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No. _____

Supreme Court of Illinois

Osborn et al

vs.

Fawcett et al

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STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 199

Fawcett

vs

Opbort

1863

1455

199-88

SUPREME COURT OF ILLINOIS.

FREDERICK PAWCETT, et. al., Plaintiffs in Error.

vs.

WILLIAM OSBORN, et. al., Defendants in Error.

M'ALLISTER, JEWETT & JACKSON FOR PLAINTIFFS.

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SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION, APRIL TERM, 1863.

FREDERICK FAWCETT, *et al.*,
PLAINTIFFS IN ERROR.

V S.

WILLIAM OSBORN, *et al.*,
DEFENDANTS IN ERROR.

Appeal to Superior Court of Chicago.

REPLY TO THE POINTS AND ARGUMENT OF COUNSEL FOR
DEFENDANTS IN ERROR.

The facts of this case, excepting those relating to the particular claims of the defendants in error, as purchasers of the leather in controversy, have already been before this court, in the case of *Stevens vs. Fawcett et al.*, reported in the 24th Ill., at page 484; and it will not be necessary to do more than call the attention of the court to them in a very general manner. Both the general facts of that case, and the particular facts of this, are embraced in the following statement :

In August, 1855, the plaintiffs were large dealers in hides and leather in New York City : Walter H. and Fletcher Stevens (firm of W. H. & F. Stevens), were tanners at Stevensville, Sullivan Co., N. Y. On the 7th of August, 1855, the plaintiffs (Fawcett, Isham

& Co.,) made a contract with W. H. & F. Stevens, respecting the tanning of hides at their tannery, for the plaintiffs, for the succeeding three years. The plaintiffs were to furnish the hides, and the Stevens were to tan them in a workmanlike manner, and return the leather to the plaintiffs in New York City, clear of expense for transportation. *For these services*, the plaintiffs agreed to pay the Stevens five cents per pound for the leather so tanned and returned. The contract also contained a provision that plaintiffs should take all the risks of sales on credit: that upon the sale of the leather manufactured from each invoice of hides, the plaintiffs should deduct the cost of the hides, the money paid or payable for tanning, and a few other items of expense, and that the balance or difference should be divided between the parties. (See Abs. pp. 3 and 4, for contract in full). The plaintiffs furnished the Stevens with 18,815 hides to be tanned under this contract, between the date of it and 16th September, 1856, of which they received back from the Stevens, manufactured into leather, about 16,000 sides, equal to 8,000 hides. About 15,000 sides of the leather, as the testimony shows, were privately, and surreptitiously, and under false and assumed names, taken away from the tannery, without the usual and customary marks upon it, by Fletcher Stevens, and sold and disposed of by him for his own benefit. The two thousand sides in controversy in this suit were sold to the defendant by his agent in Chicago, whose real name was Wm. H. Stanton, but who was only known to the defendant by the false and assumed name of L. L. Stratton. The defendant never knew or heard of the plaintiffs or of W. H. & F. Stevens, and purchased and paid for the leather without any actual notice or knowledge of the circumstances above stated. The plaintiffs demanded the leather of the defendants, and upon their refusal to deliver it brought this action to recover its value.

The material part of the law and facts of this case, as we regard them, has been concisely presented to the court in the brief already filed on behalf of the plaintiffs in error. But as the defendants' counsel, in the brief and argument presented by them, have under-

taken to revive the old issue of a partnership under the contract between the plaintiffs and W. H. & F. Stevens, it may be proper for us to notice it, if for no other purpose than to repel the presumption of acquiescence in their views upon that subject. In fact, there is no ground for the defendants to stand upon in this case, except the ground of partnership, and a right, resulting by implication of law, in Fletcher Stevens to sell the leather by virtue of such partnership; for it is too much to be claimed, at this day, before any intelligent court, that a mere naked possession of personal property in the vendor is sufficient to give the purchaser from him a good title as against the real owner. Possession of personal property, it is true, is *prima facie* evidence of ownership—so held by this court, so held by all courts; but all *prima facie* evidence merely is liable to be rebutted; and this is the distinction between *prima facie* evidence and evidence which concludes or estops the party. The one may always be set aside or overcome by the facts, the other never can. This distinction the counsel for defendants seem to have wholly overlooked. Pursuing this branch of the case a little farther, before taking up the question of partnership, we may as well treat the defendants' points in their order. And first defendants' counsel say: "We may safely claim that their (defendants') title rests on the *bona fides* of their purchase," &c. "Because the original owners placed their property in the hands of another person, under such circumstances, or in such a manner, that the law implies a right and power on the part of that person to make a valid sale thereof (to a *bona fide* purchaser without notice), although between himself and the original owner no such right existed."

The objection to this position is two-fold: 1st. The circumstances from which the law implies a right and power of sale on the part of the Stevens, are entirely wanting. 2d. Even if such circumstances existed, the defendants bought without any knowledge or notice of them, and therefore cannot be protected by them. Leaving out of the account the contract, of which the defendants had no notice, and there was a mere bailment of the hides and

leather, precisely such as exists in every case where the owner of personal property leaves it with an artisan for repair or improvement by his labor and skill. Is it the law in this State that the man to whom A. loans his horse for a ride, or with whom he leaves it to be pastured, can sell it, and give a good title, as against A., to a third party, who will purchase relying solely on the possession of the vendor ?

We have examined carefully the two cases, 7 Bing., 543, and 15 Pick., 71, cited by the counsel, in connection with the above proposition ; and if there is any analogy between them and the case at bar, we have failed to appreciate it. In the first case, the plaintiffs recovered, in trover, the value of goods obtained from them fraudulently by the agent of the defendants ; and in the other case, a sale of personal property, made by the plaintiffs' agent, was sustained by the court, and the plaintiffs failed in their action to recover it. Both cases were properly decided, without doubt ; and state the law applicable to the facts found by the courts. But how they help the defendants' case, is not so easily understood.

Again, the counsel say that, "the defendants are entitled to hold " the property as against the true original owner, in this case, because the case at bar falls within that large class of cases where, " though the title of the vendor may have been obtained by *fraudulent means*, yet he can make a valid sale of the goods to a *bona fide* purchaser, for a valuable consideration, so as to deprive the " original owner of his power to reclaim them." Not so ! Before the law of "*that large class of cases*" applies, the defendants *must show that the Stevens, or Fletcher Stevens, in some way, acquired the title* to the leather in controversy. This court has decided, in the case of *Stevens vs. Fawcett et al.*, above referred to, that the title of the hides and leather remained in the plaintiffs—the Stevens not even having a lien upon them. When and how did the plaintiffs lose that title ? Certainly, not whilst it remained in the Stevens' possession at the tannery ; nor by the thievish acts of Fletcher Stevens, in carrying it away without their knowledge or consent

This *is* the case where the vendor has no title; the defendants' counsel to the contrary notwithstanding. And the exclusive possession by Fletcher Stevens was obtained by an act or acts so nearly amounting to a felony, that the difference may be safely disregarded. The counsels' brief, on this part of the case, assumes that certain facts are established, against the whole record; and then cites authorities to fit the assumed state of facts. Without exposing, in detail, the want of application of the numerous cases referred to on page 4 of their brief, it may be sufficient to point out the difference between this case and the cases from which quotations are made on that and the succeeding pages.

Root vs. French, 13 Wendell, 570, stands first; and the law laid down by the court, in that case, is conceded to be good. The facts were these: Root sold goods to one Jenkins; who, in three days afterwards, turned them over to the defendant, French, to indemnify him against liability as endorser for Jenkins. Root replevied the goods; and, on the trial, "proved the purchase by Jenkins *"fraudulent—being made on the eve of bankruptcy."* The question in the case was: *Whether French, under the circumstances, could be considered a bona fide purchaser.* The court held that he was not; and the judgment below, in favor of French, was reversed. But, in commenting on the case, Ch. J. SAVAGE says (p. 572): "Possession of personal property is *prima facie* evidence of property. This is a general rule to which there are some exceptions also. The *bona fide* purchaser, therefore, is justified in considering the *fraudulent vendor* the true owner," etc. This is the exact difference between a title fraudulently obtained, and no title whatever. The *bona fide* purchaser is justified in treating the person who has acquired a title by fraudulent means as the true owner; *but not the person who has no title at all.* In the one case, the owner has delivered the goods with the intention of selling them; and if he does not disaffirm the sale on account of the fraud, the title of the vendee is good, as against him, even. He gave the possession, and the title with the possession. But when did Stevens,

by fraud or otherwise, acquire the title to the leather sold by him to the defendants? The counsel do not attempt, otherwise than by assertion, to bring their case within the reason of the authority cited.

The case of *Jennings vs. Gage et. al.*, 13 Ill., 610, is the strongest possible authority against the defendants, under the facts of this case; and the principle announced in it must be overruled, and a principle new to the books and the profession established in its place, or this part of the defendants' case must give way. At page 614, the court, after stating the general doctrine, that when one of two innocent parties must suffer by the fraud of a third party, the loss should fall upon him who has enabled the third party to commit the fraud, says: "This is unquestionably the law, *when the owners, with the intention of sale, have voluntarily parted with the possession of the goods, and clothed the vender with the indicia of ownership*, though under such circumstances as would authorize a recession of the sale, and a recovery of the goods, as against the vendee. *But this principle does not apply to sales upon condition, and when the original owner has never consented to the transfer of the property.*" "*It is a universal and fundamental principle of the law of personal property, that no man can be divested of it without his consent.*"

The law announced in this quotation is too well settled, and too well established, to be lightly overturned; and the question is again pertinent, when did the plaintiffs, Fawcett, Isham & Co., part or consent to part with their title to the leather in controversy?

The case of *Ketchum vs. Watson*, 24 Ill., 591, is entirely different, and rests upon an entirely different principle. In that case, Watson sold the horse in dispute to one Outlaw, for \$80; took Outlaw's note for the price, and delivered the horse to him. This made Outlaw's title perfect. Subsequently, Outlaw not being able to pay his note, it was agreed that the sale should be rescinded; that Wat-

son should destroy the note, but Outlaw should keep the horse; and if he paid the \$80 in a certain time, should own him, otherwise he should belong to Watson; and in the meantime the horse was levied on as Outlaw's property, under an execution in favor of Ketchum. Watson claimed the horse, and the case originated in a trial of the right of property, before a justice, under the statute. On the trial in the Circuit Court, judgment was given for Watson, which was reversed in this court, because "the re-sale by Outlaw to Watson, was not perfected by delivery, nor was there any change of possession. *The title, therefore, did not pass.*" This is sound law, concisely stated; but where are the facts which make it applicable to the case at bar?

We certainly think the counsel were not aware of the broad and unqualified language used by them in reference to the case of *Roberts vs. Haskell*, 20 Ill., 59, where they say that, in that case, "possession of personal property is again held to be evidence of ownership, *for all purposes.*" If by *evidence* they mean *conclusive evidence* (and in any other view the position has very little force), the statement is a flagrant perversion of the facts and law of that case, as set forth in the opinion of the court. The counsel's reference is to page 65, which contains two instructions asked for, but refused, in the lower court, and which this court say should have been given to the jury. The substance of the first is, that possession of personal property is *presumptive* evidence of title in the party having possession; and unless the proof shows that some other person owns it, the presumption is, that it really belongs to the party in possession. This is a clear recognition of the doctrine claimed by us, that the *prima facie* evidence of ownership, resulting from the possession of personal property, *may be rebutted and overcome*. The second instruction, so far as it has any application to the case at bar, is not materially different. And neither of them, nor any intimation, in the opinion of the court, in any manner, justify the sweeping assertion, subversive of all law, indulged in by the counsel for the defendants.

With these remarks, in addition to what has been suggested in the brief for the plaintiffs, already filed, we dismiss this branch of the case, at least until we come to consider particularly the instructions given by the court, and will, as briefly as we can, consider the question of partnership presented by the defendants' counsel.

II.

It is useless in this case to enter into much discussion upon the properties and elements of a co-partnership, but we wish in the outset to call the attention of the court to a very plain and reasonable distinction between things or relations, which are, upon this subject, often confounded; and these are: a partnership in fact, and a liability or power as a partner in a particular case. An illustration will best explain our meaning. In a general partnership in fact, each partner is clothed with authority to act for all, and is liable for all the debts in the course of the joint business. And all this is by virtue of the partnership actually existing. But suppose A and B to have in fact no business connection with each other whatever, but being together they meet with C; and A, in the presence and hearing of B, represents to C that B is his partner, which B does not deny, in the trade in which he is engaged under his own name; and upon the strength of that representation acquiesced in by B, C sells goods to A adapted to his trade. Does this make A and B partners? Not at all. It is true that C may sue A and B together as partners for the value of the goods sold under such representations, and both A and B will be estopped from denying the allegation of partnership in that particular case, but beyond that particular case the relations of the parties are not changed, and notwithstanding their liability as partners in the case supposed, it is not proper, nor is it a correct use of legal language to speak of them as partners. That this is so, will be evident from another case. Suppose that after the purchase of C, A goes to D, who has never heard of B in any way, and purchases of him a lot of goods

exactly similar to those purchased of C. D sells his goods entirely on the credit of A. Can B be held for the goods purchased of D as well as for those purchased of C? Certainly not; because in the case of D's sale there is no estoppel upon B to prevent his showing the exact relations in fact between him and A. This is a familiar doctrine. If D should sue A and B as partners for the value of the goods sold to A, he might use the representations to C as evidence of a partnership in fact, but it would be liable to be rebutted and overcome by counter-proof, for the reason that D did not act upon that or any similar representation, and it was his business to know the fact as it really existed. The case supposed is one of purchase; let us now take a case of sale. A and B standing together in A's store, B says to C, in the presence and hearing of A, that he is a part owner and partner with A in the stock of goods and offers them for sale; and A not objecting, C concludes a purchase of the stock from B, and pays over the price agreed upon, and takes a bill of sale of the goods, all in the presence of A, and with a silent assent from him. The sale is good, and because C acted on the faith of representations made with A's knowledge and without contradiction from him, he is estopped from disputing the truth of those representations; but if B, without the knowledge or consent of A, should offer the stock to C, and C should act upon B's statement alone, and make the purchase and payment, doing the whole business with B upon his claim of a partnership without A's being in any manner informed of it, it will not be pretended that this sale would divest A's title to the goods, or give C any interest in them as against A. The principle which we wish to evolve from these illustrations, which might be put in a thousand forms with the same result, is this: That in case of a partnership in fact, the powers and liabilities of the several partners rest upon and attach to the relation itself, no matter whether it is known or not known to the parties dealing with the firm. Hence, a silent partner, being a partner in fact, when discovered, is always held liable for the partnership debts, although not known to the creditor at the time the debt was contracted—but, that parties may make themselves liable

as partners, and estop themselves from denying a partnership, where no such relation in fact exists; and that the party who alleges a partnership, either for the purpose of recovering a debt, or making good a sale, is bound to show either a partnership in fact, which is always sufficient, or that he acted upon such representations, statements or facts as estop the parties in the particular case from showing that no partnership did exist. This doctrine is substantially laid down in notes to *Waugh vs. Carver* in respect to a nominal partnership. (See Smith's Leading Cons., vol. 1, page 729, and cases cited.)

Applying this doctrine to the case at bar and it seems to us that the facts fall far short of establishing the claim of the defendants. This court, in the case of *Stevens vs. Fawcett et al.*, has held, and properly without doubt, that a provision added to this contract that it *should not create* a partnership between the plaintiffs and the Stevens would have been valid, and further, that if inserted it would have added nothing to the contract, as the same intention is plainly expressed as the contract now stands. We say then upon the authority of this court, that there was no partnership in fact between the parties. This being so, before the defendants can claim that they are protected by the sale of the leather to them, as *bona fide* purchasers, by Stevens, they must show that they acted in making the purchase upon the faith of representations or acts of the plaintiffs indicating a partnership, and estopping the plaintiffs from denying it. This they utterly fail to do, for the record shows that they had no knowledge of the plaintiffs, and dealt with perfect strangers. Admit, and it must be admitted, that there was no partnership in fact between the plaintiffs and the Stevens, and the defendants' case is hopelessly defective in not showing any facts or circumstances tending to induce in them a belief that there was a partnership.

III.

There is apparently an inconsistency or disagreement between the real principle upon which the court decided the case of *Stevens vs. Fawcett et al.*, and a remark of the learned Chief Justice in the early part of the opinion. The principle of the case is well stated at page 488, in these words: "This arrangement was, manifestly, "but a mode adopted for part payment for the work to be performed." The remark alluded to is on page 486, and is to the effect that the clause of the contract, relating to the division between the parties of the difference between two aggregate sums, denominated in the contract "profit or loss" and "gain or loss," constituted a *partnership in the profit and loss*. It will, of course, be conceded that the remark was unnecessary to the decision of that case; that whether there was a partnership in the profit and loss, if there can be any such thing in fact, or not, was wholly immaterial in that case. The remark will therefore be regarded, not as a decision of the Court, but rather as a dictum, which will be considered controlling only in case it should be found, on more careful examination, to be well sustained upon principle and authority.

Before considering whether a *partnership in the profit and loss* is created by the contract before the court, it may be well to ascertain, if possible, what the terms themselves import—how they have been used by text-writers and jurists, and whether a partnership in the profits and losses of an enterprise is not of itself an ideality merely. We have the authority of Professor PARSONS, of Cambridge Law School, for saying that there is no such thing as a partnership in the profits and losses of a business merely; and although we find the phrase in use in the books, it is certain that it conveys no very definite notion of the relation intended to be described in it. We do not think the question of sufficient importance in this case to attempt an analysis of the texts and cases in

which the phrase is used, but we will venture this statement, applicable to all the authorities on the subject, that wherever the phrase "partnership in the profit and loss" has been used with any meaning, it has been used in the absence of a better one as a test of a partnership in fact or by implication of law, and not as indicating any distinct and definite arrangement or relation between the parties. Partnership in profit and loss in any other view is an absurdity. We understand very readily what is meant by a "sharing in profit and loss," and by a "community of profit and loss," but neither of these terms are used to describe the relations of parties, but merely as incidents to, or tests by which to determine their relations. Do the words "partnership in profit and loss" import anything more? Again we assert that in all cases where the words "partnership in profit and loss" are used intelligently as descriptive of the relation existing between parties, a partnership in fact or by implication of law is held to exist, either in respect to the subject matter of the contract or the business transacted under it, of which the sharing in profit and loss, or "partnership in profit and loss," was a controlling test or criterion. We venture, therefore, to suggest that the phrase "partnership in profit and loss" means simply a sharing in profit and loss, which may or may not, according to other circumstances surrounding the case, determine the question of partnership between the parties. The case put by the court in *Stevens vs. Fawcett et al.*, at page 487, well illustrates this view, and shows the inaccuracy of calling a joint or common interest in a result a partnership in any sense.

