No. 12994

Supreme Court of Illinois

Dow et al

vs.

Phillips et al

113-77

STATE OF ILLINOIS,

SUPREME COURT.

ASA DOW, ET AL.,

PLAINTIFFS IN ERROR,

VS.

BEZABEL W. PHILLIPS, ET AL.,

DEFENDANTS IN ERROR.

Filed April 30-1860
L. Leland
Clerk

SMITH & DEWEY, Att'ys for Pl'ffs in Error.

BRIEF ON APPEAL.

CHICAGO:
WELLS & ADAMS, BOOK AND JOB PRINTERS,
No. 69 Lake Street, third story.
1860.

1419 1/2

STATE OF ILLINOIS.

SUPREME COURT.

<table>
<tr><td>ASA DOW, and
JOSEPH L. HURD, Impleaded with
DUNCAN STEWART,
ALFRED A. ARRICK, and
GEORGE W. ANDERSON,
Plaintiffs in Error,
vs.
BEZABEL W. PHILLIPS,
WILLIAM HOGG, and
GEORGE T. HOGG,
Defendants in Error.</td><td>ERROR TO
Superior Court,
OF CHICAGO.</td></tr>
</table>

BRIEF OF PLAINTIFFS IN ERROR.

POINT I.

Was the letter of December 28th, 1858, properly introduced in evidence? It contained a reference to other letters which were not introduced or attempted to be, and one was a letter to which it was an answer.

"Where one party produces the letter of another purporting to "be in reply to a previous letter from himself, he is bound to call for "and put in the letter to which it was an answer, as part of his own "evidence."

Watson vs. *Moore*, 1 *C. & Kirnan* 626.
Greenleaf on Evidence, *Vol.* 1, 258, *note*.
Johnson vs. *Gilman*, *IV. Esp. C.* 21.

POINT II.

Does the bargain as proved constitute a co-partnership?

Dow, Hurd & Co. were to share the profits with Arrick & Anderson, and it was understood to be a method of compensation. This the plaintiff below proved, (Wiley's testimony, page 25.) The authorities say that a share in the profits designed as a mere compensation, does not constitute a partnership. They are uniform upon the question:

> *Dunham* vs. *Rogers*, 1st *Penn State R.* 255.
> *Rice* vs. *Austin*, 17 *Mass.* 197.
> *Bailey* vs. *Clark* 6 *Pick.* 372.
> *Burkle* vs. *Eckarrt*, 1st *Denin*, 377.

The latter is a case nearly in point.

POINT III.

But if there was a technical partnership between Dow, Hurd & Co. and Arrick & Anderson, it was not designed to be so between themselves, for *plaintiffs* prove by Wiley that it was understood to be a method of compensation merely, and not a partnership; and George M. Price, agent of plaintiffs (page 43,) testified it was an arrangement known to plaintiffs; and any one with knowledge, could claim no higher rights than Arrick & Anderson.

> *Chitty on Contracts* (*old edition* 220) 249 *in 9th edition.*
> *Denny* vs. *Cabot*, *VI Met.* 93, 94.
> *Livingston* vs. *Roosevelt IV John.* 251.
> *Boardman* vs. *Gore*, *XV Mass* 339.
> *Gram* vs. *Caldwell*, *V Cowen* 489.
> *Bailey* vs. *Clark*, *VI*, *Pick.* 372.
> *Anderson* vs. *Pope*, 1 *Camp.* 330, *note.*
> *Beatty* vs. *McCandie*, *III C. & P.* 202.

In Boardman *vs.* Gore, above cited, page 339, the Court says:— "It seems to be a *well-settled* principle that general co-partners are "bound by the acts of each other *when the name* of the firm or house "is pledged to any extent, unless a person who takes a security of that, "has knowledge of some limitation of the authority of the partner "who undertakes to bind the firm," and *a fortiori* when the individual names of some of the partners are used, as in the case at bar.

The Judge cites *Swan et al.* vs. *Steel et al., Cowp.* 814;
Wells vs. *Waterman et al., VII East.* 210;
Watson on Partnership, 105, 229.

POINT IV.

If there was a technical partnership between the two firms, the draft was drawn in the name of a portion only of the co-partners, *and it is a presumption of law* that it is the intention to bind *those merely* whose names are used. We cite only a few of the very numerous authorities upon this point.

In *VIII Met.* 411, on page 420, the Court says, the partners who did not make the contract sued upon cannot be joined, etc.

In *III Kent's Commentaries*, page 43, "But if a note or bill be "drawn, or other contract be made, by one partner, in his name only, "and without appearing to be on partnership account, or if one part-"ner borrow money on his own security, the partnership is not bound "by the signature, even though it was made for a partnership pur-"pose, or the money applied to a partnership use."

Which doctrine is sustained in *Pearce* vs. *Wilkins, II, Comst. R.* 469.

In *Story on Promissory Notes*, sec. 72, text as follows:

"As to partners, the signature of the firm is, in general, indis-"pensable to create a liability of the partnership."

POINT V.

Defendants in error cannot claim under the common counts, because it is not shown that the money received for the drafts, ever was applied to the benefit or use of the plaintiffs in error, except three hundred dollars, which went to the benefit of Dow, Hurd & Co. alone, Arrick & Anderson having no interest therein. The count for money had and received is certainly the only common count under which they can pretend to claim.

STATEMENT, ETC.

The appeal in this case was brought by Dow and Hurd alone, who were sued together with Duncan Stewart (not served) and Alfred A. Arrick and George W. Anderson as co-partners, under the name, style and firm of Arrick & Anderson, as makers of two certain drafts, drawn by Arrick & Anderson of Mendota, under date of December 24th, 1858, and December 27th, 1858, respectively, for $500 each, upon Dow, Hurd & Co., Chicago, which were not accepted or paid by Dow, Hurd & Co.

Arrick & Anderson voluntarily entered their appearance, and suffered default; Dow & Hurd each plead separately the general issue, and a plea, duly verified, denying the partnership.

