No. 13293

Supreme Court of Illinois

Wilkinson

---

vs.

McGilvra, Imp.

71641 

STATE OF ILLINOIS—THIRD GRAND DIVISION.

Supreme Court thereof, April term, 1860.

JOHN J. McGILVRA, Def't in Error,
vs.
ELISHA GRANGER, (impleaded with L. D. WILKINSON,) Plaintiff in Error.

Bill in Chancery.

Synopsis of Record.

Wilkinson and McGilvra were co-partners in the practice of law, from September, A. D. 1856, to February, A. D. 1858. Granger was a client of the firm. In May, A. D., 1858, Wilkinson and McGilvra, recovered judgments against Granger in the Circuit Court of Cook County, amounting to $1254.95. The firm of Wilkinson & McGilvra were, however, indebted to Granger for moneys collected, &c., in the sum of $557.00. The real balance then due from Granger to the firm, was $697.95. In July, A. D. 1858, Wilkinson and Granger pretended to settle the claims and judgments between Granger and the firm of Wilkinson & McGilvra. McGilvra immediately filed his bill in the Cook County Court of Common Pleas, against Wilkinson and Granger, alleging, among other things, that said settlement was fraudulent, and praying that it might be set aside, and for naught held. Said Court did, by its final decree, set aside said agreement as fraudulent, and ordered execution to be issued upon the common Law, judgments for $697.95.

Granger complains that said Decree is erroneous, in general terms, without specifying in his assignment of error, the particulars in which the Court erred. I take it, however, that the only question presented by the Record, is whether the Decree in so far as it sets aside the said pretended settlement, should be modified. I shall therefore proceed to discuss this pretended settlement of the firm, demands and accounts, between Wilkinson and Granger. Was *that* such a settlement of the firm demands, or *payment* by Granger of his indebtedness to the firm, as in law to bind the firm?

Facts as proved.

In the month of June, A. D., 1858, in Wilkinson's office, Granger is notified by McGilvra, not to settle with Wilkinson, unless he, McGilvra, should be present and assent. (See Grant's testimony, page 64 of the Record.)

About the 14th of the same month, Granger was agained notified by McGilvra (through Holt) not to settle with Wilkinson.

(See Holt's testimony, page 55 of the Record.)

Granger all the time refusing to have anything to do with McGilvra in the way of making a settlement, On the 23rd day of July, A. D. 1858, Granger and Wilkinson make an attempt settlement, and pretended to settle the firm's demands. But how? Why?

Granger in pursuance of a previous arrangement with Frisbie and Wilkinson, gives his note to Joy and Frisbie to pay a private and individual indebtedness of Wilkinson's to Joy, for the amount of $250.00, with full knowledge that it was a *private* debt of Wilkinsons.

(See testimony of Frisbie, page 107 and 108 of the Record.

Granger, also, at the same time and place gave his note to Wilkinson as an individual (Wilkinson being the payee of the said note) for the sum of $300.00, and pays Wilkinson $50.00 in money, making in all the sum of $600.00. The $300.00 note was transferred by Wilkinson to Joy & Frisbie to pay the balance of the demand of Joy upon Wilkinson. (The $300.00 note is now in judgment at the suit of Joy & Frisbie.) Wilkinson was indebted to Joy upon two promissory notes, one for $250, and the other for $300.00, secured by chattel mortgage. The $250.00 note was due at the time of this settlement.

(See Frisbie's testimony, page 107 and 108. of the Record.

Wilkinson then, in consideration of these valuable services rendered, and kind offices performed by his most obliging friend, Granger, takes it upon himself to receipt in full to Granger, all demands (and espicially the two judgments) of the firm, against him, Granger, and to stipulate and covenant that said judgment should be satisfied of record. The two notes were executed and delivered, the $50.00 paid, and the receipt given by Wilkinson, on the same day, and was an entire transaction. These are the facts. Now what is the law upon these facts?

It is not denied that even after dissolution a creditor of the firm, without fraud, and in good faith, and without notice, may pay his debt to either member of the firm. But a payment after notice, and even without fraud or a misapplication of the funds of the firm, is void as to the partner dissenting.

See *Grey vs. Jones*, Breese Rep. p. 167.

But Granger did not pay the firm demands in any way, shape or manner. He paid $50, in money to Wilkinson, and that was all. To be sure he gave his note to Joy & Frisbie for $250, which he

subsequently paid, and now seeks to charge to the firm. Why, he might as well pay the expenses of a banquet given by Napolean III., or a missionary to the Fejee Islands, and then charge the same to the firm of Wilkinson & McGilvra. It was certainly very kind in Mr. Granger to pay Mr. Wilkinson's private debts, and Mr. Wilkinson ought to be very grateful, but that is a matter between themselves, and they must not trouble their neighbors with it. But to return. Next comes the $300.00 note given by Granger to Wilkinson. A promissory note in the absence of any express agreement, if given for an account even, say nothing about the account being in judgment, is only a conditional payment, if given to the right party.

