

Case No. 2,945.

COFFEE v. EASTLAND.

{Brunner, Col. Cas. 216;<sup>1</sup> Cooke, 159.}

Circuit Court, D. Tennessee.

1812.

PLEADING—NON-JOINDER OF PARTNER, HOW ALLEGED—PARTNERSHIP—NON-JOINDER OF PARTNER IN SUIT BY.

1. If one of two partners be sued upon a partnership demand, he must plead the matter in abatement and set out the names of the partners; defendant may take advantage of the non-joinder for the first time on the general issue.
2. Where one of two partners brings a suit upon a partnership demand, the defendant may take advantage of it at the trial of the cause.

At law. This was an action of assumpsit brought by [John] Coffee against [Thomas] Eastland to recover the price of locating five thousand acres of land. It appeared that the plaintiff and John Drake had entered into a partnership to locate lands, whereby the profits were to be equally divided between them. And it was also proved that to the location for the making of which this action is brought the names of John Coffee and John Drake were subscribed. On the part of the plaintiff evidence was introduced to show certain promises made by the defendant to him, with

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a view not only of supporting the action upon the merits, but also to establish that the plaintiff was the only person entitled to make a claim upon the defendant.

Grundy, Dickinson, and Cooke, for defendant, moved the court to instruct the jury that the action could not be supported, inasmuch as it was brought in the name of Coffee alone. And they cited 1 Esp. 116; 1 Saund. 291f.

Whiteside and Hayes, contra, endeavored to show that the evidence did not amount to proof of the existence of a partnership, particularly as it applied to the location in question.

M'NAIRY, District Judge (absent TODD, Circuit Justice). It is a question of fact for the determination of the jury whether a partnership existed between the plaintiff and Drake; but if they find the partnership to have existed it follows that Coffee alone cannot maintain the present action. It is no objection that advantage for the first time is taken of the partnership upon the plea of non-assumpsit, and upon the trial of the cause. The plaintiff declares upon a promise made to himself; if it turns out in evidence that the promise was made to him and another, it cannot be said that the defendant assumed upon himself "in manner and form as the plaintiff in declaring hath alleged."

As to the mode of taking advantage of a partnership in an action of assumpsit the rule is this: If one of two partners be sued upon a partnership demand he must plead the matter in abatement, and set out the names of the partners, so that the plaintiff may, if need be, sue them altogether. But if one of the two partners brings a suit upon a partnership demand, the defendant may take advantage of it at the trial of the cause; for he may not know until it comes out in evidence that the fact is so.

Verdict for the defendant.

COFFEE, The JOSEPH E. See Case No. 7,536.

<sup>1</sup> [Reported by Albert Brunner, Esq., and here reprinted by permission.]