COURT OF ERRORS AND APPEALS.

HENRY MUZZY and JAMES H. WELLES.
vs.
WILLIAM J. BRUNDRED, HENRY HAWLEY, ABRAHAM BELL, and JAMES BELL, Survivors of BENJAMIN BRUNDRED, deceased.
} In case on error to Supreme Court.

This is an action of assumpsit, commenced in October eighteen hundred and fifty three, for the recovery of the amount of a promissory note, of which the following is a copy, to wit :

OLDHAM WORKS, Paterson
$473.92. N. J. July., 19th, 1853.
" Two months after date we promise to pay to the order of 2
"Messrs Muzzy and Welles, four hundred and seventy three 92-
"100 dollars, at the city Bank in New York, value received.
(Signed) B. BRUNDRED, SON & CO.

Pro ut the declaration, and the schedule annexed thereto, filed October thirteenth, eighteen hundred and fifty three.

Judgment by default was taken against William J. Brundred and Henry Hawley, Abraham Bell and James Bell pleaded the general issue—and thereupon the cause came on to be tried at the Passaic county Circuit Court, on the first Tuesday of January in the year eighteen hundred fifty five at Paterson, before the Hon- 3
orable Elias B. D. Ogden, one of the Judges of the said court, by a jury of the said county, then and there duly empannalled and sworn to try the said issue.

On the trial of the said cause, it was proved on the part of the plaintiffs, that the firm of B. Brundred, Son & Co., had been in existence from the first of May eighteen hundred and fifty one, up to the time of the giving of the said note in the declaration declared on—and was composed originally of Benjamin Brundred, William J. Brundred, and Henry Hawley—that Benjamin Brundred died on the twentieth of April eighteen hun- 4
dred and fifty three—that the business of the firm was the manu-

facture of machinery at Oldham Works, near Paterson in the county aforesaid, and that the note in question was signed by Henry Hawley one of the defendants. It was further shown that during all that period, from the commencement of the said firm, the firm of A. Bell & Son of New York, commission merchants, composed of the defendants, Abraham Bell & James Bell, acted as commission merchants for the said firm of B. Brundred, Son & Co. in the disposal of their manufactured stock, and the collection of their drafts and bills receivable, at a commission of two and a half per cent. on the amount of sales, and from time to time made advances of money to the said firm of B. Brundred, Son & Co., to enable them to carry on their business. The advances thus made were to a considerable amount, exceeding the proceeds of the assets of B. Brundred, Son & Co., placed in their hands, leaving a large balance due to Abraham Bell & Son on account. The amount advanced in the course of two or three months exceeded ten thousand dollars, and thereupon the members of the firm of B. Brundred Son & Co. gave to A. Bell & Son their bond for ten thousand dollars, bearing date the first of May eighteen hundred and fifty one, payable the first of May eighteen hundred and fifty four, with interest quarter yearly, at the rate of six per cent. per annum—which bond was secured by a mortgage given by the said Benjamin Brundred and wife, on certain real estate situate at Oldham, aforesaid, on which the factory was located.

The balance of advances continued to increase in favor of Abraham Bell & Son, until the first of February eighteen hundred and fifty two, when it amounted to seven thousand three hundred and ninety one dollars and twenty four cents, independant of the ten thousand dollars secured by the said bond and mortgage, and further to secure said advances, B. Brundred, Son & Co., on the twenty-fourth of January in the year last aforesaid, assigned their tools, patterns, &c., used in prosecuting the business, to A. Bell & Son, as collateral security.

In July of the same year the said Benjamin Brundred assigned to A. Bell & Son a patent right belonging to him, also as collateral to the said indebtedness,

The firm of B. Brundred, Son & Co. had previously obtained a license, in consideration of certain payments, to use the said patent.

