

No. 13353

Supreme Court of Illinois

Booth et al

vs.

Rees

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 191.

*Bank et al
vs
Pease*

13353

United States of America }
State of Illinois }
Le County } sc

Hens in the Le County
Circuit Court in the Le County Circuit Court
in the 22^d Judicial Circuit of the State of
Illinois in the matter of Jeremiah J. Rees
Plaintiff against Kirkland F. Booth, George
Kingson and Orange D. Reed Defendants in an
action of Trespass.

Be it remembered that on the Twenty
ninth day of October in the year of our
Lord One Thousand Eight Hundred and
Fifty nine, the said Jeremiah J. Rees Plaintiff
commenced a certain action of Trespass in
said Court against Kirkland F. Booth, George
Kingson and Orange D. Reed Defendants
and thereupon a summons issued out of
and under the seal of said Court in the
words following to wit:—

" State of Illinois }
Le County } sc

Summons }

The People of the State of
Illinois to the Sheriff of said County Greeting:
We

command you that you summon
Kirkland F. Booth, George Kingson & Orange D. Reed

Summons } if they shall be found in your County
personally to be and appear before the Circuit
Court of said County, on the first day of the next
Term thereof, to be holden at the Court House
in Dixon in said County, on the 4th Monday
of November next to answer unto Jeremiah J.
Reese in a plea of Nonassess to the damage of
said Plaintiff as he says in the sum of Three
Hundred dollars. And have you then and there
this writ, with an endorsement thereon, in what
manner you shall have executed the same.

Witness Isaac S. Bowman Clerk of said
Court, and the Seal thereof
at Dixon aforesaid this 29th day
of October A.D. 1859

Isaac S. Bowman Clerk
J. J. Ball D. C.

(Endorsed) Filed Dec 15th 1860. B. F. Snow Clerk "

Summons } also endorsed "Served the within by recording the same in
the hearing of the within named K. F. Booth, Clerk
"Hempstead Spring, I Read this 2nd day of November 1859
Per se

Lester Hanching Sheriff
By E. A. Snow Deputy "

And afterwards, to wit: on the 15th day of
November A.D. 1859, the Plaintiff in said
cause filed his Declaration in the words
following to wit:—

State of Illinois,
Lee County } ss.

Lee County Circuit Court,
of the November Term, A. D. 1859,

Declaration }

Jeremiah J. Rees Plaintiff in this suit, by
Bernard H. Truswell, his Attorney, complains
of Kirtland H. Booth, Alonzo Kinyon and
Orange M. Reed, Defendants herein who
were summoned, etc., in a plea of Trespass:
For that whereas the said Defendants here-
before, to wit: On the first day of April
in the year of our Lord one thousand eight
hundred and fifty nine, with force and
arms, to wit: at Amboy in the County
of Lee, aforesaid, seized, took and carried
away the following ^{personal} goods and chattels the
property of the said Plaintiff, to wit:
One sett of stone China ware, one sett of
glass ware, one sett of tin ware, one feather
bed, twelve feather pillows, two feather
bolsters, one sack of feathers, four new
patch work quilts, eight woolen blan-
kets, six comforters, one Mahogany stand
one cottage bedstead, one brass Kettle,
one clock, twelve cane bottom chairs
one cotton Mattress, one grass Mattress,
four moss pillows, two clothes baskets
one lounge, one trunk, forty grain
bags, one cloth cloak, Ten Brooms

Declaration } forty books and twenty pictures, three
Continued } mirrors, fourteen wire screens, six
 oilcloths of great value, to wit: of the value
 of three hundred dollars in all, then there
 found and being and converted and disposed
 of the same to there own use and other
 wrongs to the said Plaintiff then and there
 did to the damage of the said Plaintiff
 of three hundred dollars and therefore he
 brings suit, etc., etc.,

Bernard H. Trusdell,

Atty of Plaintiff.

Enclosed - "Filed Nov. 15th 1859,

J. S. Boardman, Clerk."

And afterwards to wit on the seventeenth
 day of February Anno Domini One Thousand
 Eight Hundred and Sixty the said
 Defendant Kenneth F. Booth filed his
 plea in the words following, to wit: -

State of Illinois } ss.
Lee County }

Lee County circuit court,
February, Term, A. D. 1860.

Jeremiah J. Kees

vs.

Kirtland J. Booth,

Orange M. Reed and

Alonzo Kinyon.

Trespass.

Pleas of
Defendant
Booth

And the said Kirtland J. Booth one of said Defendants by Kinyon & Williams, his Attorneys comes and defends the force and injury when &c., and says that he is not guilty of the said supposed trespass above laid to his charge or any or either of them or any part thereof in manner and form as the said Plaintiff hath above thereof complained against him, and of this he puts himself upon the country. (And the Plaintiff doth the like.)

B. H. Trusdell, Plaintiff.

Kinyon & Williams, Attys for Deft.

