

No. 14772

# Supreme Court of Illinois

Alexander

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vs.

Crosthwait

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1865, AT OTTAWA.

EDWARD L. ALEXANDER, impleaded with  
HENRY WILSON, partners, &c.,  
vs.  
HENRY W. CROSTHWAIT. } *Error to Warren.*

ABSTRACT OF RECORD.

1 On the third day of May 1864, the defendant in error commenced his  
2 suit in assumpsit, in the Warren circuit court, against Henry Wilson  
3 and Edward L. Alexander, as partners composing the firm of E. L.  
4 Alexander & Co., and filed a declaration with a single count for 1200  
bushels of wheat, sold and delivered to Alexander & Wilson, for the  
sum of eight hundred dollars. To which declaration Alexander plead-  
ed in abatement that he was not a partner of Wilson at the time, and  
was not jointly liable with him. Which plea was sworn to and an issue  
joined thereon.

8 At the October term Wilson was called and defaulted, and "judgment  
rendered against Wilson by default," (no amount is mentioned as the  
judgment, nor is there any further order as to Wilson).

9 The cause was tried on the plea in abatement of Alexander, and the  
10 jury found for the plaintiff and assessed his damages at \$551.04, and  
judgment was rendered against Wilson & Alexander for that amount.

12 The bill of exceptions shows B. T. O. HUBBARD was sworn and testi-  
fied, that he had the books of E. L. Alexander & Co. in his possession,  
and that Alexander had got an order from him on his wife for them, and  
Alexander told him that he got all the books. (A number of books  
were shown this witness, having come from the possession of Alex-  
ander,) when he testified that he thought the books were all there,  
except one.

The court, without objection, called the defendant ALEXANDER, who testified as to the possession of the missing book,—(a verbal notice having been served on him to produce all the books of E. L. Alexander & Co.); who testified, that he went with the order to Hubbard's wife for the books; that he supposed he got all the books, but could not be certain as to the missing book, and that he had no knowledge of the whereabouts of the book.

Witness HUBBARD then resumed his testimony, and testified as to a copy of an account in the missing book with Peterson & Wood, which was introduced in evidence, against the objections of Alexander. The books of E. L. Alexander & Co., so far as the accounts therein with Peterson & Wood were concerned, were introduced in evidence.

The plaintiff filed and read the following affidavit:

- 16 "H. W. CROSTHWAITE, being first duly sworn, deposes and says, that the issue in this cause is, whether E. L. Alexander and Henry Wilson were partners at the time of the sale of wheat, which is the subject matter of this suit; that, in order to prove said partnership, it is necessary that plaintiff should have access to the books of E. L. Alexander & Co. He therefore asks that defendants may be ordered to produce all the books with reference to the business of E. L. Alexander & Co.”;
- 17 —for the purpose of calling co-defendant Wilson to testify. Alexander objected to said affidavit, because it was insufficient and did not comply with the statute; and also to the introduction of Wilson as a witness in this issue against Alexander; and offered to be sworn and testify himself; but the court overruled each of these objections, and Alexander excepted.

The plaintiff then called WILSON, (still against the objections and exceptions of defendant), who was sworn and testified, that he (Wilson) purchased the wheat of plaintiff, and that, in so doing, acted for E. L. Alexander & Co., and purchased four car loads; did not remember the number of bushels; bought it at from 95 cts. to \$1.10 per bushel; that he paid plaintiff \$825.00 on the contract, and that there was yet due to plaintiff from E. L. Alexander & Co. \$551.04; that there was another book besides those in court; witness had not seen it since it was given to Hubbard. The wheat was shipped to Peoria, to Peterson & Wood, for E. L. Alexander & Co. The partnership was formed in October 1863, and continued till latter part of April or 1st May next. There was no formal dissolution of the partnership, but Alexander gave him notice to leave the premises. No wheat was bought in partnership after 20th April. The partners were E. L. Alexander and witness, trading as E. L. Alexander & Co. The terms of the partnership were, that they were to buy wheat and goods and sell the same; that Wilson

should go upon the road and market, and buy wheat and sell it, managing that part of the business; Alexander was to sell the goods and keep the books, and divide profits. The account introduced in evidence, with Peterson & Wood, contained Crosthwait's wheat, and Peterson & Wood had no individual account against witness. To all of which testimony defendant objected, for the reasons before stated; but the court overruled the objection, and defendant excepted.

On cross-examination the witness stated, that he had been informed that the wheat of plaintiff was sent to Peterson & Wood, in the name of witness. A letter was here shown witness, as follows:

BIGGSVILLE, ILL., April 11, 1864.