On the fourteenth of September eighteen hundred and fifty two, the same year another bond and mortgage for ten thousand dollars, similar to the first, and upon the same property, was given to Bell & Son, the ballance of indebtedness at that time being about sixteen thousand dollars, independent of the amount covered by the first bond and mortgage, leaving about six

thousand dollars due A. Bell & Son, independant of both bonds and mortgages. This balance continued to increase until the first of February, in the year eighteen hundred and fifty three, when it amounted to nine thousand nine hundred and fifty seven dollars and fifty two cents, independant of the amount covered by the said two bonds and mortgages.

On the twentieth of November eighteen hundred and fifty two, B. Brundred, Son & Co., acknowledged a formal delivery of the possession of their tools, patterns, &c., to A. Bell & Son, by an endorsement on the before mentioned assignment of the same.

On the twentieth of December following, A. Bell & Son gave to B. Brundred, Son & Co. a receipt in the following terms, to wit:

"New York 12 mo. 20, 1853."

"B. Brundred, Son & Co. Oldham.

"The tools in your machine shop assigned and this day del'd "to us, we hold as collateral for the large amount due us by you, "and trust you may soon be in a position by lessening the "amo't; to justify us in returning them to you. In the mean- "time we appoint your partner Henry Hawley our agent to hold "them for our ac't.

"Your assured friends,

"(Signed) ABRAHAM BELL & SON."

On a copy of which receipt the said Hawley endorsed and signed the following, to wit: "Rec'd the within property from A. Bell & Son in trust for their a'c. Dec. 20th, 1852

On the second day of February eighteen hundred and fifty three, the following agreement between the firm of B. Brundred, Son & Co., and A. Bell & Son was entered into, to wit:

"We the undersigned being largely indebted to Abm. Bell & "Son of the city of New York, *Now* in consideration of such "indebtedness and for the better securing the same to them "and such further sums as they may advance do hereby author- "ize and appoint said A. Bell & Son to the entire management "and control of all our business, from this day forward, until we "can reduce our indebtedness to them, to the sum of ten thousand "dollars. But until the debt is so reduced we do give them sole "power to collect all monies due to us, and to pay all indebted- "ness now made, or that shall hereafter be made in conducting "our business, of making machinery, &c. And we hereby de- "liver unto them all machinery manufactured, in whole or in "part, all stocks of material, tools and fixtures now at our works

"at Oldham, to be used for the payment of our indebtedness to
"said Abm. Bell & Son and other parties ; and we do further
"agree not to contract any indebtedness without the written
"consent of A. Bell & Son, and to limit our drawings for the
"support of our families, not exceeding the sum of one thousand
"dollars each, as regards William J. Brundred & H. Haw-
"ley for the current year, commencing from this date, subject to
"two hundred dollars each additional for present outstanding
"debts, *and* we do authorize A. Bell & Son to engage the servi-
"ces of a suitable person to take charge in their behalf, and will
"unite with such person, doing all in our power to promote the
"united and best interest of the concern. The compensation of
"such person to be a charge on the business in the proportion of
"two thirds, and one third by A. Bell & Son. If however we
"find his services full benefit to the extent of his entire compen-
"sation, then we are willing it be all a charge on the business.
"If after the expiration of four months, we, or A. Bell & Son,
"are of the opinion that the business is not pofitable, then upon
"either party giving the other three months notice, the whole
"concern shall be discontinued, and the entire stock of tools and
"fixtures be sold at public auction. at such time as A. Bell &
"Son shall direct after the expiration of three months aforesaid.
"It is further to be understood, if at any time all indebtedness
"due to A. Bell & Son, over and above ten thousand dollars be
"paid them by us, that they surrender and reconvey all herein
"conveyed to them, not otherwise disposed of for the benefit of
"the concern,

Signed Sealed & delivered in the presence of (Signed) ISAAC VAN WAGONER. Dated OLDHAM WORKS February 2, 1853.

