

13204

No. _____

Supreme Court of Illinois

Hurd

vs.

Brown

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 190.

Hurd
vs
Brown

2204
1280

Referred

In the Supreme Court of
the State of Illinois.

April Term 1861.
Andrew J. Brown } Appeal
ad. } from Sup
Harvey B. Hunt } Court of Chicago.
And the said.

Brown by his Attorney
W. J. Purgess comes &
says that in the record
proceedings & judgment
aforesaid there is no
error whereupon he

W. J. Purgess
for Brown

Filed Apr 18. 1861
A. Leonard
Clerk

Harvey B. Hind } Supreme Court of Illinois
v } Appeal
Andrew J. Brown }

It is hereby stipulated
that the above entitled cause may
be submitted to the court upon briefs
and arguments to be hereafter filed

H. B. Hind appellant
April 27 1861.

A. J. Brown
appellee

190

Harvey B. Lund
vs
Andrew J. Brown

Supplication

Will the clerk please
to file this & call
the attention of the court
to it. H B Lund

Please hand this
to the court & have
order entered

H B Lund
Filed April 29, 1861
L. Leland
Clerk

Supreme Court

April Term 1861.

Henry B. Ward
" }
Andrew Brown

It is hereby stipulated
that the above entitled case
may be submitted to the Court upon
Brief & arguments to be hereafter filed
H B Ward

Appellant

April 27. 1861.

A Brown

Appellee

190-118
Hind
Brown

Shprietum

Feb 21 Apr 30 - 1861

L. Leland
Clark

SUPREME COURT OF ILLINOIS

April Term, 1861.

HARVEY B. HURD, Appellant,

v.

ANDREW J. BROWN, Appellee.

} Points & Brief of Appellee.

1 The declaration avers that the appellant made his two certain promissory notes by the name and style of Dunlap, Wright & Co., dated April 28, 1857, for \$1,062,00 and \$1,233,69, payable in 90 days and 4 months, respectively. Total, \$2,295,69.

The evidence shows—

That Robert L. Dunlap, Josiah E. Colburn, A. P. Wright, and Harvey B. Hurd, were partners in 1855, and part of 1856.

The notes were given by direction of Harvey B. Hurd, after the dissolution of Dunlap, Wright & Co., for the purpose of procuring money to liquidate a partnership debt at the Marine Bank, of \$1,801,00, which indebtedness was incurred while said partnership existed.

15 Roswell Scott, book-keeper of the firm at the time, testifies that he knew the firm were indebted to the Marine Bank in about \$1600 \$1800, for over drafts of the bank account.

16 & 17 Robert L. Dunlap, partner, and the active business man of the firm, testifies that the firm were owing the Bank \$1,801,00 for over drafts on the bank account of said firm.

34 & 35 Josiah E. Colburn, partner, testifies to the same thing.

31 A. P. Wright, by his signature to a statement of the firm's indebtedness, acknowledges the indebtedness to the Marine Bank of \$1,801,00.

The several partners, excepting Hurd, acknowledge their just indebtedness, and their liability to pay said account of \$1,801,00.

The bank book, known as a pass book, in the hands of the firm, introduced in evidence, shows the balance against the firm of \$1,801,00.

The checks of the firm on the bank, introduced in evidence, show that the same were for the payment of partnership indebtedness, except the last two checks, while said partnership existed.

17 & 54 Next to the last check, was June 6, 1856, after the dissolution, but to pay a note of the firm, given before the dissolution, to E Wing & Co., for \$600,94,00.

54 The last check drew no money from the bank, but was made April 30, 1857, to represent interest on the over-draft to that date.

46 The Appellant, Harvey B. Hurd, to avoid this evidence of indebtedness on the part of the firm of Dunlap, Wright & Co., introduces Horatio G. Loomis, Vice President of the Marine Bank, with
47 a copy of the Marine Bank Ledger account, to prove that the firm
48 were not indebted to the bank, and that by the entries in said ledger account the bank was indebted to the firm of Dunlap, Wright & Co.

54 But by reference to the Daily Journal of the Marine Bank kept by the Clerk who receives the deposits, (testimony of Wm. B. Hubbard, clerk in the bank,) there is no journal entry of money received Feb. 29, 1856, \$1,000; March 15, \$700; June 14, \$760; total, \$24,50, and no check contra to offset the above entries, April 30, 1857, for \$2,450,00. Excluding these four entries from the ledger, shows the indebtedness of the firm to the bank of \$1,801,00, as appears from their pass book in their possession, produced in evidence on the trial, and which does not contain the above four entries.

And the Appellee claims that the above entries were made in the Ledger by the book-keeper, clerk in the bank, to give the firm credit with the bank, and when the firm knew they were not entitled to credit, and when they knew they were overdrawing their account.

[The clerk who made the entries, and through whose agency the over-drafts were permitted, without the consent of the bank, being dead, his testimony could not be produced by the plaintiff.

52 Dunlap being re-called, testifies that the three deposits, Feb. 27, \$1,000; March 15, \$700; June 14, \$750, were never made, and no money drawn out April 30, 1857.

53 Colburn, so far as he knows, testifies to the same.

The partnership and the indebtedness of the firm is sufficiently proven by other evidence than the testimony of Dunlap & Colburn. (The testimony of Scott, Bank or Pass Book, Checks, and corrected Marine Bank Books.)

The liability of the appellant to pay this indebtedness to the Marine Bank, and his obligation to pay the same whether he received contribution from his co-partners or not, is evident.

17 Being so indebted, the Appellant, Hurd, directed Dunlap & Col-
 34 burn to apply to the Appellee, Brown, for money to liquidate this
 indebtedness at the Marine Bank, and directed the notes sued on to
 be given under the name of Dunlap, Wright & Co., there being
 then no such firm in existence, it being previously dissolved.

By assuming this name, issuing notes and receiving money thereon, the Appellant incurred liability the same as if he had written a note over his own individual name.

The pleas of the Appellant leave only one question to be decided—Did the Appellee direct the notes to be given?

To prove this point, the Appellee introduced Dunlap & Colburn, who explicitly testify that Hurd did authorise and direct such notes to be given, and upon those notes the money was obtained and applied in payment of said indebtedness to the Marine Bank.

The evidence shows that Hurd expressly directed application to be made to Brown, for the reason that Brown was owing him about \$2,000 and therefore was under obligation to aid him in raising the money; and it is a fair presumption that Brown knowing and appreciating that obligation, did aid in raising the money, and did take up the notes, especially relying upon his business connections with Hurd for his security.

Objection was made to Dunlap's & Colburn's being sworn as Witnesses, for the alleged reason that they were interested in the event of the suit.

The Appellee in bringing this suit and in offering Dunlap and Colburn as witnesses, relies upon the decisions of this Court in the case of Crook v. Taylor 12 Ill. R. p. 353, and other cases there cited.

A partner who is not joined as a defendant may be called as a witness by the plaintiff to prove the cause of action against the partner sued.

Dunlap & Colburn are not parties to the record.

The judgement in this case can not be used for or against them in any event, for the reason they are not parties thereto.

The witnesses, if at all, are interested in behalf of Hurd, to dis-

prove the indebtedness to the Marine Bank, and their liability for contribution.

Dunlap & Colburn acknowledge their indebtedness, liability, and obligation to make contribution, and their evidence is against themselves and to the extent of the admission of their obligation to make contribution their evidence is favorable for Hurd.

Dunlap & Colburn are not interested in having this action succeed. In case this action fails and Dunlap & Colburn are sued, they would be able to enforce contribution from their partners, and in case it succeeds, they are liable to make contribution to Hurd, when he shall have paid the co-partnership indebtedness.

Dunlap & Colburn, acting under the direction of Hurd, in giving, the notes are competent to prove their agency and acts, as are agents generally, from whatever source that agency is derived, from partnership or otherwise.

Cases cited by the Court in Crook v. Taylor.

Hudson v Robinson, 4. Maule & Selwyn, 475

Blackett v Weir, 5 Barnwell & Creswell, 385

Hall v Curyon, 9 ibid, 646

Brooks v McKinney, 4 Scammon, 809

ANDREW J. BROWN,
in proper person.

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Harvey B. Ward
appellant

vs

Andrew Brown

Appellee's Brief.

Filed Apr. 30 - 1861

G. Leland
Clerk

United States of America
State of Illinois Cook County, ss

Came before the Honorable the
Justices of the Superior Court of Chicago
within and for the County of Cook and
State of Illinois, at a regular term
of the Superior Court of Chicago begun
and holden at the Court House in the
City of Chicago in said County and
State on the first Monday, being the
third day of December in the year
of our Lord eighteen hundred and sixty
and of the Independence of the United
States of America the eighty fifth.

Present the Honorable John M. Welton Chief Justice
of the Superior Court of Chicago
Sam H. Higgins Esq Grant Goodrich Judges
Charles Haven Prosecuting Attorney
Anthony C. Hering Sheriff of Cook County
Attch

Walter Kimball

Clerk

Be it remembered, that heretofore, to wit, on the 18th day of June in the year of our Lord one thousand eight hundred and fifty, Andrew J. Brown by his Attorney, filed in the office of the Clerk of the Superior Court of Chicago, his certain Declaration, in the words and figures following, to wit:

In the Superior Court of Chicago
of July Term 1860.

State of Illinois
Cook County ss. Andrew J. Brown by
William S. Burgess his Attorney comes and complains of Harvey B. Reed who was summoned &c. of a plea of Disputes on the case upon promises: for that whereas the said defendant heretofore to wit: on the twenty eighth day of April in the year of our Lord One thousand eight hundred and fifty seven at Chicago, to wit: in the County of Cook and State of Illinois by the name and description of Paul ap. Wright He made his certain note in writing, commonly called a promissory note, bearing date the day and year last above mentioned, and then and there delivered the said note to said Plaintiff and thereby then and there promised to pay the said Plaintiff or order twelve hundred

3
and thirty four dollars and fifty nine cents
four months after the date thereof, with inter-
est at the rate of ten per Centum per Annum
after maturity for value received.

But although the said note hath be-
come due, and the said defendant hath been
requested to pay the same to the plaintiff
he has refused so to do, to wit, Chicago.

And whereas also, the said defendant
hereofore, to wit, on the twenty eighth day
of April in the year of our Lord one thousand
eight hundred and fifty seven at Chicago
to wit, in the County of Cook and State of Illi-
nois by the name and description of Daniel
Wright & Co. made his certain other note in
writing commonly called a promissory note,
bearing date the day and year last aforesaid
mentioned, and then and there delivered the said
note to said Plaintiff and thereby then and there
promised to pay said Plaintiff ninety days
after the date thereof ten hundred and fifty
two dollars for value received with interest at
the rate of ten per centum per annum after
maturity - Yet although the said note hath
become due, and the said defendant hath
been requested to pay the same to said plaintiff
he has refused so to do, to wit at Chicago
aforesaid.

And for that whereas also the said defendant by the name, style and description of Daniel Wright & Co. Houtford, to wit: on the 1st day of May 1866. at Chicago in said County, was indebted to the said plaintiff in the sum of three thousand dollars for money before that time lent and advanced by plaintiff to defendant at his request.

And in three thousand dollars for money then and there paid by plaintiff for use of defendant at his request.

And in three thousand dollars ^{for money} found to be due and owing from said defendant to said plaintiff on an account then and there had and stated between them.

And the defendant being so indebted afterwards, to wit: on the day and year last aforesaid, at the place aforesaid, in consideration of the premises respectively by the name, style & description aforesaid promised the said plaintiff to pay to him, the said several ~~sums of~~ money last afore-mentioned, on request.

And for that whereas, the said defendant Houtford, to wit: on the 1st day of May 1866. at Chicago in said County was indebted to the said plaintiff in the sum of three thousand dollars for money before that time lent and advanced by plaintiff to defendant

* And in three thousand and no more for money found to be due and owing from said defendant to said plaintiff on an account then and there had and stated between them.
* And in three thousand and no more for money found to be due and owing from said plaintiff to said defendant on an account then and there had and stated between them.
* And in three thousand and no more for money found to be due and owing from said plaintiff to said defendant on an account then and there had and stated between them.

at his request.

