IN RE DUNKLE ET AL.

Case No. 4,161.
{7 N. B. R. 107.}[1]

District Court, E. D. Pennsylvania. April 19, 1871.

BANKRUPTCY OF PARTNERSHIP—PARTNERSHIP NOTES GIVEN FOR INDIVIDUAL DEBTS—CONTRACT OF DISSOLUTION.

1. Where one partner fraudulently as to the other partner, gave notes in the name of the partnership for the payment of his individual contribution of capital, it was *held* that the accommodation endorser of said notes, who had paid them, (although the partner making said notes, during the course of his conversation with the said endorser when procuring the endorsement, had represented that they were to be given for goods purchased by the partnership,) was, nevertheless, under the peculiar circumstances of the case, taking into consideration the effect of the whole conversation, and of a previous interview some, months before between said partner and said endorser, at which the former had stated that "he would perhaps want a favor" from the latter, or words to that effect, chargeable with notice of the fraudulent issue of the notes, and had no claim upon them against the partnership estate in bankruptcy.

2. Where several notes had been fraudulently given by one partner in the name of the firm for his separate debt, and the partner defrauded, upon learning of the issue of two only of said notes, by an agreement of dissolution of the partnership, purchased from his copartner his interest in the firm for a certain sum of money, payable by appropriation of portion thereof to the payment of the said two notes, and the balance on or before a certain stipulated time and the partnership was subsequently adjudged bankrupt, but any claim against the partnership estate, upon any of the notes fraudulently issued was disallowed, it was *held* that the effect of the said agreement of dissolution, as to the said two notes referred to therein, was not a ratification of the said notes by the defrauded

partner as firm obligations, but an assumption of them as his separate debts upon a consideration, which had not failed in whole or in part, the claims upon said two notes remaining also separate debts of the partner who had issued them.

[In the matter of Dunkle & Dreisbach, bankrupts.]

The notes referred to in the preceding provisional order of the court [Case No. 4,160] as to the claims of Martin and Elizabeth Dreisbach had been given by Oliver R. Dunkle to his former partner, James O. McCurdy, in payment of the interest purchased by said Dunkle from McCurdy, and which formed Dunkle's contribution to the capital stock of the new firm of Dunkle & Dreisbach. These notes were signed by Dunkle with the firm name of Dunkle & Dreisbach, and were as follows: One dated December first, eighteen hundred and sixty-eight, for three thousand one hundred and six dollars, at ten months, to the order of Oliver R. Dunkle, endorsed by said Dunkle and one Van Camp Bush. One other of same date as last for three thousand one hundred and thirty-seven dollars and twenty-six cents, drawn and endorsed as last mentioned. (Upon the maturity of the latter note as will hereafter be more particularly stated, one thousand dollars was paid on account thereof, and two notes, one for one thousand dollars at two months, the other for one thousand one hundred and thirty-seven dollars and twenty-six cents, at three months, were given, drawn and endorsed as the one for three thousand one hundred and thirty-seven dollars and twenty-six cents.) One dated November first, eighteen hundred and sixty-eight for two thousand two hundred and fifty-one dollars and sixty cents, at twelve months, to the order of Oliver R. Dunkle, and by him endorsed. The endorsements by Van Camp Bush were accommodation ones, and the notes so endorsed, after having been given to James C. McCurdy, as before stated, were endorsed by him with the firm name of Tillett, McCurdy & Hayes, of which he was a member, and then sold, the one for three thousand one hundred and six dollars to Joseph E. Temple; the one for three thousand one hundred and thirty-seven dollars and twenty-six cents to Lewis Jones. The note for two thousand two hundred and fifty-one dollars and sixty cents, (not endorsed by Bush) after endorsement by James C. McCurdy and Tillett, McCurdy & Hayes, became the property of Sarah B. Van Syckel. The proceedings in bankruptcy were instituted by Lewis Jones on the notes given in part renewal of the one for three thousand one hundred and thirty-seven dollars and twenty-six cents. All of the notes thus endorsed by Bush were subsequently taken up by him, and he sought to prove the same as partnership debts of Dunkle & Dreisbach. The note held by Sarah B. Van Syckel was proved by her and subsequently taken up by James C. McCurdy, who by reason thereof, claimed to stand in the place of said Sarah B. Van Syckel. These claims were resisted by the assignee on the ground that under the circumstances of the case the claimants had notice that Dunkle had fraudulently used the firm name for the purpose of payment of his individual debt. This objection as to the claim of McCurdy was conclusively established by the testimony.