As above remarked, we do not deem it material whether or not there may be such a business relation in fact, as a mere "partnership in profit and loss." Suppose there can be, does the contract under consideration establish it between the plaintiffs and the Stevens? We say, no. A partnership in profit and loss, if the thing is possible and real, must, in the absence of special restrictions, possess, in respect to the subject matter of it, the usual forms and incidents of other partnerships; and one of the incidents connected

with a partnership, is a power in each of the partners to sell and dispose of the subject matter of the joint or partnership interest; and in this case, we put it as a test question, whether the Stevens, separately or together, could have sold out the plaintiffs' interest in the profits of the sales of leather manufactured under the contract between them, or the plaintiffs' interest in the profits of any single invoice of the hides sent to the Stevens; or could the plaintiffs have sold out the Stevens' interest to a third party? That is, could the sale have been made, by either of the parties, of the interest of the other in the profits resulting from the sales of the leather, by which the other would have been bound, and which would have substituted the purchaser to his rights? It cannot be so pretended. Then what partnership rights, powers, or privileges does the contract create in respect to the profits and losses? None, certainly; except the right to a division of them; but a right to a division is no *partnership* right, or rather no right peculiar to a partnership, whatever. It belongs as much to a tenancy in common, as to a partnership. And under this view, which, we insist, is the only correct one, there would be, in case the balance should be in favor of the business upon the settlement of each invoice of leather, a sum of money in the plaintiffs' hands, one half of which would belong to them, and the other half to the Stevens. Does that make a partnership? Are we to say—will this court say, on reflection—that because A holds money in which he and B are equally interested, one half belonging to each, therefore they are partners in any sense, or for any purpose whatever? And we submit, that this is all there is, and all that can be made of the provision of the contract in question, relating to the pretended claim of a partnership, in the balance or difference denominated profit and loss.

IV.

The contract between the plaintiffs and the Stevens does not provide for a sharing in the profits and loss of the enterprise. When

counsel and courts are called upon to force upon parties relations which they confessedly did not intend, as between themselves, through strict and technical constructions of language improvidently used, it behooves them to bring their case completely within the letter and spirit of the law; and they should not assume that the case is made, when they have not established one fact, even, which makes the rule applicable. We therefore say it, meaning what we say, and repeat it, for the purpose of calling the attention of the court *particularly* to this point, that the contract between the plaintiffs and the Stevens does not provide for a sharing of profit and loss between them! And further—and to make this statement more emphatic—we do not hesitate to affirm of the man who denies this statement, that he either misconceives the meaning of the words “profit and loss,” or the contract itself. True, the words “profit and loss,” and “gain and loss,” are used in the contract; but the parties have, in connection with them, explained their meaning, and that explanation is binding upon courts in the interpretation of the contract, as well as upon all parties claiming through that contract. The contract says that the words profits and loss, as used in it, mean the difference or balance between two aggregate sums, the component parts of which are expressly defined and pointed out. The merchant who reckoned up his profit or loss by counting in certain specified items, agreed upon before he commenced his business, and leaving out of the account his rent, clerk hire, losses by bad debts, depreciation of stock, travelling expenses, and the thousand other incidental charges of his business and contingencies of trade, would be considered at least a poor accountant, and his balance sheets would be scarcely *prima facie* evidence of the actual condition of his affairs. The profit and loss, which, in the absence of every other element, determines the question of partnership under a given contract, is the *ultimate profit and loss* of the business—that which remains on the one side or the other of the account, after all the expenses and contingencies of the business are allowed for. There is no way of avoiding this point. We may safely challenge the defendants’ counsel and the world to produce a well con-

sidered case or authority to show that the words "profit and loss," when used in the absence of all other elements of partnership to determine the fact of partnership, mean anything short of *ultimate profit and loss*, as above explained; and if the contract now before the court had provided that the gross receipts for the leather should be equally divided, such gross receipts might, with just as much propriety be denominated profit or loss, as the balance or difference actually intended by the contract as it now is. Leave out the words "profit and loss," and "gain and loss," and the meaning of the contract is not changed in the slightest degree; and if they were left out, we verily believe that the idea of basing a partnership upon it would never have entered the head of counsel or court. If we are to be governed by technical rules in this matter, we insist that the rules be applied as they are in other cases, and that no new rule shall be originated for the purpose of lifting the burden from the shoulders of the defendants, and placing it upon the plaintiffs. The old rule, which, contrary to the intention of the parties, and in violation of their express stipulations, thrust the relations and responsibilities of a partnership, as to third persons, upon them, for sharing in the actual and ultimate profit and loss of a transaction or business, was severe enough, and nothing but its antiquity preserves it from disgrace and rejection; but hard as it is, and as unsatisfactory and fallacious as are the reasons by which it is sustained, we are willing, and, if not, would be compelled, to submit to it. But we are not willing, and do not wish to be compelled, to submit to any further restrictions of the rights of parties to make and interpret their own own contracts, and to compel others to adopt and act upon that interpretation, when it is clearly and unequivocally expressed in the body of the contract itself.

It is not often that cases can be cited exactly covering the point in issue upon a question of fact; but upon this point, viz: that this contract does not provide for a sharing in the profit and loss, in any proper sense of that phrase, when used as a test or criterion of a co-partnership, we have a case precisely covering our view, both

in the facts and the law. And whilst we insist that text-writers and jurists, by everywhere taking and maintaining the distinction between "gross profits" and "net profits," and between the popular use of the word profit, and the strict technical use of it to indicate "profit as profit," or "ultimate profit," fully sustain our position; we are not disposed, nor do we deem it necessary, to review the whole ground or point out the special portions so supporting us, but only refer the court to the case of *Bowman et al. vs. Bailey*, 10 Vermont 170, which has never been overruled or impeached as authority until questioned by the learned Judge who tried this cause in the court below—but until other authority is produced we must prefer the opinion and reasoning of Mr. Justice PHELPS and the Supreme Court of Vermont, on a question of construction and law, to his.

The case is short, and we give a full abstract of it so far as it relates to the point under consideration. Bowman, Hodgson and one Hall owned a canal boat, which, being out of repair, Bowman and Hodgson fitted up, and made an arrangement with Cummings to run it. The agreement was in substance that Cummings should pay all necessary expenses of running the boat and of taking and carrying freight, and that Bowman and Hodgson should have one-half of the earnings of the boat, and Cummings the other half; each party losing one-half of all bad debts made in the business, and each paying one-half of all other losses. The action was brought by Bowman, Hodgson and Cummings to recover an account for freight money against the defendant, and one question in the case was whether the arrangement between Bowman, Hodgson and Cummings made them partners. The Court, by PHELPS, J., say: "The plaintiffs cannot be considered partners, strictly speaking. They did not share in the profits and loss of the business, in *the sense in which the terms are used as constituting the criterion of partnership. The terms, when used in reference to this subject, denote ultimate profit or loss of the operation.* Here the plaintiffs *were to decide the gross earnings of the boat, without reference*

Bowman et al.

"to the usual and customary expenditures—*such a connection has been repeatedly held not to constitute a partnership.* They were indeed to share equally in the loss occasioned by bad debts, but this would merely render it necessary to substitute the word *receipts* for *earnings*. They were also to share equally in losses; but by this we do not understand the ordinary expenses of the business, but something accidental and contingent. Now, in settling the account between these persons, no reference would be had to ultimate profit and loss, but Cummings would be entitled to one-half the receipts as a compensation for his services and expenses in running the boat, and the plaintiffs" (meaning, doubtless, Bowman and Hodgson) "to the other half for the use of the same."

This is precisely the condition of the parties under the contract in question. In the settlement of the accounts under it no reference whatever would be made to the ultimate profit or loss of the transaction. Certain specific items would be deducted from the gross amount of sales, and the balance would be divided. There might or might not be a profit upon the whole.

The clause in the contract relating to the division of the balance or difference, called "Profit or Loss," above referred to, is the only part of the evidence in the case upon which the idea of a partnership is or can be based. All the other provisions of the contract,

and all the other facts of the case, point conclusively to a relation entirely different. And, insisting upon the view of this clause, above presented, as the only proper and correct interpretation of it, we take this further position, that, even if the court should hold that a sharing in the profit and loss was intended, still that clause must be construed in connection with the other facts and circumstances of the case, and with the balance of the contract; and when so considered, the court must find that no partnership was created by it. If any part of the contract is to be rejected, we insist that it shall be that part which is inconsistent with its general scope and repugnant to the plain intention of the parties. What that intention was, is very forcibly expressed in the opinion of Ch. Just. CATON, in *Stevens vs. Fawcett* et al., before referred to, where he says: "It is as manifest that all parties intended that Fawcett, Isham & Co. should own, hold and control the hides and leather, as if it had been so declared in distinct terms, and in a separate clause." To hold, therefore, a sharing of the profit and loss (if the court shall so interpret the clause referred to) made the plaintiffs and the Stevens partners, contrary to their express intention and the plain import of their agreement, and all the other facts

Other cases, to the same effect, might be cited; but we deem it unnecessary; and we dismiss this point with the suggestion that the difference between sharing in the net profits and sharing in the

profits and losses is fanciful and unsound, when urged as the foundation of a legal distinction. The principle is the same, in both cases. Both include a sharing in losses; the difference being only in the degree or extent of the sharing. Upon the foregoing reasoning and authorities, we claim that the first, second and third instructions asked for by the plaintiffs, should have been given; and that the modification of the second instruction by the court, by inserting the word *as*, was an error. The court should have instructed the jury, as it was substantially asked to do by the instructions referred to, that the contract did not create a partnership between the plaintiffs and the Stevens, nor give the Stevens any right or power to dispose of the leather.

VI.

The fourth instruction asked for by the plaintiff, contains a correct statement of the law applicable to the facts of the case, and should have been given by the court. Without incorporating it into this argument, in full, we may state the substance of it as follows: That although defendants purchased the leather of Stevens, or his agent, without notice or knowledge of plaintiffs' claim; yet, if the plaintiffs were the real owners of the leather, and never consented to or ratified the sale, and never gave Stevens any authority to sell, but demanded the leather of the defendants, who refused to deliver it up, before the commencement of this action; then the plaintiffs are entitled to recover, notwithstanding the purchase by defendants. This, it will be seen, is but an application to this case of the "universal and fundamental principle of the law of personal property," recognized and laid down by this court in *Jennings vs. Gage et al.*, 13 Ill., 614: "That no man can be divested of it, without his own consent." We cannot add anything to the argument of that "universal and fundamental principle" in favor of the instruction. The principle must be sustained and enforced.

See, also: *Saltus* vs. *Everett*, 20 Wend., 275.

Ash vs. *Putnam*, 1 Hill, 303.

VII.

The last point of the case which we propose separately to consider, by way of addition to what has already been said in the brief for the plaintiffs now on file, regards the instructions volunteered by the court on the trial below. It is a singular fatuity, that leads a Judge at *nisi prius*, to imagine that in the hurry and confusion of a jury trial he can better appreciate and understand the facts and law of an important case, than counsel who have devoted to it much patient investigation; and it is even more singular that he should be willing in his office to assume a responsibility which our law and practice do not cast upon him. We do not expect, however, to reform such tendencies, and only mention this as another instance in which it would have been much better for the learned Judge to have confined himself in this particular to passing upon the instructions prepared and presented to him by the defendants' counsel.

The instructions by the Court, numbered 1 and 2, are in any view of them an anomaly in the legal literature of this country, and considered in connection with the facts of the case, are a monstrous distortion of well settled principles of law. It is impossible to do them justice without criticising both their language and their substance. The first clause or paragraph of the first instruction contains as absolute and palpable a *non sequitur* as it is possible to conceive of. The substance of it is, that if the jury believe from the evidence that the leather in question was manufactured by the Stevens under the contract given in evidence, then as to third persons and purchasers, &c., the parties to that contract were partners. This may be a roundabout way of saying that as to third persons, &c., the contract created a partnership between the plaintiffs and

the Stevens; and if that was the intention, we insist upon the reasoning and authorities presented in the former part of this argument, that the law of the learned Judge is as bad as his phraseology. The second part of this instruction was doubtless intended to state the law applicable to the facts of this case, as the learned Judge understood it, and must be quoted in full in order that we may point out its strange absurdity. It is as follows: "And if the jury believe, from the evidence, that the defendants in this case, for a full consideration, and without knowledge of such an agreement, or of any circumstances tending to put a prudent man on inquiry, purchased the leather in controversy of the agents of the Stevens, in open market, the law is for the defendants. But if the jury believe, from the evidence, that the defendants had knowledge of the agreement, or of any circumstances tending to put a prudent man on inquiry as to the ownership of said leather, as between the plaintiffs and said Stevens, or of the rights of the plaintiffs in said leather, or did not pay a fair price for said leather, then the law is for the plaintiffs." It will be borne in mind in considering this part of the instruction that the record of this case is absolutely without an intimation that the defendants ever knew or heard of the Stevens or the plaintiffs. They dealt with a perfect stranger, acting under an assumed name, and without any knowledge or notice of any facts or circumstances behind which they can shield themselves. Let us eliminate from the first branch of the learned Judge's proposition, what every lawyer and court must say will not protect the defendants in their purchase. A purchase of personal property from a party who has no title, and no authority to sell, *even for a full consideration*, will not give the purchaser a title, as against the owner. We may, therefore, drop out that part, without damage to the legal proposition. A purchase of personal property, in the absence of circumstances to put a prudent man on inquiry, from a party without title and without authority to sell, will not give the purchaser a good title. And as to a purchaser in *open market*, the law of this country recognizes no such idea; or if it does, interpreting the words to

mean a public or open sale in distinction from a private or secret one, still the real owner cannot be affected by such a sale unless he knew of it, or in some way acquiesced in or assented to it. We may, therefore, without injury to the law of the learned Judge, leave out each and all of these qualifications of his premises—and the proposition then stands thus: “If the jury believe from the evidence that the defendants, without knowledge of such an agreement, purchased the leather of the agent of the Stevens, the law is for the defendants.” That this was the idea of the learned Judge appears from the converse of the above proposition contained in the next branch of the instruction, in which, as the court will notice, all the qualifying circumstances contained in the premises of the proposition are disjunctively connected—and properly separating these circumstances we have this proposition plainly stated: “If the jury believe from the evidence that the defendants had knowledge of the agreement, then the law is for the plaintiffs.” Now compare these two propositions, and we have the substance of this instruction as follows: If the defendants purchased the leather in question of Stevens’ agent, in ignorance of the agreement between the plaintiffs and the Stevens, they acquired a good title; but if they purchased with knowledge of the agreement, they acquired no title. Let us enlarge this a little in connection with other facts, undisputed in the case. The agreement or contract shows the title to the leather to be in the plaintiffs; ~~and~~ *our* supreme court has so held, and it is plain on the face of the instrument itself. The plaintiffs introduce it in evidence in support of their title, and it establishes their title. Still the defendants, by showing absolutely nothing but ignorance of that contract, establish a better title to the leather than the plaintiffs.

“Where ignorance is bliss
'Tis folly to be wise.”

The second instruction is equally objectionable, but upon a different ground, and for a different reason. It is a confounding of

the real and a fictitious case, in such a way that the jury must inevitably have been misled by it. The substance of it is, that if the Stevens acquired possession of the leather by the voluntary act and consent of the plaintiffs, with no apparent restriction of control and ownership thereof, and the plaintiffs clothed the Stevens with all the open and apparent indications or marks of ownership of said leather, and the Stevens sent the leather to Chicago for sale in *open market*, and the defendants, without any knowledge of the agreement, etc., purchased the leather in good faith and for a full price, then the law is for the defendants.

Now, the facts are, as above stated, that the defendants were absolutely ignorant of the plaintiffs and of the Stevens, and of the relations between them. The only thing they did know, was, that the party of whom they purchased had possession of the leather. It afterwards turned out that he was acting for Fletcher Stevens; both, however, going under false and assumed names. So far, then, as this instruction, and the facts supposed in it to be found by the jury, has any meaning, it means that the giving of the Stevens possession of the leather, or hides from which it was manufactured, was clothing them "with all the open and apparent indications or "marks of ownership." If this was the intention and meaning of the language, it is clearly erroneous; and if it was not the meaning, then there is nothing in the facts of the case tending to show that the Stevens were clothed with any of the indications or marks of ownership, by the plaintiffs; and such language, under such a state of facts, might well lead the jury to suppose that possession alone was the indication or mark of ownership referred to. The preceding part of this instruction is also extremely objectionable. It reverses the proper rule of evidence in such a case as is supposed. The inference from it is, that mere possession, unless there is some apparent and visible restriction of control and ownership, enables the possessor of personal property to sell it and give a good title. If the instruction had contained the words, "with an apparent and "visible authority to sell the leather," instead of, "with no appar-

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"ent restriction of control and ownership thereof," it might, in that respect, have been good law, although decidedly out of place under the facts of this case. Fletcher Stevens, having no title to the leather, it was incumbent upon the defendants to show that he had an apparent authority, more than can be inferred from mere possession, to sell it; the mere negative condition, implied by the absence of *apparent restrictions*, will not protect them. The rest of that instruction, relating to defendants' ignorance of the agreement and open market, is also objectionable, as stated in reference to the first instruction. We cannot imagine how good law can be manufactured out of facts and elements so defective. That ingenuity has been displayed in weaving them together in such a way as to give a degree of plausibility to the whole, we readily admit; but human skill is not adequate to the task of completely disguising so much unsoundness.

VIII.

Upon the whole case, as stated in the record, it may well be asked, on what ground of equitable or legal right can the defendants stand? That "no one can transfer to another a better title than he has himself, is a maxim," says Chancellor KENT, "alike of the common and civil law; and a sale *ex vi termini*, imports nothing more than that the *bona fide* purchaser succeeds to the rights of the vendor." The only exception to this rule, in the ancient English jurisprudence, was that of sales in *market overt*, which has no application in this country.

2 Kent's Comm., 324, and cases cited.
Saltus vs. Everett, 20 Wend., 275.

The defendants, therefore, by their purchase of Stevens, only acquired the rights of Stevens; or such rights as he was actually empowered to convey; and substantially, for all the purposes of this

action, stand precisely in his place. They are not guilty of his theft or fraud, whichever it may be called; but, aside from this, their legal relations to the leather are rather worse than better than those of Stevens, since it came to their possession through at least a tortious conversion of it, which divested the Stevens of any prefor withholding it from the plaintiff.

