

v. Fairchild, 64 N. Y. 471, 481; Whaling Co. v. Borden, 10 Cush. 458, 475; Collins v. Decker, 70 Me. 23; Collumb v. Read, 24 N. Y. 505; York v. Clemens, 41 Iowa, 95; Sherwood v. Railway Co., 21 Minn. 128, 130. Pursuing this line of inquiry, then, with reference to the use made of those lands which were purchased during the existence of the copartnership, we find the fact to be that the Meyer lots were occupied and used as an office by the firm, from the time they were purchased until the death of Dr. Malcolm McKinnon. It may be conceded that, strictly speaking, the Watts farm was not used for the purpose of transacting the business mentioned in the partnership articles, but it does appear that the firm frequently took live stock in payment for fees, and that the animals so taken were used to stock the farm, and that, at the time of Dr. McKinnon's death, the firm had acquired and then owned a large herd of live stock, which was being grazed and fed on the farm in question. It furthermore appears that all of the expenses incident to the care and management of the farm were paid out of the partnership funds; that whatever income was derived therefrom was received by the firm; and that no charge was made against the firm by the senior partner, in whose name the title was taken, for the care and support of the live stock of the firm which were herded on the Watts farm.

Thus far we have only referred to a class of facts which are generally held sufficient in themselves, when the matter is in doubt, to show that real estate which was purchased by a partner with partnership funds is in fact partnership property. But the case does not rest on such proof alone. The appellant testified, in substance, and his testimony was received without objection as to its competency, that all of the real property that was acquired during the existence of the partnership was purchased after a conference between himself and his uncle, upon a distinct understanding that it should form a part of the partnership assets; that it was always treated by them as partnership property; and that both had equal authority in controlling the same. There was also abundant evidence of admissions made by Dr. Malcolm McKinnon during his lifetime, to disinterested third parties, that the lands in controversy were the property of himself and his nephew, and that both had an equal voice in their management. It is also worthy of notice that the clause in the partnership articles which the appellant seeks to enforce contains an implied admission that the property of the firm did not consist entirely of personalty. It was provided in the articles that the right of survivorship should extend to all of the senior member's property "held in partnership, personal *and otherwise*."

In view of all of the foregoing considerations, we have reached the conclusion that it is sufficiently established by the record that the Watts farm and the Meyer lots were held in partnership, and were in fact partnership assets when the senior member of the firm died, and that the circuit court should have so decreed.

The evidence that was offered to establish the fact that the residence property was also partnership assets at the time of Dr.

McKinnon's death is of the same character as that which we have already alluded to in treating of the real estate acquired during the existence of the firm; that is to say, the evidence shows that the residence property was used as an office by the firm from the time it was formed, about the 1st of January, 1882, until the Meyer lots were purchased, in the spring of 1885. In the mean time no rent was paid by or demanded of the firm for the use of the premises in question. During the same period some permanent improvements were made on the property, at the expense of the firm, and a considerable sum was thus expended, considering the small value of that property. After the firm ceased to use it as an office, it was rented to third parties, and the rents received were credited to the firm, and treated as partnership funds. These facts are practically undisputed. The junior partner also testified that it was expressly agreed between himself and his uncle, when the partnership was originally formed, that the residence property should become a part of the partnership assets, and that it was always so treated both by himself and his uncle. This was one of the considerations which induced the nephew to enter into the partnership. These statements of the nephew are strongly corroborated, in our opinion, by proof of similar statements made by the elder Dr. McKinnon during his lifetime to disinterested witnesses. It was further shown, and the fact is undenied, that from January, 1882, to May, 1886, no individual account was kept of moneys received or expended by either member of the firm. On the contrary, during the entire period, all of the property in their possession was treated as common property, and all moneys received were deposited in bank to the credit of one account, which was drawn upon at will, both by the uncle and the nephew. Furthermore, it is apparent to us that the firm accumulated property much more rapidly than the senior member appears to have done before the firm was organized. In view of all the facts and circumstances, we can hardly doubt that both members of the firm regarded the residence property as a part of the firm assets, notwithstanding the fact that it was not purchased with partnership funds; and we think that it should be so treated in order to give effect to the intention of the parties, unless there are insuperable legal obstacles which preclude us from so doing. The circuit court appears to have entertained the view that no relief could be afforded as to the residence property, by reason of the statute of frauds. At all events, a doubt was intimated whether a verbal agreement to put lands into a firm, made before a firm exists, is effectual to pass either a legal or equitable title to the same, even though the parties have acted for years on the faith of the agreement, and in the mean time have treated the lands as partnership property and made large expenditures thereon. With respect to this suggestion, it is only necessary to say that no objections were made on the trial to any of the testimony on the ground that it was incompetent under the statute of frauds. Furthermore, we know of no reason why a parol agreement, of the kind last indicated, may not be specifically enforced when there has been such a

