

ed on his part proved a receipt of a greater sum than that loaned, which is an additional proof of the impropriety of sustaining such actions in a court of common law; and which proof was a sufficient ground, in itself, to have defeated the action of the plaintiff without any other cause.

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W. Dorsey, for the Appellee. It appears that the appellant, appellee and the witness, agreed to enter into partnership, in which there was no limitation of time as to how long the partnership should continue. The appellee loaned to the appellant, and the witness, each \$50, before the commencement of the partnership. There is no good ground of objection to receiving the evidence of the witness, because of his being one of the partners. The payment made by the appellant to the appellee was evidence of the dissolution of the partnership, because it was to be dissolved when the \$50 was paid. It cannot be a claim against the partnership, although the money was to constitute a part of the fund put into the capital. The loan was made to each partner, the appellant and the witness, in his separate capacity, and it cannot be said to be a partnership transaction, being loaned before the partnership. There is no solidity in the objection as to the form of action. If there had been a condition annexed to the payment of the money, then it must be specially averred. The dissolution of the partnership was an event that *must* take place, and it cannot be assimilated to an event which might never happen.

EARLE, J. delivered the opinion of the court. It appears to the court that the judge erred in his direction to the jury, "that the facts proved amounted to a dissolution of the partnership." He ought to have left it to the jury to decide, whether from the facts and circumstances proved, the partnership in question was dissolved. The dissolution of the partnership was an important point to be established by the plaintiff; for the money claimed was not due until the partnership was dissolved.

Rice, the witness, testified to an undertaking distinct from the partnership, which the court are of opinion may be enforced in a court of law in the form of action used, and without declaring upon a special contract between the parties.

GANTT, J. dissented.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.