No. 13186

Supreme Court of Illinois

Harrington

vs.

Stephens

71641 7

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 131.

Herrington
vs
Stephens

1861

13186

Supreme Court.

APRIL TERM, A. D. 1861.

CHARLES C. STEPHENS,
Respondent,

against

JAMES HERRINGTON,
Appellant.

Statement.

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At the November term, A. D. 1859, there was a trial by Jury, and plaintiff obtained judgment for two hundred and fifty eight dollars. The defendant moved for a new trial.

At the February term, A. D. 1860, the motion for a new trial was argued. The Court sustained the motion and ordered a new trial. The plaintiff then asked leave to amend his declaration. The amended declaration was filed on the twenty-second day of February, A. D. 1860, and an order was made for the defendant to plead by the following Monday. The case was then continued until the next term of said Court.

On the fifth of March, 1860, during the said February term, the defendant filed demurrer to special Count in

amended declaration and general issue to Common Counts. On the ninth of March, the demurrer was argued and overruled. The defendant elected to stand by his demurrer. A *nolle prosique* was then entered by defendant's Counsel as to the Common Counts.

At the next term, (May twenty-third, 1860), the defendant asked leave to file plea of general issue to Special Count in declaration. The Court refused to allow the plea to be filed and defendant excepted. The Court then gave judgment by default for want of plea, and assessed the plaintiff's damages at three hundred and sevento-one dollars. Defendant moved to set aside the assessment of damages. After argument the motion was sustained, and a new assessment ordered to be made by the Court.

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1. THE RULING OF THE COURT IN OVERRULING THE DEMURRER WAS ERRONEOUS.

It is respectfully submitted that the Court below erred in overrulling the demurrer to the Special Count in the amended declaration. The redundancy and grammatical errors in the recital of the inducement need no particularizing. Neither is it necessary to call the attention of the Court to the repugnancy in this count. These are faults, however, which, to say the least, are objectionable. Mr. Chitty speaks of "regulations" which has "occasioned the literature of the inferior part of the profession to recede." It is believed, no practice which encourages the lowering of the present standard of the literature of the

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1st. The attention of the Court is called to the statement of the consideration:—

"And in consideration that the plaintiff would then and there, at the special instance, and request of the defendant, sell and deliver to *him*, the said defendant, all *his* interest in said firm of Stephens and Krom, which included *his* interest in said stock of hardware in bulk, then in said store, and *his* interest in the debts due the said firm, including notes, book accounts and the sett of tinner's tools then in said store, and the iron safe used by said firm, and *belonging to said Stephens*, HE, the said defendant," &c.

Is it not plain, by the reading of the above, that the only consideration received by the defendant, which was not *his*, was the "*iron safe* used by the said firm, and *belonging to said Stephens?*" Pronouns are words used instead of nouns, and refer to their antecedents. Who is the antecedent of the pronoun *his* in the above quotation. "Defendant" certainly. Stephens does not allege ownership of anything but the iron safe, and the Court cannot be justified in giving a construction to the above language other than that which its plain reading imports, to wit: that the only consideration passing from Stephens to the defendant was the iron safe "*belonging to said Stephens.*"

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"DAILY NEWS" Print, 128 South Clark Street, Chicago.

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Died Apr 17, 1861
Administration
Asked

Supreme Court.

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At the next term, (May twenty-third, 1860), the defendant asked leave to file plea of general issue to Special Count in declaration. The Court refused to allow the plea to be filed and defendant excepted. The Court then gave judgment by default for want of plea, and assessed the plaintiff's damages at three hundred and sevento-one dollars. Defendant moved to set aside the assessment of damages. After argument the motion was sustained, and a new assessment ordered to be made by the Court.

At the November term, A. D. 1860, a new assessment was had before the Court, and the amount of damages assessed at three hundred and eighty-four dollars and fifty-six cents, for which, judgment was given. The defendant prayed an appeal, which was allowed.

Points.

1. THE RULING OF THE COURT IN OVERRULING THE DEMURRER WAS ERRONEOUS.

It is respectfully submitted that the Court below erred in overrulling the demurrer to the Special Count in the amended declaration. The redundancy and grammatical errors in the recital of the inducement need no particularizing. Neither is it necessary to call the attention of the Court to the repugnancy in this count. These are faults, however, which, to say the least, are objectionable. Mr. Chitty speaks of "regulations" which has "occasioned the literature of the inferior part of the profession to recede." It is believed, no practice which encourages the lowering of the present standard of the literature of the

profession, will be tolerated by the Supreme Court of the State of Illinois.

