# URIAS A. and CHARLES S. McGILL, Appellants, vs. A. WOERMANN, Appellee.

## LRSC 2; 1 LLR 163

[January A. D. 1883.]

*Appeal from the Court of Quarter Sessions and Common Pleas, Montserrado County. Debt.*

1. The surviving partner of a firm cannot give a note for the payment of money that will be binding upon the representatives of his deceased co-partners. When a partner dies the partnership properly goes to the survivors for the purpose of settlement, and they have all the powers necessary for that purpose and no more.

2. Where in an action of debt upon a written instrument, the instrument or note offered in evidence differs in form from that set out in the pleadings, it is error to admit same as evidence. Endorsements upon notes, where not stated in the pleadings, are to be considered as new allegations and proved.

This case is an appeal from the verdict of the jury and judgment of the Court of Common Pleas and Quarter Sessions, Montserrado County, at its September term, . A. D. 1880.

Having reviewed the record in this case, the court is brought to consider the issues upon which it rests, and also the evidence and effect of the same. The appellee (plaintiff below) alleges that the firm of McGill & Brother (late existing) is indebted to him, and that Urias A. and Charles S. McGill, the legal representatives of said firm, are now indebted to him, the said plaintiff, by virtue of the written instrument, a copy of which is filed with the said plaintiff's complaint, and that the defendants (now appellants) have neglected to pay said debt.

Permit us here to comment briefly upon the phrase '(by virtue," when it is used in respect to written instruments, as "by virtue of a written instrument." In this connection those words are intended to show that the terms of the promise therein made to be performed, in their nature exist with force and power. But we shall have more to say about written instruments in another place.

The copy of the written instrument set out in the complaint of the plaintiff (now appellee) bears upon its face a promise to pay the sum of three thousand one hundred and seventy-three dollars and twenty-two cents, upon such conditions and stipulations as are therein expressed. The defendants below (now appellants) deny that the said firm, McGill & Bro., is indebted to the said appellee (plaintiff below), and they also allege that the said appellee has no legal right to recover against them in this action.

The said appellee, to prove his case, introduced witnesses, C. T. O. King and J. W. Howard.

Witness C. T. O. King states as follows: That he was acquainted with the late J. B. McGill, and that he was the surviving partner of the firm of McGill & Bro.; and he further states that after the death of his partners, he did carry on the business in the name of McGill & Bro.

Witness also states that he recognized the signature on the document handed him as being J. B. McGill's for McGill & Bro., and the signature of the witness to the document as being Wm. Thompson's, and the body of the writing to be J. B. McGill's. He also states that the other partners of the firm were, Doctor McGill, R. S. McGill of Cape Palmas, and J. B. McGill, but was not certain as to the admission of Rockey McGill into the firm.

Witness Howard states that J. B. McGill was the surviving partner of the firm of McGill & Bro. He also states that all the parties referred to in connection with the firm except J. B. McGill were dead in January, 1880.

The written evidence of the plaintiff was then put in: 1st, the deed from James B. McGill and Martha his wife to McGill & Bro.; 2nd, the note of hand given by J. B. McGill in the name of said firm; after which, the said defendants presented a note published in the "Observer." Having noticed the evidence introduced by the parties in the case, we shall now consider how they go to prove or disprove the alleged debt.

The first issue, then, is whether the written instrument upon which the action of debt is brought is sufficient in law to bind the legal representatives of the firm of McGill & Bro. We are of opinion it is not; because it is clearly proven by witness J. W. Howard, that in January, A. D. 1880, all the partners of the firm of McGill & Bro. were dead except James B. McGill, who was the surviving partner at the time the note of hand was given the appellee. And it does appear from the question put by the plaintiff in the court below to witnesses C. T. O. King and J. W. Howard, as to whether J. B. McGill was or was not the surviving partner of the firm of McGill & Bro., that the appellee was not ignorant of the fact that J. B. McGill could not at the time of the making of this note of hand legally bind the legal representatives of the deceased partners, whose death operated as a dissolution of the partnership.

When a partner dies the partnership property goes to the survivors for the purpose of settlement, and they have all the power necessary for that purpose, and no more. No court of justice would, therefore, sanction the act of J. B. McGill as the surviving partner of the firm of McGill & Bro., giving a note of hand in the name of the firm, after the dissolution of the same by the operation of death, however great the emergency may have been that prompted him to do so. It would throw wide open a door for fraud and dishonesty.

The deed from J. B. McGill and his wife Martha was irrelevant, because it had no tendency whatever to prove the alleged debt; therefore the court below erred in admitting it. If the court admitted the deed in proof of what was alleged in the reply of the plaintiff, it was nevertheless an error, because the plaintiff is only allowed to supply such new facts as would set forth more clearly his action before the court.

The alleged cause of this action is, that the firm of McGill & Bro., lately existing, is indebted to appellee, and that appellants, Urias A. McGill and Charles McGill, legal representatives of said firm, are now indebted to the appellee by virtue of a written instrument (which bears the date of January 29th, 1880) the sum of three thousand one hundred and seventy-three dollars and twenty-two cents, and have neglected to pay the said debt.

The instrument offered in evidence having on it endorsements, it varied from that set out in the pleadings, which has none on it. Therefore the court, after inspection, having discovered the same, ought not to have admitted it in evidence, and it was error in the court below to do so. After admission of the instrument, it was nevertheless the duty of the court to regard the indorsements made thereon as new allegations to be proved, since they were denied; for it would be giving sanction to a dangerous doctrine to allow the plaintiff

to bind the defendants to the payment of an illegal note by making indorsements thereon. If indorsements are used in evidence for the plaintiff, they must be proved like other facts. A copy of the notices referred to, as published in the ' 'Observer," not appearing in the record, this court will give no expression on that point. The verdict of the jury in the court below is founded on evidence that should not have been admitted. The court therefore ought to have given a new trial, and it erred in not doing so.

This court also says the judge below did not err in refusing to arrest judgment, because it appears on the record that the law regulating the issuing of writs of attachments had not been complied with. It was the duty of the defendants to have taken advantage of this defect in the pleadings of the plaintiff at the proper stage, and their not doing so amounted to a waiver of that right.

But the final judgment given by the court below in this case rests on an illegal verdict. Therefore the judgment of this court is, that the judgment given in this case by the court below be and is hereby reversed; and that the note of hand, proved to have been given by the said J. B. McGill in the name of the firm of McGill & Bro. after the dissolution of the said firm, without any warranted authority, be and the same is good for its payment against the legal representatives and heirs of the said J. B. McGill, to the amount claimed by the appellee in his complaint, which payment is to be made out of the property of the said J. B. McGill, or out of his interest in any property of the late firm of McGill & Bro., or, out of any interests of his, in property real or personal; but under no circumstance shall his legal representatives or heirs be bound to dispose of and make payment out of any property or interests but that which is solely and strictly the property or interest of the late J. B. McGill; and that the appellee pay all costs incurred in this action.