# IN RE WARD ET AL.

Case No. 17,144.

{2 Flip. 462;[1] 25 Int. Rev. Rec. 289; 8 Reporter, 136

District Court, W. D. Tennessee. June, 1879.

PARTNERSHIP—CONTRACT—LENDER TO RECEIVE INTEREST IN PROPORTION TO PROFITS—PRESUMPTIONS OF LAW.

Beyond dispute a participation in the profits of a business is prima facie strong evidence of a partnership in it, but a loan to a person engaged in trade on condition that the lender shall receive a rate of interest in proportion to profits, or a share of the profits, does not of itself constitute the lender a partner, nor does a contract to remunerate a servant or agent of a person

engaged in trade by a share of the profits, of itself, render such servant or agent liable as a partner. [Cited in Re Ward, 12 Fed. 326.]

In bankruptcy. On petition to charge Mrs. Margaret Hoist as a partner in the firm of J. C. Ward & Co. and to adjudicate her a bankrupt. She claims that the facts only show that she lent her money on a contract to receive one-fourth of the profits as interest on the loan. The creditors insist that she was a partner in fact, and certainly so as to creditors.

Vance & Anderson, for creditors.

Estes & Ellett, for defendant.

HAMMOND, J. Partnership is a contract of two or more persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. 3 Kent. Comm. 24. There is no difficulty in the ordinary course of business with the case of an actual partner, who appears in his character of an ostensible partner. The question as to the persons on whom the responsibility of partner ought to attach in respect to third persons arises in the case of dormant partners who participate in the profits of the trade and conceal their names. They are equally liable, when discovered, as if their names had appeared in the firm, and although they were unknown to be partners at the time of the creation of the debt. 3 Kent, Comm. 31. A partnership inter sese—that is, in relation to the persons engaged as between each other can commence only by the voluntary contract of the parties, expressed in their agreement, or implied from their dealings with each other and the outside world. 43 Mo. 391. But parties as to third persons, and sometimes even as between themselves, may become partners by the legal effect of their agreement, or of their acts and dealings, although they may not be aware of such legal effect, and may not believe themselves partners and may deny it. 31 Vt. 395.

It is urged by the creditors in this case that the simple fact that Mrs. Hoist participated in the profits makes her, by operation of law a sharer in the losses and liable for debts, and that every one who has a share in the profits ought to bear his share of the losses. 1 Smith, Lead. Cas. 381.

An agreement between persons to share in certain proportions of the profits of a business does not necessarily make them partners as to each other under circumstances which certainly do render them liable as such to third persons. The Crusader [Case No. 3,456]. The rule of law formerly prevailing, that participation in the net profits of a business made the participant liable absolutely to third persons as a partner, has certainly been greatly modified in England and in this country. 83 Pa. St. 290. We have been favored by learned counsel with arguments on both sides, based upon a reference to the authorities on this question. And our supreme court say that "it must be confessed that some of the discriminations, where profits are used as compensation for definite services, are very nice." 22 Wall. [89 U. S.] 119. And I may add in the language of Lord Eldon, that the distinctions

are so thin that they have proved perplexing and unsatisfactory. 17 Ves. 403. Distinctions based on the difference between net and gross profits, whether the parties have a lien or only may look to the fund, whether entitled to an account, whether they share as principal owners or not, whether liable on the doctrine of agency, etc., have all been, I find, quite as useless to all other judges who have, in the conflict of cases, searched for the principle, as they are to us here now. 3 Kent, Comm. 25, note 1, and also same note on page 22 (bottom), 12th Ed. It will be thus seen that the conflict of cases is so great that, in the absence of controlling authority, a court may support either view with the most respectable judicial opinion.

I find that the perplexity grows out of an attempt to gauge and measure by tests each case so as to determine by a rule, whether as a matter of law, the partnership exists irrespective of the fact itself; and the solution to be to treat the case as presenting to the* court and the jury the question as one of fact, and this rule of the common law as one of evidence, more or less decisive according to the circumstances of each case and not of itself conclusive.

I adopt Judge Deady's explanation of the rulings of the supreme court in Berthold v. Goldsmith, 24 How. [65 U. S.] 537, in his opinion in Re Francis [Case No. 5,031], in a case very much like this, and agree with him that, the old rule of the common law that a participation in the profits is ipso facto conclusive of a partnership, is not the established rule of the supreme court of the United States. I doubt if it is or ever was the established rule in England. The conflict was as great there as here. It was modified, if not abrogated, by the house of lords in the great case of Hick-man v. Cox, 91 E. C. L. 523, in the year 1860, which established the rule that the participation of profits does not necessarily in all cases and under all circumstances establish a partnership, but is treated as evidence, more or less cogent, according to circumstances, of a partnership.

The English parliament, about 1866, passed an act to cure the conflict and establish the above rule, and so did the legislature of Pennsylvania about 1870. These acts declare what I believe to be the better principle supported by the best considered cases, namely: That a loan to a person engaged in trade providing that the lender shall receive a rate of interest in proportion to profits, or a share of the profits, shall not of itself constitute the lender a partner; nor shall a contract to remunerate a servant or agent of a person engaged in trade

by a share of the profits of itself render such servant or agent liable as a partner. This is also the rule in Tennessee. 5 Sneed, 726; 12 Heisk. 615; 1 Baxt. 108. Read, as to strength of presumption, 37 Conn. 260. But, notwithstanding these exceptions, we think the general rule remains beyond dispute, that participation in the profits of a business is prima facie strong evidence of a partnership in it.

There was a verdict for the creditors, and motion for a new trial overruled.

{See 12 Fed. 325.}

[1] {Reported by William Searcy Flippin, Esq., and here reprinted by permission.}