II.

FOR WHAT PURPOSE ORGANIZED.

CHESTER vs. DICKERSON.

Commission of Appeals of New York, 1873.

54 N. Y. 1, 13 Am. Rep. 550.

Action brought by Chester and others against Dickerson, Reed, Jones and Dewitt for damages arising from fraud and deceit in the sale of lands. It appeared that in November, 1864, defendants entered into written agreement whereby they agreed to purchase, lease and take refusals of lands on their joint account, and that they should sell, lease or work the lands thus taken. They further agreed that the expenses and losses, gains and profits, should be shared equally. There was evidence that this agreement had existed by parol from September, 1864. Lands were accordingly taken, and Reed entered into negotiations with plaintiffs, and represented the lands to be oil-producing, showing the indications of oil, which it appeared had been produced by petroleum poured on the lands by one Higgs, through the connivance of Jones. The plaintiffs purchased the lands on the faith of these representations and indications, and the purchase money was divided among the defendants. There was evidence that Reed participated in the fraud, but Dickerson was not implicated by the evidence. Dewitt died pending the action. Plaintiffs brought suit against defendants, on discovering the fraud. The court charged that the partnership could exist by parol, and that all of the defendants were liable for the fraud committed by either in and about the partnership. The plaintiffs obtained a verdict and judgment. The general term affirmed

the judgment, and defendants, Dickerson and Reed, appealed to this court.

James Emott, for appellants.

A. Anthony, for respondents.

EARL, C. It cannot be questioned that two or more persons may become partners in buying and selling land. There is nothing in the nature or essence of a partnership which requires that it should be confined to ordinary trade and commerce, or to dealings in personal property. Story on Part., sec. 82, 83; Collyer on Part., sec. 3, 51, and note; *Dudley vs. Littlefield*, 21 Me. 418; *Sage vs. Sherman*, 2 N. Y. 417; *Mead vs. Sheppard*, 54 Barb. 474; *Pendleton vs. Wambersie*, 4 Cranch, (U. S.) 73; *Thompson vs. Bowman*, 6 Wall (U. S.) 316; *Hoxie vs. Carr*, 1 Sumner (U. S. C. C.) 173.

Kent says: "A 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 share the loss in certain proportions; and that it is not essential to a legal partnership that it be confined to commercial business. It may exist between attorneys, conveyancers, mechanics, owners of a line of stage coaches, artisans or farmers, as well as between merchants and bankers," 3 Kent's Com. 24, 28; and why may it not exist between dealers and speculators in real estate?

But, as it is claimed that the partnership in this case existed by parol before the execution of the written agreement, dated November 28, 1864, it is necessary to inquire whether a partnership, in reference to lands, can be formed and proved by parol. Upon this question there is considerable conflict in the authorities. On the one hand it is claimed that a parol agreement for such a partnership would be within the statute of frauds which provides that no estate or interest in lands shall be created, assigned or declared, unless by act or operation of law, or by a deed or conveyance in writing subscribed by the party creating, granting, assigning or declaring the same; and to this effect is the case of *Smith vs. Burnham*, 3 Sumner 435. On the other hand it is claimed that such an agreement is not affected by the statute of frauds, for the reason that the real estate is treated and administered in equity as personal property for all the purposes of the partnership. A court of equity

having full jurisdiction of all cases between partners touching the partnership property, it is claimed that it will inquire into, take an account of, and administer upon all of the partnership property, whether it be real or personal, and in such cases will not allow one partner to commit a fraud or a breach of trust upon his copartner by taking advantage of the statute of frauds; and to this effect are the following authorities: *Dale vs. Hamilton*, 5 Hare 369; *Essex vs. Essex*, 20 Beavan 449; *Bunnell vs. Taintor*, 4 Conn. 568. A full discussion of the question is found in *Dale vs. Hamilton*; and the reasoning and review of the cases there by Vice Chancellor Wigram are quite satisfactory. The general doctrine is there laid down that "a partnership agreement between A and B that they shall be jointly interested in a speculation for buying, improving for sale and selling lands may be proved without being evidenced by any writing, signed by or by the authority of the party to be charged therewith within the statute of frauds; and such an agreement being proved, A or B may establish his interest in land, the subject of the partnership, without such interest being evidenced by any such writing." I am inclined to think this doctrine to be founded upon the best reason and the most authority. But whether it is or not, it is not very important to decide in this case. Most of the conflict in the authorities has arisen in controversies about the title to the real estate after the dissolution of the partnership or the death of one of the partners. But suppose two persons, by parol agreement, enter into a partnership to speculate in lands, how do they come in conflict with the statute of frauds? No estate or interest in land has been granted, assigned or declared. When the agreement is made no lands are owned by the firm, and neither party attempts to convey or assign any to the other. The contract is a valid one, and in pursuance of this agreement they go on and buy, improve and sell lands. While they are doing this, do they not act as partners and bear a partnership relation to each other? Within the meaning of the statute in such case neither conveys or assigns any land to the other, and hence there is no conflict with the statute. The statute is not so broad as to prevent proof by parol of an interest in lands; it is simply aimed at the creation or conveyance of an estate in lands without a writing. If there was a parol agreement in this case before the written one, it was just like the one