Wiley, clerk for Dow, Hurd & Co., a witness produced by the plaintiffs below, testified, that the firm of Dow, Hurd & Co. did business at Chicago as general produce dealers; that the firm consisted of Dow, Hurd, Stewart, and one Elwood Brooks, who was not made a party; that Dow, Hurd & Co. were doing a large business, and had agents in different parts purchasing grain, whom they paid in different ways, some by salary, some by commissions on what was purchased, and still others by what was called joint account; Dow, Hurd & Co. to furnish money to parties who were to make purchases of produce, send to Dow, Hurd & Co. to sell, and the profit or loss was to be shared equally between Dow, Hurd & Co. and the party purchasing. Dow, Hurd & Co. were to have the general control of the business, and it was understood to be a method of compensation to the purchasers as agents; the latter arrangement was the one made between Dow, Hurd & Co. and Arrick & Anderson. The witness produced books of Dow, Hurd & Co., from which it appeared that the accounts were kept as follows:

An account was kept entitled "Mendota Joint," which was charged with the moneys paid for grain and produce and the expenses, and was credited with the receipts for sales of grain and produce, and which contained a general account of the business conducted on joint account between Dow, Hurd & Co. and Arrick & Anderson. There was also another account, directly between Dow, Hurd & Co. and Arrick & Anderson, kept as follows:

Dow, Hurd & Co. in Account with Arrick & Anderson, which credits Arrick & Anderson with the money paid by them for grain and expenses incident thereto, and charges them with the money received by them, (Arrick & Anderson,) from commencement to close of business. Also, an item of about \$700, for one-half loss on joint account, and divers items of about \$3000, not in joint account, which account shows a balance of nearly \$7000 in favor of Dow, Hurd & Co., and for which Arrick & Anderson gave their note at close of business, Dec. 25th, 1858.

Price, the agent of plaintiff, at Mendota, and cashier of their bank at that place, testified that he knew of the arrangement between Dow, Hurd & Co. and Arrick & Anderson, that he had directions and did not, generally, pay or credit the drafts to them, Arrick & Anderson, until they had been accepted or paid by Dow, Hurd & Co., that the drafts in question were credited on a general account of plaintiffs with Arrick & Anderson. He also testified that Arrick & Anderson carried on a retail flour business on their own account at Mendota, but kept only one bank account.

He also testified that he saw the telegraph despatches, and should not have given Arrick & Anderson credit for the drafts had he not seen the despatches; so it appears that the credit was not given, according to their own statement, to the drawers, or to the defendants, as drawers, but upon the expectation that they, Dow, Hurd & Co., would *accept*, (but they are not sued for not accepting,) they are sued as makers. As to the telegraph despatches, they are both limitations at best, on the power of Arrick & Anderson to draw upon Dow, Hurd & Co.

The first directs Arrick & Anderson to draw to pay for wheat they buy. Now a person to whom that despatch was shown, knowing the arrangement between the parties, it seems to us, could not advance upon a draft, place the same to a general account of the drawers, and allow them to check as they *pleased without knowing* how it was applied, especially as the agents of plaintiffs knew Arrick & Anderson had authority to draw only for a specific purpose, viz: to pay for wheat they purchased; if he advances the money with full knowledge of the facts, is he not responsible for the proper application of the funds by Arrick & Anderson? He takes the risk of Arrick & Anderson so employing the funds as directed, otherwise a door for unlim-

-ited frauds would be opened, a connivance between plaintiffs and Arrick & Anderson would have enabled them to have rendered Dow, Hurd & Co. liable for any amount they chose. As to the other despatch, Dow, Hurd & Co. authorized Arrick & Anderson to draw for $300, plaintiffs having seen despatch; on strength of it, as they claim, advanced a draft of $500, one of the drafts sued on. It needs no argument to show that such act was in direct violation of Dow, Hurd & Co.'s instructions, and therefore they could not be charged thereby.

Now the bargain between Dow, Hurd & Co. and Arrick & Anderson, as proved by the agent of plaintiffs, and known to them, was that Dow, Hurd & Co. were to advance money, and with that money Arrick & Anderson were to purchase grain, joint profits to be divided between them.

It is in evidence by the plaintiffs that Arrick & Anderson, were George W. Anderson and A. A. Arrick. Now this draft was drawn in their names upon Dow, Hurd & Co. It was, under the arrangement, a mere request of Arrick & Anderson, that Dow, Hurd & Co., should advance more money, which they, Dow, Hurd & Co., had a right to refuse. Arrick & Anderson could not *compel* Dow, Hurd & Co. to advance any more money than they chose; neither could any person with knowledge of that arrangement, by purchasing the drafts of Arrick & Anderson, compel Dow, Hurd & Co. to do what Arrick & Anderson could not; any person with notice would stand in the place of Arrick & Anderson; no principle of law is better settled than this, (see Point III.) Indeed, the agent of plaintiffs shows he so understood it, for he testifies, (page 43 Abs. 6,) that he was not accustomed to credit Arrick & Anderson with the drafts, until they had been accepted or paid by Dow, Hurd & Co.; the whole course of business shows that that there was no intention to give credit to Arrick & Anderson, until Dow, Hurd & Co. had consented to the drafts.

Arrick & Anderson had no authority to, nor did they attempt to use the name of Dow, Hurd & Co., and the drafts sued on were not fully advanced, they were merely placed in general credit to Arrick & Anderson, in common for other business of their own. Could Dow, Hurd & Co. have drawn out that money on their own check? Would the plaintiffs have recognized Dow, Hurd & Co.'s check upon that fund? We can hardly believe that such would have been the case.

At the very best, even conceding for the sake of argument that the defendants were partners, it is a mere draft in the name of one of the firm upon the others, and the presumption is, that credit is given to the maker, unless it be shown that it was the intention of the partners to be bound thereby; here, on the contrary, the facts, the dealings of all the parties, between each other, and known to each other, shows that Dow, Hurd & Co. did not design to be bound by Arrick & Anderson's draft, until they assented thereto, nor did the plaintiffs so understand it, for they were in the habit of not crediting their drafts to Arrick & Anderson until Dow, Hurd & Co. had paid or accepted them; and then they were passed to the credit of an account, with a portion of which at least the affairs of Dow, Hurd & Co. had no concern, viz: the retail flour trade at Mendota.

SMITH & DEWEY,

Attorneys for Plaintiffs in Error.

No 113

In the Supreme Court.

Dow et al.
vs
Phillips et al.

