

No. 13336

Supreme Court of Illinois

stevens

vs.

Faucet et al

Supreme Court
" " "

Fletcher Stevens

vs

Frederick Faucett et al.

The contract made between Faucett Isham & Co. and W. H. & F. Stevens set forth on page 2 of abstract clearly constituted the members of these two firms partners in respect to the leather manufactured under and in pursuance of the terms of the contract.

Faucett Isham & Co. were engaged in the hide and leather business in the City of New York. W. H. & F. Stevens were engaged in the business of tanning hides at Stevensville Sullivan Co. N.Y. By the terms of the contract Faucett Isham & Co. were to furnish to W. H. & F. Stevens what hides the latter might require for the purpose of being tanned in their tannery for a period of three years and they engaged to do nothing else during this period than to manufacture the hides so furnished to them into leather. They further were engaged to receive the hides at a dock in New York and to be at the expense of transporting them to their tannery and to return at their own expense the leather when manufactured to a dock in the City of New York. Faucett Isham & Co. engaged to sell the leather and to take the sole risk of all sales made on credit and

it is agreed that all the profit and loss on all the leather manufactured under the contract shall be equally divided between the two firms -

By the terms of the contract the two firms were embarked in a joint enterprise to wit: the manufacture and sale of leather with a view to share equally between them all the profits and losses which might result therefrom the services contributed by each firm being such as appertained to its particular or peculiar business and employment -

Fanelett Deham & Co were to advance to W. H. B. Stearns 5 cents per pound on the leather manufactured at the average time of the arrival of each invoice and they were to be allowed on the first settlement a commission of five per cent for purchasing the hides a commission of 6 per cent for selling the leather and assuming the risk of sales made on credit and they were to be further allowed interest on all sums advanced by them for the purchase of hides transiting charges for cartage on both hides and leather respectively and exchanges - until the sales are due by average and the profits to be divided and the losses born by the parties are to be determined as follows.

First there is to be set down the gross amount of the sales of the leather -

Second The sums advanced by Fanelett Deham & Co with interest and commissions as above stated and the difference between these amounts being gain

a loss is to be divided equally between the two firms.

If the gross amount of the sales exceed the advances interest and commissions then there is a profit to be decided equally ^{if it falls short then there is a loss which is to be borne} between the two firms. If either the hides or leather and by any casualty lost or injured the firms are to bear the loss equally. If insured it is provided that they shall pay equally the expense of the insurance and if destroyed by fire they must account to each other for the money received from such insurance.

There is nothing in the shape of a certain compensation secured to either party, for the amount to be finally received by either firm or whether either firm shall ultimately receive anything or not is to be determined by the final result of the enterprise. The liability of W. H. & F. Stevens to pay back in the event of a loss all or a portion of the money advanced to them is fixed as certain by the terms of the contract as their right to share the profits if profits shall accrue and there is just as much propriety in saying that the commissions and interest money which Faucett Shaw & Co are allowed to obtain out of the gross amount of sales were intended as a compensation to them for buying the hides and selling the leather and storing and handling both - as there is in saying that the 5 cents per pound advanced to W. H. & F. Stevens was intended as a compensation to them for their services in tanning the hides. The two firms are to be equally affected by the ~~event~~ of the enterprise and as respect to the profits and losses which may result

from which they stand precisely alike -

The parties who have not declared in their contract that they intended a copartnership nor have they stated that this was not their intention but their agreement contains every element of a copartnership and the court must regard and ~~not~~^{treat} it as constituting that relation -

Unless the parties supposed that by the terms of the contract W. H. & F. Stevens were interested in the leather when manufactured why is it expressly provided that Fancett Isham & Co. shall assume the risk of all sales made on credit? If the leather was regarded as ^{alone} the property of Fancett Isham & Co. this provision is entirely meaningless as every man takes the risk of credit upon sale of his own property. But if the leather was regarded as the property of the two firms and the sale of it as made on their joint account then the provision is a proviso and operates as an indemnity to W. H. & F. Stevens against all losses which might arise from the contracting of bad debts in the sale of the property leaving them however to suffer from losses which might arise from casualties depressions of the market and all other causes.

It may also be asked why it is expressly provided that Fancett Isham & Co. shall procure insurance upon the property and that W. H. & F. Stevens shall share with them the expense of such insurance unless

It was supposed by the parties that both firms were interested in the ~~business~~^{leather} and in whatever should be realized from it.