embodied in the writing, to wit, a partnership to purchase, lease and take refusals of land and then sell, lease or work them for the joint benefit of the parties. This is not a controversy about the title to any of the lands taken or owned by the partners, but it simply relates to the conduct of the defendants while they were acting as partners; and in such a case the statute of frauds certainly can present no obstacle to relief.

We then come to the question whether there was sufficient proof of the existence of this partnership by parol before the 28th of November, 1864, and I cannot doubt that there was. Jones distinctly testified that the partnership between all the defendants did exist as early as September, and that it was afterwards put into writing. Neither Reed nor Dickerson, in their testimony, denied this, and neither of them claimed that they did not become partners until the writing was executed. There is abundant evidence that Reed was associated with Jones as early as the later part of September, or the fore part of October. It does not appear how or by what negotiation the members of the firm were brought together in partnership, and it does not appear through what agency Dickerson was induced to join with the others. As to him, all we have is the evidence of Jones, above referred to, and the writing, and the fact that he, subsequently, without objection, in the division of the money received from the plaintiffs, allowed his share of the sums paid for the services of Higgs, who was employed to pour oil upon the lands, from some time about the first of September. Hence we must take it as proved, in this case, that this partnership existed as early as September, 1864. But it is claimed, on the part of the appellants, that all the rules of commercial partnerships do not apply to partnerships in real estate. They apply to every other kind of partnership, and why not to this? This kind of partnership is formed like every other, for the mutual profit and advantage of the parties, and there is no reason why it should not be governed by the same rules.

In all partnerships one partner is the general agent of all the partners for the transaction of all the partnership business, and I can perceive no reason for not applying the same rule of agency to partnerships in real estate. In fact, all the powers, duties and rights which usually appertain to partner-

ships must appertain to partnerships in real estate, except as they are modified by the character of the property; and the only difference grows out of the rules of law in reference to the conveyance and transmission of real estate. One partner cannot convey the whole title to real estate unless the whole title is vested in him. *Van Brunt vs. Applegate*, 44 N. Y. 544. But he can enter into an executory contract to convey, which a court of equity will enforce. While a contract for the conveyance of land must be in writing, yet an agent to execute the contract may be appointed by parol. *Willard* on *Real Estate*, 376. And hence, when the partnership business is to deal in real estate, one partner has ample power, as general agent of the firm, to enter into an executory contract for the sale of real estate. I find no authority holding that the rules of ordinary commercial partnerships do not apply to partnerships in real estate, except the case of *Pitts vs. Waugh*, 4 Mass. 424. It was there held that the law merchant respecting dormant partners did not extend to speculators in land. The learned judge writing the opinion did not cite any authority for the decision he made, and his reasons for the conclusions which he reached are not satisfactory.

Dormant partners are held liable for the debts and contracts of the firm, because they are, in fact, members of the firm, and share in its profits, and the law will not allow them secretly to share in the profits of the firm without taking their share of the risks and bearing their share of the losses, as to third persons. And there is precisely the same reasons for holding a dormant partner in a real estate partnership liable to all persons dealing with the firm. In *Patterson vs. Brewster*, 4 Edw. (N. Y.) Ch. 352, the vice chancellor expressed the opinion that the law merchant does not apply to partners in buying and selling land. This case and *Pitts vs. Waugh* are commented on by Judge Mitchell in *Benner vs. Harrison*, 19 Barb. 53, and are there shown not to be precise authority for the doctrines announced. It follows, therefore, that the court committed no error in holding that all the partners were liable for the frauds committed by either in the transaction and prosecution of the partnership enterprise, for it is well settled that the firm is bound for the fraud committed by one partner in the course of the transactions and business of the partnership, even when the other partners have not the slightest connection

with, or knowledge of, or participation in the fraud. Story on Part., sec. 108. Collyer on Part., sec. 445; *Griswold vs. Haven*, 25 N. Y. 595, 82 Am. Dec. 380.

