

it was there held that it was not shown that the foreign corporation sued in Ohio had exercised franchises in that state, or placed itself or its business within that state so as to be found there. I am of opinion that the motion to set aside the sheriff's return must be granted.

**WILLIS *et al.* v. RECTOR.**

(Circuit Court of Appeals, Eighth Circuit. May 9, 1892.)

No. 60.

**PARTNERSHIP—USE OF NAME—NOTICE—AGENTS.**

In an action against two defendants as partners, trading as "R. & Co.," it appeared that defendant R. allowed the use of his name because the other defendant was unable to obtain a license to carry on business, that R. had no interest whatever in the business, and that plaintiffs' drummer, when he sold the goods whose price was sued for, was informed of this fact. The note sued on, signed "R. & Co." by the other defendant, was given to another agent of plaintiffs. *Held*, that it was proper to direct a verdict for defendant R., for notice to the drummer that he was not in fact a partner was notice to plaintiffs.

In Error to the United States Court in the Indian Territory.

Action by R. S. Willis, P. J. Willis, and J. G. Goldthwaite, trading as P. J. Willis & Bro., against J. H. Rector and C. T. Ryan on a promissory note. Ryan defaulted, and the court having, after trial, directed a verdict for Rector, the plaintiffs bring error. Judgment affirmed.

C. L. Herbert, W. A. Ledbetter, I. H. Orr, and Harvey L. Christie, for plaintiffs in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

CALDWELL, Circuit Judge. This action was brought in the United States court in the Indian Territory by the plaintiffs against the defendants, J. H. Rector and C. T. Ryan, who were alleged to be partners in trade under the firm name of Rector & Co., to recover the contents of a promissory note of \$1,021.51, payable to the plaintiffs, and signed "Rector & Co." The defendant Ryan interposed no defense to the action, and there was judgment by default against him, and in favor of the plaintiffs, for the amount of the note sued on, with interest. The defendant Rector filed an answer, denying the alleged partnership and denying his liability on the note. Upon the trial the plaintiffs introduced the note sued on and rested. The defendant Rector was thereupon sworn as a witness, and testified that in the year 1884 the defendant C. T. Ryan desired to engage in the mercantile business at Jimtown, Chickasaw Nation, Indian Territory, and could not procure license for such purpose, and applied to him (Rector) to let him use his name with which to prosecute such business, and this Rector agreed to; that Rector had no interest whatever in such business; that when plaintiffs' drummer, Smith, came to Jimtown to sell goods for plaintiffs, witness

told Smith that he was not a partner of Ryan, and had no interest in his business; he (Smith) gave Rector a hat to persuade C. T. Ryan to order the merchandise, which witness did do. At the close of the defendants' testimony the plaintiffs called the defendant Ryan as a witness, who testified that he was unable to procure license and do business in his own name in the year 1884, and that J. H. Rector, the defendant, authorized witness to run the business in his name, which he did do; that J. H. Rector was a partner in name only, and had no actual or real interest in the business; that witness bought goods of plaintiffs, Willis & Bro., and executed the note sued on to Willis, in name of Rector & Co.; that when the goods were purchased through Mr. Smith, as drummer of plaintiffs, Smith was told and fully advised that J. H. Rector, the defendant, had no interest in the business; that after this time witness, C. T. Ryan, on, to wit, July 22, 1884, executed and delivered to another and different agent of plaintiffs the note sued on. This being all the testimony in the case, the court directed the jury to return a verdict for the defendant Rector, and this direction of the court is assigned for error.