See *Burrit vs Smith*, 10 Foster, (N. H.) 256.
Coburn vs. Odell 10 Foster, (N. H.) 540.
Moody vs. Mobile, Marine Ins. Co. 27, Ala. 254.
Noel vs Murray, 3 Kernan, (N. Y.,) 167.
Zarrano vs. Wilson, 8 Cash, 424.
Sweet vs Jones, 2 R. I., 270.
Steamboat Charlotte vs. Hammond, 9 Miss. 59.

And numerous other authorities.

But Granger did not give his note to the firm, but to Wilkinson individually. Now I submit that the giving of such a note was no payment of the firm judgments, as against the *firm*. I have not been able to find any case upon all fours with this, for the reason, I suppose that the claim, that the giving of such a note would be a good payment to a firm, is so *absurd* that it never was made in a Court of Justice before.

I find it decided however that the receipt of property (not a note) "is not *in itself* a payment of a debt, and can only become so by agreement to receive such property *as payment.*"

"Such an agreement is a new contract; and will not be binding on the the firm, if made by a former partner after the dissolution without the consent of his co-partners."

See *Kirk vs. Hiatt*, 2 Carter, (In.) 322.
Yandus vs. Lafavour, 2 Blackford, 371.

But there is another view to be taken of this settlement; supposing that by any possibility the giving of these notes, in *good faith*, might be considered a payment of the firm demands. That view is, that such payment was a fraud upon the firm. There can be no doubt, from the facts disclosed by the record, that between Granger and Wilkinson there was a gross *misapplieation* of the funds of the firm, (if the notes in question ever were copartnership assets.) If the misapplication was by Wilkinson, Granger had full notice and knowledge of the fact.

Story says "a contract with one member of a firm by a third person who has knowledge or notice that the partner is acting in violation of his obligations and duties to the firm, or for purposes disapproved of by the firm, or in fraud of the firm, will be void as

to the firm, however binding it may be upon the individual partner making it." This (says the learned author) is a natural result of the principles of justice and equity applied to every other contract, as well as to partnership contracts.

See Story on Partnership, sec. 128, and authorities there cited.

The same doctrine applies *a fortionri* to cases of fraud, says the same author. See Story on Part., sec 131.

When one partner misapplies the funds or securities or other effects of the copartnership in discharge of his own private debts, claims or contracts, (says the same author,) "in such cases the creditor dealing with the partner, and knowing the circumstances, will be deemed to act *mala fide* and in fraud of the partnership, and the transaction by which the funds, securities and other effects of the partnership have been so obtained, will be treated as a nullity." Again: "So a release of the partnership debts by one partner (which will ordinarily extinguish the partnership debts) will be held inoperative and void as to the firm, if taken in discharge of the separate debts of the partner releasing it, by his creditors knowing all the circumstances." See Story on Part., sections 131 and 132. Also see

5 Cowen, 489;
7 Wendell, 326;
12 Peters' Sup. Court Rep., 230;
4 Scammon, 378;
12 Ill., 298.

The above cases establish the doctrine that the misapplication of copartnership funds is a fraud in law, whether it is made with or without knowledge or notice. The same authorities, and numerous others, establish beyond controversy, that a debtor of a firm who is a creditor of one of the partners, cannot, by any arrangement with that partner, procure the payment of his demand against the individual partner out of the amount due from him to the firm, either by way of offset, or by paying the debt due to the firm to the individual partner, and then receiving it back again from him to pay his, the firm debtors, demand against the partner. Then in the case at bar, if Wilkinson had owed Granger $550.00, and that amovnt had been deducted from the $697.95 due to the firm from Granger, or, if Granger had paid Wilkinson the firm demand and Wilkinson had paid back to Granger $550.00 of the same, then there is no earthly doubt but that such settlement would not bind the firm even without notice; and the case is certainly much stronger with notice from McGilvra not to settle. What is the difference whether Granger misapplies the partnership funds (if the Court considers those notes partnership funds) to pay Wilkinson's debt to Joy & Frisbie, or Joy, or to pay Wilkinson's debt to himself (Granger.) And the Court will here recollect that if Granger did not actually misapply the $300.00 note, he put it into Wilkinson's power to transfer it beyond the reach of the firm. The firm could not reach that note in the hands of Joy & Frisbie. It was the individual property of

