

No. 14544 $\frac{1}{2}$

Supreme Court of Illinois

Smythe

VS.

Harvey

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 50

Smyth
25

1863

14544

1/2

75-

Mr. Justice

Defendant ~~Tracy~~ ^{Tracy} relies upon

a dissolution of the partnership between himself and Harvie, previous to the receipt of this redemption money, as a defense to that portion of plaintiffs claim. This was allowed by the court below, in which a judgment was rendered for forty four dollars and twenty five cents, the balance of the \$128.04, and interest after deducting defendants fee for services in collecting the money.

Whilst by the rules of the ancient common law, it was no part of an attorneys duty to receive money on a judgment, yet in more modern times attorneys have become collecting agents, as well as lawyers. By uniform custom and practice, attorneys engage in, and attend to the collection of money as a part of their professional duty. Such is inseparable from the practice at the present day. It is not reasonable to suppose, that either party imagined at the time of this return, that the duty of the defendants ceased, when they obtained the judgment.

on the plaintiffs claim, and the sum charged for professional services, no doubt was designed to cover the collection of the money, as well as the recovery of the judgment. In fact the witnesses of the value of their services, refer to all they did in the case. They thus recognise their undertaking as collecting agents.

Then if this partnership in fact, the business of collecting money, as well as the practice of the law, in other branches of the profession, it became a part of their duty to collect the money after judgment ^{unless otherwise agreed} was recovered. If this was a partnership duty, it continued with each member, after the dissolution of the firm. Plaintiffs gave credit to the firm as it was then constituted, and they did not release themselves from their obligation, by its dissolution. For aught we know, the fact, that ^{Tuley} ~~Scott~~ was a partner, may have been the inducement to confide the business to the care of the firm.

Even if a dissolution of the
 partnership, could have released the
 members, from liability for a fail-
 -ure to complete the business, it could
 only have been after notice of the
 dissolution. In the absence of such
 notice, plaintiffs had no option in
 determining whether they would
 continue the ~~business~~ ^{course} in the hands
 of the member, who took charge
 of the business of the firm, or want
 place it in the hands of another at
 -torney. It cannot be, that their busi-
 ness can be transferred to others with-
 out their consent, so as to escape
 responsibility. They did not trust
 either member of the firm sepa-
 -ately, but it was to both that the
 business was entrusted and they
 have the right to look to both
 for its faithful performance. The
 court below erred in finding, that
~~the~~ ^{Tuley} ~~was~~ ^{was} released from liability
 by the dissolution of the partne-
 ship, and the judgment must be
 reversed and the case remanded.

Judge of the Court

In this opinion the whole court concurred.

Judgment reversed.

prof. of bot. and a prof. of geol.
Sol. in the entered and came remarks
Sept. 25. 1863

J. D. Eaton.
P. H. Waller
Advers. these

Dr. Wright at

50. W. 80.

A. Marie Ad.

Opportunity
Walter G.

Recorded
Page 695.
Completed

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Plas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said 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 Seventh day of October in the year of our Lord One Thousand Eight Hundred and Sixty One and of the Independence of the United States of America the Eighty Sixth.

Present, The Honorable

John M. Wilson Chief Justice of the }
Superior Court of Chicago. }

Nap Wiggins } Judges.
Grant Goodrich }

Naples Warren Prosecuting Attorney.

Anthony Keating Sheriff of Cook County.

Attest,

Walter Kimball Clerk.

Be it remembered that heretofore to wit: on the twenty second day of March A.D. 1861. there issued out of and under the seal of said Court The Peoples writ of Summons which said writ, together with the Sheriffs return thereon endorsed are in the words and figures following to wit:

State of Illinois
County of Cook }
The People of the
State of Illinois. To the Sheriff of
said County. Greeting:

We Command you that you summon Andrew Harris and Murray F. Daley if they shall be found in your County, personally to be and appear before the Superior Court of Chicago of said Cook County, on the first day of the next term thereof, to be holden at the Court House in the City of Chicago, in said Cook County, on the first Monday of April next, to answer unto ~~Richard~~ Smyth, Felix E. Mourke, and William A. Herring in a plea of Incess in the case in promise to the damage of said Plaintiffs as they say in the sum of One thousand dollars.

And have you then and there this writ, with an endorsement thereon, in what manner you shall have executed the same.

Witness Walter Kimball Clerk
of our said Court, and the
seat thereof at the City
seat, } of Chicago, in said County,
this 22nd day of March
A.D. 1860.

Walter Kimball Clerk

Served by reading to the within
named Murray F Taley the 26th
day of March 1860. Andrew Harris
not found.

John Gray, Sheriff
by Ira Snow Deputy.

And afterwards to wit on the 8th
day of November, A.D. 1860. there
issued out of and under the
seal of said Court, a certain
alias People's writ of summons,
which said writ and the sheriff's
return thereon endorsed are in
the words and figures following
to wit:

State of Illinois
County of Cook $\text{\textcircled{B}}$ ss. The People
of the State of Illinois to the
Sheriff of said County, Greeting;

We Command you as we
have before Commanded you,
that you summon Andrew Harris
Impled with Murray F Taley if
he shall be found in your County
personally to be and appear before

the Superior Court of Chicago of
 said ^{Cook} County, on the first day
 of the next term thereof to be
 holden at the Court House
 in Chicago, in said Cook
 County on the first Monday
 of December next, to answer
 unto Bernhard Smyth, Felix E
 Mounse & William A Herring in
 a plea of Trespass on the case
 upon promises, to the damage of
 the said Plaintiffs as is said
 in the sum of One thousand
 Dollars.

And have you then and there
 this writ, with an endorsement
 thereon in what manner you shall
 have Executed the same.

Witness Walter Kimball
 Clerk of our said Court
 on the Seal thereof at
 Chicago aforesaid the 8th
 day of November, A.D. 1860
Walter Kimball Clerk

Served the within by reading to
 the within named Andrew Harris
 the 8th day of November 1860.
 John Gay Sff by Ira Snow Deputy

~~And afterwards~~ and
on the
twenty eighth day of March
there was filed in the office
of the Clerk aforesaid a
Certain Declaration in the
words and figures following
to wit:

State of Illinois
County of Cook ss.

Superior Court of Chicago
April Term 1856

Andrew Harrie and Murray F
Tuley were summoned to answer
Bernhard Smyth Felix E O'Rourke &
William A Herring of a plea of Tres-
pass on the case upon promises
And thereupon the said Bernhard
Smyth Felix E O'Rourke & William
A Herring by Franklin Webster their
attorney complain.

For that whereas heretofore to
wit: on the tenth day of July in
the year of our Lord One thousand
eight hundred and fifty six, to wit
at the County and State aforesaid
the said Plaintiffs were partners in
trade doing business under the
name style and firm of Smyth
O'Rourke & Herring, and whereas
also the said Defendants were then
and there partners in the business
of Attorneys and Counsellors at law
under the name style and firm
of Harrie & Tuley, And whereas
the said Plaintiffs as partners as
aforesaid were then and there

possessed of a certain Claim
for money against one Charles
McDonnell of a large amount
and whereas the said Defts as
such partners at the Special
instance and request of the said
Defendants as partners as aforesaid
then and there entrusted to the
said Defts as such partners the
collection and enforcing of the
payment of said Claim against
said McDonnell, the said defen-
dants therefore and in consideration
thereof, and of a certain reasonable
reward to the said Defts in that
behalf undertook and then and
there faithfully promised the said
Defts that they the said Defts
would well and truly attend to
the collection and enforcement
of the payment of the said Claim
of the said McDonnell and duly
account to the said Defts for the
proceeds thereof, and for whatever
sum or sums of money the said
Defendants might receive on account
of the said Defts said Claim.

And although the said Defendants
did afterwards. to wit. on the day
and year aforesaid at the County

aforsaid receive and collect
divers large sums of money under
and by virtue of said trust on
account of said claim of the said
plaintiffs against the said Mc
Donnell, yet the said Defts
not regarding their said promises
and undertakings but contriving
to have not, nor has either of them
rendered a just & reasonable, or
any account to the said Plffs. or
either of them of the said monies
so received by the said Defts. or
any part thereof although so to
do. They the said Defts were re-
quested by the said Plffs afterwards
to wit: on the day and year aforsaid
and oftentimes afterwards to wit:
at the County aforsaid but they
so to do have hitherto wholly re-
fused & still refuse so to do.