Champion et al vs Postwick 18 Wend 175. was a case when three persons ran a line of stage coaches from Utica to Rochester the route being divided between them into three sections the occupants of each section furnishing his own carriages and horses hiring drivers and paying the expenses of his own section but the money received as fare of passengers deducting therefrom only tolls paid at turnpike gates, was divided among the parties in proportion to the number of miles run by each. Held on an action by a passenger for an injury occasioned by the negligence of the driver of the coach of one of them that all were liable as partners.

It was urged by P. F. Butler and Roger M. Sherman for plaintiffs in error. that there was no joint interest communion or participation in the profits of the business and consequently no Partnership as between the defendants themselves. -

Chancellor Stahworth at page 181 says
" the division of the whole passage money after paying out
" of the same the expenses of the tolls was a division of
" the profits of a joint concern so as to constitute a
" Partnership between themselves as to that fund; to en-
" title either of them ^{to} an account; and to render them liable

" to third persons or partners as to everything in which the
" different owners of that fund had a joint or common
" interest"

The Chancellor at page 185 approves of the distinction
between a stipulation for a compensation proportional
to the profits and a stipulation for an interest in
such profits some to entitle a party to an account
as partner and the ground upon which the distinction
is based seems to be that in the first case he would
not be entitled to an ~~account~~^{cc} and consequently would
have no lien upon the profits to the exclusion of other
creditors in the other case he would be entitled to an
account and would therefore have a specific lien for
his share of the profits before other creditors and at
page 186 he says " when each member of a firm con-
" tributes in different and distinct ways towards carry-
" ing on a joint enterprise third parties knowing of this
" arrangement and giving credit to one of the ^{members} firm would
" have no claim against the other members of the firm".

In *Paterson vs Blanchard* 1 Selden 191 the court says
" to constitute persons partners as between themselves
" there must be an interest in the profits as profits;
" each party must by the agreement in some way share
" ⁱⁿ the losses as well as the profits"

In *Pott vs Eyton* 54 Eng Com L Rep. 38. Chief Justice
Tindall says "Traders become partners between themselves

" By a mutual participation in profit and loss but as
 " to third persons they are partners if they share the profits
 " of a concern: for he who receives a share of the profits
 " receives a part of that fund upon which the creditors
 " of the concern have a right to rely for payment and
 " as therefore to be liable for losses although he may have
 " expressly stipulated for an exemption from them."

By a memorandum in writing the defendant a
 general merchant agreed with the Plaintiff in con-
 sideration of the general services of the latter in bus-
 iness to allow him in addition to a fixed salary
 one fifth of the net profits in all new business. Held
 to be a partnership between the parties and that the
 Plaintiff had a right against the defendant to an
 account and the appointment of a receiver.
 Katik vs Schenck 13 Jur. 668.

In Tibbatts vs Tibbatts 6 Mees & W 82.

" Judge Mees says "It is a matter of some nicety
 " to draw the line between agency and copartnership. a
 " stipulated sum to be paid out of the profits of the part-
 " nership could not constitute technically an indivi-
 " dual a partner although his agreement could
 " bring him substantially within some of the leading
 " principles which constitute a partnership."

" It is not necessary to constitute a partnership that
 " each individual should contribute to the capital

" equally or indeed that ~~the~~ a partner should advance
" any portion of the capital. He may agree to contribute
" his labor in the management of the concern which is
" & sufficient to make him a partner if he be shared
" in the profit and loss". "Partnership" says Sturges
" is formed by a contract by which one person or part-
" nership agrees to furnish another person or partnership
" to whom it is furnished in his or ~~the~~^{her} own name or
" firm on condition of receiving a share in the profits in
" proportion determined by the contract and of being liable
" to losses and expenses to the amount furnished and
" no more". The contract in that case related to the
" management of a farm and was held to constitute
" the parties to it partners as between themselves.

" Colyer on Partnership 4 Am Ed. 339 " The result of
" these authorities appears to be that when two persons
" agree simply to share the profits of a trade or ad-
" venture they will be partners in those profits but if
" one be the mere agent or servant of the other and
" receives his share in lieu of wages then as there is
" no mutuality between the parties they are not
" partners and the distinction seems not to be un-
" reasonable. For if on the one hand it be said that
" A & B. agree to divide the profits and on the other
" that A agrees to give B. $\frac{1}{2}$ the profits as a remun-
" eration for his trouble these two modes of expression

" convey very different notions of the rights existing
" between the parties. In the former case the natural
" inference is that A & B. have equal rights in all that
" concern the profits though only one may possess the
" capital. In the other case the inference is that A.
" has the sole control over the entire concern subject
" to account to B. for his share of the profits."