It may be said, it is a case of extreme hardship; and this we will not pretend to deny. But hardships do not fix or vary the rules of law. And, in this case, the hardship is mutual. That is, the plaintiffs will be injured as much by the subversion of the law, as the defendants can be by the enforcement of it. And even if this were not so, the fault, accident or mistake which involved the defendants in this contest of right, was rather their own than the plaintiffs'. This is a proposition strenuously denied by the defendants' counsel, but true, nevertheless. No word, act or omission of the plaintiffs induced them to make the purchase; but, incautiously trusting to the evidence of mere possession, they voluntarily paid their money to a party who could give them no equivalent therefor. Take the most favorable view of this case, appearing in what it is admitted, in the record, that the witness, Rose, would have sworn to, if he had been sworn at all, and there is still no pretence for charging the plaintiffs with fault. The sale to the defendants was in a name that had no existence in fact, a name in no way suggestive of the plaintiffs, or of any connection with them; a name of which the plaintiffs were wholly ignorant, and not in any manner traceable to them, and justice requires that they be compelled to resort for their remedy to the parties with whom they dealt, and whose warranty, as to title, they received. If Stevens or his agent had shown them any *apparent* authority from the plaintiffs, or any evidence of apparent title derived from the plaintiffs, any bill of sale though not intended to operate as such, or any bill of lading or other documentary proof of title, however obtained, from the plaintiffs, or any letter of agency, or any letter or paper showing or tending to show, that he had been entrusted with the leather by the plaintiffs, with the intention

of sale; or if the *known* relations between the plaintiffs and the Stevens had been such as to induce in the defendants a belief in the authority of Stevens to make the sale, and they had purchased, relying upon those circumstances or any of them, then might they with some reason and propriety claim to be protected against the consequences of their improvidence, and charge the plaintiffs with some degree of responsibility for the fraud which Fletcher Stevens committed. But none of these acts, representations, statements, facts, or circumstances, and nothing similar or equivalent to them, are found in the case. The counsel are compelled to draw upon their fancy, when they attempt to assign an indiscreet, improper, improvident, or unusual act to the plaintiffs. They acted in the matter as prudent and careful men, protecting themselves and their title, and all other parties as far as was practicable, under the established usages of business; but they did not undertake, and if they had, they would have utterly failed, to supply to others the necessary caution in dealing with strangers; and whilst we fully acquit the defendants of any complicity with the fraud, and make no doubt that they acted in good faith and upon the supposition that they were getting a good title to the leather, still we insist that they, and not the plaintiffs, took the responsibility of that title, and must abide the results of it. And upon this general view of the case, we insist, that the motion for a new trial should have been sustained, and that the judgment of the court below should now be reversed.

McALLISTER, JEWETT & JACKSON,

Att'ys for Pl'ffs in Error.

199 - 18

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM A. D., 1863.

WILLIAM OSBORN, <i>et al.</i> ,	}
<i>Defendants in error and Defendants below,</i>	
ADS.	
FREDERIC FAWCETT, <i>et al.</i> ,	
<i>Plaintiffs in error and Plaintiffs below.</i>	

BRIEF FOR DEFENDANTS IN ERROR—POINTS AND AUTHORITIES.

COUNSEL FOR DEFENDANTS:

THOMAS HOYNE AND C. A. GREGORY,

Filed Apr. 23. 1863
L Selane
CM

SUPREME COURT OF ILLINOIS.

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APRIL TERM, A. D. 1863.

WILLIAM OSBORN, *et al.*,
Defendants in error and Defendants below,

ADS.

FREDERIC FAWCETT, *et al.*,
Plaintiffs in error and Plaintiffs below.

Brief for Defendants in error. Points and Authorities.

The trial below resulted in a verdict for the defendants below, who are also defendants in error, and was an action of trover to recover the value of 2000 sides of hemlock tanned sole leather, sold by one F. Stevens, in 1857, to the defendants in Chicago.

F. Stevens was one of the firm known as *W. H. & F. Stevens, manufacturers and dealers in leather* at Stevensville, Sullivan Co., New York, [*p. 15 abstract, § 50-51,*] and also as merchants, [*See plaintiffs' deposition of Wm. H. Stanton, p. 10 abstract,*

§ 40 to 44]; and it is claimed had become possessed of the property in question under a contract entered into in the year 1855, between them (the Stevens, merchants and tanners,) and the plaintiffs in this action.

The contract provided that Fawcett, Isham & Co., doing business in the city of New York, should send to W. H. & F. Stevens, of Stevensville, Sullivan Co., N. Y., all hides they might require for the purpose of being tanned and manufactured into sole leather in the tannery at Stevensville, for three years from the date of the contract, limiting the amount of hides to be sent; and then provided for transportation by W. H. & F. Stevens, from New York to the tannery, to tan and manufacture the hides into sole leather, in a good and workmanlike manner, and to return said leather to the city of New York, there to be sold by the plaintiffs.

The contract then fixes the prices of tanning to be received by W. H. & F. Stevens, the rates of commission to be retained on sale of the leather by the plaintiffs to pay for their services; and the mode in which the profits and losses are to be arrived at between the parties to the contract, and also providing "*that the profit or loss on all leather, manufactured under this contract, shall be equally divided between both parties,*" and that each party should pay one-half of all insurance on the said leather.

This contract has already been before this court upon the question of the ownership of the leather as *between the parties to the contract*, in the case of *Stevens, vs. Fawcett et al.*

Vide, 24 Ills. R., 484.

Under this contract it was claimed by W. H. & F. Stevens, as will appear by reference to the case already cited, that they were co-partners in the business of manufacture, as well as joint owners in the property manufactured; and therefore W. H. & F. Stevens assumed the right to make sales of the leather in question

As Chief Justice ^{Savage} ~~Sawyer~~ says, in 13 Wend., 572: Such innocent third person is a *bona fide* purchaser for a valuable consideration. "In such a case the vendor who has been defrauded of his property, and the *bona fide* purchaser from the fraudulent vendor are both innocent parties, and where one of two innocent parties must suffer from a fraud of a third, the loss should fall on him who enabled such third person to commit the fraud."

"Possession of personal property is prima facie evidence of property. The *bona fide* purchaser is justified therefore in considering the fraudulent vendor the true owner, &c."

The same principle is announced by this court in the case of *Jennings vs. Gage, et al.*, 13 Ills., 614, in which the court say: "If he (the owner) consent to the transfer of the property, though such consent be temporary only, and obtained by fraud, and therefore recoverable as against such unfair purchaser, still an honest purchaser from him will be protected, and the first owner must bear the loss." Also in the case of *Gosnay vs. Frost*, 27 Ills., 53, in which Chief Justice Caton says: A purchaser is not bound to take mere suspicions unsupported by facts, in purchasing personal property of a party in possession and dealing with it, as constructive notice of fraud, that he had acquired his title fraudulently.

In *Ketchum vs. Watson*, 24th Ills., 591, a possession by a party who held the property upon condition that he should pay the price agreed upon by a certain day, and before that day arrived the property was seized upon execution for the debt of the party so in possession conditionally, and without a title as between himself and the true owner, yet it is held that as a third person had dealt with the possessor without notice that he was not the owner of the property thus held, and given him credit

which had been levied, in favor of such person. Breese. J.

In *Roberts vs. Haskell*, 20 Ills., 65. Possession of personal property is again held to be evidence of ownership for all purposes.

III.

These cases, and the principles decided by them, would under any circumstances, seem conclusive as to the validity of defendants' title. It will be found in all the cases where the property was purchased by a *bona fide* vendee of a fraudulent vendor who had possession of the article sold with the consent of the real owner, that the *bona fide* vendee has been protected.

But in this case at bar, not only does the possession come by consent of the plaintiffs to the hand of vendors from whom defendants purchased the hides in open market for a fair price and without notice; but the possession of Stevens, the vendor, was that of a copartner and consequently agent, and as to all third persons rightfully dealt with the property as the copartnership property of the plaintiffs and himself.

Consult the case in 24 Ills. 480, *Stevens vs. Fawcett et al.*, in which the rights of Stevens to the possession and deposition of the leather manufactured by him under the joint articles existing between the Stevens and the plaintiffs in this case, became the subject of controversy.

The decision in that case in any view which may be taken of it, so far as the present controversy is concerned, is conclusive in favor of the defendants in this case. The leather was not only in possession of our vendor when he sold to us, the defendants, but the vendor had a joint property with plaintiffs in the thing he sold.

Not only had he the joint property and interest in the property sold, but it may be also claimed, that, as to third persons he had the only possession and title which a stranger could ever recognize. Fawcett, Isham & Co. never owned *this leather*, though they had purchased hides. They had indeed furnished hides to Stevens to be manufactured into leather under a contract, but what leather did we purchase? Was it the leather manufactured out of the hides sent to the Stevens by Fawcett,

the plaintiffs, which came directly from the tannery of the Stevens, at Stevensville, instead of the stock of the merchants, plaintiffs, at New York, which, even by the fictions of the law of trover, cannot be assumed to have been ever lost by these plaintiffs, and found as their property by defendants—and the only right to which comes through a contract which was existing for its manufacture between plaintiffs and Stevens, and not a right and title or possession of which the plaintiffs had been wrongfully deprived by the fraud of any person whomsoever; they never had obtained any such possession, title or right, prior to the purchase which Osborn, Adams & Co. had made in good faith of the Stevens, as the original and first possessors. Plaintiffs' claim to the property comes through Stevens; in fact only exists by virtue of his relations to them; and long before those relations are understood or heard of by the purchasers who acted upon the faith of the appearances the vendor was enabled to assume, with the consent of plaintiffs, Osborn, Adams & Co., had

become the purchasers of the property in good faith, and had acquired the title with all the priorities of ownership, as well by right of possession and purchase, as by the equitable estoppel which will not permit a party to take advantage of his own wrong.

It is difficult to conceive of a case in which so many elements combine to constitute a perfect title to property acquired by purchase in market overt, as it were, as are apparent here.

From this we feel quite certain that the court understands the law as it is contended for by the defendants' counsel in this case; and after this implied construction of the articles that in other cases, than where as between themselves the intention as to the title of the leather was to be arrived at, the court would hold that a co-partnership existed according to the articles—and they so decide that a co-partnership was no doubt constituted between themselves.

Nor is this provision of the articles of agreement, as construed by our Supreme Court singular—in many agreements which by law are construed to make the parties to them co-partners, it has been agreed, (or intended, as in 24 Ills.,) that only one of the parties to the agreement should have the *jus disponendi* or title and right of disposition in the subject matter of the co-partnership agreement; yet we do not find that creditors are deprived of satisfaction of their claims out of such property, nor

do we find that courts of law or of equity refuse to hold valid the title of a *bona fide* purchaser (without notice) of such property, from a partner, who, by the agreement, had no right to sell the same.

If the question of partnership is considered material in this case, we may refer the court to the numerous cases, and their number is legion, in which it has been decided that the *criterion* and *true test* of a partnership is the participation in the losses and the pernancy of the profits—and when the two coincide as in the case at law, there is no rule better settled than that a partnership is constituted.

But it is true that this rule does not preclude the parties from expressing, insisting upon, and holding under the protection of the law, that one of the partners, for example, shall as between the parties themselves, be considered the owner of the stock, and have the sole right of disposing of it, or if you please that one should be considered between themselves the sole owner and another have the sole right to make sales. None of these agreements, as the court in 24 Ills. intimate, would contravene any principle of law, yet if, in spite of such agreement, one of the partners, disregarding the rights of his co-partner, were to sell to a *bona fide* purchaser without notice, for a fair price, the purchaser would take a perfect title. Such we affirm is the position of the defendants in this case, relative to the Stevens, and to the plaintiffs.

IV.

The plaintiffs in this case mainly rely upon the refusal of the court below to instruct the jury that no *co-partnership* was created by the contract existing between the parties, and that, as a

consequence, Stevens having no authority as a co-partner, to dispose of the leather, he could not make a sale to a *bona fide* purchaser for a valuable consideration, which could deprive the appellants of the power to reclaim the property.

This argument is already disposed of in the cases which have been cited to show that although the possession of the Stevens might have been fraudulent as against the plaintiffs, yet having been clothed by them with all the "indicia of ownership upon the faith of which these purchasers relied, without notice of plaintiffs' claim, or the presence of any circumstances tending to put a prudent man upon inquiry, the purchaser in such cases is protected and may obtain a superior title.

Besides if it were at all material to our right to hold this property, that a co-partnership *as to third persons*, was in fact created under the contract in question the law is too clearly stated to admit of a doubt that such was the relation of the parties to the property in controversy.

This was a contract each of the co-partners contributed not only labor and sonices but also capital stock and materials, and also expressly provided for a joint and mutual participation in *losses* as well as *profits*.

Story on Partnership, Sec. 27.

It is true that a distinction is made between cases where a partner is to receive a certain sum of money in proportion to a *given quantum of the profits as a compensation for his labor and services*; and cases where the partner has an interest in the profits as *profits* and participates in the *losses*.

The strongest case perhaps to be found in the books, where this question of co-partnership is based upon the principle that mere profits without a community of interest in losses in lieu of *compensation* for services, does not create a person a co-partner

in the business is decided in Massachusetts. *Denny et als. vs. Cabot & Metcalf* 90.

In this case the contract was one between the manufacturer of Satinet cloths and the merchant dealers, in which the manufacturer received a share of the "*nett profits*," and shared in no risk of any losses which might arise in the business. But in the case of Stevens' articles of agreement, it is expressly stipulated that they shall bear the losses equally with the plaintiffs; and further, they were to insure their interest in the property, by paying one-half the premium for insurance. Query: if the leather had by accident been lost in the Hudson river on its route to N. Y. would not plaintiffs have a right to make the Stevens, bear the part of the loss, in case of failure of insurance, &c.

Taking the distinction which Chief Justice Wilder found governing all the law of co-partnership he says: "The distinction is well established that a party who participates in the profits of a trade or business and has an interest in the profits, is chargeable as a *partner with respect to third persons*, but if he is only entitled to receive a *certain sum of money* in proportion to a *given quantum of profits* as a compensation for his labor and services, he is not thereby merely to be charged as a partner."

6 *Metc.*, 92.

Again, page 92, he says: "That Cabot, Appleton & Co. were to pay Cooper one-third part of the profits after making certain specified reductions; and Cooper clearly was not to be liable for *any losses*. If he had stipulated for a share in the profits, so as to entitle him to an account and to give him a specific lien and giving him the full benefit of the profits of the business without any corresponding risk in case of loss. Justice to the other creditors would seem to require that he *should be holden to be liable to third persons as a partner*."

If any doctrine or principle of law is more clearly settled than

another it certainly is, that wherever a person engaged in a joint business, undertaking or enterprise, has a community of interest in profits as profits he is held to be a partner as to *third persons*. But where, as in the case of the contract between W. & F. Stevens and plaintiffs, there was a joint enterprize in which both embarked money, stock, labor and capital, and expressly agreed to share "*in losses as well as profits*," the question as to a co-partnership between them, upon which the rights of third persons depend must be beyond controversy.

Story on Partnership, Sec. 36-27.

Ex parte Hamper, 17 Vessy, 404.

Ex parte Watson, 19 Vessy, 459.

Dry vs. Boswell, 1 Campb., 320.

Sellby vs. Hutchinson, 4 Gilson, 329.

In the cases where these nice distinctions are made as to profits being intended as compensation, are all cases where it was not pretended that in case of *failure* of the whole enterprize; the party would have to bear any of the *losses* as such, although he might lose his entire compensation for his services. Hence they have very little analogy or concern with *this* particular case.

The court gave plaintiffs 6th instruction requiring the jury to find that if Stevens obtained the property under the contract and then he without the consent of plaintiffs, fraudulently removed it to Chicago and sold it to defendants, and that they purchased of him as a stranger *under unusual circumstances* and they did not rely upon any of the circumstances connected with said Stevens having possession of said leather and tanning it under the contract—that then we were not entitled to set up the co-partnership—See *Abstract*, page 17.

This was in effect ruling the question of co-partnership out of our defence, and deciding it in favor of plaintiffs, and yet the jury found—we *did rely upon the appearances* with which plaintiffs were *identified* through Stevens, their agent, who acted appa-

rently with authority in open market disposing of the joint property and clothed with all the *indicia* of ownership necessary to make a valid sale. Defendants purchased it, paid the full price, and took a title. Plaintiffs are to blame for having enabled Stevens to perpetrate this so-called fraud, and are now claiming against the innocent purchasers that they shall suffer the consequences of this wrong instead of themselves.

We submit, therefore, that in the law which we have already cited in this brief, the court below was correct in giving his instructions on the part of defense.

That in refusing the instructions of the appellants he in effect refused to instruct that there could be no partnership under this contract as to *third persons*; that even if there *were none*, that still no title could pass to an innocent purchaser under the sale; and that whatever the right of plaintiffs might have been if this were a controversy as to the title of these sides of leather between the immediate parties to the contract; that under no circumstances could the appellees have been protected though purchasing in open market without notice for a full price upon the fullest convictions of the legitimate authority and ownership of Stevens, which all the circumstances indicated, he possessed over the property.

V.

Since the foregoing argument was written we have seen the points of plaintiffs in error—in which the whole argument is assumed contrary to the facts, that the property in Stevens' hands was a "*mere bailment*" of the leather. As if they say: "A had left his cloth with B, a tailor, to be made into clothes; or his watch with C, to be cleaned."

But in the case at bar the facts are different. In the case assumed there is no question of joint property as to the cloth or

watch, raised in behalf of the tailor or the watchmaker. They never acquired, by contract or otherwise, any property or rights of property in the thing itself, which became the subject of the bailment. Whether the tailor lived or died, neither himself, or heirs, executors or administrators, could ever require any sale of the property, acquire any lien for profits, be liable for any losses, or compel any accounting to be made between himself and the owner, as to the proceeds or disposition of the property. Neither "*jus ad rem*," nor "*jus accressendi*" attached, nor had he or the watch maker, according to the terms of the contract, ever acquired any of the rights of property whatsoever to the thing, except a mere lien to be paid for the services rendered.

But the Stevens' united the capital with services in producing the leather, and, subject to certain conditions, had a *right of sale* in the property, to realize their share of the proceeds. Whenever the possession of a thing is united with the interest of an ownership in personal property, the right to sell arises by implication, from possession as well as by operation of law: since a man can always sell what is his own by right. That the thing was sold in *Chicago* instead of *New York*, and by *Stevens* instead of *Fawcett*, cannot alter the general rules and principles of law as to *third persons* who act upon the faith of appearances, who without notice of limitations in the contract existing between two or more joint owners; whatever their rights may be as to each other. And this would seem conclusive of the argument.

The general rule that a fraudulent possession merely, confers no right of property or sale, as against a true owner, is not controverted in the case of defense. And the owner cannot be deprived of title without his consent. But the owner may by *implication* agree and consent "*when he does any act which operates to deceive the vendee into a belief that the vendor has a right to make a sale.*"

Story on Sales, sec. 201.

And the cases before cited.

The latter is the reason found to govern in all the cases cited. The owner enables another to *appear* in the eyes of the world under such circumstances as are calculated to lead them to put trust and confidence in the authority he exercises. True in the confidence existing between the owner and Stevens—Stevens was not expected to deal with the property as he did, but as to these defendants in error he did exhibit the most *conclusive appearances* that he was authorized to deal with the leather which had been manufactured by him out of plaintiff's hides, at a tannery where he carried on a general tanning business, as well as that of a dealer; and as the proof shows, when he at the time of the sale had other leather manufactured from other hides than those which had been furnished by the plaintiffs, and the proof is not at all conclusive that even a portion of the leather sold to the defendants in Chicago, was not the product of other hides, and not that that of the plaintiffs.