And whereas also heretofore to
wit, on the day and year aforsaid
at the County aforsaid in con-
sideration that the said plaintiffs
as partners aforsaid at the special
instance and request of the said
Defts as partners as aforsaid
had authorized, retained and empowered
the said Defts as partners as aforsaid

To Collect and enforce the pay-
 ment of a Certain debt then
 due and owing from one Charles
 McDermell to the said plffs as
 partners as aforesaid and to ob-
 tain payment and satisfaction
 of the said debt from the said
 Charles McDermell. they the said
 defendants as partners as aforesaid
 undertook and then and there
 faithfully promised the said plffs
 as such partners to render a just
 account to the said plffs as
 such partners of all monies
 which ~~the~~ the said defendants ^{should} receive
 for and on account of the said
 debt and to pay and deliver all
 such moneys to the said plaintiffs
 when they the said debts should
 be thereunto afterwards requested
 And although the said debts did
 afterwards, to wit: on the day and
 year aforesaid at the County
 aforesaid, received divers large
 sums of money under and by
 virtue of the said power and
 authority & retains for & on
 account of the said debt, yet
 the said debts not regarding
 their said promise and undertaking

and Contriving and intending to
injure & defraud the said Plffs
in this behalf have not nor has
either of them rendered a just &
reasonable or other account to
the said Plffs or either of them of
the said Monies so received by
the said Defts as aforesaid or
any part thereof although to do this
the said Defts were requested by
the said plaintiffs afterwards to
wit. on the day and year aforesaid
at the County aforesaid but
they to do this have hitherto wholly
refused & still refuse so to do.

And whereas also heretofore
to wit on the day and year aforesaid
at the County aforesaid, the said
Defts were partners in the business
of the practice of the law, and
conducted their said business as
attorneys and Counsellors at law,
and whereas in consideration that
the said Plffs then and there at
the special instance & request
of the said defendants as such
partners had retained the said
Defendants as such partners to
prosecute and enforce the payment
of a certain debt then due and

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owing from One Charles Mc
Donnell to the said plaintiffs
and to obtain payment of the
said debt from the said Mc
Donnell, they the said Defendants
as partners as aforesaid undertook
and then and there faithfully
promised the said plaintiffs to
render a just account to the said
plaintiffs, of all monies which
they the said Defendants should
receive for and on account
of the said debt, and to pay and
deliver all such monies to the
said plaintiffs when they the
said Defendants, should be
thereunto afterwards requested.
And although the said Defendants
did afterwards to wit, on the day
and year aforesaid, at the County
aforesaid receive divers large
sums of money under and by
virtue of the said retainer, for
and on account of the said
debt, yet the said Defendants
not regarding their said promise
and undertakings, but contri-
ving and intending to injure
and defraud the said plaintiffs
in this behalf have not nor have

either of them rendered a just and reasonable or other account to the said plaintiffs or either of them of the said Monies so received by the said Defendants as aforesaid or of any part thereof although to do this they the said defendants were requested by the said Plaintiff afterwards to wit on the day and year aforesaid and oftentimes afterwards at the County aforesaid but they the said Defs to do this have hitherto wholly refused & still refuse so to do.

And whereas also heretofore to wit on the day and year aforesaid, at the County aforesaid in Consideration that the said plaintiffs, at the special instance and request of the said defendants being then and there partners in the practice of the law, and as Attorneys and Counselors at Law under the name of Harris & Foley had authorized and retained the said Defendants, as such partners to collect and obtain payment of a certain debt then due and owing from one Charles Mc Donnell to the said Plaintiffs

they the said defendants as such
 partners, undertook and then &
 there faithfully promised the said
 plaintiffs to render just account
 to the said plaintiffs of all monies
 which they the said Defts should
 receive for and on account
 of the said debt, and to pay and
 deliver all such monies to the
 said Plaintiffs when they the
 said Defendants should be thereunto
 afterwards requested, and although
 the said defendants did afterwards
 to wit: on the day and year
 aforesaid at the County aforesaid
 receive divers large sums of
 money under and by virtue of
 the said Authority and retained
 for and on account of the said
 debt, yet the said defendants,
 not regarding their said promise
 and undertaking but contriving
 and intending to injure and
 defraud the said Plaintiffs in
 this behalf have not nor has
 either of them rendered a just
 and reasonable or other account
 to the said Plaintiffs or either
 of them of the said monies so
 received by the said defendants

as aforesaid, or any part thereof although to do this they the said Defendants were requested by the said Plaintiffs afterwards, to wit: on the day and year aforesaid at the County aforesaid, and oftentimes afterwards at said County but they to do this have hitherto wholly refused and still refuse so to do.

And whereas also the said Defendants as partners as aforesaid afterwards to wit on the day and year aforesaid at the County aforesaid, were indebted to the said Plaintiffs in the sum of One thousand Dollars lawful money of the United States for so much money by the said Defendants as such partners before that time had and received to and for the use of the said Plaintiffs, and being so indebted they the said Defendants in consideration thereof afterwards, to wit: on the day and year aforesaid at the County aforesaid, undertook & then and there faithfully promised the said Plaintiff to pay them the said sum of money when

they the said Defendants should
 be thereunto afterwards requested
 And whereas also the said
 Defendants as partners as aforesaid
 said afterwards to wit: on the
 day and year aforesaid at the
 County aforesaid were indebted
 to the said Plaintiffs in the
 further sum of One thousand
 Dollars of like lawful money
 for so much money before
 that time and then due and
 payable from the said defendants
 as partners as aforesaid to the
 said plaintiffs for interest upon
 and for the forbearance of di-
 vers large sums of money before
 then due and owing from the
 said defendants as such partners
 to the said plaintiffs and by
 the said plaintiffs forbore to
 the said defendants for divers
 long spaces of time before then
 elapsed at the like special
 instance and request of the
 said defendants as such partners
 and being so indebted they the
 said defendants in consideration
 thereof afterwards to wit: on the
 day and year aforesaid at the

County aforesaid undertook and then and there faithfully promised the said plaintiffs to pay them the said last sum of money when they the said defendants should be thereunto afterwards requested.

And whereas also the said defendants as partners as aforesaid afterwards to wit: on the day and year aforesaid at the County aforesaid accounted with the said Plaintiffs of and concerning divers other sums of money from the said defendants as such partners to the said Plaintiffs before that time due and owing and then in arrear and unpaid and upon such accounting the said defendants as such partners were then and there found to be in arrear and indebted to the said plaintiffs in the further sum of One thousand dollars of like lawful money and being so found in arrear and indebted they the said defendants as such partners in consideration thereof undertook and then and there

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faithfully promised the said plaintiffs to pay them the said last mentioned sum of money when they the said defendants should be thereunto afterwards requested.

Nevertheless the said defendants not regarding their said several promises and undertakings but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiffs in this behalf have not as yet paid the said several sums of money or any or either of them or any part thereof to the said plaintiffs or either of them or to any person or persons in their behalf although often to wit, on the day and year last aforesaid at the County aforesaid and oftentimes thereafter by the said plaintiffs requested so to do, but the said defendants to pay them the same have hitherto wholly neglected & refused & still do neglect & refuse.

Wherefore the said plaintiffs say that they are injured

and have sustained damages
to the amount of One thousand
dollars and therefore they
bring their suit and good
proof

Franklin Webster
atty for Plaintiffs.

Copy of account sued on,

Mexrs Harris & Tuley

1855 To Say the O'Rourke & Herring D^B
July 10 To Cash rec'd of Charles M. Dannel 128.54
July 10 " " " " Shff of Cook County 440.00
\$ 1168.54

1856
July C By Cash Received 500.00
Am't still due \$ 568.54

And afterwards to wit on the twenty
third day of April a. 1856. said
day being one of the days of the
April term of said Court. the
following among other proceedings
were had and entered of record
in said Cause. to wit:

Bernhard Smyth.
Felix O'Rourke &
William A. Merring

Andrew Harris &
Murray F. Tutey

Assumptis

On this day comes
said Plaintiffs by Franklin
Webster their attorney and on his
motion it is ordered that plain-
tiffs have leave to amend their
declaration herein.

And afterwards to wit on the 10th
day of May A.D. 1860. the defen-
dants filed in the office of the
Clerk aforesaid their certain plea
and affidavit in the words &
figures following to wit:

State of Illinois
Cook County 3 ss

Murray F. Tutey impleaded
with Andrew Harris etc.

Bernhard Snyg & Saperin
Felix E. Hounke & Court of
William A. Merring 3 Chicago
D May term 1851 Mo

And now Comes the said defendant
Murray, & JURY by Barker &
Jury his attorneys and defends the
wrong and injury when R.C. and
says that he did not undertake
and promise in manner and
form as the said plaintiffs
have above thereof complained
against him and of this he puts
himself upon the Country &c.
Barker & JURY. attys
for deft JURY.

And the said Refs do the like
Franklin Webster atty for Refs.

State of Illinois
Cook County 3 ss.

Pemberton Smyth,
Felix O'Rourke &
William Merring
Murray F. Tuley &
Andrew Harris

Superior Court of Chicago
May Term 1886

This affiant Murray F. Tuley
being first duly sworn upon
oath says that he is one of the
defendants in the above entitled
cause and that he has a good
defense to said suit upon
the merits.