The testimony taken before the register was quite voluminous, but as to the claim of Bush, the following portions of his deposition contain substantially the facts upon which the opinion of the court was founded.

"Sometime during the summer of eighteen hundred and sixty-eight, it must have been August, I suppose, he (Dunkle) met me or called at our store, I can't say which, and spoke of the change in their business; that he was getting a very good partner—stated that it was Mr. Dreisbach, of, I think, Union county; said his father was very well off, and had money himself—in other words, he was a first-rate partner, and had a prospect of getting Mr. McCurdy out on very favorable terms. That is the substance of it. I don't pretend to report the language and he might want a favor. I didn't say whether I would grant any favors or not. I see from our books—Bush, Bunn & Co.—we sold the firm of Dunkle & Dreisbach goods to an amount of three hundred and fifty dollars between November twenty-third and thirtieth, eighteen hundred and sixty-eight.

"In December of eighteen hundred and sixty-eight, I give that as the date because the notes, which I endorsed bear date December first, Mr. Dunkle called on me at our store on Market street, and exhibited, two notes. I can't say whether he sat down and signed those notes at our office, or whether they were signed when he brought them, as he had been sitting there sometime, waiting for me to be disengaged. I don't remember whether he signed them in my presence or not. At all events he asked me to endorse those two notes. They were for about three thousand dollars each. They were notes signed by himself individually. I asked him for an explanation. He stated that these notes were for Mr. McCurdy, for the balance of the stock. I asked him why the notes were his individual notes or that in substance, and asked him who purchased the goods. He said the firm of Dunkle & Dreisbach. I asked him who was to pay the notes. He said the firm of Dunkle & Dreisbach. I then went into a general investigation of his affairs,—asked him how the firm of McCurdy & Dunkle stood when they commenced business. He said he had in the concern eight thousand dollars, and McCurdy had fifteen thousand dollars. I asked him how they stood when they relinquished business and changed into the firm of Dunkle & Dreisbach. What I meant by it was, when the business changed hands from one firm to the other, and it was so understood in our conversation

fully. He said their stock of merchandise and fixtures amounted to about twenty-nine thousand dollars, and their entire indebtedness was about seven thousand dollars. When I testified before I did so from memory, but since then I have found in an old memorandum book a memorandum that I took at the time as to this point. I have that memorandum with me here. It is in accordance with what I have just stated. I asked him then how the new firm of Dunkle & Dreisbach would stand. He said the same as before; that Mr. Dreisbach took the place of McCurdy as to capital—that he had put in some considerable amount. I don't now just remember the amount. At all events his conversation was such as convinced me the firm was perfectly solvent. It was understood all through in this conversation that Mr. Dunkle's capital in the new concern was eight thousand dollars, and Mr. Dreisbach's to be fifteen thousand. I stated to him that they hadn't made much money—that is their old firm—as the capital invested was twenty-three thousand dollars, liabilities seven thousand dollars and assets one thousand dollars less. Mr. Dunkle enumerated the heavy depreciation in their stock of merchandise, and the low valuation put on the store fixtures, which cost them a great deal more, and thought the showing wasn't very bad. I thought myself it was very fair, and it gave me entire confidence in the new firm, which I hadn't before known much about. He said if I would endorse these notes as he had promised Mr. McCurdy, in order to get a good—intimating a good bargain out of it—say good terms—that I would never hear tell of them again, and I believed, from all that I had learned, that that would be the case. I neglected to state before that I asked him why he was going to give his individual notes, when they were for the firm to pay, and the firm received the goods. I had asked him this at an earlier period in the conversation. He made some land of remark like this, that he didn't know that it made any difference. I stated to him what the difference would be to a man who endorsed them—that a firm debt always had to be paid before a personal. He said he didn't know that, and it was after this particular part of the conversation that I had all this other talk about the condition of the firm all through, and particularly the firm of Dunkle & Dreisbach. I merely asked the questions with reference to McCurdy & Dunkle to get at his condition at that time—that is December first—the time I was endorsing the notes. He said that he, would buy a great many goods of us, pay us promptly, and that they would be very good customers. He drew or had drawn up two other notes after this conversation at that interview, to the amount of about three thousand dollars each, signed by the firm of Dunkle & Dreisbach, in my presence, and I endorsed them. He did buy of us between December first, eighteen hundred and sixty-eight and July, eighteen hundred and sixty-nine, merchandise to the amount of eleven hundred and fifty dollars. These purchases were for the firm of Dunkle & Dreisbach. I heard nothing more of the notes until sometime during the spring. A Mr. Joseph B. Temple, who I understood as being a note buyer, called on me and said he was offered a note of Dunkle & Dreisbach, with my endorsement, and wanted to know