Complaint is made that the words in "*open market*," are used in the instructions by the court, and it is taken as granted that these words are identical in sense with the Saxon institution of "*market overt*," in which every sale made affirmed the validity of a title, however the possession may have been obtained.

With great deference, we submit that the words "*open market*" may be used in a sense significative of the publicity of a transaction, as contradistinguished from that secrecy which is often a badge of fraud in a doubtful transaction. It is an "*open market*" in which every purchaser is at liberty to purchase in the ordinary course of business. It is such as exists in every town, store, village and city, where goods exposed to sale do not subject a purchaser to *suspensions* in dealing with vendors in possession, and where he cannot be defeated in obtaining a just measure of protection against a defrauded real owner, whenever that owner has enabled a vendor to assume the false appearances of real ownership, with possession of the thing sold.

Perhaps it is scarcely worth attention to remark that it is not

strictly true—that no “market overt” exists in this country. It is true that generally the rules of market overt are not enforced, and there is no statute establishing such market. There are, however, many exceptions in favor of negotiable instruments, when taken *bona fide*, in the ordinary course of business, in respect to sales upon execution—sales by agents acting under a general authority to sell goods, and sale of goods found, and estrays, to which the rules of the common law governing sales in “*Market overt*,” are fully applied.

THOS. HOYNE,
C. A. GREGORY,
Counsel.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

—♦—
APRIL TERM A. D., 1863.

—♦—
WILLIAM OSBORN, *et al.*,
Defendants in error and Defendants below,
 ADS.
 FREDERIC FAWCETT, *et al.*,
Plaintiffs in error and Plaintiff below. }

—♦—
BRIEF FOR DEFENDANTS IN ERROR.—POINTS AND AUTHORITIES.

—♦—
COUNSEL FOR DEFENDANTS:

THOMAS HOYNE AND C. A. GREGORY,

Filed Apr 23. 1863

Leland Clark

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

WILLIAM OSBORN, *et al.*,
Defendants in error and Defendants below,

ADS.

FREDERIC FAWCETT, *et al.*,
Plaintiffs in error and Plaintiff's below.

Brief for Defendants in error. Points and Authorities.

The trial below resulted in a verdict for the defendants below, who are also defendants in error, and was an action of trover to recover the value of 2000 sides of hemlock tanned sole leather, sold by one F. Stevens, in 1857, to the defendants in Chicago.

F. Stevens was one of the firm known as *W. H. & F. Stevens*, manufacturers and dealers in leather at Stevensville, Sullivan Co., New York, [*p. 15 abstract, § 50-51,*] and also as merchants, [*See plaintiffs' deposition of Wm. H. Stanton, p. 10 abstract,*

§ 40 to 44]; and it is claimed had become possessed of the property in question under a contract entered into in the year 1855, between them (the Stevens, merchants and tanners,) and the plaintiffs in this action.

The contract provided that Fawcett, Isham & Co., doing business in the city of New York, should send to W. H. & F. Stevens, of Stevensville, Sullivan Co., N. Y., all hides they might require for the purpose of being tanned and manufactured into sole leather in the tannery at Stevensville, for three years from the date of the contract, limiting the amount of hides to be sent; and then provided for transportation by W. H. & F. Stevens, from New York to the tannery, to tan and manufacture the hides into sole leather, in a good and workmanlike manner, and to return said leather to the city of New York, there to be sold by the plaintiffs.

The contract then fixes the prices of tanning to be received by W. H. & F. Stevens, the rates of commission to be retained on sale of the leather by the plaintiffs to pay for their services; and the mode in which the profits and losses are to be arrived at between the parties to the contract, and also providing "*that the profit or loss on all leather, manufactured under this contract, shall be equally divided between both parties,*" and that each party should pay one-half of all insurance on the said leather.

This contract has already been before this court upon the question of the ownership of the leather as *between the parties to the contract*, in the case of *Stevens, vs. Fawcett et al.*

Vide, 24 Ills. R., 484.

Under this contract it was claimed by W. H. & F. Stevens, as will appear by reference to the case already cited, that they were co-partners in the business of manufacture, as well as joint owners in the property manufactured; and therefore W. H. & F. Stevens assumed the right to make sales of the leather in question

as co-partnership property; further it appears by the deposition of W. H. Stevens, taken by the plaintiffs, [*deposition*, p. 14 *abstract*,] that he understood that the leather was manufactured on the joint account of the parties to the contract, and for both W. H. & F. Stevens and the plaintiffs, both having an interest in the leather after it was manufactured; and F. Stevens so understood it, as appears from his selling the leather, and from the deposition of plaintiffs' witness, W. H. Stanton. [*Abstract*, p. 12, § 45.]

In pursuance of the authority so claimed, and acting upon the assumption made, he brought the property claimed in this suit to the Chicago market in 1857, and sold it to the defendants, who were then as now, doing business as leather merchants in Chicago, and who, it is admitted on the record, purchased this property for a fair price, in open market, in good faith, and without any notice of the rights of the plaintiffs.

This is the case briefly stated; but the statement shows all the material elements of the case.

I.



II.

Again, defendants are entitled to hold the property as against the true, original owner in this case, because the case at bar falls within that large class of cases, where, though the title of the vendor may have been obtained by *fraudulent means*, yet "he can make a valid sale of the goods to a *bona fide* purchaser for a valuable consideration so as to deprive the original owner of his power to reclaim them."

It is not like the case where the vendor has no title and has obtained possession of the goods by felony or *chance*.

Vide, Story on Sales, § 200.

Hollingsworth vs. Napier, 3 Caines cases, 182.

Mowrey vs. Walsh, 8 Cow. R., 238.

Toott vs. Warren, 2, Fairf. R., 227.

Wheelwright vs. Depeyster, Johns. R., 471.

Cross vs. Peters, 1 Greenlf. R., 376.

Conyers vs. Ennis, 2 Mason R., 236.

Noble vs. Adams, 7 Taunt. R., 59.

Buffington vs. Gerrish, 15 Mass., 156.

Root vs. French, 13 Wend., 570.

Hill vs. Perrot, 3 Taunt., 274.

evidence of that ownership, without which the innocent purchaser would not have become a purchaser.

As Chief Justice Sawyer says, in 13 Wend., 572: Such innocent third person is a *bona fide* purchaser for a valuable consideration. "In such a case the vendor who has been defrauded of his property, and the *bona fide* purchaser from the fraudulent vendor are both innocent parties, and where one of two innocent parties must suffer from a fraud of a third, the loss should fall on him who enabled such third person to commit the fraud."

"Possession of personal property is *prima facie* evidence of property. The *bona fide* purchaser is justified therefore in considering the fraudulent vendor the true owner, &c."

The same principle is announced by this court in the case of *Jennings vs. Gage, et al.*, 13 Ills., 614, in which the court say: "If he (the owner) consent to the transfer of the property, though such consent be temporary only, and obtained by fraud, and therefore recoverable as against such unfair purchaser, still an honest purchaser from him will be protected, and the first owner must bear the loss." Also in the case of *Gosnay vs. Frost*, 27 Ills., 53, in which Chief Justice Caton says: A purchaser is not bound to take mere suspicions unsupported by facts, in purchasing personal property of a party in possession and dealing with it, as constructive notice of fraud, that he had acquired his title fraudulently.

In *Ketchum vs. Watson*, 24th Ills., 591, a possession by a party who held the property upon condition that he should pay the price agreed upon by a certain day, and before that day arrived the property was seized upon execution for the debt of the party so in possession conditionally, and without a title as between himself and the true owner, yet it is held that as a third person had dealt with the possessor without notice that he was not the owner of the property thus held, and given him credit

upon the apparent ownership, i. e., the *possession* of the property—that the true owner could not claim it as against the execution which had been levied, in favor of such person. Breese. J.

In *Roberts vs. Haskell*, 20 Ills., 65. Possession of personal property is again held to be evidence of ownership for all purposes.

III.

These cases, and the principles decided by them, would under any circumstances, seem conclusive as to the validity of defendants' title. It will be found in all the cases where the property was purchased by a *bona fide* vendee of a fraudulent vendor who had possession of the article sold with the consent of the real owner, that the *bona fide* vendee has been protected.

But in this case at bar, not only does the possession come by consent of the plaintiffs to the hand of vendors from whom defendants purchased the hides in open market for a fair price and without notice; but the possession of Stevens, the vendor, was that of a copartner and consequently agent, and as to all third persons rightfully dealt with the property as the copartnership property of the plaintiffs and himself.

Consult the case in 24 Ills. 480, *Stevens vs. Fawcett et al.*, in which the rights of Stevens to the possession and deposition of the leather manufactured by him under the joint articles existing between the Stevens and the plaintiffs in this case, became the subject of controversy.

The decision in that case in any view which may be taken of it, so far as the present controversy is concerned, is conclusive in favor of the defendants in this case. The leather was not only in possession of our vendor when he sold to us, the defendants, but the vendor had a joint property with plaintiffs in the thing he sold.

Not only had he the joint property and interest in the property sold, but it may be also claimed, that, as to third persons he had the only possession and title which a stranger could ever recognize. Fawcett, Isham & Co. never owned this *leather*, though they had purchased hides. They had indeed furnished hides to Stevens to be manufactured into leather under a contract, but what leather did we purchase? Was it the leather manufactured out of the hides sent to the Stevens by Fawcett, Isham & Co.? or was it leather which the Stevens are shown to have manufactured of their own materials, or for other persons, for in this respect it appears they were not only manufacturers for account of others, but dealers on their own account. Among other facts, the jury by their verdict may have found this fact.

Until the suit of Fawcett, Isham & Co., in 24th Ills. R. was tried, defendants could not have known that this property or leather, which first came into existence as *leather* by the application of the skill and capital of the manufacturers who sold it to defendants, which never had been as *leather* in the possession of the plaintiffs, which came directly from the tannery of the Stevens, at Stevensville; instead of the stock of the merchants, plaintiffs, at New York, which, even by the fictions of the law of trover, cannot be assumed to have been ever lost by these plaintiffs, and found as their property by defendants—and the only right to which comes through a contract which was existing for its manufacture between plaintiffs and Stevens, and not a right and title or possession of which the plaintiffs had been wrongfully deprived by the fraud of any person whomsoever; they never had obtained any such possession, title or right, prior to the purchase which Osborn, Adams & Co. had made in good faith of the Stevens, as the original and first possessors. Plaintiffs' claim to the property comes through Stevens; in fact only exists by virtue of his relations to them; and long before those relations are understood or heard of by the purchasers who acted upon the faith of the appearances the vendor was enabled to assume, with the consent of plaintiffs, Osborn, Adams & Co., had

become the purchasers of the property in good faith, and had acquired the title with all the priorities of ownership, as well by right of possession and purchase, as by the equitable estoppel which will not permit a party to take advantage of his own wrong.

It is difficult to conceive of a case in which so many elements combine to constitute a perfect title to property acquired by purchase in market overt, as it were, as are apparent here.

The court in 24 Ills., decided that the contract between the parties for the manufacture of the leather, did constitute a co-partnership (page 480); but also held that as between the parties themselves the right of property in the leather after it was manufactured was in Fawcett, Isham & Co.; but they expressly desire *it to be remembered* (page 485,) that "in that case it is not a question between *third persons and the parties to the agreement growing out of the subject matter of the agreement*, but it arises between and only affects *parties to the agreement*."

From this we feel quite certain that the court understands the law as it is contended for by the defendants' counsel in this case; and after this implied construction of the articles that in other cases, than where as between themselves the intention as to the title of the leather was to be arrived at, the court would hold that a co-partnership existed according to the articles—and they so decide that a co-partnership was no doubt constituted between themselves.

Nor is this provision of the articles of agreement, as construed by our Supreme Court singular—in many agreements which by law are construed to make the parties to them co-partners, it has been agreed, (or intended, as in 24 Ills.,) that only one of the parties to the agreement should have the *jus disponendi* or title and right of disposition in the subject matter of the co-partnership agreement; yet we do not find that creditors are deprived of satisfaction of their claims out of such property, nor

do we find that courts of law or of equity refuse to hold valid the title of a *bona fide* purchaser (without notice) of such property, from a partner, who, by the agreement, had no right to sell the same.

If the question of partnership is considered material in this case, we may refer the court to the numerous cases, and their number is legion, in which it has been decided that the *criterion* and *true test* of a partnership is the participation in the losses and the pernanancy of the profits—and when the two coincide as in the case at law, there is no rule better settled than that a partnership is constituted.

But it is true that this rule does not preclude the parties from expressing, insisting upon, and holding under the protection of the law, that one of the partners, for example, shall as between the parties themselves, be considered the owner of the stock, and have the sole right of disposing of it, or if you please that one should be considered between themselves the sole owner and another have the sole right to make sales. None of these agreements, as the court in 24 Ills. intimate, would contravene any principle of law, yet if, in spite of such agreement, one of the partners, disregarding the rights of his co-partner, were to sell to a *bona fide* purchaser without notice, for a fair price, the purchaser would take a perfect title. Such we affirm is the position of the defendants in this case, relative to the Stevens, and to the plaintiffs.

IV.

The plaintiffs in this case mainly rely upon the refusal of the court below to instruct the jury that no *co-partnership* was created by the contract existing between the parties, and that, as a

consequence, Stevens having no authority as a co-partner, to dispose of the leather, he could not make a sale to a *bona fide* purchaser for a valuable consideration, which could deprive the appellants of the power to reclaim the property.

This argument is already disposed of in the cases which have been cited to show that although the possession of the Stevens might have been fraudulent as against the plaintiffs, yet having been clothed by them with all the "indicia of ownership upon the faith of which these purchasers relied, without notice of plaintiffs' claim, or the presence of any circumstances tending to put a prudent man upon inquiry, the purchaser in such cases is protected and may obtain a superior title.

Besides if it were at all material to our right to hold this property, that a co-partnership *as to third persons*, was in fact created under the contract in question the law is too clearly stated to admit of a doubt that such was the relation of the parties to the property in controversy.

This was a contract each of the co-partners contributed not only labor and sonices but also capital stock and materials, and also expressly provided for a joint and mutual participation in losses as well as *profits*.

Story on Partnership, Sec. 27.

It is true that a distinction is made between cases where a partner is to receive a certain sum of money in proportion to a *given quantum of the profits as a compensation for his labor and services*; and cases where the partner has an interest in the profits as *profits* and participates in the *losses*.

The strongest case perhaps to be found in the books, where this question of co-partnership is based upon the principle that mere profits without a community of interest in losses in lieu of *compensation* for services, does not create a person a co-partner

in the business is decided in Massachusetts. *Denny et als. vs. Cabot & Metcalf* 90.

In this case the contract was one between the manufacturer of Satinet cloths and the merchant dealers, in which the manufacturer received a share of the "*nett profits*," and shared in no risk of any losses which might arise in the business. But in the case of Stevens' articles of agreement, it is expressly stipulated that they shall bear the losses equally with the plaintiffs; and further, they were to insure their interest in the property, by paying one-half the premium for insurance. Query: if the leather had by accident been lost in the Hudson river on its route to N. Y. would not plaintiffs have a right to make the Stevens, bear the part of the loss, in case of failure of insurance, &c.

Taking the distinction which Chief Justice Wilder found governing all the law of co-partnership he says: "The distinction is well established that a party who participates in the profits of a trade or business and has an interest in the profits, is chargeable as a *partner with respect to third persons*, but if he is only entitled to receive a *certain sum of money* in proportion to a *given quantum of profits* as a compensation for his labor and services, he is not thereby merely to be charged as a partner."

6 Metc., 92.

Again, page 92, he says: "That Cabot, Appleton & Co. were to pay Cooper one-third part of the profits after making certain specified reductions; and Cooper clearly was not to be liable for *any losses*. If he had stipulated for a share in the profits, so as to entitle him to an account and to give him a specific lien and giving him the full benefit of the profits of the business without any corresponding risk in case of loss. Justice to the other creditors would seem to require that he *should be holden to be liable to third persons as a partner*."

If any doctrine or principle of law is more clearly settled than

another it certainly is, that wherever a person engaged in a joint business, undertaking or enterprise, has a community of interest in profits as profits he is held to be a partner as to *third persons*. But where, as in the case of the contract between W. & F. Stevens and plaintiffs, there was a joint enterprise in which both embarked money, stock, labor and capital, and expressly agreed to share "*in losses as well as profits*," the question as to a co-partnership between them, upon which the rights of third persons depend must be beyond controversy.

Story on Partnership, Sec. 36-27.

Ex parte Hamper, 17 Vessy, 404.

Ex parte Watson, 19 Vessy, 459.

Dry vs. Boswell, 1 Campb., 320.

Sellby vs. Hutchinson, 4 Gilson, 329.

In the cases where these nice distinctions are made as to profits being intended as compensation, are all cases where it was not pretended that in case of *failure* of the whole enterprise; the party would have to bear any of the *losses* as such, although he might lose his entire compensation for his services. Hence they have very little analogy or concern with *this* particular case.

The court gave plaintiffs 6th instruction requiring the jury to find that if Stevens obtained the property under the contract and then he without the consent of plaintiffs, fraudulently removed it to Chicago and sold it to defendants, and that they purchased of him as a stranger *under unusual circumstances* and they did not rely upon any of the circumstances connected with said Stevens having possession of said leather and tanning it under the contract—that then we were not entitled to set up the co-partnership—See *Abstract*, page 17.

This was in effect ruling the question of co-partnership out of our defence, and deciding it in favor of plaintiffs; and yet the jury found—we *did rely upon the appearances* with which plaintiffs were *identified* through Stevens, their agent, who acted appa-

rently with authority in open market disposing of the joint property and clothed with all the *indicia* of ownership necessary to make a valid sale. Defendants purchased it, paid the full price, and took a title. Plaintiffs are to blame for having enabled Stevens to perpetrate this so-called fraud, and are now claiming against the innocent purchasers that they shall suffer the consequences of this wrong instead of themselves.

We submit, therefore, that in the law which we have already cited in this brief, the court below was correct in giving his instructions on the part of defense.

That in refusing the instructions of the appellants he in effect refused to instruct that there could be no partnership under this contract as to *third persons*; that even if there *were none*, that still no title could pass to an innocent purchaser under the sale; and that whatever the right of plaintiffs might have been if this were a controversy as to the title of these sides of leather between the immediate parties to the contract; that under no circumstances could the appellees have been protected though purchasing in open market without notice for a full price upon the fullest convictions of the legitimate authority and ownership of Stevens, which all the circumstances indicated, he possessed over the property.

V.