* And in three thousand and no more for money found to be due and owing from said defendant to said plaintiff on an account then and there had and stated between them.

And the defendant being so indebted, afterwards, to wit, on the day and year last aforesaid, at the place aforesaid, in consideration of the premises, respectively promised the said plaintiff to pay to him the several moneys last aforesaid, on request.

Yet the defendant although after request, to wit, afterwards, on the day and year, and at the place last aforesaid has disregarded his promises, and has not paid said moneys above mentioned or any or either of them, or any part thereof, to the damage of the plaintiff of three thousand and no more. And thereupon he brings suit, &c.

J. S. Burgess.

Copy of Notes declared on.

1834⁶⁴ Chicago April 28. 1837.
Some months after date, we the subscribers of Chicago County of Cook, State

of Illinois promise to pay to Andrew Brown
or order Twelve hundred thirty four ⁰⁰/₁₀₀ Dol-
lars for value received with interest at the
rate of 10 per cent per annum after maturity.
Dunlap Wright & Co.

\$1062. Chicago April 28. 1857.
Ninety days after date we the Sub-
scribers of Chicago, County of Cook, State
of Illinois promise to pay to Andrew Brown
or order Ten thousand sixty two dollars
for value received with interest at the rate
of 10 per cent per annum after maturity.
Dunlap Wright & Co.

Off to Rfd Dr
So many paid for use of Off \$3000.

And afterwards, to wit, on the 5th day of
July in the year aforesaid, the said defend-
ant filed in the office of the Clerk of said
Court this certain plea in the words & figures
following, to wit:

Superior Court of Chicago
July Term A. D. 1860.

Andrew J. Brown
vs
Harvey B. Hunt

And now comes the said
defendant in his own proper person and
denies the wrong and injury whereof, and
says he did not undertake and promise in
manners and form as the said plaintiff hath
alleged in his said declaration complained
and of this he puts himself upon the country
And the Off doth the like &c. H. B. Hunt
Benevolence for Off Improper

And for a further plea the said defend-
ant says the said plaintiff ought not to have
and maintain his said action, because he says
that the supposed notes mentioned in the said
plaintiff's declaration are not the notes of the
said defendant, that he did not make
warrants or deliver the same, or authorize
the same to be made or delivered,
and that the said defendant is ready to verify
wherefore he prays judgment if the said plaintiff
ought to have or maintain his aforesaid action
thereof against him &c. H. B. Hunt
Improper

State of Illinois
 Cook County } Harvey B. Hand said
 defendant being duly sworn says that the
 foregoing pleas are and each of them is true
 substantiated and in fact. And that he has
 a good defence, to the above entitled suit.
 Upon the merits.

Sworn to before me H. B. Hand.
 July 5 1860.
 W. Kimball Clerk

And afterwards, to wit, on the 6th day of the
 month of June aforesaid, the said Plaintiff by
 his attorney filed in the office of the Clerk
 of said Court his certain Replication, in the
 words of figures following, to wit:

Superior Court of Chicago
 July Term 1860.

Andrew W. Brown
 or
 Harvey B. Hand

And the said Plaintiff as to
 the said Plea of the said Defendant by him
 secondly above pleaded says preclude now be

cause he says

That the said notes and the notes of the said defendant, that he did make & issue and deliver the same and authorized the same to be made, issued and delivered. Of this the plaintiff puts himself upon the Country &c.

And the Defr took the like &c

Bargue for Plff.

And afterwards, to wit, on the 21st day of November in the year aforesaid said day being one of the days of the November Term of said Court the following among other proceedings were had and entered of record in said Court. To wit:

Andrew J. Brown

vs

Accompit

Harvey B. Howard

This day came the said Plaintiff by W^m T. Pungles his Attorney and the said defendant by C. Smith & in person did come and when being joined herein it is ordered that a jury come whereupon comes

40
The jury of good and lawful men, to wit:
William Sims, Thos Brodley, E. Chadwick, J.
O. Humphrey, L. K. Osborn, S. A. Sumner
Warren Hill, W. K. Cook, Wm. Barnes, John
Warren H. La Brown, and G. H. Barnard.
who being duly elected tried and sworn to try
the issue joined on aforesaid, after hearing tes-
timony, and the hour of adjournment having
arrived, it is ordered upon agreement of the
parties that the jury separate until 10-morning
morning.

And after aids, to wit, on the 22nd day of
the month of Jan last aforesaid, said day
being one of the days of the November Term
aforesaid, the following among other proceed-
ings were had and entered of record in said
Court to wit:

Andrew J. Brown
or ^{or} Assumps
Harvey B. Hays
And now again comes
the parties to this cause, and the jury em-
panelled herein on yesterday for the trial

of said Cause, also come, and testimony being
 heard, and arguments of Counsel and instruc-
 tions of the Court. The Cause is now submitted
 and the jury retire to consider of their Ver-
 dict, and the hour of adjournment having
 arrived it is ordered upon agreement of the
 parties, that the jury when they shall have
 agreed upon a verdict they shall reduce
 the same to writing, sign and seal the same.
 and afterwards separate and meet the Court
 to-morrow morning.

And afterwards, to wit, on the 23rd day of
 the month of June aforesaid, said day being
 one of the days of the said Winter Term
 of said Court. the following among other
 proceedings were had and entered of record in
 said Court. to wit:

Andrew Brown

vs. Accused

Harvey B. Hurd

And now again come the
 parties to said Cause, and the jury empan-
 nelled herein for the trial of this Cause

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And as in yesterday also come, and submit their
verdict. And say let the jury find issues for the
said Plaintiff, and assess his damages herein
to the sum of two thousand two hundred and
ninety six dollars and sixty nine cents.

And thereupon said Defendant submits
his motion herein for a new trial in said Cause.

And afterwards to wit, on the 27th day of
December in the year aforesaid, said day being
one of the days of the December Term of said
Court, the following among other proceedings
now had and entered of record in said Court.
To wit:

Andrew J. Brown
vs Assumpsit
Harvey B. Bond

And now again comes
the said Plaintiff by William S. Porges his
Attorney And the said Defendant by S. Smith
his Attorney And in his own proper person also
comes, And the Court upon hearing counsel
upon the motion submitted herein by the said
Defendant at the November Term last past for

a new trial in said Cause, and being fully
advised in the premises, it is considered by the
Court that said motion for a new
trial be and is hereby overruled, to which ruling
and decision of the Court the said defendant
now here takes exception and thereupon enters his
exceptions. Wherefore Plaintiff ought now to
have judgment entered in the verdict of the jury
rendered herein at the November term last past
of this Court.

Wherefore it is considered that the said Plaintiff
do have and recover of the said defendant
his damages of two thousand two hundred and
ninety six dollars and fifty nine cents in full
aforesaid by the jury here found and assessed
together with his costs and charges in this
the half expended and have execution therefor.

And thereupon the said defendant
Harvey B. Kead having entered his exceptions
prays an appeal herein to the Supreme Court
of this State which is allowed to him on
filing his appeal Bond in the sum of three
thousand dollars with security to be approved
by a Judge of this Court and to be filed with
his bill of exceptions within thirty days from
the date hereof.

And afterwards, to wit, on the 8th day of February in the year of our Lord one thousand and eight hundred and fifty one there was filed in the office of the Clerk of said Court a certain Bill of Exceptions and assent bond in the words & figures following, to wit:

Be it remembered that on the Twenty first day of November A.D. 1861. in the Superior Court of Chicago, being one of the days of the November Term of said Court, Saml Mc. Niggin one of the Judges of said Court presiding, the Cause therein pending wherein Andrew Brown was plaintiff and Harvey B. Reed was defendant being at issue came on to be tried before the said Court and a jury duly empanelled to try the said Cause.

And upon the trial of said Cause the said plaintiff to maintain the said action introduced as a witness in his behalf Roswell Scott, who testified as follows on the direct examination &c.

I knew the firm of Denlap Wright & Co I don't know when they commenced. I was employed last part of 1855 and first part of 1856. I knew they were indebted to the

Marine Bank some where about \$1600. to \$1800. It was for over draft of their bank account. I think it is later at the time Mr Wright went out of the firm in late of Feb. 1856.

And as for the Cross Examination he testified, Robert L. Doulap, Josiah E. Colburn, A. B. Wright & H. B. Bond were the partners. Wright went out of the firm first in April 1856. The firm name was then changed to Doulap, Colburn & Co. My Cash book that I kept then at the time showed the balance, Doulap gave me the items & I made the entries & that is the only way I knew. Business was planning to corner of Wells & Charles Street. Doulap was the managing man. Bond was a practicing attorney at the time, don't know as he had any business, he came to the mill occasionally, took no part in the business. It is from the entries in the Cash book, which with the other books of the Concern were kept at the office of the mill, that I know of overdraft at Marine Bank. That book was kept at the office. The Cash book was the actual Cash account of the firm & did not contain any entries of amt. deposited or drawn out of the Bank, I do not

know if business was carried on after Sept. May 1856. Was there afterwards in July 1856. but don't recollect what the name of the firm then was.

Robert L. Dumlaf was then called as a witness for plaintiff. He was then admitted that he was the same person who signed the note & power of attorney on which was member of the firm for which the note was given. Thereupon the defendant objected to said Dumlaf being sworn as a witness on the ground that he was interested in the event of the suit, which objection was overruled by the Court & the witness was then sworn. Upon his direct examination he testified as follows.

"I was a member of the firm of Dumlaf, Wright & Co." (and being shown the notes sued upon in this suit said, I have seen these notes before - They were given to procure money to liquidate a debt at Marine Bank, I was a debt of \$1801. Heng was a partner of Dumlaf Wright & Co. These notes were given on the day they bear date. There was this indebtedness & I went to Mr Heng to try and have it liquidated. He said he would try and raise it & I must see if I could not

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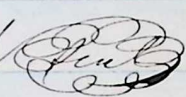
loan it, & asked me if I could not loan it of Brown or the Torrens upon the note of Dunlap Wright & Co. I asked him if that would be right to give the note of the firm as the firm had ceased doing business. He said it would be, as we had not settled up the company matter. The money for which the note was given, was to be used for that purpose. I told him I would go see Mr. Brown. I went & saw him & made the arrangement with him for the money & gave the note. These notes were shown me, one for \$1204. and for 1062. Total \$2266.69. The difference was for interest on the over draft, after I gave the note I saw Hays & he said he was glad I had got the money as Brown owed him about that amount. The Bank book shown me is the book of the firm & shows the balance. The over draft was not all while Hays was a member. Geo. Chubb was to pay a note of Dunlap Wright & Co. to E. King & Co. The following stipulations shown witness. As my signature.

In the Superior Court of Chicago
 Andrew J. Brown

Harvey B. Hays For Value received

I agree to remain liable to Andrew J. Brown upon the notes sued on in this case notwithstanding any verdict or judgment that may be rendered in this case upon the notes sued on therein and waive any rights that I may be entitled to by virtue thereof as a bar to a recovery if sued upon said notes.

Witness my hand and seal this 21st day of Nov^r 1860.

Robert L. Dondap 

The plaintiff's Counsel then offered in evidence said Bank Pass Book, which is in error & figures following — to the reading of which the defendant objected, objection overruled & dep^t accepted.

