

Harvey B. Hoard
appellant

v.
Cyrus R. Haggerty
appellee

Supreme Court
of the State of Illinois

To the Honorable Justices of the
Supreme Court of the State of Ill.

Your petitioner respectfully
represents, that he was appellant in
the above entitled cause, submitted
to your Honor at the April Term of the
Court, A.D. 1860, and decided in vacation
about the month of _____ of the same
year, affirming the judgment below.

Your petitioner is advised and
believes that said decision and judgment
were not made in accordance with the
principles of law applicable to his case,
and that the Court misapprehended the
intention, and effect of the witness
Isaac G. Mott one of the witnesses pro-
duced by the appellant on the trial below,
and confidently believes that a reconsider-
ation thereof would lead to a different result.

The questions involved are in
the opinion of the petitioner of sufficient
general interest to command a careful
investigation of the case.

And your petitioner begs leave to say
that he does not make this applica-
tion in the spirit of contention,

in the sincere belief that when the case is fully understood, the Court will reverse the judgment against him.

This suit was brought to recover the amount of a note dated 1st March 1836. for \$665.00 and executed in the name of Dunlop, Wright & Co. by Robert L. Dunlop, one of the members of the firm, and given to the appellee in payment of Dunlop's individual note, dated 27th August 1835 for the sum of \$600.00. The August note was signed by Dunlop alone, and was guaranteed by J. H. Benson the Banker of Dunlop.

It was contended by Haggerty below, that this note was given by Dunlop for money borrowed on account of the firm, and that Hurd assented to the giving of the March note in renewal of the other.

It appeared that the \$600.00 was on the 28th day of Aug. entered in the cash book of the firm. Thus "Cash, R. L. Dunlop \$600.00" and upon the day book Dunlop was credited by money borrowed of Haggerty \$600.00. This item was posted to Dunlop's credit on the Ledger.

These entries were all in Dunlop's hand writing. There was a dash drawn across the Ledger credit thus Aug 28 Cash \$600.00.

To show that the money was borrowed on the credit of the firm, and that Hurd authorized the giving of the March note, the Court below

admitted the following evidence of Scott a book-keeper of Dunlap Wright & Co. "In November 1855 Dunlap remarked in speaking of this entry, (the one erased) that was a partnership transaction, it ought not to be so entered, and therefore it was (had been) stricken out" * * * * "The amount was used to pay Wilcox, Legon, & Co. and therefore it ought not to have been placed to his credit, and that Wright admitted it in substance."

Again the same witness was permitted to testify.

And about the time the first note (Dunlap's individual note of \$1000) became due; Dunlap said he was unable to raise the money to meet it; said he would see Hurd and Haggerty, and see if he could get it renewed; and at the time Haggerty came with the note, Dunlap said to him that he had seen Hurd about the matter, and talked with him, and Hurd advised him to renew it."

There was no testimony that at the time the August note was given anything was said to Haggerty, what the money was for, who was the borrower, or anything about it - save to say they, Dunlap and Haggerty, came in to his bank, within half a block of Hurd's office, and asked him to draw the note, which he did, and the same

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was signed there.

Two questions arise on this state of facts, which the court will see by the record, were preserved by the appellant.

1st Was the declaration of Dunlop in November 1855, three months after the giving of the note, and the making of the entries, admissible evidence to explain the course not made at that time, or to show the nature of the transaction?

2nd Was the declaration of Dunlop made just before, and at the time of the giving of the firm note in place of his own guaranteed note, admissible to show that the money was borrowed on the firm credit, or that Hunt authorized the giving of the firm note.

There is however another point in the case, which I will now present upon the construction the court gave to the testimony of Mr. Mott.

I am convinced the court misunderstood the scope and purport of Mr. Mott's testimony, and that that misunderstanding had great weight, if it was not the turning point in the decision of the court.

Before I proceed to speak of the other points, I shall therefore pray the court to review the testimony of Mr. Mott, as it appears in the record: (the being omitted in the abstract.) when I feel

assured they will find, instead of it showing as the court in its opening
 "say, that 'It is evident from Mr. Mott's
 "testimony that appellant knew about
 "the note of Aug. 27th, and that the note
 "in suit was given to renew it" and
 "again - "that it does not appear that
 "appellant made any objection to the
 "arrangement" - "that the conversation
 of which Mott testified occurred only a
 few days before the trial below took place,
 and when Haggerty came to Hurd's office
 to gather such facts from the books of
 the old firm as might be necessary in
 the approaching trial, and that the
 only object and purpose of the testimony
 was to establish the fact of usury,
and to identify the two notes as referring
to the same original loan.