And for a further plea in this behalf said Defendant Booth, says as to the supposed trespass in taking and carrying away the goods and chattles mentioned in said Plaintiff's declaration the said Defendant says as to the following articles.

6
Booth's plea } to wit: Six chairs, one barrel and contents,
Continued } one bedstead, one bag of bags, one lounge, one
stand, two baskets of dishes, four comforts, one
straw Mattrap, one cotton Mattrap, one
dozen pillow, more or less, one clock, one
Trunk and contents, and one looking
glass, part and parcel of the goods and chattles
mentioned in said Plaintiff's declaration.
actis non, because he says, that on the
eighth day of March, A.D. 1858, before the
time when the said Trespass is supposed to
be done, he was and for a long time
prior thereto and now is a Justice of
the Peace, duly elected and qualified, in and
for the County of Lee and State of Illinois
that on said day one Alonzo Kinyon
applied to this defendant in his capac-
ity of Justice of the Peace aforesaid for
an Attachment against the personal effects
of said Plaintiff under the name and
style of J. S. Pees, and made the follow-
ing oath and complaint before him,
to wit:

State of Illinois } ss.
Lee County } Affiant

The oath and complaint of
Alonzo Kinyon taken before N. D. Booth
a Justice of the Peace of said County, doth

Booth's Pleas
continued

depose and say that J. S. Rees is justly indebted to Alony Kinyon in the sum of 45²⁵/₁₀₀ Dollars and that the said J. S. Rees is not a resident of this State as this affiant has been informed and believes and ask that an Attachment may issue against the personal effects of said J. S. Rees. Subscribed and sworn to before me this 8th day of March, 1858,

A. Kinyon (Seal)

N. H. Booth (Seal)

That the said Alony Kinyon then and there gave a good and sufficient Attachment Bond as is by law required and the said defendant then and there having jurisdiction issued as he is by law required a writ of Attachment against the said Rees, which said writ was delivered to one Orange D. Reel a Constable in and for said County of Lee and the same was afterwards, to wit: on the 8th day of March A. D. 1858, returned by said Constable with the following endorsement thereon to wit: March 9th, 1858, By virtue of the within I have this day levied on the following property, 6 chairs, one barrel and contents, one bedstead, one bag of bags, one lounge, one stand, 2 baskets of

8
Booth's pleas } dishes, 4 comforts, one Straw Mattrap, one
continued } Cotton Mattrap, one dozen pillows, more or
less, one clock, one trunk and contents, one
looking glass, C. H. Reed, Constable.

Said goods and Chattels levied upon being
the same herein before described as part and
parcel of the goods and Chattels described in said
Plaintiff's declaration, that afterwards, to wit:
on the 22^d day of March, A.D. 1859,
such proceedings were had before this defendant
as Justice of the Peace aforesaid as that judg-
ment was rendered in favor of said George
Kinyon and against said Plaintiff for the
sum of forty five & ³⁵/₁₀₀ dollars and costs
of suit thereupon pursuant to said
judgement and in conformity with the
Statute in such case made and provided
this defendant as Justice aforesaid issued
an order of sale of said goods and chattels
so attached as aforesaid to satisfy said
judgement which said order of sale was
delivered to said Constable and was duly re-
turned executed all which said proceedings
were in conformity with the Statute in such
case made and provided. Which are the same
trespass whereof said Plaintiff hath above
complained against the Defendant, and
all this said Defendant is ready to verify.

Whereof he prays judgement, &c.,

"

Kinyon & Williams,

Endorsed - Filed Feb. 17th, 1860.

Attys for Deft.

J. S. Boardman, Clerk.

And on the said Seventeenth day of February the said Defendant Henry Kinyon also filed his separate pleas in the said Cause in said Court in the words following to wit: -

State of Illinois } ss.
Lee County

Lee County Circuit Court.
February Term, A.D. 1860.

Jeremiah J. Rees

vs.

Orange M. Reed,
Kirtland J. Booth, and
Alonzo Kinyon

Plea of the
Defendant
Kinyon

And The said Defendant Alonzo Kinyon
by his Attorneys Kinyon & Fuller comes
and defends the force and injury when &c.,
and says that he is not guilty of the said
supposed Trespass above laid to his charge
or any or either of them or any part
thereof in manner and form as the said
plaintiff hath above thereof complained
against him, and of this he the said
defendant puts himself upon the country.
(And the Plaintiff doth the like.)

