

No. 13701

Supreme Court of Illinois

Hurd et al

vs.

Haggerty

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SUPREME COURT OF ILLINOIS,

APRIL TERM, A. D. 1860.

HARVEY B. HURD, *et al.*,
Plaintiff in Error, }
vs. } ss.
CYRUS R. HAGGERTY,
Defendant in Error. }

Statement of principal facts proved.

The note sued upon, dated March 3rd, 1856, was signed Dunlap, Wright & Co. The firm had a planing mill for planing and sawing boards. Hurd was a member of the firm till April following. On the 27th day of August previous, Dunlap, one of the members of the firm, borrowed of plaintiff below \$600, and gave his own note for it, payable on 1st March, 1856, *guarantied by F. H. Benson*. On the next day, Dunlap credited himself with the amount (in his own hand-writing,) in the day-book of the firm, charged cash with it as received of him, and he afterwards posted it to his credit in the ledger. Across the ledger credit there was a line drawn; at what time it was posted did not appear. There also appeared credits of interest upon money loaned the firm, a large share of which must have been on this loan. Hurd loaned the firm \$600, Oct. 4th, 1855, about a month afterwards. Had loaned the firm money before. The members of the firm were in the habit of loaning to the firm. Forrest was put upon the stand by Hurd, who swore he was present when the first note was given. That Dunlap & Haggerty applied to him to write the note. He does not recollect that anything was said about the purpose of the loan. The first note was found in Haggerty's hands. (See Webster's testimony, page 20.) The note sued on contained \$65 usury. (See testimony of Mott and Scott, and the figuring on back of first note.)

After the defendant Hurd had shown these facts, the court allowed plaintiff below to show that in a conversation with Wright and the book-keeper, Scott, in November, about three months after

the transaction, Dunlap said "that the amount was used to pay an indebtedness of the firm to Wilcox, Lyon & Co., and therefore it ought not to have been placed to his credit, and that Wright admitted it *in substance*." "And that about the time the first note became due, Dunlap said he was unable to raise the money and meet it; said he would see Hurd and Haggerty and see if he could get it renewed, and at the time Haggerty came with the note, Dunlap said to him that he had seen Hurd about the matter and had talked with him, and that Hurd advised him to renew it."

The plaintiff also proved that Dunlap borrowed \$300 of Wentworth on 27th August, 1855, and gave the company note, and also that the company owed Wilcox, Lyon & Co. on a note, and that on the 28th the firm paid \$870 by check on the bank, and also that at various times Wright or Dunlap said the firm must have money to pay Wilcox, Lyon & Co.

There is not a word of testimony that Dunlap applied to Haggerty to borrow money for the firm, or that Haggerty supposed he was loaning to the firm, or that the transaction had any reference to the firm. On the contrary, the note was given by Dunlap alone, and was *guaranteed* by *F. H. Benson*, and all the contemporaneous entries treated the transaction as outside of the firm, so far as Haggerty was concerned. That Dunlap loaned it to the firm, as the other partners were in the habit of doing.

There can be no question the Court erred in admitting the declarations of Dunlap, made in November, *three months after the borrowing* of the money, to change his own liability to that of the firm. (Record, page 27.) When he borrowed the money he entered it in the books of the firm, as money advanced by him. These entries were consistent with the giving of his own *guaranteed* note, and show fully *his* intention. The admissions show that he had a *sharp* knowledge of the law. It seems to me no legal mind can fail to see that he knew what he was about, and that after he had pretended to loan the firm \$600, and had procured Hurd to loan it a like amount, (page 29,) he concluded to put off his debt upon the firm, with the same dishonest intention with which he procured lumber for his individual purposes, and had it charged to the firm, (page 31.) Still more objectionable are the admissions made at the time the fraud was committed. While in the very act of committing

a fraud upon his partners can he be permitted to admit away their rights? The admission (pages 28 and 29,) were of the very facts that were necessary to bind Hurd, which Haggerty and Dunlap both seemed to understand. They are such as these "he would see Hurd and see if he could get it renewed" "and at the time Haggerty came with the note, Dunlap said to him he had seen Hurd about the matter and had talked with him, and that Hurd advised him to renew it." I call the attention of the Court to the fact that R. L. Dunlap endorsed this note, (page 30.) It seems strange to me that when Haggerty took the pains to get Dunlap's endorsement on the note, in addition to the name of the firm, that if Hurd was really willing to become liable as a member of the firm, that he did not get his endorsement also, or some assent from him. I can see no reason for the endorsement, unless there was some fear that the note would prove bad. The following authorities show clearly that these admissions should not have been received.