19

¹⁸⁵⁵	Dec 24	To bal old Book	75 94	¹⁸⁵⁵	Dec 27	By Sov. 15 ³⁰	\$15 30
	26 "		300		28 "		20
¹⁸⁵⁶	Jan'y 5 "		150		31 " 27 ³⁰ 20		47 39
	18 "		188	¹⁸⁵⁶	Jan'y 11	326 ¹⁰ 100. 19. 7	453 80
Feb'y	19 "		355		7 "		300
	21 "		100		8 "		40 50
	26 "		220		12 "		171 75
Mch	2 "		400		15 "		10 70
	6 "		200		17 "		45
	13 "		150		18 "		112 50
June	7 "		609 22		19 "		96 22
					Feb 1 "		124 69
					19 "		262 50
					23 " \$10. 25.		75
					26 "		40
					Mch 1 "		160
					3 "		15
					5 "		53 29
			Total 2748 16			Total 2342 64	

1854	Form ^d	2748 16	1856	Form ^d	2849 64
April 29 S. C.		2141 13	March 6 By	242 ²⁵ 300	562 25
			10 "		400
			11 "		200
			12 "		75
			14 "		100
			15 "		65
			April 23 "		204 29
			June 6 "		600 94
			1857		
			Apr 30 "		339 17
		<u>2489 29</u>			<u>4889 29</u>

34 Check Refd

Thereupon the defendant moved to exclude so much of said Dunlap's testimony as related to the partnership between himself & Hays and the alleged authority by Hays to borrow the money & give the said note, and so much as related to Hays' assent to the giving of said note which the Court overruled & the defendant then & there excepted to the overruling of said motion.

The defendant then moved to exclude the whole of said Dunlap's testimony, which the Court overruled, to which overruling of said motion the said defendant then & there excepted.

And upon his cross examination

the said witness testified as follows.

Wright went out April 1856. at the time of the dissolution. Ward Wright Colburn & myself were partners ^{before that} - I can't say when Ward became a member of the firm of Amos Wright & Co. Ward was a member before I went in. The firm existed about one year. That firm dissolved when Wright went out. Ward was a partner after Wright went out. The firm was then called Amos Colburn & Co. The firm of Amos Colburn & Co. was dissolved in month of July 1856. (May get the date wrong, but it was about that time. Ward has sworn before in depositions - Ward went out when that firm dissolved. Thomas L. Sanford then came in - The firm was then changed to Amos Sanford & Co. Sanford went out in about a month & Colburn & myself then reorganized the firm December 1856. Hitchcock then came in & it was called Amos Hitchcock & Co. That continued to first part of July 1857. Hitchcock went out in May then Hignett came in & the firm was called Amos Hignett & Co. From the time I went into the concern in 1855 till we went out in July 1857. I had the management of the concern with Colburn we added back door blind making when Sanford came in. Brown is brother-in-law to me and a prac-

fictitious lawyer. The note was signed by me &
 Colburn. Forrest wrote the note. He is brother
 in law to Brown. The first time I went to see
 Hand was few months before the note was
 given. The time I refer to in my direct was
 the same day the note was given. I saw
 Mr Hand in his office. It was during
 business hours, about ten o'clock in the
 forenoon. Mr Colburn went with me. I
 think there was no one in the office but
 Hand at that time. Webster officed with
 him but he was not there I think. I think
 I spoke of the matter first can't say. I went
 there to see Hand about raising the money.
 He might have first spoken as he had been
 looking out for money. I asked Hand if
 he had raised the money to meet the Marine
 Bank debt. He said he had not. I asked
 me if I could not raise it of Brown or the
 Forrests. I told him I would go asked, there
 was nothing else said. I think I went
 right out. Colburn went with me. I do
 not recollect that Colburn said anything
 he went with me. He went to Brown's office
 I was with Forrest & Bros. I don't know
 what business he was then doing he had
 been putting up the business of the Union
 Bank. Forrest Bros & Co Bank.

Brown agreed to let me have about
 \$2200. Forrest filled up the notes then
 & there were signed them right off. The
 notes were made out right there & I wrote
 them. I think Colburn signed them then. I
 did not take the money I left it for
 Mr Forrest to get and deposit it in the
 Marine Bank. The money was not counted
 no money was passed to me. I left the
 notes for Mr Forrest to get the money
 & deposit it in Marine Bank & sent away.
 I have credit for the money on one bank
 account, that was satisfactory to me.
 That is all I know about it. The Bank
 book I allude to is the one in Court.
 It is the one Mr Burgess showed me. in
 my direct. The date is April 29. 1857
 It is \$2141.13. The hand writing of this book
 is Henry L. Forrest brother of the one
 I have been speaking of. I don't know
 when & when the entry was made. I
 got this book a short time after I left
 the note at Brown's, with directions to
 Forrest to have the amount deposited.
 It was given me a week or ten days
 after Forrest gave it to me. Thomas
 L. Forrest gave it to me. He was the
 one that was directed to do the business

Think Henry L. was then book keeper
 at the Marine Bank. I don't know when
 he got it. I had never seen this book
 before. we had a bank (pass) book
 when I went into the company, in which
 was a writing stating I was authorized
 to draw checks. It was left at the Marine
 Bank when I called for it I was told
 it was taken away by some one & was not
 there. This was made up in the place of
 it. I don't know when it was written up.
 The entries are all in one hand writing
 the first time I saw this was when it was
 handed me by Forrest. The old book
 was left there when the last check was
 drawn in June 1836. The last time that
 the Marine Bank called on me to make
 the amount good was about a week
 before I made these notes. Henry L. For-
 rest called on me he was on the steps
 of Marine Bank. I was passing along
 & saw him he stopped & I went up to him
 he mentioned the matter first & it was
 not before the notes were given I was
 several times called upon by Henry L.
 Forrest. nobody else called on me from
 the time I went out of the firm to
 make the amount good.

Endorsement on the note shown witness.
 This endorsement off of amount of interest
 is in Forrest's hand writing. Can't say
 whether "A. J. Brown" on the back of these
 notes is in Brown's hand. I gave the note
 mentioned on the back of these notes -
 Don't know that I ever signed that note.
 This note was given about three months
 after the first notes. I don't know that
 I ever saw the note I don't want to
 & told him that they wanted the interest
 I said he could not pay it. That was
 all that was said. I have not been called
 upon to pay it, have not seen it since.
 I never went into the Marine Bank
 after I left my book there. I never saw
 the books kept by the Marine Bank.
 All I knew about the condition of our
 account with the bank was what Forrest
 said. & what our book keeper said. Our cash
 book did not contain any account with
 the Marine Bank. it was the general
 cash account of the concern. The stubs
 of the checks would show what checks
 were drawn that were left at Hurd's.
 I don't know that they were left at Hurd's.
 don't know where they are. The books
 of the firm were left at Hurd's.

We got together, Colburn Wright & myself to see how much Dunlap Wright owed & this is the account we drew off, we did not find out how much each was to pay, when Wright went out of the firm he was to pay his proportion of the debts & share his share of the assets. This was two months of the whole amount. I did not get his account but I thought it would take several hundred dollars to make him good with the firm.

He went out of the firm of Dunlap Colburn & Co. the firm that succeeded Dunlap Wright & Co. about the 20th May 1856. by selling out to Sanford Wright sold out & the firm of which he was a member dissolved sometime the fore part of April I think.

I did not frequently talk over my business with Brown. I think I did talk with him about the business. I talked with Brown about my business after Heard went out. About the time Sanford went out or a little after I talked with Brown about Sanford's taking Heard's place & about the doubts about Sanford & how we had got him out of the firm. I have had hard feelings towards Heard about Sanford. In

February 1857. we had some dispute. I told Hurd he ought to pay Sanford's share of the loss. he said Sanford was to pay it. I did not say. I would show him (Hurd) that I would make him pay Sanford's share, but I told him he ought to pay it. Hurd claimed that Sanford was taken into the firm in Hurd's place & that he was to pay Hurd's share of the debts. I did say that I would make him pay his share of the debts of Quaker Wright & Co. I have not seen the interest notes since I gave them. I live in Iowa City. I went & made an alteration in the cash book at the time these notes were given, but one was present, nothing in the entry but the amount.

And being further examined by the plaintiff, the witness being shown certain checks, says they are the checks drawn and all the ones alluded to in the paper book before alluded to.

I had a conversation with Hurd after giving the notes. I informed him that I had given the notes, he said Brown was owing him about \$2000, which ought to have been paid by Brown.

The witness was then shown the following

paper addressed to above & read to the jury, &
which was so read subject to exception by de
fendant.

Chicago March 3. 1857.
Dunlap Colburn & Co.
Dunlap Wright & Co.

S. ap	10.64
L. E. Demerise	63.25
E. M. Young	149.12
J. Bannick	4.31
A. H. Allen	14.00
H. Vanatta	28.15
A. J. Wentworth	10.41
G. Holland	140.00
J. Parker	31.61
M. L. Dunlap	49.72
R. L. on	30.00
R. L. on	2.57
M. S. Mebbin	41.48
R. Scott	123.00
J. Southland	3.38
Lampford & Norton mto	280.66
Sam Wolfe	123.27
as per Books	982.30

R. L. Dunlap
A. B. Wright
J. E. Colburn

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Chicago Apr 3. 1857.
Dunlap Wright & Co.

To Dunlap & Colburn Dr	
Paid bal of H. P. Moser	69.92
" " " Ball & Sears	36.00
" " " J. Tarbell	46.34
" " " J. S. Morich	30.30
" " " G. R. Robert	14.53
" " " S. B. Comrey	2.85
" " " E. S. Wells	22.50
" " " J. J. Skittan & Co	28.65
" " " M. Dunlap	26.48
" " " P. J. Jenson	60.00
" " " J. B. Harris	59.50
" " " O. Lyce	7.26
" " " Grosh & Bradley	154.13
" " " J. S. Balls	102.90
" " " Dunlap & Colburn	659.24
" " " P. W. Cranston	3.00
" " " J. S. Wallis	115.60
" " " Grant & Holden	52.00
" " " W. H. Covert	60.50
" " " Murry Houghton	20.98
" " " Brown & Throbridge	44.78
" " " R. Stenmark	164.16
" " " Wild & Son	41.54

Carpe Books

\$1831.46

J. P. Wright

J. C. Colburn

A. L. Dunlap

28
30

Chicago April 3rd 1837.

Accounts due and at Night of Co.

dr	Geo W Kears	56.31
"	A Danker	17.65
"	J. Huntington	29.95
"	Geo B. Davis	87.70
"	H. Hamilton	1.34
"	E. Burnett	1.13
"	Geo Allen	2.50
"	W. S. Jennings	65.23
"	J. D. Pierce	14.54
"	Sp Cobb	35.72
"	Wm Wolf	100.00
"	St. Weber	54.84
"	J. North Co.	204.00
"	Geo Howard	1.64
		<u>\$672.63</u>

Wm Brock

A. P. Wright
R. L. Cunliffe
J. E. Colburn.

28
30

Chicago April 3rd 1837.

Accounts due and at Night of Co.

dr	Geo W Kears	56.31
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"	H. Hamilton	1.34
"	E. Burnett	1.13
"	Geo Allen	2.50
"	W. S. Jennings	65.23
"	J. D. Pierce	14.54
"	Sp Cobb	35.72
"	Wm Wolf	100.00
"	St. Weber	54.84
"	J. North Co.	204.00
"	Geo Howard	1.64
		<u>\$672.63</u>

Wm Brock

A. P. Wright
R. L. Cunliffe
J. E. Colburn.

April 3rd 1834
 Notes & judgments of
 Amos Wright & Co unpaid

Wiles & L	& Co. Acct	500.00
W. L.	do	535.00
C. P. Hazard and	"	725.00
Amos & Mariah Bond	"	1801.00
Amos & Colburn as per statement		849.61
		<u>\$4400.61</u>

R. L. Colburn
 A. P. Wright
 J. C. Colburn

This paper shown me in Wright's hand writing and was signed by myself Colburn & Wright, I had had it in his possession there was an attempt to settle but we disagreed. Amos wanted me to assume Wright's part, I would not do it. He made no objection to the amount, he said he wanted me to sue Wright & said he would be my attorney. Wright left for the East before these notes were given, he was not here when they were given, all of which testimony was received subject to the same objections & exceptions as the previous.

