

## CONFLICT OF LAWS UNDER THE UNIFORM PARTNERSHIP ACT AND UNIFORM LIMITED PARTNERSHIP ACT.

The Uniform Acts, produced by the Commissioners on Uniform State Laws, create a condition of uniform law only among the states which adopt them. In the period preceding universal adoption of a particular act there are many points of law as to which there is conflict between the law of the act and the common law of a state which has not adopted it. Legal transactions and situations will arise during that period, some elements of which have their situs or locus in a jurisdiction governed by a uniform act, others in a jurisdiction governed by a different common law rule. If such situations and transactions come before courts for adjudication choice of law will have to be made in accordance with the principles of Conflict of Laws.

The territorial applicability of some of the provisions of the Uniform Partnership Act causes little difficulty. It is a familiar principle that a forum applies its own rules of procedure and none other. Sections of the act which are procedural will therefore be applied only by the courts of a jurisdiction which has adopted the act. Such sections as Sec. 40, consisting of Rules for Distribution of Insolvent Estates of Partnerships or of Partners, and Sec. 7 (4), which establishes rules of *prima facie* evidence for determining the existence of a partnership, are clearly procedural. Another familiar principle, that the acquisition, holding and disposal of title to real estate is governed by the law of the situs, limits the applicability of Sec. 8 (3) and (4), and Sec. 10, which provide for the acquisition and conveyance of partnership real estate, to cases involving real estate, the situs of which is in a jurisdiction which has adopted the act. The more difficult problems of Conflict of Laws arise out of contracts and other transactions by partners in jurisdictions other than that in which the partnership has its situs, when there is a difference between the law of the locus of the transaction and of the situs or domicile of the partnership. A few such problems will now be stated, with

suggestions for their solution, and references to the few pertinent decisions that have been found.

*First.*—A and B in Pennsylvania (one of the first states to adopt the Uniform Partnership Act) make a contract under which B is to carry on a business in State X (a state which has not adopted the act), and for some consideration furnished by A he is to receive a share in the profits of the business. C becomes a creditor of B in State X, and according to the law of X, A is liable on the contract because of the fact of his profit sharing.<sup>1</sup>

Section 7 of the act, entitled "Rules for Determining the Existence of a Partnership," reads in part as follows:

"In determining whether a partnership exists, these rules shall apply:

"(1) Except as provided by section 16, persons who are not partners as to each other are not partners as to third persons." (Section 16 provides for partners by estoppel.)

Can C hold A liable as a partner?

If A is liable on a contract made by B it is because of an act on his part which is by law of X given the effect of constituting him a co-principal in relation to the transactions of B. The act to which the law gives that effect is not the executory agreement of A and B, that profits shall be shared, but the performance of that agreement by the carrying on of business and sharing of profits.<sup>2</sup> If A did become entitled to a share in profits in X, then under the law of X he became a principal and liable to third persons as a partner on B's contracts in the course of the business. The liability is created, if at all, not by the executory agreement in Pennsylvania, but by the profit sharing in X, and in accordance with the law of X.<sup>3</sup> C therefore can hold A liable.

Suppose, instead of suing in State X, where the law of the forum concurs with the law of the locus of the contract between B and C, and the law of the locus of the event of profit sharing, which determines A's legal relation to B's contracts, all agreeing

<sup>1</sup> See collection of authorities on partnership liability based on profit sharing, in 18 L. R. A., N. S., 963.

<sup>2</sup> Hart v. Kelley, 83 Pa. 286.

<sup>3</sup> Waverly National Bank v. Hall, 150 Pa. 466; Citizens National Bank v. Hine, 49 Ct. 236.

in imposing liability on A, that suit is brought in Pennsylvania. Will the fact that the law of the forum is opposed to liability in such a case affect the result? It might be claimed that the forum should not, for reasons of public policy, impose on a citizen a liability contrary to the statutes of the forum and of his domicile. On such a ground the United States Supreme Court has refused to enforce against a married woman sued in the court of her domicile, a contract valid by the law of the place of contracting, but invalid for lack of capacity by the statutes of the forum and domicile of the defendant.<sup>4</sup> It is hardly likely that Sec. 7 (1) will be considered as involving so strong considerations of public policy as the laws for protection of the property of married women.