*Mr. Henry Wilson :—*

DEAR SIR: I have loaded and sent off one car of 324.50 bu. spring wheat, and loaded a car with best winter wheat, with 384.24 bu. I shall continue to ship your wheat as fast as I can. You may bring some greenbacks when you come again.

Yours truly,

H. W. CROSTHWAIT.

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*E. L. Alexander & Co.*

—And witness stated that he had corresponded with plaintiff in his own name; that he had received the letter at the time. He made checks sometimes in his own name, and sometimes in name of ~~Peterson & Wood~~, on Peterson & Wood, and got the money from the bank in Monmouth. He drew against the wheat of Crosthwait in his own name and in the name of E. L. Alexander & Co. That there had been a difficulty between Alexander and himself, and he was anxious to see a judgment rendered against Alexander in this case, because it was right. That he had set beside plaintiff's attorney and made suggestions to him relative to the management of the case.

On re-examination the witness stated, that in all his acts, whether in his own name or in the name of ~~Peterson & Wood~~, in connection with plaintiff's wheat, he had acted for the firm.

20

The plaintiff here closed; and the defendant proved, by RICHARD MAUR, that he acted as agent for the R. R. at Biggsville when the plaintiff's wheat was shipped; that it was shipped for plaintiff, as consignor, to Peterson & Wood, Peoria, for Wilson, consignee; shipped it as directed; that both plaintiff and Wilson were present at the time.

WM. M. GREGG was then called as a witness for defendant, and was asked by defendant if he had cashed some checks brought by Wilson to the bank in Monmouth, some drawn in favor of E. L. Alexander & Co.,

and some in favor of Wilson ; which was objected to, upon the ground that Wilson had already testified as to those facts. The court sustained the objection, and defendant excepted.

25 The letter of Crosthwait to Wilson was then offered in evidence ; also a bill in chancery, brought by Wilson against Alexander in the Warren circuit court, on the 10th Oct. 1864, praying for a settlement of the partnership between them. This was offered for the purpose of impeaching the testimony of Wilson. After stating the partnership and the business done under the partnership, the complainant alleges that, at the time the partnership ended, 20th April 1864, there was an invoice taken of the claims due to said firm, and the indebtedness of said firm, copies of which are therewith filed and made a part thereof, marked " B " and " C."

55 These exhibits nowhere contain any statement whatever of any money  
60 due to the plaintiff from the firm of E. L. Alexander & Co.

This was all the evidence in the case.

The court refused the following instructions, asked for by defendant, to which exceptions were taken :

32 If the jury believe, from the evidence, that Wilson made contradictory statements upon the stand in regard to material parts of his testimony, or has been impeached in regard to material parts of his testimony, then the jury have a right to disregard his testimony in making up their verdict.

If the jury believe, from the evidence, as well as the appearance on the stand of Wilson, one of the defendants, that he (Wilson) is interested in any way in having a judgment rendered in this case against Alexander, and has made contradictory statements on the stand as to material parts of his testimony, and from his conduct before them in aiding the plaintiff's attorney in the conduct of this suit, if they believe such has been his conduct, then the jury have a right to disregard the whole or a part of the testimony of said Wilson in making up their verdict.

The jury are instructed, that the account of indebtedness filed with Wilson's bill in chancery, due from the firm of E. L. Alexander & Co. to others, does not contain any account in favor of the plaintiff against E. L. Alexander & Co., and that such account is proper evidence to impeach the evidence of Wilson.

The court gave the following instruction, with the addition of the second paragraph, the defendant having asked for the first paragraph, to the modification of which there was an exception :

34 If the jury believe, from the evidence, that the plaintiff made a contract with Wilson, one of the defendants, for the purchase of the wheat, and afterwards corresponded with Wilson personally, and not with E. L. Alexander & Co., and shipped the wheat to Peterson & Wood for Wilson, and not for E. L. Alexander & Co., then the jury have a right to find that such was the individual transaction of Wilson with Crosthwait, and not with E. L. Alexander & Co.

But, if the weight or preponderance of the testimony is, that Wilson bought the wheat on account of the firm of E. L. Alexander & Co., it is wholly immaterial what Wilson did with the wheat, whether he shipped it in his own name and received the funds thereof in his own name or not. It is sufficient, if Wilson bought the wheat of the plaintiff on account of the firm of E. L. Alexander & Co., in pursuance of their partnership arrangement and business.

And gave the following instructions for plaintiff, to which there was an exception :

That the only question for the jury to determine in this suit is, whether there was a partnership existing between Wilson and Alexander at the time of the purchase of Crosthwait's wheat, and whether that wheat was purchased by the firm ; and that what Wilson did with the wheat afterwards is totally immaterial to the issue herein.