See also *Cheap et al vs Cramond* 4 Barn & Ald 663.
(6 Eng Com L 645.)

"It is clear that in the cases supposed will be in-
vested with very different rights and privileges"

See also *Cheap et al vs Cramond* 4 Barn & Ald 663
(6 Eng Com L 645.)

In the case of *Griffith et al vs Buffum* 22 Vermont
184. Court says

"In order to constitute a partnership between the parties
" themselves it is necessary that they should have a
" common interest in the profit and loss of the business
" in which they are engaged. It is not essential that
" each should furnish a share of the capital or prop-
" erty which is to become the stock or subject matter of
" the business of the partners. One may furnish the capital
" or stock and another contribute his labor and skill
" And if it be agreed between the parties that one shall
" furnish on his own account a particular kind of
" stock to be used in the business yet if when purchased
" it becomes the subject of labor and skill and in its

" altered state is to be sold for the common benefit it con-
stitutes a partnership business "

see also

Fremont vs. Conpland 2 Bing. 170 (9 Eng. Com. 531)

Selby vs. Hutchinson 4 Gill. 329.

When one person advances funds to carry on a trade and another furnishes his personal services for which he is to receive a portion of the profits there is a partnership between them both as regards the partners themselves and third persons

Dob. vs. Halby 16. Johnson 33.

There is always a partnership as between the parties themselves when there is a mutual participation in the profit and loss.

Green vs. Buelly 2 Bing 366. 107 (29 Eng. Com. 159)

Wassard vs. Camp 14 Barb. 341.

The case of Denny et al vs. Cabot et al 12 Met. 82 was an agreement to pay for services rendered a certain part of the net profits after certain specific deductions. It was not an agreement to share or divide the profits & losses as in this case.

and a page 91-2 Court says

" But however this may be we think there is no
" sound distinction between an agreement to pay
" to a party a certain share of the gross profits and

" an agreement to pay a certain share of the net profits
 " as explained in the present contract; the clear meaning
 " of the terms of which is that Corbat Appleton & Co were
 " to pay Cooper one third part of the profits after making
 " any certain specified deductions therefrom and Cooper
 " clearly was not ^{to be} liable for any losses"

We do not think a case can be found where a court
 has held that parties under an agreement to share
 or divide between them, the profits and losses of a
 particular enterprise or adventure, were not partners.

The interest of a partner is in the entirety of the joint
 property and his rights of disposition and control are
 co-extensive but the share of a partner owned although undivided
 is his distinct property. And consequently he has
 the sole power to make or authorize any contract in
 relation to its disposition or use.

2 Duvon Ind. 99.

One partner cannot sue another partner for wrongfully
 disposing of the partnership property.

Balkley vs Baskin 2 California 420.

Carey vs Williams 1 Duv 667.

Chittenden vs Collins 7 Dana 284.

8 F.R. Howard 489.

4 Cal 276 - 318.

5 Cal 299.

2 C.O. Smiths Rep 190.

The principle is well settled that partners cannot sue each other at law for any matter relating to the partnership concerns unless there has been a final settlement between them a balance ascertained and an express promise to pay the balance.

Chadsey vs Harrison 11, Me. 156.

Buckley vs Kennedy 3 Scam. 569.

Weston vs Emerton 1 Wend. 532.

And the reason why a remedy at law is denied to one partner as against another is on account of the difficulty of adjusting complicated accounts between them

1 Chittys Plead. 44.

Of the plaintiffs with the defendant and Walter H. Stevens were copartners and as such interested in the leather manufactured under the ^{2d} contract given in evidence. then this action cannot be maintained and the Court erred in overruling the motion made in behalf of defendant (See page 18 of Abstract) to exclude the evidence in behalf of the plaintiff tending to prove a concession by the defendant of a portion of said leather and in giving the 1st & 2nd instructions in behalf of the plaintiff and in refusing the first instruction asked in behalf of defendant.

The fact that by the terms of the contract the

leather was to be sent to the plaintiffs and they were to sell it does not give them any additional right of property in the leather. This provision relating entirely to the mode or manner in which the business was to be conducted a violation of this provision by W.H. & F. Stevens or either of them might be a ground for asking the intervention and aid of a court of equity - but it certainly can not be treated as a tort any more than the breach or violation of a provision in any other contract.

It appears from the evidence that the plaintiffs sent to W.H. & F. Stevens to be manufactured under this contract 18,815 equal when tanned to ^{sides} 37,630.

