

Case No. 4,970.
[1 Cliff. 158.]¹

FOSTER v. GODDARD.

Circuit Court, D. Massachusetts.

Oct. Term, 1858.²

CONTRACTS—CONSTRUCTION—ACCOUNTING BETWEEN
TRADERS—EXPENSES—TERMINATION OF CONTRACT—EFFECT ON EXISTING
BUSINESS RELATIONS.

1. Under a written contract to pay one tenth of the net profits after deducting expenses “that may appertain to the goods themselves,” the expenses of clerk-hire, advertising, and taxes were properly deducted from the gross amount

[See note at end of case.]

2. Under this contract the respondent, who had the exclusive control of the accounts of the business, refused to receive a sum less than he considered due from a debtor of the concern, after the claim was barred by the statute of limitations, declined to allow the complainant to receive his proportion of the sum offered, and withheld from him the means of adjusting such proportion. *Held*, that respondent must account for complainant’s proportion of the sum thus offered.

3. Where, by the terms of a contract, the respondent had the right of purchasing, selling, and chartering the vessels designed for the trade, at his option, the loss or profit to be charged or credited in the general account, *held*, that respondent should account to the complainant for the profits made by him on the sale of a vessel built expressly for the business, though never used in it, but sold for a large profit soon after being launched.

4. When the agreement under which a vessel was employed expired two months before her return, and while she was at sea, *held*, that her value must be computed, in determining the respective shares of the parties to the agreement, at what she was worth at the time of arrival, and not at the date of the expiration of the agreement, such appearing to be the intention of the parties, and that the burden was on the party contracting to pay a certain proportion of the value, to show that she was worth less at the time of her arrival than she was actually sold for two months after.

5. At the expiration of an agreement, by its own limitation, claims to a large amount arising from transactions under the agreement were still outstanding and uncollected. The respondent, one of the parties to the agreement, claimed that the master, in making up the account under it, should deduct the discount necessary to make the debts due equivalent to cash on the day the agreement expired, and that henceforth they were to be regarded as his property, and at his risk. *Held*, that the master properly declined to adopt this theory, and justly allowed the complainant his portion of the profits made after the agreement expired.

This was a bill in equity praying for an account of all the dealings between the parties, under two agreements, dated June 24, 1843, and May 7, 1819, respectively. The first agreement was set forth in the bill as follows:

“This memorandum of an agreement entered into this 24th of June, 1843, by and between William W. Goddard, on the one part, and George J. Foster, on the other part witnesseth: That said Foster engages to proceed at once in the ship Robin Hood direct

FOSTER v. GODDARD.

to Valparaiso, and that he will there remain for the term of five years, and devote himself for the whole time exclusively to the management of said Goddard's business, such as the sale and purchase of cargoes, collecting freight moneys, procuring return freights, eliciting orders for the purchase and shipment of goods for the coast, effecting the sale of vessels, when wished, and collecting and forwarding all the information that may be obtained respecting the trade. In fine, to transact any and all business that may be required of him by said Goddard, in strict accordance with his instructions, whose interest he is to care for and protect from frauds, impositions, false and unjust charges, and also extravagant expenditures of the shipmasters, to the best of his ability; he is also to give to each vessel the greatest possible despatch that may be consistent with the owner's interest. In consideration of which, said Goddard engages that said Foster shall, at the expiration of five years, be entitled to one tenth of the net profits of his business in that trade, after deducting interest at the rate of six per cent per annum on the capital invested, and all costs and expenses of whatever name and nature that may be incurred, both at home and abroad, in sailing, victualling, manning, and keeping in repair the vessels employed, including all port charges, as also the actual expenses that may appertain to the goods themselves, including the cost of said Foster's living, which is not to exceed six hundred dollars per annum. And, furthermore, said Goddard has the right of purchasing, selling, and chartering the vessels designed for the trade, at his option, the loss or profit attendant thereon to be charged or credited in the general account. The vessels now designed for the trade are the ship Robin Hood and baric Roscius, and are valued, the Robin Hood, at ten thousand five hundred dollars, cash, at the completion of her last voyage; and the Roscius, at eight thousand dollars, cash, on the completion of her present voyage. It is also understood that said Foster's interest of one tenth is liable to the full extent for all the risks and casualties in the business attendant upon the goods and vessels. It is furthermore agreed that said Foster shall be entitled to a compensation of one thousand dollars per annum, in lieu of his share of the profits, should it fall short of that amount; it is understood, however, that this is not in addition to his share of the profits, and that the profits of the business are not to be abstracted until the expiration of the five years agreed upon. Said Foster is also hereby authorized to call to account and to displace any and all masters of vessels that may be sent out by said Goddard, and replace them with others, should he find it expedient so to do. In witness whereof we have hereunto set our hands and seals."

Under this agreement the complainant alleged that he proceeded to Valparaiso, where he continued to reside during the time limited therein, and well and truly performed all things in said agreement provided to be done by him. The general mode of conducting the business was by adventures and shipments of merchandise, procured at Boston by defendant, and consigned to complainant, by whom the merchandise was sold, and the proceeds invested in other merchandise which was consigned to defendant, who sold the

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return cargoes; by whom, also, books and vouchers were kept, showing the exact profit and loss on each adventure. At the time limited for the existence of said agreement there was due the complainant, and in the hands of the respondent, as alleged in the bill, a large sum, which, for the accommodation of the respondent, was allowed to remain in his hands, without the rendition of any account. The second agreement entered into between the parties was set forth as follows:—