It might be argued that Sec. 7 (1) is a procedural provision and therefore necessarily applicable by the forum.<sup>5</sup> The title of the section, "Rules for Determining the Existence of a Partnership" suggests rules of evidence. Sub-section (4) seems undoubtedly to contain rules of evidence, and to be a procedural section applicable by the courts of the jurisdiction which has adopted the act, and none other.<sup>6</sup> But as sub-section (1) is

<sup>4</sup> Union Trust Co. v. Grossman, 38 Supreme Court (U. S.) 147.

<sup>5</sup> Uniform Partnership Act, Sec. 7:

"Sec. 7. (Rules for Determining the Existence of a Partnership.) In determining whether a partnership exists, these rules shall apply:

"(1) Except as provided by section 16, persons who are not partners as to each other are not partners as to third persons.

"(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

"(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

"(4) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

"(a) As a debt by installments or otherwise.

"(b) As wages of an employee or rent to a landlord.

"(c) As an annuity to a widow or representative of a deceased partner.

"(d) As interest on a loan, though the amount of payment vary with the profits of the business.

"(e) As the consideration for the sale of the good-will of a business or other property by installments or otherwise."

<sup>6</sup> A forum applies its own rule of what is *prima facie* evidence, even to a transaction occurring in another jurisdiction, *Pennsylvania Co. v. McCann*, 54 Ohio St. 10; and not the rule of the jurisdiction in which the transaction occurred, *Jones v. Chic., St. P., N. & O. R. Co.*, 80 Minn. 488.

worded in language appropriate to a rule of substantive law, it would probably not be held to be procedural, in spite of its context. Wherever suit is brought, A's liability to third persons as a partner should be determined by the law of X.

*Second.*—The firm of A and B is formed in Pennsylvania, where it maintains its principal place of business. A is in charge of a branch in State X, and there executes and delivers to C a promissory note in the name of the firm for money loaned. No member of the firm is expressly authorized to borrow money or execute notes, but such acts are usual in the conduct of the business of other firms in the same line of business in the community where the branch is located and A has acted. By the law of X the firm is bound by the note.<sup>7</sup> Under section 9 (1) and (2),<sup>8</sup> the firm is not liable, because the act of A is not "apparently carrying on in the usual way the business of the partnership." Is the firm liable?

As no question of procedure is involved, it should make no difference where suit is brought. The issue is whether the implied authority of a partner depends upon the law of the place where he acts, or on the law of the place where the firm was organized and has its principal place of business. He is the agent of the firm to carry on its business in X, and in the furtherance of its business does an act. Whether that act is within the incidental powers attached to the general power to carry on the firm

<sup>7</sup> A member of a trading firm is presumed to have authority to issue negotiable instruments, and the course of business of other firms in the same community engaged in the same general line of business is the measure of his implied authority. *Woodruff v. Scaife*, 83 Ala. 152; *Standard Wagon Co. v. Few & Co.*, 119 Ga. 293; *Smith v. Collins*, 115 Mass. 388; *Buckley v. Wood & Co.*, 4 Pa. Super. Ct. 391; *Irwin v. Villiar*, 110 U. S. 499. The commissioners have deliberately adopted a narrower rule for the act. See 28 *Harv. Law Rev.* 779; 29 *ibid.* 299.

<sup>8</sup> Uniform Partnership Act, Sec. 9:

"Sec. 9. (Partner Agent of Partnership as to Partnership Business.)

"(1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

"(2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership, unless authorized by the other partners."

business should depend on the law of the place where he is, by authority from the partnership, carrying on the business. This view is supported by the weight of authority both in cases of partnership,<sup>9</sup> and agency.<sup>10</sup>

*Third.*—A, a member of the Pennsylvania partnership of A and B, makes a contract with C in state X. By the law of X partnership liability is joint and several. Under section 15 of the act, partnership liability is joint. Is the liability joint, or joint and several?

There is no question that the contract is a valid contract, and that A and B as partners are parties to the contract. The question is as to the nature of the liability created, the effect of the contract, whether it is determined by the law of the contract, or by the law of the place where the agency relation was created between the firm of A and B, and the acting partner A. The issue is analogous to that in the preceding problem. Assuming an agency to exist, then the scope of the incidental powers, the means and methods legally permissible for the execution of the agency, should depend on the law of the place where the agent acts. The liability should therefore be joint and several. An analogous question has been passed on in Louisiana.<sup>11</sup> By the law of Louisiana, where the contract was made, liability of each partner in the sort of partnership involved was for his virile share, while by the law of Pennsylvania, where the partners were domiciled, liability was *in solido*. It was held that the extent of the liability was governed by the law of the contract, not of the situs of the partnership.