Sworn to and
Subscribed before
me this 10th May
1886.
W. Kimball
clerk

Murray F. Tuley

And afterwards to wit. on the
11th day of February A.D. 1861. said
day being one of the days of
the February Term of said Court
the following among other pro-
ceedings were had and entered
of Record in said Cause.

Bernhard Smith
Julius E. Roanoke
William Herring
Andrew Harris &
Murray & Tuttle

Assumpsit.

This day comes
the said plaintiffs by Franklin
Webster their attorneys and due
personal service of process of
summons issued in said Cause
having been had on the said
defendant Andrew Harris only
and he being three times sol-
emnly called in open Court
comes not, nor does any
person for him but herein
he makes default. which is
on motion ordered to be taken
and is hereby entered of Record
whereupon the said plaintiffs

ought to have and recover of
and from the said defendant
Andrew Nance impleaded and
Murray & Tuley their damages
sustained herein by reason of the
premises. and thereupon refer-
ence is had to the Court to
assess damages. herein hereafter.

And afterwards to wit: on the
y^d day of March A.D. 1861. said
day being one of the days of
the March term of said Court
the following among other pro-
ceedings were had and entered
of record in said Cause. To
wit:

Bernhard Smyth
Felix O. Kountze
William A. Nearing

Andrew Nance &
Murray & Tuley

assumpsit.

and now
again comes the said Plaintiff
by Franklin Webster their attorney
and the said defendant

Murray F Tuly in his own proper person also comes. and upon agreement of the parties made now here in open Court this Cause is submitted to the Court for trial on issues joined on plea of the said defendant. Murray F Tuly impleades with Andrew Hanic defaulted herein and also to assess damages against the said last named defendant. and the Court now here after hearing testimony takes the matter under advisement

And afterwards to wit. on the 26th day of October A.D. 1861. said day being one of the days of the October term of said Court. the following among other proceedings were had and entered of record in said Cause to wit.

Linhard Chygh
 Felix E. Kourter
 William A. Herring

Andrew "Narrie" &
 Murray F. Tuley

This day again
 comes the said plaintiffs by A. B.
 Kourd their attorney and the said
 defendant Murray F. Tuley in
 his own proper person also
 comes and the cause on issue
 joined to plea of said defendant
 Tuley and default of the said defen-
 dant Narrie having been taken
 under advisement by the Court,
 at the March term last past
 and the Court being fully
 advised in the premises finds
 issues for the said plaintiffs
 and assess their damage herein
 against both of said defendants
 to the sum of Forty four dollars
 and twenty five cents.

And thereupon the said plaintiffs
 submit motion herein for a
 new trial in said cause,
 which is overruled by the Court,
 and plaintiffs enter this Exceptions
 therefore it is considered that

the said plaintiffs do have and receive of and from the said defendants their damages of Thirty four dollars and twenty five Cents in form aforesaid assessed by the Court, and also their Costs and charges in their behalf sustained, and have Execution therefor

And it is ordered that plaintiffs have thirty days time from this day in which to file their bill of Exceptions

And afterwards to wit on the 25th day of November A.D. 1861, the said plaintiffs by their attorney filed in the office of the Clerk of said Court their Certain Bill of Exceptions in the Words & figures following to wit:

Be it remembered, issue being joined in the cause pending in the Superior Court of Chicago in the State of Illinois wherein Bernhard Smyth, Phelix E. Rourke & William A. Herring are plaintiffs and Andrew Harris & Murray F. Tully are defendants and the said cause coming on to be tried before Van H. Higgins one of the Judges of said Court the same was on the 26th day of being one of the days of the October Term of said Court, holden at the Court House in the City of Chicago submitted to the Court for trial, and thereupon to maintain the issues on their behalf the said plaintiffs gave in evidence letter from said defendants to said plaintiffs dated August 8th 1855 in words and figures following

Chicago Aug 8th 1855
Messrs Smyth, Rourke & Herring.

We wrote you that Mr McDermott had promised to secure your debt by a trust deed on certain property to be paid by first October next. After putting us off from day to day and promising to pay at a number of stated times. we have concluded that we could not place

any further reliance upon him &
have commenced suit on McDonnell
for the second Monday of Sept next
and hope to make your money by
the first of October next. Mr McDonnell
refuses to sign the tract deed but
says he will get a loan within a few
days & will pay off your debt. We
place no confidence in the loan matter
& believe that we will have to make
the money by judgment & Execution
Yours Respectfully
Harvie & Foley

The said defendants then and there
admitted that they acting as the
attorneys of the said plaintiffs did on
the 20th October A.D. 1855. procure a judg-
ment in the Cook County Court of
Common Pleas in favor of said plaintiffs
& against Charles McDonnell for the sum
of Eleven Hundred & Ninety seven & 68/100
dollars & costs of suit. That on the 23rd
Nov 1855 execution was ~~issued~~ sent out of
said Court on said judgment by said
defendants & placed in the hands of the
then Sheriff of said County & that the
same was levied upon Lot 17. 18. 19
20 & 21 Bk 67 Original Town of Chicago
28 and at the sale thereof the said defen-

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defendants bid off said property in the name of said plaintiffs for the sum of Four Hundred dollars and on the 20th March A.D. 1856 the said defendants received of the said Sheriff a Certificate of purchase of said property running to the said plaintiffs and accepted therefor to the said Sheriff by name and style of Harris & Daly plffs attys. That afterwards to wit on the 24th March A.D. 1856 the said defendants sued out another execution on said judgment and on the 10th day of July A.D. 1856 the said defendants received on the same from the said Charles M. Donnell the sum of six hundred and twenty eight & 54/100 dollars

The said plaintiffs then gave in evidence the letter of said Defendants in words and figures following. To wit:

Chicago July 12th 1856.
Messrs Smyth, McKim & Herring
New York. Gentlemen

Please receive Enclosed a draft for \$500. on acc of your judgment against Charles M. Donnell. The balance is secured by a levy on real Estate

of ample value. and another Execution which is also issued. As you are no doubt aware when real Estate has been sold on Execution a years redemption is allowed by law and the time of redemption has not yet Expired.

We confidently hope however to be able to remit your balance of your judgt within 90 days.

Please acknowledge receipt
roblize

Yours truly Maria & Sally
for Andrew Harris

The said plaintiffs then called John A Wilson who being duly sworn testified as follows. Was Sheriff of Cook County on the 19th January A D 1857 and at the time of the payment of the redemption money mentioned in receipt shown me Charles McDannell deposited with me as such Sheriff \$440. for the redemption of the property mentioned in said Certificate viz Lots 17. 18. 19. 20 & 21 BLK 67. Original town of Chicago (It was here admitted that the redemption spoken of was from the sale before mentioned)

and the Certificate hereafter mentioned was the same as before mentioned as received by said defendant & running to said plaintiffs the reading of which was as follows. Mr Harrie one of the late firm of Harrie & Taley came to me on the 19th day of February 1854 bringing with him this Certificate and requested the payment of said redemption money, & I paid it to him and took this receipt on the back of said Certificate it is in words and figures following.

Rec^d of John L Wilson \$440. in full of within Certificate (signed) Harrie & Taley attys for Purchasers Dated Feb 19/54

Franklin Webster being duly sworn testified as follows. I made demand of Messrs Harrie & Taley for the balance claimed by the plaintiffs viz 4440 - rec^d of Wilson Sheriff and 128⁵⁴/₁₀₀ balance of the amount received of McDannell. I made the demand about one week before commencing this suit the defendants refused to pay over the amount.

Whereupon the plaintiff closed his case.

The said defendant Tuley then called as a witness in his behalf who being duly sworn testified as follows. I am acquainted with the defendants Harvie & Tuley know how long they were in partnership. Know when they dissolved. The defendant then asked the witness to state when dissolution took place to which the plaintiff atty objected and the objection was overruled by the Court. to which overruling of said objection the said plaintiff then and there excepted & the witness testified. they dissolved on or about the 8th day of October A.D. 1856 Mr Tuley going out of the office & leaving with Mr Harvie all papers & business of the former firm. It was admitted that debt paid \$20. Costs for said plff.

Thorne testified as follows. I am an attorney. I consider that from \$75. to \$100. - would be a fair charge for doing the business done by the defendants in the case of plff as Charles M. Donnell

The plaintiff objected to the testimony of said witness on the ground that defts have not shown themselves entitled to fees in said case. objection overruled & testimony received to which plff, then and there Excepted.

The foregoing is all the testimony given on the trial of said Cause on either side.

After argument of Counsel the Court found for the plaintiff \$44.25 whereupon the plaintiff moved the Court for a new trial and filed the following reasons in support of his motion.

- 1st The finding of the Court is against the evidence.
- 2nd That the judgment is for too small an amount.
- 3rd The Court erred in finding that the depts Tuley was not bound by the act of Harris in behalf of Harris & Tuley in the receipt of the redemption money \$440. of the Sheriff.