[The remainder of the opinion is unimportant.]

Judgment affirmed.

NOTE: For other cases bearing upon partnerships organized for the purpose of dealing in land, see Mechem's Elem. of Partn., § 17 and notes.

WOODWORTH vs. BENNETT.

Court of Appeals of New York, 1870.

43 N. Y. 273, 3 Am. Rep. 706.

Appeal from a judgment of the supreme court affirming a judgment allowing a counter claim, in favor of the defendant Bennett and against the plaintiff Woodworth for $100. Opinion states the facts.

C. F. Bicknell, for appellant.

Charles Mason, for respondent.

CHURCH, C. J. The point in this case is, whether the court below erred in allowing to the defendant the sum of $100 as an offset. The facts are substantially as follows: The plaintiff, defendant, Stephens and Truesdell, made an agreement in the nature of a copartnership, to propose or bid for public work on the Seneca river improvement. The bid was to be put in in the name of the plaintiff alone, the defendant and Stephens to become sureties. Truesdell was at the time an engineer in the employ of the State on the canals. The bid was made in the name of the plaintiff, in accordance with the arrangement. Before the work was awarded, the said parties made an agreement with one Haroun, to withdraw their claim to the work, and sell their bid to him for $400 (he being a higher bidder for the same work), which was consummated, and he gave his note for the amount. It was then arranged that the note should be left with the plaintiff for collection, and that when collected each of said persons should be entitled

to $100. The plaintiff collected the note, paid to Stephens and Truesdell each $100, and promised to pay the defendant, and apply it on their deal, but never did. It is claimed that it cannot be allowed, on account of the illegality of the transaction out of which it arose. To enable the court to apply correct legal principles, it is necessary to analyze the transaction and ascertain its true nature and character.

The original arrangement for a joint interest or copartnership was illegal, and contrary to a positive statute in two respects. The law of 1854, chapter 329, in substance requires that every proposal for work shall contain the names of all persons who are interested, and prohibits any secret agreement or understanding that any person not named shall become interested in any contract that may be made, and engineers, and all other persons in the employ of the State on the canals, are also prohibited from becoming interested in any contract or job on the public works.

In the next place, the transaction with Haroun was contrary to public policy, and illegal. It is manifest that the object and purpose of the purchase of the bid was to have it withdrawn so as to enable Haroun to take the contract upon a higher bid. This was directly against the interests of the State, and tended to destroy that honest competition which public bidding is designed to secure; and when, as in this case, it was done partly for the benefit of an officer of the State, whose duty it was to protect its interests, it was not only contrary to public policy, but was grossly corrupt.

The supreme court placed its decision in favor of the defendant, upon the ground that as between these parties, the illegal contract had been fully executed when Haroun paid the money, and that the plaintiff then became a mere depositary, and held the money for the use of the other parties.

It is undoubtedly true that, if the contract or obligation does not depend upon nor require the enforcement of the unexecuted provisions of the illegal contract, it will be carried out. It has been laid down as a test, that whether a demand connected with an illegal transaction is capable of being enforced at law depends upon whether the party requires any aid from the illegal transaction to establish the case: *Chitty* on *Con.* 657. So it has been settled that where a party pays money to a third person for the use of another, which, on account of

the illegality of the transaction, he was not obliged to pay, such third person cannot interpose the defense of illegality [to an action for the money brought by the person for whose use it was so paid]. *Tenant vs. Elliott*, 1 Bos. & Pull. 3; *Merritt vs. Millard*, 4 Keyes, (N. Y.) 208. This principle is based upon the undoubted right of a person to waive the illegality, and pay the money; and that when once paid, either to the other party directly or to a third person for his use, it cannot be recalled; and that the third person, who was in no way connected with the original transaction, cannot avail himself of a defense which his principal saw fit to waive.

If the only illegal transaction was the contract with Haroun for the sale of the bid, these principles might be applicable, and would probably constitute a good answer to the objection to this counter claim. The payment of the money by Haroun completed that contract, and nothing remained unexecuted. But here the original partnership was illegal; not because of its purposes and objects, but its composition was prohibited by law. If a lawful firm should receive funds from an illegal traffic or business, it may be that the illegality would be regarded at an end, and a division of the money enforced by virtue of the rights of the members under the contract of partnership. This is the utmost limit to which the rule can be carried: *Brooks vs. Martin*, 2 Wall. (U. S.) 70.