B. H. Trusdell, Atty for Pltff.
Kinyon & Fuller, Attys for Deft.

And further plea in this behalf the said
defendant says, as to the supposed Trespass
in taking and carrying away the goods and
chattles in said Plaintiffs declaration men-
tioned as to certain part, of the same
that is to say the following articles, to wit:

12
Hinson's pleas }
Continued

Six chairs, one barrel and contents, one bedstead, one bag of bags, one lounge, one stand, two baskets of dishes, four comforts, one straw Mattress, one cotton Mattress, one dozen pillows, more or less, one clock, one trunk and contents, and one looking glass. Actio non, because this defendant says that on the eighth day of March, A. D. 1858, the said Plaintiff was owing to and indebted to this defendant in the sum of forty five dollars and twenty five cents, which said indebtedness was evidenced by a certain promissory note made executed and delivered by the said plaintiff by the same style and description of J. S. Rees to one J. M. McEwin and endorsed by the said McEwin to this defendant which said promissory note is in words and figures following, to wit: Due per McEwin one hundred dollars in boarding at the Exchange Hotel, Cambridge, Ill., for value received for said McEwin and wife.

Sept. 15th, 1858. (Signed) J. J. Rees.

On the back of said note is the following endorsement, to wit: December 13 received on the within \$50, also the name of the payee of said note endorsed, in blank to wit: (Jeremiah McEwin) That on

Kinyon's plea }
Continued

The said eighth day of March, after having filed a bond as required by law, this defendant the following affidavit as he lawfully had a right to do, before one Kirtland J. Booth, a justice of the Peace, in and for the County of Lee, and State of Illinois, duly elected commissioned and qualified according to law, in words and figures following, to wit:

Affidavit.

State of Illinois.

Lee County

} ss.

The oath and complaint of Abner Kinyon, taken before K. J. Booth a justice of the Peace of said County, doth depose and say that J. S. Rees is justly indebted to Abner Kinyon in the sum of 45²⁵/₁₀₀ dollars, and that ^{said} J. S. Rees is not a resident of this State as this affiant has been informed and believes, and asks that an attachment may issue against the personal effects of the said J. S. Rees.

A. Kinyon, Seal

Subscribed and sworn to before me this 8th day of March, 1857.

K. J. Booth, J.P. Seal

In which affidavit the name of the said Plaintiff was by mistake written J. S.

Kingon's pleas }
 Continued } Rees instead of J. B. Rees; That on the said eighth
 day of March the said Booth justice of the
 Peace as aforesaid issued the following writ of
 Attachment as he lawfully had right to do,
 against the goods and chattles of the said
 Plaintiff by the name, style and description
 of J. B. Rees, in words and figures follow-
 ing, to wit:

Attachment Writ.

State of Illinois } ss.
 Lee County }

The people of the State
 of Illinois, to any Constable of said County,
 Greeting: Whereas, Abner Kingon, has
 on this day filed an affidavit, before H.
 J. Booth, a justice of the Peace of the said
 county, that J. B. Rees is justly indebted
 to Abner Kingon, in the sum of 45⁰⁰/₁₀₀
 Dollars and that said J. B. Rees is not
 a resident of this State as this affiant is
 informed and believes, and the said Abner
 Kingon having given bond and security
 according to law, we therefore command
 you that you attach so much of the
 personal effects of the said J. B. Rees
 to be found in your County, of value
 sufficient to satisfy the said debt and costs
 and such property by you attaching you
 are to secure or so to provide that the same

of any one's pleas
Continued } May be liable to further action therein
before the undersigned justice of the Peace,
and in case that personal property of
value sufficient cannot be found you
will summon all persons that the plain-
tiff or his agent may direct, to appear
before me at my office in Amboy on the
12th day of March, 1858, at 10 o'clock
P. M., to answer what may be objected
against him or them as garnishee and
there have you this writ with what you
have done thereon. Given under my hand
and seal this 8th day of March, 1858.
K. H. Booth, J. P. Seal

And delivered the same on the said eighth
day of March to one Orange M. Reed an
acting Constable in and for the County
of Lee, and State of Illinois, duly elected
and qualified according to law: That
on the ninth day of March, A. D. 1858,
said Reed as he lawfully might, by virtue
of said writ of Attachment, seized and
took possession of the said goods and chattels
belonging to the said plaintiff hereinbefore
described and endorsed his doings thereon
upon the back of said writ of Attachment
and on the said ninth day of March

Kinjon's, pleas
Continued

returned the said writ to the said justice of the Peace as by law he was required to do, That afterwards having advertised ten days for service as required by law, to wit: on the twenty second day of March, A.D. 1859, such further proceedings were had before the said justice as that a judgement was rendered in favor of the said Alongs Kinjon and against the said Plaintiff by the man style and description of J. S. Rees for the sum of forty five Dollars and twenty five cents and three Dollars and fifty cents costs; and afterwards, to wit, on the twenty third day of March, A.D. 1859, the said justice of the Peace as lawfully might and by law was required to do, issued a special execution or order of sale in words and figures following, to wit:

State of Illinois }
Lee County } ss.