part execution of the same as will ordinarily suffice to take a parol contract for the sale of lands out of the operation of the statute of frauds, and instances are not wanting where contracts of the latter character have been specifically enforced in the courts of the state from which this appeal comes. *Tatum v. Brooker*, 51 Mo. 148; *Dozier v. Matson*, 94 Mo. 328, 332, 7 S. W. Rep. 268; *Self v. Cordell*, 45 Mo. 345, 346. But, however this may be, we think it is well established by the weight of authority that when the existence of a firm is established, by an instrument of writing, any one who is concerned in the firm assets (whether he is a creditor of the firm or a partner) is then at liberty to prove by extrinsic evidence, or by parol, that certain lands which are held by one of the partners are in fact the property of the firm. Cases of this description are not within the provisions of the statute of frauds. *Whaling Co. v. Borden*, 10 Cush. 458, 475; *Collins v. Decker*, 70 Me. 23; *Dale v. Hamilton*, 5 Hare, 369; *York v. Clemens*, 41 Iowa, 95, 102; *McGuire v. Ramsey*, 9 Ark. 518; *Jarvis v. Brooks*, 27 N. H. 37, 67; *Sherwood v. Railway Co.*, 21 Minn. 128.

In view of what has been said, our conclusion is that the circuit court erred in dismissing the bill. Its decree is therefore reversed, and the case is remanded to the circuit court, with directions to vacate its former decree, and to enter a decree in favor of the complainant, vesting him with all the right, title, and interest in and to the lands in controversy that was held or owned by Dr. Malcolm McKinnon at the time of his death, and further perpetually enjoining the appellees from further prosecuting any ejection suit to recover said lands, under any pretended right or title thereto, acquired by the laws of descent, from Dr. Malcolm McKinnon.

PUTNAM v. RUCH et al.

(Circuit Court, E. D. Louisiana. June 12, 1893.)

No. 12,169.

1. CONSTITUTIONAL LAW—CORPORATIONS—ANNULMENT OF CHARTER.

Const. La. arts. 248, 258, which provide for regulating the slaughter of cattle and abolish all monopoly features in the charter of any corporation existing in the state, did not entirely annul the charter of the Crescent City Live-Stock Landing & Slaughter-House Company, a private corporation, created by Act No. 118 of 1869, which gave it the exclusive right to slaughter cattle in New Orleans; but they merely abolish the monopoly feature, and leave a corporation capable of carrying on the business in common with all others engaging therein. 54 Fed. Rep. 216, reaffirmed.

2. CORPORATIONS—RIGHTS OF STOCKHOLDERS—BILL TO ENJOIN WASTE.

A stockholder cannot maintain a bill to restrain the wasting of corporate assets unless the corporation itself refuses to file the bill; and in such case it must be made a party defendant. 54 Fed. Rep. 216, reaffirmed.

In Equity. Bill by Forest L. Putnam against Louis Ruch and others for the appointment of a receiver for the Crescent City Live-Stock Landing & Slaughter-House Company, and for other relief. For former opinion, on motion for injunction pendente lite, see

54 Fed. Rep. 216. On demurrer to the bill and supplemental and amended bill. Demurrer sustained, and bills dismissed.

J. R. Beckwith, for plaintiff.

Rouse & Grant and Drolla & Augustin, for defendants.

BILLINGS, District Judge. This case is heard on the demurrer to the bill, and the supplemental and amended bill. The questions involved are, in substance, those presented upon the hearing of the application for an injunction; but they have been argued with such ability, and considerations have been heard which were omitted at the former argument, leaving the matter in such a state that I think it proper briefly to go over the ground again. The question to be decided is whether the charter of the corporation known as the "Crescent City Live-Stock Landing & Slaughter-House Company" was altogether recalled by the provisions of the constitution of 1879. I will not restate in full the text of the charter or the terms of the two constitutional provisions. The charter is found in Act No. 118 of the Acts of 1869, at page 170, and the articles of the constitution which touched the question being considered are articles 248 and 258. The question, then, is whether the provision of the constitution which withdrew from the corporation its exclusive right left it still a corporation capacitated to carry on its original business, but shorn of any exclusive privilege. Section 3 of said Act No. 118 provides:

"And the said Crescent City Live-Stock Landing & Slaughter-House Company shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privileges granted by the provisions of this act."

It seems to me it is as if in one section of this charter it had been said that this corporation should have the privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privileges granted by the provisions of this act, and in another section it had been enacted that the privileges granted in the first section should be exclusive, and the constitution of the state had, in effect, repealed and recalled the second section granting the exclusiveness. This would have left the former section in full force, and the corporation, though deprived of any exclusive right, would have still had without any exclusiveness the privilege of conducting and carrying on the live-stock landing and slaughter-house business. The point was very much pressed that the supreme court of the state of Louisiana, in the case of *State v. Fagan*, 22 La. Ann. 546, and the supreme court of the United States, in the *Slaughter-House Cases*, 16 Wall. 36,—they viewing the subject from different standpoints,—had each maintained the validity of the exclusive privilege granted to this corporation, upon the ground that the legislature could control and regulate the matter of public health; and, therefore, that the statute above referred to (Act No. 118) was a public law, and perished in toto with the conflicting constitutional provision. But there must be the same discrimination made here as with respect to the twofold nature of the Act No. 118. The su-