“This memorandum of an agreement entered into this 7th of May, 1849, by and between William W. Goddard, on the one part, and George J. Foster, both of Boston, on the other part, witnesseth: That said Foster engages to proceed at once to the west coast of South America, and that he will devote his whole time in those parts, as also in Mexico and California, exclusively to the management of all said Goddard’s business in those countries, such as sale and purchase of merchandise and any other property, collecting freight moneys, procuring freights and consignments of goods, eliciting orders for the purchase and shipment of property, investing money, drawing and negotiating bills of exchange, and forwarding all the information that can be obtained respecting the trade; in fine, to transact any and all business that may be required of him by said Goddard, in accordance with his instructions and best interests, which he is also to care for and protect from impositions, unjust charges, and also extravagant expenditures of the shipmasters, to the best of his ability. In consideration for which, said Goddard engages that said Foster shall on his return be entitled to one fourth part of the net profits of his business in that trade that he (said Foster) shall have conducted to completion, after deducting interest on the capital furnished by said Goddard, as also all costs and expenses of whatever nature that may be incurred both at home and abroad in prosecuting the business, including the expense of sailing and keeping in repair the vessels employed, together with the port charges, as also the cost of said Foster’s living, which is not to exceed one thousand dollars per annum; and, furthermore, said Goddard has the right of purchasing, chartering, freighting, and selling the vessels designed for the trade at his option, the profit or loss attendant thereon to be charged or credited in general account. The vessels

FOSTER v. GODDARD.

now designed for the trade are the ships *Crusader* and *Harriet Erving*, which are to be charged in account, the former at the value that may be agreed upon between William W. Goddard and Samuel Goddard, in settlement of their account; and the latter, at the cost of construction and equipment when new, abating nothing for the use of the ship for her present and first voyage. It is understood that said Foster is to leave in hands of said Goddard, bearing interest, what funds he may have,—less two thousand dollars, to be paid him before leaving this country,—and that neither the same nor any portion of his profits shall be abstracted until he shall see fit to withdraw from the present arrangement, which he is at liberty to do at any time, by giving said Goddard so much notice, that any voyage he may have commenced previous to receipt of such advice shall receive the full benefit of all said Foster's services to its final accomplishment, and not otherwise. It is also understood, that said Goddard has the right to annul this agreement whenever he may choose to do so; and furthermore, that said Foster is liable to the full extent of his interest and means for all the losses that may be made in this business, as also for all the risks and casualties attendant thereon. Said Foster is hereby authorized to call to account, and to displace, any and all masters of vessels that may be sent out by said Goddard, and to replace them with others, should he find it expedient so to do."

Under this second agreement the complainant proceeded to the west coast of South America, and there conducted the portion of the copartnership business provided for him to do, until the 31st of September, 1850, when he terminated the agreement in the manner therein provided. The business under this contract was conducted in the manner similar to that under the first, the accounts and vouchers being in the hands of the respondent, who had been, by the complainant, repeatedly requested to effect an adjustment, and furnish the complainant an account of the profits of the business. The cause was referred to a master, to take an account of the dealings and transactions of the parties under the agreements, and to state balances. After the reference to the master, the complainant, by leave of court, filed an amendment to the bill, and the respondent filed his answer to the same. An order was also passed by the court, that the amendments to the pleadings should be submitted to the master to whom the cause had been previously referred, to state the accounts with the same powers, and in as full and perfect a manner as if the amendment had been introduced prior to the first order of reference.

The material portions of the master's report were as follows:—

"The first disputed item is a claim made by the complainant to a share in the profits realized by the respondent upon a sale of the ship *Valdivia*. This was a new ship, built under a contract made by the respondent, and she was launched on the 15th of October, 1846, and was sold by the respondent to the United States government the 7th of December, 1846, at a profit. The validity of this claim depends upon the construction to be given to the particular stipulations upon the subject in the first agreement. She was

never actually employed in the business of this trade. On the other hand, there is evidence tending to prove that she was originally contracted for, built, and designed for this trade; that the respondent had engaged a part of her outward cargo; that these facts were communicated by him to the complainant; and that under instructions from him, the complainant had procured a portion of her first return cargo. But she was sold before any cargo had been laden on board of her at Boston. It is contended by respondent, that complainant is only entitled to a share of the profits of such vessels as were actually employed in the trade, and not of those which might have been designed for the business, but not actually employed in it; that although the respondent may have intended the Valdivia for this trade, yet he abandoned that intention before carrying it into effect, and that the agreement of June 24, 1843, did not restrict him from pursuing business on his private account. The language of this contract is that the respondent may purchase, sell, or charter any vessel designed for this trade, and any profit or loss attendant upon such purchase, sale, or charter is to be credited or charged in the general account. If the respondent purchased or sold any vessel designed for this trade, an interest was expressly given to the complainant in the results of that transaction. Whatever was designated for use and sale, and set apart became a part of the common stock. That this language was here used in its natural and obvious sense will appear from a reference to the succeeding provision in the agreement viz.:—"The vessels now designed for the trade are the ship. Robin Hood and bark Roscius, and are valued, the Robin Hood at \$10,500 cash, at the completion of her last voyage, and the Roscius at \$8,000 cash, on the completion of her present voyage.' At this time, the Roscius, so far from being actually employed in the joint business, was then absent upon a different voyage. She was, however, agreed upon and designated for this trade, and her value was fixed upon the completion of her then present voyage. It seems to me, therefore, upon every view of this contract, that the construction for which the responde. It contends that the complainant had an interest only in the vessels actually employed cannot be maintained.