Since the foregoing argument was written we have seen the points of plaintiffs in error—in which the whole argument is assumed contrary to the facts: that the property in Stevens' hands was a "*mere bailment*" of the leather. As if they say: "A had left his cloth with B, a tailor, to be made into clothes; or his watch with C, to be cleaned."

But in the case at bar the facts are different. In the case assumed there is no question of joint property as to the cloth or

watch, raised in behalf of the tailor or the watchmaker. They never acquired, by contract or otherwise, any property or rights of property in the thing itself, which became the subject of the bailment. Whether the tailor lived or died, neither himself, or heirs, executors or administrators, could ever require any sale of the property, acquire any lien for profits, be liable for any losses, or compel any accounting to be made between himself and the owner, as to the proceeds or disposition of the property. Neither "*jus ad rem*," nor "*jus accrescendi*" attached, nor had he or the watch maker, according to the terms of the contract, ever acquired any of the rights of property whatsoever to the thing, except a mere lien to be paid for the services rendered.

But the Stevens' united the capital with services in producing the leather, and, subject to certain conditions, had a *right of sale* in the property, to realize their share of the proceeds. Whenever the possession of a thing is united with the interest of an ownership in personal property, the right to sell arises by implication, from possession as well as by operation of law: since a man can always sell what is his own by right. That the thing was sold in *Chicago* instead of *New York*, and by *Stevens* instead of *Fawcett*, cannot alter the general rules and principles of law as to *third persons* who act upon the faith of appearances, who without notice of limitations in the contract existing between two or more joint owners; whatever their rights may be as to each other. And this would seem conclusive of the argument.

The general rule that a fraudulent possession merely, confers no right of property or sale, as against a true owner, is not controverted in the case of defense. And the owner cannot be deprived of title without his consent. But the owner may by implication agree and consent "*when he does any act which operates to deceive the vendee into a belief that the vendor has a right to make a sale.*"

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The latter is the reason found to govern in all the cases cited. The owner enables another to *appear* in the eyes of the world under such circumstances as are calculated to lead them to put trust and confidence in the authority he exercises. True in the confidence existing between the owner and Stevens—Stevens was not expected to deal with the property as he did, but as to these defendants in error he did exhibit the most *conclusive appearances* that he was authorized to deal with the leather which had been manufactured by him out of plaintiff's hides, at a tannery where he carried on a general tanning business, as well as that of a dealer; and as the proof shows, when he at the time of the sale had other leather manufactured from other hides than those which had been furnished by the plaintiffs, and the proof is not at all conclusive that even a portion of the leather sold to the defendants in Chicago, was not the product of other hides, and not that that of the plaintiffs.

Complaint is made that the words in "*open market*," were used in the instructions by the court, and it is taken as granted that these words are identical in sense with the Saxon institution of "*market overt*," in which every sale made affirmed the validity of a title, however the possession may have been obtained.

With great deference, we submit that the words "*open market*" may be used in a sense significative of the publicity of a transaction, as contradistinguished from that secrecy which is often a badge of fraud in a doubtful transaction. It is an "*open market*" in which every purchaser is at liberty to purchase in the ordinary course of business. It is such as exists in every town, store, village and city, where goods exposed to sale do not subject a purchaser to *suspensions* in dealing with vendors in possession, and where he cannot be defeated in obtaining a just measure of protection against a defrauded real owner, whenever that owner has enabled a vendor to assume the false appearances of real ownership, with possession of the thing sold.

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strictly true—that no “market overt” exists in this country. It is true that generally the rules of market overt are not enforced, and there is no statute establishing such market. There are, however, many exceptions in favor of negotiable instruments, when taken *bona fide*, in the ordinary course of business, in respect to sales upon execution—sales by agents acting under a general authority to sell goods, and sale of goods found, and estrays, to which the rules of the common law governing sales in “*Market overt*,” are fully applied.

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SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1863. }

77 Law Lib 453
as to partnership in property

FREDERICK FAWCETT, Et. AL.,
Plaintiffs in Error,
v s.
WILLIAM OSBORN, Et. AL.,
Defendants in Error.

POINTS FOR PLAINTIFFS IN ERROR.

I.

The material facts in this case are briefly these: In August, 1855, the plaintiffs, being co-partners and dealers in leather in the city of New York, under the firm name of Fawcett, Isham & Co., entered into a written contract with Walter H. & Fletcher Stevens, who were carrying on a tannery at Stevensville, Sullivan county, New York, under the firm name of W. H. & F. Stevens, whereby the plaintiffs agreed to send to said W. H. & F. Stevens what hides they, the plaintiffs, might require to be manufactured into leather, for the three years next ensuing, and which the said W. H. & F. Stevens agreed to manufacture into leather, and return to the plaintiffs, at a dock in the city of New York, on terms of compensation not material now to state. That between the date of said contract and the 16th day of September, 1856, the plaintiffs pur-

chased, became the owners of, and sent to said W. H. & F. Stevens, a large number of hides to be manufactured into leather, and be returned to them, under said contract. That the Stevens having overdrawn to the amount of some twelve thousand dollars on account of their services under said contract, the said Fletcher Stevens, sometime in the month of September, 1856, surreptitiously and with the evident intent of embezzling the same took a large quantity of leather manufactured out of plaintiffs' said hides, and caused it to be removed in a direction other than to New York. That two thousand sides of the leather so removed, was sent to Chicago, consigned to F. Stafford—the name which said Fletcher Stevens assumed for the purpose of effectuating his said scheme. That Stevens employed, to assist him, a man by the name of William H. Stanton, but who, at Stevens's suggestion, assumed and went by the name of L. L. Stratton, and who came to Chicago to dispose of the leather thus sent there. On coming to Chicago, Stanton made the acquaintance of a man of the name of O. J. Rose, who, before then, was a total stranger to him, and Rose introduced Stanton to the defendants, Osborn & Adams, by the name of Stratton, whereupon Stanton sold the two thousand sides, and received the pay therefor, at a fair price.

The plaintiffs having traced out the leather in question, made a demand of the defendants before suit, which was refused.

The above is all there is of this case, and this court having determined, in the case of *Stevens vs. Fawcett et. al.*, 24 Ill. R. 483, which was trover against the said Stevens for the same act of conversion, that the said Stevens was not a partner with the plaintiffs as to said leather, and had no right or authority under said contract to sell it, but that the true ownership thereof was in the plaintiffs—the question now arises whether the defendants' purchase of the leather, in the manner and under the circumstances exhibited in this case, will protect them against the claim of the true owners—and whether the rulings of the court below in this behalf, are sustained by the law.

II.

It is a universal and fundamental principle of the law of personal

(3)

property, that no man can be divested of it without his own consent, or by operation of law.

Jennings vs. Gage et al., 13 Ills. R. 610.

Saltus vs. Everett, 20 Wend. 275.

(1). As to consent. There is no evidence in the case in any manner tending to show a consent, express or implied, actual or constructive.

There is a constructive consent when the owner delivers possession of his property to another with the intention of selling it, although it may have been obtained by fraud. See cases above cited.

“If the real owner of goods suffer another to have possession of his property, and of those *documents* which are the *indicia* of property, “then perhaps a sale by such a person would bind the true owner.”

Chit. on Contract, 384.

But how are the facts here? The plaintiff did not deliver the hides

"sideration and without knowledge of such agreement, and in the absence of any circumstances tending to put a prudent man upon inquiry, "purchased the leather in controversy of the agent of Stevens, in *open market*, the law is for the defendants." The same doctrine is also promulgated in the second of said instructions, and was evidently intended to, and in fact does, recognize the English law relative to the "Saxon institution of *markets overt*." No such law exists in this State, and we insist that the giving of those instructions is manifest error.

Newkirk vs. Dalton et. al., 17 Ills. R. 413.

Hoffman et. al. vs. Carow, 22 Wend. 285, and cases cited.

III.

McALLISTER, JEWETT & JACKSON,

PLAINTIFFS' ATTORNEYS.

¹⁹⁹
Supreme Court ⁶⁸
Frederick Fawcett
vs
William Asborn
et al
Plffs Poms

Filed A/L 28.1863
Leland
CM

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the sixth day of October in the year of our Lord One Thousand Eight Hundred and Sixty two and of the Independence of the United States of America the Eighty seven.

Present, The Honorable John M. Wilson Chief Justice of the }
Superior Court of Chicago. }

Van H. Higgins }
Grant Goodrich } Judges.

Joseph Knox Prosecuting Attorney.

Anthony C. Hession Sheriff of Cook County.

Attest, Thomas B. Carter Clerk.

Be it remembered, that heretofore to wit:
on the sixth day of July in the year of our
Lord one thousand eight hundred and
fifty seven Frederick Fawcett, Samuel Wham
and Thomas Fawcett, by their Attorneys filed
in the office of the clerk of the Cook County
Court of Common Pleas, a certain precipe
for summons, which is in the words and
figures as follows to wit,

(2)

County of Cook }
}

In the Cook County of Common Pleas
Of the September Term A.D. 1857

Frederick Fawcett Samuel Isham and
Thomas Fawcett partners trading under the
firm name & style of Fawcett Isham & Co.

vs

William Osborne. William H. Adams &
Frederick M. Talbot partners trading under
the firm name & style of Osbourn, Adams & Co.

Walter Kimball Esq)

Clk of said Court) Sir

You will please
issue a summons to the Defendants in the above
entitled cause in an action of Trespas on the case
damages Ten Thousand dollars (\$10,000) returnable
to the next September Term of said Court—

Chicago July 3rd 1857 }

Yours &c

Lea & Co. McCallister Smith & Peabody

Attys. for Plffs

(3)

And thereupon on the day and year last
aforesaid there issued out of the office of
the clerk and, under the seal of the said
Court the People's writ of Summons.

Which writ with the Sheriff's return thereon
endorsed is in the words and figures as
follows to wit:

4

State of Illinois)
County of Cook) ss.

The people of the state of Illinois to the Sheriff of said County— Greeting. We command you that you summon William Osborne, William H. Adams and Frederick M. Talbot, if they shall be found in your county, personally to be and appear before the Cook County Court of Common Pleas of said County on the first day of the next term thereof, to be holden at the Court House, in the City of Chicago, in said County, on the second Monday of September next, to answer unto Frederick Fawcett, Samuel Isham & Thomas Fawcett in a plea of Trespass in the case, to the damage of the said plaintiffs as they say in the sum of ten thousand dollars.

And have you there and there this writ, with an endorsement thereon, in what manner you shall have executed the same.

Witness Walter Kimball Clerk of our said Court and the seal thereof, at the City of Chicago, in said County this 6th day of July A.D. 1857

Walter Kimball Clerk

Served by reading to the within named defendants the ninth day of July 1857.

John L. Wilson Sheriff
by John H. Darr Deputy

(37)

And afterwards to wit on the day and year
aforesaid there was filed in the office of
the Clerk aforesaid a certain declaration
in words and figures following to wit:

(6)

State of Illinois)
County of Cook }

In the Cook County Court of Common Pleas
Of the September Term A.D. 1857

William Osborne, William H. Adams and Frederick M. Abbott, Partners trading under the firm name & style of Osborn, Adams & Co. Defendants in this suit were summoned to answer, Frederick Fawcett Samuel Isham & Thomas Fawcett, Partners trading under the firm name & style of Fawcett Isham & Co. Plaintiffs in this suit, of a Plea of Trespass on the case. And thereupon the said Plaintiffs by Deane McAlister Jewett & Peabody their attorneys complain of the said Defendants.

For that whereas the said Plaintiffs heretofore to-wit on the Thirtieth day of October, in the year of our Lord One thousand eight hundred & fifty six (1856) at the County aforesaid was lawfully possessed as of their own property, of certain goods and chattels to-wit;

Two Thousand Sides of Hemlock tanned Sole Leather manufactured at the tannery of W. H. & F. Stevens at Stevensville in the state of N.Y. of great value to-wit of the value of nine thousand dollars (\$9000) lawful money of the United States of America, and being so possessed thereof, the said Plaintiffs afterwards to-wit on the day and year aforesaid, casually lost the same out of their possession - and the same afterwards to-wit on the day and year aforesaid, at the County aforesaid came to the possession of the said Defendants by finding -

(7)

Yet the said Defendants, well knowing the said goods and chattels to be the property of them the said Plaintiffs, and of right to belong and appertain to them; but contriving & fraudulently intending craftily and subtly to deceive and defraud the said Plaintiffs in this behalf, have not as yet delivered the said goods and chattels, or any of them, or any part thereof to the said Plaintiffs although often requested so to do, and have hitherto wholly neglected and refused so to do, and afterwards to-wit on the day and year aforesaid, at the County aforesaid, converted and disposed of the said goods and chattels to their own use

And also for that, whereas the said Plaintiffs heretofore to-wit on the 10th day of December A.D. 1856 at the County aforesaid was lawfully possessed^{as} of his own property of certain other goods and chattels to-wit; other Two Thousand Sides of Hambock Tanned Sole Leather of great value to-wit of the value of nine thousand dollars, of like lawful money of the United States. And being so possessed thereof the said Plaintiffs afterwards to-wit on the day and year last aforesaid, casually lost the same out of their possession, and the same afterwards to-wit on the day and year ^{last} aforesaid at the County aforesaid came to the possession of the said Defendants by finding—

Yet the said Defendants well knowing the said last-mentioned goods and chattels to be the property of them; the said Plaintiffs

8

and of right to belong and appertain to them but
 contriving and fraudulently intending craftily and
 subtly, to deceive and defraud the said Plaintiffs
 in this behalf have not as yet delivered the said
 goods and chattels last mentioned or any of them
 or any part thereof to the said Plaintiffs although
 often ^{requested} asked so to do. And have hitherto wholly neg-
 lected and refused so to do. And afterwards to wit
 on the same day and year ^{last} aforesaid, converted
 and disposed of the ^{said} last mentioned goods and chattels
 to their own use — To the damage of the said
 Plaintiffs of ^{ten} ~~nine~~ thousand dollars and therefore
 they bring suit &c.

Scates McAllister Sewitt & Peabody
 Attys for Plffts.

And afterwards to wit on the sixteenth day of June in the year of our Lord one thousand eight hundred and fifty nine there was filed herein a certain Plea in words and figures following to wit;

The Superior Court.
of the City of Chicago }

William L. Adams
William Osborne et al }

vs.

Fawcett Isham and Fawcett }

And the said defendants by J. N. Arnold their Attorneys came and ^{defend} appeared the wrong and injury Where ~~sc~~ and say that they are not guilty of the grievances above laid to their charge and of this they put themselves upon the Country &c

J. N. Arnold
Attorney for Defendants.

And afterwards to wit, on the eleventh day of February in the year of our Lord eighteen hundred and sixty two. Said day being one of the days of The February Term of the Superior Court of Chicago the following among other proceedings was had in said Court and entered of

record to wit;

(11) Frederick Fawcett
Samuel Isham and Thomas Fawcett

vs

William Osborn William C. Adams
and Frederick M. Talbot.

This day comes the said plaintiffs by Scates
McAllister and Jewett their Attorneys and said
defendants by Gloyne Miller and Lewis their
Attorneys also come and submit their motion for
~~and~~ ^{leave} to file Notice of set off herein which motion
being considered by the Court is hereby
overruled,

And afterwards to wit, on the Thirteenth
day of February in the year aforesaid said
day being one of the days of the February
Term of said Court the following among
other proceedings was had in said Court
and entered of record to wit;

Frederick Fawcett
Samuel Isham and Thomas Fawcett

vs

William Osborn William C. Adams
and Frederick M. Talbot.

This day again comes said parties by their

respective Attorneys as aforesaid and defendants having this day filed their pleas plaintiffs by Scates McAllister and Jewett their Attorneys submit their Motion to strike defendants said pleas from files,

And afterwards to wit on the Twelfth day of March in the year aforesaid said day being one of the days of the March Term of said Court the following among other proceedings was had in said Court and entered of record to wit; —

Frederick Fawcett
Samuel Isham and Thomas Fawcett

vs

William Osborn. William C. Adams
and Frederick Mc. Talbot.

This cause being this day called for trial comes said plaintiffs by Scates, McAllister and Jewett their Attorneys and said defendants by Hoyne and Gregory their Attorneys also come and issues being herein it is ordered that a jury come Whereupon comes the jury of good and lawful men to wit; J. J. Williams, B. W. Fisk, W^m Beglin, R. N. Adams, John McEaven, Ephraim Newcomb, Samuel Durand, Tho^s J. Holt, Chas^s H. Akins,

(12)

Samuel Ray, Edward G. Smith and John Bap who being duly elected tried and sworn to try the issues joined as aforesaid after hearing part of testimony and the hour of adjournment having arrived it is ordered upon agreement of the parties that the jury separate and meet the Court tomorrow morning.

And afterwards to wit, on the Thirteenth day of March in the year aforesaid Said day being one of the days of the March Term of Said Court the following Among other proceedings was had in Said Court and entered of record to wit;

Frederick Fawcett

Samuel Isham and Thomas Fawcett

vs

William Asborn William C. Adams
and Frederick M. Talbot.

This day again comes the parties to this cause by their Attorneys and the jury empanelled herein on yesterday for the trial of said cause also come and after hearing remaining part of testimony and the hour of adjournment having arrived it is ordered upon agreement of the parties that the Jury again separate and meet the

Court tomorrow morning.

And afterwards to wit on the Fourteenth day of March in the year aforesaid Said day being one of the days of the March Term of Said Court the following Among other proceedings was had in Said Court and entered of record to wit;

Frederick Fawcett
 Samuel Isham and Thomas Fawcett.

vs

William Osborn William L. Adams.
 and Frederick Mc. Talbot.

This day again comes the parties to this cause by their Attorneys and the jury empanelled herein as on yesterday for trial of said cause. also come and having heard remaining testimony Arguments of Counsel and instructions of the Court retire to consider of their verdict and afterwards return into Court submit their Verdict and say We the jury find defendants not guilty. And thereupon said plaintiffs submit their motion herein for a new trial in said cause.

And afterwards to wit on the Twentyfifth day of October in the year aforesaid Said day being one of the days of the days

(14) of the October Term of said Court the following among other proceedings was had in said Court and entered of record To wit;

Frederick Fawcett
Samuel Isham and Thomas Fawcett

vs

William Osborn William L. Adams
and Frederick M. Talbot,

And now at this day again comes said plaintiffs by Scates McAllister and Jewett their Attorneys and said defendants by Hoyne Miller and Lewis and Charles A. Gregory their Attorneys also come and this cause coming on now to be heard upon the motion of said plaintiffs heretofore submitted herein at the March Term A.D. 1862 of this Court for a new trial in said cause and Counsel being heard thereon and the Court being fully advised in the premises are of the opinion that the reasons filed by said Plaintiffs are not sufficient to support their said motion the motion for a new trial is therefore overruled and a new trial refused, to which ruling of the Court said plaintiffs then and there excepted and entered their exceptions. Wherefore said defendants ought to have judgement for their costs entered upon the verdict of not guilty rendered

15—

herein by the jury as aforesaid
Wherefore it is considered that said de-
fendants do have and recover of and from
said plaintiffs their costs and charges about
their defence in this behalf expended
and have execution therefore.