if I had endorsed it. I told him I had endorsed two. He said he had a notion to buy this note and conferred with me, asked me if I would not rather it was out of the market, as I was in business, and it would do me no good having a note going about in that way. I told him I had rather it was taken off the market. Next after that the second note fell due, and I received notice of its protest. I was called on by Mr. Hughes, Thomas Hughes, of Chestnut street, soon after, and Mr. Hughes asked me to pay it for all that I recollect. I told him that I had simply endorsed the note as an accommodation, and I would rather he would wait on Dunkle & Dreisbach and try to make some arrangement with them—that of course. I didn't try to get clear of my responsibility to him, as I had endorsed the note. He then, in a day or two, came to me with two new notes, amounting to about one thousand dollars less, and said that Dunkle & Dreisbach had paid one thousand dollars, and he had given them that much time on the balance—I think it was sixty or ninety days, and that he thought from what they said after being in their store on Eighth street, that they would be met at maturity. I endorsed these two notes, and he had with him the old note. I took my endorsement off of that. These new notes, he said, were drawn, and I believe they were, and endorsed as the former ones, by McCurdy, Tillett & Hays,'but their endorsement was after mine, but I don't know that, the notes will show for themselves. I suppose that was the first note that matured. It was the note that Temple didn't buy. I understood Mr. Hughes that a man by the name of Jones owned the note. I didn't know Mr. Jones. I knew Mr. Hughes. Mr. Hughes is in the dry goods commission business, on Chestnut street, and I always had a good opinion of him—believed that he was a very fair man, and believe so still.

"When the renewed notes came due, Mr. Dreisbach called on me for the first time. That was the first time I ever knew him. He said these notes were not for the firm to pay, and that, I think, George Pollock it was, told him he never need pay them. I told him I didn't know anything about that—that that was news to me, &c. He then said if I didn't pay them, that he would have his father come in and take everything. His father had borrowed the money for him that he had put in business, and that he had given him judgment notes. I don't know whether he said note or notes. I had, a short time previous to that, been told that Mr. Dreisbach

had stated, for the purpose of obtaining credit, that the capital in business was his own. I asked him if he hadn't done so. He said he had, and then said, 'I don't say that I will do what I said I would,' that is, let his father come in and take everything. I may have had conversation with him more than once in our store, but I think this is the last time I ever saw him on the subject until after the bankruptcy proceeding. After bankruptcy proceedings. I offered to make a loss with him, rather than go on with a long law suit. I offered to take up these two notes if he would take up the other, the note which had been purchased by Mr. Temple. He was with me at Mr. Bullitt's office. Mr. Bullitt said he would advise him to do it. Afterward Mr. Bullitt or his young man, said he could do nothing with him, that he didn't seem to be disposed to do anything. After that I never tried to negotiate a settlement. I told Mr. Dreisbach that in bankruptcy proceedings he would lose everything, and 1 would lose also. He said he would see about that, or to that effect. I could get no satisfaction out of him at all. He (Dunkle) spoke to me some time during the summer, of wanting me to do him a favor—probably August, as stated before, and never again until he called on me on the occasion that I endorsed. In fact, I hadn't thought of it. He reminded me of having spoken about it Of course I then recollected it.

