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Right of Partnership to Sue or Be Sued in its Own Name

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Civil Practice Act and the codification of the practice relating to the issuance of a certificate of finality by the County Clerk in order to eliminate differences in practice as to types of interlocutory decrees rendered in the various departments of the state and thus make such procedure uniform throughout New York State.[4] Thus, the automatic type of interlocutory judgment which now prevails in most counties becomes the only type authorized by statute after September 1, 1946.

Thus the possibility of marriages, entered into by one of the parties more than three months after granting of the interlocutory decree, being declared bigamous and void is now obviated.[5] The County Clerk will now attach the original certificate of finality to the interlocutory judgment and indicate the issuance of a certificate of finality in his minutes of the action thus obviating the necessity of searching the file and the clerk's minute book more than once for orders affecting the validity of the judgment.[6]

Section 7-a of the Domestic Relations Law is similarly amended, effective September 1, 1946, in order to keep all divorce, annulment or dissolution of marriage actions in conformity.[7]

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RIGHT OF PARTNERSHIP TO SUE OR BE SUED IN ITS OWN NAME. —At common law a partnership could not sue or be sued in its own name but only in the name of all its individual members.[1] This followed naturally from the doctrine that a partnership was not a distinct legal entity but merely an aggregate of individuals. In suits in which the partnership was the defendant, this became particularly undesirable because of the many instances when it was quite difficult to ascertain who all the members of the partnership were.[2]

Although the non-entity theory has been well recognized, from time to time, either by judicial interpretation or by legislative enactment, partnerships have been clothed with entity characteristics for certain purposes. Thus in equity this has been common practice as far as "the keeping of accounts" is concerned or in "marshaling the

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[4] 12 Judicial Council Reports, 1946, p. 239.
[5] Pettit v. Pettit, 105 App. Div. 312, 93 N. Y. Supp. 1001 (3d Dep't 1905).
[6] N. Y. Laws 1946, c. 203, § 1, effective September 1, 1946.
[7] N. Y. Laws 1946, c. 203, § 2, effective September 1, 1946.

[1] J. V. Baldwin and Son v. Caflish, 182 App. Div. 477, 170 N. Y. Supp. 354 (4th Dep't 1918); Union Wine Co. v. Green, 62 Misc. 551, 115 N. Y. Supp. 921 (Sup. Ct. 1909); Calumet and Hecla Mining Co. v. Equitable Trust Co., 186 App. Div. 328, 174 N. Y. Supp. 317 (1st Dep't 1919).

[2] By statute it has been made a misdemeanor to fail to file a certificate giving the true names of the partners where the firm name does not bear the surnames of the partners; however, this statute has no civil effect. See N. Y. PENAL LAW § 440b.

assets of an insolvent or liquidating firm." [3] By statute a partnership may acquire property in its own name [4] and may sue or be sued in the firm appellation if the business is being carried on in the name of a deceased person.[5]

The legislature, in enacting Civil Practice Act, Section 222a,[6] has taken another step in limiting the common law aggregate theory without entirely changing partnerships to legal entities, for the statute merely affects procedure and not substance.[7] The law provides: "Two or more persons carrying on business as partners may sue or be sued in their partnership name whether or not such name comprises the names of the persons" and it is further provided where the partnership is the defendant that the service of summons may be made on any one of the partners with the same effect as though all the partners had been named as defendants by their own names.

The new law also states that the clerk with whom the judgment roll is filed must write upon the docket opposite the name of each member of the partnership upon whom the summons was served the word "summoned". This is more desirable than the old method of placing the words "not summoned" upon the docket, for usually suits in the partnership name will be brought for the reason that the party suing does not know the names of all the partners. Since this is so, it is more logical to put "summoned" next to the name of the person served, for the plaintiff surely knows that name, whereas to determine whom he did not serve would place upon him the burden of discovering the appellations of all the partnership members. This procedure of placing the word "summoned" after the name of the party being served has also been applied to the case of joint debtors so as to make the practice uniform.[8]

Resort to Civil Practice Act, Section 222a, is permissive, not mandatory, and will generally be necessitated only when the plaintiff is unable to determine all the members of a partnership.

It is believed that judgments under the new law will be given complete recognition by sister states under the "Full Faith and Credit" [9] clause as were judgments when rendered in the name of the individual members of a partnership. "The name in which a suit

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[3] Jones v. Blun, 145 N. Y. 333, 39 N. E. 954 (1895).

[4] N. Y. PARTNERSHIP LAW § 12 (3). At common law, on the doctrine that a partnership was an aggregate of individuals and not an entity, real property could not be held in the partnership name, for real property had to vest in some person whether natural or artificial.

