BAILEY *vs.* STARKE.

As a general rule one partner cannot sue another, at law, in an action in form *ex contractu*, but must proceed by action of account, or by bill in equity.

One partner cannot, at law, recover a sum of money received by the other on account of the firm, unless, on a balance struck, that sum is found to be due him.

But if one partner expressly covenant to account, &c., and neglect to do so, an action may be supported by the other; and if an account be stated, and one partner expressly promise to pay the balance appearing to be due the other, the latter may sue at law.

These rules apply to cases where the cause of action arises subsequent to the formation of the partnership, and grows out of the partnership transaction.

If the cause of action arise prior to the partnership, the law is different.

Thus, where a partnership covenant recites that B. and S. had entered into partnership—that B. had purchased, and put into the firm, goods to the amount of $2,696.26; that he had received of S. a negro, at $600, in part payment of the goods—that they were to be at equal expense and profits in the goods, and that S. was to account to B. for one half of said goods, except the said negro, at $600; B. may maintain covenant against S. for failing to account for the balance of one half of the price of the goods.

This agreement, though evidenced by the partnership covenant, will be regarded as having arisen prior to, and having no necessary connection with, the partnership transactions.

Writ of error to the circuit court of Pulaski county.

ACTION of covenant, by attachment, brought by A. B. Bailey against James T. Starke, and determined in the Pulaski circuit court, at the May term, 1844, before the Hon. J. J. CLENDENIN, judge.

The declaration set out the following instrument, as the foundation of the action:

"April 5th, 1841.—Articles of agreement, made and entered into, this day, between A. B. Bailey of the first part, and James T. Starke of the second part, witnesseth, they have, this day, entered into a partnership in the mercantile business, to continue as long as the said partners agree so to do: and whereas the said Bailey has purchased of Inglish & Johnson, and others, goods to the amount of $2,696.26, on hand, which the said Bailey puts into the firm, and the said Bailey has this day received of said Starke one negro girl, at $600, which is in part payment of said goods, then the said parties are to be at general expenses and profits in said goods, and business, and the said Starke is to account to the said Bailey for the one half of said goods, except the before mentioned negro girl at $600; and the parties agree to go near the line between Ark. and Mo. in Randolph county, and then as may be thought best by them."—Breach, that defendant had not accounted to plaintiff for the one half of said goods, as aforesaid, or any part thereof, except the said $600—concluding, to the damage of plaintiff one thousand dollars.

The defendant demurred to the declaration, and assigned as cause therefor: that it appeared from the declaration, that the plaintiff and defendant were partners in the mercantile business, and in and about the cause of action, and that, by law, the same was matter of account, and cognizable only in a court of equity, where alone the defendant could make his full and just defence, and have adequate relief.

The court sustained the demurrer, and the plaintiff declining to amend, gave judgment for the defendant. The plaintiff brought the case to this court, by writ of error.

RINGO & TRAPNALL, for plaintiff. It is true that the co-partnership matters generally cannot be settled except in a court of chancery; but when there is a settlement, and balance struck, an action at law lies. *Clarke vs. Dibble,* 16 *Wend.* 601. An action at law may be maintained by one partner against another for a balance due him growing out of the partnership transaction, if there be but a single item to liquidate. *Musin vs. Trumplon,* 5

Wend. 274. But this is not a matter connected with the co-partnership business. It is a debt not growing out of, but created in the inception of it; and not dependent on, or that could be involved in their co-partnership. Covenous suits cannot be maintained by one partner against another, upon a partnership transaction, until a final settlement, and balance struck. Because until that event it cannot be determined, on a trial at law, how the balance of the indebtedness stands. If this were a matter depending on the final settlement of the co-partnership business, the court of law could not have jurisdiction; but clearly that is not the case. They were equal partners in the goods. Bailey had paid the whole amount of the purchase. Starke had paid him a part and bound himself to account for the residue. If this had been embraced in a separate note instead of the articles of co-partnership, it would present no difficulty, but this fact can have no weight with the court.

WATKINS & CURRAN, contra. This suit is founded upon articles of co-partnership, and no principle of law is better settled than that one partner cannot sue another, at law, in respect of the partnership matters, unless there has been a settlement, and an express promise to pay the balance; and, even in that case, the action cannot be upon the articles, but should be based upon the promise. *Clay vs. Grubbs,* 1 *Littell's Rep.* 223. *Rogers vs. Rogers,* 1 *Hall,* 391. *Alwater vs. Fowler,* 1 *Hall,* 180. *Niven vs. Spickerman,* 12 *John. Rep.* 401. *Westerloo vs. Evarston,* 1 *Wend.* 532.