"Q. Was the favor that you were to do for him to be for himself as you understood it in August? A. No sir. I didn't understand anything to be personal. I didn't talk to him in that way, nor he to me. I mean by personal, individual, not firm. I understood the favor to be for the firm of Dunkle & Dreisbach. Of course, at the first, I didn't know whether there Would be a firm or not, nor didn't think anything special about it. He merely spoke to me of getting a partner, saying it was a good thing, &c. Q. Did he mention the name of his expected partner, in August? A. Yes, sir. I am not positive that it was in August, but it was some time in the summer while the negotiations for the formation of a proposed partnership was going on. I fix the date at that time for that reason. Q. What was the precise language which he used—the words—with reference to this favor? A. I can't use the precise language. Q. Did he say, 'I will want you to do me a favor,' or 'I will want you to do the firm a favor?' A. I don't think he used either of those expressions. He conveyed to me an idea, which was, that in order to get good terms of Mr. McCurdy, he had promised Mr. McCurdy my endorsement. He merely at that time said he might want a favor from me. I understood what it meant, from the fact that he was talking about McCurdy going out, and somebody else going in. Q. Did he at that interview say that he would want you to endorse a note for him, in order to get better terms from McCurdy? A. No, sir. He didn't put such a question to me in any way. I, however, understood that he wanted me to endorse for that purpose. I can't recollect the words of the conversation in August. It was very indefinite, and I thought nothing more of it—would never have thought of it again, in all probability, if he hadn't come to me in December. Q. How long did your interview in December last? A. I should think it lasted some considerable time. I should

think probably twenty minutes or a half hour. I know it was long enough for me to understand all the points. I wanted to know that I was safe in endorsing, as also of course, could judge whether to sell them goods or not. Q. What was your reason or motive for endorsing the notes? A. I had no reason or motive. He was represented always to me as being a very correct man—a worthy man, and I naturally had a" little feeling of friendship towards him—thought that if that was going to do him any good, and cost me nothing, as he said it would not, and I believed it would not from the statement made, that I ought to do it Q. Did Mr. Dunkle tell you how much he was to pay McCurdy for his interest in the old firm, and how much Dreisbach was to pay McCurdy? A. No, sir. He said he had nothing to pay that his was in and remained in. He didn't say that Mr. Dreisbach was to pay McCurdy anything. He merely said that Mr. Dreisbach was to put so much in the firm, and he, Dunkle had eight thousand dollars in, which would make their capital in the new concern the same as it was in the old. I went over this ground with Mr. Dunkle until I had fully understood it Q. How much did you understand was to be paid to Mr. McCurdy for his, McCurdy's, interest in the firm? A. That I didn't understand at all. I was only arriving at their goodness, that was all I was after—of the firm—and to understand why they were good, and I understood that by the capital they originally had in. I didn't inquire, but Mr. Dunkle had told me that Dreisbach invested, or would put in fifteen thousand dollars. I didn't understand him that Dreisbach had anything to pay to McCurdy. I understood it was the firm of Dunkle & Dreisbach had to pay McCurdy for his interest in the stock of goods. Mr. Dunkle distinctly said that it was the firm that had to pay for the goods, and had received the goods. I asked him those questions very distinctly. Q. Did you understand that Mr. Dreisbach had put in fifteen thousand dollars in cash? A. No, sir. I didn't understand that it was all in. In fact I understood that it wasn't all in. Just how much wasn't in I don't now remember. The stock of goods had been bought on long credit, at least these notes were on a long credit, and of course, as is customary on such occasions, the cash would be used for other purposes, buying goods for cash. Q. Did you understand that Mr. McCurdy's interest in the

