

drawn, at the option of the party making them, and were to bear interest while used in the business. The party of the first part was to be allowed \$1,000 per year for managing the business, and quarterly statements of its condition were to be made by him to the party of the second part.

Held:—*That the latter was, as to third persons, a partner with the former, although such third persons gave credit wholly to the other partner, and were ignorant of the partnership.*

Appeal from Common Pleas of New York city and county, General Term.

Action for materials and labor. James Stanley appeals from a judgment for plaintiff.

RUGER, C. J. The determination of this case involves the construction of an agreement between James Stanley and Moulton W. Gorham, and the question whether such agreement constituted the defendant Stanley a partner as to third persons with Gorham. If it did, then the judgment must be sustained. The liability of the alleged partners is predicated upon a debt for services rendered and materials furnished by the plaintiffs, upon the request, of Gorham, in fitting up a place in New York to carry on the business of heating, ventilating, etc. The part of the agreement which, it is claimed, creates the partnership reads as follows: "That for and in consideration of the loan of \$750 from the said party of the second part to the said party of the first part, for use in the business of heating, ventilating, etc., for which said party of the first part has given unto said party of the second part his note at two years with interest, bearing date January 14, 1885, payment of which is secured by an assignment of said value in a certain \$3,000 policy in the Massachusetts Mutual Life Insurance Company, and also by a certain chattel mortgage, bearing date January 23, 1885, and in further consideration of services of said party of the second part in securing sales in said business, and for any further moneys he may, at his own option, advance for me in said business, the said party of the first part agrees to divide equally the yearly net profits of the said business.

It is understood and agreed that said loan of \$750 is expressly for use in said business, and for no other use whatever." It was further provided that advances made by either party in the business were at all times subject to be withdrawn, at the option of the party making them, and were to bear interest while used in the business. Gorham was to be allowed \$1,000 per annum for his services in managing the business, and quarterly statements of its condition were to be made by him to Stanley.

It is fairly to be implied from the contract that Gorham was to be the active man in the business, and it was to be carried on in his name: but whether he was to furnish any capital, and if so, how much, is not disclosed. For aught that appears, the money furnished by Stanley was all that was supposed to be necessary to start and carry on the business until returns were realized from its prosecution.

This agreement does not, in express terms, purport to form a partnership; neither is the intention to do so disclaimed; and the question is therefore whether, in a business carried on under the conditions provided for in the contract, the parties thereto became partners, as to third persons. It clearly provides for something more than a loan of money, as it is fairly to be implied from it that Stanley would render active services as a principal in the prosecution of the business, and furnish further financial aid therefor, if it became necessary, and he deemed it advisable to do so. The loan was not one made to Gorham generally, but was for the benefit of the particular business, in whose prosecution Stanley had an equal interest, and any diversion of the funds from such use was strictly prohibited. Each party was authorized to charge the business with interest on the funds advanced by him for its prosecution, and they would each be entitled to *pro rata* reimbursement of such funds from the assets of the business, in case of a deficiency in assets to pay the advances in full. In that respect it was evidently contemplated that each party should bear any loss incurred, in proportion to the advances made by them respectively. For all this, Stanley was to receive one-half the net profits