Appellees additional point & authority —

By the defective index of Vol. 17 Ill. R. I failed to find the case of Parsons v. Evans p. 238, which is against me on a portion of the brief filed heretofore — I there find that no motion for a new trial is necessary when a cause is tried by the Court without a jury, but the decision of the Court may be excepted to — This case is followed in practice by the case of French v. Lowry 19. Ill. R. 158 — But in the case at bar the Court will perceive by the record (not the abstract) that no exception was taken at the time of the decision, but that after the defendants had moved for a new trial, (which so far as the bill of Exceptions shows was never decided, & of Course no decision thereof excepted to) then, for the first time, the defendants "then & there" excepted —

Upon that State of facts 17 Ill. R. 238 before cited is an authority Conclusive for the appellants, provided the Court do not differ from us as to the Construction of the bill of exceptions —

Charlesworth v. Williams 16 Ill. 338 is nearly like this case as to the Construction of the Bill of Exceptions — There the bill on the face of it showed that it was made after the motion for a new trial & the language was in the present tense "except" — Here the bill on the face of it shows the same, & after reciting "Whereupon" the Court did so & so, & "Whereupon" the defendants moved so & so, then says the defendants "then & there" excepted — thereby showing that in the order of time, excepting was the last thing the defendants did –

If the bill of exceptions is ambiguous, it is to be taken, like a pleading, most strongly against the appellants.

Rogers v. Hall 3 Scam. 6.

Van Buren & Hay
attys pr appellees –

No. 113

Dow et al

vs

Phillips et al

additional brief for appellee

Filed May 19 1860
L. Leland
Clerk

12994

Van Buren & Gary
Atty of Appee.

SUPERIOR COURT OF CHICAGO.

BEZABEL W. PHILLIPS, WILLIAM HOGG and GEORGE T. HOGG.

VS.

ASA DOW and JOSEPH L. HURD, impleaded with DUNCAN STEWART, ALFRED A. ARRICK and GEORGE W. ANDERSON.

ASSUMPSIT.

APPEAL

FROM

Superior Court of Chicago.

ABSTRACT OF CASE.

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This suit was commenced against all of the above named defendants, of whom Asa Dow and Joseph L. Hurd, the plaintiffs in error, were served. Defendants, Alfred A. Arrick and George W. Anderson, entered their appearance voluntarily, and were defaulted. Defendant Duncan Stewart was not served. Defendants Dow and Hurd plead, and issue was joined upon the pleas. Suit was commenced of the February Term, A. D. 1859. Declaration was filed on the 12th day of February, A. D. 1859, by which the said plaintiffs, partners under the name, firm, and style of B. W. Philips, complained of all the defendants, partners in business and trade, &c., of a
1, 2, 3. plea of trespass of the case upon promises: For that the said defendants, on the 24th day of December, 1858, at Mendota, &c., by the name, style, and description of Arrick & Anderson, and as partners as aforesaid, MADE their certain bill of exchange in writing of that date, whereby they requested certain persons, by and under the name, style and firm of Dow, Hurd & Co., at sight to pay to the order of one G. M. Price, the sum of Five Hundred Dollars for value received, and that the same was then and there delivered to said Price, who then and there endorsed and delivered the same to said plaintiffs. It avers due presentation to said Dow, Hurd & Co., at Chicago, and their refusal to accept or pay the same, or any part thereof, and also notice, &c.

The second count avers that said defendants afterwards, and on the 27th
6, 7 & 8. day of December, A. D. 1858, at Mendota, by the name, style and description of Arrick & Anderson, MADE their certain other bill of exchange in writing, bearing date said day, and thereby then and there requested certain persons under the name, style, and firm of Dow, Hurd & Co., at sight to pay to the order of one Geo. M. Price, the sum of Five Hundred Dollars at sight, and then and there delivered the same to said Price, who then and there endorsed and delivered the same to the plaintiffs, avers due presentation for acceptance to Dow, Hurd & Co., and their refusal to accept or pay the same, and also notice, &c.

Then follows the common counts in usual form.

10. On the 12th day of February, 1859, defendants, A. A. Arrick and George W. Anderson, enter their appearance without service.

On the 5th day of May, A. D. 1859, defendants, Asa Dow and Joseph L. Hurd filed their separate pleas as follows:

1st. The said Asa Dow denies that he, together with the said Arrick, Anderson, Hurd & Stewart undertook and promised in form and manner as
11. the said plaintiffs had complained, &c., and put himself upon the country, &c.

2d. And for a further plea, the said defendant, Dow, by leave of the Court, prayed judgment of the said writ and declaration, because he said the said several supposed promises and undertakings in said declaration mentioned, were not by the said Dow as co-partner or otherwise, with the
11, 12. said defendants, Arrick, Anderson, Hurd and Stewart, or any or either of them, under the name, firm, and style of Arrick & Anderson, nor by the said defendant with any other person or persons under the name, style, and firm of Arrick & Anderson, or in any other way or manner; he also denies that he was at the time a co-partner with his co-defendants, or any other persons under the name, style, and firm of Arrick & Anderson; but avers on the contrary, that the said supposed promises were made by the said Al-

PAGES fred A. Arrick and George W. Anderson alone, and not as co-partners with
this defendant, and his other co-defendants, all of which he was ready to
verify; and the said defendant, Asa Dow, prays judgment of the said writ
and declaration, and that the same might be quashed, &c., which plea was
verified in the usual form by said Dow. The usual affidavit of merits was
13. also filed by said Dow.

The said defendant, Joseph L. Hurd, filed his said separate plea, the same
14, 15, 16. as the said Dow, verified in the usual manner, and the usual affidavit of
merits.

Issue was duly joined by said plaintiffs on the 11th day of May, filing
17. their replications to the last plea of each of said defendants, Dow and Hurd,
denying the same and concluding to the country.

Afterwards, on the 14th day of May, 1859, the said defendants caused the
18. default of said defendants, Arrick & Anderson impleaded, &c., and a
reference was taken to the Court to assess damages.

19. Afterwards, on the 20th day of May, 1859, by agreement of parties, the
issues joined between plaintiffs and defendants, Dow and Hurd, were submitted to the Court without the intervention of a jury.

Afterwards, on the 5th day of July, 1859, and the Court having had said
issues under advisement, finds the issues joined for plaintiffs, and assesses
20. damages against all the defendants except Duncan Stewart, not served, at
the sum of $896, and thereupon said defendants, Dow and Hurd, submitted
their motion for a new trial.