In such a case the obligation to divide would not arise out of the illegal purposes of the firm, nor would the division carry out any of those purposes, but the obligation would arise out of the contract of partnership itself. Here this contract was illegal. The object of the statute was to enable the State officers to know with whom they contracted, and also to see that the statute, prohibiting engineers and other canal officers from becoming interested, was not violated, and to prevent all secret combinations in relation to obtaining work.

The money obtained by this bid belongs to the firm; and the plaintiff could have been compelled to divide, if the firm had been lawful, by force of the contract organizing it. In this case he also agreed to pay the money, and defendant asks the court to compel him to perform this obligation. The answer to it is obvious. There is no obligation, because it was incurred contrary to law. It rests upon the contract of partnership, and that is void for illegality.

In law there was no partnership, and none of the parties obtained any rights under the contract creating it: *Armstrong vs. Lewis*, 3 Mylne & Keene 45.

The sentiment of "honor among thieves" cannot be enforced in courts of justice. Suppose the engineer had sued for his share after an express promise, would any court have tolerated his claim for a moment in the face of a statute prohibiting him from being interested? If not, in what respect does the defendant occupy any better position? The first step in his case is to prove that he was a secret partner and entitled to a share of this money. The law prohibits secret partners, and he is, therefore, not a partner.

The express promise does not aid the defendant, because the promise was only to carry out the unexecuted provision of the contract of partnership to divide the money. The two cases cited by the counsel for the defendant, if they are to be reregarded as good law, are distinguishable from this. In the case of *Faikney vs. Renous*, 4 Burr. 2069, one of two partners had paid £3,000 to settle differences in illegal stock-jobbing operations, and the defendant executed his bond to secure the share of the other partner. The court overruled the defense recognizing the exploded distinction between acts *malum prohibitum* and *malum in se*, and held that as between those parties the bond was to secure the plaintiff for money paid, and the purposes of the payment would not be inquired into. A similar decision was made upon the authority of this case in *Petrie vs. Hannay*, 3 Term Report 418, Lord KENYON dissenting. The distinction between the above cases and this is in the circumstance that there the illegal transactions had been closed up and settled, and the obligations sought to be enforced were for the money advanced for that purpose. Here it is sought to consummate the illegal contract by a new agreement that it shall be performed. No case has gone this length, and the two cases above cited have been very much shaken by subsequent decisions, and are, to say the least, questionable authority, especially the latter: *Aubert vs. Maze*, 2 Bos. & Pul. 370; *Mitchell vs. Cockburne*, 2 H. Blackstone 380; *Ex parte* Daniels, 14 Ves. 190; *Lowry vs. Bourdieu*, 2 Douglas 467; *Brown vs. Turner*, 7 Term Rep. 630; *Belding vs. Pitkin*, 2 Caines (N. Y.) 147, note *a*.

The general rule on this subject is laid down in this court,

in *Gray vs. Hook*, 4 N. Y. 499, by MULLETT, J., as follows: "The distinction between a void and a valid new contract in relation to the subject-matter of a former illegal one depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecuted provisions of the former contract, or whether it is based upon a moral obligation growing out of the execution of an agreement which could not be enforced by law, and upon the performance of which the law will raise no implied promise. In the first class of cases, no change in the form of a contract will avoid the illegality of the first consideration, while express promises based upon the last class of considerations may be sustained."

It is sometimes difficult to apply general rules to particular cases, but this case comes clearly within the first class mentioned in the above rule. It is not from any regard to the rights of the party setting up this defense that courts refuse to enforce illegal contracts, but it is for the protection of the public. The plaintiff in this case is entitled to no sympathy or favorable consideration. He must have made an affidavit that no other person was interested with him in the proposal, and when he received this money, as between him and the defendant, the latter was entitled to it; and while we have no disposition to justify his conduct, his position enables him to secure the advantage of a decision which we are compelled to make in obedience to a principle of public policy which is indispensable for the protection of the community against the corrupting influences of illegal transactions.

The observation of Lord MANSFIELD in *Holman vs. Johnson*, 1 Cowper 343, is applicable here. He said: "The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant (in this case the plaintiff). It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say."

Judgment must be reversed and a new trial ordered, costs to abide the event.

All the judges concurring.

Judgment reversed and a new trial ordered.

NOTE: See following case.

CRAFT vs. McCONOUGHY.

Supreme Court of Illinois, 1875.

79 Illinois, 346, 22 Am. Rep. 171.

Bill in equity by McConoughy against Craft and others for an account and distribution of the profits of an alleged partnership existing under the contract referred to in the opinion. The defense was that the contract was void as in restraint of trade and opposed to public policy. Decree below for complainant and defendants appeal.