1st. The attention of the Court is called to the statement of the consideration:—

"And in consideration that the plaintiff would then and there, at the special instance, and request of the defendant, sell and deliver to *him*, the said defendant, all *his* interest in said firm of Stephens and Krom, which included *his* interest in said stock of hardware in bulk, then in said store, and *his* interest in the debts due the said firm, including notes, book accounts and the sett of tinner's tools then in said store, and the iron safe used by said firm, and *belonging to said Stephens*, HE, the said defendant," &c.

Is it not plain, by the reading of the above, that the only consideration received by the defendant, which was not *his*, was the "*iron safe* used by the said firm, and *belonging to said Stephens?*" Pronouns are words used instead of nouns, and refer to their antecedents. Who is the antecedent of the pronoun *his* in the above quotation. "Defendant" certainly. Stephens does not allege ownership of anything but the iron safe, and the Court cannot be justified in giving a construction to the above language other than that which its plain reading imports, to wit: that the only consideration passing from Stephens to the defendant was the iron safe "*belonging to said Stephens.*"

"When the mode in which the consideration is "stated is *defective*, *informal* or UNCERTAIN, the "declaration will be bad upon special demurrer." —1*st Chitty* pldg., p. 300.

"Here is the statement of the promise, "*he*, "the said defendant, then and there agreed and "promised (*in consideration of the iron safe, with-*"*out any value*), that is to say, to assume and pay "one-half of all of the debts owing by the said firm "of Stephens and Krom, or that they were holden "for and to keep and protect said Stephens free "and harmless from all debts and claims then out-

"standing against said firm of Stephens and "Krom, and for which they were liable."

To whom and with whom did the defendant promise? And when and where? The above is intended to be a traversable allegation, and as such, must have certainty of time and place. *And must also state* EXPLICITLY *to and with whom* the promise was made. How can the defendant be called on to avoid or deny the above? Was the promise made to Stephens' creditors, and for their benefit? Or was it made to and for the protection of Krom?

But the defendant is said to have further "agreed and promised" as follows:

"*And also*," that is another further and dis-"tinct promise, 'and also allow or pay to the said "Krom, his, said Stephens' individual account on "the books of said Stephens and Krom, and to pay "*him* the sum of three hundred and fifty dollars, "($350) in money.'"

Can there be any doubt to whom the above promises are made? "His, said Stephens, individual account," AND "three hundred and fifty dollars in money." The word *and* is a copulative conjunction, and connects what follows as an addition to that which precedes, The promise of "three hundred and fifty dollars in money," is made with as much certainty to Krom, as "his, said Stephens, individual account."

Such is the natural sense of the language, and the natural sense must prevail over every artificial or argumentative construction.

"And to pay *him*," Krom, is the antecedent of the pronoun *him*. "Stephens" is inserted for the purpose of identifying the particular account.

The language is not double—it does not admit of two interpretations. If it were double or doubtful, that construction would be given which

tended strongly against the pleader, for he is supposed to have stated his case in the most favorable light for his client.

There are no *positive* allegations as to the considerations or promises. They are stated by way of recital altogether.

"The plaintiff must charge the promise by the "defendant *positively*, and not by way of recital "only; for, if the declaration be defective in this "respect, it is a fatal error, and not cured by "verdict."—*Sexton v. Holmes*, 3d, Muno. 566.

This declaration is simply *whereas*, and not positive, as "for *that* whereas," &c.

It would be supererogation to further discuss this declaration. It is respectfully submitted that this count is bad on general demurrer. And a special demurrer will be held general, and has been so decided by the Supreme Court of Massachussetts. The declaration is inconsistent with itself, and a careful examination of it by the Court is respectfully requested.

The defendant elected to stand by his demurrer. None of the defects of this declaration are cured by verdict. It is brought before the highest judicial tribunal of our State for critical examination. Is it *sufficient in law to* authorize the plaintiff to recover? It is thought not, and that this tribunal of dernier resort must decide the demurrer to be well taken.

The Court erred in passing on the demurrer before the general issue was disposed of. By so doing, the defendant was deprived of valuable rights. But after the plaintiff withdrew the Common Counts, the defendant should have been allowed to file the general issue to Special Count. And it is submitted, the Court below erred in not allowing the plea to be filed under the circumstances. Defendant asked permission to do so at the

earliest opportunity, and for the reason the plaintiff withdrew the Common Counts.