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preme court of the state and the supreme court of the United States were not dealing with the right of the legislature to create such a corporation without exclusive rights, but it was the exclusiveness of the privilege that they dealt with, and it is the exclusiveness of the privilege which undoubtedly brings it, so far as it is made a monopoly, within the category of public laws. But Act No. 118 is twofold,—it creates a corporation, and gives it definite faculties or capacities; in the next place, as a public law, it avails itself of the corporation it has thus created to make it of practical benefit to the public in the matter of public health. It was not the creation of the corporation, and the endowing it with the faculty of carrying on the business of landing and slaughtering animals, which was contested, or which could be; it was the fact that, after creating that corporation, the legislature had given it the exclusive right to carry on this business. That the corporation is a private one appears from the fact that in section 2, Act No. 118, above referred to, said corporation was made a corporation, that should have a capital stock, the amount and the number of shares of which should be fixed by the corporation. That fixes the character of the corporation. A corporation whose shares are held by individuals, as these shares were to be held, is a private corporation. See the following authorities: *Bank of United States v. Planters' Bank*, 9 Wheat. 904; 2 Kent, Comm. (8th Ed.) 309, 310; *Trustees of Dartmouth College*, 4 Wheat. 664; *Bonaparte v. Railroad Co.*, 1 Baldw. 223; *Rundle v. Delaware & R. Canal*, 1 Wall. Jr. 275. Justice Baldwin's Reports (volume 1, p. 223, in *Bonaparte v. Railroad Co.*, supra) thus makes the distinction between public and private corporations:

"Generally speaking, public corporations are towns, cities, parishes, existing for public purposes. Private corporations are for banks, insurance, roads, canals, bridges, etc., where the stock is owned by individuals, but their use may be public."

This corporation was further declared in section 10 to have an existence for 25 years. There was then created a private corporation by this statute, and this private corporation, so created, was made an instrumentality of rendering effective a regulation for the promotion of the public health; that is to say, after the legislature had created this private corporation, and had endowed it with certain privileges, in the furtherance of a public law, they made those privileges exclusive. The constitution has taken away whatever the public law gave, and has left a corporation capable, as it seems, of carrying on its business in common with all other people who are engaged in carrying on the same. This is a reiteration of my views upon this subject.

A supplemental and amended bill introduces matter tending to show a motive on the part of the directors in committing a waste which was charged in the original bill; but, since the corporation is not made a party to the bill, the reason which, after the former hearing, seemed to me good against its being possible for the court to entertain it, still remains good. I will not recite the authorities again; they are found in my earlier opinion in the case.

For these reasons, it seems to me that the demurrer must be maintained, and the original and supplemental or amended bill dismissed.

WESTERN UNION TEL. CO. v. CITY COUNCIL OF CHARLESTON et al.

POSTAL TELEGRAPH CABLE CO. v. SAME.

(Circuit Court, D. South Carolina. June 21, 1893.)

1. TELEGRAPH COMPANIES — GOVERNMENTAL AGENCIES — SUIT IN FEDERAL COURTS—TAXATION.

A telegraph company which has accepted the provisions of the act of July 24, 1866, "to aid in the construction of telegraph lines," thereby becomes an agent of the federal government, and is entitled to maintain a suit in the federal courts to enjoin the collection of a state tax, which it alleges will imperil its existence, though the amount in controversy is not sufficient to sustain the jurisdiction of such courts on the ground of diverse citizenship.

2. SAME—TAXATION—INTERSTATE COMMERCE.

A city ordinance provided that "telegraph companies or agencies, each, for doing business within the city of Charleston, and not including business done to or from points without the state, and not including any business done for the government of the United States," should pay an annual license fee of \$500. *Held*, that this imposed a tax, and was valid, because it expressly exempts from its operation interstate and governmental business.

In Equity. These were bills filed by the Western Union Telegraph Company and the Postal Telegraph Cable Company against the city council of Charleston and others for an injunction against the collection of taxes. Bills dismissed.

Smythe & Lee and Mordecai & Gadsden, for complainants.
Charles Inglesby, for defendants.

SIMONTON, District Judge. These two cases, covering precisely the same averments and issues, were heard together. The complainants are corporations, each organized under the laws of New York. Each of them has an office in the city of Charleston, and each is engaged in sending messages by wire to points in the United States, to points outside of this state, and in other countries on this continent, and is connected by cable with the old world. Each of them is thus an instrument of and engaged in interstate commerce. Besides this, each of them, having its lines over the post roads, highways, and railroads in the city of Charleston, state of South Carolina, and in others of the United States, has accepted the provisions of the act of congress approved 24th July, 1866, to aid in the construction of telegraph lines. By this action the company so accepting puts its line at the service of the United States for postal, military, and other purposes, and gives precedence to its messages over all other business. It thus becomes an agent of the government. The bills, having made statements to this effect, proceed to say that the city council of Charleston, assuming to act under an act of the general assembly of South Carolina, passed an ordinance to regulate licenses for the year 1892; that by