N. B. Ward,
attly for Plffs

which motion was then and there
overruled by the Court & final
judgment was duly entered for the
said sum to the overruling of which
motion for new trial & the entering
of said judgment the said plaintiffs
then and there excepted and prayed
time to file their Bill of Exceptions
and the Court then and there granted
to the said plaintiffs thirty days
for that purpose.

In Witness whereof the said
Van N. Higgins Judge as aforesaid
hereunto set his hand & Seal this
Twenty first day of November 1886.
Van N. Higgins *Esq.*

State of Illinois
County of Cook ss.

I, Thomas B. Carter clerk of the Superior Court of Chicago in and for said County & State aforesaid. Do hereby Certify that the foregoing is a full true and complete Transcript of all the pleadings on file in my office and of all orders and judgment entered of Record in said Court together with the Bill of Exceptions in the Case wherein Bernhard Smyth, Felix E. O'Rourke & William A. Herring are plaintiffs and Andrew Harris and Murray & Tuley defendants.

In testimony whereof, I hereunto set my hand and affix the seal of said Court at Chicago in said County this First day of February A D 1862

Thomas B. Carter clerk
(H)



Supreme Court of Chicago
April Term A.D. 1862

Barnhard Smyth
vs
Haley }
Andrew Harvie &
Murray F. Tuley }

And now comes the said
plaintiffs in error ~~vs~~ Hurd Prothon & Potter
and say there is manifest error in the
foregoing record & judgment in this
First. The Court found against the record
in finding that Tuley was not liable for
the \$440. Received on the certificate of
sale from the Sheriff

Second. The Court found for too much
an amount
Hurd Prothon & Potter
Attys for ~~the~~ the Plffs in Error

And the said Murray F.
Tuley says there is no such error as
is above supposed. —

Ab. F. Tuley, pro se.

80 191 30
Bar used Supt's et al

5

Andrew Harris et al

Filed April 22, 1862
L. Leland
Clerk

Fees \$5.00.

Paid J. B. Carter
Clerk

IN THE
Supreme Court of the State of Illinois,

THIRD GRAND DIVISION,

April Term, A. D. 1863.

Bernhard Smyth, Felix E. O'Rourke and William A. Herring,
PLAINTIFFS IN ERROR.

vs.

ANDREW HARVEY and MURRAY F. TULEY,
DEFENDANTS IN ERROR.

ARGUMENT OF HURD & BOOTH FOR PLAINTIFFS.

Filed Apr. 24-1863
L. Ireland
clk

CHICAGO:

PRINTED BY BEACH & BARNARD, NO. 14 SOUTH CLARK STREET.
1863.

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ARGUMENT OF HURD & BOOTH FOR PLAINTIFFS.

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PRINTED BY BEACH & BARNARD, NO. 14 SOUTH CLARK STREET.

1863.

ARGUMENT.

This is an action to recover moneys collected by the defendants, as attorneys for the plaintiffs.

In 1855, the plaintiffs, residing in the city of New York, sent to the defendants, then residing in Chicago, and copartners in the practice of law, a promissory note, of one Charles McDonnell, also a resident of Chicago, for \$1,160.38, to be collected. The defendants undertook the business, and on the 20th of October, 1855, obtained judgment in behalf of said plaintiffs for \$1,198.68; and on the 23d of Nov. following, issued execution to the sheriff of Cook county. A levy was made on real estate of McDonnell, which was sold by the sheriff, and bid in by the defendants for the plaintiffs, for \$400; and on the 20th of March, 1856, the defendants receipted to the sheriff \$400, proceeds of said sale, as paid by the sheriff, in the form of a "certificate of purchase." This certificate was retained by the defendants in their possession until the 19th of February, 1857, when, the lands having been redeemed by McDonnell, it was delivered up to the sheriff by the defendant, Harvie, to be cancelled; and thereupon the sheriff paid over to him the redemption money, amounting to \$440, and took from him the following receipt endorsed on said certificate:

"Rec'd of John L. Wilson, \$440, in full of within certificate.

HARVIE & TULEY,

Feb. 19, '57.

Att'ys for Purchasers."

On the 10th of July, 1856, McDonnell paid the defendants, as attorneys for plaintiffs, on said judgment, \$628.54; and on the 12th of same month they remitted to the plaintiffs, by letter, \$500, on account of said judgment. Defendants also paid sheriff's and court costs, amounting to \$19.95.

The defendants proved, subject to exceptions, that they dissolved partnership about the 8th of October, 1856, Tuley going out of the concern, and leaving all papers and business with Harvie.

It will be observed that all the transactions above narrated took place *prior to the said dissolution, except the receipt of the said redemption money by the defendant, Harvie.*

There is no evidence that the defendants ever gave the plaintiffs any notice that any sum whatever had been collected by them from McDonnell, save the \$500 remitted as above.

The main question in the case is, whether the defendant, Tuley, is liable for the \$440 received by Harvie from the sheriff some four months after the dissolution? We understand the ground of the defence to be, that attorneys have no authority to bid in real estate sold on execution upon claims of their clients, and to receive for them the redemption money; and that consequently, Harvie, having received the redemption money after the dissolution, and without authority as attorney in the case, Tuley is not bound.

Our reply to this defence is—

First. That, under the circumstances of the case, the defendants were not acting in the capacity of attorneys only, but also in that of *collecting agents*. They were acting for *foreign clients*. It was their business, not simply to commence and prosecute a suit to judgment, but to collect the note, if practicable; and for this purpose they had authority to take all the usual steps—to cause a levy and sale of real estate; bid in the property for the plaintiffs, to secure their claim; and, in case the property was afterwards redeemed, then to receive the redemption money. It was all one continuous job, strictly within the spirit of their original employment and undertaking, and in accordance with the usual practice in such cases. That the defendants regarded their employment in this light, and that they so gave the plaintiffs to understand it, is perfectly clear from the letters of Aug. 8th, 1855, and July 12th, 1856. That the plaintiffs regarded the matter in the same light, is obvious from the fact that no objections were made by them.

Second. Whether the defendants had such authority or not, originally, they assumed to exercise it, and that, too, before the dissolution of their partnership; and the plaintiffs ratified and approved their procedure. Every step, except the receipt of the redemption money, had been taken before the dissolution. Why did they retain possession of the certificate, from the 20th of March until their dissolution in October, unless they intended to receive the redemption money, in case it should be paid? And on what other hypothesis can their letter of July 12th be explained, in which they "confidently hope to be able to remit the balance of the judgment within ninety days"? All these were joint acts prior to the dissolution.

And when, by their letter aforesaid, they, with some studied concealment and perversion of the facts, inform the plaintiffs that real estate has been sold on their execution, and that the time of redemption has not yet expired, the plaintiffs, by allowing them to retain the certificate, beyond all question ratified their proceeding, and thus gave them authority to receive the money, if they had none before.

Could the plaintiffs hold the sheriff liable for illegally paying over the money? Would not the fact that they had allowed the defendants to retain the certificate for a whole year, with actual knowledge as early as July, of what had been done, be conclusive in favor of the sheriff, either that the defendants had original authority to do this, or that the plaintiffs had at least, by subsequent assent, ratified the procedure? If the evidence would be conclusive—as we conceive it must be—against the plaintiffs and in favor of the sheriff, it is not easy to see why it is not equally so in favor of the plaintiffs and against the defendant.

In any view of the case, it does not now lie in the mouth of either of these defendants, after having assumed so to act, and after having consummated all the steps of the proceeding during their partnership, except the last, *and that a mere unavoidable incident to, and sequence of, their previous joint acts and undertakings*, to say that all these acts were unauthorized and unlawful, and that he

is not to be held responsible for what was done by the other in pursuance of their joint undertakings, and which amounted simply to *receiving the fruits of their joint acts*.

When Tuley went out of the firm in October, leaving the business and papers, the certificate amongst the rest, with Harvie, he must have done it with the expectation that Harvie would complete this unfinished business of the firm. If such was not the understanding, the certificate should then, at least, if not before, have been transmitted to the plaintiffs. There is no evidence that the plaintiffs were informed of the dissolution, and, in our view of the case, the dissolution was an immaterial fact, the evidence of which should have been excluded; the duties and liabilities of the partners in respect to such unfinished business remaining unchanged by their separation, so far as other parties were concerned. The dissolution of a partnership works no change in the responsibility of the several partners for each other's acts, with reference to all business then on hand.

It may seem scarcely necessary to cite authorities for this plain principle. We will only refer to two cases, both of which are full and clear on this point:

Walker vs. Goodrich, 16 Ill. 341, and

Poole vs. Gist, 4 McCord, 259.

In both these cases, the question arose upon the duties and liabilities of attorneys, as partners. In the former case, the Court say: "The contract of retainer was a joint and continuing contract, and neither of the partners could be released from its obligations or responsibilities which they had thereby assumed, either by a dissolution of the firm or by any other act or agreement between themselves." A dissolution does not affect engagements already made, at least so far as their clients are concerned."