2. WEAT WERE THE DEFENDANT'S RIGHT, AT THE INQUESTS FOR DAMAGES.

It is again respectfully submitted that the Court erred in not allowing the following question to be asked the witness, Krom:

"What was that interest (Stephens') worth, if "anything, after assuming to pay one-half of all "the debts owing by said firm of Stephens and "Krom, or that they were holden for, and to keep "and protect said Stephens free and harmless "from all debts and claims, then outstanding "against said firm of Stephens and Krom, and for "which they were liable; and also allow or pay "to the said Krom his (Stephens') individual ac-"count on the books of said Stephens' and "Krom?"

The issue before the Court was the amount of demages. Is not the above question pertinent to that issue? The defendant was contesting the damages, and does not the question tend to their reduction? The demurrer admits, it will be said, the contract. Admit it does, then what? It by no means admits the breach. The breach and consequent damage, if any, remained an open question before the Court. The defendant could not contest plaintiff's right to nominal damages, but anything that tended to a reduction of the amount of damages was proper, and the defendant should have been allowed the benefit of an answer to the above question as tending to such reduction.

Mr. Chitty says, the doctrine that a demurrer admits the facts well pleaded must be taken with this qualification, "*that it is only so upon the argument.*"

The exact amount mentioned was not admitted by the demurrer.

"It seems that even in debt or *simple contract*, "a writ of enquiry cannot always be dispensed "with; as in debt for the value of foreign money "and other cases, in which a judgment by default "*is an admission of the* CONTRACT *in the declara-* "*tion*, BUT NOT OF THE EXACT SUM "MENTIONED THEREIN." — *2nd Sanders' Pldg. and Ev.*, 218. See Chicago and Rock Island Rail Road vs. Ward, 16th Illinois.

Again, the Court erred in assessing more than nominal damages. If the demurrer admitted the exact sum in declaration, why any proof or evidence at all? But it did not, and left it incumbent on plaintiff to prove his damages. This he totally failed to do, for an examination of the evidence of his own witnesses will show that he proved no damages whatever. The Court below gave judgment for the amount claimed in the declaration, with interest. The plaintiff's evidence does not warrant this judgment. And which should guide the conscience of the Court, the the language of the plaintiff's declaration or his witnesses.

"DAILY NEWS" Print, 128 South Clark Street, Chicago.

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Herrington

vs

Blythens

Filed Apr 17. 1861

L Leland

Clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

JAMES HARRINGTON
vs.
CHARLES C. STEPHENS. } Error to Kane.

ABSTRACT OF RECORD.

PAGE OF REC.

This was an action of assumpsit by *Stevens* vs. *Herrington*.

3 The declaration consists of one common count, for goods sold,, &c., filed May, 1859.

6 Plea—general issue.

9 November, 1859—Jury trial.—Verdict for plaintiff; damages $258.

11 Febuary, 1860—New trial granted, and leave to plaintiff to amend his declaration and add new counts.

12 February 22, 1860—Amended declaration filed, containing 2 counts.

17 March 5, 1860—Defendant filed plea to last count and demurrer to the 1st count (special count) of amended declaration.

19 Demurer to special count overruled; defendant abides; other counts *non pros*.

21 At May term, defendant asked leave to plead to this special count; but
20 the Court refused and gave judgment against defendant for want of a
21 plea, and assessed damages, on proof, at $371, which defendant moved to set aside, and the motion was allowed.

At the December term, 1860, the Court heard proof and made another assessment, $384.56. Defendant moved to set aside the assessment, which was refused, and defendant excepted—and judgment that plaintiff recover.

The following is an abstract of the bill of exceptions taken to the refusal to set aside the last assessment of damages:

JAMES HARRINGTON
vs.
CHARLES C. STEVENS.

ABSTRACT OF BILL OF EXCEPTIONS.

Assessment of damages before the Court.

