RIGHTS OF THE DISSENTIENT IN A TWO-MEMBER PARTNERSHIP: A REAPPRAISAL OF RATIONALE

ABSENT a contrary agreement in the partnership articles,[1] any dispute among partners over matters within the ordinary scope of the partnership business will be resolved by a majority of the partners.[2] A recent North Carolina decision, *National Biscuit Co. v. Stroud*,[3] has raised the problem of the effect of a disagreement in a two-member partnership on a matter within the ordinary scope of the firm's business. The defendants, copartners in a general partnership, regularly purchased bread from the plaintiff for sale in their business. The defendant Stroud notified the plaintiff's agent that he would not be liable for any future purchases of bread by the partnership. For approximately a month thereafter, the plaintiff supplied bread on credit at the request of the defendant-copartner, Freeman. The partnership was then dissolved. Under the dissolution agreement, all of the partnership assets, with a few exceptions, were assigned to Stroud, who agreed to discharge all of the partnership's liabilities. With the exception of the plaintiff's claim, Stroud ultimately paid all the partnership obligations, being forced to draw upon his personal funds to a considerable extent. Stroud tendered to the plaintiff one-half of the amount claimed for the bread, and invoked his disclaimer of personal liability as a bar to the plaintiff's recovering a greater amount.

The Supreme Court of North Carolina sustained the lower court's decision that the plaintiff could recover the full amount from Stroud. The court stated that buying bread was within the ordinary scope of the business, and that disagreements over ordinary matters of partnership business were to be resolved by a majority of the partners.[4] Because there could be no majority in a two-member partnership dispute, each partner having equal management rights, it was held that Stroud

[1] CRANE, PARTNERSHIP 275 (2d ed. 1952) [hereinafter cited as CRANE].

[2] UNIFORM PARTNERSHIP ACT § 18(h) (1916), provides in part: "Any difference arising as to ordinary matters connected with the partnership may be decided by a majority of the partners . . . ." Discussion is found in BARRETT & SEAGO, PARTNERSHIPS: LAW AND TAXATION, ch. 5 § 7.2 (1956); CRANE, 276; MECHEM, PARTNERSHIP § 282 (2d ed. 1920). For the similar English rule, see ENGLISH PARTNERSHIP ACT § 24(8) (1890); LINDLEY, PARTNERSHIP 403 (11th ed. 1950).

[3] 249 N.C. 467, 106 S.E.2d 692 (1959).

[4] North Carolina has enacted the Uniform Partnership Act. N.C. GEN. STAT. § 59-48(h) (1957), contains the provision cited in note 2 *supra*.

could not restrict Freeman's authority to buy bread for the partnership. Consequently, both partners were liable for the debt despite Stroud's disclaimer of personal liability.[5]

The problem of the effect of a dissent in a two-member partnership has arisen only infrequently.[6] Moreover, the decisions dealing with the problem have reached conflicting results. A majority of these cases recognize as effective a disclaimer of personal liability which is known to interested third parties.

One major point of disagreement in the decisions arises where money, goods, or services have come to the partnership from the creditor and have been used by the partnership. Some courts have argued that the use of the goods is a benefit to the partnership, for which both partners should be held accountable, presumably on a quasi-contract theory.[7] Other courts have maintained that there is logically no benefit to the dissentient, since he may have been trying to guard against an overstocking or overextension of the partnership.[8] In instances where the dissentient knew that the goods were being delivered to the partnership despite his disclaimer, some courts have found an "implied ratification" to bolster their contention that there was a benefit.[9]

Other decisions are based on the premise that each partner is an agent of the other partners.[10] A few of these cases suggest, in accord with the instant decision, that there can be no restriction on either part-

[5] Justice Rodman dissented but did not file an opinion.

[6] In the somewhat analogous close corporation, where the majority also rules in disputes, "Voting shares and membership on the directorate may be evenly divided between opposing factions, or minority interests may hold veto powers over shareholder and director action; and deadlocks occur with alarming frequency." O'NEAL, 1 CLOSE CORPORATIONS § 8.06 (1958). A major reason, perhaps, for the comparatively few partnership cases is the ease with which disagreeing partners may dissolve their venture.