[5] N. Y. CIV. PRAC. ACT § 223.

[6] N. Y. Laws 1945, c. 842, effective September 1, 1945.

[7] In states where like statutes have been enacted, the courts have so held. E. I. Dupont v. Jones, 200 Fed. 638 (S. D. Ohio 1912); Byers v. Schlupe, 51 Ohio St. 300, 38 N. E. 117 (1894).

[8] N. Y. CIV. PRAC. ACT § 1199, amended by the Laws of 1945, c. 842, effective September 1, 1945.

[9] U. S. CONST. Art. IV, § 1.

is brought and presented, when the same persons are involved, cannot reasonably be said to have an effect on the extra-territorial validity of such judgments, since, in the final analysis the *sine qua non* is jurisdiction over the person or persons sued while the 'names' of such persons pertain rather to form than to substance." [10]

The legislature, in addition to enacting Civil Practice Act, Section 222a, repealed Civil Practice Act, Section 229a,[11] and amended Civil Practice Act, Section 1197,[12] by placing certain provisions of the old Civil Practice Act, Section 229a, into Civil Practice Act, Section 1197. Former Section 229a was essentially duplicative of Section 1197 in that it permitted service on fewer than all the partners while allowing the taking of judgment against all, and was repetitive of Section 1199 in its permission for enforceability of the judgment against the partnership property and the individual property of the partner served. Civil Practice Act, Section 229a, applied only to partnerships "doing business" in this state or holding property here, while Civil Practice Act, Section 1197, had no such restriction. However, Section 229a was extremely broad in that it was applicable to "any suit legal or equitable" while Section 1197 applied to actions only for the recovery of a sum of money in whole or in part from two or more persons jointly indebted in contract or jointly liable in tort. Therefore the legislature repealed Civil Practice Act, Section 229a, in its entirety and amended Section 1197 [13] so as to incorporate into it the broad provisions of Civil Practice Act, Section 229a, *i.e.,* any action legal or equitable.

The failure of the legislature to include the provisions for "doing business" or holding property in this state may raise some question as to whether sister states will recognize judgments rendered against partnerships which do not meet these requirements and in which jurisdiction was obtained by serving one of the partners while temporarily in New York State. However, the presence of one of the partners within the state should be sufficient to obtain jurisdiction over the partnership property as jurisdiction over any partner will give the court power to compel that individual to apply not only his own property but the partnership assets as well to the payment of partnership debts.[14] As a partnership is not considered a distinct legal entity, the doctrine that a foreign corporation not "doing business" within the state is not subject to personal service merely because one of its offi-

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[10] 11 Rep. N. Y. Judicial Council (1945) 226; East Denver Municipal Irrigation District v. Doherty, 293 Fed. 804 (S. D. N. Y. 1923).

[11] N. Y. Laws 1945, c. 842, effective September 1, 1945.

[12] *Ibid.*

[13] *Ibid.*

[14] Equitable Trust Co. of New York v. Halim, 133 Misc. 678, 234 N. Y. Supp. 37 (1929); Yerkes v. McFadden, 66 Hun 631, 22 N. Y. Supp. 1119 (1894).

cers or directors was served while temporarily in New York State does not seem to apply.[15]

There should be no problem of constitutional law or conflict of law in making Section 1197 apply to any "action legal or equitable," for conflicts of law and constitutional law are concerned only with jurisdiction and not with type of action. Once the requirements of *in rem* or personal jurisdiction are met, a court has power to grant judgments whatever the type of action.[16]

Nor will this new section conflict with Civil Practice Act, Section 1200, of the Joint Debtor Law which provides that where one or more persons have not been joined as defendants and judgment is taken against those named as defendants, a subsequent action may be brought against those not joined, because according to Civil Practice Act, Section 222a, the partners need not be named individually, and therefore the possibility of not joining one of the partners is non-existent.

The advantages of the new law are obvious. Uniformity of procedure is always desirable. Suits against partnerships have now been made to conform with the laws regulating joint debtors. Moreover, with permission to sue a firm in its partnership name, a plaintiff is relieved of the burden of determining who all the members of a partnership may be.

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[15] Rosenberg Bros. and Co., Inc. v. Curtis Brown Co., 260 U. S. 516, 67 Sup. Ct. 372 (1923); Zoller v. Smith, Levin and Harris, Inc., 30 F. Supp. 435 (S. D. N. Y. 1939).

[16] 11 Rep. N. Y. Judicial Council (1945) 232.