

No. 13389

# Supreme Court of Illinois

Metcalf

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vs.

Edmiston et al

# Supreme Court---Second Grand Division.

JANUARY TERM, 1861.

## ABSTRACT.

JOHN A. METCALF

vs.

MOSES S. EDMISTON and  
THOMAS KRAMER.

This is an action of assumpsit, brought by John A. Metcalf against Edmiston  
3 and Kramer, to recover about \$2500 for hogs, sold and delivered to the defend-  
dau s.

The declaration contains the common counts, to which the general issue is  
6 pleaded under oath.

A jury was waived and the case tried by the court.

17 William P. Dole testified, that in the early part of January, 1858, shortly after  
Moses S. Edmiston had made an assignment of his property for the benefit of his  
creditors, which was about the 11th of January, 1858, (witness was one of the  
17 Trustees,) defendant Kramer claimed that a lot of hogs in a pen north of the Town  
of Paris, which had been transferred by Edmiston to his Trustees, were the tail end  
18 of hogs which he and Edmiston had been handling during that season; that he  
had furnished Edmiston a large sum of money, witness does not recollect the  
amount, but it was a good many thousand dollars; Edmiston was to purchase  
hogs and corn and ship them and they were to divide the profit; Kramer was to  
furnish the capital and Edmiston his time, and purchase, feed and ship the hogs  
and then to divide the profit; Edmiston admitted the correctness of Kramer's state-  
ment and said he ought to have the hogs in the pen, that he ought not to have  
assigned them. Kramer threatened to bring suit for the hogs, but left without  
doing so.

18 Thomas McCliland testified, that in November or December, 1857, he was en-  
gaged in hauling corn to the lot north of Paris for Edmiston; that Edmiston  
brought several hogs there to the lot and told him that one of them was from  
Metcalf's hogs; there were some sows among them; they were turned into the pen;  
it was the same pen the hogs were in that Kramer claimed; I saw the same hogs  
19 there after Edmiston made his assignment; when I delivered my hogs at the pen,  
near the Railroad in Paris, about the 25th of November, 1857, Kramer was there  
with Edmiston to receive them; there was one sow he turned out and told me to  
tell Edmiston to take her to the pen; I saw it there after Edmiston made his assign-  
ment.

19 John Fouts testified: Am Clerk for plaintiff, had a partial settlement with Ed-  
miston on the 21st day of December for hogs and corn delivered up to that date; there  
was then \$856 due Metcalf; Edmiston admitted it was correct; Edmiston made  
19 another settlement after he made his assignment and gave the note now shown  
here for \$2117 16-100; Metcalf gave up the other note, (the note is in evidence,)  
and took the last one; it included the first and balance for other hogs delivered  
20 after first settlement; Edmiston admitted the correctness of the account; did not  
know at the time they hogs were sold to Edmiston that he had a partner, nor at  
the time the note was taken; the price to be paid for the hogs was four dollars per  
hundred; the note was given for hogs.



21 William Hanks, and several other witnesses examined, proved the delivery of the hogs at the Railroad pen in Paris, in the fall of 1857 and December of same year. The defence then introduced answer of John A. Metcalf to their bill of discovery, 15 filed in the case, who states that in the fall and winter of 1857, he sold the hogs in controversy to Moses S. Edmiston, not knowing that he had a partner, nor did he know he had one at the time he took the note, but afterwards learned that the hogs were bought and applied to the joint use of Edmiston and Kramer under their contract, and were used by them for partnership purposes; that the note was 15 given for hogs and corn to feed the same.

21 Edmond Nickols stated that Edmiston shipped a great many hogs that summer and fall, that he was engaged some with him, that he shipped some to him at New York, in January, 1858 ; he sold them and applied the money to Edmiston's use ; that he had some hogs brought from Wright's in the pen near Paris at one time.

James Nelson was agent for the Terre Haute, Alton and St. Louis Railroad during the year 1857 and 1858; Edmiston shipped hogs to Cincinnati, to Terre Haute and New York; I recollect the facts of the shipment and in considerable quantities; I kept the books of the Company correctly, I believe. The books of the Company were introduced in evidence, to which the plaintiff by his counsel objected. The court overruled the objection and admitted the books in evidence, to which the plaintiff at the time excepted.

22 The books showed a shipment December 8th, to New York; December 30th, to  
Terre Haute; and January 8th, to New York, which were the only shipments  
shown by the books by Edmiston for those months. The deposition of McWhinny  
was then offered in evidence, to which the plaintiff objected on the ground of in-  
23 competency; the court overruled the objection and admitted the deposition, to  
which the plaintiff at the time excepted. States that he resides in Richmond, Indi-  
ana, that his occupation is that of a pork packer; was acquainted with Moses S.  
Edmiston and Thomas Kramer; that he contracted with defendant Kramer in  
24 spring, 1857, for hogs; that Edmiston was unknown in the contract, nor was he  
24 acquainted with him at the time; that he purchased 2000 or 3000 hogs of Kramer,  
was satisfied on reflection three thousand; that the contract was made in Rich-  
mond, Indiana; got 400 or 500 hogs in June or July, 1857; shipped to New York  
384, at Paris November 19th, 1857; November 25th, shipped from Paris 444 head  
25 of hogs, then 385 head, which he thinks were from Paris, December 8th, 1857, and  
316 head that he don't know where they were from; that he knows nothing of any  
contract between defendants or plaintiff and defendants. That being all the evi-  
dence.

The court rendered judgment for defendants for costs.

26 The plaintiff moved for a new trial, which was overruled and an appeal taken  
27 to this court.

The following errors are assigned :

29 1st, The Judgment of the court is contrary to the law and evidence.  
2d, The court erred in admitting in evidence the books of the Railroad Company.  
3d, The court erred in admitting the deposition of McWhinny.  
4th, The court erred in holding that when one furnished the capital, another his labor and time and divided profits, that it does not constitute a partnership.  
5th, The court erred in deciding that the plaintiff could not recover against said defendants under the common counts.

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vs.  
EDMISTON and KRAMER. } Brief.

The books of a Railroad Company are not such public records as are admissible

in evidence; they stand on the same footing as the books of individuals, in which they keep an account of their daily transactions.

The deposition of McWhinny was improperly admitted, because it proves nothing relevant to any of the facts in issue.

The evidence of Dole proves that Edmiston and Kramer were largely engaged in buying and shipping hogs; Kramer furnishing the capital, Edmiston his time and labor and to divide the profit, that constitutes in law a partnership.—See Story on Partnership.

*Section 5-8, p note 53, 54, & note 18 & note 6 on Partnership p 13 & 14.*

The liabilities of a dormant partner, when discovered, are the same as those of an ostensible partner.—See

*Story on Partnership section 63, 80, 163 & note 139, 3rd ed. Kent p 30 & note Addison on Contracts p 756.*

The plaintiff could recover under the common counts.

*13th Dec 648*



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Metcalfe

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Abstract  
& brief

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Filed June 18-1861

L. Leland

Blank

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Filed Jan 17-9  
W. L. Leland  
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