2 3 White, a witness for Stephens, testified that he talked with Jas. Harrington about time that Stephens left the firm of Stephens & Krum. Harrington wanted to sell to witness Stephens' interest in the hardware store; said Stephens had $400 or $500; that the rest they owed for, and that would have to be paid to Stevens; the rest, witness could have time

for; that Stevens had put in between $400 and $500, and that would be all the money witness would have to raise to go in with Krum. Harrington ~~then~~ said that he could buy it cheaper of Stephens than witness could. In the store Harrington solicited witness to buy Stephen's interest—said the thing was failing; Stephens discontented; that he (Harrington) was holden on some notes, and didn't feel secure, and had bought it back. This was in the Spring of 1859, after town meeting. Stephens was at this time about town. Harrington was liable on some transactions done before Stephens went in. Witness, Harrington and Krum then owed about $600 each on their original purchase. Samuel Fletcher, another witness, said that Harrington, a short time after Stephens left the concern, told the witness that he would let him have half the hardware store for $600 (a share along with Krum), witness to pay half the outstanding debts, (say about $200.) This was all of plaintiff's testimony.

Defendant's Evidence.

Simon Krum heard the above conversation between White and Harrington. It was about two weeks after Stephens sold out. Harrington & Krum paid to Tuttle & Co., in Chicago, $210, for Stephens. Harrington assumed Stephens' account in the store. Harrington also assumed one half of the debts of Stephens & Krum—about $2,000. Witness was acquainted with the stock of goods at the time. Harrington asked witness, "What was that interest worth, if anything, after assuming to pay one half of all the debts owing by said firm of Stephens & Krum, or that they were holden for, and to keep and protect said Stephens free and harmless from all debts and claims then outstanding against said firm of Stevens & Krum, and for which they were liable, and also to allow or pay to the said Krum his (Stephens') individual account on the books of Stephens & Krum. To which plaintiff objected; objection sustained, and defendant excepted. Amount of Stephens' account was $321.

Cross examination—That account accrued when Stephens was in company with me. Mr. Poor assumed it. Harrington first assumed it. Harrington came to me first, and said he was to pay half the indebtedness on Stephens' account. Date of the writing was March 9th, 1859, about the day Harrington bought Stephens out.

The above is all the evidence.

The Court, Dec. 15th, assessed plaintiff's damages at $384.56.

POINSTS.

There are two principal questions in the case. 1st, Ought not the demurrer to have been sustained to the special counts. 2nd, Ought not the assessment of damages last made have been set aside.

The 1st question requires an examination of the special count, *at large*, which is found on pages 12 and 13. The demurrer is special, and the count is surely inartistic and uncertain.

On the question of the assessment of damages it ought to be set aside, because it was irregular in not allowing the defendant to enquire into the value of the interest of Stephens in the store, and

2d, Because the proof showed a payment of money for Stephens, which should have given only nominal damages.

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SUPREME COURT OF ILLINOIS:

APRIL TERM, 1861.

JAMES HARRINGTON
vs.
CHARLES C. STEPHENS.

ABSTRACT AND POINTS.

Filed April 18. 1861
L. Leland
Clerk

SUPREME COURT OF ILLINOIS,

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APRIL TERM, 1861, AT OTTAWA.

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vs.
CHARLES C. STEPHENS. } Error to Kane.

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Simon Krum heard the above conversation between White and Harrington. It was about two weeks after Stephens sold out. Harrington & Krum paid to Tuttle & Co., in Chicago, $210, for Stephens. Harrington assumed Stephens' account in the store. Harrington also assumed one half of the debts of Stephens & Krum—about $2,000. Witness was acquainted with the stock of goods at the time. Harrington asked witness, "What was that interest worth, if anything, after assuming to pay one half of all the debts owing by said firm of Stephens & Krum, or that they were holden for, and to keep and protect said Stephens free and harmless from all debts and claims then outstanding against said firm of Stevens & Krum, and for which they were liable, and also to allow or pay to the said Krum his (Stephens') individual account on the books of Stephens & Krum. To which plaintiff objected; objection sustained, and defendant excepted. Amount of Stephens' account was $321.

Cross examination—That account accrued when Stephens was in company with me. Mr. Poor assumed it. Harrington first assumed it. Harrington came to me first, and said he was to pay half the indebtedness on Stephens' account. Date of the writing was March 9th, 1859, about the day Harrington bought Stephens out.

The above is all the evidence.

The Court, Dec. 15th, assessed plaintiff's damages at $384.56.

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On the question of the assessment of damages it ought to be set aside, because it was irregular in not allowing the defendant to enquire into the value of the interest of Stephens in the store, and

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SUPREME COURT OF ILLINOIS:

APRIL TERM, 1861.

JAMES HARRINGTON
vs.
CHARLES C. STEPHENS.

