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Fact that a certificate for the formation of a limited partnership, as provided by the statute, is made out and signed by the parties, but is not recorded, has no tendency, in the absence of extrinsic evidence, to show that they actually entered into business as partners, to prove a general partnership. 37

37 Gray v. Gibson, 6 Mich. 300.

FARMING ON SHARES.

The courts have been called upon in a number of cases to pass on the question of the relation which exists between the owner of the land, and one who works it upon shares under an agreement with the owner. The number of times that this question has been presented, is evidence of the uncertainty and perplexity which have been supposed to prevail in relation to the matter. As the question involved is not without its importance, it may be interesting to consider the subject, and ascertain what the principles are which govern in such cases.

The cases on this subject may be classified under three heads, as giving rise to the relations of partners, of tenants in common, and of landlord and tenant. We shall consider them in this order. We may observe in the first place, that it is settled that the mere fact that it is agreed that the one shall furnish the land, and that the other shall occupy and cultivate the land, dividing the crops in a certain proportion, will not create the relation of partners between the parties so contracting. 1 It is clear that such an agreement does not contain any essential element of a partnership, but it has been held that where the owner of the land was to furnish half the labor and the necessary teams, the other party giving his personal services to the supervision of the cultivation of the farm, the expenses of the plantation to be borne by them equally, and the proceeds to be equally divided between them, that a partnership was thereby created between them. 2 So where the agreement was that one should contribute the land and stock for its cultivation, and that the other should contribute personal skill and labor, and other stock, each to furnish a specified proportion of the food for the animals, and to pay equally the expenses of the plantation, the crops to be equally divided between them, it was held that the contracting parties were partners, and not tenants in common. The court declared that there was, perhaps, no question of greater difficulty and more embarrassed by contrariety of judicial decision, "than to determine when a contract like that we are considering creates a partnership inter se, or an agency or employment for services in the one party, or a tenancy in common of the profits or products of a common enterprise." There being manifestly a community of interest in profit and loss under the contract in question, the court determined the relation existing between them to be that of partners. 3 So in a case in North Carolina a similar conclusion was arrived at, where the agreement was that one was to furnish the outfit and the land, and the other was to hire the laborers and superintend the farm, the former agreeing to provide money to carry on the business, half of which was to be repaid to him, the profits to be divided between them. 4 So, too, in a case in the Supreme Court of Georgia, where two had agreed that one should furnish the land and stock, the other the labor and the pay for it, while each was to pay one-half the feed of the stock and laborers and all other plantation expenses, and when the crop was made they were to divide the same share and share alike, the ruling was that as to the crop thus made, the parties were inter se partners. 5 In another case in the same court, where a father and son farmed together under an agreement that the father was to furnish the land and the stock, and the provisions for the stock, while the son was to furnish the hands and to superintend the work, the crop being equally divided between them, it was held that so far as third persons were concerned, they were partners in the enterprise. The evidence, said the court, "shows that they were jointly interested in the profits and losses of the

2 McCrary v. Slaughter, 58 Ala. 299.
3 Autrey v. Frieze, 59 Ala. 587.
4 Reynolds v. Pool, 84 N. C. 37.
5 Hollifield v. White, 52 Ga. 507.
It is evident that where the agreement is of such a nature that the parties are to share in the profits and losses of the enterprise, the courts hold that the parties are, as between themselves at least, partners. So, where there is a contract by which a laborer undertakes to make a crop for a given share of it, it is held that the contract does not create a partnership between the parties. Contract may create the relation of partnership; one partner does not possess any power as to such as to borrow money, or to draw and indorse bills of exchange or promissory notes. The relation must be governed by the general rules of partnership, and one partner has not, without the consent of the other, any power to bind the partnership by any contract not connected with the partnership business, and within its scope. The power to borrow money, or to draw and indorse bills and notes, does not pertain to such a partnership any more than it does to the partnership of law or of medicine. Such a power is not necessary or appropriate to the business of farming.

