PLEASANTS *v.* FANT.

1. Where the question before the jury is whether F. (the defendant) was a partner with K., so as to make him liable for the debts of the firm, K.'s declarations to third persons are not admissible in favor of the plaintiffs until they have established a *primâ facie* case of partnership by other evidence.
2. The admission of the defendant and the deposition of K. to the effect that the defendant had procured for K. a loan of money to be used in a purchase of cotton, and that K. had voluntarily promised to give the defendant a part of the profits, if any were made, for his assistance in procuring the loan, when no sum or proportion of profits was named, does not raise such a presumption of partnership.
3. Nor is such evidence sufficient to require the court to submit the question of partnership to a jury; and its instruction to find for the defendant was right.
4. Such instruction is right where the court would decide for the defendant on a demurrer to all the evidence, and the true rule in the case is that if, to the judicial mind, the evidence, tested by the law of the issue and the rules of evidence, is not sufficient to justify a jury fairly and reasonably in finding a verdict for the plaintiff, the court should so tell the jury.
5. If the court can see that if a verdict for the plaintiff should be rendered, it ought to be set aside as being unwarranted by the testimony, such instruction should be given in advance of the verdict.

ERROR to the Circuit Court for the District of Maryland.

R. & H. Pleasants sued Fant in the court below, and the single question in dispute was whether the defendant was a partner in the firm of Keene & Co., so as to charge him with a debt conceded to be due by that firm to the plaintiffs, arising out of some transactions in cotton. The case was tried before a jury, and when the testimony was through, both plaintiffs and defendant prayed instructions of the court, which were all refused, and the court said to the jury,

"There is no evidence in this cause from which the jury can find that the defendant had such an interest in the purchase and sale of the cotton by Keene & Co. as will make him, the defendant, a partner as to third persons, and the jury will, therefore, find their verdict for defendant."

The bills of exception disclosed the testimony on which this instruction was founded, and the question now before

Statement of the case.

this court was whether the verdict founded on that instruction should be set aside and the judgment reversed.

The direct testimony offered to prove the partnership was confined to the statements of Fant in a conversation with one of the plaintiffs and a clerk in their office, and the deposition of Keene, a partner of Keene & Co. The substance of the former was that Fant denied that he was a partner, said he knew from some experience what was necessary to make him a partner, and admitted that he had procured for Keene a loan of $10,000 in gold from a bank of which he was president, and that he was to receive part of the profits of Keene's venture in purchasing cotton with that money, as compensation for procuring the loan. What portion of the profits he was to receive was not stated.

Keene in his deposition denied that Fant was a partner in the transaction, but said that Fant had negotiated for him the loan from the bank, and he had made Fant a promise, *which was entirely voluntary*, to give him a part of the profits he might realize, and that he had mentioned *no particular part or proportion of the profits to be so given.*

After the admission of this testimony, the plaintiffs, on the ground that they had sufficiently shown a relation between Fant and Keene to admit of Keene's declaration to third persons as to Fant's interest, offered to prove by one of the plaintiffs, that Keene had told him Fant was a partner, and asked that the plaintiffs would advance money enough on the cotton then in their possession as brokers to enable him to pay Fant his money and let him out of the firm. This offer was objected to and the objection sustained by the court.

A large amount of testimony, however, was admitted, the object of which was to show that Fant, as president of the bank, was in the habit of using the money of the bank in private speculations, without the knowledge of the directors, but which was very feeble and far from establishing that fact.

Verdict and judgment having been given for the defendant, the plaintiffs brought the case here.

Argument for the plaintiff in error.

Messrs. I. N. Steele and S. T. Wallis, for the plaintiffs in error:

1. The English rule laid down in *Waugh* v. *Carver*,* makes a participation in profits conclusive proof of partnership under all circumstances.