Crop. And upon further crop of information he testified. These checks were given to me this morning Brown gave them to me last night. I said yesterday the book & checks were left at Hove's office. I don't know where Brown got them the last check on the Marine Bank was drawn 6th June 1836. I did not draw any in the Spring of 1837. I did not draw any in April of that year. I never authorized anybody to get these checks from the Marine Bank I don't know whether I got the checks or not I don't recollect that I got the checks when I got the book. I guess I have seen the checks before. don't know.

This statement of account was left with Hove. I said him take it and look it over leaf by leaf. he looked at it some time. I did not try to get him to settle by it because the figures were not carried out. I did try to get him to settle by it, but he would not & did not.

After I gave the notes I went back to Hove. It is my best recollection it was the same day, or that it was the day after nobody went with me. I found no one there but Hove, can't say who spoke first, substance of the matter there got the

money & given the Company note. I told him I got it of Brown. He said I am glad as Brown owes me \$200.

The Plaintiff then called Josiah C. Colburn as a witness and it being then & there admitted by the plaintiff that the said Josiah C. Colburn was the same person who executed the notes sued upon with said Amulap & one of the partners of the firm of Amulap, Wright & Co. at the time of its dissolution the defendant objected to his being sworn as a witness in this cause, for the purpose of proving the liability of Kend jointly with himself to said Amulap, which objection was overruled by the Court, & the said defendant then there accepted.

And upon his direct examination he testified as follows. I know the firm of Amulap, Wright & Co. It was formed in 1835. Robert L. Amulap, E. P. Wright, H. B. Kend & myself were the partners (notes sued upon shown witness) These notes are signed by Robert L. Amulap & myself. I cannot state whether I signed them when they were given or whether they were brought to the office of Amulap & Colburn for me to sign, previous to the giving the notes as in Kend's

office with Dunlap. Mr Dunlap was talking
 with Hens about the indebtedness of the firm
 of Dunlap Wright & Co. Mr Hens stated that
 we must hire some money & take up this
 indebtedness that is pay it up. settle up this
 debt as I understand was at the Marine Bank.
 Mr Hens said we must hire some money.
 & give the Company note, consequently these
 notes were given. That is the reason these
 notes were given. It was spoken of as the
 debt of the firm. Mr Hens said to Dunlap
 Can't you get the money of Mr Brown
 I think Mr Dunlap said I don't know
 I will see him. I don't recollect that any
 thing was said about getting it of any one
 else. nothing more was said. I left &
 went to the mill. There was no reason
 given that I recollect of at the present why
 we should get it of Brown. I don't remem-
 ber that any thing was said about Brown
 owing Hens. I don't know that I saw
 Hens afterwards about these notes. It
 strikes me that the notes were brought
 to me & I signed them at the mill. I
 know we were indebted at the Bank. it
 was by borrowing money. I think some
 arrangements were made by Dunlap to
 take up some notes of the Co. Some of it

was for overdraft. We owed the bank. Don't know how much. (Statement of account signed by Dundas Wright & Colburn shown witness) Have seen it before & signed it, the date marked on the back is "April 8" 1856.

It was about that time they signed it. I don't know that Ford had lit, I don't remember whether that item in the account is the debt to Marine Bank or not. I don't know whether the account is correct or not. I know little or nothing about the finances of the concern.

The defendant then & there moved to exclude the evidence of said witness which motion the Court overruled & the defendant to the overruling of said motion by the Court then & there accepted.

The defendant then & there moved to strike out so much of said witnesses testimony as relates to the authority of Ford to borrow said money & give said notes, which motion the Court overruled & the defendant to the overruling said motion then & there accepted.

And upon his cross examination the witness testified. I came in town last

night, went to our store & learned I was
 wanted. I don't know how long he found
 the notes were given that the information was
 had at Hays's office, might have been three
 or four days, my best recollection is: that
 it was not over three days. Can't recollect
 might have been two days say two days.
 Went directly to the Mill. Went to the
 Mill before I signed the notes. Amclap
 stayed up town. It was ten o'clock in the
 forenoon when we went to Hays's office
 don't recollect about any one in the office
 Amclap first introduced the subject. He
 first said to Mr Hays we must have some
 money to pay the Marine Bank & Fire Insurance
 Hays said I have no money that I can
 let you have, we must find some. Mr
 Hays said Can't we hire it of Mr Brown.
 Mr Osborn said no. I don't remem-
 ber that anything else was said. We went
 out then. Went to the Mill & Amclap
 said down town. I know nothing a-
 bout how the amount stood at the
 bank except what Amclap said.
 We signed this paper at A. P. Wright's store
 after that Amclap saw it. I don't know
 of my own knowledge whether the state
 mint is correct or not.

10.
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Direct Examination returned I was present at the time Wright & Lampl looked over the books. In the conversation with Ward I don't recollect that anything was said about the terms of the loan. Ward said gave the Company notes. I can't give the exact words. I don't recollect the order in which the conversation occurred. I only state the substance. The above testimony was admitted subject to the same objections & exceptions as before made.

The Plaintiff then introduced as a witness Thomas L. Forrest who testified as follows. I have heard that Lampl, Colburn Wright & Co. I have heard that Ward was a member of the firm of Lampl Wright & Co. Henry was a book keeper in Marine Bank. He remained there till the beginning of 1834. The notes are in my hand writing. I don't know whether I was present when the notes were signed. There was some \$2000 deposited in Marine Bank. I deposited it myself. That is I gave it to my brother to deposit. he was then employed in the Bank then. I know it was deposited & the difference

between the note & the deposit was the interest on the note above ten per cent, being shown the pass book. The entry of \$1337.17. I suppose was the interest on the overdraft.

Cross. And upon his cross examination he testified as follows I am not positive, whether I deposited ~~whether I~~ the money myself or whether my brother got it. My impression is my brother got the money. I don't know whether it was in currency or not, at all events we paid it.

Sorrell Bros Co. advanced the money & paid it, we paid it to Dunlap. Dunlap did not apply to me. Brown & Dunlap applied, it was mixed up together. I cannot say how it was. There is nothing on our books showing that Brown had any thing to do with it.

It is entered on our books as a note of Dunlap Mfg Co. It appears to be a discount in favor of Dunlap Mfg Co. Henry L. was then a member of the firm of Sorrell Bros Co. He was doing a banking business. I don't recollect when Henry L. left the Marine Bank.

it was in March or April 1857. Henry L. had been a book keeper in the Marine Bank for two years. There is an endorsement of interest on back of the notes. The note given for the interest was signed by Amos. Same as these notes. Don't know what has become of the interest note.

Quick returned. We discounted these notes to Amos Wright Co. & it is so entered on our books. Brown paid them to us afterwards - The Plaintiff then showed the interest note as follows.

11.
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This is the note given for interest.

The Plaintiff then offered to introduce
the two notes sued upon, as follows.

\$1062

Chicago April 28-1857

Ninety days after date, we the Subscrib-
ers of Chicago, County of Cook State of Illi-
nois promise to pay to Andrew J. Brown
or order Seven Hundred fifty two Dollars
for value received, with interest at the rate
of 10 per cent per annum, after maturity.

Randolph Wright & Co

Endorsed Not paid hereon (by note) to 1 Nov 57.

\$1234⁶⁹

Chicago April 28-1857

Four months after date, we the sub-
scribers of Chicago County of Cook State
of Illinois promise to pay to Andrew
J. Brown or order Seven Hundred thirty
four ⁶⁹ Dollars for value received,
with interest at the rate of ten per cent per an-
num after maturity.

Randolph Wright & Co.

Endorsed Not paid hereon (by note) to 1 Nov 57.

under which upon the same price of paper
followed the following power of Attorney.

Know all Men by these Presents, That
the subscriber

justly indebted to
upon a certain Promissory Note, bearing
even date herewith, for the sum of
dollars with interest

and due after date.
Now therefore in consideration of the premises
do hereby make, Constitute and
appoint of any Court of Record, to be or any Attorney
lawful Attorney, irrevocably for true and
name, place and stead, to appear
in any Court of Record in term time, or in
vacation, in any of the States or Territories
of the United States, at any time after the
date of said Note, to wait the service of
process and confer a judgment in favor
of the said or assignee.
upon the said Note for the above
sum, or for as much as appears to be due ac-
cording to the tenor and effect of said Note
and interest thereon, to the day of the entry
of said judgment, together with costs and
dollars Attorney's fees: and also

to file a Cognovit for the amount that may
 be so due, with an agreement therein, that
 no writ of error or appeal shall be proce-
 cuted upon the judgment entered by virtue
 hereof, nor any bill in Equity filed to inter-
 fere in any manner with the operation
 of said judgment, and to release all errors
 that may intervene in the entering of said
 judgment, or issuing the execution thereon:
 And also to waive all benefit of advantage
 to which [] may be entitled by virtue
 of any Homestead or other Exemption Law
 now or hereafter in force in this or any State
 or Territory where judgment may be entered
 by virtue hereof. Hereby ratifying and confirm-
 ing all that said Attorney may do by
 virtue hereof.

Witness

hand and seal this

day of

A.D. 18

In presence of

Robert L. Dinklap *RB*

Josiah E. Colburn *RB*

Know all Men by these Presents.
 That the Submitter
 justly indebted to

upon a certain Promissory Note, bearing even
 date herewith, for the sum of
 Dollars with interest

and due after date.

Now therefore in consideration of the premises
 do hereby make, constitute and appoint
 or any Attorney of any
 Court of Record, to be true and lawful
 Attorney irrevocably, for and in
 name place and stead, to appear in any
 Court of Record in term time, or in vacation
 in any of the States or Territories of the
 United States, at any time after the date
 of said Note, to receive the service of process
 and confer a judgment in favor of the said
 or assigns or assignees,
 upon the said Note for the above sum, or for
 as much as appears to be due according to
 the tenor and effect of said Note, and
 interest thereon, to the day of the entry of said
 judgment, together with costs and
 Appraisers Attorneys fees: and do hereby file a
 Cognovit for the amount that may be so
 due, with an agreement therein, that no
 writ of error or appeal shall be prosecuted
 upon the judgment entered by virtue hereof
 nor any Bill in Equity filed to interfere in
 any manner with the operation of said

judgment, and to release all errors that
 may intervene in the entering up said judgment
 or issuing the execution thereon; and also to waive
 all benefit of advantage to which
 may be entitled by virtue of any Homestead
 or other Exemption Law now or hereafter in
 force, in this or any State or Territory where
 judgment may be entered by virtue thereof.
 Hereby ratifying and confirming all that
 said Attorney may do by virtue
 hereof.

Witness hand and seal this

day of

A.D. 18

In presence of

Robert L. Paul of *Paul*

Isiah E. Colburn *Colburn*

Which the defendant insisted should be read
 to the jury as part of said notes & the Court
 ruled they should be read as part of said
 notes. To the introducing of which notes
 the said defendant then & there objected
 & the Court overruled the objection & the de-
 fendant then & there excepted to the overruling
 of said objection.

The Plaintiff thereupon closed his testimony.

Defence

The defendant Thompson called Horatio G. Loomis as a witness who testified as follows. I am engaged in the Marine Bank as Acting Vice President. It was thereupon agreed that a copy of the Ledger account of the firm of Dunlap, Wright & Co. might be used instead of the Ledger. The witness then produced a paper containing the following.