The people of the State of Illinois, to any constable of said county; Greeting: Whereas, heretofore, to wit: on the 6th day of March, A.D. 1859, Alongs Kinjon, sued out before the undersigned a justice of the Peace in and for said county, an attachment against J. S. Rees and ^{caused} said attachment to be levied

Kingyon's place
Continued

on six chairs, one barrel and contents, one
bedstead, one bag of bags, one lounge, one
stand, two baskets of dishes, four comforts
one straw mattress, one cotton mattress
one dozen pillows more or less, one clock,
one trunk and contents, one looking
glass as the property of said J. S. Rees
and whereas afterwards to wit: on the 22^d
day of March 1857, such further proceedings
were had before said justice as that a
judgement was rendered in favor of said
Abouzo Kingyon and against J. S. Rees for
the sum of 45 dollars and 25 cents in a plea
of assumpsit, besides costs of suit which
are endorsed thereon and taxed at 3 dollars
and 50 cents and the property attached ordered
to be sold for the satisfaction of said judge-
ment and costs. You are hereby com-
manded that pursuant to said judge-
ment, and in conformity with the
Statute in such case made and provided,
you proceed without delay to make sale of
said property, attached and make said
debt and costs and make due return of
your doings hereon. Given under my
hand and seal this 23^d day of March, 1857.

(Signed)

K. J. Booth, Deal

justice of the Peace.

Kinyon's pleas
Continued

And delivered the same to said Recd constable as aforesaid, by virtue of which execution or order of sale, said Recd afterwards after having advertised said goods and chattels at public vendue for the purpose of satisfying said execution and costs for selling said goods as lawfully he might and by law was required to do; and on the said eleventh day April returned said execution or order of sale to said justice of the Peace, with his doings thereon endorsed on the back of the same as required by law which is the said supposed Trespas in the introductory part of this plea mentioned and whereof the said plaintiff hath above complained against him the said defendant is ready to verify, wherefore he prays judgement if the said plaintiff ought to have or maintain his aforesaid action thereof against him.

Kinyon & Fuller,
Attys for Defendant.

Endorsed "Filed Feb. 17th, 1860.

J. S. Boardman, Clerk.

And on the said seventeenth day of February the said Defendant Recd, also filed his separate pleas in said cause in the words following to wit:—

State of Illinois }
Lee County } ss.

Lee County Circuit Court.
February Term, A.D. 1860.

Jermiah J. Rees
vs.

Kirtland F. Booth
Orange H. Reed, &
Alonzo Kinyon

Action, Trespass.

Hears of }
Defendant }
Reed }
And the said defendant Orange
H. Reed by his Attorneys Kinyon & Fuller
comes and defends the force and injury
when &c., and says that he is not guilty
of the said supposed Trespass above laid
to his charge or any or either of them
or any part thereof in manner and
form as the said plaintiff hath above
thereof complained against him, and
of this he the said defendant puts him
self upon the Country. (And the plain-
tiff doth the like)
B. H. Trussell,
Atty for Pltff.
Kinyon & Fuller,
Attys for Deft.

And for further plain this behalf the
said defendant says, as to the supposed
Trespass in taking and carrying away the
goods and chattels in said plaintiff's declara-
tion mentioned or to certain part

Reel's pleas
Continued

of the same, that is to say, the ^{following} articles,
to wit: Six chairs, one barrel and contents,
one bedstead, one bag of bags, one lounge, one
stand, two baskets of dishes, four comforts,
one straw mattrap, one cotton mattrap, one
dozen pillows, more or less, one clock, one trunk
and contents, and one looking glass, acts
mon, because the said defendant says that
on the first day of April A.D. 1853, and
for a long time prior thereto, to wit, for
more than one year this defendant was
an acting Constable within and for the
County of Lee and State of Illinois,
duly elected and qualified according to
law: That on the eighth day of March
A.D. 1853, one Kirtland J. Booth a Justice
of the Peace in and for the County of
Lee and State aforesaid duly elected, com-
missioned and qualified as required by law,
issued the following writ of Attachment as
he lawfully had a right to do, against
the goods and Chattles of the said plain-
tiff by the name style and description
of J. S. Reel, in words and figures, to wit:

State of Illinois }
Lee County } s.s.

Attachment Writ:

The People of the State of
Illinois, to any Constable of said County

Reed's pleas
Continued

Greeting: Whereas, Alongs Kinyon has on this day filed an affidavit before N. J. Booth a justice of the Peace of the said County, that J. S. Rees is justly indebted to Alongs Kinyon, in the sum of 45⁰⁰ Dollars, and that the said J. S. Rees is not a resident of this State as this affiant is informed, ^{and believes} and the said Alongs Kinyon having given bond and security according to law, we therefore command you that you attach so much of the personal effects of the said J. S. Rees to be found in your County, of value sufficient to satisfy the said debt and costs, and such property by you attached, you are to secure or so to provide that the same may be liable to further action before the undersigned justice of the Peace and in case that personal property of value sufficient cannot be found, you will summon all persons that the plaintiff or his agent may direct, to appear before me at my office in Ambury on the 12th day of March, 1853, at 1 o'clock P. M., to answer what may be objection against him or them as garnishee, then and there have you this writ, with what you have done thereon. Given under

Reed's pleas } My hand and seal this 8th day of
Continued } March, 1859.