Suppose the contract made by A with C in State X was to be performed by the partnership in Pennsylvania. By the majority of courts the effect and liability created by the contract, as well as its validity, would be determined in accordance with the law of the place of performance.<sup>12</sup>

<sup>9</sup> Park Bros. & Co. v. Kelly Mfg. Co., 49 Fed. 618.

<sup>10</sup> *Chatenay v. Brazilian Submarine Telegraph Co.* (1891), 1 Q. B. 79; *American Fire Ins. Co. v. King Lumber & Mfg. Co.*, 77 So. Rept. 168 (Florida, 1917); *contra*, *Freeman's Appeal*, 68 Ct. 533.

<sup>11</sup> *Baldwin v. Gray*, 4 Martin, N. S., 192.

<sup>12</sup> *Cox v. United States*, 6 Pet. 172; *Baum v. Birchall*, 150 Pa. 164; *Burnett v. Pennsylvania Railroad*, 176 Pa. 45. See cases collected in articles by J. H.

Suppose the contract was made and was to be performed in State X, but suit is brought in Pennsylvania. It might be claimed that whether a partner can be sued alone as severally liable, or whether all must be joined, is a question of who are the proper parties to the action, a question of procedure to which the law of the forum applies. The statutes making partnership liability joint and several have been treated by the courts of some of the states in which they have been adopted as procedural, and the liability "is deemed to be joint and several for the purposes of suit," and not as changed in respect to the substantive law.<sup>13</sup> If the statute of X making liability joint and several is a rule of substantive law, it should be enforced by the forum.<sup>14</sup> If the statute is merely procedural, the forum would give no effect to it. Decisions of the courts of X should guide the forum in construing the statute.

*Fourth.*—A, a member of the Pennsylvania firm of A and B, in Pennsylvania, executes and delivers to C, his separate creditor, a firm note. C takes the note to X and endorses it before maturity to D, a purchaser for value without notice. By the law of X, D can enforce the note against the firm, while by the law of Pennsylvania he can not.<sup>15</sup> Which law governs?

Beale, "What Law Governs the Validity of a Contract," 23 Harv. Law Rev. 179, 194, 260.

<sup>13</sup>Some statutes are obviously procedural, as that of Dis. Col. Code, Sec. 1205, to the effect that partnership contracts and obligations "shall for the purpose of the suit thereupon be deemed to be joint and several," the New York Statute III, Consolidated Laws, page 2522, reading: "Every general partner is liable to third persons for all the obligations of the partnership jointly and severally with his general partners," appears to be a statement of substantive law. See article by F. M. Burdick, "Liability of Partners," 11 Col. Law Rev. 101.

<sup>14</sup>*Cf.* Elmer v. Hall, 148 Pa. 345, which holds that under the statutes of New York an assignee becomes legal owner of the claim assigned and, therefore, where the assignment was made in New York, under the operation of New York law, the assignee acquired the power to sue in his own name anywhere.

<sup>15</sup>The pertinent provisions of the act are as follows:

"Sec. 9. (Partner Agent of Partnership as to Partnership Business.)

"(1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

"(2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership, unless authorized by the other partners."

We have an instrument which is, by the law of the place of making, void and unenforceable by a transferee. Can that instrument be validated by a negotiation in a state by whose laws it would have that result? It is a question of the effect of negotiation to cut off defenses of the maker. That is possible only if the note is issued with the inherent potentiality of being validated by negotiation. It must have that as one of its attributes from the first. That attribute, generally called negotiability, must therefore be attached to it by the law of the place of making. Only by operation of that law is it a negotiable instrument.<sup>16</sup>

*Fifth.*—A, B and C form and carry on a partnership in State X. C dies. Subsequently B makes a contract in Pennsylvania, in the partnership name, with D. No notice of dissolution of the partnership has been given and by the law of State X, in case of dissolution by death, no notice is necessary to terminate authority of partners to bind co-partners by further contracts. Under the Uniform Partnership Act, Sec. 35, notice of dissolution is necessary in order to terminate the authority of a partner, except when the partnership is dissolved because it is unlawful to carry on the business. D sues the surviving members of the firm in Pennsylvania. Are they both liable?

This is a question of the relation of A to B at the time of B's act. Has the former relation of principal and agent terminated or not? The law governing the relation and its termination is the law of the place where the relation was formed and

While making the note is, so far as D is aware, "apparently for carrying on the business in the usual way," yet C, "the person with whom he (A) is dealing, has knowledge of the fact that he has no such authority." The note does not therefore bind the partnership, even in the hands of D.