"Crusader's second voyage.—Complainant claimed, in the next place, that he should be

FOSTER v. GODDARD.

credited with a share of the profits of the Crusader's second voyage. His engagement was for the term of five years after his arrival in Valparaiso, which expired October 3, 1848; he was to receive one tenth of the profits of the business for the same period, or the sum of \$5,000, at his election. He in fact remained in Valparaiso until November 30 or December 1, 1848, employed, as he claims, in the business of the respondent. The agreement was for a fixed and definite period, and it makes no provision for compensatory services rendered after its expiration. If the complainant rendered any services after October 3, 1848, he did not render them under this agreement, for it expired by an express limitation at that date. It seems to me, therefore, that he cannot claim by virtue of this agreement an interest in a voyage which was not completed until more than three months after October 3, 1848, as compensation for any services rendered by him after that date. It was competent, however, for these parties to make an additional agreement covering a period not embraced within the original contract, and the evidence clearly shows that they have so done. It must be conceded that the respondent had no right to call upon the complainant, for his services for a single day beyond October 3, much less for a period of two months; neither is it very probable that the latter would have gratuitously rendered such services. Upon this point, I find, as matter of fact, that the respondent did request and did receive of the complainant the benefit of his services after October 3, 1848, and particularly in reference to the second voyage of the Crusader, upon the agreement, if not express, yet clearly implied and well understood, that the latter was to share in the profits of this voyage. It was competent for the parties to make an additional agreement, and they have done so; but I cannot acquiesce in the suggestion of complainant's counsel, that it was competent for the parties subsequently to agree that a certain voyage begun before the agreement ended should be deemed to be within the original contract, which would not have been otherwise embraced in its terms,—thus giving to the contract a construction and effect which by law it would not have.

“The amount to be credited for the sale of the Charlotte.—The Charlotte was sold by the respondent, in February, 1849, for the sum of \$23,000. In the first account filed by him in this case, he credited the business with that sum, and charged commissions on that sum for effecting the sale. The respondent now asks to reduce that credit to the sum of \$16,000, which he alleges was the true value of the vessel on October 3, 1848, and alleges that the complainant is only entitled to a credit of her value upon that day, when the agreement of 1843 expired. On October 3, 1848, the Charlotte was upon her fourth voyage, having left Valparaiso, September 9, and arriving in Boston, December 5, 1848. In the accounts filed by the respondent in this case, he has credited the complainant with a share (one tenth) of the profits of this voyage. It has thus been treated by the respondent as embraced within the agreement, although the voyage did not terminate until December 5, 1848. I can draw no other inference, from the fact that the respondent himself has thus

credited the profits of this voyage, than that, by common consent, this voyage was taken and agreed to be within the first agreement. On the 3d of October the Charlotte was at sea, engaged in this voyage for the common benefit, and her service was not ended until December. And therefore, until the completion of that voyage thus prosecuted for the joint benefit, she was by the express terms of the agreement at the joint risk. From this consideration it seems to me clear that the period for her valuation must be deemed to have been postponed until the termination of this voyage. The Charlotte arrived the 5th, and was probably discharged about the 20th, of December. According to the testimony the demand for California vessels began in December, 1848, and the witness advertised one about the 10th of December. The Charlotte was sold in February, 1849. There is no evidence before me that her value on December 5th or 20th was not about the same as in the succeeding February. Respondent credited the amount received on the sale in February, and charged commissions thereon. I am of the opinion, therefore, that no sufficient reason has been shown for disregarding the credit originally given for the sale of the Charlotte, and that this item must stand as originally credited in the first account filed by the respondent.

“New England Worsted Company’s account—The respondent in his account has charged the general account with a balance due from the New England Worsted Company, under date February 28, 1848, \$2,173.04. The complainant objects to this item, and claims that there should be deducted from it the sum of \$1,789.89, which, as he avers, the New England Worsted Company were willing to pay, and which the respondent was bound to receive.

“The facts proved are as follows:—The company were charged, on the books of the respondent, with the sum of \$2,173.04 on the balance of an account due for wool; but the amount due was in dispute between them. In 1850 or 1851, the company tendered in payment about \$1,500, which he declined to receive. Nothing further was done by either party, until January, 1857, after the claim had been outlawed three years, when the company offered the sum of \$1,789.89, but the respondent refused to receive it, and also declined to permit the complainant to receive his proportion of that sum. It is contended by the respondent that he had a right

FOSTER v. GODDARD.

to conduct his own business, in his own way, being responsible only for a want of good faith, and that he was neither bound to accept a sum less than what he believed to be due, nor to institute a suit to recover what he claimed; and that, if any loss has thereby occurred, it is properly chargeable to the business. The management of the business, including the collection of the accounts, was under his absolute control; and in conducting it he was responsible, I think, only for the exercise of good faith and ordinary diligence. He was not bound to accept a sum less than what he believed to be due; and if he had instituted a suit to recover the full amount, the complainant would undoubtedly have been bound by the result. But was he at liberty to do neither? Moreover, in January, 1857, when the New England Worsted Company offered to pay the sum of \$1,789.89, Goddard had no legal claim whatever upon them; for he had already allowed his right to recover the original demand, or any sum, to be barred by the statute of limitations for three years. If under these circumstances he chose to decline the sum of \$1,789.89, he voluntarily subjected himself to the loss; but he could not in good faith compel the complainant, against his expostulations, to share it with him. In my opinion, therefore, the sum of \$1,789.89 should be deducted from the item in dispute.

“Rent, taxes, clerk hire, &c.—The respondent has charged in his account, under both agreements, certain items for store rent, taxes, clerk hire, and advertising, paid by him, as he claims, on account of the joint business, and which should be allowed. The complainant disputes these charges; and the first question is, whether they are to be considered in ascertaining the complainant’s share of the profits. How far these charges are maintainable under the first agreement, I have found to be a question of difficulty in view of the provision upon that subject. By the terms of the contract the parties have, as it seems to me, expressly provided that, so far as the complainant’s share is concerned, the profits are to be ascertained by deducting—1st. The interest on the capital invested (not the interest and taxes). 2d. All costs and expenses of sailing, victualling, manning, or repairing the vessels employed, including port charges. 3d. The actual expenses that may appertain to the goods themselves. 4th. The cost of the complainant’s living, not exceeding \$600 per annum; and that no expense which does not belong to one or the other of these clauses can be included. Under this view, I incline to the opinion and do report that the charges for clerk hire, for taxes on the capital employed, and for advertising the business generally, ought not to be allowed. As to store rent, so far as the store was procured or occupied for the storage of the goods, the charge is proper, but beyond this it must be disallowed.