ABSTRACT AND POINTS.

Filed April 18. 1861
A Leland
Clerk

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Clerk of the Circuit Court for the County of Kane Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Kane County, before the Judge thereof, between Charles C. Stephens

plaintiff, and James Herrington

defendant, it is said manifest error hath intervened, to the injury of the aforesaid Defendant

as we are informed by his complainant and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 12th day of February in the Year of Our Lord One Thousand Eight Hundred and Sixty one

L. Leland
Clerk of the Supreme Court.
by J. B. Rice Deputy

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James Hemmington

No. vs.

Charles C. Stephens

WRIT OF ERROR.

This Writ of Error is made a Supersedeas, and as such is to be obeyed by all concerned.

L. Leland

Clerk.

FILED Feb. 13. A. D. 186[illegible]

L. Leland

Clerk.

Supreme Court of Illinois — 3d Grand Division — Ap Term 1861 —

James Herrington
vs
Charles C. Stephens
} Error to Kane

Abstract of Record

This was an action of assumpsit by Stevens vs Herrington

3 — The declaration counts of one Common Count — for goods sold &c — filed May 1859

6. Plea — General issue

9. November 1859 — Jury trial — verdict for plaintiff damages $258 —

11. Feb 1860 — New trial granted & leave to plaintiff to amend his declaration & add new counts

12. Feb 22 — 1860 — Amended declaration filed containing 2 counts —

17 — March 5th 1860 — Defendant filed plea to last count & demurrer to the 1st Count (Special count) of amended declaration

19 — Demurrer to special count overruled deft abides — other counts upon issue —

21 — At May term deft asked leave

20 to plead to this Special Count
but the Court refused & gave jud
mt against defendant for want
of a plea — & assessed damages
21 — on proof at $371 — which
defendant moved to set aside
~~Motion refused & deft excepted~~
~~& filed his bill of Exceptions~~ —
& the motion was allowed

At the December Term 1860 — The
Court heard proof & made another
assessment — $384.56 — Deft
moved to set aside the assessment
which was ~~refused~~ & defendant ex
cepted — & judgmt that plaintiff recover

The following is an abstract
of the bill of exceptions taken to
the refusal to set aside the last
assessment of damages

James Harington

vis

Charles C Stephens

Abstract of bill of exceptions

Assessment of damages before the court.
Whith a witness for Stephens testified that
he talked with James Harrington about the
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store. Said Stephens had $400 or $500 in-
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would have to be paid to Stephens the rest
witness could have time for. That Stephens
had put in between $400 and $500 and
that would be all the money witness
would have to raise to go in with Krown
Herrington said that he could buy it
cheaper of Stephens than witness could.
In the store Herrington solicited witness
to buy Stephen's interest. Said the thing
was failing. Stephens discontented. That
he (Herrington) was holden on some notes

and didnt feel secure and had bought it back – This was in the Spring of 1859 after town meting – Stephens was at this time about town – Herrington was liable on some transactions done before Stephens went in – Witness Herrington an Krown then owed about $600 each on their original purchase Samuel Fletcher another witness. Said that Herrington a short time after Stephens left the concern – told the witness that he would let him him ~~had~~ have half the hardware store for $600 (a share along with Krown) Witness to pay half the outstanding debts (say about $200) – This was all of pltfs. testimony

Defts. Evidence

Simon Krown heard the above conversation between White and Harrington. It was about two weeks after Stephens sold out – Herrington and Krown paid to Tuttle & Co in Chicago $200 for Stephens – Herrington assumed Stephens account in the store – Herrington also assumed on half of the debts of Stephens and Krown about $2000 witness was acquainted with the stock of goods at the time – Herrington asked witness – "What was that interest worth, if anything, ~~by said~~ after assuming to pay one

half of all the debts owing by said firm of Stephens and Krum, or that they were holden for, and to keep and protect said Stephens free and harmless from all debts and claims then outstanding against said firm of Stephens and Krum. and for which they were liable. and also to allow or pay to the said Krum his (Stephens) individual account on the books of Stephens and Krum ?"
To which pltffs ~~counsel~~ objected — Objection sustained and dfts excepted — Amt of Stephens account was $ 321
Cross Ex. That account accrued when Stephens was in company with me. Mr Bon assumed it. Herrington first assumed it Herrington came to me first and said he was to pay half the indebtedness on stephens account — Date of the writing was March 9th 1859 about the day Herrington bought Stephens out

The above is all the Evidence

The Court. Dec. 15th. assessed pltffs damages at $ 382.56.