Dr Dunlap, Wright & Co. in account with Chicago M. & S. B. Co

1855				
Dec	31 To Bal	6.75		Dr 6.75
1856				
Jan	4 "	452.80		" 459.55
	5 By		150	" 309.55
	7 To	300.00		" 609.55
	8 "	40.50		" 650.05
	12 "	171.75		" 821.80
	15 "	10.70		" 832.50
	17 "	145.		" 877.50
	18 By		188	" 689.50
	" To	112.50		" 802
	19 "	96.22		" 898.22
Feb	1 "	124.69		" 1022.91
	19 By		355	" 667.91
	" To	262.50		" 930.41
	21 By		100	" 830.41

47	23 To	75.		905.41
	26 By		230	685.41
	" To	40		725.41
	29 By		1000	274.59
Nov	1 To	160		114.59
	3 By		400	514.59
	" To	15		499.59
	5 "	53.29		446.30
	6 By		200	646.30
	" To	562.25		84.05
	10 "	400.		Or 315.95
	11 "	200.		" 515.95
	12 "	75.		" 590.95
	13 By		150	" 440.95
	14 To	100		" 540.95
	15 "	65		" 605.95
	" By		700	94.09
Apr	23 To	204.29		Or 110.24
June	6 "	600.94		" 711.18
	14 By		750	38.82
1857 Apr	29 "		2141.13	2179.95
	30 "		609.22	2789.17
	" To	2450.		339.17
	" "	<u>339.17</u>		" "
		<u>6963.35</u>		<u>6963.35</u>

This is a copy of the account of the firm of

Dunlap Wright Co. with the Marine Bank
 it commences Dec 31. 1853. & extends down
 to April 30. 1857. I don't know of any other
 account. This is the whole account of
 that firm during that time this is an
 exact copy from the Ledger I have com-
 pared it with the Ledger. This account
 shows that on the 23^d April 1856. there was
 an over draft of \$110.24. on the 6th June
 there is a charge of \$600.94 in creating
 account, on the 14th June there was a credit
 of \$750. leaving due Dunlap Wright Co.
 \$338.82. the next is a credit of \$244.13. on
 29th April 1857. On 30th April 1857. Credit of
 \$609.22. increasing the credit balance
 to \$2789.19 on the 30th April 1857. the same
 day there is a charge of \$2450. & another
 of \$339.17 balancing the account. Since
 that time there have been no transactions
 to my knowledge. The entries in the book
 are in the handwriting of Henry L. Forest
 This account is in the same book that con-
 tains all the accounts of depositors with
 the bank. It is called "Individual Ledger"
 It is the only account we keep with the
 depositors. This account shows the daily
 balance of the depositor, on the 28th April
 1857. by this account it seems the Bank

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owed the firm of Donalds Wright & Co. \$38.83.
(Now it was admitted that the Bank
had no other demands against Donalds
Wright & Co. but on the deposit account.)

Cross. And upon his cross examina-
tion the witness testified, the Book Keeper
might have made a false entry. I know
of no way of preventing a book keeper
making a false entry, if he has a mind
to. There is no physical impossibility.
Of my own knowledge I don't know.
Whether the deposit here entered was made
the entries could be made & the money
not deposited, there is no physical
impossibility. If he made a false entry
it would be detected. We have a means
of detecting a false entry, we try the
books once in two weeks, he could not
keep it covered but a short time. I
understand book keeping. I was not
engaged in the Bank at the time these
entries were made.

Direct resumed. I am one of the di-
rectors of the Marine Bank, have been
since May 1858. I have kept books
for twenty or thirty years - have been in

Merchandise business, and furnished with Bank book Keeping. When a deposit is made the teller makes a ticket of from the checks the amount is made up, there is a general ledger which is a check on the individual ledger. The gross sums of each depositions deposits are carried to this general ledger & this is the check. We don't suppose that a book keeper would make a false entry except for his own benefit. The check against false entries is in that general ledger when it is written up & there is no other mode of getting at whether the deposit was actually made on a certain account but by the tickets.

Cross examined - The paying teller refers to the book keeper to see if there is a balance in favor of the drawer and if there is he pays his check. The book keeper could not make the deposit tickets generally. If he were acting for the receiving teller he might do so. There were no examined any journal, but if there was a discrepancy it would have been discovered.

The defendant then introduced as a witness Cyrus R. Haggerty who testified

as follows. I know the members of the late firm of Dunlap, Wright & Co. There was a suit in the Circuit Court between me & the members of that firm. There were two trials, the first was in February 1858. I have found the Cash book spoken of. We had a book of that firm in the trial here. I saw it once some time after the trial in the room below this. There was an effort made to find it to make up the bill of exceptions in that case. Heard was the only defendant that defended in that case. He wanted the book very much, but we could not find it.

The defendant then introduced Isaac G. Mott as a witness, who testified as follows. I was Clerk for Heard when the trial was had in the Haggerty case. I have been in his office ever since. I went to find the Cash book. Heard sent me Haggerty said he had seen it. then I went to find it again. I looked wherever we could think it might be. looked all in the office for it. we wanted it in the Haggerty case to make up the bill of exceptions by.

Thereupon the defendant rested

And the plaintiff recalled Robert L. Dunlap to the giving of whose further testimony the defendant then & there objected & the Court overruled the objection to which the defendant then & there acquiesced.

Thereupon the said Dunlap testified as follows. I have examined what purports to be a copy of the account of Dunlap Wright & Co. with the Marine Bank.

Deposits of Feb 29th 1836 of \$1000. One March 15. 1836. of \$700 and one on the 14th of June 1836. \$750. These deposits I never made they do not appear on the pass book of the firm before introduced in evidence in this case. To my knowledge, I know of no money being drawn out of the bank on April 30 1837.

Cross Examined - I deposited \$1500 in Marine Bank some time in December 1836. This is the only item I can give correctly. I have no memory except this that if a deposit of three or four thousand dollars should appear then I should know we never deposited it. I have no knowledge except by the books. I looked over the items when this pass book was given me. This was

the book I settled up. Brown handed me a paper & I compared it with this book I did not compare it with this. I examined the pass book.

The plaintiff then recalled Josiah B. Colburn as a witness, to the further testimony of whom the defendant objected & the Court overruled the objection & the defendant then & there excepted, & the witness then testified as follows. I never made any deposits. I made a loan of \$1500 & it went into Mr. Dunlap's hands & he deposited it. That was December 1836. I don't know if I ever made any deposits. He had a book keeper don't know if he went to the bank.

The plaintiff then called as a witness William B. Hibbard who testified as follows. I have examined the journal of the Marine Bank, there is no journal entry for these items \$1000 Feb 1836. \$700 15 March 1836. \$750 June 14th 1836. and none for the item \$2450 April 30 1837. I don't know who kept the journal, some of the entries are in Henry L. Somers's hand writing, can't say how many.

Ward called this morning to examine our books. I showed him the Individual Ledger and the Journal were shown him the Journal was called off. I don't find any interest changed. I did not examine the Ledger where what the \$39.17 is for. If it had been interest, it should be entered as interest. The account shown me now shows that it is not so changed. It appears here to be that amount drawn out by check.

Checks now were introduced & read to the jury corresponding in amount & date with those entered in the passbook, all of which are omitted by consent from this bill except those of date June 6/36 & April 30/37 which are as follows.

Chicago June 6th 1836
 To Chicago Marine and Fire Insurance Company
 Pay to the order of C. Wright & Co. or Bearer Six
 Hundred 94/100 Dollars and Charge
 the same to the account of
 Geo 94/100. L. L. Wright & Co.

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No. Chicago April 30th 1837.
Chicago Marine and Fire Insurance Company,
Pay to Interest on Bond
of Three hundred thirty nine \$100 Dollars
\$339.17.
Dunlap Wright & Co.

The foregoing is all the testimony given
in said Case, on said trial.

The testimony thereupon being closed
after argument of Counsel the Court
instructed the jury as follows.

The Court is requested to instruct the
jury, on the part of the Reff.

1 That if they believe from the evidence
in the Case, that Messrs. Dunlap, Wright
& Colburn, formed the partnership of "Dun-
lap Wright & Co." that after that partne-
ship was dissolved Messrs. Dunlap and Wright
said Dunlap to his money to pay the
alleged indebtedness of the firm, to sign

Given

the name of the firm to a note to be given by him for that purpose and Lumlach in fact obtained the money, and gave the notes in question - then Hunt is liable to the Off for the amount due thereon.

2 That if Lumlach one of the partners of the said firm of Lumlach Wright & Co. gave the notes in question to the Off upon the faith of which money was advanced, that said Hunt was afterwards advised of the said making of said notes and did not object to the same, when so advised but assented thereto then he, Hunt is liable to the Off for what from all the evidence appears to be due on the note. This is so, if Hunt was informed of all the facts in regard to the hiring of the money.

3 That the Off. has a right to sue any person who is a party to a contract or note alone, though others may be liable with him upon such note, & is entitled to recover the same as if he was sued jointly, unless the party sued alone pleads in abatement, the word

2nd Left

Given

The jury are instructed that a partner of a firm that has been dissolved has no right to bind the firm by note given after the dissolution of the firm without the express authority of each of the partners. But if one partner is sued alone, it is sufficient to prove that he authorized the note to be issued.

3rd Left

Refused

If the jury believe from the evidence that the note was made in the name of N. J. Brown only for the purpose of his becoming an endorser, and that it was discounted by the Forrest & Bros and Brown afterwards took up the note he is not a bona fide holder and he cannot recover against Hunt.

4th Left

Refused

If the jury believe from the evidence that at the time the note was given Forrest & Bros discounted the note and it is not shown that the money was paid to the Marine Bank upon a bona fide debt due from Randolph Wright Co. & that Brown paid the note as endorser he cannot recover of Hunt on the same.

And the Court refused to give the said defense.

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and said third & fourth instructions, but marked the first & second of said defendants said instructions given & having arisen before the jury in said case thus addressed them "Gentlemen of the jury the plaintiff asks the following instructions which are given" & thereupon proceeded to read to the jury the plaintiffs said instructions, which being done without saying anything further & without reading the defendants said instructions & without informing the jury that he gave any instructions for the defendant he read to them the said instructions so read & the said defendants instructions so as aforesaid and marked given, but none of the instructions had any mark or indication upon them to apprise the jury that they were given for the Plaintiff or Defendant. So the refusal to give said instructions each of them the said defendant then & there excepted.

Thereupon the jury retired & the next morning returned a verdict for the plaintiff for \$2596. 69. & the defendant then & there moved for a new trial for the following reasons.

Superior Court of Chicago

Andrew J. Brown
 or
 Henry B. Reid

The said defendant now comes and moves for a new trial in the above entitled cause upon the following points.

1st The Court erred in allowing Robert L. Dunlap to be sworn as a witness for the plaintiff in this cause, he having been shown to be interested in the result of the suit.

2nd The Court erred in allowing Josiah E. Colburn to be sworn as a witness for the plaintiff in this cause, he having been shown to be interested in the result of the suit.

3rd The Court erred in allowing Robert L. Dunlap & Josiah E. Colburn to testify in this cause that having been shown to be joint makers of the notes in question.

4th The Court erred in refusing to exclude the testimony of Robert L. Dunlap.

5th The Court erred in refusing to exclude the testimony of Robert Josiah E. Colburn.

Superior Court of Chicago
 Andrew J. Brown }

or
 Harvey B. Hand }

State of Illinois }

Cook County }

Harvey B. Hand
 the defendant in the above entitled cause
 being duly sworn deposes and says that
 on the 10th of the above entitled cause.
 he prepared ~~four~~ instructions in his behalf and
 handed them to the judge before whom the
 cause was tried to be given to the jury, that on
 the close of the arguments in the said case
 the said judge arose and addressed the
 jury thus "gentlemen of the jury the plaintiff
 asks the following instructions" & then
 proceeded to read to the jury the plaintiff's
 instructions, & then without saying any thing
 about the instructions asked for by the de-
 fendant and without reading any instruc-
 tions in his behalf or saying that any were
 given for him handed what this deponent
 supposed to be the plaintiff's instructions
 to the jury who thereupon retired. And this
 deponent further says, that while the said
 judge was handing the instructions to the
 jury his Counsel Mr. Smith stepped forward
 & whispered to this deponent said "why does

not the Court give your instructions, and they not right" to which this deponent answered, "I don't know they must be right", and while the jury were leaving their seats this deponent said to the Judge in the hearing of all present "I wish to except to the refusal of my instructions" & was going on to say the giving of the plaintiff's instructions when the Court & others replied "it is considered that all exceptions are taken".