firm was about fifteen thousand dollars? A. His capital was—it was fifteen and eight when they commenced—there was evidently a loss of a thousand dollars. How they divided that I didn't ask Dunkle, but I didn't think it material as to the point of credit, which I was inquiring about. Q. You endorsed for Mr. Dunkle notes to the amount of about sixty-two hundred dollars, which were to be given to Mr. McCurdy. How did you understand that the rest of the purchase money was to be paid to Mr. McCurdy for his interest? A. I understood these notes "vere for the balance of what was due McCurdy. I had no knowledge of how the rest was to be paid. I didn't ask it that I recollect of. Q. Did you understand that it had been paid? A. Yes, sir. I understood this to be the balance. I didn't know there was any other note out until after these bankruptcy proceedings. Q. What reason did Mr. Dunkle give you for proposing to give his own note with your endorsement to Mr. McCurdy, in payment of what you state you understood to be the indebtedness of Dunkle & Dreisbach to McCurdy? A. When Dunkle exhibited the notes of his own. I asked him why—that is in substance, I don't pretend to give the language—he gave his own notes? He said he didn't know it made any difference whose notes he gave. That was the commencement of my whole conversation. Said I, who is to pay the notes? who is to receive the goods? He said the firm of Dunkle & Dreisbach. I told him that of course it was Dunkle & Dreisbach's notes that I was to endorse if I endorsed any, but it was from the fact that he first had the personal notes that I went into all this explanation or investigation. Q. Did you at that time seek out Mr. Dreisbach and investigate from him any of these matters? A. No, sir. I never knew Mr. Dreisbach until he called on me after the renewal notes were protested. Q. Is Mr. Dunkle a reasonably intelligent man, or a stupid business man? A. I always believed him to be reasonably intelligent, but I don't now. Q. Why were these notes, which you did endorse, made to the order of Oliver R. Dunkle instead of to the order of the firm? A. I stated to him that all of our firm notes I drew up to the order of myself, then they were good for nothing until I had endorsed them, and it didn't matter whose order they were drawn to. So I proposed that he should just draw them to his own order. At the conversation in August, he (Dunkle) spoke of the advantages that would be gained by getting Mr. Dreisbach in, and that he might want me to do, them a favor. I can't say that he said do him a favor or them. I know it left on my mind that he wanted me to endorse."

William Dreisbach, one of the bankrupts, denied having used the expressions alleged by Mr. Bush, as to threatening to let his father take everything. He also stated that he had given Mr. Dunkle a check for one thousand dollars, signed with the firm name, at a time when Mr. Dunkle had given him a check for the sum of nine hundred and ninety-four dollars of Tillett, McCurdy & Hays—but denied having any knowledge at that time, of the existence of the note issued by Dunkle, which was partially paid by said cheek; or any knowledge that the check was to be used for such a purpose.

Register's opinion:

Upon consideration of the foregoing testimony, I am of opinion the claim of Van Camp Bush on the three notes, particularly therein described, has been duly proved. The partnership of Dunkle & Dreisbach, (a trading firm,) having been formed some months prior to the endorsement of the said notes, (or of one of which two of the said notes were in part a renewal,) Oliver R. Dunkle, a member of said partnership, was fully competent to perform all acts within the scope of its business, and consequently to borrow money on its credit Dunkle being vested with such authority, Bush, the claimant, when applied to for the loan of his credit, had a right to reply upon Dunkle's representations in regard to the purposes for which the money sought to be raised was to be used, there being no evidence of mala fides on the part of Bush in the transaction.

It was contended, however, by the counsel for the assignee in this matter, that there is no general implied authority in one partner to raise money for the purchase of the capital stock of the firm, although such partner is authorised to raise money for the purchase of merchandise, after the partnership shall have actually commenced its business; and in support of this distinction, he cited the cases of Fisher v. Tayler, 2 Hare, 218; Greenslade v. Dower, 7 Barn. & C. 635. These cases, it is true, (although as to the last named it may be doubted whether it was a case of partnership, it certainly not being one for the purpose of trade,) would seem to establish the doctrine that if money is borrowed by one partner for the declared purpose of increasing the, partnership capital, or of raising the whole or part of the capital agreed to be subscribed by the individual partners in order to start the firm, the firm would not be bound, unless some actual authority of ratification can be proved. The distinction between such cases and the one under consideration is set forth in the following observations in Lindl. Partn. 218: "Connected with the subject of borrowing money, is increasing capital. A sole trader who borrows money for the purpose of his trade, cannot with propriety be said to increase his capital; but if two or more persons are in partnership, and each borrows money on his own separate credit, and the money is then thrown into the common stock, the capital of the firm as distinguished from the capital of the persons composing it, may