If we pass now to those cases which hold that the relation between the parties is that of tenants in common, we shall be compelled, in the same connection, to consider the third class of cases, holding that the relation is that of landlord and tenant. The cases run into each other, and can not be very well separately considered. In Stewart v. Dougherty, decided as early as 1812, the New York Supreme Court passed on the character of the contract. In that case the articles of agreement declared that the owner of the land "rented and hired, and suffered the lessee to possess and enjoy the farm, and gave him the quiet and uninterrupted possession," etc. It was further agreed that the owner was to receive one-half of the crops which should be raised under the agreement. Mr. Chief Justice Kent delivered the opinion of the court, saying: "An interest in the soil passed, and the lessee would have been entitled to an action of trespass, for any unlawful entry upon it; the proportions of the productions of the farm which the tenant was yearly to render, was a payment of rent in kind. They were not tenants in common of the crops and productions raised. The interest and property in the crops was exclusively in the tenant, until he had separated and delivered to the lessor his proportion." But in 1841 the same question was again raised in that court, and this time a contrary conclusion was reached, the case being that of Putnam v. Wise. In this case, the words of demise and covenant to pay a share of the crop, were almost literally, and, in the opinion of the court, clearly in legal effect, the same as in the earlier case. The opinion was announced by Mr. Justice Cowen, and there was no dissent. The authorities were carefully considered. "It is a case in which we should not not to tie ourselves up to the consideration of mere words;" so runs the opinion. "The substance should be looked at; and that, as it would be universally understood among farmers, is an agreement between owners and occupants, that the latter should come in rather as servants than tenants; each party taking an interest as common owners in the crops and other products as they accrue, by way of compensation to the owners for the use of their farm, and the occupiers for their labor. The test seems to lie in the question, whether there be any provision, in whatever form, for dividing the specific products of the premises. If there be, a tenancy in common arises, at least in such products as are to be divided. The occupier being a mere servant, it is said, can not bring trespass quare clausum fregit, but the owner only. His possession is that of the owner. He has no interest in the land which he can assign, and on his death the contract would be at an end."

In Caswell v. Dietrich, decided by the same court in 1836, five years prior to Putnam v. Wise, and twenty-four years after the case of Stewart v. Dougherty, the court held, as in Putnam v. Wise, that the agreement between the parties was not strictly a lease. "There is nothing," said Mr. Justice Nelson,
which indicates that the stipulation for a portion of the crops was by way of rent; but the contrary. The shares were of the specific crops raised upon the farm. It is very material to the landlord, and no injury to the tenant, that this view of the contract should be maintained, unless otherwise clearly expressed, for then the landlord has an interest in the extent of his share in the crops. If it is deemed rent, the whole interest belongs to the landlord, and no injury to the tenant. Where a farm is let for a year upon shares, the landlord looks to his interest in the crops as his security, and thereby is enabled to accommodate tenants, who otherwise would not be trusted for the rent. It was held that the parties were tenants in common of the crops, and a distinction was taken between the case under consideration and that of Stewart v. Doughty. In respect to this distinction, it is interesting to note the observation of Mr. Justice Cowen in Putnam v. Wise, which was as follows: "He (Nelson, J.,) thought the case distinguishable from Stewart v. Doughty, where the phraseology being that usual in leases, could not be got over by the agreement to pay in shares from the specific crops. With deference, I have not been able to make any substantial distinction in the phraseology. Independently of the fact that the rent was confined to a share in the specific crop, it would, as appears to me, in both cases, have operated to make a lease." Putnam v. Wise must be regarded as flatly overruling Stewart v. Doughty. And the former case must be regarded as stating the law of New York at the present time. That case has never been overruled, but the courts have recognized and followed it in subsequent cases. The last time the subject was considered in New York was in 1868, in Taylor v. Bradley. The opinion was delivered by Mr. Justice Woodruff, who was evidently dissatisfied with the opinion expressed in Putnam v. Wise, for he declared: "If the question were new, I should say, unhesitatingly, that each case ought to be chiefly governed by the language employed by the parties to express their intention. Nor do I perceive any legal objection to a stipulation in a lease for the payment of rent in wheat or other product of the land leased," and more to the same effect. He, nevertheless, felt bound by authority to adhere to the doctrine announced in Putnam v. Wise, saying: "Notwithstanding these suggestions, the balance of the authorities above cited seems to be, that, notwithstanding the technical terms employed, such an agreement does not amount to a technical lease; that the relation of landlord and tenant is not contemplated, and the portion of the crops reserved to the owner is not rent, but compensation for the use of the land, while the other portion is compensation to the occupier, for his work, labor and services, etc.; and that the legal possession of the land is in the owner, and the two are tenants in common of the crop." Other New York cases to the same effect are cited in the note below. 