K. F. Booth, J. P. seal

And delivered the same on the said eighth day of March, to this defendant Constable as aforesaid: That on the ninth day of March A. D. 1859, this defendant as he lawfully might, by virtue of said writ of Attachment, seized and took possession of the said goods and chattels belonging to said plaintiff, hereinbefore described, and endorsed his doings thereon, upon the back of said writ of Attachment, and on the said ninth day of March returned said writ to the said justice of the Peace, as by law he was required to do. That afterwards, after having advertised ten days for service as required by law, to wit: on the Twenty Second day of March A. D. 1859, such further proceedings were had before the said justice as that a judgement was rendered in favor of the said George Kinson and against the said plaintiff by the name style and description of J. S. Reed, for the sum of forty five Dollars and twenty five cents, and three Dollars and fifty

Reed's Pleas
Continued

cents costs, And afterwards to wit: on the
Twenty third day of March A. D. 1859,
the said justice of the Peace as he lawfully
might and by law was required to do:
issued a Special execution or order of Sale
in words and figures following, to wit:

State of Illinois }
Lee County } ss.

The people of the State of
Illinois, to any Constable of said County;
Greeting; Whereas, heretofore, to wit:
on the 8th day of March, A. D. 1859,
Alonzo Kinyon sued out before the under-
signed, a justice of the Peace, in and
for said County an attachment against
J. S. Rees, and has caused said attach-
ment to be levied on six chairs, one
barrel and contents, one bedstead, one
bag of bags, one lounge, one stand, two
baskets of dishes, four comforts, one straw
mattress, one cotton mattress, one dozen
pillows, more or less, one clock, one trunk
and contents, one looking glass, as
the property of said J. S. Rees, and where-
as afterwards, to wit: on the 22nd day of March
1859, such further proceedings were had
before said justice as that judgement
was rendered in favor of said Alonzo

Reed's Pleas }
Continued }

Kinyon and against J. S. Rees for the sum of 45 dollars and 25 cents, in a plea of assumpsit besides costs of suit which are endorsed hereon and taxed at 3 dollars and 50 cents and the property attached, ordered to be sold for the satisfaction of said judgment and costs. You are therefore, ^{hereby} commanded, that pursuant to said judgment, and in conformity with the statute in such case made and provided, you proceed without delay to make sale of said property attached and make said debt and costs, and make due return of your doings hereon. Given under my hand and seal this 23^d day of March, 1857,

(Signed) N. J. Booth. Seal

Justice of the Peace.

And delivered the same to this defendant Constable as aforesaid, by virtue of which execution or order of sale, this defendant afterwards, after having advertised said goods and Chattels for sale ten days as required by law, to wit: On the eleventh day of April A. D. 1857, at ten o'clock A. M., of said day sold said goods and Chattels at public vendue for the purpose of satisfying said execution

and costs for selling said goods, as law
Read's Pleas } fully he might and by law was re-
continued } quired to do; and on the said eleventh
day of April, returned said execution
or order of sale to said justice of the
Peace, with his doings thereon endorsed on
the back of the same as required by
law, which is the said supposed
Trespass, in the introductory part of
this plea mentioned, and whereof the said
plaintiff, hath above complained against
him, and this the said defendant is
ready to verify, ^{wherefore} he prays judgement if the
said plaintiff ought to have or maintain
his aforesaid action thereof against him.

Kington & Fuller,
Attys for Deft. "

Embraced "Filed Feb. 17th 1860.

J. S. Baerman, Clerk. "

And afterwards, on the eighth day of May
AD 1860, the said Plaintiff in said cause
filed his Demurrer to the second plea of the
said Defendant Kington in the words following
that is to say: -

State of Illinois }
Lee County } ss.

Lee County circuit court.
May Term, A. D. 1860.

Jeremiah J. Rex
vs.

Alonso Kinyon
Trespas with Orange
H. Reed, and
Kirtland H. Booth

Trespas
Demurrer to second plea

Demurrer to
Kinyon's 2^d
plea

And the said plaintiff as to the
said plea of the said defendant Kinyon by
him secondly above pleaded, with that the
same and the matters therein contained, in
manner and form as the same are above
pleaded and set forth, are not sufficient
in law to bar or preclude him the said
plaintiff from having or maintain-
ing his aforesaid action thereof against him
the said defendant Kinyon, and that he the
said plaintiff is not bound by law to ans-
wer the same. And this he the said
plaintiff is ready to verify. Wherefore by
reason of the insufficiency of the said plea
in this behalf the said plaintiff prays
judgement and his damages by him sus-
tained on occasion of the committing of
this said Trespas, to be adjudged to him &c.,

Entered "Filed May 8th 1860.

Bernard H. Truettell, Atty for Plff."