In *Poole vs. Gist*, the Court say that the undertaking of a firm of attorneys to collect, is like that of a firm of common carriers to transport goods, etc.

If, then, the defendants undertook to collect this claim by sale of

the rule laid down in *Bedell vs. January*, 4th Gilman, 193, and, we think, that no question can be raised as to the right of the plaintiffs to interest on their claim, if they are entitled to recover at all. It is a case where "money was received to our use" and "retained without our knowledge." We claim, therefore, that the Court below should have found for the plaintiffs \$128.54, with interest at six per cent., from July 10, 1856, being the balance of money then collected after deducting the \$500 then remitted to the plaintiffs, and \$420.05, with interest from February 19, 1857, being the amount then received, less the costs then paid.

HURD & BOOTH, *for Plaintiffs.*

IN SUPREME COURT OF ILLINOIS.

APRIL TERM, 1862.

ERROR TO THE SUPERIOR COURT OF CHICAGO.

BERNHARD SMYTH, FELIX E. O'ROURKE and WM. A.
HERRING, Plaintiffs.

vs.

ANDREW HARVIE and MURRAY F. TULEY, Defendants.

ABSTRACT.

Suit against Harvie & Tuley, as partners in the practice of the law, to recover a balance of money collected by them for plaintiffs. Tried by the Court, GRANT GOODRICH, presiding.

18

The amount sued upon is as follows :

July 10, 1856—To cash received of Charles McDonnell,	\$628 54
Feb. 4, 1856—To cash received of Charles McDonnell	
by sheriff.....	440 00
	\$1,068 54
 Cr.—By cash received.....	 500 00
	\$568 54

Default as to Harvie and issue as to Tuley.

EVIDENCE.

27 Letter of Harvie & Tuley, dated August 8th, 1855, as follows:

"We wrote you that Mr. McDonnell had promised to secure your debt by a trust deed on certain property, to be paid by 1st October. After putting us off from day to day, and promising to pay at a number of stated times, we have concluded we could not place any further reliance upon him, and have commenced suit against McDonnell 2d Monday in September, and hope to make your money by 1st of October next. Place confidence in the loan matter, shall have to make the money by judgment and execution."

28 Tuley admitted on trial, that they acting as attorneys for Smyth,
O'Rourke & Herring, procured judgment against McDonnell, for
\$1,179 68, and costs; that on the 23d of November, 1855, exe-
cution was levied on property of McDonnell, and bid off by Harvie
29 & Tuley for \$400. On the 20th March, Harvie & Tuley received
from the sheriff a certificate of the sale, running to Smyth, O'Rourke
& Herring, and receipted therefor to sheriff, as their attorneys;
and afterwards, March 24, 1856, they took out another execution
on same property, and recovered \$628 54.

Letter of defendants, dated July 12th, 1856: "Please receive, enclosed, \$500, on account of your judgment against Charles McDonnell. *The balance is secured by a levy on real estate, of ample value, and another execution, which is also issued. As you are no doubt aware, when real estate has been sold on execution, a year's redemption is allowed by law, and the time of redemption has not yet expired. We confidently hope, however, to be able to remit you balance of your judgment within ninety days.*

Yours, etc.,

HARVIE & TULEY.

- 30 *John L. Wilson.* Sheriff of Cook county; February 19th, 1857, McDonnell deposited with me \$440, to redeem his property from the certificate aforesaid, given to Harvie & Tuley. Mr. Harvie, one of the late firm of Harvie & Tuley, came to me on the 19th February, 1857, bringing with him the certificate, and requested payment of the redemption money. I paid it to him and took the following receipt on the certificate:

“Received of John L. Wilson, \$440, in full of within certificate.”
Dated February 19th, 1857.

HARVIE & TULEY,
Attorneys for Purchasers.

- 31 *Franklin Webster.* Made demand of Harvie & Tuley for balance of plaintiffs' claim, namely, \$440 received of Wilson; and \$128 54, balance, received of McDonnell. This was one week before suit commenced. They refused to pay.

DEFENCE.

- 32 Harvie & Tuley dissolved October 8th, 1856. Tuley going out and leaving all papers and business with Harvie. They paid \$20 costs. (The plaintiffs' attorney objected to this testimony, as immaterial; objections overruled, and plaintiffs excepted).

- 33 Seventy-five or one hundred dollars reasonable charge for the defendants' services in the case against McDonnell. (Plaintiffs' attorney objected to this testimony on the ground that defendants had misconducted; objection overruled, and plaintiffs excepted).

Judgment for the plaintiffs for \$44 25.

33 Motion for new trial, on the following grounds :

- 1st. Finding of Court is against the evidence.
- 2nd. Judgment too small.
- 3rd. Court erred in finding Tuley was not bound by the act of Harvie, and in receipt of redemption-money, in behalf of Harvie & Tuley.

The Court overruled the motion for new trial, and entered judgment, and plaintiffs excepted.

ERRORS ASSIGNED.

First. The Court found against the evidence, in finding that Tuley was not bound for the \$440, recovered on the certificate of sale from the sheriff.

Second. The Court found for too small an amount.

HURD, BOOTH & POTTER,

Attorneys for Plaintiffs.

80 191-50
Supreme Court

Bernhard Smyth
Felix E. O'Rourke and
Wm A. Herring Plaintiffs
vs.
Andrew Harris and
Murray F. Tully Defendants

Abstract

Filed April 22, 1862
J. Seland
Clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM THEREOF, A. D. 1863.

BERNARD SMYTH <i>et al.</i> , Plaintiffs in Error,	}	<i>Error to Cook.</i>
vs.		
ANDREW HARVIE and MURRAY F. TULEY. Defendants in Error.		

POINTS FOR DEFENDANTS IN ERROR.

If I considered myself, by any course of reasoning, as morally bound to pay this money, I should feel myself forever dishonored by resisting the claim for one moment; but we now have to do only with the law of this case.

The summons is in assumpsit, as joint defendants, and is brought upon the account sued upon, as follows:

July 10, 1856--To cash received of Charles McDonnell,.....	\$628 54
Feb. 4, 1856--To cash received of Charles McDonnell by sheriff.....	440 00
	\$1,068 54
Cr.—By cash received.....	500 00
	\$568 54

Claimed to be for moneys collected by Harvie & Tuley, as attorneys.

Default as to Harvie, and issue as to Tuley.

The facts are, (or rather as shown by the evidence,) Harvie & Tuley were partners as attorneys, and 8th August, 1855, had a claim of plaintiff in error against one Charles McDonnell, as such attorneys. On that date, H. & T. wrote to plaintiffs at New York city, that negotiations as to security for that claim could not be depended upon, and that attorneys would have to make the money by judgment and execution, and that they had commenced suit for September term, 1855, and expected to make money by October.

Harvie & Tuley commenced suit and procured judgment on 20th October, 1855. *Fi. fi.* was sued by attorneys, and on 23d November, 1855, levied on real estate of McDonnell. 20th March, 1856, sale had, and real estate bid off by Harvie & Tuley, for \$400.00, in the name of plaintiffs. Certificate issued in name of plaintiffs, and attorneys received it from the sheriff, and receipted for it. It does not appear what was then done with the certificate. No letters are shown from or to Harvie & Tuley from August 8th, 1855, until the 12th July, 1856, about 4 months after the sale, when Harvey & Tuley remit them \$500.00, which was part of \$628.24 paid attorneys on the 10th July, 1856, on alias execution of date March 24th, 1856, p. 29 R.

The amount due, including interest, (and including costs of first sale,) was \$788, at the time the \$628.24 was paid, leaving \$160.24 of balance. The redemption did not by law expire as to the \$400 until [12 months] 20th March, 1857.

H. & T. on 12th July, 1856, wrote to plaintiffs:

"Please receive, enclosed, \$500, on account of your judgment against Charles McDonnell. The balance is secured by a levy on real estate, of ample value, and another execution, which is also issued. As you are no doubt aware, when real estate has been sold on execution, a year's redemption is allowed by law, and the time of redemption has not yet expired. We confidently hope, however, to be able to remit you balance of your judgment within ninety days.

Yours, etc.,

HARVIE & TULEY,
per Andrew Harvie.

Harvie & Tuley dissolved October 8th, 1856. Harvie, on the same day, 19th February, 1857, that the land was redeemed by McDonnell, 4½ months after the dissolution of H. & T., received the redemption

money of \$440, and receipted "*Harvie & Tuley, Att'y for purchasers,*" and surrendered up the certificate. *Certificate was not endorsed by Smyth, O'Rourke & Herring.* The *two letters* of August 8th, 1855, and July 12th, 1856, are the *only letters in evidence.* *No letters either to or from Smyth et al., from July 12th, 1856, to commencement of this suit.* The 90 days referred to in letter of 12th July, expired Oct. 12th, 1856, after the dissolution, and 4 months and more before Harvie received the redemption money.