Afterwards, on the 19th day of July, the said defendants' motion for a
new trial was overruled, and judgment ordered against all defendants except
Stewart, for $896 and costs, and that plaintiffs have execution. Thereupon
21. said Dow and Hurd, having entered their exceptions, prayed an appeal to the
Supreme Court, which was allowed on their filing a bond in the penal sum
22. of $1200, with security, to be approved by one of the Judges, within one
week, and that said defendants have 90 days within which to file their exceptions, and thereupon, on the 25th day of July, 1859, a bond was duly
23, 24. filed and approved by consent of plaintiffs.

On the 23d day of May, 1859, before the Hon. Van Higgings, Judge of said Court the issues joined in the cause.

A jury having been waived by consent of parties, and the cause by consent submitted to the Court, the plaintiffs, to prove the issues on their part, produced and caused to be sworn, William Wiley, a witness who testified:

"I am bookkeeper for the firm of Dow, Hurd & Co.; the members of the firm are Asa Dow, Joseph L. Dow, and J. L. Hurd & Co., of Detroit; said company consist of Duncan Stewart, Ellwood Burks and J. L. Hurd; knows the handwriting of the firm."

Seven letters were here introduced in evidence, which were admitted to
25. be in their handwriting, which letters are as follows:

"Chicago, Saturday, August 21st, 1858.

"We sold the last car load of barley to-day, and it brings a fine profit.

"D., H. & CO."

"P. S.—Mr. Hurd just in and says you have not got the corn off yet, and "that you have 10,000 bus. there. Do not send any more there till you "get it off.

"Let everything come in by rail. We shall yet make a bad thing out of "the LaSalle mine.

"There is no mistake, at the present prices, we are running a great risk "in not getting purchases forward, and we prefer not touching another bu. "till it does come forward. In haste

DOW, H. & CO.

(Copy of Letter No. 2.)

"Gents:—Yours of yesterday received. The boat from LaSalle got in
"last night, and we let it go to-day at 64c afloat, at which it closes dull.
"We have not heard whether the balance was shipped by rail or not.
26. "Market still looks down and every thing dull. As stated yesterday, we
"think it best to stop buying entirely at the south till we get what is already
"bought forward and see how we stand.

"We have advised your Mr. Arrick, to this effect.

"Resp'y yours, DOW, HURD & CO."

PAGES

(Copy of Letter No. 3.)

"Gents:—Yours of yesterday received. We send the list of cars to Mr. "Arrick, at Decatur, to-night. The market closes dull at inside quotations.

"We sold, last night, 400 bus. of No. 1 red wheat, at 1.08 in store, and "will put it into the joint account unless you prefer to hold longer. If so, "please let us know. Resp'y yours,

"DOW, HURD & CO."

(Copy of Letter No. 4.)

"Chicago, Dec'r 14th, 1858.

"Messrs. Arrick & Anderson—Gentlemen: Yours of yesterday is "received. We did not expect your draft to-day, for the reason that we had "several other parties to supply, besides having about 800 hogs on hand, "which we are carrying along a few days, hoping the market may rally a "little, 5.00 and 6.00 being the best we can do, dividing on 200.

27. "Mr. Hurd says you mentioned having received on advance ac. some $700 "within the past few weeks, and yet you do not lesson your balance any. "This is certainly not as it should be. We have a right to expect you to "draw down the balance at least to the extent that you receive on advances. "Besides, we feel if we continue the business on joint ac., that you should "secure us to the extent talked of when your Mr. Arrick was here, if no "more, and you certainly cannot think us unreasonable to ask it.

"Let us hear from you without delay on this subject. Do not buy any "more hogs at over 4½ to 5.00. Car No. 76 in, and sold at 50c for 70 lbs.

"Resp'y yours, DOW, HURD & CO."

(Copy of Letter No. 5.)

"Chicago, Thursday, Dec. 16, 1858.

"Gents:—Yours of yesterday received; also dispatch of to-day. We "paid your draft to-day. We wrote you day before yesterday, giving the "reason why it was not paid when first presented. We are delivering "the hogs as fast as possible, but having so many we shall not get "round to your lot till to-morrow. The eastern news comes in a little better "to-night, and possibly prices may stiffen up here a little, and you had better "take your share at four-and-a-half to four-and-three-quarters for light, and "five to five-and-a-quarter for heavy. We should have held on another "day but the R. R. folks were getting so full that they could not keep them.

"Corn and wheat unchanged. Yours truly,

"DOW, HURD & CO."

(Copy of Letter No. 6.)

"Chicago, Thursday, Dec. 23, '58.

"Gents:—Enclosed we send you account sales of hogs and corn. The "cold weather makes corn active and at full prices. You had better take "your share at market rates, and same for corn and wheat.

"Yours truly, DOW, HURD & CO."

(Copy of Letter No. 7.)

"Chicago, Dec. 28, '58.

Messrs. Arrick & Anderson:

"Gents:—Yours of yesterday is received. Two more of your drafts "were presented to-day, but for reasons mentioned yesterday, we could not "considerately honor them. Nor do we think that you can reasonably feel "that we have done very wrong in not doing so, considering all the circum- "stances, of which you of course as well as ourselves, are fully advised. "However, we are willing, bad as matters are, to go on and do the best we can "to wipe the loss out, if you feel disposed to make up security to the amount of "four thousand dollars, and will give you a reasonable time to do it, and until "you decide either pro or con, we will furnish to Mr. Thomson what funds may "be necessary to carry along the business, and we have written him to draw "on us for whatever may be needed for that purpose.

"Enclosed we send you a statement of the joint account from the begin-
29. "ning; also account sales of two hogs. Owing to the soft weather and a "lower market, we shall hold over the lot of twenty-nine for a few days for "colder weather and better prices. Resp'y yours,

"DOW, HURD & CO."

The statements of accounts are all in my hand writing, and was sent to Arrick & Anderson, as book-keeper for Dow, Hurd & Co., or else he gave them to Mr. Dow for that purpose, (several bills like the two shown me)
29. (the bills sued upon,) were presented to Dow, Hurd & Co., and all but one

PAGES paid; I know that many bills have been presented, an avarage of one a week since 25th May, 1858, up to December 25th; many of them were made payable to the order of George M. Price, (same as shown me.)

Statements of account were then introduced by plaintiffs, headed

Mendota, Joint in Account with Dow, Hurd & Co., Dr.

30, 31. This account contains sundry items of charges, amounting to about $80,-000, principally for grain, but includes charges for telegraph, clerks' salary, express items, some freight, inspection and insurance, extending from May 3d, 1858, to December 25th, of same year.