(Signed) B. BRUNDRED, by his atty. W. J. Brundred, [LS]
(Signed) W. J. BRUNDRED, [LS]
(Signed) HENRY HAWLEY [LS]

In persuance of this agreement, A. Bell & Son appointed one Albert Brett, of the City of New York, to take charge of the business of B. Brundred, Son & Co. in pursuance of said agreement ; and the business was carried on under said agreement, without any change in the name of the firm. from that time until the fifteenth of August eighteen hundred and fifty three, or thereabouts, when A. Bell & Son refused to accept any further drafts or pay any more bills, for the firm of B. Brundred Son & Co.

The course of business during this period, was much the same as prior to the execution of the said agreement ; all the busi-

ness of the concern was done in the name of B. Brundred, Son & Co., (the original articles of partnership having provided, that the firm should continue notwithstanding the death of either of the partners.)

William J. Brundred superintended the manufacturing department; Henry Hawley kept the books and made drafts, and the said Brett procured orders around the country, and generally effected such purchases as were made in New York; acting (as he testified) in the transaction of all the business done by him, as the agent and in the name of the firm of B. Brundred, Son & Co.: alone, the defendants did not dispute but that A. Bell & Son knew of the manner in which the business was conducted by the said Brett. 81

A Bell & son transacted the business of the concern in New York, on commission, in the same, or a similar manner, and at the same rate of commission as they had done before the said agreement was entered into; received the notes, drafts and bills receivable, of B. Brundred, Son & Co., for collection, and continued making advances to said firm, as they required money for their payments: which was usually effected by drafts upon A. Bell & Son, by the defendant Hawley in the name of B. Brundred, Son & Co. 91

The balance of indebtedness for such advances, independant of the twenty thousand dollars secured by bond and mortgage, amounted on the first of May eighteen hundred and fifty three, to the sum of twelve thousand four hundred and ninety seven dollars and twenty nine cents, and on the first of August eighteen hundred and fifty three, to twenty three thousand eight hundred and ten dollars and thirty five cents. A. Bell & son, however, holding at the last date, contracts and consignments against a portion of said balance, from which they realized after refusing to honor the paper of B. Brundred, Son & Co., sufficient for, and applied by them to reducing the said balance, on the first of November eighteen hundred and fifty three, to eight thousand nine hundred and eighty four dollars and twenty two cents, which yet remains mostly unpaid. After A. Bell & Son refused further to honor the drafts of B. Brundred, Son & Co. in August, eighteen hundred and fifty three, the works were subsequently conducted by C. S. Van Wagoner, on behalf of the estate of B. Brundred, deceased, and William J. Brundred & Hawley, the surviving members of the firm, the tools not having been removed or sold by A. Bell & Son. 20 21

The note on which this suit was brought was one of three note

of same date, given in payments of an account for lumber, furnished by the plaintiffs to the firm of B. Brundred, Son & Co., between the second of February eighteen hundred and fifty three,
22 and the date of the notes.

Before any of this lumber was furnished the defendant, Brundred and the said Brett came to the office of the plaintiffs at their lumber yard, and entered into conversation with the plaintiffs' clerk about buying lumber, and in the course of such conversation Mr. Brett said "we are going to use considerable more lumber than has theretofore been done; if you will sell us as cheap as we can get it in New York we will patronize you." The orders for the lumber were afterwards signed by the defendant Hawly, in the name of B. Brundred Son & Co., and were
23 sent from time to time, as the lumber was wanted, and the account was charged on the books of the plaintiffs, to B. Brundred Son & Co.