“Third voyage of the Harriet Erving.—It is said by the respondent that the sales of this cargo were not completed until long after January 1, 1851; that they were made by Alsop & Co. after the complainant became a member of that firm; that one of its articles was, that no partner should be interested in any other business; and that he as such

partner received his share of the commissions upon these identical sales. It is argued that the complainant never had any interest in this voyage, or, if he had, that he forfeited the same, because he was entitled only to a share of the profits of such business as he should conduct to completion. These suggestions deserved, and I have endeavored to give them, the most careful consideration. The duties which the complainant was to perform are stated in the agreement with considerable particularity. According to the arranged course of business, the merchandise shipped by the respondent to Valparaiso for sale was placed in the house of Alsop & Co., who made the sales upon a guaranty commission, with the assistance and under the general control of the complainant, who acted under instructions from the respondent. It thus appears, that, while aiding in the sales of the outward cargoes formed a material, it by no means constituted the main part of the duties devolving upon the complainant under the agreement. The evidence very fully shows that it was not the habit nor according to the intention of these parties to force immediate sales of the entire cargoes, either by auction or otherwise. So that, although the larger portion of each cargo was generally disposed of within a few months—often a few days—after its arrival, yet in most, if not in all cases, some portion of it remained undisposed of for one, two, or even three years. It must, therefore, have been perfectly well understood by them, that, whenever this agreement should be terminated, more or less would remain to be done in disposing of the outward cargoes. Respondent, in his letter of March 18, 1846, wrote thus: ‘Do not, however, suffer our goods to be forced upon people at a sacrifice. My object is to supply the market at the highest point, and deeply mortified should I be to learn that another had afterwards obtained better prices.’ The business seems to have been conducted subsequently in accordance with these instructions. Whether the respondent, under any circumstances, after the termination of the agreement upon notice, could have required the complainant to remain in Valparaiso and devote himself, to the exclusion of all other business, for one, two, or more years, as the case might be, in disposing of the residue of cargoes, at such prices as the former might prescribe, upon pain of forfeiting all his interest in such cargoes, may admit of grave doubt. He might, perhaps, reasonably have required that he should have the benefit of the complainant’s services in substantially disposing of any such residues, and that the

FOSTER v. GODDARD.

latter should not engage in any other business which would conflict with his duty in this respect, Complainant was indeed bound to conduct to completion the business of this voyage, by superintending the sale of the cargo; but, their relations having terminated in all other respects, it is difficult to perceive why that duty might not have been fully performed by him, in letter and spirit, although he had become, without the assent of the respondent, a member of the house of Alsop & Co., or of some other firm. What remained for him to do under this agreement was this: to aid and superintend Alsop & Co. in effecting sale of the residue of the cargo. What the respondent had a right to require was, that he should perform this service faithfully, and that he should enter into no engagements that would be inconsistent with its performance; and therefore it is, that I do not perceive why the circumstance of his joining a mercantile house, after the termination of his agreement, although before the last cargo was entirely disposed of, would necessarily involve a violation of his agreement, or a forfeiture of his rights. If the respondent could have exacted more than this, it certainly was not practically necessary for the protection of his interest, and it is not strange that he should have waived it. That he did waive any such right, if it existed, is, I think, clearly proved. Upon the 13th of April, 1850, the third voyage of the Harriet Erving had been projected, and the respondent must have known then, as well as in June, July, and August, during which months the evidence shows much correspondence relating to this voyage, that, according to all former experience, some portion of her outward cargo would remain to be sold after December 31, 1850. Knowing this, on the 13th of April, in reply to the complainant's letter of February 22, announcing his intention to terminate the agreement, January 1, 1851, and then to join the house of Alsop & Co., he not only assented to this course but warmly approved of it. It was after this expression of assent that the voyage in question was undertaken, and that most of the services in reference to it were rendered. Let it be observed that under the agreement of 1849, then subsisting, the complainant could be called upon to transact no business of which he was not to share the profits. He was called upon by the respondent to transact this business, and he did it. I think that the cordial assent which the latter gave on April 13th to Foster's joining the house of Alsop & Co., January 1, 1851, fairly carried with it an assent that he might, after becoming a member of that firm, complete what would remain to be done under this voyage. It is now too late for him to object, especially as, after giving that assent, he required and accepted the services of the complainant as to this voyage,—services which he was not bound to render, and which the respondent could not require, except upon agreement that he was to share in the profits. The argument pressed against the complainant's right to share in the profits of the Harriet Erving applies as well to every preceding voyage, for the sales of none of them were completed, on January 1; 1831, when he joined the house of Alsop & Co. But the same answer applies to all: either, 1st, that, after the termination of the agreement by notice, the complainant was at liberty to engage

in other business, provided that he, at the same time, faithfully performed what remained for him to do in completing the sale of the residues of cargoes; or, 2d, if the agreement authorized the respondent to require of the complainant that he should abstain from all other business until the sales of all residues of cargoes were absolutely completed, yet that he waived this harsh and oppressive privilege, and consented to his joining the house of Alsop & Co. As to the suggestion that the complainant, after becoming a member of the firm of Alsop & Co., was not at liberty to engage in other business, that would seem to be a matter between him and his partners, rather than between him and the respondent; but a complete answer to it, as well as a sufficient reason for the respondent's ready assent to the arrangement, are found in the previous connection that had existed between all these parties in this business, and in the fact that, in effecting the best sales possible of this cargo, their interests were identical.