M. D. Hathaway, *Wm. Barge* and *S. Dixon*, for defendants.

Jas. K. Edsall, for complainant.

CRAIG, J. (After stating the facts.) Two questions arise upon the record: First, whether the contract set out in the bill is void. Second, if illegal and void, will a court of equity, after it has been executed, require one of the parties to account to another for a portion of the gains arising under the contract?

Prior to and up to the time of the execution of the agreement set out in the bill, the four parties were engaged in the grain business in the town of Rochelle, each one on his own account, and in competition with each other, but, after the agreement was executed, all competition ceased. All the warehouses in the city, and every lot suitable to erect a warehouse upon, were controlled by the combination. Some were purchased and others were leased, so that the combinations formed effectually excluded all opposition in the purchase, sale, storage and shipment of grain in that market.

Secret meetings were held in the night time by the parties to the contract, at which the price to be paid for grain was agreed upon, rates for storage and shipment fixed, in order that the public should be kept in ignorance of the plans and operations of this illegal combination.

To the public the four houses were held out as competing firms for business. Secretly they had conspired together, and were working in a common cause, in the sole interest of each other.

The language used in the contract itself leaves no room for doubt as to the purpose for which the agreement was entered into, as a few extracts will show: "Each separate firm shall conduct their own business as heretofore, as though there was no partnership in appearance, keep their accounts, pay their own expenses, ship their own grain, and furnish their own fund to do business with." * * * "Prices and grades to be fixed from time to time as convenient, and each one to abide by them. All grain taken in store shall be charged one and one-half cents per bushel monthly." * * * "No grain to be shipped by any party at less rates than two cents per bushel."

While the agreement, upon its face, would seem to indicate that the parties had formed a copartnership for the purpose of trading in grain, yet, from the terms of the contract, and the other proof in the record, it is apparent that the true object was to form a secret combination which would stifle all competition, and enable the parties, by secret and fraudulent means, to control the price of grain, cost of storage, and expense of shipment. In other words, the four firms, by a shrewd, deep-laid, secret combination, attempted to control and monopolize the entire grain trade of the town and surrounding country.

That the effect of this contract was to restrain the trade and commerce of the country is a proposition that can not be successfully denied.

We understand it to be a well settled rule of law, that an agreement in general restraint of trade is contrary to public policy, illegal and void, but an agreement in partial or particular restraint upon trade has been held good, where the restraint was only partial, consideration adequate, and the restraint reasonable.

This subject was ably discussed in the leading case of *Mitchel vs. Reynolds*, 1 P. Williams 181; see, also, 1 Smith's Lead. cases, 172, and notes, and the rule of law established, which has been followed and adhered to in numerous cases since.

In reference to the point, what might be regarded a reasonable restriction, numerous cases might be cited, but what was said in *Horner vs. Graves*, 7 Bing. 743, 20 Eng. Com. L. 330, will illustrate the principle. Tindal, C. J., said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is

such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either. It can only be oppressive, and if oppressive, it is, in the eye of the law unreasonable. Whatever is injurious to the interest of the public is void, on the ground of public policy."

If, therefore, the restraint imposed by the contract in question was but partial, as insisted upon by the complainant, as it was unreasonable, oppressive and injurious to the public, it cannot be sanctioned in a court of equity.

While these parties were in business, in competition with each other, they had the undoubted right to establish their own rates for grain stored and commissions for shipment and sale. They could pay as high or low a price for grain as they saw proper, and as they could make contracts with the producer. So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guaranty the public required, but the secret combination created by the contract destroyed all competition and created a monopoly against which the public interest had no protection. *Morris Run Coal Co. vs. Barclay Coal Co.*, 68 Penn. St. 173, 8 Am. Rep. 159.

It is, however, insisted that, even if the contract was contrary to public policy, as it has been executed, a court of equity will require an account.

The rule is, however, well settled in this State, that a court of equity will not lend its aid in the division of the profits of an illegal transaction between associates. *Neustadt vs. Hall*, 58 Ill. 172; *Skeels vs. Phillips*, 54 Ill. 309; *Jerome vs. Bigelow*, 66 Ill. 452.

The complainant and the defendants were equally involved in the unlawful combination. A court of equity will assist neither.

The decree will be reversed and the cause remanded.

Decree reversed.

NOTE: For other cases upon the effect of illegality in the purpose, see Mechem's Elem. of Partn., §§ 18, 20.