J. S. Boardman, Clerk.

And on the said 8th day of May 1860 the said Plaintiff also filed his Demurrer to the second plea of the said Defendant Booth in the words following, to wit: _____

State of Illinois } ss.
Lee County }

Lee County circuit Court.
of the May Term, 1860.

Jeremiah J. Rees
vs.

Hirshland F. Booth
impleaded with
Orange H. Rees, &
Alonso Kniryon

Trespass.

Demurrer to Second plea

Demurrer to
Booth's 2^d
pleas

And the said plaintiff as to the said
plea of the said defendant Booth by him
secondly above pleaded, saith that the same
and the matters therein contained, in man-
ner and form as the same are above plea-
ded and set forth, are not sufficient in
law to bar or preclude him the said
plaintiff from having or maintaining his
aforesaid action thereof against him the said
defendant Booth, and that he the said plain-
tiff is not bound by law to answer the same.
And this the said plaintiff is ready to verify.
Wherefore by reason of the insufficiency of the
said plea in this behalf the said plaintiff
prays judgement and his damages by
him sustained, on occasion of the commit-
ting of the said Trespass, to be adjudged to
him &c.,

Bernard H. Trusdell,

Entered Filed May 8, 1860.

Att'y of Plaintiff.

J. S. Boardman, Clerk.

And on the said eighth day of May
AD 1860, the said Plaintiff also filed his
Demurrer to the second separate plea of
of the said Defendant Reed, whose
said Demurrer is in the words following
to wit: -

State of Illinois }
Lee County } ss.

Lee County Circuit Court,
of the May Term, 1860.

Jeremiah J. Rees
vs.

Orange D. Reed, impleaded
with Kirtland F. Booth &
Abner Kingon.

In Trespass.
Demurrer to second plea

Demurrer to
Reed's 2^d
pleas.

And the said plaintiff as to the
said plea of the said defendant Reed by
him secondly above pleaded, saith that
the same, and the matters therein contained
in manner and form as the same are
above pleaded and set forth are not
sufficient in law to bar or preclude
him the said plaintiff from having or

Maintaining his aforesaid action thereof
against him the said defendant Read,
and that he the said plaintiff is not
bound by law to answer the same.

And this the said plaintiff is ready to
verify. Wherefore by reason of the insuffi-
ciency of the said plea in this behalf the
said plaintiff prays judgement and
his damages by him sustained, on
occasion of the committing of the said
Trespases to be adjudged to him &c.

Bernard H. Truswell,

Att'y of Plaintiff.

Embraceri. Filed May 8th, 1860.

J. S. Boardman, Clerk.

Record }

At a regular Term of the Lee County Circuit Court begun and holden at the Court House in the City of Dixon in said Lee County on the first Monday in May in the year of Our Lord One thousand Eight Hundred and Sixty.

Present, Honorable John D. Custace Judge
of the said 22 Judicial Circuit

Present, Robert C. Emvickell States Attorney
for said 22 Judicial Circuit

Present, Isaac S. Doornbosson Clerk
of the said Lee County Circuit Court

Present, Lester Hamilton Sheriff of
said Lee County

And
on the sixteenth day of May aforesaid
the following is the Record entry in said Cause
in said Court, at said Term to wit:-

"Jammiah J. Rees

Kimball F. Booth, Henry S. Emvickell
and Orange D. Reed

} Decedent

On this
day comes the Plaintiff by Emvickell his
Attorney, and the Defendants by Emvickell

Record }

& Williams, their attorneys, and the Defendants to the special pleas of each of said Defendants coming on to be heard, are now by the Court sustained. "

And afterwards to wit: at another regular Term of the said Sec County Circuit Court begun and holden at The Court House in Dexon aforesaid, on the fourth Monday of November in the year of Our Lord One Thousand Eight Hundred and Sixty- and one one of the regular days of the said November Term to wit on the seventh day of December AD 1860

Present Honorable John B. Easton Judge
Said 22 Judicial Circuit

Present David McCourtney, States
Attorney for said Circuit

Present Benjamin F. Shaw Clerk of
said Sec County Circuit Court

Present Aaron L. Porter Sheriff said County
and the said cause coming on to be heard
the following proceedings were had in that
behalf as appears to us of Record to wit:

Jeremiah J. Rees

Record }

Landward J. Booth, George Emmon
and Orange O Reed

} Indisputable

On this day
comes the Plaintiff by Samuel J. Lee & Lee,
his attorneys; also come the Defendants by
Emmon & Williams their attorneys, and the
issues being joined also come a jury of good
and lawful men to wit; David C. Smith
B. P. Burr Stephen C. Finley, Herman O. Mead
Horace C. Mead, Merit A. Morse, Melan
R. Barnes, Harvey O. Williams, John Huntington
John Holden, Herman Zimmerman, the
panel of regular jurors being exhausted Reuben
A. Woods, was called as a talesman from the
laystanders, and he together with the eleven
jurors of the regular panel were duly elected
tried and sworn: and now comes the said
Plaintiff and enters a Noli Prosequi as to
the Defendant Orange O Reed, and so the
trial proceeds; and the jury in this case
after hearing the evidence, and the argument
of Counsel, retire to consider of their verdict;
and by agreement of parties the said jury
have come to deal their verdict, and to meet
the Court tomorrow morning at Nine O'Clock.