“Mode of making up the accounts, &c.—The respondent claims that the accounts are to be made up as cash on the 3d of October, 1848, the day when the first agreement terminated, and on the 1st of April, 1850, or the 1st of January, 1851, according as it may be determined upon which of said days the second contract terminated. Accordingly, to accomplish this, in crediting the account with the outstanding claims due under the two contracts, but running to maturity, he proposes to deduct the amount of discount necessary to make them equivalent to cash on the 3d of October, 1848, and April 1, 1850, or January 1, 1851, as the case may be, and then to charge the amount with interest ever afterwards on such discount, as if the cash had actually been paid by him. No such discounting of the claims for cash actually occurred. In my opinion this is not the proper mode of making up the accounts, for two reasons. 1st The contracts do not provide for this mode of accounting and settlement, but, as it seems to me, contemplate the contrary. If the respondent may now make up the account on that theory, then certainly the complainant on the days when these contracts severally terminated, had the right to require that the former should assume the risk that all debts due to the concern, amounting as it is said in the whole to over four hundred thousand dollars, would be paid, and he was then entitled to an absolute credit for these sums,

FOSTER v. GODDARD.

deducting the discount. So that if every dollar had been lost or uncollectible, the complainant would still have been credited with the full amount. The propositions cannot be dissevered. If the respondent may now assume that he took this risk, then certainly Foster could have required him to take it. But the written contracts, as well as the conduct of the parties, contradict this view. 2d. In the second place, if the respondent had the right, or was bound to assume and to give credit to the concern for all outstanding claims, as cash on the day when each contract terminated, and to settle on that basis, he did not do it, but refused so to do. He advanced no money, he discounted no credits. Having refused or neglected to come to an account until all the claims had matured, and until the filing of this bill, I do not perceive upon what equitable or legal principle he can now assume that he has done what he refused to do, or be entitled to any such benefit as he now claims. The period to which the account must be made up under both contracts is the filing of the bill.

“Recapitulation.—The master finds and reports that under the original and amended bill the complainant is entitled to recover: 1st. The balance due him under the first and second agreements (exclusive of the second voyage of the Crusader and the third voyage of the Harriet Erving), as per item No. 1 (\$41,581.56), \$41,581.56. 2d. One tenth of the profits of the second voyage of the Crusader, as per item No. 3 (\$4,005.72), \$4,005.72. 3d. One fourth of the profits of the third voyage of the Harriet Erving, as per item No. 2 (\$21,943.15), \$21,943.15.”

To which the respondent alleged the following exceptions:—

“First exception.—For that the said master has not allowed to the said respondent, and has not permitted him to debit the business of this respondent carried on by him under the contract dated June 24, 1843, sundry sums of money paid by the said respondent in the regular and usual course of his said business, for clerk hire, taxes, and advertising, to wit, thirty-eight hundred and thirty-eight dollars and seventy-eight cents for clerk hire, seventeen hundred and eleven dollars and ninety cents for taxes assessed upon the property employed in said business, and three hundred dollars paid for advertising his said business; the said sums amounting in the aggregate to fifty-eight hundred and fifty dollars and sixty-eight cents, all which were proper expenditures in the course of the said business.

“Second exception.—For that the said master has erroneously charged this respondent with the sum of seventeen hundred and eighty-nine dollars and eighty-nine cents, the amount of a loss made in the prosecution of the business aforesaid, by a sale of goods to the New England “Worsted Company, for which they have not paid, but refuse to pay.

“Third exception.—For that the said master has allowed to the complainant, under the contract of June 24, 1843, one tenth of the profits made by this respondent in the construction and subsequent sale of a vessel commonly called the Valdivia, which vessel was

not employed in, or put into, the business of this respondent, carried on under the contract aforesaid.

“Fourth exception.—For that the said master, in taking an account of the business of this respondent to which the contract of June 24, 1843, refers, has fixed the value of a vessel called the Charlotte as it was at a period of time some six months subsequent to the expiration of the five years mentioned in the contract of June 24, 1843, whereas it should have been fixed at its value at the time of the expiration of said five years.

“Fifth exception.—For that the said master has allowed the complainant one tenth of the profits made by this respondent by the use and employment of a vessel called the Crusader, and its cargoes, during her second voyage, which was not sought to be recovered by the bill of the complainant as originally filed or as amended, and which was not and is not embraced by or in the contract of June 24, 1843.

“Sixth exception.—For that the master, in taking the accounts under the contract of June 24, 1843, did not ascertain the value of the assets which had been employed in the business to which the contract refers, at the expiration of the five years in the said contract mentioned, as should have been done in order to ascertain the profits in which the complainant under said contract was entitled to share, but, in taking the said accounts, erroneously allowed the complainant a portion of the profits made by the respondent in the prosecution of his business after the 3d of October, 1848, at which time the interest of the complainant in the business of the respondent altogether ceased.

“Seventh exception.—For that the said master, in taking the said accounts, has allowed the complainant a portion of the interest received by the respondent for the use of the money of this respondent subsequent to the 3d of October, 1848.

“Eighth exception.—For that the said master has allowed to the complainant, under the contract of the 7th of May, 1849, a portion of the profits made by the respondent in the prosecution of his business and trade connected with Valparaiso, which was transacted and carried on by this respondent after the relation established by said contract between the complainant and the respondent had ceased, and the rights and interest of the complainant in the business of this respondent had altogether determined, which rights and interest did determine on or about the 1st of April, 1850, which business and trade were not conducted to completion by the said complainant, and which did not receive the full benefit of all the services of the complainant to its final accomplishment.

FOSTER v. GODDARD.

“Ninth exception—For that the said master did not ascertain the profits made by the respondent in his Valparaiso trade, to which the contract of the 7th of May, 1849, refers, by ascertaining the value of the assets which had been employed in the trade, as it existed at the expiration of the time during which the complainant had an interest in the business and trade of said respondent under the said contract, as the said master should have done.

“Tenth exception.—For that the said master has allowed the complainant one fourth of the profits made by this respondent in the use and employment of a vessel called the Harriet Erving, and its cargoes, during her third voyage, which was not sought to be recovered by the complainant in his original or amended bill, which vessel and cargoes, and the profits resulting therefrom during the said voyage, were not embraced in the contract of May 7, 1849, nor by any contract or agreement made by the respondent with the complainant, but were solely and exclusively at the profit and loss of the respondent.