And thereupon on motion of said plaintiffs
it is ordered that said plaintiffs be allowed
forty days time in which to file their
bill of exceptions herein,

And afterwards to wit on the Twelfth day
of ~~March~~^{December} in the year aforesaid the Plaintiffs
filed therein their bill of exceptions in words
as follows

(16)

State of Illinois County of Cook.

In the Superior Court of Chicago

Frederick Fawcett }

Samuel Isham & }

Thomas Fawcett }

vs

William Osborne }

William H. Adams }

Frederick M. Talbot }

This cause coming on for trial on the 12th day of March A.D. 1862 that being one of the days of March Term A.D. 1862 of said Court before the Honorable Grant Gasdorch one of the Judges of said Court and a Jury. The said Plaintiffs for the purpose of sustaining the issue on their part offered as evidence and read to the Jury the deposition of Speer Cummings as follows.

"My name is Speer Cummings, age twenty years. Am Book-keeper and General Clerk with Plaintiffs and reside in the City of New York. I am acquainted with the Plaintiffs and with Mr Adams one of the Defendants Have known the Plaintiffs since 1853 and Mr Adams since 1857 The Plaintiffs are engaged in the Hide and Leather Business and are partners Their firm name is Fawcett Isham & Co. They have been in the business to my knowledge since 1853 and I have been their General

Clerk and Bookkeeper since that time. Between the months of August 1866 and November 1866 the Plaintiffs carried on their business at No. 70 Gold St in the City of New York. I am acquainted with Walter H. and Fletcher Stevens and have known them since August 1866. They are engaged in the tanning business. Between August 1866 and November 1866 their place of business was Stevensville, Sullivan Co. New York, and their firm name was "W. H. & F. Stevens"

I know of an agreement made in writing between the Plaintiffs and W. H. & F. Stevens on or about the 7th day of August 1866 in relation to the tanning of Hides. I was present at the time of the execution of it and was the witness to its execution. It is now in my possession - exhibit A attached to this my deposition in the original agreement. I saw it executed by the parties thereto, it has been in my care ever since. I know that the Plaintiffs furnished Hides to the said Stevens to be manufactured into Leather in pursuance of said agreement between the day of the date of said agreement and September 1866. They furnished 18,815 Hides as follows

August 13 th 1866	1,000 Hides
Sept 13 th "	938 "
October 3 rd "	787 "
" 13 th "	2,000 "

18

November 5 th	1,000 "
" 13 th	.600 "
" 28 th	1,406 "
December 18 th	.370 "
" 31 st	2,000 "
January 16 th 1856	2,182 "
" 29 nd "	2,000 "
March 18 th "	817 "
" 29 nd "	911 "
April 23 rd "	1,000 "
May 22 nd "	430 "
June 6 th "	1,375 "
Total	18,815-

A Portion of the Hides furnished to said Stevens by the Plaintiffs were returned to them by the Stevens manufactured into leather. They returned 10,587 Sides equal to 5,293½ Hides and they were received by the Plaintiffs as follows

April 15 th 1856	669 Sides
" 17 th "	531 "
" 22 nd "	441 "
" 25 th "	523 "
May 1 st "	1,362 "
" 8 th "	246 "
" 15 th "	188 "
June 2 nd "	394 "
" 11 th "	667 "
" 18 th "	914 "
" 25 th "	252 "

(14)

July 2 nd	293 "
" 5 th	543 "
" 11 th	288 "
" 17 th	277 "
August 23 rd	704 "
" 29 th	663 "
Sept 2 nd	749 "
" 8 th	864 "
" 11 th	<u>430 "</u>
	10,587 sides

Equal to 5,293 1/2 Hides —

There were advances of money drafts and notes made by the Plaintiffs to the Stevens between the date of said agreement and the 16th day of September 1856 to my knowledge an account of said agreement. Their advances amounted to \$20,005.29 a particular account of which I attach to my deposition marked Exhibit B. — They were made at the request of the Stevens and were made in notes and acceptances of Garrett Shum & Co. & cash. The notes and acceptances were all paid at maturity. Such advances were in payment of work done to leather and not yet delivered and was generally in the notes & acceptances, and cash paid for freight Insurance and other matters by order of the Stevens. On the 16th of September 1856 the Stevens were indebted to the Plaintiffs in the sum of \$12,122.48 Exhibit B is a full statement of

(20)

the account as it stood between them on that day. There were then unaccounted for by the Stevens 27,043 sides equal to 13521½ Hides which had been sent by the Plaintiffs to the Stevens under said agreement.

I know of marks being placed on said Hides so that after they were manufactured into sole Leather, one lot of Leather could be distinguished from another lot manufactured by the same persons. The list of Invoice marks placed on ^{said} Hides by the Stevens were furnished to the Plaintiffs by the Stevens. I have also seen some of the marks on the Leather. They consisted of the numbers 1, 2, 4, 5, 6, and 7.

After September 16th 1856 we received Leather from the Stevens as follows

September	17 th	1856	612 Sides
"	22 nd	"	332 "
October	9 th	"	861 "
"	16 th	"	335 "
"	17 th	"	334 "
"	22 nd	"	369 "
"	29 th	"	1157 "
Nov.	3 rd	"	311 "
"	7 th	"	314 "
"	12 th	"	309 "
"	18 th	"	864 "
Dec.	5 th	"	<u>111</u> "

5909

Exhibit A referred to in deposition of Spier Cummings and read to the Jury.

(21)
It is this day agreed between Fawcett
Isam & Co. of the City of New York and W. H.
& F. Stevens of Stevensville Sullivan County
New York that said Fawcett Isam & Co. shall
send to said W. H. & F. Stevens what Hides they
may require for the purpose of being tanned
and manufactured into Sole Leather in their
tannery at said Stevensville for three years
from this date, the number of Hides is not
to be less than fifteen thousand ~~xxx~~ ~~xxxx~~
each year nor more than twenty five
thousand each year unless both parties in
writing should hereafter agree to increase
or lessen the amount.

W. H. & F. Stevens during the said three years
are not to tan Hides for any other parties
W. H. & F. Stevens agree to receive the Hides at
a dock in the city of New York, to pay all
expense of transportation to their tannery;
to tan and manufacture them into sole
Leather in a good and workmanlike man-
ner, to make Leather of a quality and of
gain in weight equal to that made by
all first class tanners and to return the
Leather so tanned to said Fawcett Isam
& Co. at a dock in the city of New York clear
of all expenses of transportation.

For all which services Fawcett Isam & Co.
agree to pay said W. H. & F. Stevens five cents per
pound for each pound of Leather so tanned

(22)

and returned, which shall be done at the average time of the Receipt of each Invoice. It is further agreed that the profit or loss on all the Leather manufactured under this contract shall be equally divided between both parties which shall be determined as follows— After said Fawcett Isham & Co. shall have sold the Leather manufactured from each Invoice of Hides they shall deduct from the gross amount of such sales the cost of the Hides with five per cent added thereto, the amount paid as payable for tanning all costs and charges of cartage on both Hides and Leather, inspection, exchange, interest on all those amounts till the sales are due by average also six per cent on the gross amount of the sales and the balance or difference being gain or loss shall be equally divided between said Fawcett Isham & Co. & said W. H. & F. Stevens. Fawcett Isham & Co. are to take the ^{entire risk of all} sales made on credit— W. H. & F. Stevens agree to return the Leather from each invoice of hides within eight months from the time they leave the city of New York provided that each invoice shall not exceed one thousand sides in such case they agree to return them in a fair proportionate time and provided further that in case Hides are sent faster than they can be worked an allowance shall be made in proportion.

23

Gawcett Isham & Co. shall procure what Insurance against fire they may think necessary one half of the cost of which shall be paid by W. H. & F. Stevens -

New York August 7th 1855.

Witness

J. Cummings }

W. H. & F. Stevens

Gawcett Isham & Co.

(24)

Exhibit B. referred to in Deposition
of Spear concerning road to the jury.
W H & J Stevens

In Y with Barrett & have the
Interest to Sept 16. 1856

Date	Stevens	when due	Dr	cents
1855				
Nov 17	To pd. his on hides & leather 1 year 2000 $\frac{1}{2}$	Nov 17/55	25	
	Add interest from Nov 17/55 to Sept 16/56	303 days	145	
" 27	" sent by mail our note Dec 5 at 4 mos	April 8/56	2000	
	Add interest from Apr 8/56 to Sept 16. 1856		41	76
1856				
Jan 14	" sent by mail our note Feb 5 at 4 mos	June 8/56	3000	
	Add interest from June 8 to Sept 16/56		57	54
Feb 12	" paid his on hides & leather in their tannery $\frac{1}{2}$	Feb 12/56	30	
	Add interest from Feb 12/56 to Sept 16/56		124	
" 27	" our note Mar 5 at 4 mos	July 8 "	3000	
	Add interest from July 8 to Sept 16/56		40	29
Mar 29	" our note April 5 at 4 mos	Aug 8 "	1500	
	Add interest from Aug 8 to Sept 16/56		11	22
Apr 3	" pd Insurance on tannery 1 year \$500	Apr 3/56	125	
	Add interest from Apr 3 to Sept 16/56		398	
7	" " " on Hides & leather 1 year \$2000 $\frac{1}{2}$	Apr 7 "	30	
	Add interest from Apr 7 to Sept 16/56		93	
26	" our note May 5 at 4 mos (sent by mail)	Sept 8 "	1500	
	Add interest from Sept 8 to Sept 16/56		249	
June 3	" " " June 5 at 4 mos	Oct 8 "	2500	
	Deduct hit from Sept 16 to Oct 8/56		1055	2489 45
26	" pd to Brown & Woodward (the Bank build June 16 "		93	
	Add interest from June 26 to Sept 16 1856		146	
July 1	" our note July 5 at 4 mos (sent by mail)	Nov 8 "	3000	
	Deduct hit from Sept 16 to Nov 8/56		3050	2969 70

(25)

Aug 9	to pd their check on Union Bank to Geo Lewis dated May 17/56 & hit and hit from Aug 9 to Sept 16/56	Aug 9 "	102 20	74
" 10	" draft Aug 14 at 60 days date deduct hit from Sept 16 to Oct 16/56	Oct 16 " 700	4.12	695 98
28	" " Aug 21 at 60 day date deduct hit from Sept 16/56 to Oct 28/56	Oct 28 " 500	3.55	496 45
Sept 8	" draft Aug 30 at 60 day date deduct hit from Sept 16/56 to Nov 1/56	Nov 1/56 500	4.41	495 59
9	" draft Sept 5 at 60 days date deduct hit from Sept 16/56 to Nov 7/56	Nov 7 " 1000	9.88	990 02
	" Cash profit on Leathers to Sept 16/56 and due June 4/56 add interest from June 4/56 to Sept 16/56		296 11	4 59
			2000 5 99	

Credit

By tanning 3148 4/4 @ 5¢ ind \$1. due April 25/56	448.81	
add hit from Sept 25/56 to Sept 16/56	12.40	461.21
" " 2990 4/4 lbs @ 5¢ ind \$2 due April 29/56	1495.02	
add hit from April 29/56 to Sept 16/56	40.14	1535.16
" profit on above ind as per agreement due Nov 7/56	304.88	
deduct hit from Sept 16 to Nov 3/56	2.80	302.08
" tanning 27,624 lbs @ 5¢ ind \$4 due July 10/56	1381.05	
add hit from July 10 to Sept 16/56	18.00	1399.05
" 1/2 profit on above hit due Jan 10/57	90.89	
deduct int from Sept 16/56 to Jan 10/57	4.19	88.70
" tanning 7939 4/4 @ 5¢ due Aug 11/56	3969.72	
add hit from Aug 11/56 to Sept 16/56	27.29	4097.11
Due F. S. & Co. on Sept 16 1856		7583 31
		\$12122 68

The Plaintiffs next offered and read to the jury the deposition of Edwin J. Bailey as follows

(26)
"My name is Edwin J Bailey - I am
twenty eight years old, am Captain of a
Canal Boat and in the months of September
and October 1856 was employed as Captain
of the Canal Boat William C Rose - I
know two of the plaintiffs Frederick Fawcett
& Mr Isham - Do not know defendants -
I know Fletcher Stevens & have known
him since September 1856, and have seen
a man who Fletcher Stevens said was his
brother Walter H Stevens - About September
1856, Fletcher Stevens came to me at Wurts-
boro concerning a load of leather for my
canal boat. He told me the leather was to
go to Oswego - I was then in the employ-
ment of Tuttle & Brodhead as captain of
Canal Boat William C Rose - sometimes
the owners & sometimes Mr Dorrance direct-
ed me as to the use & employment of the Boat -
Mr Dorrance was the agent of Tuttle & Brodhead
the owners of the Boat - The Boat was
employed on the Delaware & Hudson Canal
- It went up the Hudson River to the mouth
of the Canal and up the Canal to Wurtsboro
and back down the Canal and River to
New York

In the years 1855 & 1856 the Stevens
were engaged in the business of tanning.
Their place of business was I think within
30 miles of said Canal. Wurtsboro was the

(29)

point on the canal nearest to their place of business - The Stevens were accustomed to ship Leather manufactured by them by Canal Boats, at Wurtsboro while navigation was open by the Merchants & Farmers line - it was shipped to New York prior to the month of September 1856. In the year 1856 prior to the month of September I took away Leather tanned by the Stevens. I received it at Wurtsboro and conveyed it to the city of New York - It was ~~consigned~~ consigned and delivered to Messrs Sawett & Shaw & Co. and was stamped "Stevensville"

Before the year 1856, I took away leather tanned at said Stevens tannery. It was stamped "Stevensville". I have been accustomed to carry leather and am acquainted with the custom of Tanners in relation to the stamping of leather manufactured by them and particularly Hemlock tanned sole leather - upon shipment by them - The custom is to stamp each side with the name of the Tannery or Tanners - I have carried unstamped Hemlock tanned sole leather. It came from ^{the} Stevensville tannery - I never saw any other unstamped Hemlock tanned sole leather - I received the first about the middle of September 1856 and carried it to Albany. Afterwards in October and November received two other

(28)

loads from said Stevens, unstamped which I took to Albany and Troy. In the month of September 1856 and on the 16th day of said month I received on board of my boat 5565 sides of Hemlock tanned sole leather manufactured by said Stevens. I received it from the Storehouse of Ira Dorrance and by his direction - Dorrance gave me directions about receiving it - they were that I was not to receive any stamped leather aboard of my Boat. A few sides were received on board stamped "Stevensville," but they were thrown back into the storehouse - all the leather conveyed in my boat at that time was to the best of my knowledge unstamped - Dorrance and his brother and a hired man assisted in putting the leather on board.

I received no instructions in regard to the freight of the load taken in September or for the service in which my boat was engaged. I left Wurtsboro September 16th I delivered the leather at Oswego, N.Y. - While the Boat was on the passage to Oswego, part of the leather was rolled up in bundles by direction of a person then known to me by the name of L. L. Stratton, who superintended the delivery of the leather at the end of the route - I saw Fletcher Stevens on and about my boat whilst the leather was being put on board at Wurtsboro - on the Boat at Albany, and he

29

also came on board when we got within about
 six miles of Oswego. - He is commonly known
 by the name of "the Doctor". He told me he
 wanted the leather taken to Oswego - He said
 he had as good a right to sell the leather as
 Pawlett had and told me not to mention to
 any one that it was going to Oswego - He gave
 these directions at Albany - The person I
 knew as L. L. Stratton was with him at Albany.

He was put on board to take charge of the
 leather. And was introduced to me by Fletcher
 Stevens by the name of Mr. Stratton. While on
 the boat I saw him write the name L. L. Stratton.

At the time Stevens introduced Stratton to me
 and in his presence. he said he would send
 Stratton along to take charge of the leather and
 help me roll it up in bundles - He said
 Stratton would pay the Toll - Stratton helped
 me roll the leather on the passage and
 saw to the delivery of it at Oswego. He paid
 the toll & cleared the Boat at the Collectors office.
 He made out the invoice in my presence. And
 put down the cargo therein as groceries, provision
 leather - He went on the boat from Albany
 to Oswego. Except that he got off at Utica & came
 on again at Rome - He left the boat at
 Oswego & told me he was going to Montreal
 and I saw him on a boat after she had
 left her dock at Oswego - He went in the
 same boat that carried a portion of the

30
leather. Fletcher Stevens was with Stratton when the leather was delivered at Oswego. And I saw him on the same boat with Stratton. Since then I have seen the same person (Stratton) who was put on board of the boat to take charge of the leather. I saw him in July 1857. He was not then passing by the name of Stratton. His right name is William H. Stanton, commonly known as Harvey Stanton. I took no Receipt for the leather at Oswego because it was in the charge of the man then known to me as L. L. Stratton. My Boat on this trip was loaded with leather only."

The plaintiff next offered and read to the jury the deposition of John A. Leach as follows -

My name is John A. Leach age nineteen years - am in employ of plaintiffs as clerk in their store in New York City. I know all the parties - Have known the plaintiffs since 1853 and the defendants since December 1856. - I am not a practical Tanner - I am connected with leather dealers and engaged in handling leather. Have been so engaged since 1853 with the plaintiffs - Plaintiffs have been engaged in the Hide and Leather business being knowledge since 1853. as Partners under the firm name

of Sawett & Shaw & Co. I was in their employ
 as general receiving and delivery clerk between
 August 1855 and November 1856 - I know the
 Plaintiffs furnished Hides to W. H. & F.
 Stevens between those dates - Their tannery
 was situated in Stevensville Sullivan County
 New York - I knew both Walter H. and Fletcher
 Stevens. In August 1855. they were engaged
 in the tanning business as Partners. Their
 firm name was W. H. & F. Stevens. They
 manufactured Hemlock tanned sole leather
 I have seen and been accustomed to handling
 leather manufactured by them - Have seen
 and been accustomed to handle leather
 manufactured by them during the year
 1856 since April in said year - I am
 and was familiar with the quality and
 appearance of the leather manufactured by
 them and so familiar with it as to be able
 to distinguish it from leather manufactured
 at other Tanneries out of the same quality
 of Hides - The number of Hides furnished
 by the Plaintiffs to the Stevens to be tanned
 between August 1855 and November 1856
 was 18845 - It is customary for Tanners
 to place a mark on Hides which they
 tan by which one lot or invoice of leather
 can be distinguished from another - It
 is done by placing a different mark on
 each Invoice of Hides before tanning and

such marks would not be obliterated by the process of tanning— The Stevens were accustomed to mark Hides which they tanned I know they marked the Hides which they received from the Plaintiffs— I know it by seeing the marks on leather received from them which marks the Stevens had previously informed me they would put on the Hides and I know the marks were not on the Hides when they were sent to the Stevens The marks placed on the Hides by the Stevens consisted of numbers from 1 to 7 inclusive.

