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is in the same capacity in which the plaintiff had sued him. Since the subsequent suit was brought against the plaintiff in his capacity as employer for the negligence of his employee, a different capacity from that in which the plaintiff had brought the initial suit, the statute should not apply. While recognizing this distinction in capacities, the court took the view that the employer was in court, in the initial suit, in a dual capacity as (1) assignee of the widow's right, a representative capacity, and (2) as employer of the deceased. *A fortiori*, had the defendant validly counterclaimed, a verdict could have been entered against the plaintiff and it would have been no defense to the plaintiff that he was bringing the action in a representative capacity. The court had previously distinguished the representative capacity from the personal capacity and had held that the element of mutuality of parties was essential to a counterclaim.³ Thus when the husband had sued as representative of his wife and defendant counterclaimed against the husband personally, counterclaim was not allowed as the essential element of mutuality was lacking.⁴ Demands, to be subject of a counterclaim, must be "mutual" which means that claims must be due to and from the *same* parties acting in the *same* capacity.⁵ The term "counterclaim" implies a reciprocal demand existing between the same persons at the same time.⁶ This view is currently followed by the federal district courts⁷ when applying Federal Rule 13 after which the Florida statute is patterned.⁸

By requiring the filing of a counterclaim in the initial suit the court in the instant case was influenced by its awareness of the tremendous volume of litigation growing out of motor vehicle collisions. To have held otherwise would have increased the burden of the court by permitting circuitry of actions. It is submitted that failure of a defendant to file counterclaim in the initial action for damages sustained in the same occurrence will constitute a waiver of that right regardless of the fact that the plaintiff is liable to the defendant in a different capacity from that in which plaintiff has brought his action.

TAXATION—PUERTO RICAN PARTNERSHIPS PLACED AT DISADVANTAGE BY ABANDONMENT OF CIVIL LAW CONCEPT

Defendant, member of a partnership ("Sociedad") duly formed and registered in accordance with the Puerto Rican Code of Commerce, was

3. *Proodian v. Plymouth Citrus Growers Association*, 149 Fla. 507, 6 So.2d 531 (1942).

4. *Ibid.*

5. *Southern Ry. v. Elliott*, 86 F.2d 294, 269 (4th Cir. 1936).

6. *Tidewater Coal Exchange v. New Amsterdam Casualty Co.*, 31 F.2d 446 (D.C. Del. 1929); *Sheffield v. Preacher*, 175 Ga. 719, 165 S.E. 742 (1932).

7. *Dunham v. Bunn*, 85 F. Supp. 530 (D.C. Pa. 1949).

8. *Symonds v. Browning*, 156 Fla. 808, 24 So.2d 526 (1946).

charged with deficiencies in his individual income tax for the years 1941-42. The alleged deficiency was based upon defendant's *right to share* in 40 per cent of the firm's profits. Defendant claimed that the alleged deficiencies were non-existent, since his share of the profits had never been distributed to him in any manner. The Tax Court of Puerto Rico found for defendant, and the Treasurer appealed. *Held*, that although the law of Puerto Rico, until the bringing of this action, had regarded partnerships as corporations for purposes of taxation,¹ from the 1941 amendments to the Income Tax Law of Puerto Rico² it was clear that the legislature's intent was to tax partners on their "*right to share*" in the profits and that therefore distribution of the same was unnecessary to the effective imposition of the tax. *Treasurer of Puerto Rico v. Tax Court and Ballester, Intervener*, 69 D.P.R. 750 (1948) (appeal pending, (1st Cir.)).³ In the holding of the instant case, the court was of the attitude that the legislature enjoys power to impose this tax, notwithstanding the fact that the same is not imposed upon corporate shareholders.⁴

The significance of the principal case may be fully appreciated only when the difference in concept accorded by the civil law to the partnership, or sociedad, is understood. Unlike the common law, which applies the aggregate theory to the partnership form of association, the civil law has always regarded the sociedad as a juridical person,⁵ a legal entity that may contract, own property, sue and be sued in its own name. Thus the Puerto Rican income tax laws impose a tax on the partnership entity in the same manner as the U. S. law taxes the corporation. The Insular income tax laws follow either literally or substantially the language of its prototype, the Federal Revenue Act of 1924.⁶ But because of the Puerto Rican (Civil Law) concept of a partnership, that section of the United States Internal Revenue Code which

1. There the Treasurer had attempted to tax the undisturbed profits of a partnership. The Supreme Court of Puerto Rico held that the Treasurer had exceeded his powers of regulation and upheld the general scheme of taxing partnerships on the same basis as the corporation. *Behn v. Domenech*, 49 D.P.R. 808 (1936); *Accord Ballester v. Tax Court*, 61 D.P.R. 460 (1943).