Also, Account CONTRA. Cr.

32, 33, 34. Which amounts to about $6,000, less than the previous account; this account consists chiefly of items of credits for net proceeds of sales of grain, extending from May 25th, 1858, to December 25th, 1858.

Statement marked No. "2," is headed

Sales by Dow, Hurd & Co., in Joint Account with Arrick & Anderson

35. Which shows items of each sale, the amounts of each sale, price received and expenses, which shows a profit to Cr. of joint account of $1,814.79.

Dated August 26th 1858.

(Copy of Statement No. 3.)

Arrick & Anderson in Ac. with Dow, Hurd & Co.,

1858.			Dr.	
Dec.	1.	To Balance as per ac. rendered,............	$6,938 02	
"	3.	" Cash Dft., Dec. 2, favor G. M. Price,....	500 00	
"	4.	" " " " 3, " " "	500 00	
"	7.	" " " " 6, " H. Woodward,..	150 00	
"	8.	" " " " 7, " G. M. Price,....	500 00	
"	10.	" " " " 9, " " "	500 00	
"	13.	" " " " 11, " " "	500 00	
"	16.	" " " " 13, " " "	1,000 00	
"	20.	" " " " 20, " " "	500 00	
"	21.	" " " " 18, " " "	500 00	
"	25.	" Half loss on Joint Ac.................	740 00	
"	24.	" Cash Dft., Dec. 23, from G. M. Price,....	500 00	
				12,768.42

Contra, Cr.

Dec.	1.	By item marked "A." in Joint Ac. Statement,	274 59	
"	4.	" B......................	850 07	
"	7.	" C......................	333 12	
"	9.	" funds sent to C. C. Warren,............	300 00	
"	10.	" D......................	365 50	
"	11.	" E......................	250 52	
"	12.	" F......................	552 23	
"	15.	" G......................	627 22	
"	16.	" H......................	91 24	
"	17.	" I......................	371 00	
"	17.	" C. C. Warren,............	200 00	
"	18.	" K......................	97 40	
"	20.	" L......................	186 43	
"	21.	" M......................	195 62	
"	22.	" N......................	296 60	
"	23	" J. F. B. Soaps' note,..................	150 00	
"	24	" O......................	237 26	
By Mendota expenses, 336-87, W. Thompson, sale due, 13, 200......................................			536 87	
By your Note for Balance,........................			6,853 75	12,768.42
				6,853.75
				5,914.67

Chicago, Dec'r 28, 58,

Dow, Hurd & Co., per Wiley.

37. Sales by Dow, Hurd & Co.,

In Ac. with Arrick & Anderson.

1859.		R. R. Frt.	
Jan. 11,	778—274 10	23 03	
	176—270 40	22 73	
	544 50 Bu. E. Com. @ 50		272.36

PAGES

R. R. Frt......................................	45 76
Bal. to Cr. of Joint Ac........................	226 60

272.36

Chicago, Jan'y 11th, 1859, DOW, HURD & Co.
Per WILEY.

EXAMINATITION OF WITNESS RESUMED:

I know that Hutton was employed as Clerk by Arrick & Anderson in grain business; item of was in grain; we sent some books to Arrick & Anderson, and paid the express charges; telegraphs were sent to Mendota or some other place where they were interested on joint account; item of expenses of $387 is an amount given by A. & A. for joint matter; Thompson selling 200—he succeeded Hutton as Clerk; contents of case sold at Mendota; item of loss on joint ac., $1460.80.

The plaintiffs further to maintain the issue on their behalf called as a witness DUDLEY R. HOLLAND, who, being duly sworn, testified as follows:

38. Presented draft for same amount, and of like date and tenor; can't tell precise day, without referring to my books; was not paid; presented at office of defendant to his Book keeper; was not paid. Presented for account of plaintiffs' drafts of 24th and 27th. Two telegraph despatches and one receipt were here introduced as evidence. The following are copies of same:

Mendota, Dec. 17, 1858.

"By Telegraph from Chicago, Dec. 17, 1858.

To Arrick & Anderson:—Draw for enough to pay for what you buy.
DOW, HURD & Co."

"By Telegraph from Chicago, Dec. 25th, '58.

To Arrick & Anderson:—Please send Warren three hundred, (300,) and draw on us. DOW, HURD & Co."

Merry Christmas. (Copy Receipt.)

Arlington, Ills, Decr, 27, '57.

$300.—Received of Arrick & Anderson, per Griffiths, three hundred dollars on acc't of Dow, Hurd & Co. D. C. WARREN."

Here drafts, copies of which are attached to declaration, was read in evidence, being admitted to be genuine.

WITNESS RILEY RECALLED:—Item of Dec'r 9th, had nothing to do with joint account. Item of Dec'r 23d, same; Dec'r 25th, same; notes of $6,-
39. 853.75 was given in payment of the account to Dow, Hurd & Co. Mr. Anderson came into Chicago to make a settlement at that date, and the joint account was then closed, and that ended the joint transactions.

Dow, Hurd & Co's business was to buy and sell grain at different points by their agents. They paid their agents sometimes by salary, and sometimes by joint account, and sometimes by commissions; never knew the arrangement with Arrick & Anderson, except that I was instructed to open the books on joint account; they were to have half of the profits, as I understood; they purchased the grain; Dow, Hurd & Co. were to furnish the money; the wheat was to be shipped to Dow, Hurd & Co., by railroad; Dow, Hurd & Co. were to have direction and control of the business; there did not seem to be any difference between the mode of conducting their affairs and that of their agents.

The full face of these drafts were charged Arrick & Anderson in every instance; the item of $6,000 was money advanced to Arrick & Anderson; and the credits were made up of the cost of purchase of grain for defendants, for Mendota joint account; no other credits of consequence; the whole expenses of the joint account, of the Mendota joint account, were charged in the books of Dow, Hurd & Co., as well at Mendota, as at Chicago; and most of the money was paid out in drafts of Arrick & Anderson,
40. similar to these.

There was paid in May, 1858, $4,760; in June, $16,670; in September, $23,000; in October, $5,000; in November, $3,000; in December, $6,000. These drafts were all, or nearly all, at sight, and nearly all passed through the hands of plaintiffs as Bankers.

Objected to because the defendants were sued as makers.