This deponent further states that he supposed the said Judge had refused all his instructions and did not know till he sat down to draw out reasons for a new trial after the verdict was rendered that any of these instructions had been marked given or that the Court intended to give them to the jury. But that while he was marking the instructions numbering them for the purpose of referring to them in his said motion for new trial he discovered that the two instructions were marked defendants set & 2 instructions were marked given & on enquiring this deponent learned that they had been handed to the jury with the plaintiff's instructions without being read. And this deponent further swears that at the time the said instructions were

handed to the jury neither the plaintiffs
or defendants instructions were numbered
or marked in any way so as to designate
for whom they were given. That while this
deponent was drawing out the said motion
for a new trial in this case he marked
and numbered both the plaintiffs and
defendants instructions with the assent
of Mr Burgess the Plaintiffs Counsel
subscribed & sworn

before me Decr
6th 1865

H. B. Hunt

W. Kimball CMO

State of Illinois
County of Cook & Superior Court of Chicago

I, S. A. Hummel one of the jurors before
whom the case of A. J. Brown vs Harry
B. Hunt was tried in the Superior Court
of Chicago State of Illinois, being duly sworn
before and say, that when the evidence in
the said case and argument was closed
the judge of said Court arose and said
"The plaintiff asks the following instruc-
tions" then about to be read, and read to
in the plaintiffs instructions, and without

17.
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Saying whether he gave any instructions for the defendant he handed to one of our number a considerable number of instructions, which we supposed to be only those he had just read to us, not having been told that the Court meant to give any instructions for the defendant he did not read over the instructions handed to us or hear the same read, and if any were handed to us which were not read by the judge they were not considered by us.
Signed before me this 1st

Day of December A.D. 1861. J. A. Plummer
ORR M. Lell
Notary Public.

J. J. Brown Certify that I was one of the jurors in the case of Andrew J. Brown vs Harvey B. Hunt tried at the November term of the Superior Court of Chicago A.D. 1861, and that when the judge read over the instructions to the jury he did not read any instructions for the defendant but alone and said "the plaintiff asks the following instructions, and then read over several instructions for the Plaintiff

but neither saw or heard any instructions
for the defendant. and if any such
were handed in to any one of our number
I neither saw them or heard them read, and
could not have considered them in my
verdict in said case.
Chicago Dec^r 1860. Isaac Brown

State of Illinois
Cook County ss. Gilbert W. Barnard
being duly sworn says that he was one
of the jurors in the Case of Andrew J.
Brown against Harvey D. Bond tried
in the Superior Court of Chicago at the
November Term 1860. That after the argu-
ment of said case the Court read sev-
eral instructions on the part of the plaintiff
off but did not read any for the defendant
or say that he gave any instructions for
the defendant that a number of instruc-
tions were handed to one of our number
staked into the jury room, that while
the jury were out some one read one
or more instructions in the hearing of
this deponent that he has seen the in-
structions asked for by the defendant

67 Since the verdict. And said to have been handed to the jury & that he knows that he has not read or heard the said defendant's instructions read while in the jury room that this deponent was in favor of a verdict for the defendant when the jury first went out, & that some one or more of the jury and as an argument to this deponent that no instructions were given in favor of the defendant & this deponent and the same argument to some other juror.

This deponent believes that all the jurors understood that no instructions were given for the defendant.

Subscribed & sworn to

before me this 4th day of
December A. D. 1861.

G. W. Barnard

A. P. Wilder

Notary Public

State of Illinois In the Superior Court of
County of Cook } do Chicago. For and Term
1861.

Chas. J. Brown }
Harvey B. Hunt }

John Warworth being duly sworn deposes and says that he was one of the jurors in the trial of the above cause.

That at the trial of said cause the Judge who tried the cause, read to the jury several instructions for the plaintiff therein, but this deponent did not hear any instructions read to the jury for the defendant, and that this affiant neither saw nor heard read any instructions for the defendant either while sitting at the trial of said cause nor while in the jury room, and that without the aid or directions of any such instructions this affiant made & rendered his verdict in said cause.

This affiant also says that several jurymen, this deponent being among their number enquired while in the jury room "Where are the instructions for the defendant?" But none were found or shown nor was this inquiry in any way satisfied, to the knowledge of this affiant while the jury were in the jury room, nor before their verdict had been rendered.

Subscribed & sworn to
before me this 8th day of
December A.D. 1865

John Warworth

DeP. Hildes. Notary Public

18.
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Superior Court of Chicago
Harry B. Hend
vs
Abner J. Brown

State of Illinois
County of Cook J. Sidney Smith being
duly sworn deposes and says that he
acted as counsel for the Defendant in
this cause upon the trial thereof. And was
present when the instructions were given
to the jury by the Court. That the Court
read instructions in behalf of the Plaintiff
to the jury and informed the jury that the
instructions were given in behalf of the plain-
iff which were so read. That the said Court
read no instructions in behalf of the De-
fendant, and deponent supposed until
he was informed to the contrary after
the verdict was rendered, that the Defendant's
instructions were all refused, and immediately
as the jury were retired deponent asked
Mr. Clark how it was that none of Defendant's in-
structions were given and said Clark re-
plied that he could not tell. Deponent then
remarked to him, that he had better see
that exceptions were properly taken, said
Clark then remarked something to the Court

but spoke so low, that defendant did not
 hear what was said.
 Subscribed & sworn to Sidney Smith
 before me this 8th day of
 Dec. 1861.

H. Kimball Clerk

And afterwards to wit, on the 24th day
 of December A. D. 1861. at the December
 term of said Court. the Court overruled the
 said motion for a new trial and caused
 final judgment to be entered to the amount
 of said verdict & costs of suit to the over-
 ruling of which motion for new trial the
 said Defendant then & there accepted, and
 prayed an appeal to the Supreme Court
 which was granted the said Defendant
 to file bond in the sum of Three thousand
 dollars with security to be approved by the
 Court. And time was given for thirty days
 to file bill of exceptions & bond, and after-
 wards to wit, on the 26th January A. D. 1861.
 the said Defendant filed the following
 stipulation

Superior Court of Chicago
 Charles J. Brown
 vs
 Harry B. Hunt This then by mutually

71) agreed by and between the parties to the
above entitled Cause that the time
fixed for filing bond and bill of excep-
tions in the above entitled Cause may
be and the same is hereby extended to the
Eleventh day of February A. D. 1861
January 21/61.

W. J. Burgess
for Plff

And that same shall be treated as a part of
the Record if then signed & sealed by the judge
W. J. Burgess
for Plff

And the said defendant & said plaintiff both
appearing & assenting thereto the Court ordered
that the time for filing the bond & bill of ex-
ceptions be & the same was extended till the
11th day of February A. D. 1861.

And for as much as the said defendants
bill of exceptions did not appear of record in
said Cause the said defendant by his Counsel
prays that the same may be signed & sealed by
said Court & made part of the record in this
Cause which is done this eighth day of February A. D. 1861
Wm H. Higgins Judge Clerk

And afterwards, to wit, on the 8th day of February in the year aforesaid, there was filed in the Office of the Clerk of said Court, a certain Appeal Bond, in the words & figures following to wit:

Know all Men by these presents that we Harvey B. Hunt as principal & George W. Reynolds as surety are held and firmly bound unto Andrew J. Brown in the penal sum of Three Thousand and dollars lawful money of the United States for the payment of which well and truly we have made us bind ourselves our heirs & administrators jointly severally & firmly by these presents.

Witness our hands and seals this eighth day of February A. D. 1861.

The Condition of the above obligation is such that whereas the said Andrew J. Brown did on the Twenty seventh day of December A. D. 1860. in the Superior Court of Chicago in the County of Cook & State of Illinois recover a judgment against the above bounden Harvey B. Hunt for the sum of Three Thousand and Six Hundred & ninety six & 10/100 Dollars & costs of suit from

which judgment the said Harvey B. Hurd had taken an appeal to the Supreme Court of the State Illinois.

Now if the said Harvey B. Hurd shall prosecute his appeal with effect & shall pay the said judgment & costs in case the said judgment shall be affirmed together with interest & what ever damages may be awarded by the Supreme Court then the above obligation shall be void otherwise to remain in full force & effect.

H. B. Hurd *Seal*
 G. H. Reynolds *Seal*

Approved
 Wm H. Higgins

Judge S. C. of Chicago

State of Illinois
Cook County P.

Walter Kimball
Clerk of the Superior Court of Chicago,
within & for the County of Cook and State
of Illinois, do hereby certify the foregoing
to be a full, true and complete transcript of
the papers on file in my office, & proceedings
and judgment entered of record in said Court
together with the Bill of Exceptions & Appended
Bond in a certain Cause wherein Andrew
J. Brown was Plaintiff & Harvey B. Hunt
Defendant.



Witness Walter Kimball
Clerk of the Superior Court of
Chicago, & the Seal thereof at
the City of Chicago, in said
County & State, this 3rd day
of April A. D. 1861.
Walter Kimball Clerk

Harvey B. Hurd	} Supreme Court
Appellant	
Andrew J. Brown	} April Term 1876
Appellee	

And now comes the said Harvey B Hurd in his own proper person comes and says there is manifest error in the foregoing record rulings judgment & proceedings and assigns the following errors.

1st The Court Erred in allowing Robert L Dunlap to be sworn as a witness for the plaintiff in this cause he having been shown to be interested in the result of the suit

2nd The Court Erred in allowing Jonah Q Colburn to be sworn as a witness for the plaintiff he having been shown to be interested in the result of the suit

3rd The Court Erred ^{in allowing} the said Dunlap & Colburn to testify in this cause they having been shown to be joint makers of the notes sued upon.

4th The Court refused to exclude the testimony of Robert L Dunlap & Jonah Q Colburn

5th Court Erred in overruling the objection to the reading of the notes & the

jury
6th The court erred in refusing the
~~plaintiffs~~ ^{defendants} 3^d & 4th instructions & in not
reading the ~~1st & 2nd~~ ^{3rd & 4th} instructions or in=
forming the jury that the same were given
7th The court erred in overruling the
defendants motion for new trial
8th The verdict was contrary to the
evidence

Wm B. Hurd
in his office

Supreme Court.
Andrew & Brown
attys

Harvey B. Hurd

And now comes the ^{Andrew & Brown} defendant
in error and foris no error &
says there is no error in said
verdict and proceeds and
asks to have said judgment
affirmed &c)

W T. Burgess & H. F. Waite
for defendant in error

~~192~~ 190-115

Brown

²¹
Hurd
Transcript

Filed April 16, 1861
L. Leland
Clerk

Dec. \$15.00

SUPREME COURT.

STATE OF ILLINOIS.

HARVEY B. HURD, *Appellant*,

—VS.—

ANDREW J. BROWN, *Appellee*.

THIS is a suit brought by Andrew J. Brown against Harvey B. Hurd, to recover of him the amount of two judgment notes for \$2,296, made by Robert L. Dunlap and Jonah E. Colburn, in the name of *Dunlap, Wright & Co.*, over a year after the firm had been dissolved. The firm dissolved 20th April, 1856, and the notes were given on the 28th April, 1857, payable to Brown, who knew of the dissolution. Dunlap signed the firm's name to the notes, and he and Colburn executed the power of attorney attached.

The plaintiff brings his suit against Hurd alone, so as to avail himself of the testimony of his brother-in-law, Dunlap, and his confederate, Colburn, to prove that Hurd authorized the giving of the notes, and fixed his liability on them. When they were called as witnesses, the plaintiff admitted that Dunlap was the same person who signed the note, and that he and Colburn were the same persons who executed the powers of attorney attached to them. The defendant objected to their being sworn, on the ground that they were interested in the event of the

suit; but the Court over-ruled the objection, and the defendant excepted. They then testified that Hurd was a partner in the firm of *Dunlap, Wright & Co.* when it dissolved, in April, 1856; that, when the firm dissolved, it owed the Marine Bank \$1,800 for over-drafts on their account, and that Dunlap and Colburn went to Hurd's office together to see about raising money to pay it; that they found Hurd alone in his office: asked him if he had raised the money; that Hurd said "No." And Dunlap swears Hurd asked him if he could not raise it of Brown, or the Forrests, upon the notes of Dunlap, Wright & Co. Colburn swears that only Brown's name was mentioned. Dunlap says he asked Hurd if it would be right to give the notes of the firm, as it had ceased, &c.; that Dunlap said he would try: and they went immediately to Brown's office and gave the notes.