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Record }

And afterwards, at another regular day of said November Term to wit on the eighth day of December, 1866, the following entries appear to us of Record in this docket, that is to say:

"Jesse J. Rees

"Kirtland S. Booth & George Knigge
vs
inf &c

} Writ of Habeas Corpus

On this day again come the said parties by their respective Counsel; also come the jury heretofore empanelled in this docket; and the said jury now return a Verdict that they find the Defendants Knigge & Booth Guilty, and that they assess the said Plaintiff's Damages in the sum of Two Hundred Dollars (\$200), and thereupon the said Defendants enter their motions for a new trial and in arrest of judgment.

And the following is the Verdict in said cause, so rendered by the jury in said cause

"We the jurors find the Defendants Knigge
" & Booth Guilty, and assess the Plaintiff's
" Damages at two hundred Dollars (signed &c)

Verdict }

And the instructions asked in said course
on the trial thereof are in the words following
to wit:

Instructions }
" Jeremiah G Reed }
" }
" Kingston et al. }

Green } The Defendants ask the
Court to instruct the jury that unless the plaintiff
has proven that he was either in the possession
of the property taken, at the time of the alleged
trespass, or that he was at that time the owner
of such property, and entitled to the immediate
possession of the same, they must find for the
Defendant.

Green } That unless the Plaintiff has proven that these
Defendants either assisted in taking the
property, or ordered or directed it to be taken
they must find for the Defendants.

Green } That unless the Plaintiff has proven, that the goods
left in the house or granary in Dec 1858 were
the same goods, ~~and~~ ~~which~~ taken by Witness Reed
in the Spring of A.D 1859, and by the direction
these defendants or one of them, that he cannot
recover the value of such property left in the
house or granary, and that the Plaintiff can
only recover the Damages for the property.

Instructions } belonging to the Plaintiff actually taken by the
 continued } Witness Reed, under the Direction of the Defendants
 or either of them.

Given } That unless the Plaintiff has proven that
 the Defendant Booth either assisted in
 taking the property, or ordered or directed it
 to be taken they must find the Defendant
 Booth not guilty.

And the same law is
 applicable to the Defendant King.

Given } That the simple fact that Booth received the
 proceeds of the sale of the property, or any
 portion of the same, is not sufficient to
 constitute him a trespasser, unless it is
 also proven, that he either aided, assisted or
 directed in the Commission of the trespass.

Given } If the Jury believe from the evidence that
 Booth Commanded Reed to take this property,
 and the same was accordingly taken and
 received from said Reed or portion of the proceeds
 of the sale, of the same, these facts are sufficient
 to connect Booth with the Trespass, if the
 taking of the property was a trespass.

Answer

The Jury are instructed that there is no evidence before them tending to prove justification

Instructions continued

Refused

That if the evidence shows that the command of Booth to take ^{no} property, was made in writing that the plaintiff ^{must prove} such command by the writing itself, and not by parol evidence -
(endorsed "Filed Dec 8th 1860 B F Shaw Clerk
Joseph H. Ball D.C. "

And afterwards to wit on the fifteenth day of December aforesaid the undersigned one of the regular clerks of said November Term the following Record entries appear to us in this behalf that is to say: -

Record continued

" Jeremiah J. Rees

Kirkland J. Booth & George Lemmon
(impleaded with Orange B Reed

Disputed

On this

day again come the said parties by their respective Counsel, and the motions in arrest of judgment; and for a new trial coming on to be heard, are by the Court overruled; to which rule of the Court, the said Defendants by their Counsel then and there except.

It is considered and adjudged by the Court that the said Plaintiff have and recover of

Record }

of the said Defendants the sum of Two Hundred Dollars, his Damages by him in this behalf sustained, together with his costs and charges by him in and about this suit expended and that he have Execution therefor

And now come the Defendants and pray an appeal which is allowed, on the condition however that the said Defendants do within sixty days from the date hereof, file an appeal Bond in the sum of Five Hundred Dollars, with Rufus H. Mullen, and Henry C. Jaeger as securities, properly conditioned and which said Bond, is to be approved by the Clerk of this Court.

And afterwards to wit on the Eleventh day of February AD 1868, the said Defendants file their Bond in the words following to wit:-

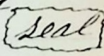
“
Appeal Bond } Know all Men by These Presents;
that we Kirtland J. Booth and Alonzo
Kinyon as principals, and we Rufus H. Mellen
and Henry E. Badger as securities all of
Amboy in the County of Lee and State
of Illinois, are held and firmly bound
unto Jeremiah J. Rees in the sum of Five
Hundred Dollars good and lawful money,
for the payment of which well and truly
to be made we and each of us bind ourselves
our heirs executors and administrators jointly
and severally firmly by these presents.
Witness our hands and seals this 11th day
of February, A. D. 1861.