[7] Campbell v. Bowen, 49 Ga. 417 (1873); Blackstone Guana Co. v. Ball, 201 N.C. 534, 160 S.E. 769 (1931); Johnson, Clark & Co. v. Bernheim, 76 N.C. 139 (1877); First Nat'l Bank v. Larsen, 146 Wis. 653, 132 N.W. 610 (1911); Willis v. Dyson, 1 Stark. 164, 171 Eng. Rep. 434 (K.B. 1816) (dictum). The court in the instant case indicated its decision would be the same regardless of benefit.

[8] Dawson Blakemore & Co. v. Elrod, 105 Ky. 624, 49 S.W. 465 (1899); Mouroe v. Conner, 15 Me. 178 (1838). *Cf.*, De Santis v. Miller Petroleum Co., 29 Cal. App. 2d 679, 85 P.2d 489 (Dist. Ct. App. 1938); Bank of Bellbuckle v. Mason, 139 Tenn. 659, 202 S.W. 931 (1917).

[9] Cowan v. Tremble, 111 Cal. App. 458, 296 Pac. 91 (Dist. Ct. App. 1931); Wipperman v. Stacy, 80 Wis. 345, 50 N.W. 336 (1891).

[10] "Every partner is an agent of the partnership for the purpose of its business, and the act of every partner . . . for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership." UNIFORM PARTNERSHIP ACT § 9(1) (1922). The Englisb provision is similar. ENGLISH PARTNERSHIP ACT § 5 (1890).

ner's authority on matters within the ordinary course of business, absent an agreement between the parties or a majority of opinion within the partnership.[11] One notable decision has reached a similar result by reasoning that a partner who indicated to the seller that he would not be liable for a proposed purchase was not attempting to disclaim liability, but was trying to remain in the background of partnership transactions.[12] A majority of the agency-theory decisions, however, have reached a result contrary to the present case by holding that a communicated dissent truncates the implied authority of the copartner as agent, and forces the third party to rely solely on the credit of the partner dealing with him.[13] The act is then that of the partner, not that of the partnership or the dissenting partner.

In reaching similar results, some courts have rejected the agency theory. One court has suggested that since one partner has the power to dissolve the partnership by notice, thereby preventing the making of further binding contracts, the partner should also be able to protect himself by notice against particular contracts.[14] An even more questionable theory is that, since a partner has the power to incur liability by conduct or consent, he should be able to terminate such liability by notice of dissent or disclaimer.[15]

Writers who have dealt with even-division situations in partnerships are by no means unified in their opinions. Story took the position that such a division must result in a "temporary suspension of the right and

[11] Coggeshall v. McKenney, 114 S.C. 1, 103 S.E. 30 (1920) (dictum); Wipperman v. Stacy, 80 Wis. 345, 50 N.W. 336 (1891) (dictum); Canadian Bank of Commerce v. Patricia Syndicate, 20 Ont. Weekly N. 529 (Can. 1921) (dictum).

[12] Dinkelspeel v. Lewis, 50 Wyo. 380, 65 P.2d 246 (1937). Where the disagreement arises over existing obligations, one partner has not been allowed to restrict the other. Noyes v. New Haven, N.L. & S.R.R., 30 Conn. 1 (1861); Burns v. Treadway & Webb, 174 Ky. 123, 191 S.W. 868 (1917); Lodewick v. Cutting, 121 Misc. 348, 201 N.Y.S. 276 (1923); Markee v. City of Philadelphia, 270 Pa. 337, 113 Atl. 359 (1921); Butchart v. Dresser, 4 De G.M. & G. 542, 43 Eng. Rep. 619 (C.A. 1853).

[13] De Santis v. Miller Petroleum Co., 29 Cal. App. 2d 679, 85 P.2d 489 (Dist. Ct. App. 1938); Leavitt v. Peck, 3 Conn. 124 (1819); Knox v. Buffington & Co., 50 Iowa 320 (1879); Dawson Blakemore & Co. v. Elrod, 105 Ky. 624, 49 S.W. 465 (1899); Bull v. Harris, 18 Ky. 195 (1857); Yeager v. Wallace, 57 Pa. 365 (1868); Bank of Bellbuckle v. Mason, 139 Tenn. 659, 202 S.W. 931 (1917). *Cf.*, Johnston & Co. v. Dutton's Adm'r, 27 Ala. 245 (1855) (dictum). Only De Santis v. Miller Petroleum Co., *supra*, was decided under the Uniform Partnership Act, although Bank of Bellbuckle v. Mason, *supra*, made reference to the Act. It also seems clear from the above cases that one partner may refuse to join in the issuance of negotiable paper and not become liable thereon. Arguably, of course, this is not within the ordinary scope of business.