Arrick & Anderson were credited, and the Mendota joint account charged with $136 for scales, and putting same up.

There is included in the draft of $730 for one half of the loss on the Mendota joint account; had been no dealing between defendant A. and Dow, Hurd & Co. prior to the entry of the $500. Despatch was sent to Arrick

PAGES & Anderson, at Mendota. First freight paid on the joint account of grain was seventh of May.

"The witness being cross-examined by the defendants' counsel, testified as follows: There were two distinct and separate accounts kept; one with Arrick & Anderson, and the other with the joint account."

The whole $6,000 was money advanced to Arrick & Anderson, above what they had grain to represent. Drafts were generally presented within one day. All money and the payment of all drafts were charged to Arrick & Anderson, who were credited with expenses, and all money paid out for grain; and the proceeds were credited with joint account, and that account was charged with the costs of all the grain, and with all the expenses,
41. which Dow, Hurd & Co. paid, and with all expenses which Arrick & Anderson rendered to Dow, Hurd & Co., as paid by them. The whole amount of credits to Arrick & Anderson, exclusive of joint account before the date of drafts, is $2,000 only.

The amount of dealing of joint account is $85,600, and upwards; joint account is not charged with any street man.

At this stage of the proceedings the defendant offered to prove that Dow, Hurd & Co. are members of Chicago Board of Trade; and that it is a custom among grain dealers, and generally known to them, to employ men to purchase grain on joint account, the results of which were to be shared between the principals furnishing the money and the party purchasing and doing the buying; the same which was considered and understood to be a compensation for the services; and that contracts made in his name are not understood to bind the principals furnishing the money, and proposes to prove that this custom has existed five years.

Objected to by plaintiffs' counsel, and excluded. The Mendota joint account was but a small part of the business of Dow, Hurd & Co.; the cash passing through the house of Dow, Hurd & Co., during the year, was $800,000.

Re-examined by Plaintiffs. Letters 21st August offered in evidence by defendants. Objection to the reading of letters Dec'r 28th, because account was closed, and because letter referred to was not produced, it does not appear to have come to the knowledge of plaintiffs. Objection overruled and
42. exception. At the the time the matter was settled, it was agreed that there were still some matters to come in, and these are the items after that date on the books; it was agreed that all old transactions should be closed; the draft of the 6th December was to be paid. Draft of Dec'r 27th was paid Dec'r 31st. It is admitted that Arrick & Anderson were Alfred A. Arrick and George W. Anderson. Plaintiffs here rested, and the defendants, to maintain the issues on their behalf, first called as a witness George M. Price, who being duly sworn, testified as follows: I am Cashier of the Mendota Bank, which is owned by plaintiff; had business transactions with Arrick & Anderson; was in the habit of discounting their drafts, giving them currency for them; advanced on the last draft to Mr. Warren $300, and some small amounts besides; had no interest in drafts; was merely Cashier. The course of business was to credit Arrick & Anderson with amount of draft, and let them check it out; as they needed the currency, both drafts were passed to the credit of Arrick & Anderson; but the last one was not fully paid. Arrick & Anderson had a credit of $144 on the evening of the 23d, before witness took the draft of them; after the drafts were returned, there was a balance against them of $869.85; the indebtedness was for money advanced on Arrick & Anderson's checks; saw despatch of 17th same day, or the next evening; it was shown me by Arrick & Anderson, at the time he got the discount; and the other of the 25th, was shown me at the time by Arrick, when he got the $300; I don't suppose I should have cashed these drafts without seeing the despatches. On
43. the evening of the 18th of December, Arrick & Anderson had $65 to their credit; never inquired whether the checks were given for grain or not.

Witness cross-examined by Plaintiffs' Attorney, and testified as follows: Account of Arrick & Anderson with plaintiffs shown witness; item of $213, paid to Woodward; $362 was all on the 20th; $100 was to call for grain; five items of $35.00; don't know what for; draft was drawn that day for $500. Arrick & Anderson bought flour to retail at Mendota; they kept but one bank account at that time; had small balances before that time, but not very large balances; did not let Arrick & Anderson have the full face of the drafts; had instructions that we should not pay any

PAGES drafts, or advance on any unless he had evidence that they had been accepted, or would be accepted; had no particular instructions as to Arrick & Anderson's drafts; saw the letter and despatch at the time of advancing on the drafts sued on. I supplied Arrick & Anderson with the full amount of the $500, and did not limit it to $300; charged the $300 paid to Warren on the regular account. Arrick & Anderson have a street man, buying on the street; got these letters from Anderson.

Witness re-examined by defendants' counsel, as follows: Knew that Arrick & Anderson were buying produce and provisions, and shipping to Dow, Hurd & Co. I did know at the time of taking these drafts the terms of doing business. Arrick & Anderson were to buy at Mendota, without
44. charge. Dow, Hurd & Co. were to sell in Chicago without charge. Dow, Hurd & Co. were to furnish the money; supposed he could hold Dow, Hurd & Co., whether they refused to accept it or not. Telegraphs and letters have been shown me; knew that Dow, Hurd & Co. were doing busiat other places than at Mendota.

Drafts were always at sight; they never were accepted, but paid on presentation. I generally received the drafts, and sent them for collection, and did not place them to the credit of Arrick & Anderson, until I had advices of their payment; don't recollect how many I bought. I advanced frequently on these drafts—sometimes $400 or $500 on a draft of $2,000. Phillips, one of tho plaintiffs, does business in Chicago, and these drafts were all sent through his house. Arrick & Anderson were worth little or nothing at the time these drafts were presented; would not have advanced on their credi t.

Whereupon the counsel for the defendants—Dow, Hurd & Co.—moved the Court for a new trial and an arrest of judgmant upon the following grounds, to wit:

1st. That the Court erred in excluding the offer made by defendants to prove that "Dow, Hurd & Co. and plaintiffs are members of the Chicago Board of Trade, and that it is a custom among grain dealers, and generally known to them, to employ men to purchase grain on joint account, the result of which was to be shared between the principal furnishing the money and the party purchasing and doing the buying the same; which was considered and understood to be a compensation for the services, and that contracts made in his name are not understood to bind the principals furnishing the money, and this custom has existed for five years.

2d. The Court erred in finding that defendants were co-partners, or made the drafts in question as co-partners.

3d. The Court erred in finding that the credit was given to defendants Dow, Hurd & Co., as makers of the drafts in question.