If, therefore, the jury believe, from the evidence, that such partnership existed, and the wheat of Crosthwait was bought by Wilson for said firm of E. L. Alexander & Co., and that said purchase of wheat was within the scope of said partnership business, they will find for the plaintiff, although they may also believe that Wilson misappropriated the proceeds of said wheat.

35 The defendant made a motion for a new trial, on the ground that Wilson should not have been allowed to testify ; that the court permitted him to testify to facts outside the affidavit ; that witness Gregg should have been allowed to testify ; that proper instructions were refused, &c. ; but the court overruled the motion, and defendant excepted.

The court also overruled a motion in arrest of judgment, and defendant excepted.

The defendant brings the case to this court by writ of error, and assigns the following :

1. The court erred in permitting defendant, Henry Wilson, to testify in the case.
2. The court erred in allowing Wilson to testify as to facts outside of the affidavit of defendant in error.
3. The court erred in giving the defendant in error's instructions and refusing plaintiffs', and each of them which were refused, and modifying those given.
4. The court erred in refusing to allow the testimony of William M. Gregg.
5. The court erred in refusing to grant a new trial.
6. The court erred in refusing to arrest the judgment.

164  
Alexander

v  
Christians  
abstract

1865

Filed A/p 12. 1865  
J. Le Comte M

14772

# SUPREME COURT OF ILLINOIS.

EDWARD L. ALEXANDER, Jr.,

VS.

HENRY W. CROSTWAIT.

ERROR TO WARREN—APRIL TERM, 1865.—No. 164.

## BRIEF.

### I.

*Wilson, the co-defendant, was not a competent witness on behalf of Crostwait against Alexander, in his plea denying the partnership.*

Bell, &c., v Thompson, (decided last Term, and not yet published, but recorded vol. 13, page 191,) and authorities there cited.

Act 1861, Session laws 71.

Homes v Budd, 11 Iowa, 189.

Easterly v Bassignand, 20 Cal., 489.

Davis v Sanford, 18 Georgia, 289.

Columbian Co v Dutch, 13 Pick 125.

Morrell v Jones, 7 Bing. 379.

1. The plaintiff below attempted to put himself within the provisions of the act of 1861, by filing an affidavit and calling upon Wilson to testify against whom a default and judgment had already been rendered, when Alexander was in court and offered to testify, Wilson not being a party to the issue; and the question is whether this can be done under this act. If it can, then the effect of the act is to give a party to the record who is not a party to the issue to be tried, a right to testify on the side upon which he is interested;—whereas he would not have such right if he were not a party to the record; and the adverse party in interest would not have a right to testify. It would not be an act to dispense with Bills of Discovery, but an act to place every person charged with being a co-partner at the mercy of his co-defendant.

The Legislature intended no such thing; and when the act says the affiant "may call upon the opposite party as a witness in the trial of said action, to prove the fact set forth in said affidavit," it means as it says—*the opposite party in the trial*—the party contesting the question at issue—and not any other party to the record, who may or may not have an interest with the affiant. Independent of this, the statute left the common law rule to prevail, whatever that was; and in the 3d Sec., where the act requires the affiant to call upon "all the persons who compose the opposite party" before he can testify, it means the same thing—the opposite party in the issue upon trial. And in the case of Bell v Thompson, decided at April Term, 1864, recorded page 191, vol. 13, the witness stood in the same position as the witness in this case, and the court put the true construction on the act of 1861. But a fact appeared in that case which does not appear in this case, as stated in Mr. Justice Beckwith's opinion:

"It appeared from his (the witness) testimony, that he took notes and accounts of the firm, and that he was to pay its liabilities. The witness, therefore, had no right of contribution from his co-defendants. It was immaterial to him whether the burden was cast upon his co-defendants and he rendered liable to them, or whether they were exonerated and he remained liable to the plaintiff."

No such fact appears in this case, but the record shows that Wilson conducted the suit in fact against Alexander, and testified that he was anxious to have a judgment rendered against Alexander "because it was right," and there was no other evidence to show any partnership. It was in fact a suit of Wilson v Alexander. Wilson had the wheat shipped in his own name. Crostwait corresponded with him about it in his own name, and he drew upon the consignee in his own name for the proceeds; and had a direct interest in having judgment rendered against Alexander and himself in that case, otherwise he would have been held personally responsible for the whole debt.

2. The affidavit was objected to because it was insufficient. Not one of the following statements are made in the affidavit which the act of the Legislature requires. That the affiant is unable to prove the fact material to sustain the action, except by himself, or the opposite party, and a statement of the specific fact sought to be proved.

See Bell vs. Thompson.