There was no conflict in the testimony. The defendant Rector, who testified in his own behalf, and the defendant Ryan, who was called as a witness by the plaintiffs, agree perfectly in their testimony, and testify to the same state of facts. Upon this uncontradicted evidence the court rightly instructed the jury to find a verdict for the defendant Rector. Notice given to an agent while acting in the agency is notice to the principal. The plaintiffs' agent, Smith, who sold the merchandise for which the note sued on was given, was told before and at the time he sold the goods to Ryan that Rector was not a partner of Ryan, and had no interest in the business, but that the name of Rector & Co. had been assumed by the defendant Ryan because he could not procure a license to conduct the business in his own name. One who holds himself out to the world as a partner is liable as such, although he in fact does not participate in the profits and losses; but where there is a stipulation between two or more persons who hold themselves out to the world as partners that one of them shall not have any share in the profits nor pay any portion of the losses, he is not liable to the creditor of the firm who before giving credit knew of this stipulation, because such creditor has no right to fix upon him a responsibility against his bargain and intention, when such bargain and intention were known to the creditor before he extended the credit. Pars. Cont. 193, and note *g*; *Alderson v. Popes*, 1 Camp. 404, note. See *Thompson v. Bank*, 111 U. S. 529, 4 Sup. Ct. Rep. 689.

Judgment affirmed.

McCLELLAN *et al.* v. PYEATT *et al.*

(Circuit Court of Appeals, Eighth Circuit. May 16, 1892.)

No. 83.

## 1. APPELL—PRACTICE—ASSIGNMENT OF ERRORS—EXCEPTIONS.

Where the charge to the jury contains a series of propositions, a single exception thereto in gross cannot be sustained if any proposition is sound, and the appellate court will not, on such an exception, inquire whether any part of the charge is erroneous.

## 2. SAME—EXCEPTIONS TO INSTRUCTIONS.

An assignment of error in giving instructions will not be considered where it fails to comply with Cir. Ct. App. Rule 24, 47 Fed. Rep. xi., prescribing that, "when the error alleged is to the charge of the court, the specification shall set out the part referred to *in totidem verbis*, whether it be in instructions given or in instructions refused."

## 3. SAME.

Where one of a series of propositions preferred as one request to charge is unsound, an exception to a refusal to charge the whole series cannot be sustained.

## 4. EXECUTION—CLAIMS BY THIRD PERSONS—BONA FIDES.

When a third person claims title to chattels seized under execution, a bill of sale executed by defendant to a stranger after the alleged sale to the claimant is admissible as bearing on the *bona fides* of the sale to the claimant.

## 5. APPELL—ASSIGNMENT OF ERRORS—MOTION FOR NEW TRIAL.

Since a motion for a new trial is, under the federal practice, addressed to the discretion of the trial court, and no error can be assigned to the ruling thereon, such motion will not be considered in aid of an insufficient assignment of errors.

## 6. CIRCUIT COURT OF APPEALS—FOLLOWING STATE PRACTICE.

Though the practice act of Arkansas, regulating the practice of state courts of original jurisdiction, is obligatory on the federal courts held in that state and in the Indian Territory, the rules of practice of the supreme court of that state are not adopted by the circuit court of appeals in cases coming from either the state or the territory.

In Error to the United States Court in the Indian Territory.

This was an issue as to the right to property levied on by Henry C. Pyeatt and James C. Kirby under an execution against William P. McClellan, and claimed by Charles M. McClellan. The issue was found for plaintiffs, and judgment rendered against Charles M. McClellan and D. W. Lipe, the surety on his bond, and they bring error. Affirmed.

For decision on motion to dismiss the writ of error and vacate the *super sedens*, see 49 Fed. Rep. 259.

George E. Nelson and Wm. M. Cravens, for plaintiffs in error.

John H. Rogers, for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

CALDWELL, Circuit Judge. The defendants in error on the 3d day of October, 1889, recovered a judgment in the United States court for the Indian Territory against William P. McClellan for the sum of \$7,598.07, upon which execution was issued on the next day, and was levied by the marshal on the 5th day of October on certain cattle and horses, as the property of the defendant in the execution. The property so levied upon was claimed by Charles M. McClellan, who executed a bond conditioned as required by section 3042, Mansf. Dig. Ark., with the defendant Lipe as his surety. Thereupon the plaintiff gave notice, as provided by section 3045 of the same digest, and the trial of the right to