Thomas L. Forrest, a brother-in-law of Brown, swears that Brown did not advance the money upon the notes, but they were discounted by Forrest Bro.'s & Co. to Dunlap, Wright & Co.; that no money was counted out to Dunlap, but the notes simply left with Forrest; and either he took the money to the Marine Bank, or his brother, Henry L., who was the book-keeper at the Marine Bank, and a partner in the firm of Forrest, Bro.'s & Co., got it and took it there. A pass-book was also introduced by plaintiff, which showed a deposit of \$2,141.41 on the 29th April, 1857, and a check, paid on the 30th, for \$339.17, which balanced account (Rec. p. 20). The balance to make up the \$2,296 was added into the note for extra interest. It appeared, however, upon cross-examination of Dunlap, that the original pass-book of the firm had been left at the Marine Bank about the time Hurd went out of the firm, since which time he had not seen it, and, though he had inquired for it since, it was not to be found, and the one introduced in evidence was a new one, made out at the time of the note's transaction, and handed him by Thomas L. Forrest, and was in the hand-writing of Henry L. The Vice-President of the Marine Bank, who was introduced by the de-

fendant, produced the "Individual Ledger" of the Bank, which contained the whole and only account with the firm of *Dunlap, Wright & Co.*, from which it appeared that, at the time Hurd left the firm, there were \$110.24 due the Bank for over-draft; that on 6th of June \$600 were drawn out, and \$750 deposited, leaving \$38.82 due the firm: *and so the account had stood, without any deposits or drafts, till the 29th of April, 1857*, when there was a credit of \$2,141.13, and on 30th, \$609.22, making a credit to firm of \$2,789.19, and, on same day, charge of \$2,450 and \$339.17, balancing account (Rec. p. 47). Thus, the Court will see the books of the Bank stood with a credit to the firm for nearly a year after its dissolution, and so stood when the notes in question were given. The entries were all in Henry L. Forrest's hand-writing.

The appellee contended that the account upon the books of the Bank was fraudulent; that Forrest had credited the firm with money that had never been deposited. Mr. Loomis, upon his cross-examination, testified, that if he (Forrest) had made false entries, it would have been detected; that they had means of detection, and that they tried the books once in two weeks, and that he could not have kept it covered but a short time. He also testified that the check in the "Individual Ledger" was the "General Ledger," which was made up from deposit tickets, and those only would tell in whose account the fraud had been perpetrated. He again says, that if there had been an error, it would have been discovered. Although Scott & Colburn try to swear that there was some indebtedness to the Bank, their cross-examination shows that they knew nothing about it but what Dunlap told them. After Loomis' testimony, Dunlap was recalled to the stand, and swore that items—Feb. 29, 1856, \$1,000; March 15, \$700; and June 14, \$750, and which did not appear in the pass-book, were never deposited. But he swears he deposited \$1,500 on this account in December, 1856. Colburn also swears to the same thing, and swears he borrowed the money

and let the firm have it. Yet no such credit appears in the pass-book or on the Bank's account with the firm. Dunlap swore that the \$1,500 was the only item of deposit he could give correctly; that he had no recollection on the subject of the other deposits, except by the books; and he had looked over the pass-book, and that was what he settled by. One of the book-keepers of the Marine Bank stated that he did not find the items omitted on the pass-book entered in the journal. Some of the entries in that book were in Henry L. Forrest's hand-writing. There was nothing showing what connection the journal had with the matter, or whether it would be a check on the "Individual Ledger."

We think the Court, after reading the testimony in this cause, will be struck with these peculiar features of the plaintiff's case: That the book-keeper of the Marine Bank, Henry L. Forrest, should pass such large amounts to the credit of Dunlap, Wright & Co., without the knowledge of any body—even Dunlap; that Colburn should swear he borrowed and loaned to the firm \$1,500, in December, 1856; and that both Dunlap and Colburn should swear it was deposited at Marine Bank: and yet there should be no trace of it upon the books of the Bank, or *the new pass-book*; that the old pass-book should have been lost at the time it was; that Hurd should so freely and fully authorize Dunlap to borrow money, and pledge him for it; after the contest in February before, and Dunlap's threats that he should direct it to be borrowed of Brown, while Brown owed him the full amount wanted; that the trouble should be taken to send the note to a remote part of the city for Colburn's signature, and that neither of the parties thought it worth while to see Hurd or get his signature, though he was within half a block of the Bank of Forrest, Bro.'s & Co., where the business was done; and Brown, a lawyer, knowing the firm had been dissolved for a year, and that Hurd could only be bound by express authority; that all this transpired between brothers and brothers-in-law; that Hurd was never called in by the Forrests to pay the note, or interest; that Brown should take it up, without any effort

on their part to collect it of any body ; and, more than all, that Forrest, the book-keeper, should be able to keep his *unsolicited* fraud upon the Bank covered, for over a year, with semi-monthly trials by the Bank for the detection of all such frauds—or that he should have allowed himself to stand in such jeopardy so long.

The Court will see by the record, the appellant took the proper exceptions to the admission of the testimony of Dunlap & Colburn, and to the introduction of the notes in evidence by objections before and during the taking of the testimony, and by motion to exclude the same after it had been given.

The first question raised by the record is : Were Dunlap & Colburn, who stood confessedly liable upon the notes under their own hands and seals, competent witnesses to bring in Hurd as a joint debtor with themselves, and compel him to pay the whole debt in the first instance ?

They were clearly ^{*interested*} ~~interested~~. In the language of the authorities : “The effect of their testimony was to take a third of the debt off “their own shoulders and throw it on the appellant’s,” though they confess themselves liable to the appellee for the whole debt ; yet, “tracing the consequences of their testimony to their final result, “they get rid of one third of the debt, to the whole of which they would otherwise be liable.” Dunlap & Colburn are undoubtedly liable for the whole debt, whether they acknowledge it or not. By their testimony in this action, they throw the whole of it upon Hurd, and reduce their ultimate liability one-third.

They stood bound for the whole debt, under their hands and seals, and the only question before their minds was, whether they could make Hurd contribute. Had they paid the notes, they would not have been permitted to show Hurd’s liability by their own testimony. They cannot do indirectly what they could not do directly. It is

a shrewd contrivance of Dunlap and his brothers-in-law, Brown, and the Forrests, to execute the threat of Dunlap, made in February, before the note was given (Record 1, 24). If Hurd pays the debt, he can have no remedy but to sue these witnesses for contribution. If the appellee contends that if Hurd is not jointly liable he can recover back the whole, I answer him that this is assuming that they can swear a liability upon me as a joint liability, because I may have the right to prove that the witnesses have purjured themselves. But even if Hurd could prove this, he could not recover for the whole amount, for there would be no implied promise to repay him. *Justice Richards*, in the case of *Wm. H. Marshall vs. Thrakill's Executors*, 12 Ohio, 279, a case exactly like this, says, in treating of the very same question: "Before Thrakill could recover the money of Marshall, the witness, it would be incumbent upon him to show that the payment was made at Marshall's instance and request, for no man can make another his debtor against his will. The law raises no implied promise on such a state of facts. Now, in the supposed case, the record itself would be the best evidence of which the case would admit, to show payment by Thrakill to plaintiff, for the use of Marshall; but, when introduced, it would not show that the whole payment was made for Marshall's use. On the contrary, it would be, as to him, conclusive evidence that a part of it was made on his own account, and, at most, would only entitle him to contribution. Could he get along without the record? Not well. Lay it out of view, and he must still prove that the payment was made at the request of Marshall, expressed or implied, and the case stands no better for him. The only act of Marshall, upon which an implied request of payment for his use could be raised, is the very evidence given on the trial, and that, if used at all, must be taken entire, and, like the record itself, would show that but half the demand was paid for Marshall's use. So, taking the matter every way, manage it the best way he can, and the witness, Marshall, will have the benefit of his own oath in transferring one-half of his own debt from his own shoulders on those of another. The result is an inevitable one, at least.

"We can see no way of escape. The witness was, therefore, interested and incompetent." There cannot be any escape from the position that the witnesses were instructed to swear Hurd into a joint liability with themselves; and I think I can show, to the entire satisfaction of the Court, that the law excludes their testimony.

The appellee will, however, rely upon a dictum of *C. J. Treat*, in the case of *Crook vs. Taylor* (12 Ill., 353). Though the dictum referred to would seem to cover this case, the question decided in that case is clearly different from the one at issue in this. In that case, the note sued was signed "George A. Crook, per George Spruch." Spruch was offered as a witness to prove that he signed the note as agent of Crook. It was a mere question of agency, where, *prima facie*, the witness was not liable to the plaintiff. He was no more liable on the note than any other agent would have been. The fact called out on the cross-examination, that he was interested in the transaction as a partner, was held to make no difference.

The case of *Crook vs. Taylor*, is almost exactly like the case of *Tappen vs. Baily* (4 Met., 529). In that case, it was shown that the witness Wilder, had been advertised as having been reelected as agent of the Company, and articles of agreement were shown, proving the defendants were partners in the Company called the Kenebec Lumber Company. The note sued upon was signed by Wilder, as agent of the Kenebec Lumber Company.

C. J. SHAW, delivering the opinion of the Court, says: "In regard to the competency of Wilder as a witness, it appears to us that, upon the ground mainly relied upon, the objection goes to his interest in the question, and not in the event of the suit. The ground is, having assumed to act and make the note in the name and by the authority of the Company, if he was not so authorized, he was personally bound by the contract, so that charging the Company would tend to relieve himself from the responsi-

"bility. This is obviously an interest in the question only, because
 "the judgment, on whichever side it may be given, could not be
 "given in evidence in a suit against him. Besides, by the general
 "rule, an agent is competent to prove the authority under which
 "he acted, and the acts done under it. As a mere member of the
 "Company, Wilder is called to testify against his interest, because
 "it is to charge the Company with a debt, the payment of which
 "he will be liable to contribute. *Brackett vs. Wier* (5 Brain. & Cres.,
 "385); *Hall vs. Curyon* (9 Brain. & Cres., 646)."

But in the subsequent case of *Columbian Manufacturing Co. vs. Alfred Dutch et al.* (13 Pick., 125), which was a case involving the identical question in the case at law, and in which the same C. J. SHAW delivered the opinion of the Court, the witness is held incompetent. The suit was to recover value of a quantity of sheeting consigned to Dutch & Malchett. The firm dissolved, and the goods were left in store of A. Dutch & Co. Dutch was offered to prove that the acceptances in question, which were drawn on A. Dutch & Co., were so drawn for convenience. Dutch & Malchett were still to be liable for the goods, notwithstanding the dissolution, and that he acted as the agent of that firm in giving the acceptances.

C. J. SHAW, in delivering the opinion of the Court, says: "It
 "must be considered that by defeating this action, Dutch lays the
 "foundation of another against himself, in which he must be solely
 "charged with the debt; whereas, if he testifies against the defend-
 "ant, and in favor of the plaintiff, he fixes the other defendant as
 "equally liable with himself for the debt—equally liable for the whole
 "in the first instance, and ultimately liable *prima facie* to contribu-
 "tion."

If this is a good distinction, it fully reconciles the case of *Crook vs. Taylor* with the case at bar, and with the numerous authorities which I propose to present to your honor. Spenck was held out as agent of Crook, and was not liable, upon the note, as

principal. The plaintiff had a right to deal with him in the belief that he could prove his agency by his testimony. The liability of Crook did not depend upon the proof of a joint liability with the witness, as in the case at bar. And the Court will observe that the case of *York vs. Blott*, hereafter referred to, is the only case, English or American, where the witness was allowed to testify where the plaintiff was bound to prove a joint liability with the witness to recover in his suit; and in that case the witness simply proved the signature of the defendant. If the case of *Crook vs. Taylor* cannot be thus distinguished, it must stand opposed to both authority and reason.