“Wherefore the said respondent doth except to the said master’s report, and appeals therefrom to the judgment of the court”

The argument was upon these exceptions.

C. A. Welch, and E. D. Sohier, for complainant

Watts and Peabody, for respondent

CLIFFORD, Circuit Justice. Ten exceptions are filed by the respondent to the master’s report, which will be considered in the order in which they were made. In the first place, the respondent complains that he was not allowed by the master to debit the assets on hand, under the first contract, with the sums paid by him for clerk hire, taxes upon the property, and for advertising the business. Those expenses amount in the whole, as alleged by the respondent, to the sum of five thousand eight hundred and fifty dollars and sixty-eight cents, and it is insisted by the respondent that the decision of the master on this point was incorrect. Net profit was the basis prescribed by the contract, by which the amount of the complainant’s compensation was to be ascertained. If there had been no net profit, then he would have been entitled to no compensation, except the six hundred dollars allowed for his support. As a general rule, the term “net profits” may be defined to be the gain made by the merchant in buying and selling goods after paying all costs and charges for transacting the business, and such it is insisted by the respondent is the sense in which the words are used in this instrument. By the terms of the contract, the complainant was entitled, at the expiration of five years, to one tenth of the net profits of the business in that trade, and by necessary implication the remaining nine tenths of the profits belonged to the respondent. Were this the whole of the contract, it would unquestionably follow, as is contended by the counsel for the respondent that each of the nine parts of the profits belonging to the respondent ought to be equal to the one tenth part allowed to the complainant. On the part of the complainant it is insisted that the words

“net profits,” as used in this contract, must be understood in a and advertising special sense, and that they mean the gain made in the business after the expenses therein specially enumerated have been deducted. Suppose it to be so for the sake of the argument, it still remains to ascertain whether the charges in question are not properly embraced in the expenses appertaining to the goods themselves, which it is admitted are specially enumerated among those which are to be deducted. Unless clerk hire and expenses for advertising fall within that class of expenditures, it is difficult to see what terms short of the actual enumeration of those expenses could have been employed to accomplish that purpose. Expenses for clerk hire and advertising are as much incident to the transaction of mercantile business as those incurred for insurance, “freight,” and storage, and the merchant might as reasonably calculate to procure goods without cost, as to expect to keep them on hand for sale without their being subject to taxation. Interest on capital was, doubtless, enumerated, on account of the special character of the arrangement, to exclude the conclusion that might otherwise follow, that the capital for the business was to be furnished by the respondent without any such allowance, and the same remark applies also to the costs and expenses in victualling, manning, and sailing the vessels employed, and keeping them in repair. Necessary expenses of that sort would arise at home as well as abroad, and hence it was provided that all such expenditures should be deducted from the gross proceeds of the business, in order to ascertain the net profits, to diminishing the usual signification of that term. For these reasons the first exception to the master’s report is sustained.

Complaint is made, in the second place, by the respondent, that the master has erroneously charged the business with \$1,789.89, being the amount of a loss made in prosecuting the same, for which payment has not been made. Credit had been given to the debtors owing this sum to the amount of \$2,173.04 on the sale of a certain quantity of wool; but the amount actually due was in dispute. They tendered to the respondent, in 1850 or 1851, the sum of \$1,300, which he declined to receive. Nothing further was done by either party until January, 1857, which was three years after the demand was barred by the statute of limitations. At that, time the debtors offered to pay the sum charged by the master to the general account, but the respondent refused to accept it, and also declined to allow the complainant to receive the proportion belonging to him, although

FOSTER v. GODDARD.

the complainant was present and requested permission so to do. Mere omission to collect, without more, would not render the respondent liable for a claim of this description; but the claim in this case does not rest on that fact alone. He not only suffered the demand to be outlawed, but when the debtors voluntarily came forward after the limitation had taken effect, and offered to pay nearly the whole amount of the principal, he refused to receive it, and by virtue of his exclusive control over the accounts withheld from the complainant the means to adjust the proportion belonging to him. Suffice it to say on this point, that I am of the opinion that the decision of the master was correct, and for the reasons that he assigned for his conclusion. Both of the preceding exceptions refer to the business transacted under the first agreement, and so does the third, which will now be considered.

It is to the effect that the master has improperly allowed to the complainant one tenth of the profits made by the respondent in the construction and subsequent sale of the vessel called the Valdivia, which he alleges was sold by him for his own benefit. By the terms of the contract, the respondent had the right of purchasing, selling, and chartering the vessels designed for this trade, at his option; and it was expressly stipulated that the loss or profit attendant thereon should be charged or credited in the general account. According to the report of the master, the allegation that this vessel was never employed in the business is technically correct, but she was constructed under a contract made by the respondent, and was in fact built and designed for that purpose, and by the express words of the contract, the interest of the complainant to the full extent of his one tenth was made liable for all the risks and casualties in the business, whether attendant upon the goods or the vessels. As early as the 17th of March, 1846, and before the vessel was constructed, the respondent wrote to the complainant, informing him that he had made the contract for her construction, expressing the hope, at the same time, that she would make the outward passage in sixty-five or seventy days. On the 22d of August, 1846, he wrote again, to the effect that one of the masters employed in the business was waiting for this vessel, adding, in the same letter, that she would be despatched in November. His next letter is dated October 12, 1846, in which he informs the complainant that the vessel would be launched on the following day, saying, "She will be our next ship." In that letter he also informed the complainant that he had engaged a part of her outward cargo, and in a letter dated on the day following he instructed the complainant not to sell anything to arrive by this vessel. During the period covered by this correspondence, and before any intimation had been given by the respondent of any different arrangement, the complainant, on the faith of these letters, had procured a part of her return cargo. Another vessel, however, was sent in her stead, and on the 15th of January, 1847, the respondent wrote to the complainant to the effect that he expected the complainant would be surprised, and perhaps disappointed, in seeing another vessel instead of the new ship, and admitting that he had

been tempted to sell her for some \$9,000 or \$10,000 advance above cost. On these facts, and others which need not be reproduced, the master in this case found that the vessel in question was built and designed for this trade, within the meaning of the contract. It appears to the court that the finding is correct, and for the reasons assigned by the master, which need not be repeated. Accordingly the exception is overruled.

