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No. \_\_\_\_\_

# Supreme Court of Illinois

*David Hammer*  
~~Antoine~~ Ward,† et al,

---

vs.

Musgrove

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In the Supreme Court, State of Illinois.

FIRST GRAND DIVISION,

At Mount Vernon----November Term, A. D., 1861.

ARMSTEAD WARD & DAVID HAMMER,

vs.

STEPHEN MUSGROVE.

} Error to Jasper.

A B S T R A C T .

This was a Bill in Chancery filed in the Jasper Circuit Court by the defendant in error against the plaintiff's in error.

- 2] The bill alleges that Ward purchased a lot of cattle of one Preston—
- 3] that afterwards Musgrove purchased of Ward a one half interest in said cattle, constituting them partners therein—that nothing was paid by
- 4] Musgrove—agreed to drive the cattle to Chicago to market—were to share equally in the profits, and reinvest the proceeds in other stock—that
- 5] after complainant had started with the cattle, Ward came to him and
- 6] informed complainant that he had sold one half of the cattle to Hammer, the plaintiff in error—avers that said sale to Hammer was made without complainants knowledge, and that it was made for the purpose of defrauding complainant out of his interest in said cattle—that said cattle were sold at a great advance on what they were to complainant when he purchased, and
- 7] great gains were made thereon—that said Ward and Hammer received the money arising from such sale and-refused to account to complainant—that Hammer, at the time of his pretended purchase, knew that complainant owned one undivided half of said cattle, and that he and Ward were partners.
- 8] Prays that Ward and Hammer be made defendants—that said partner-
- 9] ship be dissolved—that an account be taken, &c., and that defendants be decreed to pay to complainant one half the profits arising from the sale of such cattle—waives the oath of defendants to the answer.

A N S W E R . O F . W A R D .

- 12] Admits that he proposed a partnership with complainant if complainant would make him secure and furnish one half the expense money in taking cattle to market; that complainant, after endeavoring to do so, entirely failed to give such security or furnish such expense money; that thereupon he sold
- 13] one half of said cattle to Hammer; that said Musgrove then abandoned all pretence of having any interest in said cattle, and engaged with said
- 14] Hammer as a hand to assist in driving the cattle to market; that Musgrove was not responsible for his debts; avers that but small profits were made; denies all other allegations.



15] Denies all knowledge of sale to complainant; admits that he purchased of Ward one half of the cattle; says the profits were but little if anything; avers that all the time said Musgrove pretends he was in partnership with Ward he was in the employment of Hammer for wages.

17] GENERAL REPLICATION FILED.

28] At October term, 1859 a jury was empanelled by order of the Court to try the following issues, viz:

1st. Whether a partnership did or did not exist between said Ward and Musgrove as charged in complainants bill.

2d. If the jury find for Musgrove on the first issue, that they then find what profit, if any, was realized on said cattle, and how much is due thereon to said Musgrove if anything.

29] The jury returned the following verdict: "We, the jury, find the first issue in favor of the complainant; and, on the second issue, we, the jury, find for the plaintiff the sum of three hundred and forty seven dollars and fifty cents. The court then ordered that said partnership be considered as closed, "and that the said defendant pay to the said complainant the sum of three hundred and forty-seven dollars and fifty cents, so found as 30] aforesaid, as the nett balance due the complainant from the said defendant on a final settlement of said partnership," and that execution issue, &c., and that defendant pay the costs.

EVIDENCE OF COMPLAINANT.

32] Wm. Gross said: Was employed in spring of 1855, by Musgrove, to 33] help drive the cattle to Chicago; understood from both Musgrove and Ward that they were partners in the cattle; we started about the 16th of May 1856 with the cattle from Crawford County; were about one hundred and eleven head. I went to Chicago. We sold 6 or 7 head on the road at prices varying from \$20 to \$35. The rest were sold in Chicago market 34] except three lost on the road. They were sold at \$25 a head all round except two yearlings which were sold for \$10 each. Both complainant and defendants transacted their business together, and were with the drove until sold out. I kept their accounts for them, and by their directions kept an account of the expenses of each on the road.