A similar view of this question has been taken in Vermont. In Aiken v. Smith, decided in that State in 1849, the articles of agreement set forth that the said Smith "agrees to let" his farm, etc., the produce to be divided equally. The question arose, whether the agreement was such as to constitute a lease of the land, and vest the whole interest in the crops in the lessee. The court declared that it doubtless gave the party of the second part an interest in the land, yet that it did not constitute a lease of the land. "No obligation rests upon Austin to pay any certain quantity of produce, and the right of Smith to demand any is contingent, and dependent upon what may be raised, be the same more or less. We think the parties could have only contemplated a common interest in the crops." They were held to be tenants in common of the crops. 

In Lowe v. Miller, decided in the court of appeals of Virginia in 1846, the facts were as follows: One who was in possession of land to which he had no title, but which he was authorized to rent out for his own benefit, made a written contract to let the land for a year to one A, who was to board him and his family, work the crop and give him one-half of it when gathered. It was held that this could not be considered a lease rendering
rent in kind, as the reservation of the one-half of the crop was not incident to the reversion, and consequently gave no right of distress. The parties were considered joint tenants of the crop.

In Somers v. Joyce,\(^{19}\) decided in 1873, the agreement was that A "leased, demised and to farm let," and that the products were to be divided. The opinion was by the former Chief Justice of the Supreme Court of Connecticut, sitting as arbitrator. It was held that the agreement was not a lease, and that the parties were joint owners of the products. The theory that such an agreement constituted a lease was said to be "now generally repudiated, except where the terms of the contract clearly indicate that the parties intend to come into the relation of mere lessor and lessee." Another case decided in the Supreme Court of that State seems to be to the same effect.\(^{20}\)

Is there any rule of law which will prevent the occupant of land under an agreement which constitutes him a tenant in common with the owner in the crops, from having as entire a control over the premises during the term as a tenant covenanting to pay a money rent would have? In other words, can those who are tenants in common of the crops stand to each other in the conventional relation of landlord and tenant? From the opinion just quoted it is evident that in New York the opinion seems to be that the relation of landlord and tenant does not exist between the parties in such cases. This precise question was considered in California in 1864, in Walls v. Preston,\(^{21}\) the opinion being announced by Mr. Justice Rhodes, who said: "We can see nothing incompatible in the tenancy of the land under a lease, being, at the same time, a tenant in common of the crops, and there never would have been any doubt upon this point, had not the judges in New York, in passing upon questions concerning the rights of the parties to the possession of the crops, uttered dicta which seemed to determine the point against the occupant." It was held that while the relation was that of landlord and tenant, the parties were tenants in common of the crops. And so in Missouri in the case of Johnson v. Hoffman,\(^{22}\) decided in 1873, the parties were held to stand in the relation of landlord and tenant as to the land, but as tenants in common as to the crops. "The rights of the defendant in the crops, as tenant in common, were not inconsistent with their relations as landlord and tenant."

In Smyth v. Tankersley,\(^{23}\) however, decided in the Supreme Court of Alabama in 1852, an contrary view of this question was taken, although that case seems not to have fallen under the notice either of the Missouri or California court. "If this contract was a lease, then the whole product of the land rented belonged to the lessee, until the share of the lessor had been separated and delivered;\(^{24}\) while, on the contrary, if it was only a letting of the land on shares, then the parties to the agreement were tenants in common of the products to be grown and divided between them." And the court stated the rule to be that a contract made with the owner of land, which the other party agreed to cultivate, and to divide the products equally with him, was not, technically speaking, a lease, but that a tenancy in common was created in the products. "It is true," said the court, "that the phraseology adopted is that which is usual in leases, but the substance of the agreement is to be regarded rather than the words; and, in contracts of this description, the true test seems to be, that wherever provision is made for dividing the specific products of the land, a tenancy in common results."