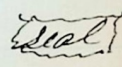
The condition of the above obligation
is such that, Whereas judgement was ren-
dered against the above bounden Kirtland
J. Booth and Alonzo Kinyon in favor
of the said Jeremiah J. Rees in the Circuit
Court of said Lee County in the State
of Illinois, at the November Term there-
of A. D. 1860, for the sum of Two hun-
dred Dollars damages besides costs of suit,
to be taxed, in which judgement and
proceeding the said Kirtland J. Booth and
Alonzo Kinyon complain and believe that
there is error therein, and thereupon have
prayed an appeal from the decision of

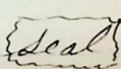
40
Bond app^l
Continued

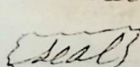
Said Court, in that behalf, to wit: at the
November Term of said Court as afore-
said. Now therefore if the said Kirtland
J. Booth and Abner Kinyon shall prosecute
their appeal to effect, and without delay,
and shall pay such judgement and costs
as aforesaid in case such judgement shall
be affirmed, as also all such costs as
may accrue upon a trial or dismissal
of said appeal, then this obligation to
be void, otherwise to remain in full
force and effect.

Sealed and Delivered
in presence of
Everett C. Chase.

Kirtland J. Booth 

Abner Kinyon 

R. H. Mellen 

H. C. Badger 

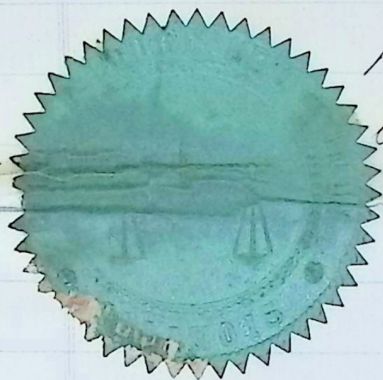
Endorsed - "Filed & approved Feb: 11th 1861"

B. F. Shaw, Clerk

Per Joseph Ball, Atty. Gen.

State of Illinois } ss.
Lex County }

Certificate } J. Benjamin F. Shaw Clerk
of the Circuit Court within and for
the County of Lex in the State aforesaid
do hereby certify that the foregoing is
a full true and complete transcription
of all the proceedings of record in said
cause as appears from the books & files
of my office.



In testimony whereof I have
hereunto set my hand and the
Seal of said Court at Dixon
this 12th day of March 1884
Benjamin F. Shaw Clerk
per Joseph Ball D.C.

Cost of this Transcript \$8.50
Clerks Fee in Case 10.20
Sheriffs Fee in Case 12.75
Witnesses Fee in Case 24.00
County Fee in Case 4.25
\$59.70

193

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Kirkland J. Booth
+ Alouzo Kinyon
Depts in error

Jenniah J. Pees
Depts in error
appeal from Lee

Filed Apr. 16, 1861.
S. Iceland
Clerk.

And ^{now} Come the said Appellants, Alonzo Kingon
and Rutland H. Booth, by Kingon & Stevens their
Attorney and say that there is manifest error in
the Record of the proceedings, of the said Court aforesaid
in the said Cause aforesaid in this, to wit: First:
Because the said Court sustained the said demurre
to the said 2nd Plea of the said Booth, and the demurre to the said
2nd Plea of the said Kingon. Whereas the said demurre ought
to have been overruled. ^{And} There is also error in this, to wit: that
by the Record aforesaid it appears that the Judgment aforesaid
in form aforesaid was given for the said Jeremiah I. Rees
against the said Rutland H. Booth and Alonzo Kingon whereas
by the ^{law} ~~fact~~ of the case the said Judgment ought to have been
given for the said Rutland H. Booth and Alonzo Kingon
and against the said Jeremiah I. Rees; and the said Rutland
H. Booth and Alonzo Kingon pray that the Judgment aforesaid
for the errors aforesaid, and other errors in the Record and pro-
ceedings aforesaid, may be reversed, annulled, and altogether
held for nothing, and that they may be restored to all things
which they have lost by occasion of such Judgment &c

Kingon & Stevens
Attys for Appellants

Harvey B. Hurd
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

4
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.

C.

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.

Noyes 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.

10/

"The question as the case then stood, was, had the indebtedness created by the note of August 27, 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. Taylor*
 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 account, 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 Haggerly's business where it went afterwards. If the firm had got the possession of the money without any intention on the part of Haggerly 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

16)

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 the 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 & Bros. 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 prop-
 ositions 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 agreements 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 appellee

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

Richard

Clark

Copy No 3
Filed Apr 16, 1861
Richard
Clark