[14] St. Louis Brewing Ass'n v. Elmer, 189 Mo. App. 197, 175 S.W. 102 (1915).

[15] Monroe v. Conner, 15 Me. 178 (1838).

authority of each [partner] to carry on or manage the partnership business."[16] Other writers have concluded that those partners in an even-division situation who oppose undertaking new activities should prevail,[17] thus favoring the partner who would maintain the *status quo*. Such a rule is said to be in accord with the general principle of voting, "that the onus lies on those who affirm a proposition, and not on those who oppose it."[18] Yet, it is not clear whether the writers who have suggested such a rule have considered the situation where the affirmative proposition, the purchase of bread in the instant case, is in fact the continuance of the *status quo*.

The court in the *Stroud* case relied heavily on Crane's statement of case law, that only a majority can forbid otherwise permissible partnership transactions.[19] This view of the law is supported by Mechem,[20] but Crane criticizes it on the ground that it allows overcommitment of the partnership, which could not be curtailed short of dissolution.[21] Crane's criticism was implicitly rejected by the North Carolina court in this case.

The literature in this field leaves a basic question unposed and unanswered: Should a dissenting partner, whether in a minority, majority, or equal position in the partnership, be forced to assume the normal obligations of partnership liability or else resort to dissolution?[22]

[16] STORY, PARTNERSHIP § 123 (7th ed. 1881). *Accord*, 40 AM. JUR. *Partnership* § 116 (1942). *But see*, Comment, 29 COLUM. L. REV. 66, 73 (1929).

[17] BURDICK, PARTNERSHIP 233 (3d ed. 1917); GEORGE, PARTNERSHIP 159 (1897); GILMORE, PARTNERSHIPS 368 (1911); LINDLEY, *op. cit. supra* note 2, at 403. SHUMAKER, PARTNERSHIP 172 (2d ed. 1912).

[18] UNDERHILL, PARTNERSHIP 90 (4th ed. 1931).

[19] "In cases of an even division of the partners as to whether or not an act within the scope of the business should be done, of which disagreement a third person has knowledge, it seems that logically no restriction can be placed upon the power to act. The partnership being a going concern, activities within the scope of the business should not be limited, save by the expressed will of the majority deciding a disputed question; half of the members are not a majority." National Biscuit Co. v. Stroud, 249 N.C. 467, 471, 106 S.E.2d 692, 695 (1959); CRANE, 277.

[20] MECHEM, *op. cit. supra* note 2, at § 242.

[21] "In practical operation application of such a solution to projected transactions might be inconvenient and costly. If each of two partners wishes to buy goods, or hire employees, to an extent needed for the transaction of business, and if on disagreement known to third persons, each is to be considered as capable of acting so as to bind the other, the firm may be put into the position of being disastrously overstocked with goods, services or other things. In its practical workings the better rule appears to be that in case of even disagreement, known to third persons, no action new or positive can be taken until the partners themselves reach a solution." CRANE, 277-78.

[22] This point was raised on appeal in the present case but was not discussed in the opinion. Brief for Appellee, p. 2, National Biscuit Co. v. Stroud, 249 N.C. 467, 106

The Uniform Partnership Act and cases preceding it, provide an answer to this question in those instances in which there is not an even division of opinion within the partnership. In the language of the Uniform Partnership Act, "Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners . . . ."[23] This rule seems logically predicated on the theory that all partners should be equally liable, in the absence of an express agreement to the contrary. The Act is silent, however, where there is an even division of opinion within the partnership.

In this latter situation the equities are closely balanced. A partner should be able to protect himself against the capriciousness of his copartner by some means short of terminating the partnership.[24] On the other hand, to allow the dissentient to continue as a partner and to disclaim liability at will, in the absence of an express agreement, is an anomaly. Moreover, it hinders the expedition of business.

Objections[25] which may be interposed to the result in the *Stroud*

S.E.2d 692 (1959). One writer has discussed the question to some extent: "On the whole, it may be said that the law-merchant, as it is incorporated into the common law of England and of this country, does not permit one to secure to himself all the advantages and gains of partnership, and guard himself against all its liabilities and losses; and that his attempt to do so would be defeated by casting upon him these liabilities." PARSONS, PARTNERSHIP 80 (4th ed. 1893).