One of the most exhaustive and satisfactory discussions of this general subject that can be found in the books, is that contained in the opinion of Mr. Justice Bell in Moulton v. Robinson,\(^{25}\) decided in New Hampshire in 1853. It was there held that in case of a letting on shares the relation of landlord and tenant was created as to the land, while the parties were tenants in common of the crops, the part of the profits of land reserved on the lease not being regarded as rent, but held to be an exception from the grant of the profits ordinarily implied in a letting to hire. The court considered it settled that a reservation of a part of the profits, could not be

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\(^{19}\) 40 Conn. 592.

\(^{20}\) Herskell v. Bushnell omn

\(^{21}\) 25 Cal., 89.

\(^{22}\) 25 Mo., 504.

\(^{23}\) 20 Ala., 212.


\(^{25}\) 27 N. H., 500.
regarded as rent by the books usually looked to as authoritative on such subjects. In a subsequent case in the same court in 1875, the doctrine is reasserted that the relation of landlord and tenant exists as to the land.

In a case decided in the Maryland Court of Appeals in 1846, the court held the parties to be in the relation of landlord and tenant, as to the land, and of tenancy in common, as to the crops. We give in the note below other cases in which the parties have been held to stand in the relation of tenants in common to the crops. It is held, however, that when the crops to be divided are to be paid distinctively as rent, that then the relation is that of landlord and tenant. And it has been held that in such cases the title to the crops remains exclusively in the tenant until the stipulated portion is set-off to the landlord.

In a case decided in New Jersey, it was held that no matter what the relation between the parties was, whether that of landlord and tenant, or of tenant in common of the crops, the tenant could sell the crop and pass a good title to a bona fide purchaser.

In Illinois in determining whether the relation is that of landlord and tenant or not, the court said: "In general, the question of possession will determine the matter. Take the case where the tenant moves on to the farm, and occupies and controls it exclusively, as if it were his for the time being, and is by the agreement so to occupy it for the year, it would be deemed to be in his exclusive possession, and it would be held to be a lease of the farm for the year, although the rent was to be paid in a part of the crops, the amount of which was to be determined by the amount of the crops raised; when the tenant would be held to be the exclusive owner of the crop until the stipulated rent was set off to the landlord.

On the other hand, in a case where the owner of the farm resided upon it, and allowed another to cultivate a crop upon a part, or even the whole of it, and to receive a portion of the crop as his compensation for the use of the land, we should not presume a tenancy, nor hold the person who cultivates it, to be in the exclusive possession of the portion which he cultivates, and the parties would be tenants in common of the crops."

Henry Wade Rogers.

Alwood v. Ruckman, 19 Ill. 200.

PROHIBITION—NUISANCE—ABATEMENT BY INJUNCTION.

STATE v. CRAWFORD.

Supreme Court of Kansas, October 31, 1882.

A drinking saloon in which intoxicating liquors are sold repeatedly, continuously and persistently, in utter violation and defiance of the Constitution and statutes of the State, and are sold to be drank on the premises as beverage, is a public nuisance; and this is so, not merely because of the express provisions of the statute declaring such places to be nuisances, (Sec. 13 of the Prohibitory Act of 1881,) but it is also so from the necessary implications of the statute, and by the direct force of the statutes, which make the keeping of the saloon and the consummation of each sale of intoxicating liquor criminal offenses: and it is so because of the repeated, continuous and persistent violation of the statutes. Such a nuisance may be "shut up and abated" under the provisions of said sec. 13 of the Prohibitory Act of 1881. But it can not ordinarily be perpetually enjoined by a court of equity. And this want of power in a court of equity is not because of the fact that the keeping of the saloon is a criminal offense, and involves the commission of many criminal offenses, but because the statute (said sec. 10) affords another complete and adequate remedy.

Error from Shawnee County.

VALENTINE, J., delivered the opinion of the court:

This action was originally instituted in the district court of Shawnee county, Kansas, by the county attorney of such county, in the name of the State, for the purpose of perpetually enjoining the further continuance of an illegal liquor saloon, in which intoxicating liquors were illegally, continuously and persistently sold, to be drank on the premises as a beverage. G. N. Boutell, the keeper of the saloon, and Lester M. Crawford, the owner of the building in which the saloon was kept, were made parties defendant. Other kinds of business, not illegal, were also...