with propriety be said to be increased. But in this ease, the firm is not the borrower, nor is it debtor to the lender for the money borrowed. If a firm borrows money, so as to be itself liable for it to the lender, the capital of the firm is no more increased than is the capital of an ordinary individual increased by his getting into debt. When, therefore, it is said that one partner has no implied power to borrow on the credit of the firm for the purpose of increasing its capital, what is meant, is, that one partner, as such, has no power to borrow, on the credit of himself and copartners, money, which each was to obtain on his individual credit, and then to bring into the common stock. Unless the expression means this, it means nothing." As one partner may assign the whole of the partnership effects, if the transaction be bona fide (Hennessy v. "Western Bank, 6 Watts & S. 301; Deckard v. Case, 5 Watts, 22; Sloan v. Moore, 1 Wright [37 Pa. St] 223), it would seem to follow that he may purchase that which is to form the principal part, or even the whole of the stock of merchandise, in which the partnership proposes to trade.

The note upon which the claim of Sarah B. Van Syckel was founded, appears by the deposition of James McCurdy to have been taken up by him, (he having been an endorser thereof) and is now held by him. Mrs. Van Syckel has therefore now no claim upon said note against the bankrupt's estate. Mr. McCurdy has not made the deposition required by the twenty-second section of the bankrupt act, his counsel contending that it is not necessary for him to do so; that under the nineteenth section of said act, he is entitled "to stand in the place" of Mrs. Van Syckel. Whether the clause in the nineteenth section referred to is intended to dispense with the deposition required by the twenty-second section, it is not necessary to consider; for as this note was given to McCurdy for the separate debt of Dunkle, McCurdy knowing such to be its consideration, no claim made by him upon it against partnership assets or individual assets of William Dreisbach in the hands of the assignee can be allowed.

The assignee excepted to the foregoing opinion.

CADWALADER, District Judge. The register's view of the question is correct in the abstract, but, I think, inapplicable to the peculiar case of a transaction, which, as the prior conversation and form of the notes originally tendered, apprised Mr. Bush, concerned capital of one partner, and was unconnected with current business of the firm. His own reasoning, rather than any prudent inquiry, convinced him that he might get the partnership paper, and induced Dunkle to commit a fraud upon his partner, in giving it. Mr. Bush, if he did not wilfully shut his eyes, adopted a course by which they were closed; and although he may have intended no wrong, is the party who should suffer. The exceptions are sustained. But the effect of the agreement of dissolution as to the notes, which it specifies, requires consideration. Through the decision that the exceptions are sustained, Mr. Dreisbach has not suffered any injury from the frauds of Dunkle. At all events none is now apparent. If none has been suffered, his engagement to pay two of the notes may

be in force. This the register will consider. It may be necessary, perhaps, to give a two-fold effect to the agreement; first, as a ratification pro tanto, of the notes otherwise not binding the firm and secondly as an independent, separate engagement of Mr. Dreisbach. On these points no positive opinion is expressed.

To the foregoing decision an appeal was, on the twenty-ninth day of April, eighteen hundred and seventy-one, taken to the circuit court by Van Camp Bush, and is still depending in said court.