The testimony was all objected to at the time it was being given, and the court erred in refusing to confine the witness to the facts set forth in the affidavit. There was no pretense that any fact could not be proved, except the fact of partnership. Wilson not only testified as to the partnership, but he testified as to the amount and price of the wheat purchased of Crostwait, the amount still due, and other facts, outside of the affidavit.

3. A bill in chancery, filed Oct. 10, 1864, by Wilson against Alexander, for a settlement of the partnership, was introduced in evidence by defendant, for the purpose of impeaching the testimony of Wilson. Certain exhibits, attached to this bill, purport to set out the whole indebtedness of the firm. Now, no account appears in the whole exhibit in favor of Crostwait. Here is the solemn statement of Wilson as to the fact, made long after the partnership had dissolved. How could he have overlooked an account of between \$500 and \$600, when he has set forth many small items less than \$1. It was an afterthought. After he had drawn his money from the consignee in his own name, an idea strikes him, and by collusion with Crostwait, a suit is brought against defendant, Alexander, after he had failed to take money to Crostwait, as requested by him in his letter addressed to Wilson individually.

4. The case of Brown v Hurd, decided at April Term, 1864, although an extreme case, as we consider it, does not come up to the present case. In that case the plaintiff called upon all the defendants; and in the same case now on the docket, Hurd v Brown, (No. 153,) all the defendants were allowed to testify. In the case at bar, the court refused to allow Alexander to testify. In Hurd v Brown a default had been taken against the co-defendants, but no judgment rendered against them. In the case at bar, a judgment had already been rendered against Wilson.

## II.

*The decision of the Court in excluding the testimony of Wm. M. Gregg was erroneous.*

Defendant, Alexander, attempted to show, and did, at least, prove facts tending to show that if the wheat was really bought for the firm, it was done for the purpose of defrauding him; that Crostwait was a party to the fraud. Then had he not a right further to show that Wilson drew upon the proceeds of the wheat in his own name, and had the draft cashed of a banker? It is true that the record shows that the court excluded the testimony because Wilson had already testified to that? But he attempted to explain that away by stating that he did so sometimes upon the funds of the firm. Could we not show by others that he had drawn upon this wheat in his own name as an independent fact, when he had shipped it in his own name? Were we bound by his testimony, when he was but a witness for the opposite party? We would not have been concluded by his testimony, even though we had called him ourselves.

### III.

*All the instructions given on the part of the plaintiff were wrong; and the modification of the court of defendant's third instruction, as well as the refusal of those instructions of defendant marked refused, was erroneous.*

Story Partnership, Sec. 128, 132, and authorities then cited.

The instructions go upon the broad ground, that if the wheat was purchased by Wilson for the firm, then no difference what fraud was committed upon Alexander—no difference whether Crostwait had notice that Wilson intended to ship the grain in his own name and misapply the funds or not, and sold knowing that such would occur—still Alexander was liable. This is not the law, as the above authority will conclusively show: And the question is whether these broad instructions were applicable to the facts in this case.

Now, the question shows that Wilson & Alexander had a difficulty about their partnership matters, and that Alexander dissolved the partnership by giving Wilson notice to leave. There is no evidence in the record showing when this wheat was purchased; but the record does show that the wheat was shipped in Wilson's individual name by the agent of the R. R. at Biggsville, under instructions given at a time when Wilson and Crostwait were both present—that Crostwait corresponded with Wilson personally, and not with the firm about the wheat—that Wilson admitted, on cross examination, that he drew some checks on Peterson & Wood, of Peoria, consignees of the wheat, in his own name, and had them cashed by Wm. M. Gregg, cashier of the bank. Under this state of facts, the court erred in stating the law so broadly as is stated in these instructions. They were calculated to mislead, and did mislead, the jury.

The instructions refused on part of defendant should have been given, or at least a part of them. There is no pretense that the accounts attached to Wilson's bill contain any statement of an account with Crostwait. Why, then, was not this solemn statement not proper evidence to impeach him? For the foregoing reasons, as well as the reason that the verdict was against law and the evidence, a new trial should have been granted.

### IV.

*The proceedings of the court were erroneous as to the entry of the judgment against Wilson before the issue was disposed of against Alexander.*

The proper practice was, to default Wilson, and have the same jury assess the damages against Wilson, which tried the issue against Alexander.

A. G. & I. M. KIRKPATRICK,

For Plaintiff in Error.

164 30

Alexander

to

Crosstwaite

Pluff. Brief

Printed Apr 24, 1845

L. L. Lane M.R.

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A. G. & I. M. KIRKPATRICK,  
For Plaintiff in Error.

164

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W. M. Crosthwaite

W. M. Crosthwaite

Filed April 24, 1865

J. L. Leland M<sup>r</sup>