2. Law 31 (April 12, 1941) amendment to § 34(a) of the Income Tax Law (under which "earnings" are defined as "any share or *right to share* in a partnership, which belongs to the partners or participants in each taxable year out of the earnings or profits of any partnership.")

3. Jurisdiction of the (1st Cir.) § 43 of the Organic Act of P.R. 39 STAT. 966, 48 U.S.C. 865, authorizing appeals from final judgments of the S. Ct. of P.R. and on 28 U.S.C. 1293 (1948) vesting in that court jurisdiction of appeals from final decisions of the S. Ct. of P.R. in all cases involving the constitution, laws or treaties of the U.S. and in all civil cases where the controversy exceeds \$5,000 exclusive of interest and costs.

4. The instant court took the position that although both "sociedades" and corporations are regarded as juridical persons, the distinction lies in that distribution of profits of the former depends upon the will of the partners, while in the latter distribution (of corporate earnings) depends upon the action and judgment of the board of directors.

5. CODIGO CIVIL DE ESPAÑA, Art. 35(2); Civil Code of Puerto Rico, Art. 27. See *People of Puerto Rico v. Russell and Co.*, 315 U.S. 610 (1933) (where the Supreme Court held that a Puerto Rican "sociedad," being in substance a corporate body in accordance with the local law, is a citizen of Puerto Rico within the meaning of the federal jurisdictional statutes).

6. See note 1, *supra*.

treats income of a partnership as income of the individual partners and taxes them on their share whether distributed or not⁷ does not appear in the Insular Act.

The Puerto Rican legislature, by the 1941 Amendment,⁸ and the court in the instant case would seem to disrupt the basic scheme for taxing partners on the same basis as corporate shareholders. The immediate practical effects of the decision could result in the extinguishment of the partnership as a form of business association in the Island. A possible motive for such change in legislative trend may be found in the recent program for industrialization of Island resources.⁹ Again, the basic motive may be the channeling of business associations into the corporated form. Whatever the political-social objective may be, legal problems remain. Is such a tax violative of due process? Is it discriminatory in that it is imposed on partners, but not members of a similar civil law entity, the corporation?¹⁰ These important questions can be answered only by definite legislative clarification or by subsequent judicial interpretation. The holding in the instant case casts serious doubt on the present taxable status of undistributed partnership earnings and places the partnership form of association in Puerto Rico at a distinct tax disadvantage.¹¹

TORTS—INFANTS—UNBORN CHILDREN—LIABILITY FOR INJURIES NEGLIGENTLY INFLICTED ON VIABLE UNBORN CHILD

Plaintiff, prior to birth, received personal injuries when her mother fell while attempting to alight from defendant's bus. The fall brought on plaintiff's birth prematurely, and this together with the injuries resulted in plaintiff's permanent disabilities for which she sues to recover damages, claiming that as "an existing, viable child" at the time of the fall she is not without remedy.¹ A demurrer to plaintiff's complaint was overruled. *Held*, on appeal, plaintiff, viable at the time of the injury, capable of living and having demonstrated such capacity to survive by surviving, was a "person"

7. INT. REV. CODE § 182.

8. See note 2 *supra*.

9. LAWS OF PUERTO RICO Art. 346 (1947). See also Baker and Curry, *Taxpayer's Paradise in the Caribbean*, 1 VAND. L. REV. 194 (1948)

10. The legislature has great freedom in classifying subjects for purposes of taxation, but the classification must be reasonable and must rest upon some ground having a fair and substantial relation to the object of the legislation so that all persons similarly situated shall be treated alike. *F. S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412 (1920).

11. It should be noted that "To warrant reversal of a decision of the Supreme Court of Puerto Rico on construction of local statutes the error must be manifest; the interpretation must be inescapably wrong, the decision must be patently erroneous." *Bonet, Treasurer v. Texas Co. (P.R.) Inc.*, 308 U.S. 463 (1939). *Accord*, *DeCastro v. Board of Commissioners of San Juan*, 322 U.S. 45 (1944).

1. A "viable foetus" is one, normally seven months or older, which has reached such a stage of development that it can live outside the uterus. AMERICAN ILLUSTRATED MEDICAL DICTIONARY 483, 1605 (19th ed., Dorland).