Report of the register as to the effect of the agreement of dissolution of partnership, upon the portion of the claim of Van Camp Bush, represented by two certain notes:

I, the undersigned register, to whom the above matter was referred, in pursuance of the opinion of the court of April nineteenth, eighteen hundred and seventy-one, referring to my consideration the effect of the agreement of dissolution of partnership between the said bankrupts upon the claim of Van Camp Bush, by virtue of two notes, one for one thousand dollars and the other for one thousand one hundred and thirty-seven dollars and twenty-six cents, more particularly set forth in the deposition for his proof of claim, would respectfully report:

That I am of opinion that the effect of said agreement was the assumption by said William Dreisbach of the payment of said notes, in consideration of the relinquishment of Dunkle's interest in the copartnership at that time. The said agreement of dissolution of partnership was made on the twenty-eighth day of July, eighteen hundred and sixty-nine, said Dreisbach, appearing "from the fifteenth to the twentieth of July," to have first learned of the issuing of any notes by Dunkle in the partnership name, for the purpose of providing for the payment of his (Dunkle's) original interest in the firm, and was as follows: Dunkle, in consideration of the payment by Dreisbach of three thousand one hundred and forty-eight dollars and twenty-eight cents, viz: by the payment by Dreisbach of the two notes before referred to, and the balance of said sum on or before January first, eighteen hundred and seventy, sold to Dreisbach all his interest in the firm, he, Dunkle, agreeing by good and sufficient security, to secure Dreisbach against the payment of any and all notes, bills of exchange or other obligations given by him, Dunkle, in the firm name for any individual debt, and

that he would not engage in the retail dry goods business in the city of Philadelphia, nor be employed in any dry goods store in said city for the period of two years, two thousand dollars being agreed upon as stipulated damages for the violation of said last mentioned agreement of Dunkle not to engage in the dry goods business, &c. Dreisbach also thereby agreed to pay all the partnership debts, and by good and sufficient security to indemnify said Dunkle therefrom, except such partnership notes, bills or other obligations not therein specified, that had been or might be given by said Dunkle for his individual debts. The securities stipulated for in this agreement were not given by either party thereto, there being a dispute as to the sureties, Dreisbach having tendered a bond with his father as surety and Dunkle one with a person as surety whom Dreisbach was not willing to accept, alleging that Dunkle had agreed to procure certain other persons as sureties. After this, however, Dreisbach appears to have had full control of the business and assets of the said partnership, and Dunkle appears to have relinquished all right thereto.

By the opinion of the court referred to, no other such notes, indemnity against which was promised by Dunkle, had been allowed as claims either against Dreisbach's separate estate or the partnership estate in bankruptcy, and therefore there has been, in fact, no failure of consideration for the agreement of dissolution upon the part of Dunkle. I do not think that said agreement of dissolution can be considered as a ratification by Dreisbach of the act of Dunkle in issuing these two notes as an act binding the firm; for it in terms prescribes that the price of the interest of Dunkle in the firm as then ascertained, was to be used by Dreisbach in the payment of these notes. They must now be considered as having been, at the time of the dissolution, separate debts of Dunkle, and if the agreement had accomplished the purpose for which it was intended, all the assets would have vested in Dreisbach as his separate estate, and perhaps this may be the case, notwithstanding the adjudication of bankruptcy (Ex parte Williams, 11 Ves. 3), and the only effect it could have as to these notes, would be that already stated, viz: an engagement on the part of Dreisbach to pay them as separate debts of Dunkle in consideration of the transfer of his interest in the firm. They are therefore not partnership debts of Dunkle & Dreisbach, but provable as separate debts of each partner against their respective separate estates.

For a fuller statement of the circumstances attending the dissolution and the object of Dreisbach in making it, I refer to my report as to the claims of Martin and Elizabeth Dreisbach in this matter, filed November twenty-first, eighteen hundred and seventy.—May 29th, 1871.

Exceptions to the foregoing report were made both by Van Camp Bush and the assignee.

(July 7, 1871.)

CADWALADER, District Judge. Lord Wensleydale, when considering certain relations of the law of partnership said, in very general words, that it is a branch of the law

of principal and agent 8 H. L. Cas. 312. Partners have often been called agents, each of the other. They are more accurately designated as each an agent of the partnership, to administer its proper affairs. Story, Partn., cited by Lord Wensleydale, ubi supra, and Code Nap. art 1859, No. 1.