This may seem an over literal construction of the act, but such a construction is not impossible. It might even seem that such construction is the one which would be expected from a court which has construed the Uniform Negotiable Instruments Act in so mechanical a fashion as in *Wisner v. The First National Bank of Gallitzin*, 220 Pa. 21. (Holding that as Sec. 185 declares that a check is a bill of exchange, the failure of a drawee bank to return a check within twenty-four hours after delivery constitutes an acceptance under Sec. 137. The legislature promptly amended the latter section by adding a proviso: "That the provisions of this section shall not apply to checks." 6 Pur. Dig. 7018.)

For common law decisions favoring D, see *Ames' Cases on Partnership*, 519 n.; 30 Cyc. 513.

<sup>16</sup> *Herdic v. Roessler*, 109 N. Y. 127; *Ory v. Winter*, 4 Martin, N. S., 277. For other cases see 61 L. R. A. 208 n.

was being principally carried on—the law of State X. If the relation was terminated under that law, though no notice was given, then A, acting in Pennsylvania, does not represent B and can not make him a party to a contract. This is in accordance with the decision in a converse case: *Easton v. George Wostenholm & Son*.<sup>17</sup> In that case a California partnership had a branch in Costa Rica, where a partner made a contract, after the retirement of a co-partner, without giving the notice required under the law of California. It was held that the co-partner was liable, irrespective of the law of Costa Rica, which apparently did not require notice. If notice made necessary by the law of the domicile of the partnership is indispensable to terminate authority to act elsewhere, it should follow that authority to act elsewhere is terminated if, without notice, the agency relation terminates at the domicile of the partnership.

*Sixth.*—A and B form and carry on a partnership in Pennsylvania. It is voluntarily dissolved and A is appointed liquidating partner. A gives a promissory note to C in payment of a debt barred by the Statute of Limitations. C brings suit on the note in State X. By the law of State X a liquidating partner has no power to revive a liability barred by the Statute of Limitations. Under the Partnership Act, Sec. 35 (a), a partner, after dissolution, can bind the partnership “by any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution.” Under the previous Pennsylvania decisions it has been held that a liquidating partner retains his power to revive a barred claim,<sup>18</sup> and such acts would probably be held within the authority given by the act. Does the law of the forum or the law of the domicile of the partnership and place of contracting govern?

By the law of the forum, the Statute of Limitations can be tolled by a new promise. There has been a new promise. That satisfies the law of the forum, provided the new promise is binding on the co-partner. This latter question depends on whether dissolution has terminated the partner's powers, and should be

<sup>17</sup> 137 Federal 524.

<sup>18</sup> *Houser v. Irvine*, 3 W. & S. 345; *Reppert v. Colvin*, 48 Pa. 248; *Wilson v. Waugh*, 101 Pa. 233.



governed by the law of the jurisdiction in which the dissolution occurs. Therefore, the law of Pennsylvania should apply. In the only case of this sort which has been found, a contrary decision was rendered: *Kerker v. Wood*,<sup>19</sup> on the ground that this question pertained wholly to the remedy.

*Seventh.*—A limited partnership is formed in Pennsylvania under the Uniform Limited Partnership Act. One of the general partners makes a contract in State X, which has no provisions whatever for the formation of a limited partnership. Is a special partner liable on the contract?

This depends upon the relation between the special partner and the active partner who made the contract. Is the special partner a principal? This should be referred to the law governing the formation of the relation, that is, the law of Pennsylvania. This result has been reached in several cases.<sup>20</sup>

If the action is brought in State X, it should make no difference that the forum has no statutory provisions for the formation of limited partnerships, as the institution of limited partnership is not obnoxious to public policy, nor is it necessary to disregard the institution for the protection of citizens of the forum. Even if the court of State X should think otherwise on the question of public policy it is difficult to see how they could hold the special partner liable as it is not a question of disregarding a right created in a foreign jurisdiction, but of the forum attempting to create a right based on a transaction in a foreign jurisdiction, namely, the formation of the relation between the special and general partners, which according to the law governing the transaction does not create an agency relation at all. A forum should not, solely out of its own law, create a legal relation, as of agency, burdensome to a person who has not acted or, in fact, caused another to act within the jurisdiction of its law.

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<sup>19</sup> 48 Ohio State 613.

<sup>20</sup> King v. Sarria, 69 N. Y. 24; Barrows v. Down, 9 R. I. 446.