EINSTEIN ET AL. V. GOURDIN ET AL.

Case No. 4,320.
{4 Woods, 415.}[1]

Circuit Court, S. D. Georgia. Nov. Term, 1877.

PARTNERSHIP BY CONTRACT AND BY IMPLICATION OF LAW—COMMUNITY OF PROFITS.

1. A contract between the firm of K. & H., carrying on a banking and brokerage business in Savannah, Georgia, and S., of Quincy, Florida, whereby the latter agreed to open a store in Quincy for the sale, for cash, or its equivalent in salable commodities, of goods belonging to K. & H., and to devote his whole time to the business, and in consideration for his services S. was "to be entitled to have and receive an amount of money equivalent to one-half of the net profit on the sales actually made," does not provide for such a community of profits as would by operation of law constitute a partnership, as to third persons, between K. & H. and S.
2. A charge not applicable to any evidence in the case is properly refused.
3. A partnership, as to third persons, can only arise either by contract between the partners themselves, by implication of law arising from a contract which does make them partners as to third persons, or by some act or declaration of the partners by which third persons are reasonably led to suppose that the partnership exists.

{Error to the district court of the United States for the southern district of Georgia.}

This suit was brought by the defendants in error {R. N. Gourdin and others}, as the assignees in bankruptcy of Ketchum & Hartridge, to recover the value, alleged to be $1,133, of certain goods and merchandise which it was charged that Ketchum & Hartridge had, when insolvent and contemplating insolvency, and within four months of their adjudication as bankrupts, transferred and delivered to the plaintiffs in error {Einstein, Eckman & Co.}, who were creditors of said firm, with a view to give them a preference, they, the said defendants in error, having, at the time of said transfer, reasonable cause to believe, and in fact well knowing, that Ketchum & Hartridge were insolvent, and that the transfer was made in fraud of the bankrupt act. On the trial of the cause in the district court, the jury returned a verdict for the plaintiffs for the sum of $1,100 and interest from the commencement of the suit, on which the court rendered judgment. To reverse this judgment, this writ of error was brought.

The bill of exceptions showed that on November 27, 1872, the bankrupts, as partners under the firm name of Ketchum & Hartridge, of Chatham county, Georgia, entered into a contract in writing of that date, with one Alexander L. Smith, of Quincy, in the state of Florida, of which the following is a copy: "State of Georgia, County of Chatham: This agreement, made and entered into on this, the 27th day of November, 1872, between Miller Ketchum and Alfred L. Hartridge,

copartners, using the firm name arid style of Ketchum & Hartridge, of said state and county, of one part, and Alexander L. Smith, of Quincy, county of Gadsden, and state of Florida, of the other part, witnesseth, that the said Smith agrees to open a store in said Quincy at once, for the sale of goods belonging to the said parties of the first part, and to devote his whole time and energies to the sale of said goods, for cash, or its equivalent in salable commodities, only as the agent of and for the said parties of the first part. It is agreed that in consideration of the services of the said Smith in celling and disposing of said goods, wares and merchandise, he, the said Smith, is to lie entitled to and to receive an amount of money equivalent to one-half of the net profit on the sale of the same actually made, and this agreement to be binding for sis months. The said parties of the first part agree that they will beep up the said stock of goods, wares and merchandise in their said store to an amount estimated on the cost value of the same not exceeding $4,000, goods to be forwarded to said store from time to time as the exigencies of the trade. In said Quincy may require, up to said limit. The said Smith agrees, as such agent, to render to his said principals, the parties of the first part, monthly statements of stock on band in said store, weekly returns of sales of said goods, and to remit proceeds of the sales of the same to his said principals at the end of each and every week. The said Smith also agrees, in connection with the above business, to solicit consignments of cotton to said parties of the first part as factors, and for such services is to receive the usual and customary return commission. In witness," etc.

To secure the faithful performance on his part of the said contract, Smith executed and delivered to Ketchum & Hartridge a "bond with sureties in the penal sum of $5,000.

Ketchum & Hartridge were a firm carrying on a banking, exchange and brokerage business in Savannah, Georgia. They were not engaged in the dry goods business in any place save in the town of Quincy, Florida, where the said Smith had opened a house for the sale of dry goods under said contract with them. The contract had never been made public, nor had its contents been disclosed to the plaintiffs in error or either of them. Smith had, as agent for Hartridge & Ketchum, bought from the plaintiffs in error dry goods to the amount of $1,134 on March 8, 1873, and on that day, as agent, drew a draft on Ketchum & Hartridge for said amount in payment for goods. The draft was accepted by Ketchum & Hartridge. The following is a copy of the draft: "Savannah, March S, 1873. Four months after date, pay to the order of Einstein, Eckman & Co., eleven hundred and thirty-four dollars, and charge same to account of A. L. Smith, agent To Ketchum & Hartridge, Savannah, Ga."