4th. The Court erred in finding that the defendants Dow, Hurd & Co. were liable as makers of the said drafts; the plaintiffs having full notice of the arrangement between Dow, Hurd & Co., and Arrick & Anderson.

To all of which decisions and rulings the counsel for the defendants—Dow, Hurd & Co.—then and there duly excepted.

The foregoing was all the testimony and evidence given upon the trial of the said cause. Whereupon, after argument by counsel pro and con, the Court found their decision for plaintiffs against the defendants.

The following question also arises in this case:

The following are the facts, and the opinion of Judge Caton is desired as to whether the Judge has authority to sign the Bill of Exceptions. The case was tried in June, and decision in favor of the plaintiffs. A motion for a new trial was made, which was decided 19th July, 1859. By the order of the Court ninety days was given to file Bill of Exceptions; this was extended by parol agreement of counsel until the 1st Monday of November. It was afterwards extended one week by written stipulation between the parties; before the expiration of the time granted by written stipulation, application was made to the Judge for ten days further time, which was granted; the Judge not knowing that the time had been extended by agrement, but supposing that the time before granted by the Court, had not expired; within the ten days last given a Bill of Exceptions was tendered to the Judge to sign, after the time fixed by the Court, and after the time agreed upon by the parties; but before the last extension granted by the Court had expired, which the Judge declined, on the ground that he had no power to sign it, or to make the last order, as the previous extension of time had been by agreement of parties, and not by order of the Court. The

Judge is willing to sign the bill, if he has the power; and the question is submitted whether, when the time fixed by the Court for filing the Bill of Exceptions had elapsed, and after the expiration of the term, and when the parties themselves had agreed to an extension beyond the time fixed by the Court, could the Court grant a further extension of time without the consent of the parties at a subsequent term of the Court?

(Signed) VAN H. HIGGINS, Judge.

From which decision and rulings of said Judge, the defendants below—Dow and Hurd—appeal to this Court.

SMITH & DEWEY,
Atty's for Plffs in Error.

SUPREME COURT.

113-77

ASA DOW et al.
Plffs in Error,

vs.

BE[illegible]EL W. PHILLIPS et al.
Defendants in Error.

ABSTRACT.

SMITH & DEWEY

Att'ys for Plffs in Error.

Filed April 18. 1860
L. Leland
Clerk

IN THE SUPREME COURT.

APRIL TERM, A. D. 1860.

BEZALEEL W. PHILLIPS, Et Al,
Appellees,
ats.
ASA DOW, Et Al,
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The evidence upon which the Court below found for the plaintiffs, shows that Arick & Anderson, at Mendota, and Dow, Hurd & Co., at Chicago, entered into an arrangement with each other, by which Arick & Anderson were to buy, at Mendota, grain, &c., ship the same to Dow, Hurd & Co., at Chicago, who were to sell it, and the *Profit or Loss* was to be shared equally between them. That in pursuance of that arrangement, Arick & Anderson drew on Dow, Hurd & Co., the two bills of exchange described in the declaration, which the plaintiffs received from Arick & Anderson, and advanced the money upon the same, to the amount of the verdict, (less the interest included in the verdict). That Alfred A. Arick and George W. Anderson composed the firm of Arick & Anderson, and Asa Dow and Joseph L. Hurd were members of the firm of Dow, Hurd & Co.

By sharing the *Profit and Loss*, the two firms became partners in the adventure.

Story on Part, S. 55.

A servant, clerk or agent may be compensated for his services by a sum *Proportioned* to the *Profits*, without being a partner, even as to third persons.

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But in all these cases the clerk, &c., has no interest vested in the profits so as to be entitled to take them himself as a principal; but has only a right of action against his principal for his compensation, proportioned though it be, to the profits. These are only a measure of his compensation and not the compensation itself. But whenever his share of the profits is his as it accrues, so that he is entitled to take it himself, and is not required to call upon his principal for it, then he is a partner. And if he share in the losses, as well as profits, then in all cases he is a partner.

Story on Part. S. 35, 55. Collyer Part Sec 30. 39. 40. 41

Smith's Mercantile Law 43.

Perhaps the foregoing position will not be disputed, but the ground taken will be that as Dow, Hurd & Co. were to furnish the capital, which fact was known to the plaintiffs' agent, they had no right to discount for the partnership, or lend money to the partnership, on the application of Arick & Anderson without the assent of Dow, Hurd & Co. previously expressed. In other words, that as Arick & Anderson could not compel Dow, Hurd & Co. to furnish more capital than they deemed expedient, they, therefore, had no authority to pledge the credit of the partnership to any person who knew the terms of the partnership.

This was a commercial partnership. "In commercial partnerships the law implies authority in the several partners to bind the whole by executing notes, bills of exchange, etc., in the partnership name."

Gray vs. Ward, 18 Ill. 31.

Collyer Part
Sec. 405.

The partnership name in this case was Arick & Anderson, at Mendota, and Dow, Hurd & Co., at Chicago, for the reason that the joint trading was carried on in those names at those places:

"A partnership comprising several, as A & B & C, may carry on trade in the name of one, as A, or in the name of B & C, or even in a fictitious name, or that of a mere stranger, and when any of these methods is adopted, the pledge of the partnership's name binds the whole firm.

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Besides, the evidence shows that the course of dealing between the plaintiffs and defendants had been long continued, and in many instances, in the same manner as these bills were drawn and discounted.

The effect of the discount was not an increase of capital. It was the ordinary case of a borrowing of money at the place of purchase of

These instances of partnerships in adventures between pre-existing separate firms are not uncommon in the books & have been frequently the subjects of litigation – Collyer on Part. Sec 23. 400 403. 405

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produce, to be repaid at the place of sale, which is constantly pursued on a larger scale in sending the products of the west, eastward.

Lastly, there was the express authority, by telegraph dispatches, contained in the record, from Dow, Hurd & Co. to Arick & Anderson, to draw, which were shown to plaintiffs before the bills were discounted, upon which they relied.

No notice of non-acceptance or non-payment was necessary. A partnership drawing on itself has knowledge of its own refusal to accept or pay.

Chitty on Bills, 355. 1 Gilman 24

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Without reference to the counts on the bills, the plaintiffs were entitled to recover on the common count for money lent. or account stated

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Broadwell vs. Broadwell, 1 Gil. 611.