The defendant Hawly, being examined as a witness on the part of the plaintiffs, testified amongst other things, that he had never regarded the defendants, Abraham & James Bell, as partners in the firm of B. Brundred Son & Co., or as individually liable for the debts of that firm; but said: "My understanding "was, that in conducting the business under the agreement of "February second, eighteen hundred and fifty three, (which we
24 "considered as a kind of experiment to resuscitate the business,) "if there should be an ultimate defficiency, it should be borne "*pro rata* by all the then creditors, Abraham Bell & Son includ- "ed, so far as regarded their debt, outside of the twenty thou- "sand dollars secured by bonds and mortgages. I think the un- "derstanding was that they were to advance funds to B. Brun- "dred, Son & Co., for the purchase of materials Mr. Brett said "business wanted driving and funds, and he had come there for "both purposes. There was no understanding, however, that "Bell & Son were to be liable except upon their acceptances."
25 The said Hawley further testified, in relation to Bretts situation in the concern as follows: "I considered him as partly our "agent, and partly the agent of Bell & Son, so far as he made "purchases and procured orders, he was our agent, and so far as "overseeing and watching over the interest of A. Bell & Son he "was their agent."

The said Hawley further testified that the agreement of February second eighteen hundred and fifty three, he believed covered all the property of B. Brundred Son & Co., not before mortgaged to A. Bell & Son, except the lease of the factory and

real estate from B. Brundred to the firm at a rent of two thou- 26
sand dollars, which witness considered too high ; and a license to use B. B undred's before mentioned patent for making throstles, which they used in their manufacture, and which was of contingent value according to the amount of business done.

It further appeared that among the debts and liabilities of B. Brundred, Son & Co. paid during the transaction of the business under the agreement of February second eigteen hundred and fifty three, were debts and liabilities of said firm incurred prior to that date, which were continued to be paid as they became due ; no distinction being made between debts or liabilities in- 27
curred before and those incurred after said date.

The foregoing facts appearing by the evidence, the defendants applied for a non suit, on the ground that the defendants Abraham Bell and James Bell were not liable to the plaintiffs in this action ; nor in connection with the other defendants ; and if liable at all, were only in a court of Equity.

But his Honor the Judge refused to grant a non suit, and charged the jury that under, and by virtue of the agreement of February second, eighteen hundred and fifty three, before mentioned, Abraham Bell & James Bell were li- 28
able for the debts incurred while the business was transacted in pursuance of said agreement, and were jointly liable therefor with the other defendants ; and directed the jury to find a verdict for the plaintiffs, for the amount of the note upon which the suit was brought.

To which ruling and charge the defendants, Abraham Bell & James Bell, did by their counsel object and accept, and prayed that this their Bill of exception might be sealed, which is hereby done accordingly.

ELIAS B. D. OGDEN, Judge. [**Seal.**] 29

New Jersey Supreme Court,

Of the term of February, in the year of our Lord one thousand eight hundred and fifty five.

WILLIAM J. BRUNDRED,
HENRY HAWLEY,
ABRAHAM BELL and
JAMES BELL,
vs
HENRY MUZZY and
JAMES H. WELLES,
} In Error. 30

Afterwards that is to say, on the fourth Tuesday of February in the year of our Lord one thousand eight hundred and fifty five, before the Supreme court of New Jersey, come the said William J. Brundred, Henry Hawley, Abraham Bell and James Bell, by Joseph P. Bradley their attorney, and say, that in the record and proceedings, aforesaid, and also in giving the judgment, aforesaid there is manifest error in this, to wit: that the Judge who tried the cause at the trial thereof, as by the bill of exception taken therein appears, refusad to grant the defendants
31 below, the now plaintiffs in error, a non-suit, although the said now plaintiffs were by law entitled to a non suit at the trial of the said cause, also in this, to wit: that on the trial of the said cause the Judge erred in charging the jury—that under and by virtue of the agreement of February second 1853—in the said Bill of exceptions mentioned—the said Abraham Bell and James Bell were liable for the debts incurred, while the business was transacted in pursuance of said agreement—and were jointly liable therefor with the other defendants—and there is error also in this, that the said Judge directed the jury to find a ver-
32 dict for the plaintiffs below—the now defendants in error—whereas by the law of the land the said Judge ought not so to have charged—and the said plaintiffs below, the now defendants in error were not entitled to the said verdict as a matter of law arising upon the facts stated in the said bill of exceptions—And there is error also in this, that the said judgment is in other respects erroneous—and unlawful,

JAS. P. BRADLEY,
Ptffs Atty.

