No. 13321

Supreme Court of Illinois

Lindsay et al

vs.

Edmiston et al

71641

Supreme Court---Second Grand Division.

JANUARY TERM, 1861.

ABSTRACT.

SAMUEL LINDSEY
vs.
MOSES L. EDMISTON and
THOMAS KRAMER.

This is an action of assumpsit brought by Lindsey against Edmiston and Kramer to recover some eight hundred dollars for hogs, sold and delivered to the defendants, by the plaintiff. The declaration contains the common counts in assumpsit. The defendant plead the general issue sworn to by Edmiston. The proof agreed upon by the parties and embodied in the bill of exception, shows that the defendant, Edmiston, resided in Paris, Edgar County, Illinois; that the defendant, Kramer, resided in Richmond, Indiana, a distance of about one hundred and fifty miles; that in the summer and fall of 1857, Edmiston was extensively engaged in dealing in cattle and hogs and corn to feed the same; that during that season he bought and sold nearly twenty-five thousand dollars worth of stock that he shipped to New York and other points; that he had a certain stock lot north of the town of Paris, about one mile distant from the Railroad depot; that as he would receive cattle and hogs from persons in the country they would be driven into this lot and assorted for shipment and fed until shipped. It was also proved that Edmiston and one Nickols were in some way connected with some hog contracts that year.

It was also shown in evidence, that McWhinny & Co. of Richmond, Indiana had a contract with the defendant that season for a large number of hogs; that, Edmiston bought the hogs of the plaintiff, without disclosing that any other person was interested in said purchase; that on the 23d day of November, 1857, the plaintiff brought his hogs to Paris, Illinois; that Kramer, Edmiston and one McWhinny were there on that day, and receiving and weighing; that Kramer met Lindsey's hogs about half mile from town and helped him drive them in; that as the hogs were weighed and driven into the shipping pen, near by that, Edmiston being furnished with the weights, settled with the plaintiff and gave his note, (which was admitted in evidence to show the amount,) due by consent; that at the time of receiving said hogs either Edmiston or McWhinney said they were the last on their contract; nothing was said at this time about Kramer and Edmiston being partners. It is admitted, that on the 12th day of January, 1858, Edmiston failed and made an assignment of all his property for the benefit of his creditors; that a short time after Edmiston made his assignment, the defendant, Kramer, came from Indiana and demanded of Edmiston's assignees a small lot of hogs, which he alleged, were the tail end bought by Edmiston with his money during the summer and fall of the season; that he had furnished Edmiston with about $17,000 to buy hogs for him; that he charged Edmiston with the money and gave him credit as he received hogs, in Indiana, and that Edmiston owed him about $2000 for money advanced and profit; that he had been largely engaged with Edmiston during the previous summer and fall in buying and shipping hogs; that the arrengement between them was that he was to furnish the money, Edmiston to give his labor in buying and shipping the hogs, and they were to divide the profit, which Edmiston, who was present admitted to be the arrangment, and that the hogs in the pen transferred by Edmiston to his trustee, were the tail end of the hogs bought under said contract. Kramer afterwards left without prosecuting his claim to the hogs; that Kramer bought a lot of hogs of Silas H. Elliott which were shipped with plaintiffs; that Elliott had a suit in Indiana against Edmiston and Kramer to recover the price of his hogs, which Elliott dismissed and Kramer paid him. It was agreed between the parties, that if the foregoing state of facts constituted a partnership and that the plaintiff could recover under the pleadings, that judgment should go for

the amount of the note. A jury was waived and case on the aforesaid statement submitted to the court, who gave judgment for the defendant, from which the plaintiff prayed and obtained an appeal to this court. The errors assigned are that
17 1st. The judgment of the court is contrary to the law and evidence of the case.
2nd. That the court erred in holding that the facts admitted did not in law constitute a partnership.

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vs.
EDMISTON and KRAMER. } Brief.

The fact is not disputed in this case, but that the hogs of the plaintiff were purchased and applied by the defendants under their contract, is admitted. The chief question is, whether an arrangment for one to furnish the capital and the other the labor, and the profit to be divided, constitutes in law a partnership. The authorities are uniform that such a contract constitutes a partnership as to third persons even if there should have been an express agreement that it should not be between the parties. Here there was no such agreement, and it is a partnership, both as between the parties and as to third persons—see Sections 58 & note 53, 54 & note 18 & note Lawson on Partnership p 13 & 14

Kramer was a dormant partner, and although unknown to the plaintiff, when he made the sale and delivered the hogs and took the note of Edmiston, yet upon his discovery, the plaintiff had a right to elect, to hold them both responsible; Kramer's liability upon discovery is the same as that of an ostensible partner. (See Story on Partnership.
Sections 63, 80, 103, & note 139, 3 Hurl p 3 & note addison on Contracts p 756

The next point raised in the case is, whether under the common counts we can recover against them jointly when the general issue under both is pleaded. We assume that in law the promise of one partner, in business connected with the partnership, is the promise of all the firm. And that Kramer being a dormant partner, if such were not the case, no dormant partner upon discovery could even be made responsible for the contracts of the contracting partner. See

13 Ill Dec p 648,

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