The case in 16 *Wend.* 601, and 5 *Wend.* 274 cited by the plaintiff, support the above principle; in both of those cases there had been a settlement, and an express promise made to pay the amount sued for; neither was upon the articles of co-partnership.

JOHNSON, C. J., delivered the opinion of the court.

The assignment of errors presents but one question for the examination, and decision of this court; and that is, did the court below err in sustaining the defendant's demurrer to the plaintiff's declaration? At law, one partner or tenant in common cannot,

in general, sue his co-partner or co-tenant in any action in form *ex contractu*, but must proceed by action of account, or by bill in equity: a rule founded on the nature of the situation of the parties, the difficulty at law of adjudicating complicated accounts between them, and the propriety, arising from the confidence reposed by the parties in each other, of their being examined upon oath, which can only be effected in a court of equity. Therefore, in the case of a partnership, one partner cannot at law recover a sum of money received by the other on account of the firm, unless, on a balance struck, that sum is found to be due him alone. 2 *T. R.* 478. But if one of two or more partners expressly covenant or agree to account &c. and neglects so to do, an action may be supported by the others; and if an account be stated and one partner expressly promise to pay the balance appearing to be due to the other, the latter may sue at law. 2 *T. R.* 482. 7 *Mod.* 116. 13 *East,* 8, 538, and 2 *T. R.* 482, '3 and 478. This is the law in cases where the cause of action arises subsequent to the formation of the co-partnership, and grows out of the partnership transactions. The first point, then, to be determined, is whether the cause of action arose prior, or subsequent, to the formation of the co-partnership: Because, it is clear that if the cause of action arose before the existence of the firm, the case must turn upon other and different principles, and that the doctrine above stated can have no application to it. The covenant recites that on the 5th of April, 1841, the plaintiff and defendant entered into partnership, and that the plaintiff had purchased goods to the amount of twenty-six hundred and ninety-six dollars and twenty-six cents, which he then first put into the firm, and also that he received of the defendant on the same day one negro girl at six hundred dollars, which was in part payment of said goods, and further that the parties were to be at equal expense and profits in said goods, and that the said defendant was to account to the said plaintiff for the one half of said goods, except the before mentioned negro girl, at six hundred dollars. This is the substance of the contract between the parties, and though not very formally or technically drawn, yet we think that the intention of the parties can be easily ascertained.

The sum and substance of the matter is, that the plaintiff had purchased goods to the amount of twenty-six hundred and ninety-six dollars and twenty-six cents, that he had sold one half of said goods to the defendant at the same price which he had paid; that the defendant had paid him a negro girl, valued at six hundred dollars, and promised to pay him the residue. It is manifest from the whole tenor of the covenant that the sale of the one half of the goods by the plaintiff to the defendant, though evidenced by the same instrument, that contains the contract of co-partnership, was prior to it, and had no necessary connection with it. It is difficult to conceive how it could be seriously contended that the cause of action arose out of the partnership transactions, when it is evident that the sale was made in contemplation of, and in order to enable the partnership to exist and commence operation. The reason assigned by the books why one partner cannot sue another at law, is the difficulty at law of adjusting complicated accounts between them, and the propriety, arising from the confidence reposed by the parties in each other, of their being examined upon oath, which can only be effected in a court of equity. The reason of this law cannot apply to the case before us. Here are no complicated accounts between the parties, but, on the contrary, a plain promise made by one party to pay another a sum of money. It is true that the precise sum is not specified in so many words, yet it is easy to be reduced to a certainty. And the maxim of law is, that is certain which is capable of being reduced to a certainty. The contract of bargain and sale between the parties was perfect and complete before the existence of the firm, and the rights of the one and the liabilities of the other could not, in any manner, have been changed or affected, whether it ever existed or not. The residue to be paid by the defendant to the plaintiff, was not, necessarily, to be realized out of the proceeds of the goods, but was an abstract and unconditional promise from the beginning. We are therefore clearly of the opinion that the circuit court erred in sustaining the defendant's demurrer to the plaintiff's declaration.

Judgment reversed.