JOINDER IN ERROR.

Opinion of Supreme Court.

33 SUPREME COURT.

BRUNDRED, and others
vs
MUZZY & WELLES
} Error to Passaic Circuit.

Elmer J.—The Judge of the Circuit having charged the jury that Abraham Bell & Son, were liable jointly with B. Brundred, Son & Co., for the debt contracted by the latter firm, in pursuance of the agreement entered into on the second day of February 1853, and directed them to find a verdict for the plaintiffs, the propriety of that charge and direction, depends upon the
34 legal effect of the agreement. If the effect was as is now insisted to make them members of the firm of B. Brundred, Son & Co., the charge was correct, it being undoubtedly a question of law—which it was the duty of the court to decide, whether the undisputed facts of the case did or did not make the parties legal

partners.

No question of fact was submitted to the jury. It was not alleged that A. Bell & Son were held out to the plaintiffs, or to others as partners in the business of B. Brundred, Son & Co., and no question of their liability arising in that manner was raised. The latter firm was engaged in manufacturing machinery at Oldham Works, near Paterson in this State, and the firm of A. Bell & Son was a Commission house in the city of New York. As such, they transacted the business of the manufacturers, disposed of their manufactured stock, collected their drafts and bills, and made them advances of money to enable them to carry on their business. A large balance having become due, to the commission merchants, mortgages were given, and an assignment of their tools made to them by B. Brundred, Son & Co., for their better security, afterwards the agreement in question was entered into, and the business carried on as before. The lumber for which the note in suit was given by the firm of B. Brundred Son & Co., was ordered in the name of that firm by one of the partners therein, and charged to them in the books of the plaintiffs.

35

36

There seems to be no reason to believe that A. Bell & Son intended to become partners in the business of B. Brundred, Son & Co., and this was not much insisted on, but the argument relied on by the counsel of the defendants in error, the plaintiffs in the original suit is, that the effect of the agreement of February 2nd, 1853, was to entitle the firm of Bell & Son to participate in the subsequent profits made by B. Brundred, Son & Co. in their business, and thus to render them in law, partners in that firm at least so far as third parties are concerned. It cannot be doubted, that as the law is established, persons may become partners as to third parties who are not partners as between themselves. This effect is produced wherever such persons become entitled to an actual participation in the profits of the business, as profits, and so that they are entitled to an account, and have a specific lien or preferance in payment over creditors, and thus have the full benefits of the profits of the business, without any corresponding risk in case of loss. Grace vs Smith, 2 W. Black. 998, exparte Hamper 17 ves. 103, Champion vs Bostwick 18, Wend 184, Denny vs Cabot 6 Met. 82, Barry vs Nesham & Lawther 3, Man Gran. & Scott 641, Cushman vs Baily 1, Hill 526. If however, the true construction of this agreement was as is insisted, that it gives a right to Bell & Son to take all the profits of the business, after paying to the partners

37

38

of the firm of B. Brundred, Son & Co., the sums stipulated in consideration of their services, I am not satisfied that it would have rendered them partners. They would not upon that construction, take the profits as such, that is, so that their gain
39 would be more or less in proportion to the profits earned, but would take them simply as creditors in payment of a prior debt. The profits as such, would enure to the benefit of the firm of B. Brundred, Son & Co., after the agreement, as truly as they did before, nor would those who had trusted the latter firm, have any ground of complaint, because the debts incurred in carrying on the business, would be first paid before profits would accrue.