Before this draft fell due, to wit, on April 10, 1873, Ketchum & Hartridge became insolvent, and their insolvency was generally known throughout Savannah, where the plaintiffs in error carried on business. Ketchum & Hartridge were adjudged bankrupts in June following. Soon after the insolvency of Ketchum & Hartridge was known one of

the plaintiffs in error called on them about the payment of said draft, and proposed that if the draft could not be paid in money it should be paid by a restoration of the goods bought from the plaintiffs in error. Ketchum & Hartridge thereupon gave the plaintiffs in error an order upon Smith for goods to the value of said draft. The draft was returned to Ketchum & Hartridge, and the plaintiffs in error received from Smith at Quincy, Florida, goods to the value of said draft, some of which had been purchased from them and some had not. At the time of this transaction it was well known to Smith and to the plaintiffs in error that Ketchum & Hartridge were insolvent. When Smith gave his draft on Ketchum & Hartridge, as agent to the plaintiffs in error, they charged the goods on their books to A. L. Smith, agent, but Smith did not directly disclose for whom he was agent Hartridge, of the firm of Ketchum & Hartridge, and Smith, both testified that the goods at Quincy, Florida, which were in the possession of Smith, were the property of Ketchum & Hartridge, and that the business was carried on by Smith in strict accordance with the terms of the contract, and was not in any respect carried on otherwise, and there was no contradictory testimony on these points.

On this state of facts the district court charged the jury that the compensation provided for Smith in the said contract between him and Ketchum & Hartridge was not such a community of profits as would, by operation of law, constitute a copartnership as to third persons between Smith and Ketchum & Hartridge. The court refused to charge, as requested by plaintiffs in error, "that at common law a simple community of profits will constitute a partnership." The court also refused to charge, as requested by plaintiffs in error, "that if there was a partnership in Florida between Ketchum & Hartridge and Smith, and a partnership in Savannah between Ketchum & Hartridge only, engaged in a different character of business, that the two partnerships were distinct, and that the stock and assets of the Florida partnership would be first subject to the payment of the debts of the Florida firm, before any portion could be subjected to the payment of the debts of the Savannah firm." The charge given, and the refusals to charge as requested were assigned for error.

S. Yates Levy and R. E. Lester, for plaintiffs in error.

Geo. A. Mercer, for defendants in error.

WOODS, Circuit Judge. 1. The charge given by the court, and complained of as erroneous, was correct. The contract between Smith and Ketchum & Hartridge was plainly intended to make Smith the agent, and not the partner, of Ketchum & Hartridge. As between the parties to the instrument, this was undoubtedly its effect. There was no such community of profits as would make the parties to the contract partners. Story, Partn. §§ 23, 32, 33, 35, 36; Code Ga. % 1890; Sankey v. Columbus Iron Works, 44 Ga. 228; Bradley v. White, 10 Mete. (Mass.) 303; Berthold v. Goldsmith, 24 How. [65 U. S.] 536; 3 Kent, Comm. marg. p. 33.

2. The first charge refused was properly refused. The only evidence to show on what terms Smith carried on the business for Ketchum & Hartridge is found in the contract between these parties, and there was no evidence to show that Smith had received any compensation whatever from Ketchum & Hartridge except according to the terms of the contract. The charge requested was therefore not applicable to any evidence in the case. It was purely abstract, and its only tendency could be to mislead the jury, and it was therefore properly refused. Schuylkill & Dauphin Imp. & R. Co. v. Munson, 14 Wall. [81 U. S.] 442.

3. There was no evidence in the cause to which the second charge requested was applicable. There is nothing in the record to show that there was a word of proof tending to establish a partnership between Ketchum & Hartridge and Smith in Florida. The contract which was put in evidence clearly showed that as between the parties themselves, and as to third persons, there was no partnership. Was there any act or declaration of either Ketchum & Hartridge or Smith by which they held themselves out to the plaintiffs in error or the public as partners? There is none such disclosed by the record. If Smith, without disclosing his principals, had gone to the plaintiffs in error and purchased of them a stock of goods, he might have made himself liable as principal, but this would not have made him a partner of his principals. A partnership, as to third persons, can only arise either by contract between the partners themselves, by implication of law arising from a contract which does not make them partners as to each other, but does make them partners as to third persons, or by some act or declaration of the partners by which third persons are reasonably led to suppose that the partnership exists. There was no evidence in the record tending to show by either of these methods a partnership between Ketchum & Hartridge and Smith, either in Florida or anywhere else. The second charge requested was therefore not applicable to any testimony in the case, and was properly declined. There is no error in the record. The judgment of the district court is therefore affirmed.

[1] [Reported by Hon. William B. Woods, Circuit Justice, and here reprinted by permission.]