No controversy was had about the
 merits of the cause. Hurd was simply
 seeking the admission of these two
 facts necessary to his defence, while he was
 granting to Haggerty an investigation
 of the books of the firm. Then in his hands.

The whole testimony shows
 that the questions of Hurd were propounded
 at intervals while Haggerty was copying
 from the books and no general
 conversation of the merits of the case
 was had.

The Court has understood the
 testimony of Mr. Mott entirely different
 from what it was understood below.

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by either side, and has taken a view
that was unexpected by the appellant,
which takes him by surprise.

If then the court ~~then~~ upon
review of Mr. Mott's testimony shall find
it as I have supposed, it will come
directly to the points before stated.

I shall not argue the cause at-
large, but will briefly state such
points as seem to me to present them-
selves, and quote only those authorities
which seem to me most to the point.

First then. Are those declarations
of Dunlop part of the res gesta, and if
they are, are they competent?

The Declaration of November 1855
was not at the time of any other act
in regard to either the first or the last
note. It stood separated by nearly three
months from any act. It seems to be
a new view that Dunlop had some
way found out he might take to
relieve himself from a personal obligation,
and put it upon the firm.

It was not res gesta with any
entry then made, for none was then
made.

"Declarations to become a part of
the res gesta, must have been made at
the time of the act done, which they were
supposed to characterize, and have been well
calculated to unfold the nature and
quality of the facts they were intended
to explain, and so to harmonize with

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"them as obviously to constitute one transaction"

Enos v. Tuttle 3 Cowen 250

In re Taylor, 9 Page 611

Carter v. Buchanan 3 Kelly 513

Blood v. Redout 13 Met. 237

"Baylen v. Burke 14 Howards S.C. 575-

"But declarations of a previous fact,
" (e.g. how the parties hands became bloody).
" are inadmissible" Scragg v. The State, 8 Smeal
" & M. 722"

"Is where a party on removing an
" ancient fence, put down a stone in
" one of the post-holes, and the next day
" declared he placed it there as a boundary,
" it was held that this declaration, not
" constituting a part of the act done, was
" inadmissible in evidence in his favor.

" Hayes v. White, 19 Cowen 250

Corneth v. Lincoln, 34 Maine 310

The declarations were not competent to explain the erasure, because the erasure was not made at the time of the declarations. In the case just cited, the declaration was made the next day, in this case the erasure might have been made ever so long before.

In regard to the declarations made at the time of the giving of the company note, it is contended they were res gesta with the giving of that note. If they were, that fact makes them evidence.

The act of giving that note was

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a fraud. The defendant did not call the witness attention to the execution of the note. No part of the transaction was called out by the defendant. The witness was adduced by the plaintiff on purpose to testify to the declarations.

The giving the note and all that surrounded it was inadmissible, unless connected with Hard.

Can it be said that Dunlop in the very act of committing the fraud upon his co-partners by substituting the firm note for his own, can then make testimony in favor of his transaction by declarations that he is doing the act with the assent of the partner ~~he is undertaking to defraud~~.

If this be law, then the way is wide open for the dishonest partner to saddle his co-partners with his individual debts. If in the act of committing his fraud he will only make such explanatory declarations as will show he has the authority of his co-partners to his acts, he is sure to accomplish his purpose.

The rule should then be stated, to be, not that the partner to be bound should give his express assent, but the partner using the name of his firm may bind all the members thereof, if he will at the time of giving the note represent that he has the assent of the partner.

We understand the rule to be this. A partner cannot bind his co-partner by substituting the firm note for his own or by giving an acceptance of the firm for his individual debt.

To bind the co-partner his express authority must be proved.

To allow the fraudulent partner's own declarations to prove that assent, would take from the rule all its value as a prevention of fraud. It would need only the addition of a lie to make his fraud successful.

All these declarations are introduced for the purpose of showing:— First, that the money was borrowed for the firm;— and second, that Hurd assented to the substitution of the partnership note for Dunlop's individual note. They are the only testimony in any way tending to show the fact. And the very first of them was three months after the money was borrowed, after Dunlop had given his own note for it, guaranteed by his banker Benson;— after he had brought it into the firm as a loan from himself, and made three distinct entries of it in that light, besides crediting himself with interest on the money.

His Honor Judge Bress in delivering the opinion of this Honorable Court, says in considering these admissions.