36] P. Sowers said: I was employed by the parties. Ward asked Musgrove if he would not like to go into a partnership; they then stepped aside and had a private conversation; Ward afterwards said that they had agreed to go into partnership. Musgrove, Ward and witness all started with the cattle; went as far as Cumberland County, when Ward went home, leaving Musgrove and witness with the cattle; Ward returned in three days; Musgrove employed three hands; Musgrove paid hands employed in taking care of the cattle. On cross examination witness said Musgrove and Ward were both present when the three hands were hired and both hired them, and that 37] these hands had been hired before Musgrove saw the cattle; said he could not state certainly that he saw Ward pay these hands, and that he did not see Hammer while with the cattle. Samuel Musgrove said: Was present at the conversation spoken of by witness Sowers; heard Ward ask Musgrove if he would not like to go into a speculation in which he could make \$1,000 or \$1,500; Ward asked witness to remain until he and Musgrove went to 38] Crawford county to look at the cattle; heard Ward say afterwards that he had taken complainant in as a partner.

R. H. Jones said: After the cattle were sold in Chicago, Ward said he would have to give Musgrove \$25, as he had sold the cattle to Hammer; 39] said he went to R. Carr to enter into partnership with him, and that Carr declined, and he then proposed a partnership to Musgrove; that Ward



was to have the selling of the cattle and handling the money as security because Musgrove was not responsible. On cross-examination said that Hammer paid Musgrove \$18 per month for all the time Musgrove was gone to Chicago. The payment of said \$25 was by crediting an account held by Ward against Musgrove.

H. Dulgar said: I had a conversation with Ward directly after their return from Chicago, and to the best of my recollection he said if they suc-  
40] ceeded in collecting their money they would make about \$800. That they had sold the cattle on credit, with the exception of the profits which they had taken in store goods, mostly knitting needles.

W. Swick said: Heard Ward say once that he had taken Musgrove in as a partner. On cross-examination said he thought he and Ward might have had a laugh over the idea of a partnership with Musgrove, but can't remember certain.

Perry Songer said: Heard Ward say they had sold out and made a small profit, about \$800, if they ever got their money; that they had sold on time; heard Ward say that about the time the cattie were taken off he had sold them to Hammer and in the operation he had made about \$25 for Musgrove. Heard Ward say the contract between him and Musgrove was that Musgrove should share half the loss, half the profits and pay half the expense, and in the sale to Hammer, Musgrove would be entitled to \$25 as his profits. That Ward was to do the trading, and Musgrove was to stay with the cattle. Said he had sold the cattle to Hammer for fifty cents profit per head. That the profits spoken of by Ward were paid in store goods.

#### DEFENDANT'S EVIDENCE.

J. Fuller said: The cost of driving cattle to Chicago would be about one dollar per head.

J. E. James said: Had a conversation with Musgrove in Chicago, about these cattle. Musgrove said in the first place he contracted for and was to have an interest in the cattle, but now Ward had took the cattle and sold them he was only a hired hand, and had no interest in the cattle whatever. Just then Mr. Hammer came in and the conversation was interrupted before Musgrove was through.

48] H. H. Massy said: I had a conversation with Musgrove about buying the cattle, much of which I don't recollect. I finally made him an offer for them: he said he had not the right to sell, as *he did not own any*  
49] *interest in them.* After he told us he could not sell, he said there was a man at the wagon who could sell them.

53] This was all the evidence. The bill of exceptions shows that the jury returned a verdict in favor of complainant for \$350 50. Defendant moved to set aside the verdict and for a new trial, which motions were overruled and judgment entered on the verdict; to which defendant at the time excepted.

#### ASSIGNMENT OF ERRORS.

1st. The Court erred in refusing to set aside the verdict of the jury, and in overruling the motion for a new trial.

2d. The Court erred in entering a judgment against defendant below, Hammer.

3d. Said record is in other respects informal and erroneous.



BRIEF FOR PLAINTIFF IN ERROR.

1st. The verdict was against the weight of evidence. The admissions of Ward were made before the sale of the cattle, while those of Musgrove were made after the sale. If a partnership had existed Musgrove clearly admits that it was terminated, and that he had no interest in the cattle. The complainant's own testimony shows that he was working for wages, and that he received his pay from Hammer.

2d. But if the Court would not disturb the verdict for this reason, it is clearly erroneous to enter a judgment against Hammer. He had purchased one half of the cattle; and so far as he is concerned it is immaterial whether it was the half alleged to be sold to Musgrove or not. He was entitled to one half of the proceeds of the cattle, and it is not pretended he received more; yet this judgment makes him liable to pay to Musgrove the whole amount decreed to him, in case it can not be collected of Ward, without showing any improper conduct on his part. For these reasons we insist the decision of the Court below ought to be reversed, and a new trial awarded.

E. BEECHER,

*For Plaintiffs in Error.*



*See*

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ANSWER OF HAMMER.

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