[23] UNIFORM PARTNERSHIP ACT § 18(h) (1916). This rule in America goes back at least as far as Johnston & Co. v. Dutton's Adm'r, 27 Ala. 245 (1855). England has a similar rule. ENGLISH PARTNERSHIP ACT § 24(8) (1890). Any deviation from this rule is a result of confusing majority and even-division situations. Matthews v. Dare, 20 Md. 248 (1863); G.H. Haulenbeck Advertising Agency v. November, 27 Misc. 836, 60 N.Y. Supp. 573 (1899).

[24] It is interesting that in a surprising number of the even-division cases, the dissenting partner was one who participated only to a limited degree in the active management and pursuit of the business; he usually was one who might be called the "moneyed" partner. Campbell v. Bowen, 49 Ga. 417 (1873); St. Louis Brewing Ass'n v. Elmer, 189 Mo. App. 197, 175 S.W. 102 (1915); Johnson, Clark & Co. v. Bernheim, 76 N.C. 139 (1877); Bank of Bellbuckle v. Mason, 139 Tenn. 659, 202 S.W. 931 (1917); T.T. Word Supply Co. v. Burke, 57 S.W.2d 610 (Tex. Civ. App. 1933); Wipperman v. Stacy, 80 Wis. 345, 50 N.W. 336 (1891); Dinkelspeel v. Lewis, 50 Wyo. 380, 65 P.2d 246 (1937).

[25] There are two objections to such a policy. First, its natural concomitant might be early dissolution of the partnership. A study of the cases involving an even division of opinion within a partnership, however, demonstrates that dissolution is frequently imminent anyway. See, *e.g.*, Johnson, Clark & Co. v. Bernheim, 76 N.C. 139 (1877); Yeager v. Wallace, 57 Pa. 365 (1868); First Nat'l Bank v. Larsen, 146 Wis. 653, 132 N.W. 610 (1911); Willis v. Dyson, 1 Stark. 164, 171 Eng. Rep. 434 (K.B. 1816). The intimate business association which is the essence of partnership depends for its substance on reciprocal trust and confidence among the partners. The advent of distrust, often expressed in disagreement among the partners, may frequently lead to dissolution regardless of the policy adopted by the courts. Moreover, it is always pos-

case do not offset the social policy which favors a partner's assuming full partnership obligations. It is to be hoped that courts facing the even-division situation in the future will discard the equivocal rationale employed in the past and frankly give effect to this desirable policy.

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sible for the partners to agree to some restriction at the inception of the partnership. The danger of dissolution, therefore, should not be overemphasized.

A second, more theoretical objection to a nonrestrictive policy arises from the agency theory of partnership law. Might not the agency of one partner to act for the other be considered revoked in the situation where one dissents? Of course, an agency is revocable unless it is, in the terminology of the *Restatement*, "given as security" or, perhaps more familiarly, "coupled with an interest." RESTATEMENT (Second), AGENCY §§ 138-39 (1958). See Hunt v. Rousmanier's Adm'rs, 21 U.S. (8 Wheat.) 174 (1823). It is submitted, however, that, if the agency is considered revoked, it should result in a total dissolution of the partnership. See LINDLEY, *op. cit. supra* note 2, at 283. *Cf.*, RESTATEMENT (Second), AGENCY, Introductory Note Ch. 5 (1958), to the effect that, "[W]henever the agent should know that the principal does not desire him to act, . . . it is wrongful for the agent to enter upon the execution of an authority which he has reason to know the principal does not wish him to exercise."

On the other hand, to avoid dissolution of the partnership a court might find that the agency is "coupled with an interest." RESTATEMENT (Second), AGENCY § 138, comment *d* (1958), suggests that, "An agent who has become a party to a transaction and has incurred liabilities on behalf of the principal may, in the protection of his own interests, subject the principal to liability although the principal has terminated the authority which he held as agent." Arguably, partners who naturally incur liabilities on behalf of each other could fall into a similar classification. Yet, it is not clear what repercussions this particular facet of agency law would have on partnership dissolubility, and the wisdom of introducing the hazy "interest" concept might be questioned.