The principal's ratification of an unauthorised act of an agent, validates it retroactively, and requires no new consideration. The like rule applies to a partner's unqualified adoption of an act of his copartner which was originally unauthorised. Thus, if Mr. Dreisbach had simply recognised the two notes in question as acts of the firm, or had promised to pay them as such, though he might have at the same time declared them to have been at first wrongfully issued, the ratification would have so inured to the benefit of Mr. Bush, the holder, as to render them partnership debts from their date. But, in the actual case, Mr. Dreisbach's only recognition of the notes was by the agreement of dissolution. I say "only" recognition, because the subsequent conversation must be understood as referential to that agreement. The provisions of the agreement on the subject are special and qualified. The value, a liquidated sum, of Mr. Dunkle's interest in the firm, was to be paid to him as retiring partner. The agreement shows that this conventionally ascertained value exceeded the amount of the two notes in question, which he had unauthorisedly issued in the name of the firm for his individual account. The language of the agreement indicates no less clearly that if the excess had been the other way, Mr. Dreisbach would not have engaged to pay the notes, or, at all events, would not have engaged to pay any part of such excess. In equity, these two notes, being together of less amount than Mr. Dunkle's interest in the firm, were, as against him, rightfully payable out of that interest. His interest in the firm was, therefore, appropriated by the agreement for their payment, that is to say, they were expressly made payable out of it. But as all the assets were at once transferred to Mr. Dreisbach, he assumed the payment of the two notes to their holder as a payment of so much of the interest of Dunkle. Neither more nor less than this appears to have been intended by the agreement. Now if it had contained no such express appropriation, and such an appropriation had, by a distinct act, been afterwards made by Mr. Dunkle of part of the money which he was thus to receive from Mr. Dreisbach, the case would in principle have been the same. In that case, would the notes in question have been thereby partnership debts?

Justly, they could not have been with relation to other partnership creditors, because, with relation to the firm, such creditors ought to have been paid in full before Mr. Dunkle could receive any payment on account of his share; and Mr. Bush, representing Dunkle, should not stand on any better footing. Therefore, the notes, which otherwise were not partnership debts, did not become such through this special agreement of Mr. Dreisbach to pay them. The effect of the agreement was to make him in equity a separate debtor from its date for their amount to their holder, without any merger of the former relation of Dunkle, who until their payment, continues to be also a separate debtor. To this conclusion as to Dreisbach it is for him objected that the frauds of Dunkle in issuing paper in the name of the firm for his individual account, prevent the engagement of Dreisbach in the agreement for dissolution from being obligatory upon him. To this objection the answer is that Mr. Dreisbach has not sustained any injury from the fraud, either as to the two notes particularly in question, or as to any other such paper, and therefore the consideration of his engagement has not, in whole or in part failed. That "fraud without damage gives no cause of action, but both must concur," may be considered an established rule or maxim of both law and equity. In its application, there has occasionally, for centuries, been more or less difficulty. In the present case, it is urged that although circumstances have precluded and will preclude any successful assertion of a joint liability upon any of the notes, yet their fraudulent issue by Dunkle was of injurious effect in creating a moral necessity for the dissolution of the firm, and that all or many of the unfortunate occurrences chronicled in this case were secondary consequences. If so, the damage or injury is too abstract or too remotely consequential for judicial cognisance.

The case is recommitted to the register, whose report is confirmed, so far as may consist with these views. The exceptions are overruled, so far as they do not consist with the same views. I adhere to my former opinion that Mr. Bush does not stand on the footing of a holder of negotiable paper who received it without notice that it was wrongfully issued.

From this decision an appeal was, on the seventeenth day of July, eighteen hundred and seventy-one, taken to the circuit court by Van Camp Bush, and is still depending therein. {The circuit afterwards reversed the order, disallowed the exceptions to the register's report, and confirmed the same. See Bush v. Crawford, Case No. 2,224.} Since the provisional order of the court upon the register's report as to the claims of Martin and Elizabeth Dreisbach, no further action has (at this date, July fifth, eighteen hundred and seventy-two) been taken either by the court or the claimants in regard thereto.

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