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Dow & Hurd without the concurrence of the other defts. Arick & Anderson could not move for a new trial. Arick & Anderson did not join in or consent to the motion for a new trial — page 21.22 of Record.

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13 Ill 664 — 21 Missouri R. 122. 157. 272. 569

21 " 636 — 23 " " 404

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113-77

Supreme Court

Bezaleel W. Phillips et al Appellants

vs

Asa Dow et al Appellees

Brief & Points

Farnsworth & Gary for Appellees

Filed Apr 23, 1860

L. Leland Clerk

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The evidence upon which the Court below found for the plaintiffs, shows that Arick & Anderson, at Mendota, and Dow, Hurd & Co., at Chicago, entered into an arrangement with each other, by which Arick & Anderson were to buy, at Mendota, grain, &c., ship the same to Dow, Hurd & Co., at Chicago, who were to sell it, and the *Profit or Loss* was to be shared equally between them. That in pursuance of that arrangement, Arick & Anderson drew on Dow, Hurd & Co., the two bills of exchange described in the declaration, which the plaintiffs received from Arick & Anderson, and advanced the money upon the same, to the amount of the verdict, (less the interest included in the verdict). That Alfred A. Arick and George W. Anderson composed the firm of Arick & Anderson, and Asa Dow and Joseph L. Hurd were members of the firm of Dow, Hurd & Co.

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Story on Part. S. 35, 55. Coll. on Part. Sec. 30. 39. 40. 41

Smith's Mercantile Law 43.

Perhaps the foregoing position will not be disputed, but the ground taken will be that as Dow, Hurd & Co. were to furnish the capital, which fact was known to the plaintiffs' agent, they had no right to discount for the partnership, or lend money to the partnership, on the application of Arick & Anderson without the assent of Dow, Hurd & Co. previously expressed. In other words, that as Arick & Anderson could not compel Dow, Hurd & Co. to furnish more capital than they deemed expedient, they, therefore, had no authority to pledge the credit of the partnership to any person who knew the terms of the partnership.

This was a commercial partnership. "In commercial partnerships the law implies authority in the several partners to bind the whole by executing notes, bills of exchange, etc., in the partnership name."

Gray vs. Ward, 18 Ill. 31.

Collyer on Part Sec 405.

The partnership name in this case was Arick & Anderson, at Mendota, and Dow, Hurd & Co., at Chicago, for the reason that the joint trading was carried on in those names at those places:

"A partnership comprising several, as A & B & C, may carry on trade in the name of one, as A, or in the name of B & C, or even in a fictitious name, or that of a mere stranger, and when any of these methods is adopted, the pledge of the partnership's name binds the whole firm.

Smith's Mercantile Law 68.

Wintle vs. Crowther, 1 Cromp. & J. 316.

1 Tyrwh. 215, S. C.

Besides, the evidence shows that the course of dealing between the plaintiffs and defendants had been long continued, and in many instances, in the same manner as these bills were drawn and discounted.

The effect of the discount was not an increase of capital. It was the ordinary case of a borrowing of money at the place of purchase of

These instances of partnerships in adventures between pre-existing seperate firms are not uncommon in the books & have been frequently the subjects of litigation

Collyer on Part. Sec 23. 400. 403. 405

9 Johns. R. 470.

Coope v. Eyre. 1 H. Black. R. 37 which is a case fully sustaining the appellees on this branch of the case

produce, to be repaid at the place of sale, which is constantly pursued on a larger scale in sending the products of the west, eastward.

Lastly, there was the express authority, by telegraph dispatches, contained in the record, from Dow, Hurd & Co. to Arick & Anderson, to draw, which were shown to plaintiffs before the bills were discounted, upon which they relied.

No notice of non-acceptance or non-payment was necessary. A partnership drawing on itself has knowledge of its own refusal to accept or pay.

Chitty on Bills, 355. 1 Gil. 24

Roach vs. Ostler, 1 Man. & R. 120.

Porthouse vs. Peake, 1 Camp. 82.

Without reference to the counts on the bills, the plaintiffs were entitled to recover on the common count for money lent. or account stated 1 Gil. 24.

The evidence of the usage of the Chicago Board of Trade, that persons holding the relations of the defendants, were not partners, was properly excluded.

Broadwell vs. Broadwell, 1 Gil. 611.

Woodruff vs. Merchants Bk., 25 Wend, 673.

VanBURENS & GARY,
Attorneys for Appellees.

Dow & Hurd without the concurrence of the other defts. Arick & Anderson could not move for a new trial - Arick & Anderson did not join in a consent to the motion for a new trial - pages 21. 22 of Record.

Cochran v. Ammon 16 Ill. 316. 317 -

So that the question of the sufficiency of the evidence to justify the verdict does not arise, because no motion for a new trial was made by all, or concurred in by all, the defts. Also the bill of exceptions does not show that the motion of Dow & Hurd for a new trial was decided & there is no exception to that point - It is only by the entry of the Clerk that it appears that it was ever decided - pages 22, 45 & 46 of the record -

Dickhut v Durrell 11 Ill. R. 72

Pottle v. McWorter 13 " " 454

The letter of the 28 Dec. on which appellants first point is made, was read by consent - pages 26. 29 - The first objection to that, or any letter, was when the defts. were cross examining the plffs. witness Riley, page 42 Record, & who objected or what the Court did does not appear - <u>The abstract is wrong</u>.

In fact the defts. do not seem ever to have thought of excepting to any thing, until after the Court had found for the plffs. & the defts moved for a new trial, when the first time they

"then & there" excepted in a lump to all that the Court had ever done in the Cause. pages 45 & 46, Record.
The abstract is wrong as to this

For want of exception to a decision overruling a motion for a new trial, the evidence cannot be examined — 13 Ill. 454

The case of 12 Ill ~~###~~ 477 is not parallel for there, there was a point of law ruled & excepted to

The bill of exceptions should not be looked into at all, not being signed in time.

~~See~~ page a statement of facts at the end of the ~~record~~ bill of exceptions

13 Ill R. 654 — 21 Missouri R, 122. 157. 272. 569 &
21 " " 636 — 23 " " 404
25 " " 328 in point

Supreme Court
113 - 7677
Reynolds W Phillips
et al. Appellants
agst
Asa Dodge et al
Appellees

Brief of Points
Van Buren & Gerry
for Appellees

Filed Apr 28 1860
L. Leland
Clerk