No evidence as to which of the partners wrote the first letter, nor as to which partner bid in the land or receipted to the sheriff. Evidence shows that last letter was written by Harvie, and that redemption money was received by Harvie. For aught that appears, all these transactions may have been by Harvie without the actual knowledge of Tuley. The question is whether, under these circumstances, Tuley is liable to plaintiffs for the redemption money of \$440, collected by Harvie.

I.

The original retainer as attorneys gave Harvie no authority to receive the redemption money.

Authority of an attorney is twofold—expressed in the warrant or implied by law.

Co. Litt. 52.

The rule is, that the power of an attorney, under his general warrant, expires when judgment is rendered, for thereby, says Lord Coke, *placitum terminatur*.

2 Inst. 378.

The defendant is out of Court by the judgment, for the warrant of attorney is "*quos que placitur terminatur,*" the defendant's *placitum* is determined by the judgment.

1 Moore & Payne, 513, 514, (17 E. C. L. 193)

4 Bingham S. C. 578.

1 Hill, 659, 660.

Previous to judgment, there must be an order of substitution to change attorneys, (1 Wendell, 293); but after judgment, plaintiff may have his execution issued by any attorney without substitution.

5 Cow. 446.

The general rule is, that power and authority of attorney, by virtue of his retainer, ceases with final judgment.

8 John, 361,
1 Hill, 656.

The following cases should be decisive of this one :

An attorney cannot, under his general authority, purchase land under execution in the cause for the benefit of his client.

11 John, 464.
14 Vesey, jr. 517.

He must have express authority so to do.

4 Cowen, 738.

Attorney can not receive securities to collect and apply on judgment ; can not receive bond in discharge of judgment.

13 Mass. 320.
5 Rand. 639.

By stipulation attorney agreed to receive (did receive) deed for land in satisfaction of judgment held : he had no power.

14 Serg. & R. 307.

An attorney may receive money upon execution, but is not bound to do so.

4 McCord, 259.

After judgment, the attorney can only issue execution ; can not enter satisfaction without payment ; release the damages ; discharge the defendant from execution without payment ; can take nothing but money in satisfaction, and the assignment by creditor cuts off all control of attorney over judgment.

1 Desau, 469.
27 Ill. 151.
16 Ill. 272.
10 Ala. 231.
11 Adol. & Ellis, 829, s. c.
2 Exchequer, 489.
4 Barnwell & Adolphus, 366.

client Where an attorney obtained authority for administrator to sell the estate ; employed auctioneer ; went with purchaser and client to attorney's office, and attorney received the money and gave receipt for it in presence of the ~~attorney~~, and the client afterwards refused to sign the report of sale, the count held.—

His authority extended [by virtue of his employment as attorney] no further than to act as Nolan's solicitor in the suit; obtain the decree; make report of sale, and obtain final order of approval. "He could not make the sale or receive the purchase money without *further authority* from his client."

II.

It is submitted that there is no proof of any authority to Harvie & Tuley to bid in this land; but it is contended that, having done so, they notified the plaintiffs and plaintiffs ratified their doing so. *Admitting this to be so*, the question then is, did they, the plaintiffs, authorize the attorneys to receive the redemption money, or did *Harvie & Tuley* undertake to do so.

The letter of H. & T., dated July 12th, 1856, is the only evidence on that point.

That letter remitting \$500, says: "The *balance* [of your judgment] is secured by levy on real estate, and another execution which is also issued." "We confidently hope to remit you *the balance* of your judgment within ninety days."

The only balance upon the judgment was about \$160, being what remained due after deducting the \$628.54, [cash paid by McDonnell,] and the \$400 which was paid by sale of lands.

In the same letter they say, the time of redemption has not expired, in reply to some previous letter (probably) as to the time of redemption allowed. Is there anything in this letter by which Harvie & Tuley undertake to receive this redemption money? *The certificate may or may not have been* in H. & T.'s possession at date of letter. May not H. & T. have sent it to plaintiffs, and the letter of H. & T. be in answer to some letter of theirs regarding the time when they could receive their money upon it. *The plaintiffs* are business men; kept copies of their letters; could prove sending letters to H. & T. Where is answer to this letter of H. & T., or previous letters to them? Why then suppress all letters written by them (or to them by Harvie) from July 8th, 1856, up to the commencement of this suit?

Harvie received this money 19th February, 1857, and no demand was made on Tuley (or knowledge brought to him that Harvie had received it) until week before suit was commenced, 22d March, 1860, more than 3 years.

Letter of 8th July, 1856, says, that H. & T. "confidently hope, however, to remit you balance of your judgment within 90 days." Is it not incredible, when New York was but 3 days from Chicago, *that plaintiff never wrote*, nor did Harvie ever *write about the balance*, whether it was balance of \$160 or of both that and the \$400. That they never *had any notice* of the dissolution; business remained with Harvie; letters to H. & T. would go to him. Plaintiffs would, as ordinary business men, write at about the expiration of the 90 days; yet no letters appear for a period of 3 years, *no intimation to Tuley from any source, for 3 years.*

Is it not apparent that *he* is their attorney? He writes *per Andrew Harvie*. *And is it not, from all these circumstances and omissions to offer proof, [that ought to be in their possession,] to be presumed either that Harvie was specially, after dissolution of H. & T., authorized to receive this redemption money, (certificate probably sent to him,) or that plaintiffs had notice of this dissolution.*

III.

In the case of purchase of land, *under an execution sale, the judgment is actually satisfied*. There is no longer *any judgment* for attorneys to control.

What authority would Harvie have had to receive the money upon an unendorsed note or security, which was merely received upon the settlement of a claim of a client.

Suppose that H. & T. had received a mortgage and notes running to plaintiffs from McDonnell, before they brought suit, and before or when they had become due Harvie, after the dissolution of H. & T., without any instructions from plaintiffs or any endorsement by them, have cancelled and surrendered the mortgage and note, would not the act have been a fraud on plaintiffs which would not have discharged the debt, and certainly Tuley would not have been responsible.

Suppose that, apart from H. & T.'s general retainer, they were authorized to buy in the land, yet "an agent employed to make, negotiate or conclude a contract, is not as of course to be treated as having an incidental authority to receive payments which may become due under such contract."

Story on Agency, sec. 98, and cases cited.

This certificate of redemption was a negotiable instrument; and, as to negotiable instruments, it is held that payment can only be made to the party in whom the legal title stands. In other words, if note payable to A., that A. himself must appear and claim payment.

S Barn. & C. 622.
3 Man. & R. 58.
3 Younge & C. 220.

Harvie did not have the legal title to this certificate, (it was not endorsed,) and he could not receive the money except he was specially authorized.

Edwards on Bills, p. 537.

The receipt was given by Harvie in H. & T.'s name, as "*attorneys for purchasers*," not as attorneys for plaintiffs. The evidence and facts show that H. & T. were aught but attorneys of plaintiffs in the Record.

So far as being collection agents, we were no more collection agents than every attorney in any money suit.

As to the question of interest, the interest could only run from *demand* made on Tuley, which was three years after Harvie wrongfully received the \$440.

It is certainly right to hold attorneys to a rigid accountability, but it is submitted that an attorney should not be made to suffer for an unfortunate connexion *in business*, any more than any other copartner.

BARKER & TULEY,
Attorneys for Appellees.

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Harvie et al
vs
Smythe

Deft Brief

Filed May 6, 1863
J. Seland
Clerk

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IN THE

Supreme Court of the State of Illinois,

THIRD GRAND DIVISION,

April Term, A. D. 1863.

Bernhard Smyth, Felix E. O'Rourke and William A. Herring,

PLAINTIFFS IN ERROR.

vs.

ANDREW HARVEY and MURRAY F. TULEY,

DEFENDANTS IN ERROR.

ARGUMENT OF HURD & BOOTH FOR PLAINTIFFS.

Filed Apr. 24-1863
L. G. Land
clk

CHICAGO:

PRINTED BY BEACH & BARNARD, NO. 14 SOUTH CLARK STREET.
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ARGUMENT OF HURD & BOOTH FOR PLAINTIFFS.

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ARGUMENT.

This is an action to recover moneys collected by the defendants, as attorneys for the plaintiffs.

In 1855, the plaintiffs, residing in the city of New York, sent to the defendants, then residing in Chicago, and copartners in the practice of law, a promissory note, of one Charles McDonnell, also a resident of Chicago, for \$1,160.38, to be collected. The defendants undertook the business, and on the 20th of October, 1855, obtained judgment in behalf of said plaintiffs for \$1,198.68; and on the 23d of Nov. following, issued execution to the sheriff of Cook county. A levy was made on real estate of McDonnell, which was sold by the sheriff, and bid in by the defendants for the plaintiffs, for \$400; and on the 20th of March, 1856, the defendants receipted to the sheriff \$400, proceeds of said sale, as paid by the sheriff, in the form of a "certificate of purchase." This certificate was retained by the defendants in their possession until the 19th of February, 1857, when, the lands having been redeemed by McDonnell, it was delivered up to the sheriff by the defendant, Harvie, to be cancelled; and thereupon the sheriff paid over to him the redemption money, amounting to \$440, and took from him the following receipt endorsed on said certificate:

"Rec'd of John L. Wilson, \$440, in full of within certificate.