In the first account filed by the respondent, he credited the business with the sum of \$25,000 received by him, for the sale of the vessel called the Charlotte, and charged commissions on that sum for effecting the sale. That sale was made in February, 1849, as appears by the report of the master. Afterwards he asked to reduce that credit to \$16,000, alleging that the last-named sum was the true value of the vessel, on the 3d of October, 1848, when the first agreement expired. His request was denied by the master. To that refusal he objected, and insists in his fourth exception, that, in taking the account the master has fixed the value of the vessel at a period subsequent to the expiration of the five years mentioned in the contract, whereas it should have been fixed, as he contends, on the 3d of October, 1848, when the five years, from the time of the arrival of the complainant in Valparaiso, expired. When the agreement expired, as is assumed by the respondent, this vessel was at sea upon her fourth return voyage; and it appears, by the report of the master, that she did not arrive in Boston until the 5th of December, 1848. She was not sold until the following February; but the master reports that there was no evidence before him that the value was not about the same at the time of her arrival as at the time of her sale. If any such difference existed, as is supposed, it was certainly incumbent upon the respondent to prove it; and, in the absence of any such proof, it cannot be presumed that mere lapse of time had added anything to the value of the vessel. He gave the credit at the time of sale, and there is no evidence of any mistake or any sufficient reason offered why the correction should be made. On the contrary, it appears, from the report of the master, that he credited one tenth of the profits of the voyage to the respondent although it did not terminate until two months after the agreement expired. From these facts the master draws the inference, and I think justly, that these transactions were understood and agreed between the parties to be within the first

FOSTER v. GODDARD.

agreement For these reasons, as well as those assigned by the master, the fourth exception is overruled.

When the cause was first submitted to the master, he refused to allow the complainant for the profits made in the second voyage of the Crusader, for the reason that those profits were not claimed in the bill of complaint Subsequently, an amendment to the bill was introduced into the cause, by leave of the court, alleging in substance and effect, that the complainant rendered the same service in relation to that voyage as that rendered by him in relation to the preceding voyages, and that it was well understood and agreed between the parties that this voyage also should be deemed within the original agreement, and that the complainant should be interested therein in the same manner, as if it had been completed within the five years. All these allegations were denied by the answer. In the fifth exception, the respondent complains that the master has allowed the complainant one tenth of the profits of this voyage, insisting, notwithstanding the amendment, that the claim is not embraced in the original or amended bill. Comment upon the objection that the claim is not embraced in the amended bill is unnecessary, as the amendment was introduced into the cause for the very purpose of obviating that difficulty; and its language is as well suited, to accomplish the purpose for which it was drawn as could well be chosen. Suffice it to say, that so much of the exception as alleges that the claim is not with in the amended bill cannot be sustained. Upon the question of fact put in issue by the pleadings, as amended, the master finds that the respondent requested and received the services of the complainant after the expiration of the five years, and particularly in reference to this voyage; and that the services were rendered by the complainant, with the understanding and agreement between the parties that he was to share in the profits. Such being the state of the facts, the master reported that, under the amended bill, the complainant was entitled to recover one tenth of the profits of this voyage. On an examination of the evidence, the finding of the master appears to be satisfactory, and accordingly the exception is overruled.

It was also contended by the respondent, before the master, that the accounts, under the first agreement, should be made up as cash collected on the day the agreement terminated; and the refusal of the master to adopt that theory constitutes the foundation of the sixth exception. It is to the effect that the master, in taking the account, did not value the assets at the expiration of the five years, but allowed the complainant a portion of the profits after the agreement expired. Claims were still outstanding and uncollected at that time to a large amount; and the respondent proposed and insisted that the master, in making up the accounts, should deduct the discount necessary to make the debts due equivalent to cash on the day the agreement expired, and calculate interest accordingly. In other words, he contended, and still insists, that the assets, so far as they consisted of unpaid balances, should be valued in the manner suggested as cash on hand; and that

thenceforth they were to be regarded as his property, and at his risk. That theory the master declined to adopt, and, as it seems to me, for good reasons which need not be repeated.

Upon the expiration of each contract certain sums were due for goods already sold, and other goods belonging to the joint account were remaining on hand, which were subsequently sold, and the proceeds of both these classes of goods were collected by the house of Alsop & Co. On these sums while they remained in their hands they allowed interest Remittances were not made by bills of exchange, but the proceeds of the outward adventure were invested in the purchase of return cargoes, and the remittances were made in that way. Interest paid by Alsop & Co., on the funds collected by them on the goods thus circumstanced, was charged by the master in the general account To that allowance the respondent objected; and it constitutes the essence of his complaint as set forth in his seventh exception. Those funds were clearly at the joint risk, until they were received by the respondent, and no reason is perceived why the complainant is not entitled to his share of the interest accruing on the same. It is clear, therefore, that the seventh exception cannot be sustained.

Another position assumed by the respondent before the master was, that the second agreement terminated on the 1st of April, 1850, when the complainant gave the notice of his intention to withdraw from the business. His letter giving the notice was dated February 22, 1850; but it was not received until the 1st of April following. On the 13th of the same month the respondent replied, approving of the complainant's decision to join the house of Alsop & Co. at the time mentioned in his letter, and promising to comply with the complainant's request for an account as speedily as possible. He made no objection to his withdrawal, or to the time fixed for its accomplishment; and the case shows that the complainant remained and transacted the business as usual, up to the 31st of December, 1850, when he withdrew, and became a member of the house mentioned in his letter. On this state of facts, the master held that the relation between them, under the second agreement, did not terminate before the period when he joined that house. To that finding the respondent objected, and it constitutes the foundation of the eighth exception. It appears to the court that the finding of the master was correct; and the exception is accordingly overruled.