Of the Hides sent by Plaintiffs to the Stevens there were returned to the Plaintiffs by the Stevens manufactured into Leather 16,496 sides of Leather equal to 8,248 Hides— I saw them so returned There was a stamp on them other than the marks before referred to— It is the custom of Hemlock Sole Leather Tanners to stamp each side of Leather manufactured by them with their own name or the name of their Tannery It is done after the Leather is tanned As far as my knowledge goes, it is the universal custom of Hemlock Sole Leather manufacturers to stamp each side of Leather manufactured by them The Stevens were of this class of Tanners They used as a mark the word "Stevensville" It is placed on the butt of the Side Hides are usually tanned for Sole Leather in two parts, each part is called a Side.

I first saw Defendants in their store in Chicago Ill. in December 1856 I was there December 11th 12th & 13th 1856 for the purpose of looking up Leather, claimed by the Plaintiffs, and at their request. I was in Defendants store twice, the first time Palma Hill was with me the next time Frederick Fawcett and a Mr Clinton were with me. I heard a conversation ~~con-~~
~~versations~~ between Mr Fawcett and Mr Adams one of the Defendants. Mr Fawcett asked Mr Adams if the leather which I identified as leather manufactured by W. H. & F. Stevens and belonging to Plaintiffs was part of the 2,000 sides which his (Adams) firm had bought, 1000 sides of Rose and 1000 of Stafford. Mr Adams said it was. Mr Fawcett then demanded what Leather they had belonging to Plaintiffs which Mr Adams refused to let him have. I saw a portion of the leather referred to by them in that conversation. The appearance and the quality of the leather and the style of Tanning are familiar to me I could from the appearance of the leather and handling it tell with certainty by whom it was manufactured. That leather was manufactured by W. H. & F. Stevens. There was not the name of any Tannery or Tanner upon it. There were other things in which I could and did identify the leather which I saw at the store of Defendants. There were marks (invoice marks) upon the leather from which I could tell with certainty who

34)

furnished the Hides, it was manufactured from to the tanners, The marks consisted of the numbers "1" "2" & "4" Judging from such marks as stamps the Plaintiffs furnished the Hides from which that leather was manufactured to the tanners I so recognized and identified not less than 450 Sides of leather, I was also able to identify the leather from the fact that the Hides from which it was manufactured, were the same as those sent by the Plaintiffs to Stevens, by its general appearance and the style of tanning, In the conversation between Mr. Tarwett and Mr. Adams 2000 sides of leather were spoken of by them, The leather of the manufacture of W. H. & F. Stevens was mentioned. Mr. Adams said, that his firm the Defendants had bought 1000 sides of such leather of Stafford, and he Stafford then told them, there would be another 1000 sides of leather of which Rose would have the management, and that said Defendants afterwards bought 1000 sides of the same leather from Rose. To the best of my judgement the leather was worth \$4⁰⁰ per side.

The Plaintiffs next offered as evidence, and read to the Jury, the deposition of Palma Will as follows—

" My name is Palma Will I am 45 years of age, and am a Tanner by trade and have been engaged for some time in carting leather, I reside in the City of New York, I am acquainted with the ~~Plts~~ Plfts. and with William H. Adams one of the Defendants, Have known the Plaintiffs

over 10 years and New Adams since December 1856. I have been in the tanning business more or less for 25 years, mainly in Greene Ulster, and Sullivan Counties, N.Y. I am at present engaged both in tanning and carting leather, For the last five years I have been connected as carman with and for the Plaintiffs, and other firms, leather dealers in the city of New York. I was in the employ of the Plaintiffs as their carman, between the months of August 1855, and the month of November 1856. I know that the Plaintiffs furnished Hides to tanners in Sullivan County, between those dates. The Hides were sent to W. H. & F. Stevens and their tannery was at Stevensville Sullivan County N.Y. I am acquainted with Walter H. & Fletcher Stevens, have known Walter H. for ten years and Fletcher since August 1855. They were engaged in the tanning business in the years 1855 & 1856, as Partners, under the firm of W. H. & F. Stevens. They manufactured Hemlock Sole Leather. I have seen and been accustomed to handling leather made by them since the year 1856 and during that year also. I am familiar with the appearance and quality of the leather manufactured by them and so familiar with it as to be able to tell it distinguished it from leather manufactured at other tanneries out of the same quality of Hides. I know of the Plaintiffs furnishing to the Stevens Hides to be tanned at their tannery between August 1855 and November 1856.

361

I assisted in weighing, culling, carting and shipping such Hides - (Don't know how many - It is customary for tannery to place a mark on the Hides which they tan, by which one lot of leather can be distinguished from another lot on Invoice. It is done with a punch and mallet when the Hide is taken from the Soaks after it is split. Such marks can not be obliterated by the process of tanning. The Stevens were accustomed to mark the Hides which they tanned. I know that they so marked the Hides which they received from the Plaintiffs. I knew it by seeing the marks on the leather. They stamped a different figure on each Invoice -

I cannot say what part of the Hides sent by Plaintiffs to Stevens were returned manufactured into leather. Some of them were so returned. On the leather so returned I ~~saw~~ there was a stamp other than the mark above mentioned. Tanners are accustomed to stamp each side of Hemlock Sole Leather, either with their name, or the name of their Tannery. The custom is universal so far as I know. I never knew an exception to it. The Stevens were Hemlock Sole Leather Tanners, and they are accustomed to stamp each side of leather, "Stevensville".

I first saw Mr. Adams one of Defendants in Chicago. I was in Chicago in December 1856 on the 11th 12th

and 13th of said month. I was there at the request of Plaintiffs to look after some leather which had been taken away from the Stevensville Tannery. Whilst there I was in the store of the Defendants at one time with John A. Beach alone, and at another time Mr. Frederick Fawcett was with me and I think Mr. Clinton of Albany. I saw Defendant Adams both times and heard a conversation between him and Mr. Fawcett. Mr. Fawcett said that some leather there (pointing to it) was a part of the leather belonging to him, and Mr. Adams said that was a part of the leather he bought of Rose - Mr. Fawcett then said "Will you be positive that is a portion of the Stevensville leather?" I said I was sure it was. There was another conversation between them but I did not pay enough attention to them to remember it. I saw a portion of the leather referred to by them in that conversation. Its appearance, quality and style of tanning was familiar to me, I could from its appearance tell for a certainty by whom it was manufactured. It was manufactured by W. H. S. Stevens. There was no name of any Tanner or Tannery stamped upon it to my knowledge. I identified it by its complexion, from the kind of Hide from which it was made, and the manner in which it had been handled in the yard. There were Invoice marks on the leather similar

7
(38)
to those I had seen on leather in the Plaintiffs store in New York which had been received from said Stevens, and therefore I can say with certainty that the Plaintiffs furnished the Hides from which the leather I saw in Defendants store was made.

At this distance of time I cannot recollect all the marks but I distinctly remember seeing from 1 to 4 inclusive. I recognized and identified at the store of Defendants about 450 sides of such leather. In the conversation between Mr Fawcett and Mr Adams 2,000 sides of leather were spoken of by them. The value of the leather per side at that time was about \$4.50

The Plaintiffs next offered as evidence and read to the Jury the deposition of Richard H. Broadhead as follows—

I know Plaintiff Frederick Fawcett and the other Plaintiffs by sight. Do not know the Defendants. In the year 1856 I was interested as owner in a line of Canal Boats running between Wurtsboro and the city of N.Y. I was half owner of the line the firm name was Futhill & Broadhead. Our agent at Wurtsboro was Isa Lorraine. There was no rival line or competing Boats running between Wurtsboro and New York during the year 1856. The principal business done by our boats was taking leather from Wurtsboro to New York, and Hides, Merchandise & provisions

from New York to Wurtsboro. I know the two Stevens who carried on the tanning business at Stevensville. The one they generally called "the Doctor" I was best acquainted with from doing business with him. I have done business with them as "W. H. & F. Stevens" I have known them from 1855. In 1855 and 1856 they were tanners doing business at Stevensville Sullivan County N.Y. some 15 or 20 miles from Wurtsboro. Our boats were engaged in carrying Hides and Leather, to and from Wurtsboro for the Tannery of said Stevens. All the leather sent from the Stevens by our line was consigned to Farwell Isham & Co. from the opening of navigation 1856 to the month of September of said year.

In August or September 1856 one of the Stevens the one they call "Doctor" (I think his name is Fletcher Stevens) called on me and applied for a boat to carry leather to Albany, or farther if he saw fit. He did not wish me to say anything about it to anyone, he did not want it known in the "Swamp".

The place known as the "Swamp" is the locality of the wholesale leather dealers in New York City.

^{This conversation was at my office in said City.}
I told Stevens I would furnish him with a boat as he requested, and think I notified someone that I had so agreed. I know that I notified him and kept Stevens request not to let the matter be known, until ^{some} several months after when inquiries were made of me.

(40)

A boat was ~~was~~ furnished by my firm to the Stevens in September 1856 in pursuance of the request aforesaid. The name of the boat was "William B. Ross" the Captains name was E. I. Bailey. The boat was hired by the day. She went from Wurtsboro to Albany and on one trip the Captain reported that the boat went to Oswego, that was her first trip in September of that year. Stevens furnished the freight and it was sole leather Bailey had charge of the boat and Stevens was to send a man to take charge of the cargo, and Stevens agreed to pay for ^{the use of} the boat and did pay part. By reference to my firm books ~~that~~ I find that all the hides furnished to the Stevens by our boats during and after the month of August 1855 were sent by Fawcett Shant Co. to said Stevens.

The Plaintiffs next offered and read to the Jury the deposition of William B. Stanton as follows

My age is 22 years and upwards. For several years ^{prior} ~~previous~~ to September 1856 I was in the employ of Fletcher Stevens and his brothers D. F. and O. S. Stevens. I know the Plaintiff Frederick Fawcett and the Defendants Osborn and Adams. Do not know the other parties to this suit. I was acquainted with Walter H. Stevens and Fletcher Stevens between August 1855 and November 1856. They resided and did business at Stevensville Sullivan County N.Y. They were engaged in the tanning & mercantile business part-

ness under the firm name of W. H. & F. Stevens.

41

I was not connected with them in business as a firm. I was not in the employ of ^{the firm of} W. H. & F. Stevens in September 1856, but was employed by Fletcher Stevens during the fore part of Sept. 1856. Am not able to state whether Walter H. ^{F. Stevens} knew of my employment by Fletcher. I was first employed by Fletcher Stevens as aforesaid to meet him in Albany in the State of N. Y. about the 9th of said month. I engaged to ship and sell a quantity of leather which he said was on a Canal Boat. The employment terminated the fore part of October 1856. I did not assist in removing any leather from the tannery of W. H. & F. Stevens in September October or November 1856. (Do not of my own knowledge know of any leather being removed from said tannery during said times. The tannery of W. H. & F. Stevens was about 22 miles from the canal, and Westboro ~~was~~ Sullivan Co. N. Y. was the place most convenient thereto. I believe they were in the habit of sending their leather to the canal for shipment. I am acquainted with Captain Edwin I. Bailey, was introduced to him in Sept. 1856. and knew him in September and October of that year. He was Captain or master of the canal-boat William C. Rose. Don't know by whom he was employed. He had a freight of leather when I first became acquainted with him; but further than that I know not. Do not know whether there was any leather

from the tannery of W. H. & F. Stevens shipped on the
 boat commanded by Captain Bailey in September 1856
 I went on board his boat at Albany in September 1856
 and remained on board till the boat arrived at Oswego.
 There was a boat load of leather I should think about
 five thousand sides. I was in the employ of Fletcher
 Stevens whilst on board the boat having charge of the
 leather. Do not know by whom the boat was employed
 I first became acquainted with Captain Bailey at Albany.
 Was introduced to him by Doctor Fletcher Stevens
 and was introduced to him by the name of Stratton
 I paid and was known on the ^{pidy} boat by the name of
 Stratton. The person who introduced me to Captain
 Bailey claimed to own the leather. Do not know of
 my own knowledge when or by whom the leather
 was tanned. I paid the tolls of the boat whilst I was
 on board. Dr. Stevens furnished the money for that
 purpose. I attended (in company with the Capt.) to the
 entry and clearing of the boat at the different offices
 on the canal. The cargo was entered as part leather and
 part merchandise having the ^{rate of} same toll as leather.
 The cargo was all leather. Dr. Stevens requested me to
 enter it in that manner. The leather was discharged at
 Oswego. A part of it was sent to Montreal, a part to Toron-
 to and a part to Chicago. About 2,700 sides were sent to
 Montreal about seven or eight hundred sides to Toronto
 and about 2,000 sides to Chicago. Dr. Stevens and I went
 to Montreal with the leather sent there.

(43)

The leather that Dr. Stevens and I went with to Montreal was sold to Hugh Thompson & son for about \$10,800 \$ 800 was paid in cash the balance in three drafts drawn by cashier of the bank of the people and the bank of the republic in the city of New York. They were drawn to the order of Hugh Thompson and endorsed by him. I endorsed them in the name of L. L. Stratton to Daniel Elston & Co. I received the \$, 800 & paid it over to Dr Stevens. The drafts were delivered either to O. H. Rose or Daniel Elston at Chicago. The leather sold at Montreal was sold in the name of L. L. Stratton & Co. and the Bill made out in that name. My name is William H. Stratton. I passed under the name of L. L. Stratton. Stevens name was Fletcher Stevens. He passed under the name of F. Stafford. Of the 2000 sides or thereabouts sent to Chicago one lot was sent by Steamboat direct to Chicago and the residue by the Callington Boat about 1000 sides each way. It was consigned to F. Stafford. I received 1000 sides of the said leather. Do not know who received the balance. I saw 1000 sides at Chicago on Mather & Co's dock. I sold it on the dock. I sold the other 1000 sides to be received when it arrived, and gave O. H. Rose an order to receive it. The name of the person to whom it was consigned was not the real name of the consignee. The real name was Fletcher Stevens. I was introduced to the Defendants Osburn & Adams by O. H. Rose of Chicago by the name of Stratton. I was introduced to them to open a negotiation for the sale of leather. I was not known to

(44)

Rose by any other name than Stratton to my knowledge. I had known him but a few hours. I was not introduced to any person or persons in Chicago by letters from New York. I was acting under the direction and for Dr. Fletcher Stevens. At the time I was introduced to Dpts. Osborne and Adams the leather had not arrived at Chicago I think.

I sold ^{to the defendants} 1000 sides of Hemlock Sole Leather and delivered it; also 1000 sides to be received by them on its arrival at Chicago. I do not know when or by whom it was manufactured. The sale was made on the 10th of October 1886 at 22 cents per pound. I do not know by whom said leather was transported or conveyed from the tannery to Albany N.Y. I superintended the shipment at Oswego. Have no knowledge who superintended the leather previous to its coming under my charge at Albany. I know nothing more in reference to the conveyance of the leather, than I have already stated. I never had any conversation with Walter H. Stevens in reference to the said leather or with Fletcher Stevens until I met him at Albany.

The first conversation was at Albany, and others took place at various places, down to the time the leather was sold. Fletcher Stevens advised me to pass under the name of Stratton. The reason assigned by him was that he had had difficulty with Furcott, Selham & Co. and could not do business with them or get pay for his leather. That he wished to sell the leather to

45
liquidate his liability That he had taken counsel upon the subject and was so advised That by taking an assumed name Farwell Isham & Co. would not be able to track or follow him and thus intercept his plans.

The Plaintiffs then offered and read to the Jury the deposition of Ira Surrance as follows—

My name is Ira Surrance—My age is 26 years—I am a forwarder on the Delaware and Hudson Canal, and was the ^{agent} ~~deputy~~ of the Merchants and Tanners line of Canal Boats, owned by Tuthill & Broadhead, at Wartsboro County of Sullivan, in the Summer and Fall of 1856—~~I think~~ I know both Walter W. & Fletcher Stevens during the Summer and Fall of 1856. They resided and did business at Stevensville Sullivan County N.Y. Their business was the tanning of Hemlock Sole Leather Their place of business is 24 miles from my place of business. They are accustomed to send away their leather by horse teams to the canal by the canal to Roundout Ulster Co. N.Y. and down the Hudson River to the city of New York. Wartsboro was the nearest shipping point on the canal. Their teaming was mostly done with their own teams From and to Wartsboro their carrying was done by the Merchants & Tanners line of Canal Boats. I have no ~~personal~~ ^{personal} ~~further~~ knowledge as to who furnished them their Hides—But for some ^{months prior} ~~time previous~~ to September 1856 they returned their leather to ^{the} Plaintiffs at the city of N.Y.

46)

About the month of August or September 1856 Fletcher Stevens made an arrangement with me about storing leather until they should order it to be ^{sent} forward.

I think the arrangement was made in August. The arrangement was this - The leather not stamped was to be stored until he (Fletcher) ordered it to be sent forward.

The stamped leather was to be sent forward to Fawcett Isham & Co. without specific orders.

In pursuance of this arrangement, and between the month latter part of August and the 16th of September 1856 sides of leather or thereabouts, were stored with me. Subsequently there was between eight and nine thousand sides stored with me at different times down to November 8th.

The stamped leather was sent to New York to Fawcett Isham & Co. by directions of Fletcher Stevens. The leather was brought to my place by horse teams. The unstamped leather was stored until orders were given by Fletcher Stevens. The first lot remained in store about three weeks.

The second lot five or six weeks. The third lot between one and two ^{weeks}. It was removed by directions of Doctor Stevens by canal boat Wm. C. Rose, Edwin S. Bailey master.

Fletcher Stevens gave directions in relation to the shipping of said leather and all business was transacted with him. He is generally known by the name of Doctor Stevens.

The boat did not receive all the leather at one time. There were three boat loads. The first load left Sept. 16th 1856 with 5851 sides or thereabouts. I received instructions for the employment of said boat from Fitchell & Broadhead.

(47)

The Wm. C. Rose was a regular line boat but was occasionally used as a transient boat. Tuthill & Broadhead owned the line. I told Captain Bailey to proceed to Roundout or Albany and there Sater Stevens would meet him, and after that to follow Stevens directions. I knew of no other instructions. This was on the authority of T. C. Stevens. I received some leather in the latter part of August 1856 which was not sent to New York but was sent by Captain Bailey; but with this exception all the leather received previous to September was sent to Plaintiffs in New York city. — Prior to August or September 1856 I never received any leather from said Stevens that was not stamped. Their stamp was Stevensville.