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"The question as the case then stood, was, had the indebtedness created by the note of August 21st been assumed by the firm, which was for the jury to decide, and it was competent for that purpose, and for the purpose of showing that the indebtedness in the first instance was created for the benefit of the firm, and on the firm credit, and was part of the entire transaction."

And one of the instructions of which the appellant complains, declares the law in the same way as far as it goes, - "that the jury are to say what effect and weight shall be given to the entries and Dunlop's declarations in reference thereto in determining the question whether the money was borrowed upon Dunlop's individual credit, or upon the credit of the firm"

In the case of Astrom & Jacobson et al v. Met. 454. where Philo Upson & Co. were sued, the Court say. "The plaintiff offered, first to give in evidence the declarations of Upson, (who executed the note) to show that the transactions for which the notes were given, were for the partnership business, and that the notes were company notes. This evidence was properly rejected under various decisions that have been made, and especially in our own courts. The plaintiff offered

" To show, secondly - that at some period
 " after Upson's death, Jacobs another
 " of the firm acknowledged the notes and
 " notes of the firm, and wanted to borrow
 " money to pay them, saw whatever
 " effect might be given to the admissions
 " of Jacobs to charge himself as a partner
 " with Upson. Most clearly Jacobs can
 " no more by his admissions charge
 " Conroy a partner in a firm of Upson,
 " Jacobs, & Conroy, than Upson could,
 " by his admissions charge Conroy, or
 " Jacobs & Conroy.

The same doctrine is held
 in *Guttle v. Cooper* 3 Pick. 414. and
 19 Barbour Suprem. Ct. 326.

In the case of *Smith v. Smith*
 19 Barbour 326. The partner gave his
 own note endorsed by the firm, for his
 own note. At the time of giving the
 firm note the evidence - "that when
 " Kelly, the plaintiff's agent, took the note,
 " he asked if De Witt, the giver of the note,
 " would have the right to endorse the
 " firm name. De Witt replied that such
 " was the understanding between him
 " and his partner" - was declared to be
 "clearly inadmissible." The Court in
 that case further say. "It is impossible
 " for one partner by his acts, or admissions,
 " to bind his co-partners without their
 " assent expressed, or implied, for an individ-
 " ual debt of his own."

The case of 5 Pick. 414 was the

some kind of a case, except - that the note was given in the firm name, and endorsed by the partner.

The Plaintiff sought to give in evidence the declarations of the partner giving the note. The court say.

"The question was whether the note
sued upon was a partnership transaction
or not. If it had been proved to
be a partnership transaction, then
the confessions of Robbins (giver of the note)
would have been evidence, but there
was no evidence of that fact, and
therefore as to the note the defendants
were not co-partners, and the confession
of one, ought not to be admitted to the
prejudice of another. The verdict pro-
posed to be examined, would be a principle
actor in the fraud complained of.
To allow him to tell his own story
in his own way, and to mislead the
jury perhaps by an artful tale,
would reflect little credit on the
wisdom of the law."

Strip this case of the declarations of Dunlop, and what have we to support a verdict, and how does the case stand - thus - money borrowed upon the note of Dunlop, guaranteed by J. H. Benson, not one word said between Haggerty and Dunlop that the firm was the borrower; nothing indicating that either Dunlop, or Haggerty under-
stood

it to be a firm transaction, but on the contrary, the books of the firm show that it was then considered as a loan by Haggerty to Dunlop, and by him to the firm. Instead of those entries being notice to any one that the firm owed Haggerty, they most unequivocally declared to the contrary.

This court has said in substance in its decision in this cause, that because Hurd might have seen the books, he will be presumed to have assented to the transaction.

But the court will see that the notice was all to the effect that the firm was indebted to Dunlop for the money, and not to Haggerty.

There was nothing to show from the contrary, but that the footing of the individual account of Dunlop did not contain this sum. But even if the second note had been entered upon the books as the note of the company, no inference could have been drawn from such entry against this defendant.

In the case of ^{the} Barbour above referred to, the note was entered in the books as a company note, and the partners proved to have assented to them; yet the court say, the other partners were not bound to express their dissent, but the plaintiff must prove their assent affirmatively.

Assuming then, that Hurd did

see the books of the firm; he saw by them that Dunlop had loaned to the firm \$600.00, and from time to time credited himself interest on the same. If he is presumed to have examined Dunlop's individual accounts, and saw that the \$600.00 had been marked out, and omitted in the footing, what would it notify him of? What will the court presume in the absence of all proof? There was no change in the original entries, and no counter entries.