HARVIE & TULEY,

Feb. 19, '57.

Att'ys for Purchasers."

On the 10th of July, 1856, McDonnell paid the defendants, as attorneys for plaintiffs, on said judgment, \$628.54; and on the 12th of same month they remitted to the plaintiffs, by letter, \$500, on account of said judgment. Defendants also paid sheriff's and court costs, amounting to \$19.95.

The defendants proved, subject to exceptions, that they dissolved partnership about the 8th of October, 1856, Tuley going out of the concern, and leaving all papers and business with Harvie.

It will be observed that all the transactions above narrated took place *prior to the said dissolution, except the receipt of the said redemption money by the defendant, Harvie.*

There is no evidence that the defendants ever gave the plaintiffs any notice that any sum whatever had been collected by them from McDonnell, save the \$500 remitted as above.

The main question in the case is, whether the defendant, Tuley, is liable for the \$440 received by Harvie from the sheriff some four months after the dissolution? We understand the ground of the defence to be, that attorneys have no authority to bid in real estate sold on execution upon claims of their clients, and to receive for them the redemption money; and that consequently, Harvie, having received the redemption money after the dissolution, and without authority as attorney in the case, Tuley is not bound.

Our reply to this defence is—

First. That, under the circumstances of the case, the defendants were not acting in the capacity of attorneys only, but also in that of *collecting agents*. They were acting for *foreign clients*. It was their business, not simply to commence and prosecute a suit to judgment, but to collect the note, if practicable; and for this purpose they had authority to take all the usual steps—to cause a levy and sale of real estate; bid in the property for the plaintiffs, to secure their claim; and, in case the property was afterwards redeemed, then to receive the redemption money. It was all one continuous job, strictly within the spirit of their original employment and undertaking, and in accordance with the usual practice in such cases. That the defendants regarded their employment in this light, and that they so gave the plaintiffs to understand it, is perfectly clear from the letters of Aug. 8th, 1855, and July 12th, 1856. That the plaintiffs regarded the matter in the same light, is obvious from the fact that no objections were made by them.

Second. Whether the defendants had such authority or not, originally, they assumed to exercise it, and that, too, before the dissolution of their partnership; and the plaintiffs ratified and approved their procedure. Every step, except the receipt of the redemption money, had been taken before the dissolution. Why did they retain possession of the certificate, from the 20th of March until their dissolution in October, unless they intended to receive the redemption money, in case it should be paid? And on what other hypothesis can their letter of July 12th be explained, in which they "confidently hope to be able to remit the balance of the judgment within ninety days"? All these were joint acts prior to the dissolution.

And when, by their letter aforesaid, they, with some studied concealment and perversion of the facts, inform the plaintiffs that real estate has been sold on their execution, and that the time of redemption has not yet expired, the plaintiffs, by allowing them to retain the certificate, beyond all question ratified their proceeding, and thus gave them authority to receive the money, if they had none before.

Could the plaintiffs hold the sheriff liable for illegally paying over the money? Would not the fact that they had allowed the defendants to retain the certificate for a whole year, with actual knowledge as early as July, of what had been done, be conclusive in favor of the sheriff, either that the defendants had original authority to do this, or that the plaintiffs had at least, by subsequent assent, ratified the procedure? If the evidence would be conclusive—as we conceive it must be—against the plaintiffs and in favor of the sheriff, it is not easy to see why it is not equally so in favor of the plaintiffs and against the defendant.

In any view of the case, it does not now lie in the mouth of either of these defendants, after having assumed so to act, and after having consummated all the steps of the proceeding during their partnership, except the last, *and that a mere unavoidable incident to, and sequence of, their previous joint acts and undertakings*, to say that all these acts were unauthorized and unlawful, and that he

is not to be held responsible for what was done by the other in pursuance of their joint undertakings, and which amounted simply to *receiving the fruits of their joint acts*.

When Tuley went out of the firm in October, leaving the business and papers, the certificate amongst the rest, with Harvie, he must have done it with the expectation that Harvie would complete this unfinished business of the firm. If such was not the understanding, the certificate should then, at least, if not before, have been transmitted to the plaintiffs. There is no evidence that the plaintiffs were informed of the dissolution, and, in our view of the case, the dissolution was an immaterial fact, the evidence of which should have been excluded; the duties and liabilities of the partners in respect to such unfinished business remaining unchanged by their separation, so far as other parties were concerned. The dissolution of a partnership works no change in the responsibility of the several partners for each other's acts, with reference to all business then on hand.

It may seem scarcely necessary to cite authorities for this plain principle. We will only refer to two cases, both of which are full and clear on this point:

Walker vs. Goodrich, 16 Ill. 341, and
Poole vs. Gist, 4 McCord, 259.

In both these cases, the question arose upon the duties and liabilities of attorneys, as partners. In the former case, the Court say: "The contract of retainer was a joint and continuing contract, and neither of the partners could be released from its obligations or responsibilities which they had thereby assumed, either by a dissolution of the firm or by any other act or agreement between themselves." A dissolution does not affect engagements already made, at least so far as their clients are concerned."

In *Poole vs. Gist*, the Court say that the undertaking of a firm of attorneys to collect, is like that of a firm of common carriers to transport goods, etc.

If, then, the defendants undertook to collect this claim by sale of

real estate, each became responsible for the acts of the other throughout that process, notwithstanding the dissolution of their firm in the meantime; and it makes no difference whether the authority to do this was contained in their original employment, or whether, having assumed to do it, the plaintiffs subsequently ratified their acts. We may go farther than this, and assert, that if, as partners, they undertook to do this without any authority whatever, and in their own wrong, yet neither of them can now take advantage of such want of authority; but, as against the plaintiffs, must be estopped from setting up such a defence.

The principle enunciated in the two cases cited, fully sustains this position. The undertaking of the defendants to collect this judgment, is governed by the common rules of bailment; that whenever a bailee has entered upon the execution of any undertaking, he is bound to see it safely through. As in *Poole vs. Gist*, it is said that the undertaking of a firm of attorneys to collect, is like that of a firm of common carriers to transport goods; and in *Walker vs. Goodrich*, that "the contract of retainer is a joint and continuing contract, and neither of the partners can be released from its obligations," etc.; so here, the defendants having undertaken to collect the plaintiffs' judgment, and to retain and properly use the certificate of purchase, each is bound to stand by the undertaking; and neither of them, after having nearly completed the undertaking, and placed the other in a position where he may obtain and misuse the fruits of their operations, and thereby defraud the plaintiffs, can deprive the plaintiffs of the benefits of his responsibility, whether he attempt it by a dissolution of partnership or any other form of withdrawal. The principle here is the same with that of the old leading case of *Coggs vs. Bernhard*, where the defendant, having undertaken to transport a cask of wine, dropped and burst it on the way, the Court held that, having undertaken the business and taken possession of the cask, it mattered not whether with authority or without, and even though he were a wrongful intermeddler, he was bound to stand by the undertaking, see it safely through, and shoulder all intervening damage to the property. Apply this just principle to the present case, and the obligation of

each of the defendants to account for and pay over the funds of the plaintiffs, collected or received by either of them, is clear.

It is conceded that there is a class of cases in which the courts have held that the authority of an attorney over a suit ends with the judgment and execution. Between the narrowness of these decisions, and a large liberality in defining the powers and duties of attorneys, the courts have fluctuated so as to greatly embarrass one who does not thoroughly digest the cases. But to apply the narrower rule to a case like this, would be to destroy the efficiency of an attorney, and make him comparatively powerless to aid his client. Separated from his client by a distance of 1,000 miles, he must possess large discretionary powers in order to aid him in emergencies. The plaintiffs did not want the defendants simply to prosecute a suit to judgment. They wanted them to collect a debt, and in employing them for this purpose, they impliedly authorized them to exhaust their legal remedy under the collection laws of the State. Let us glance at some of the cases where the more liberal view is taken of the powers and duties of attorneys.

In 1 Dana, 272, *Cranberry vs. The Commonwealth*, the Court say the attorney may receive money coming on execution. In 16 Ill. 272, *Nolan vs. Jackson*, the Court hold that an attorney for collection may *receive and receipt for the proceeds*, but cannot compromise, etc. In 1 Greene (Iowa), 360, *McCarner vs. Neely*, it is held that an attorney controls demands in his hands for collection, till *final* collection.

In 1 Call, 127, the attorney obtained judgment and execution, upon which a replevin bond was given. Six years after the date of the judgment, the defendant paid the money to the attorney, which fact was offered in defence to a motion made nine years afterward for judgment on the replevin bond. It was held that the payment to the attorney was good.