As the same Judge delivered both opinions, and in the latter the former is not over-ruled, there can be no doubt the Supreme Court of Massachusetts regard them as consistent with each other.

The distinction to be drawn from these cases is: Where the witness acted only as the agent of the Company, and is not *prima facie* liable upon the note, he is competent to prove his agency; but where he is *primarily liable* for the whole debt, he is incompetent to show another jointly liable with him.

Mr. Greenleaf lays down the rule that, "In a suit against one "on a joint obligation, a co-obligor, not sued, is not a competent witness for the plaintiff to prove the execution of the instrument by "the defendant, for he is intended to relieve himself of part of the "debt by charging it on the defendant." 1 Greenleaf's Ev., § 395, 8th edition.

In presenting the further authorities, I shall first quote all that I have been able to find in any way bearing against the appellant, following them with the authorities in his favor, believing that the Court will see that though there is a seeming conflict between the cases in the King's Bench on one side, and the Common Pleas of

England and all the American cases on the other, yet every case like the one at bar sustains the position of the appellant.

The case of *Hudson vs. Robinson* (4 Maul. & Selwin, 474, referred to in *Crook vs. Taylor*), was a suit against the individual partner for a bill of goods purchased by him of the plaintiff, and which he sold, and for which he received the money to his own use; and as it appeared he had mixed his firm up with the purchase, one of his partners was held a competent witness, to show that he received the money to his own use.

The case of *Blackett vs. Weir* (5 Barn. & Cress., 385), which seems to be the leading case on that side of the question, was a case where the plaintiff sold goods to a steam yacht company, and the witness, Gibson, was a partner, but had had nothing to do with the purchase of the goods, and did not appear to be liable, except for contribution, he was admitted to prove the defendant a partner of the company; and the Court there say, in support of their ruling, there was nothing but his admission to show he was liable to contribute.

In the case of *Hall vs. Lett* (9 Barnwell & Cress.,) the witness was not the party primarily liable. He had no hand in contracting the debt. He was a shareholder in the company which had contracted the debt, and was admitted to prove the defendant was also a shareholder.

The case of *York vs. Blott* (5 M. & S. 71) admits the witness to prove his own signature and that of his co-defendant.

These are all cases in the King's Bench, and are the only English cases that way. They are opposed by the case of *Brown vs. Brown* (4 Taunt., 752), which decides, "that in an action on a joint contract against two, one who has suffered judgment by default, is

effect. The Court say: "A partner in a firm is not an admissible witness to prove that another person is a member."

The case of *Purveyance vs. Dryden* (3 Sergeant & Rawle, 402), was for money borrowed by the witness, Dryden, and, as he testified, paid over to the defendant, Purveyance. The witness was called to prove this fact and the fact of partnership. TILGHMAN, C. J., delivering the opinion of the Court, says: "Samuel Dryden, son of plaintiff, received the whole of the money of the plaintiff. He is, *prima facie*, liable for the whole; and, if the plaintiff fails in this suit, he must pay the whole. The effect of his evidence, then, is to take half the burden off his own shoulders and throw it on the defendants. It is contended that he swears against his interest because he confesses himself answerable to the plaintiff for the whole debt. True, he does so; but, tracing the consequences of his testimony to their final result, he gets rid of half the debt, to the whole of which he would otherwise be liable." And GIBSON, J., in concurring, adds: "If the plaintiff had sued the witness and recovered, and witness had sued his partner, he would be obliged to prove the existence of the partnership, and that the sum was employed in the business of the firm. I think it clear he was incompetent to prove any fact he would be bound to prove between himself and his partner, in which the verdict, as in this case, would be evidence." *Taylor vs. Henderson* (17 Sergeant & Rawle, 453), is to the same effect.

The case of *Van Rant vs. Kay* (2 Humphrey, 106), was an action against A., as the maker of a promissory note signed by A. & B., and made by B. a year after the firm dissolved. The note was in liquidation of a former debt. The plaintiff introduced B. as a witness. The Court reviewed the whole law, citing and commenting upon the cases in the King's Bench, and disapproving of their doctrine, and citing the cases in this country, and holding that B. was an incompetent witness.

The case of *Marshall vs. Thrackell's Exec.* (12 Ohio, 275), was upon a note. Marshall, one of the signers of the note, was called to prove the execution of the note by Thrackell. The Court held him incompetent. As the opinion of the Court is an able review of all the law on the subject, and its reasonings are conclusive, we beg to refer your Honors to the opinion itself. It is affirmed in *Hale vs. Watson* (4 Ohio, New Series, 600).

Latham vs. Kenniston (13 New Hampshire, 203), is another case fully discussing the doctrine, renewing all the authorities. It was a suit upon a promissory note signed Colby & Kenniston. Colby signed the partnership name to the notes, and he was offered as a witness to prove joint liability of Kenniston. GILCHRIST, J., says: "It is to be remarked that Colby's testimony proves himself
"to be solely liable for the whole debt, unless Kenniston could be
"held as a partner. Which would be the better course for the inter-
"est of Colby—that the plaintiff should recover judgment against
"Kenniston alone for the whole debt, and thereby be enabled to
"procure satisfaction from K. alone, which would relieve Colby of all
"liability to the plaintiff, or remain liable himself to the plaintiff
"for the whole debt? A verdict and judgment against the defend-
"ant, make him liable, in the first instance, for a debt for which the
"witness is liable, either alone or as a partner. Here is a certain
"benefit, then, to Colby; for, although the judgment would not be
"evidence of Colby's liability, because he was not summoned, it
"would be evidence that Kenniston had been charged in his capa-
"city as partner with him for the debt. If such a state of facts
"could exist, that Kenniston, in a suit against Colby to recover the
"amount paid on the judgment, could prove his case without using
"the judgment against him in evidence in support of his action, it
"is difficult to see why Colby might not use it for the purpose of
"showing that he was liable only for one-half of the debt, because
"the recovery had been had against K. as a partner."

C. J. PARKER, in delivering his elaborate opinion in the case,

takes the position that, "The judgment would be evidence between the parties, whether Colby or K. paid the judgment and brought suit. That it would, under the best possible circumstances for defendant, be *prima facie* evidence that the money was paid on partnership account, and throws the burden upon the defendant to disprove it." As the opinion fully discusses the question, we call the especial attention of your Honors to it.

Little vs. Haggard (5 Harrison, Delaware, 291). Suit on note signed "H. & P." P., who signed the firm's name to the note, was adjudged to be incompetent to prove the partnership.

Garner et al. vs. Myreck et al. (30 Miss., 448). "A co-partner is an incompetent witness in favor of plaintiff to establish partnership between himself and defendants, he being directly interested in the recovery of a judgment against them."

Sherman vs. Otis H. Kelton & Co., (2 Rhode Island, 532). Suit for goods sold to Otis H. Kelton & Co. Witness called to testify that he bought the goods for that firm, and that defendants were partners with himself, and he remitted the proceeds of sale of goods to the firm. The Court say: "The witness had a direct interest in the event of the suit, because the effect of his testimony was to throw upon the defendants a debt for which he was primarily liable." The Court further say the English cases upon the question are conflicting, but the American cases are conclusive against the competency of a witness under such circumstances, and after reviewing the English and American cases, the Court say: "But we think the question is susceptible of another view equally fatal to the competency of the witness. Suppose in the subsequent suit, the question of partnership or no partnership was entirely an open question of fact, unaffected by the evidence or proceedings of the first suit, and if not found to exist, the defendant could recover the whole sum of the witness. The witness

"would not then stand indifferent. The rule in relation to a balance of interest requires that the interest which balances should not only be equal in amount, but as direct and certain as the interest which is balanced. * * But such liability cannot exist except on the assumption that what the witnesses is offered to prove in this suit will be proved to be false in the next, and this assumption is to be made in favor of the party who offers the witness. Such a liability is little more than a possibility, and being inconsistent with the fact which the witness is called to prove, we think is insufficient to balance the certain and direct interest which the witness has to throw upon the shoulders of the defendants the debt for which he is primarily liable."

Davis & Mizzell *vs.* Sanford (18 Georgia, 289). Note sued on was signed Davis & Mizzell. Plea by Davis, *non est factum*. Plaintiff offered Mizzell to prove partnership, and his *authority to sign the name of Davis* to the note. The Court say: "It is very plain that Mizzell is an interested witness—interested to throw a portion of that liability upon Davis, which would otherwise have to be responded to solely by himself. He cannot, therefore, be a witness in the case without violating a primary rule of evidence." His being a party did not exclude him under Georgia Statute.

Merritt *vs.* Pollys, &c. (16 B. Monroe, 355). This was a suit on a note given by Brown, in name of "Brown & Merrett," two years after the firm had been dissolved, and was in liquidation of a debt of the firm. The Court decide that the note did not bind the defendant as partner, and that Brown was an incompetent witness on account of interest.

Barney *vs.* Earle *et al.* (20 Ala. 405). Suit on note signed "Barney & Skinner, by H. A. Skinner." On the trial below, the witness, Skinner, swore that when the note was given, he and defendant were partners in planting. Defendant authorized S. to buy

corn, for which the note was given. That the corn was used for defendant's benefit, and he had since promised to pay for the same, and there had been a final settlement of the partnership accounts between witness and defendant. The Court say that "it was clearly "and directly the interest of the partner not sued to aid the plaintiff "in his recovery, and we think he should not have been allowed to "testify."

To the position that the plaintiff urged that, on the whole, Skinner appeared to be only an agent, the Court say: "This by no means makes him less interested. As a joint and several maker "of the note, he is liable to the payee or holder for the full amount "of the debt. The reason for his exclusion is stronger on this view "of the case than it was on the first, and the rule is laid down in *McCall vs. Sinclair* (14 Ala., 764)." The Court further hold that an agent who signs the note as surety, cannot prove his authority to sign for the principal, and cite *Lewis vs. Post* (1 Ala., 72); *Bran vs. Pearsole* (12 ib. 592); *Scott vs. Garbrough* (5 ib. 221).

The second point arises on the manner in which the Court treated the appellant's instructions. The judge marked the plaintiff's instructions and first two of defendant's instructions, "given" and addressing the jury he said: "The plaintiff asks the following "instructions, which are given," and then read to them the plaintiff's instructions, and without saying anything further, and without reading defendant's instructions or informing the jury that he gave any for the defendant, he handed with the plaintiff's instructions the two of the defendant's, marked "given." Neither set of instructions had anything on them to apprise the jury for whom they were given. The record shows that the defendant treated the matter as if his instructions had all been refused, and excepted to such refusal on the spot. He supposed all had been refused, and did not discover the oversight of the Court till the jury returned their verdict. It is not contended that it would have been error to have

handed all the instructions as they were to the jury ; but the course of the Court was such as would most likely deprive the defendant of the benefit of his instructions, and the affidavits of the jurors show that such was actually the case. They not only did not read them, but those who were in favor of finding for the plaintiff, used the fact that the Court did not give any instructions of the defendant to persuade those in favor of the defendant over to their side. When the Court undertook to read the instructions, the jury had a right to suppose he read all he intended to give them.

Third.—The authority shown did not authorize the giving these notes for \$2,296.69, when the debt to be paid was only \$1,801.

Fourth.—Dunlap and Colburn's testimony show, upon the whole, that the money was to have been borrowed of Brown, while, in fact, it was borrowed of Forrest Bro's & Co. The case of *Barney vs. Earle et al.*, (20 Ala. 405,) above cited, is directly in point. The witness testified his authority was to buy the corn of Joseph B. Earl, and he bought it of James W. Earl, his brother. The Court say the agent exceeded his authority ; the principal had a right to select his creditor.

H. B. HURD, *Pro. Per.*

N^o 190
Superior Court

Harvey B. Hurd

v

Andrew J. Brown

Appellants Brief.

Filed May - 9th 1861

L. Leland

Clerk