Wilkinson, so far as it appeared upon its face. It was negotiable paper, and a *bona fide* holder for a valuable consideration, would be protected in law and equity. If Granger had paid the *money* to Wilkinson direct, not knowing of, or aiding in the misapplication of the funds of the firm, and without notice not to settle, the case would be quite different. But Granger himself, with full knowledge and *repeated notice*, pays the individual debt of Wilkinson to a third person, and now seeks to charge the firm with such payment. Can there be any question but that this was a fraud upon the firm, even if the transaction stopped here, and the $300.00 note had not been given to Wilkinson? Certainly not. Then this settlement must be set aside as fraudulent and void as against the firm; and set aside entirely and *in toto*, for it was one entire transaction, and if tainted with fraud it is void *in toto*. It will be claimed by Granger, I presume, that the payment of the $50.00 alone, or perhaps that the payment of the $50.00 and the giving of the $300.00 note, was an independent and valid consideration for the receipt or release by Wilkinson of the firm demand, and that the settlement ought only to be set aside as to the $250.00 note. In reply I say that—Fraud vitiates and avoids, in toto, both at law and in equity, every contract and agreement which is tainted by it.

See Chitty on Contracts, pages 688 and 701, note 1, (margina), 590 and 601.)

Hovenden on Frauds, vol. 2, page 4.

Jarvis vs. Peck, 1 Hoff., page 479.
Bond et al vs. Mather, 11 Cushing, pages 1 & 8.
Crayton vs. Munger, 9 Texas Rep. 285.
Hoitt vs. Holcomb, 3 Foster (N. H.) 535.

In the case of Bond et al vs. Mather the Court say, "If the part which is good depends upon that which is bad, the whole is void, and so I take the rule to be, if any part of the consideration be *malum in se*, or the good and the void consideration be so mixed, or the contract as entire, that there can be no apportionment."

But it is insisted by Granger that said settlement should be set aside only as to moiety of the demand, and that McGilvra should look to Wilkinson or the assets of the firm for any general balance which may be due him from the firm. In the first place, the assumption that a moiety of the whole belongs to each partner is false, for each partner's interest is an undivided half of the whole: and besides he has a lien upon the assets and demands of the firm for any balance that may be due to himself or any creditor of the firm.

See Story on Part., sec. 97 and 326.

Secondly, if McGilvra has a remedy against Granger and Wilkinson both, he may enforce his claim against both or either, and they must make contribution among themselves. They cannot dictate in the premises.

Thirdly, Wilkinson is insolvent. See page of the record.

Fourthly, There are not partnership assets sufficient to pay McGilvra the balance due him, including the amount decreed to be collected from Granger.

The bill states that in all probability there cannot be collected from the assets of the firm (including the demand against Granger) more than $1000.00 after paying the expenses of collection, which as a matter of fact is more than will be collected. Deduct from that the $225.00 which the firm owes, and the balance is $775.00. Therefore McGilvra's only remedy is against Granger. But again, Granger harps upon the hardship of having to pay this demand twice. How that may be as to the $300.00 note (now in judgment) I am not prepared to say. If he does have to pay it twice, it is only the result of his own folly, injustice and fraud. He ought to be compelled to pay this amount again, not only in justice to the defendant, McGilvra, but as a penalty for his fraud in the matter. Why did he refuse to settle with Wilkinson and McGilvra together, if not from malicious wilfulness? Then again, why did he not pay the money or give his note to the firm? or if he was desirous of making an honest settlement of the firm demands against him, McGilvra was willing to compromise the claims for the same sum which was the basis of the pretended settlement between Granger and Wilkinson. But no; Granger would not give two notes, one to Wilkinson and the other to McGilvra. He must see to it himself that the whole of the amount should be appropriated to Wilkinson's use and benefit. Any man that will work so hard to defraud another, and run such risk to have his will, is entitled to no sympathy at the hands of any court. But, it may be asked, why did McGilvra propose to settle these demands against Granger and take one-half the amount to be received in settlement? The reply is obvious, and literally true in the case, viz: that he was anxious to save what he could from the inordinate and reckless grasp of his insolvent partner, Wilkinson. He very naturally came to the conclusion that one-half was better than none at at. And again, he would rather loose one-half, or two or three hundred dollars than be at the expense, and suffer the annoyance of a litigation of this character.

Now I repeat, in conclusion, that the record shows *clearly* and conclusively beyond all doubt, that in this pretended settlement, it was the deliberate intention and preconcerted determination of Granger and Wilkinson, acting in perfect concert, that the whole of the amount due from Granger to the firm, should be applied at all hazards to Wilkinson's use, and to pay Wilkinson's private debts.

Frisbee had consulted with Granger and Wilkinson before either of the notes was given by Granger, (See Frisbee's testimony page 107 of the record), and the whole thing was planned and perfectly understood by Granger and Wilkinson, the parties to this fraud, for fraud it is and nothing else, both in law and in fact.

JOHN J. McGILVRA.

Pro. se.

Sup Court

John J McGilvra

Deft in Error

ads

Elihu Granger

(impleaded &c)

Pltff in Error

Defts Brief

13293

3