In 15 Mass. 316, *Dearborn vs. Dearborn*, it was held that an attorney commencing suit for collection, and taking bail of the defendant, is bound to pursue the bail upon a return of "*non est*";

and Chief Justice Parker says (page 319), "It is our opinion that " when an attorney undertakes to collect a debt, *he is bound to sue out all process necessary to the object. Scire facias* against the " bail is not a new suit. It is a *regular step* in the collection of the " original claim." Who doubts that in the present case the bidding in of the land for the plaintiffs, the retaining of the certificate to await the option of McDonnell, whether he would redeem or not, and lastly, the receipt of the redemption money, were, under our redemption laws, all *regular steps* in the collection of the plaintiffs' claim?

We also cite 2 Comstock, *Stewart vs. Biddecom*, where the authority of attorneys is fully discussed on pages 106-107, and a full analysis of the cases given, showing that those powers are amply sufficient to cover all the acts and undertakings of these defendants.

In 1 Vermont, 73, *Crocker vs. Hutchinson et. al.*, the Court hold that, in case his client resides in the neighborhood, or is easily accessible, an attorney for collection is bound to follow instructions. But in the *absence of his client, he is to act as his client would direct, if present, and knowing the circumstances.* He is to take every step in the course of the collection which is apparently for the interest of the client. He may *bring after suits* against bail or officer as a matter of discretion, as the interest of his client demands. Accordingly, in this case, the defendants, a firm of attorneys, were held liable *for not* prosecuting bail, the defendant in the principal case, not being found.

The 14th Vermont, 474, *Hopkins vs. Willard*, fully sustains the preceding case. The Court hold, p. 478, "that an attorney holds " the position of *agent* for a *remote or distant client*, and may use " and act to the best of his judgment without instructions from his client."

The 4th Conn. 517, *Bracket vs. Norton*, ably discusses on pages 522 to 525, the law and decisions, as to the powers and duties of attorneys. On page 524: "The Court may, and often does, presume the " extent of an agency from the nature of the case." "When a

"note is sent for collection from a creditor in one State to an attorney in another, by the reception of it to collect, the latter assumes the duty of performing the measures requisite for this purpose, with integrity, diligence, and skill. Having obtained judgment, and delivered the execution to the legal officer, *he has not performed all his duty as an attorney*, to the creditor." "He may give directions to the sheriff, relative to his management of the execution"—"and it is his duty to do so, when, in his opinion, it will accomplish the object of his appointment."

These decisions, and the reasons upon which they are founded, seem to cover the case at bar. The suit against McDonnell, was brought simply for collection purposes, and the bidding in of the property was in furtherance of that object, with no design to acquisition of real estate. The plaintiffs were residents of another and distant State, and every step taken by their attorneys, in the process of collection, including the receipt of the redemption money, was fully authorized by the circumstances and nature of their employment.

In each view of the case, therefore, the conclusion seems unavoidable, that the defendants are both liable for the money.

The defendants have pleaded no set-off, and there are numerous cases to the effect that, no advantage can be had of a set-off, unless pleaded according to the statute. But, as it appears that they have paid \$19,95 for costs incurred in the suit, there is no objection to an allowance for the same. But, that they are entitled to any fees or commissions for services, we most strenuously deny. We think no cases need be cited on this point, although the authorities are ample. It would be intolerable injustice to say to the plaintiffs, "although your attorneys have abused your confidence, misappropriated your money, and put you to the expense of a sharply contested suit to obtain redress, nevertheless they must be paid for their services as if they had been honest and faithful."

In this case, though a demand was proved to have been made before bringing suit, none was necessary. The case is strictly within

the rule laid down in *Bedell vs. January*, 4th Gilman, 193, and, we think, that no question can be raised as to the right of the plaintiffs to interest on their claim, if they are entitled to recover at all. It is a case where "money was received to our use" and "retained without our knowledge." We claim, therefore, that the Court below should have found for the plaintiffs, \$128.54, with interest at six per cent., from July 10, 1856, being the balance of money then collected after deducting the \$500 then remitted to the plaintiffs, and \$420.05, with interest from February 19, 1857, being the amount then received, less the costs then paid.

HURD & BOOTH, *for Plaintiffs.*

IN SUPREME COURT OF ILLINOIS.

APRIL TERM, 1862.

ERROR TO THE SUPERIOR COURT OF CHICAGO.

BERNHARD SMYTH, FELIX E. O'ROURKE and WM. A.
HERRING, Plaintiffs.

vs.

ANDREW HARVIE and MURRAY F. TULEY, Defendants.

ABSTRACT.

Suit against Harvie & Tuley, as partners in the practice of the law, to recover a balance of money collected by them for plaintiffs. Tried by the Court, GRANT GOODRICH, presiding.

18

The amount sued upon is as follows :

July 10, 1856—To cash received of Charles McDonnell,	\$628 54
Feb. 4, 1856—To cash received of Charles McDonnell	
by sheriff.....	440 00
	\$1,068 54
Cr.—By cash received.....	500 00
	\$568 54

Default as to Harvie and issue as to Tuley.

EVIDENCE.

27 Letter of Harvie & Tuley, dated August 8th, 1855, as follows :

" We wrote you that Mr. McDonnell had promised to secure your debt by a trust deed on certain property, to be paid by 1st October. After putting us off from day to day, and promising to pay at a number of stated times, we have concluded we could not place any further reliance upon him, and have commenced suit against McDonnell 2d Monday in September, and hope to make your money by 1st of October next. Place confidence in the loan matter, shall have to make the money by judgment and execution."

28 Tuley admitted on trial, that they acting as attorneys for Smyth,
O'Rourke & Herring, procured judgment against McDonnell, for
\$1,179 68, and costs; that on the 23d of November, 1855, ex-
29 ecution was levied on property of McDonnell, and bid off by Harvie
& Tuley for \$400. On the 20th March, Harvie & Tuley received
from the sheriff a certificate of the sale, running to Smyth, O'Rourke
& Herring, and receipted therefor to sheriff, as their attorneys;
and afterwards, March 24, 1856, they took out another execution
on same property, and recovered \$628 54.

Letter of defendants, dated July 12th, 1856: "Please receive, enclosed, \$500, on account of your judgment against Charles McDonnell. *The balance is secured by a levy on real estate, of ample value, and another execution, which is also issued. As you are no doubt aware, when real estate has been sold on execution, a year's redemption is allowed by law, and the time of redemption has not yet expired. We confidently hope, however, to be able to remit you balance of your judgment within ninety days.*

Yours, etc.,

HARVIE & TULEY.

- 30 *John L. Wilson.* Sheriff of Cook county; February 19th, 1857, McDonnell deposited with me \$440, to redeem his property from the certificate aforesaid, given to Harvie & Tuley. Mr. Harvie, one of the late firm of Harvie & Tuley, came to me on the 19th February, 1857, bringing with him the certificate, and requested payment of the redemption money. I paid it to him and took the following receipt on the certificate:

“Received of John L. Wilson, \$440, in full of within certificate.”
Dated February 19th, 1857.

HARVIE & TULEY,
Attorneys for Purchasers.

- 31 *Franklin Webster.* Made demand of Harvie & Tuley for balance of plaintiffs' claim, namely, \$440 received of Wilson; and \$128 54, balance, received of McDonnell. This was one week before suit commenced. They refused to pay.

DEFENCE.

- 32 Harvie & Tuley dissolved October 8th, 1856. Tuley going out and leaving all papers and business with Harvie. They paid \$20 costs. (The plaintiffs' attorney objected to this testimony, as immaterial; objections overruled, and plaintiffs excepted).

- 33 Seventy-five or one hundred dollars reasonable charge for the defendants' services in the case against McDonnell. (Plaintiffs' attorney objected to this testimony on the ground that defendants had misconducted; objection overruled, and plaintiffs excepted).

Judgment for the plaintiffs for \$44 25.

Motion for new trial, on the following grounds :

- 1st. Finding of Court is against the evidence.
- 2nd. Judgment too small.
- 3rd. Court erred in finding Tuley was not bound by the act of Harvie, and in receipt of redemption-money, in behalf of Harvie & Tuley.

The Court overruled the motion for new trial, and entered judgment, and plaintiffs excepted.

ERRORS ASSIGNED.

First. The Court found against the evidence, in finding that Tuley was not bound for the \$440, recovered on the certificate of sale from the sheriff.

Second. The Court found for too small an amount.

HURD, BOOTH & POTTER,

Attorneys for Plaintiffs.

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Supreme Court

Bernhard Smyth
Felix E. O'Rourke and
Wm. A. Herring Plaintiffs

vs.
Andrew Harvie and
Murray F. Tuley
Defendants

Abstract

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1863

Filed April 22, 1862

L. L. Lowell

Per N