The Plaintiffs next introduced as a witness Mr. P. L. Yoe who being first duly sworn, testified as follows:
I reside in Chicago, and in 1856 and prior thereto, was engaged in the leather business in Chicago. I know the Defendants and know of the Plaintiffs. I never saw the leather in controversy in this suit. Heard about the difficulty between Plaintiffs and the Stevens in the Winter of 1856 & 7. Saw some of the leather in Chicago which the Plaintiffs claimed to belong to them & to have been taken ^{away} by the Stevens. About 800 sides of it was purchased by me after the Plaintiffs recovered possession of it, and the payment of it was made by the parties to whom I sold out my business. My impression is that they paid about \$2,000 for the 800 sides. There was some mis understanding and trouble about the price.

(48)

I cannot fix any value upon the leather in controversy in this suit for the reason that I do not know the quality or weight of it. A lot of leather right from the tannery ~~would~~ contain all grades, and in the fall of 1856 in October the different qualities ranged in price from 17 to 28 cents per pound in Chicago. If there was any change the price was higher in the Spring and early ^{in the} summer of 1857 than in the ^{fall of 1856} fall of 1856, a fine lot of mixed leather would average about 35^(side)¢ per

It was here admitted by and on the part of the Defendants, to be taken as evidence in the case, that in the month of June 1857 and shortly before the commencement of this suit the Plaintiffs demanded of the Defendants the leather in controversy and that the Defendants refused to comply with ^{the} ~~their~~ ^{said} demand. And the Defendants also further admitted that they paid for said leather to Fletcher Stevens or his agent the sum of \$6,200 and that they took it subject to freight and charges thereon amounting to between two and three hundred dollars.

Here the Plaintiffs rested their case, and the Defendants in order to sustain the issue on their part, offered and read to the Jury as evidence the deposition of Walter H. Stevens taken by Plaintiffs as follows:

I know the Plaintiffs but do not know the

(49)

Defendants. Between August 1855 and November 1856 I was engaged in the tanning, farming and mercantile business. I was engaged with Fletcher Stevens in the tanning, ~~farming~~ and mercantile business at Stevensville Sullivan Co. N.Y. The firm name was W. H. & F. Stevens. The firm between the dates aforesaid received Hides from Fawcett Isham & Co. of the city of New York. They were received on what is known generally as a joint account-contract. The leather was manufactured as I understood it for ~~Fawcett~~ the Plaintiffs and W. H. & F. Stevens both having an interest in the leather after it was manufactured. The leather was sent to Plaintiffs by the New York & Erie Railroad or by the Delaware and Hudson Canal. The Plaintiffs did business in Gold street New York. The hides were carried to our tannery by rail road and canal and by horse teams - We were not receiving Hides from any other persons or firm than the Plaintiffs during the time before mentioned, except a few we purchased in the country, but a part of the time we were sending off leather to Small & Bealey on a previous contract. The leather was usually stamped "Stevensville" (if stamped at all) or "Stevensville Tannery". I cannot state the number of sides manufactured as I have no data by me. The leather was loaded on the sledges or wagons and sent off that is all I know about it except that I saw part of it afterwards in Plaintiffs store.

(50)

It was shipped at Wurtsboro when sent away by canal principally. Fletcher Stevens superintended the removal. I do not know by what boat or boats or line of boats. I do not know at what place it was put on board the boats, or who had charge of the shipping then. Fletcher Stevens is commonly known as Doctor Stevens. He was at home a part of the time in Sept. Oct. and November 1856, and a part of the time he was absent, can't say what part of the time he was at home or absent. I do not know whether he was in Chicago during that time. I knew nothing of the shipping of leather manufactured at the tannery of W. H. & J. Stevens in Sept. 1856 to Albany and thence ^{westward} ~~to the West~~.

It was here admitted by and on the part of the ^{said} Plaintiffs that O. P. Rose who had been subpoenaed by the Defendants would if sworn, testify that he introduced the agent of F. Stevens to the Defendants at the time Defendants bought the leather and told Defendants that the owners of the leather were large manufacturers and dealers in leather in Sullivan Co. N.Y. well known to him, and had sent a quantity of leather to Chicago for sale, that the Defendants purchased the leather in controversy of said Fletcher Stevens or his agent, without any knowledge or notice of Plaintiffs claims thereto. That they had no knowledge or notice of the manner in which said Stevens became possessed of said leather, ^{and that in purchasing said leather} they acted bona

(51)

and in good faith, and that they paid a fair price for it under the circumstances detailed in the evidence.

The foregoing is all the evidence ^{offered} on the trial of said cause—

The Plaintiffs then asked the Court to instruct the Jury as follows—

1st the Jury are instructed that the contract between Plaintiffs and W. H. & F. Stevens given in evidence did not constitute or create a partnership between them or give the said Stevens any interest in or right to sell the Hides furnished by the Plaintiffs to be tanned, under said contract, or the leather manufactured therefrom—

2nd The absolute ownership and sole right of disposition of the leather manufactured under said contract between the Plaintiffs and W. H. & F. Stevens, remained in the Plaintiffs notwithstanding the possession thereof by the said Stevens. And by the terms of said contract said Stevens had no lien on said leather after it was finished, or other right to retain possession of the same as against said Plaintiffs—

3rd If the Jury believe from the evidence that the only right Fletcher Stevens had to the leather in question was derived from the contract with the Plaintiffs given in evidence and that the Defendants purchased the said leather from him, or his agent without the knowledge, consent or permission of the Plaintiffs then

Defendants acquired no title to said leather by such purchase, and the Plaintiffs are entitled to recover its value in this action—

4th Even though the Jury may believe from the evidence that the Defendants purchased the leather in question from Fletcher Stevens or his agent without any actual knowledge or notice of the Plaintiffs title thereto—yet if they further believe from the evidence that the Plaintiffs were at the time of such purchase the real owners of said ^{leather}, and had and have never in any manner consented to or ratified the sale thereof by said Stevens, and had not given him any authority to make such sale, but subsequently demanded possession of said leather from the Defendants which was refused before the commencement of this suit, then the Plaintiffs are entitled to recover in this action, notwithstanding such purchase by the said Defendants—

5th The Jury are instructed that the contract between the Plaintiffs and W. H. & F. Stevens given in evidence did not constitute or create a copartnership between the Plaintiffs and the said W. H. & F. Stevens in respect to the leather or any portion thereof which was manufactured by the said W. H. & F. Stevens out of hides furnished and delivered to said Stevens by the said Plaintiffs under and in pursuance of said contract. Nor did the said contract give the said W. H. & F. Stevens or ^{either} of them any right, without the consent or permission of the Plaintiffs to take the said leather so manufactured by them or any

part thereof out of hides as furnished as aforesaid, or
 cause the same to be taken to any place other than
 the city of New York, nor had they or either of them
 any right or authority under said contract to sell ^{the} said
 leather or any part thereof without the permission or
 consent of the Plaintiffs, and if the Jury believe from
 the evidence in this cause, that the leather in ^{the} question
 in this suit, was in fact manufactured by the said
 W. H. & F. Stevens out of hides furnished and delivered to
 them by the Plaintiffs under the said contract to be
 manufactured into leather and returned to Plaintiffs
 in the city of New York in pursuance of ^{the provisions of} said contract,
 and that Fletcher Stevens one of the parties to said contract
 without the consent of the Plaintiffs, or either of them
 expressed or implied, but fraudulently and surreptitiously
 without the knowledge of the Plaintiffs or either
 of them, took the said leather from the tannery of said
 Stevens, and removed the same to the city of Chicago
 and immediately on its arrival being a stranger to
 Defendants made a sale of the leather ^{in question} to the Defendants
 who took possession thereof from ^{the said} Fletcher Stevens or his
 agent, then there was no such title or ownership of said
 leather in said Fletcher Stevens, or ^{indicia} evidence of ownership,
 as would give the Defendants a title to said leather as
 against the Plaintiffs, and if Plaintiffs demanded the
 said leather of the Defendants before the commencement
 of this suit, and the Defendants upon such demand
 refused to deliver the same to Plaintiffs, then the

Plaintiffs are entitled to recover of the Defendants in this action, and the measure of the damages is the value of said leather at the time of such demand and refusal.

6th If the Jury believe from the evidence that the leather in question in this suit was manufactured by W. H. & F. Stevens out of hides delivered to them by the Plaintiffs under and in pursuance of the contract between Plaintiffs and said Stevens, given in evidence, and that Fletcher Stevens one of the Parties to said contract without the consent express or implied, of the said plaintiffs or either of them, but fraudulently and surreptitiously and with the intent to cheat and defraud the plaintiffs in that behalf, took the leather from the tannery of said Stevens and caused the same to be removed to Chicago and there put into the contrall of a man by the name of Stanton, but who assumed the name of Stratton, and made a sale of the leather to the Defendants as the property of Stafford & Co. and if the Jury further believe from the evidence that the Defendants in purchasing said leather, dealt with a person who was a total stranger to them and who offered the same for sale under unusual circumstances, and that the Defendants in making such purchase did not know of or rely upon any of the circumstances connected with the said Stevens having possession of said leather or tanning the same under said contract, then the Defendants are not entitled to set up in this suit, that the Plaintiffs and ^{said} W. H. & F. Stevens were

under said contract co-partners, as to third persons or that they are protected as bona-fide purchasers of the same.

The Jury are instructed that in order to enable the Defendants to protect themselves by any indicia of title and ownership in W. H. & F. Stevens under the contract between the Plaintiffs and W. H. & F. Stevens given in evidence it is necessary for the Defendants to show by the evidence in the cause that in purchasing the leather in question they by some dealings with the said W. H. & F. Stevens or otherwise, had knowledge of the circumstances, or some of them constituting such indicia of ownership, and acted upon the faith of such appearances. But if the Defendants purchased ~~the~~ said leather of another person than either of said Stevens and who was a total stranger to the Defendants, and without any knowledge or notice of any of the circumstances aforesaid, and without relying upon the same or either of them, then the said Defendants are not entitled to protect themselves in this action by the said appearances, or indicia of title in said W. H. & F. Stevens ~~third, fourth~~. The court refused to give the said first, third, fourth, fifth and seventh instructions requested for by the said Plaintiffs as aforesaid, and each of them and to the ruling and decision of the court in upholding the same, and each and every thereof, the said Plaintiffs by their ^{counsel} ~~counsel~~ then and there excepted.

The court also refused to give to the Jury the said second and sixth instructions as asked for by

56

said Plaintiffs, but modified the same making the same read as follows

2nd The absolute ownership and sole right of disposition of the leather manufactured under said contract as between the ~~said~~ Plaintiffs and W. H. & F. Stevens remained in the Plaintiffs notwithstanding the possession thereof by the said Stevens, And by the terms of said contract, said Stevens had no lien on said leather after it was finished, or other right to retain possession of the same as against said Plaintiffs —

6th If the Jury believe from the evidence that the leather in question in this suit, was manufactured by W. H. & F. Stevens out of Hides delivered to them by the Plaintiffs under and in pursuance of the contract between Plaintiffs and said Stevens given in evidence and that Fletcher Stevens one of the parties to said contract, without the consent express or implied, of the said Plaintiffs or either of them, but fraudulently, surreptitiously, and with the intent to cheat and defraud the Plaintiffs in that behalf took the leather from the tannery of ^{said} Stevens, and caused the same to be removed to Chicago, and there put into the control of a man by the name of Stanton, but who assumed the name of Stratton, and made a sale of the leather to the Defendants as the property of Stafford & Co. and if the Jury further believe from the evidence that the Defendants in purchasing said leather dealt with a person who was a total stranger to them, and who

offered the same ^{for sale} under unusual and suspicious circumstances to put a prudent man on inquiry and that the Defendants in making such purchase did not rely upon and know of the circumstances ^{connected with} the said Stevens having possession of said leather in tanning the same under said contract; then the defendants are not entitled to set up in this suit, that the Plaintiffs and said W. H. & F. Stevens were under said contract copartners with power to sell said leather, as to third persons, or that they are protected, as bona fide purchasers of the same.

And to the refusal of the court to give said second and sixth instructions and each of them as asked by the Plaintiffs and to the modification thereof made as aforesaid by the court, the said Plaintiffs by their counsel then and there excepted—

And therefore the Court of its own motion instructed the Jury as follows—

1st If the Jury believe from the evidence that the leather in question was manufactured by Stevens & Co. at their manufactory under the agreement given in evidence, then as to third persons and purchasers in good faith, for a full consideration and without any knowledge of said contract and in the absence of circumstances of suspicion to put them on inquiry the parties were as to such third persons, partners. And if the Jury believe from the evidence that the Defendants

58
 in this case for a full consideration, and without knowledge of such agreement and in the absence of any circumstances tending to put a prudent man on inquiry, purchased the leather in controversy, of the agent of the Stevens in open market, the law is for the Defendants— But if the Jury believe from the evidence that the Defendants had knowledge of the agreement or of any circumstances tending to put a prudent man on inquiry as to the ownership of said leather as between the Plaintiffs and said Stevens or of the rights of the Plaintiffs in said leather, or did not pay a fair price for said leather, then the law is for the Plaintiffs.

2nd If the Jury shall believe from the evidence that the leather in controversy was manufactured by the Stevens at their manufactory under the contract given in evidence, and that the possession of the same was committed to the Stevens by the voluntary act and consent of the Plaintiffs with no apparent restrictions of control and ownership thereof, and that they clothed the Stevens with all the open and apparent indications or marks of ownership of such leather, and that the Stevens sent such leather to Chicago for sale in open market, and the Defendants without any notice of the agreement given in evidence between the Plaintiffs and Stevens & Co. and without any knowledge of any circumstances to put a prudent man on inquiry of the Plaintiffs rights therein, purchased

such leather for a full consideration and in good faith, then the law is for the Defendants—

To the giving of which instructions last mentioned and each of them by the Court the Plaintiffs, ^{by their experts,} then and there excepted—

The Jury thereupon retired to consider of their verdict and afterwards came into court with the following verdict to wit—“We the Jury find the Defendants not guilty”

The Plaintiffs thereupon moved the court to set aside the verdict of the Jury and for a new trial of said cause, and afterwards, and at the said March term aforesaid of said Court, filed their motion in writing for that purpose, as follows—

Superior Court of Chicago
March term A.D. 1862

Frederick Fawcett et al
vs.
William Osborn et al

And now come the said Plaintiffs by Scates McElister & Hewitt their attorneys and move the court to set aside ^{of the Jury} the verdict rendered in this cause and to grant a new trial therein and for cause show.

1st The verdict is contrary to the evidence and against the weight of the evidence in said cause.

2nd The verdict is contrary to the law under the facts established in said cause—

60

3rd The verdict is contrary to the law and the facts of said case—

4th The Court refused proper instructions to the Jury asked for by the Plaintiffs.

5th The Court of its own motion gave improper instructions to the Jury—

6th The Court erred in modifying instructions asked for by the Plaintiffs, & refusing to give them as asked for.

7th The Court in the instructions given to the Jury misstated the law applicable to the facts of the case to the prejudice of the Plaintiffs.

Scates M^r: Shister & Sewitt

Attys for Plaintiffs

Which said motion was afterwards and at the October term A.D. 1862 of said court, overruled by the court and Judgment was entered upon said verdict—

And to the ruling and decision of the court in overruling said motion and rendering Judgment as aforesaid the ^{said} Plaintiffs by their ^{counsel} ~~consent~~, then and there excepted—

And for as much as the proceedings aforesaid on the trial of said cause, and the rulings and decisions of the court therein and the acceptances thereto aforesaid do not appear of record in said cause, the said Plaintiffs have prepared and tendered to the court this their Bill of exceptions, setting forth the proceedings, rulings decisions and exceptions aforesaid, and pray that the same may be signed ^{and sealed} by the court and ~~be~~ made a part of the

61)

record in said cause, which is accordingly done this 12th day
of December A.D. 1862 —

Grant Goodrich *Seal*

State of Illinois
County of Cook } S.S.

I Thomas B. Carter Clerk
of the Superior Court of Chicago, within and
for the County and State aforesaid, do hereby
certify that the above and foregoing is a full,
true and complete transcript of all the pleading
on file in my office, together with all orders and
judgment entered of record in said Court, as
well as the ~~Record and~~ Bill of Exceptions in
a certain cause wherein Frederick Sawcett,
Samuel Isham & Thomas Sawcett, plaintiffs
and William Osborn, William L. Adams, &
Frederick M. Salbot, defendants.

In testimony whereof I hereunto
subscribe my name, and affix
the seal of said Court, at the City
of Chicago, in said County, this 18th
day of March A.D. 1863.
Thomas B. Carter Clerk



State of Illinois

In the Supreme Court of said State
 Their Grant Division
 April Term AD 1863 -

Frederick Fawcett, Samuel	}	Errors to Superior Court of Chicago.
Isaac & Thomas Fawcett		
vs		
App. in error	}	
William Osborn, William H.		
Osborn, and Frederick M. Talbot	}	
App. in error		

And now come the said Frederick Fawcett, Samuel Isaac & Thomas Fawcett, Plaintiffs in error, by McAllister, Junr & Johnson their Attorneys, and say, that in the Record and proceedings aforesaid, and also in the giving of Judgment aforesaid, there is manifest error in this Court:

1st The said Superior Court of Chicago erred in refusing the 1st 3^d 4th 5th and 7th Instructions asked by the said Plaintiffs, and each of them -

2^d. The said Superior Court of Chicago erred in refusing to give to the Jury, the 2^d and 6th Instructions of the said Plaintiffs, as asked by them and in modifying the same -

3^d. The said Superior Court of Chicago erred in the Instructions given to the Jury of its own motion - neither of said Instructions

containing a correct or proper Statement
of the Law applicable to the facts of the case -

4th - The said Superior Court of Chicago ever
in refusing to set aside the verdict of the Jury
and overruling the Plaintiff's motion for a new trial

5th - The said Superior Court of Chicago also
ever in this writ: that by the Record of said
it appears, that the Judgment of said court in favor
of said sum, was given for the said Defendants
in sum and against the said Plaintiff in sum,
whereas by the Law of the Land the said Judgment
ought to have been given for the said Plaintiff
in sum, and against the said Defendants in sum.

And the said Plaintiff in sum, prays that
the Judgment of said court for the sum of said
and other sums in the Record and proceedings
aforesaid, may be reversed, annulled and altogether
held for nothing, and that they may be restored
to all things which they have lost by occasion
of said Judgment or -

W. Allister, David Jackson
Attys for Plffs in sum

And the said Defendants in Error
^{Thomas Hoynes &}
by H. C. A. Gregory their Attorneys now
Came and say that there is no
Error in the Record or proceedings
aforesaid in manner and form
as above assigned And this &c
Whereupon they pray that the said
Judgment may be in all things
affirmed &c

Thomas Hoynes
Chas. A. Gregory
attys for depts.

¹⁹⁹
Supreme Court
Frederick Fawcett et al

vs

William Osborn et al

Record

Filed April 22 1863
L. Leland
clerk

Fees. Transpt. \$13.70

Cut.

80

\$ 14.50.