The portion of the leather manufactured from cheil ^{hides} was with the concurrence of W.H. Stevens but without the knowledge or consent of the plaintiffs Fanelet & Osborn & Co sold by Fletcher Stevens who had the principal charge and management of the business at Stevensville. He giving as a reason for this that he had had difficulty with Fanelet & Osborn & Co and would not do business with them or get pay for his leather. That he wished to sell the same and pay off his debts. that he had taken counsel upon the subject and had been advised that he could do so (see page 15 of Abstract).

The court held that this amounted to a conversion

one hide makes two sides of leather -

of plaintiffs property, and that the plaintiffs were entitled to recover the full value of the property so converted less such part of it as had been recovered by them since such conversion with interest in such value from the time of such conversion by way of damages and refused to instruct the jury that the true measure of damages was the value of the plaintiffs interest in the property at the time of its conversion. Under this instruction the jury found a verdict in favor of the plaintiffs for \$3,690.80. -

Plaintiffs proved that the hides cost \$4.35 ^{each} (page 11 of abstract) and that the leather when manufactured was worth \$4.40 per side (see page 10 of Abstract) thus making the leather worth a little more than ^{twice} as much as the hides [#] - this increased value was of course given to the raw material by the labor and skill of the manufacture. Fancett Shaw & Co. had not paid one dollar towards the manufacture of the leather which was sold by the defendant Fletcher Stevens and it is clear that their real and actual interest in it could not be determined except upon a final settlement of the account between the two firms - and it is equally clear that F. H. & F. Stevens would have had a specific lien upon this leather to remunerate them for the labor and skill they had bestowed upon the raw material in giving it its increased value - and this lien would be preferred to the claims of

other creditors of Fancett Isham & Co. Had Fancett Isham & Co obtained possession of all the leather manufactured under this contract without advancing anything to W. H. & F. Stevens and had then become insolvent. W. H. & F. Stevens could undoubtedly by a proceeding in Chancery have enjoined them from further disposing of the leather and have obtained the appointment of a receiver for the portion of it then remaining on hand and should it appear that the proceeds of sale already amounted to more than sufficient to pay whatever Fancett Isham & Co would be entitled to upon a final settlement. then the entire proceeds of the leather in the hands of the receiver. would be directed to be paid to W. H. & F. Stevens.

A. Statement of the amount of money expended and of the amount received by Fancett Isham & Co in this transaction will show the great injustice of this verdict.

The whole cost of the hides to the plaintiffs
see page 8 of Abstract was - \$81,627.87
The amount advanced by them to W. H. & F.
Stevens including freight insurance
interest see page 5.6.7. of abstract was - 20,005.95
making all \$101,633.82
16,496 hides were returned to them.

by W. H. & F. Stevens in pursuance
of the contract (see page 4)
Their value at \$4.40 per side would be
They afterwards received (see page 11)
4206 hides - \$4.40

\$2,582.40

18,506.40

They received at the tanning office after
it was burned 6268 hides from which
they realized over and above the expense
of finishing tanning 10 - see page 22 -
They received of insurance proceeds
(see page 22)

22,835.93.

\$12,738
\$126,674.72
101,633.82

Making a difference against Fanelet Island Co. \$25,041.01
This statement may not be entirely accurate but it
shows conclusively that Fanelet Island Co. have suf-
fered no damage but have really received much more
than they were entitled to under the contract.

If the plaintiffs were entitled to recover the
measure of their damages should have been the value
of their interest in the property at the time of the
conversion with interest "The general rule of damages
is unquestionably the value of the property taken at
the time of its conversion but there are exceptions and
qualifications of this rule as plain and well estab-
lished as the rule itself. Whenever the property is
returned and received by the plaintiffs the rule does
not apply and when the property has been sold
and the proceeds been applied to the payment of

plaintiffs debt, or otherwise to his and the reason of
"the rule ceased and justice forbids its application
In all such cases the facts may be shown in mitigation
of damages. These principles are supported by many
adjudications and are founded on ^{equity} and practical
"convenience."

Pierce vs Benjamin 14 Pick. 361

The amount of the plaintiffs ^{recovery} ~~damages~~ should be limited
to such a sum as will completely indemnify them
for the injury they have sustained.

Dusen Manuf. Co vs Waterlin 3 Mutchf 18.

Green vs Fanner 4 Burr 22.23.

Chamberlain vs Shaw 18 Pick. 283.

Hoynes Muller & Lewis

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Supreme Court.

Fletcher Stevens

vs.

Frederick Tancet Wal

Argument for Appellants

Filed May 29. 1860

L. Deland

Ch.

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Henry Huller Secy