"It was not competent for Smith, by his declarations, even during the existence of the partnership, to change what on the face of the transaction appeared to be an individual debt, into a debt against the firm." *Thorn v. Smith*, 21 Wend. R. 365.

The Court in that case further say: "If *Smith's name* alone constituted the firm, that fact should have been proved, and even then I apprehend it would have been necessary further to have shown that the note *when given*, was avowedly given *for the firm and in that capacity.*"

All the authorities agree that the testimony should show that "*when the note was given, at the very time the loan was made*, it was understood to be a partnership transaction."

The case of *Ostrom v. Jacobs et al.*, 9 Met. 454, is in point. Philo, Upson & Co. were sued; the note in question was signed by Upson alone. The Court say: "The plaintiff offered first to give in evidence the declarations of Upson, to show that the transactions for which the notes were given, were for the partnership business, and that the notes were company notes. This evidence was properly rejected, under the various decisions that have been made, and especially in our own courts." Again: "The objection to the competency of the declarations of Upson, to charge this upon the partnership, is the same in principal as if his admissions were

offered to establish the fact of a partnership." "The plaintiff offered to show, *secondly*, that at some period after Upson's death, Jacobs, another of the firm, acknowledged the notes as notes of the firm, and wanted to borrow money to pay them." "Now, whatever effect might be given to the admissions of Jacobs to charge himself as a partner with Upson, most clearly Jacobs can no more by his admissions charge Conrog as a partner in a firm of Upson, Jacobs & Conrog, than Upson could by his admissions charge Conrog, or Jacobs and Conrog. In *Tuttle v. Cooper*, 5 Pick. R., 414, the same doctrine is held. So 19 Barber R., 326.

If it is claimed that this testimony was admitted to explain the erasure, the erasure is another evidence of the intention of Dunlap to shift his liability upon the firm, and shall one step in the fraudulent transaction justify another? When he has done one act, tending to his fraudulent purposes, and is called in question about it, shall that be a good excuse for letting in all the testimony he has a mind to manufacture for his purposes? If it is claimed to be *res gestae* with the erasure of the entry in the ledger, I say it did not occur at that time, and even if it did, it would not be testimony.

"Declarations to become part of the *res gestae*, must have been made at the time of the act done, which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them as obviously to constitute one transaction."

Enos v. Tuttle, 3 Cowen, 250.

In re Taylor, 9 Page, 611.

Carter v. Buchanan, 3 Kelly, 513.

Blood v. Redeout, 13 Met., 237.

Boyden v. Burke, 14 Howard S. C., 575.

"But declarations of a previous fact (*e. g.* how the party's hand became bloody, are inadmissible." *Scraggs v. The State*, 8 Smead & M., 722.

"So when a party on removing an ancient fence, put down a stone in one of the post-holes, and the next day declared that he placed it there as a boundary, it was held that this declaration not constituting a part of the act done, was inadmissible in evidence in his favor. *Noyes v. White*, 19 Cowen, 250. *Corneth v. Lincoln*, 34 Maine, 310.

If it is claimed that it is part of the *res gestae* of the loan, it is still more objectionable.

There can be no excuse for the admission of the declaration made at and about the time of the giving of the note sued upon.

The second of the plaintiff's instructions is based upon this testimony, and assumes that there was evidence of Hurd's "*contract to have the firm assume the payment of the note.*" It also assumes that there was evidence that the money was borrowed for the firm. There was no such evidence but the objectionable testimony. Instructions, unless based on evidence, should not be given. *Hosley v. Brooks*, 20 Ill. R., 115; 19 Ill. R., 510; 1 Scam. R., 47.

"An instruction, unless it be upon an abstract proposition of law must have some evidence for its foundation, and must spring out naturally from such evidence." *Galena & C. U. R. R. Co. v. Jacobs*, 20 Ill. R., 478.

My objections to the 3rd and 7th instructions are covered by excepting to the refusal to give defendant's instructions.

On the eighth instruction the jury are told to find for the face of the note sued upon, and ten per cent. This instruction ignores the defence of usury altogether. It directs the jury in effect, to find for \$65 usury, which was added into the note, and to find ten per cent. upon that as well as upon the principal.