The Honorable Judge in giving his opinion in this case, however, makes the following distinction.

"It is true where a note made in the name of one partner is sued on, and there is no evidence to show it was a partnership debt, the declaration of the maker can not be used for such purpose. But if it has been executed in the partnership name, and attached as having been made by an individual partner to pay his own debt, then the declarations of the partner who made the note, with the circumstances attending its execution must, with some qualifications go in evidence."

Now in all the above cited cases except the one of Ashom & Jacobs et al., the action was upon the partnership note, and the courts expressly say the declarations, and acts of the individual

partner are inadmissible.

And upon principle, I cannot see why there should be any such distinction. Because the partner has done the very act that is intended to work the fraud, and removed the chance of detection a step further off, shall he thereby entitle himself to bind his co-partners by his declarations of fairness and pretences of authority?

I say then, without the declarations of Dunlop, there is not the least evidence to show that the money was borrowed on the credit of the firm, or for the use of the firm.

It is not sufficient that it should have been the intention of Dunlop to put it in to the firm, or that it came into the hands of the firm, and was finally used by the firm in the payment of its debts, or in any other way. If it was borrowed by Dunlop, and upon his guarantee note, it was none of Haggerty's business where it went afterwards. If the firm had got the possession of the money without any intention on the part of Haggerty to let Dunlop have it, that would be a different thing, and such a case as the one referred to by the court in 4 Metcalf 577, where an administrator applied money of the estate to the use of the firm.

The Honorable Judge who

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who delivered the opinion in this cause says. "The question, what was done with the money raised by the August note, was left to the jury on the evidence, and they have found it went to pay a debt due by the firm, to Wilcox Lyon & Co. And for which each member of the firm was responsible. If this be so then it could be no fraud on the firm, on the renewal of its note to pledge the firm for its payment."

The evidence showed that the money was charged to cash, as received of Dunlop on the 27th & 28th August, and the next day Wilcox, Lyon & Co. were paid by the company, by check some \$700. It is fair to presume that this money formed a part of that paid to Wilcox, Lyon & Co.

I have selected a few references that seem to me to show a different doctrine than that expressed by the Court.

"If a partner borrows a sum of money and gives his own security for it, it does not become a partnership debt by being applied to partnership purposes, with the knowledge of the other partners"

Bevan v. Lewis, 1 Sim. R. 376
Wiggins v. Hammond, 1 Missouri R. 121
U. S. Bank v. Binney, 5 Mason R. 176

Wells v. Hill, 2 Dev. and Bakh., 231

"If a partner borrows money on his individual note, and uses the money in the firm, it does not become a partnership debt."

Groff v. Hickman, 5 Watts R., 434

Whittaker v. Brown, 16 Wend. R. 570

"Where one partner borrows money on his individual credit, and afterwards applies it to the payment of partnership debts, or loans it to the firm, it does not entitle the original lender to consider himself a creditor of the firm, and to enforce payment against them."

Ex parte Hunter, 1 Ark. R., 222

Parkin v. Corushus, 3 Esp. R., 259

(Quoted 6 Cowen R., 523, where the doctrine is discussed.)

19 Barbour, 326, and cases therein before cited.

"Where a person holds a partnership note and gives it up and notes the individual note of one partner, it is a payment of the partnership note."

Here is a case from which the appellees counsel quoted a syllabus, and which seems to establish the doctrine propounded by this court.

It is in the case of Union Bank v. Earow 5 Humph. 499.

That I may show the error of the syllabus, I have copied the whole of the opinion of the Court so far as

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it applies to this case. It is as follows.

"This action was brought upon a promissory note which purports to have been executed by Hall & Eaton. Hall and Eaton were partners in extensive distilling. Hall drew a bill of exchange on Eaton which was negotiated at the Union Bank 19 April 1838. This bill was protested for non acceptance: when it came back, it was taken up by Hall who in subsequent renewals executed notes in name of Hall & Eaton. The plaintiff proved by Armstrong that when Hall presented the bill for endorsement, he said he wished the money to be obtained by discounting the bill for the use of their distillery. John M. Chapin, President of the Bank, proved that Allen A. Hall, when he offered the bill for discount at the Bank, stated that the proceeds were wanted for the use of the distillery carried on by him and Eaton; that he was authorized by Eaton to draw on him to raise funds for that purpose, and witness thought Hall exhibited to him a letter from Eaton to that effect.