In *Berthold* v. *Goldsmith*,† and in *Seymour* v. *Freer*,‡ this court holds that the rule does not apply to "a case of service or special agency, where the employé has no power, as a partner, in the firm, and *no interest in the profits, as property, but is simply employed as a servant or special agent, and is to receive a given sum out of the profits, or a proportion of the same, as a compensation for his services.*" Beyond that exception the court does not go in its adjudication or its reasoning. There is nothing in either to countenance the idea that a party, not an employé, but contributing, or lending, or procuring the capital of a concern, can stipulate, *ab initio*, for a share of its profits, as a compensation for doing so, and yet escape liability for its debts. And such an idea is contrary to the whole current of authority.§ This court has not followed some of the later English cases.‖

2. The instruction given to the jury improperly took the case away from it. The evidence undoubtedly did at least *tend* to prove a participation in the profits; and while the rule of evidence does not allow one partner to bind or speak for the other, until proof has been given of his authority, it nevertheless requires nothing more than proof tending to

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* 2 Henry Blackstone, 235; S. C. reported with notes in 1 Smith's Leading Cases, 7th ed., p. 1289.

† 24 Howard, 542, 543. ‡ 8 Wallace, 215.

§ Hesketh *v.* Blanchard, 4 East, 144 (8 Wallace, 222); Gouthwaite *v.* Duckworth, 12 East, 422; Cheap *v.* Cramond, 4 Barnewall & Alderson, 667; Parker *v.* Canfield, 37 Connecticut, 250; Taylor *v.* Terme, 3 Harris & Johnson, 505; Benson *v.* Ketchum, 14 Maryland, 355; Sheridan *v.* Medara, 2 Stockton, 475; Bearce *v.* Washburn, 43 Maine, 564; Brownlee *v.* Allen, 21 Missouri, 123; Wood *v.* Vallette, 7 Ohio, 178; Catskill Bank *v.* Gray, 14 Barbour, 477; Pierson *v.* Steinmyer, 4 Richardson's South Carolina (Law), 310.

‖ Cox *v.* Hickman, 8 House of Lords Cases, 268; Bullen *v.* Sharp, 1 Law Reports (C. P.), 86.

establish the authority; proof legally sufficient to go to the jury on the point.*

It is settled law that a Circuit Court has no authority to order a peremptory nonsuit against the plaintiff's will.† But very nearly the same result is reached if after a plaintiff has given what he deems sufficient evidence of his case, and which does confessedly *tend* to prove it, the court may tell the jury what this court told the jury below.

Mr. R. T. Merrick, contra.

Mr. Justice MILLER delivered the opinion of the court.

If the admission of Fant to plaintiffs, and the evidence of Keene, are insufficient to raise a *primâ facie* presumption of partnership, then Keene's declarations on that subject were inadmissible, and the court was right in its instruction to the jury. If it was sufficient for that purpose then it was erroneous, and the evidence here offered of Keene's statements to plaintiffs was improperly excluded.

The case rests after all on the question whether in Fant's declaration to the plaintiffs and Keene's deposition there was evidence of a partnership on which a verdict for plaintiff could have been sustained.

We have been favored by counsel with a reference, very learned and very exhaustive, to the authorities on the question of how far or when a participation in the profits subjects a party to the liability of a partner to third persons. And it must be confessed that some of the discriminations, where profits are used as compensation for definite services, are very nice.

We do not think that a close examination into these is necessary in this case. According to Keene's testimony there was clearly no contract binding him to divide the profits with Fant. He says the promise was entirely vol-

* Rosenstock *v.* Tormey, 32 Maryland, 182, 183; Irvine *v.* Buckaloe, 12 Sergeant & Rawle, 35; Roberts *v.* Gresley, 3 Carrington & Paine, 380; National Bank *v.* Mechanics' Bank, 36 Maryland, 5.

† Elmore *v.* Grymes, 1 Peters, 469.

untary, and that no portion of the profits was mentioned. By voluntary he undoubtedly means that it was not a part of the agreement by which he obtained the money, but a gratuitous promise to reward his friendship if he succeeded in his venture.

Fant's statement to the plaintiff, as detailed by the latter, differs but very little from this. As a compensation for obtaining the loan, he says that Keene agreed to allow him a part of the profits, but how much or what proportion, or whether it was a definite sum to be paid out of the profits, or a proportionate part of the profits, is not shown.

If one of the most approved criteria of the existence of the partnership in such cases be applied to this, namely, the right to compel an account of profits in equity, the evidence totally fails. In a suit for that purpose, founded on this precise statement, no chancellor would hesitate to dismiss the bill.

But we are pressed with the proposition that it was for the jury to decide this question, because the testimony received and offered had some tendency to establish a participation in the profits, and the question of liability under such circumstances should have been submitted to them, with such declarations of what constitutes a partnership as would enable them to decide correctly.