The giving of the substitute for the defendant's second instruction, was clearly erroneous. The defendant understanding that the Court admitted the evidence of Dunlap's declarations for the purpose of explaining the entries of credit to Dunlap, though they were inadmissible for that purpose even, not being *res gestae*, yet he asked the Court to give that view of them to the jury, but in the substitute the Court expressly extend them to the original transactions and leaves it to the jury "to say what effect and weight shall be given to the entries and *Dunlap's declarations* in reference thereto, in *determining the question whether the money was borrowed upon Dunlap's individual credit or upon the credit of the firm.*"

The defendant's third instruction contains three propositions, two of which the Court rejected by its substitute. The instruction asked for, directed the jury that if the note contained any unusual provision and contained usury, they could not find on the note unless Hurd authorized the giving of it. The defendant's seventh in-

struction asked for, contains a like proposition in regard to usury. I ask the Court's attention to the note, and to the provision alluded and feel confident that I had the right to the benefit of that part of the instruction. It certainly is such a provision as a partner is not authorized to make in a note of the firm. On the point of usury the right of a partner to bind his co-partners, extends only to lawful contracts. There is no implied authority to violate the laws. When the parties entered into partnership, the laws of the State formed a part of their contract, and every person dealing with the partners is bound to know it.

The question I now raise before the Court is quite different from that between actual parties to a usurious contract. It is a question of authority, and I beg the careful attention of the Court to it. The following authorities stand unopposed by any other, and seem to settle the question.

"The liability of a partner for the acts of his co-partner, done in behalf of the firm, cannot be held to extend to illegal contracts, and therefore when money was borrowed at usurious interest by one member, without the knowledge or consent of the other, the member not participating in such contract is not responsible for the money borrowed." *Hatchins v. Turner*, 8 Hump., 415.

In that case the Court say "the liability of a partner, arising out of this implied assent and undertaking to be responsible for the acts of his co-partner in behalf of the firm, in the ordinary business and transactions thereof, cannot be held to extend to *illegal* contracts. This would be absurd. An agency or authority to a partner to violate the provisions of a public statute, cannot be implied, nor can it be implied that such illegal act is within the scope of the partnership, which could only exist for lawful purposes." "The other party or creditor is presumed to have known that he was violating the law; he will also be presumed to have known that the partner entering into such usurious contracts, without the knowledge of the other partner, was acting without the scope of his legitimate authority, in violation of his duties and obligations to the firm, and in fraud of its rights. To bind the firm in such case, there must be clear and satisfactory evidence that the other partner had knowledge of and expressly assented to the usurious contract. To hold otherwise, would be subversive of all sound principles and policy."

The Court will see by the language of the decision, that it was not made in a State where the usurious contract was void. If it were void, then the assent of the other partner would not avail. The statute of Tennessee is almost exactly like our present statute, only forfeiting the interest.

The defendant's 4th and 8th instructions embody the defence that "if the loan was made to R. L. Dunlap and upon his individual note, the defendant was not liable. This should have been given."

"If a partner borrows a sum of money and gives his own security for it, it does not become a partnership debt by being applied to partnership purposes, with the knowledge of the other partners."

Bevan v. Lewis, 1 Sim. R., 376.

Wiggans v. Hammond, 1 Missouri R., 121.

U. S. Bank v. Binney, 5 Mason R., 176.

Wells v. Hill, 2 Dev. and Bat., 231.

"If a partner borrows money on his individual note, and uses the money in the firm, it does not become a partnership debt.

Graff v. Hickman, 5 Watts R., 454.

Whittaker v. Brown, 16 Wend. R., 510.

"Where one partner borrows money on his individual credit, and afterwards applies it to the payment of partnership debts, or loans it to the firm, it does not entitle the original lender to consider himself a creditor of the firm, and to enforce payment against them.

Ex parte Hunter, 1 Atk. R., 223.

Parkin v. Caruthus, 3 Esp. R. 250.

(Quoted 6 Cowen R., 503, where the doctrine is discussed.)

19 Barber, 326, and cases herein before cited.

"Where a person holds a partnership note and gives it up and takes the individual note of one partner, it is a payment of the partnership note. 12 Johnson R., 409.

If it is claimed that the plaintiff might have recovered on the common counts, I say they could not have done so under the instructions. They have not in fact done so. The jury found for about \$50 more than could have been found under the common counts. This is for the excess above ten per cent. It is for the usury.

The default and judgment *vs.* all of the defendants, including *Wright* comes within the following cases:

“A judgment against several is a unit, and if erroneous as to one, must be reversed as to all.”

“It is erroneous to render a judgment against a party who has not been served with process nor declared against.”

Brockman et al. v. McDonald, 16 Ill. R., 112.

McDonald v. Wilkie et al., 13 Ill. R., 22.

South et al. v. Byrd, 2 Gilm. R., 412.

1 Denio, 537. 2 Hill, 333.

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