"The question before the jury was whether Hall and the plaintiff had been guilty of a fraud in the substitution of the note of Hall and Eaton executed by Hall, for draft which Hall had drawn and upon which he had received the money.

from the Bank. As the draft was drawn in Hall's individual name, if the money was advanced for his individual use, and on his credit the substitution of this note for the draft would be a fraud on Eaton.

But the evidence does not make out that case. Armstrong & Bos. prove that Hall said when he presented it to the Bank for discount, that he wanted the money for the use of the distillery of Hall & Eaton. Now as they were partners in that business, Hall had a right to borrow money on the credit of the firm, to be used for the prosecution of the transactions of the firm. Having borrowed money for the business, and on the credit of the firm, both partners would be liable therefor. But if he secured the payment by note or bill in his own name, the creditor would have an action on that security against him only, though he might possibly succeed against the firm for money paid and received.

Then quoting Collier on Partnership Ch. 2 Sec. 2 P. 262. Story on Partnership Sec. 102, 104. and Foster v. Eaton, 4 Humph. Rep. 346. says—

"It is clear from these authorities that when money is borrowed for a firm, and the individual note, or bill of one partner is taken, that

" that partner alone will be responsible
 " on the note or bill; and in order to
 " hold the firm liable for money advanced
 " it must appear that it was obtained
 " for the firm and on the credit of the
 " firm, otherwise it will be treated
 " as an election of the creditor to
 " absolve the partnership from responsibility,
 " and to confine the credit to that partner
 " only."

This case establishes two propositions in favor of the appellant.

1st " That the money must be borrowed for the use of the firm.

2nd " That it must be upon the credit of the firm, "otherwise it will be treated as an election by the creditor to absolve the partnership from responsibility, and to confine the credit to that partner only."

As before stated, I show by authority, it is not enough to show that the money found its way into the firm and paid its debts.

The meaning of the rule must be, that there was an intention to borrow for the firm, and to lend for the use of the firm. If it means more than that it impinges upon the authorities just quoted.

There should then have been testimony showing the minds of the lender and borrower at the time of the transaction as in the case

just cited.

Allowing the admissions of Dunlap, made long after, to show that intention, gives such time for reflection, calculation, and change of interest, as to endanger the rights of the parties, and work injustice.

I also contend that it was equally incumbent upon Haggerty to have shown the intention of the parties in reference to whose credit the money was loaned upon.

The note in the individual name of Dunlap, and guaranteed by Benson was very strong evidence that the intention was to take the individual security of Dunlap.

And the court will mark that there is not the first word of contradicting testimony, unless by implication, from the admissions complained of.

I may safely affirm then that the verdict of the jury rests wholly upon the admissions of Dunlap, that Hurd authorized him to give the note of March, and the only question for the court is, shall your petitioner be bound by that admission?

Though I might again present the question of usury in its two bearings, namely, 1st That the jury ignored the clear testimony showing usury.

2nd That a partner has no right to bind his co-partner to a usurious contract without express assent. (The law that forbids the making of usurious contracts must be considered as entering into the agreement of partnership, and is notice to all parties dealing with the firm.)

I have thought it best not to trouble the court with a review of the law upon those points.

I trust the court will not look upon my petition in this cause, as made in the spirit of contention. The case is the first in this state upon the subject involved, and will settle the law in regard to a commercial interest not inferior to any in our state; and for this reason, I come with greater boldness to ask a rehearing, believing that your Honors will upon a full argument of the cause, settle the law consistent with the safety of partners, and according to equity, and the law, as established in other states, and your petitioner will ever pray

Supreme Court
of the State of Illinois

Harvey B. Hurd
appellant

^{p.}
Cyrus R. Haggerty
appellee

Do Messrs. Hoyle, Muller & Lewis
Attorneys for appellee

You will please take
notice that at the Term of the Supreme
Court of the State of Illinois to
be held at Ottawa in this
State on Tuesday morning next
April 16th 1861 at ten o'clock A.M.
or as soon thereafter as counsel can
be heard, I shall present to said Court
a petition for a rehearing in the above
entitled cause, a copy of which petition
is herewith attached, and herewith
served

Chicago April 9th 1861

Yours Truly

H. B. Hurd

for appellant

Recd copy of motion

This 9th day of April 1861

Wm Muller Lewis

Supreme Court

Harvey B. Hunt

Cyous R. Huggins

Petition for hearing

Thomas

Copy No 3

Filed Apr 16, 1861

W. L. Garrison

clerk

Copy No 3
Harvey B. Hunt
Cyous R. Huggins
W. L. Garrison
clerk