840), 5 Blackf. 351 (Ind.); Thatcher v. Coleman (1839), 5 Blackf. 76 (Ind.), Hopper v. Lucas (1882), 86 Ind. 43.

[11] Boland v. Claudel (1913), 181 Ind. 295, 104 N. E. 577; Board of Commissioners v. Huffman (1892), 134 Ind. 1, 31 N. E. 570; McGaughey v. Woods (1885), 106 Ind. 380, 7 N. E. 7; McCarthy v. McCarthy (1879), 66 Ind. 128; Weaver v. Jackson (1846), 8 Blackf. 5 (Ind.), Gilbert v. Nantucket Bank (1809), 5 Mass. 97; Commonwealth v. Dedham (1819), 16 Mass. 141.

[12] Pate v. Bacon Co. (1818), 6 Munford 219 (Va.); Seizt v. Buffum (1850), 14 Pa. 69; Marshall v. Hill (1835), 8 Yerg. 101 (Tenn.); Davis v.

By statute in Indiana it is provided that a partnership may be served with process on any action growing out of the partnership business in any county where the firm conducts an office or agency.[13] Under this statute it has been held that a default judgment entered in the wrong name is valid if in fact the real party in interest was served with process and then failed to make a special appearance and plead the misnomer in abatement.[14] If it can be said from the form of the complaint in the principal case that this was an action against the brokerage firm of Thompson and McKinnon, brought in the firm name, it seems quite clear that under this statute the Appellate Court erred in its conclusion of law that the fourteen persons so operating the partnership were not served with process. This statute was passed with the obvious purpose to abolish the procedural difficulties existing at common law where each partner had to be individually served.[15] If the process was served in the partnership name it would be, as previously noted, a mere defect of names which will be waived unless especially pleaded in abatement. We have a clear statute in Indiana which expressly provides that the character or capacity in which a party sues or is sued, and the authority by which he sues, shall not be questioned unless it be denied by a plea in abatement.[16]

The soundness of the decision in the principal case, as tested by the rules of law heretofore stated, will depend upon the proper construction of the complaint containing the designation of the parties defendant. The question presented is whether this is an action against a Mr. "——— Thompson" and a Mr. "——— McKinnon," or an action against the firm of Thompson and

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Kline (1882), 76 Mo. 310; Frisk v. Reigelman (1889), 75 Wis. 499, 43 N. W 1117, Olsen v. Veazie (1894), 9 Wash. 486, 37 Pac. 677, Ives v. Muhlenburg (1907), 135 Ill. App. 517, Thomas Ord v. Neiswanger (1909), 81 Kans. 63, 105 Pac. 17, Brownson v. Metcalfe (1854), 1 Handy 188 (Ohio), Foreman v. Weil Bros. (1893), 98 Ala. 495, 12 So. 815, Cady v. Smith (1882), 12 Nebr. 628, 12 N. W 95, Ketelson v. Pratt Bros. (1907), 100 S. W 1172. (Tex. Civ. Appeals), Spaulding Co. v. Godbold (1909), 92 Ark. 63, 121 S. W 1063.

[13] Burns' 1933, section 2-703.

[14] Bloomfield R. R. Co. v. Buress (1882), 82 Ind. 83, Vogel v. Brown Township (1887), 112 Ind. 299, 14 N. E. 77, Kingen v. Stroh (1893), 136 Ind. 610, 36 N. E. 519. It is here stated that jurisdiction of the defendant depends on the actual service of process and not on the accurate statement of the names of the parties. Thus it is held that the defect is waived by a failure to put in a special appearance to plead in abatement.

[15] Another statute very much in point provides that all persons conducting a partnership business in an assumed name, other than the real names of the persons conducting such business, must file with the clerk of the circuit court of the county in which such business or office may be situated a certificate stating the full name and residence of each person engaged therein.—Burns' 1933, section 50-201. This statute seems to be a most direct answer to the difficulty expressed by the court "of determining who the persons were constituting the alleged partnership under the firm name and style of which the business was transacted, and upon whom the service of summons was had, and against whom judgment could be rendered." Although the legislature has not so far expressly authorized actions by and against the partnership in the firm name, this section seems, in the opinion of the writer, to rock the very foundation of the common law refusal to do so, for it provides a method for obtaining certainty of parties. Also see Burns' 1933, section 3-1113, where in the Uniform Declaratory Judgment Act it is expressly provided that a declaratory judgment may be rendered in the firm name.

[16] Burns' 1933, section 2-1034.

McKinnon, a partnership existing at the time of the plaintiff's cause of action and with whom she had transacted business. If it is the former, the ruling of the Appellate Court in reversing the trial court for excluding the evidence of the death of a Mr. Thompson, which occurred some four years previous to the plaintiff's cause of action, seems correct; such evidence would prove the non-existence of the partnership at the time of this cause of action. However, in the opinion of the writer, such a construction of the complaint seems questionable. It certainly seems obvious that this complaint directs a cause of action against the new partnership, which retained the identical firm name used before the death of Mr. Thompson and the resignation of Mr. McKinnon, and that such new partnership was designated as a party defendant by the firm name in the complaint and in the verdict and judgment of the trial court. Those words in the complaint, "——— Thompson" and "——— McKinnon," seem meaningless, whereas the partnership name of "Thompson and McKinnon" is fully stated. If this is an action against a Mr. Thompson and he in fact was dead, then there was an answer in general denial by a dead man without his personal representative being made a party to the action, which, it is submitted, would be a novel procedure under our system of law. Whereas if the general appearance was made by someone other than the deceased person, and that someone was the partnership, there seems to be ample authority that the partnership would be bound by the judgment; for it seems to be the settled law in Indiana that one who employs counsel and procures a matter to be litigated in the name of another, who is only nominally interested, is concluded by the judgment rendered upon the matter in question.[17] Also, to the extent of the validity of the proceedings, the authority of the attorney to appear will be conclusively presumed.[18] Thus, upon considering the record of the proceedings as discussed by the Appellate Court,[19] one can readily understand why the trial court would regard the partnership of Thompson and McKinnon as the party defendant who contested the plaintiff's rights on the trial of the merits of the case.