FOSTER v. GODDARD.

All that need be said concerning the ninth exception is, that it presents the same question, as to the mode of stating the account under the second agreement, as the one involved in the sixth exception, touching the same subject under the first agreement, and must be overruled for the same reasons.

More difficulty arises in disposing of the tenth exception, which is the only one that remains to be considered. It alleges in effect that the master has allowed the complainant one fourth of the profits of the third voyage of the *Harriet Erving*, which, it is insisted, are not claimed in the bill or the amendments to the same, and that the voyage was not the subject of any agreement between the parties. Some reference to the pleadings, so far as respects the second agreement, becomes necessary, in order that the precise nature of the question presented may be clearly understood. As contended by the respondent, the bill sets up the contract, alleges that the complainant entered upon and conducted the business until December 31, 1850, when the agreement was terminated, by the complainant's giving due notice to the respondent in the manner provided in the contract. In the answer, the agreement is admitted; but the respondent denies that it constituted a partnership, as alleged in the bill. He also admits the complainant's right to withdraw on giving the required notice, and avers that the notice given was received by him on the 1st of April, 1850, and that he acknowledged its receipt, and expressed his satisfaction with the same. No additional agreement was made in respect to this voyage; and if the complainant is entitled to recover this claim at all, he must do so under the pleadings as stated, and the written agreement set up in this part of the bill of complaint. This vessel sailed from Boston, on her outward voyage for Valparaiso, on the 21st of August, 1850, more than four months after the notice had been received by the respondent. She arrived out on the 8th of December, 1850, and sailed thence for Coquimbo on the 27th of the same month. On the 4th of January, 1851, she sailed for Talcahuano, and afterwards, during the same month, for Boston, where she arrived on the 7th of April, 1851. By the terms of the second contract, under which this claim arises, the complainant was entitled to have one fourth part of the net profits of the respondent's business in that trade, which he should have conducted to completion. He was at liberty to withdraw at any time, by giving to the respondent so much notice, that any voyage he had commenced prior thereto should receive the full benefit of the complainant's services to its final accomplishment, and not otherwise. This voyage had not been commenced when the notice was given, nor until more than four months after the respondent received it, and had signified to the complainant his satisfaction at learning the decision to which he had come. At the time the vessel sailed on her outward voyage, both parties understood that the complainant had complied with the terms of the agreement in giving the notice, and that he was under no obligations arising out of its terms and conditions to transact this business. Beyond question, the reply of the respondent must be understood as an assent to the sufficiency

of the notice; and if so, then both parties knew, or ought to have known, that their relations under the second agreement would terminate at the time therein specified. That the complainant so understood it is manifest, not only from the terms of the letter in which he gave the notice, but from his subsequent conduct in joining the house of Alsop & Co. at the time therein designated. It is admitted that the complainant joined the house of Alsop & Co., on the 1st of January, 1851, agreeably to his intention as expressed in the letter giving the notice, and that he did not go to Coquimbo in this vessel, on the 27th of December, 1850. Another fact is also admitted, of some importance in this investigation, and that is, that the business after the 1st of January, 1851, was transacted by the house of Alsop & Co., and that the new agent of the respondent reached Valparaiso on or about the 1st of November, 1851. As before stated, this vessel arrived at Valparaiso on the 8th of December, 1850. Net sales of the voyage amount in the whole to the sum of \$205,620.74, as appears by the record. All of the sales were made by the house of Alsop & Co., who regularly rendered an account of the same to the respondent, for which they charged two per cent for guaranty, and four and one half per cent for commissions on sales. Sale of the cargo commenced on the 31st day of December, 1850, as appears by the account of sales, and was continued at different periods down to June 30, 1853. On each and all of these sales they charged the six and one half per cent commissions, amounting to the sum of \$9,736.26. During the whole of the period through which the sales were continued the complainant was a member of that mercantile house, and as such, of course, received his share of those commissions. Whenever he assisted in the business, as appears to the court from the evidence, he acted in virtue of the new relations he had contracted, and not under the agreement with the respondent, which he had previously terminated by the notice. But it is insisted by the complainant that the parties understood their relations otherwise, and that there is evidence in the case sufficient to warrant the conclusion that they had agreed that this voyage should be settled and adjusted within the principles of the written agreement. Suppose it were so, it is not perceived that it would benefit the complainant in this suit, as the difficulty would still remain in all its force, that there is no proper allegation in the bill, or in either of the amendments, to support any such new

FOSTER v. GODDARD.

agreement. After a careful examination of all the correspondence, I am of the opinion that it does not sustain that view of the case. On the contrary, it appears to me that both parties well understood that their relations, under the written agreement, so far as respects this voyage, had ceased. For these reasons, the tenth exception is sustained, and the accounts must be adjusted so as to conform to the opinion of the court. When that is done, the complainant will be entitled to a decree in his favor. Should any dispute arise in making the adjustment, the cause must be recommitted to the master, to make the necessary corrections.

[NOTE. Cross appeals were taken from this decree to the supreme court, and the decree of the circuit court was duly affirmed, Mr. Justice Swayne delivering the opinion. The charges for taxes, clerk hire, and advertising, under the clause, "actual expenses that may appertain to the goods themselves," were held to be legitimate, the learned justice remarking: "It was certainly not the intention of the parties that the defendant should make a donation by an expenditure in the business. The computation should be made as if he were engaged in no other business. The items in question are as much a part of 'the actual expenses,' appertaining 'to the goods themselves,' as storage, commission, or insurance. They rest on the same foundation, and the same language in the contract which affords a warrant for including the latter applies with equal force to the former." *Foster v. Goddard*, 1 Black (66 U. S.) 506.]

¹ [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

² [Affirmed in 1 Black (66 U. S.) 506.]