No doubt there are decisions to be found which go a long way to hold that if there is the slightest tendency in any part of the evidence to support plaintiff's case it must be submitted to the jury, and in the present case, if the court had so submitted it, with proper instructions, it would be difficult to say that it would have been an error of which the defendant could have complained here.

But, as was said by this court in the case of the *Improvement Company* v. *Munson*,* recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no

* 14 Wallace, 448.

evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

The English cases there cited fully sustain the proposition,* and the decisions of this court have generally been to the same effect.

In the case of *Parks* v. *Ross*,† this court held that the practice of granting an instruction like the present had superseded the ancient practice of demurrer to evidence, and that it answered the same purpose and should be tested by the same rules; and in that case it said the question for the consideration of the court was whether the evidence submitted was sufficient to authorize the jury in finding the contract set up by plaintiff. And in *Schuchardt* v. *Allens*,‡ this case is referred to as establishing the doctrine that if the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly.

In the case of *Pawling* v. *The United States*,§ the court, by Marshall, C. J., said: "The general doctrine on a demurrer to evidence has been correctly stated at the bar. The party demurring admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit, but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably draw the court ought to draw."

It is the duty of a court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by

* See Jewell *v.* Parr, 13 C B. 916; Toomey *v.* L. & B. Railway Co., 3 C. B. (N. S.), 146; Ryder *v.* Wombwell, 4 Law Reports, Exch. 33.

† 11 Howard, 362.

‡ 1 Wallace, 359.

§ 4 Cranch, 219; see also Bank of the United States *v.* Smith, 11 Wheaton, 171.

instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law.

In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor, that is the business of the jury, but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury. In such case the party can submit to a nonsuit and try his case again if he can strengthen it, except where the local law forbids a nonsuit at that stage of the trial, or if he has done his best he must abide the judgment of the court, subject to a right of review, whether he has made such a case as ought to be submitted to the jury; such a case as a jury might justifiably find for him a verdict.

Tested by these principles we are of opinion the Circuit Court ruled well. If plaintiffs had secured a verdict on the testimony before us we think that court ought to have set it aside as not being warranted by the evidence. It is not possible with any just regard to the principles of law as to partnership, and the rules of evidence as applied to this tes-

timony, to come fairly and reasonably to the conclusion that Fant was Keene's partner in this transaction.

JUDGMENT AFFIRMED.

RAILROAD COMPANY *v.* PRATT.

1. Though where goods received at one place are to be transported over several distinct lines of road to another and distant one, the liability of the common carrier first receiving them (where no special contract is made) is limited to his own line, yet he may subject himself by special contract to liability for them over the whole course of transit. And this is true of a railroad corporation possessed of the powers given to railroad corporations generally and subject to corresponding liabilities; such railroad corporations, *ex. gr.*, as those incorporated under the general railroad law of New York.
2. If there is competent evidence of such a contract thus to carry, put before the jury, the weight, force, or degree of such evidence is not open for consideration by this court.
3. What amounts to competent evidence. This matter stated in a recapitulation of the evidence given in this particular case. A way-bill in which the heading spoke of the goods as goods to be transported *by* the first road, *from* the place of departure *to* the place at the end of the whole line, and at which the owner wished to have them delivered, *held* to be such evidence, whether looked upon as a contract, or as a declaration or admission.
4. Where in such a line of roads as that described in the first paragraph above, the common carrier owning the first road undertakes to carry goods over the entire line—part of the goods being put aboard the cars on his line, and a part *to be* put on at its termination and where the next road begins—the fare asked and agreed to be paid being, however, the fare usually asked and paid for the carriage over the whole line, and the contract being for transportation over the whole road and not for carriage to the end of the first line and then for delivering to the carrier owning the next road and for carriage by him—the fact that a part of the goods were put on the cars only where the second road begins, will not exonerate the owner of the first road from liability for their loss.
5. Where on such a line of road as that in the said first paragraph described, the second road posts *its* rules in the station-house of the first, a person furnishing goods for transportation "through" is not to be held as of necessity to have notice of them from the fact of such posting, and because he was often in the station-house of the first company where they were posted. Independently of which, his contract being with the first company only, and *it* agreeing to carry for the whole distance, *its* rules are the rules that are to govern the case.