In the opinion of the writer, the holding of the principal case is out of harmony with the well established rule in Indiana as to the effect of a plea of general denial to a complaint brought against a partnership in the firm

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[17] Shugart v. Miles (1890), 125 Ind. 445, 25 N. E. 551; Montgomery v. Vickery (1886), 110 Ind. 211, 11 N. E. 38, Griffis v. First National Bank (1907), 168 Ind. 546, 81 N. E. 490; Worley v. Hineman (1892), 6 Ind. App. 240, 33 N. E. 260.

[18] That the authority of the attorney is presumed to the extent of giving validity to the proceedings and public policy forbids a collateral attack upon the record and judgment, see Hunter v. Harrel (1928), 88 Ind. App. 68, 163 N. E. 295, Holliger v. Reeme (1894), 138 Ind. 363, 36 N. E. 1114, Shultz v. Shultz (1894), 136 Ind. 323, 36 N. E. 126, Jones v. Crowell (1896), 143 Ind. 218, 42 N. E. 612.

[19] The proceedings show a complaint stating a cause of action for money had and received; a special appearance of fourteen persons by their attorney to quash the summons; a withdrawal of the special appearance, and then the same attorney filed an answer in general denial designating the defendants in the manner of the caption in the complaint; a finding of the jury that a partnership operating under the name of Thompson and McKinnon existed at the time of the plaintiff's cause of action; and that this partnership took a deposit of the plaintiff's money, the return of which she is now seeking.

name.[20] Also, the decision of the principal case does not discuss nor consider the equally well established doctrine that a judgment against a partnership in the firm name is not void but only irregular. In the light of these inconsistencies plus the ever increasing need for a convenient method of obtaining certainty of parties in transactions with various types of business organizations, the writer believes that a more desirable result would have been reached if the court had seen fit to uphold the trial court's decision. H. L. T.

MUNICIPAL CORPORATIONS—OFFICERS' BONDS.—Appellee, Sriver, was a duly appointed and qualified patrolman of the city of South Bend, Indiana, and gave bond for $2,000 to the city as required by statute,[1] conditioned on the faithful performance of his duties as said patrolman.[2] The relator was unlawfully injured and arrested by said Sriver while in line of duty and now sues on this bond. Held, there can be no recovery by an individual for personal injuries on this kind of a bond. There is no statute giving the individual such a right of action and there is no indication in the statute requiring such bonds of any intent or purpose to make the policeman and his sureties liable upon the bond for torts committed upon a stranger to the contract. Neither is there a special agreement in the bond for liability of torts committed by Sriver, nor is the relator a privy to the contract or its consideration.[3]

This case squarely presents the question of who can sue on a bond given by a policeman to the city conditioned on the faithful performance of his duties. As was stated in the court's opinion, this is a case of first impression in Indiana.

If the problem be confined to cases involving personal injuries rather than any other kind of torts, to injuries sustained in the enforcement of criminal law rather than civil process, and where there are no statutes permitting suit on such bonds, there are comparatively few decisions in point. These decisions show a rather even split of authority on the question. The writer's tabulation shows five other states in accord with the principal case and six contra in result. The states denying recovery are: Tennessee,[4] Georgia,[5] Texas,[6]

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[20] That a plea of general denial to a complaint brought against a partnership in the firm name constitutes a waiver of the defect of designating the parties defendant. Jones v. Martin (1840), 8 Blackf. 351 (Ind.), Peden's Adm. v. King (1868), 30 Ind. 181, Adams Express Co. v. Hill (1873), 43 Ind. 157, Hopper v. Lucas (1882), 83 Ind. 43, Meyer v. Wilson (1906), 166 Ind. 651, 76 N. E. 748.

[1] Chapter 129, Sec. 44 of the Acts of 1905, found in Sec. 48-1244, Burns' Ann. St. 1933, and Sec. 11423 Baldwin's Ind. St. 1934.

[2] That said Sriver "do honestly and faithfully discharge and perform all and singular, his duties as such patrolman during the continuance in office as such in all things according to law; and faithfully and accurately account to this Board, and deliver to the proper officers all valuables, money or effects coming into his possession as such officer."

[3] State ex rel. Abdiehl v. Sriver (1936), — Ind. —, 1 N. E. (2d) 579.

[4] Carr v. City of Knoxville (1921), 144 Tenn. 483, 234 S. W 328.

[5] Alexander v. Ison (1899), 107 Ga. 745, 33 S. E. 657, Hopkins v. Watts (1914), 141 Ga. 345, 80 S. E. 1001.

[6] U. S. Fidelity & Guaranty Co. v. Jasper (1909), 56 Tex. Civ. App. 236, 120 S. W 1145.