But in my opinion it is a misapprehension of the agreement in question, to consider it as transfering the profits of the business, as such, to Bell & Son—Nothing is said about profits, nor was
40 their amount of any importance to Bell & Son, except that the greater they should prove to be, the less they might be called on to advance, and the more they would receive in discharge of their debt. Their interest in the profits was the interest of creditors, and not of participators, who were to gain or lose, in proportion to what those profits should turn out to be. The agreement gives the entire management and control of the business of B. Brundred, Son & Co. to Bell & Son, with power to collect all moneys due to the first named firm, and to pay their indebtedness at their pleasure. The machinery on hand manu-
41 factured in whole or in part was stipulated to be delivered to Bell & Son, in payment of the prior indebtedness. Brundred, Son & Co. were not to contract any indebtedness without the written consent of Bell & Son, and the acting partners of the former were limited to draw only specified sums for the support of their families. The firm of Bell & Son were authorized to employ an agent to superintend the business under their direction, part of whose salary was paid by them and part out of the business of B. Brundred, Son & Co. Power was also given to A. Bell & Son to discontinue the business after a period named and
42 to dispose of the stock and fixtures at auction.

This agreement it might perhaps be plausibly argued, was an assignment of the property and business of Bell & Son, and rendered them liable to account for it, or it may perhaps have constituted them the real principals in the business carried on for their benefit, in the name of B. Brundred, Son & Co., as their agents ; but I can see no ground for holding them to be partners, and liable jointly with B. Brundred, Son & Co., for the debts contracted before or after the agreement. The business was carried on after the agreement precisely as it had been be-

fore.—B. Brundred, Son & Co. acted as the manufacturers, and 43
as such, contracted debts in their own names and upon their
own credit, while A. Bell & Son acted as commission merchants,
collecting, receiving and paying in that capacity.

The old debts appear to have been treated like the new ones,
and provided for as occasion required, in the same way. What-
ever therefore may have been the rights of the creditors of B.
Brundred & Son, as against A. Bell & Son, either at law or in
equity, as to which no opinion is meant to be intimated, I am
clear that there was no partnership and no joint liability, as the
legal effect of the agrement entered into between the parties, 44
and that the judgment must be reversed.

Upon the delivery of the foregoing opinion the cause was re-
moved into the court of Errors and Appeals, by writ of error,
returnable to the first day of December, A. D. 1855, and errors
assigned thereon as follows :

New Jersey Court of Errors and Appeals

of the term of November—in the year of our Lord one thousand
eight hundred and fifty five.

Henry Muzzy and,		
James H. Welles,		45
vs		
William J. Brundred,	In Error.	
Henry Hawley,		
Abraham Bell and		
James Bell.		

Afterwards, that is to say, on the first day of December
in the year of our Lord one thousand eight hundred and fifty
five, before the Court of Errors and Appeals of the State of New
Jersey, come the said Henry Muzzy and James H. Welles, by
Socrates Tuttle their attorney, and say that in the record and 46
proceedings aforesaid, and also in giving the judgment aforesaid,
there is manifest error in this, to wit : that the judges of the
Supreme Court before whom the cause was argued as by the
opinion delivered by the said court appears, decided that there
was no partnership and no joint liability, as the legal effect of the
agreement of February second eighteen hundred and fifty three,
in the bill of excetionr of the above named defendants mentioned.
And also that there is error in this, to wit : that none of the
reasons assigned by these defendants for the reversal of the
judgment of the Circuit Court before which the cause was tried, 47
were or are sufficient in law for the reversal of the same ; and

also that there is error in this, to wit : that the Supreme Court reversed the judgment of the Circuit Court whereas by the law of the land the said judgment ought to have been affirmed ; and there is error also in this, to wit : that the said judgment is in other respects erroneous and unlawful, and the said Henry Muzzy and James H. Welles pray that the judgment aforesaid for the errors aforesaid, may be reversed, annulled and altogether holden for naught, and that they may be restored to all
48 things which they have lost by occasion of the said judgment, &c.

S. TUTTLE. Atty. for and of counsel
with the plaintiffs.

Joinder in Error.

The points relied upon in the cause, appear from the charge of his Honor Judge Ogden, and the exceptions taken thereto.