There are two principal questions in the case
1st Ought not the demurrer to have been
sustained to the Special Count —
2nd — Ought not the assessment of
damages last made have been set
aside —

The 1st question requires an
examination of the Special Count — at large — which is found
on pages 12 & 13 — the demurrer
is special — & the Count is surely
infinite & uncertain

On the question of the assessment
of damages it ought to be set
aside because it was unequal — in not allowing the
defendant to enquire into the
value of the interest of Stevens
in the Store — &
& 2nd — because the proof showed
a payment of money for Stevens
which should have given only
nominal damages —

131
Supreme Court -

Hennington
vs
Stevens

Abstract & points

Filed Apl. 17. 1861
L. Vol
Clk.

Supreme Court of Illinois
To Ap Term - 1861 -

T. Lyle Dickey being sworn says that he believes he is acquainted with the pecuniary circumstances & responsibility of Augustus M. Herrington & that he is worth at least five Thousand dollars over liabilities & is good security for $500 five hundred dollars —

T. Lyle Dickey

Sworn to & subscribed this 9th day of Feb 1861 before me A. D. Caton

SUPREME COURT.

THIRD GRAND DIVISION.

JAMES HERRINGTON, Pltff in Error,
vs.
CHARLES C. STEPHENS, Deft. in Error.

APRIL TERM, A. D. 1861.

ARGUMENT AND BRIEF.

The Abstract of Record filed by the plaintiff in Error is so meagre, that it does not present the Errors Assigned, so that the Court can understand them; it is therefore incumbent upon the defendant to present a full statement. Whether the plaintiff intentionally omitted, or intentionally garbled the Record for the purpose of misrepresentation and unfair criticism, is not for the defendant to determine.

The first question presented as error is, ought not the demur to have been sustained to the declaration. In order to present the subject fairly, and to test the *remarkable Grammatical criticisms* made to the declaration by the plaintiff in Error, I present the whole declaration printed, so the Court can see the unfairness of presenting isolated portions of it, for examination without taking the connections. The Court will find it on Page of the Record.

"For that whereas heretofore, to wit: on the 9th day of March A. D. 1859, at the Village of Geneva, "in the County of Kane and State of Illinois, the said plaintiff was engaged in conducting, managing and "carrying on a Hardware Store, in the said village of Geneva, in equal copartnership with one Simon Krom, "under the name and style of Stephens & Krom. And whereas the Stock of Hardware in said Store "of the said Stephens & Krom, including the Stock of Goods or Hardware on hand and in said Store, book "accounts, notes and debts due, or to become due to said firm; and the set of Tinners' Tools then in use in "said Store and belonging to said firm, and one Iron Safe in use of said firm and belonging to said Stephens "were then and there of great value and worth a large sum of money, to wit, the sum of $4,000, and the "plaintiff's individual interest in the said Stock of Hardware then in said Store, and the debts, notes and "book accounts, and set of Tinners' Tools in said Store and in use, and the Iron Safe in use and belonging "to said Stephens, was worth a large sum of money, to wit, $2,000, as the defendant then and there had full "knowledge, and in consideration that said plaintiff would then and there at the special instance and request "of the said defendant sell and deliver to him, the said defendant, all his interest in said firm of Stephens & "Krom, which included his interest in said Stock of Hardware in bulk then in the said Store and his inter- "est in the debts due the said firm, including notes, book accounts and the set of Tinners' tools then in said "Store, and the Iron Safe used by said firm and belonging to said Stephens, he the said defendant then and "there agreed and promised, that is to say, to assume and pay one half of the debts owing by the said firm "of Stephens & Krom, or that they were holden for and to keep and protect said Stephens free and harmless "from all debts and claims then outstanding against said firm of Stephens & Krom, (and for which they were "liable, and also allow or pay to the said Krom his, said Stephens' individual account on the books of said "Stephens and Krom,) and to pay him the sum of $350 in money.

"And the said plaintiff in fact saith that he, confiding in the promises and undertaking of said defendant, "as aforesaid, and afterwards, to wit, on the 9th day of March, A. D. 1859, at Geneva in the said County of "Kane and State of Illinois, did sell and deliver to said defendant on the terms aforesaid, his interest in said "Stock of Hardware, notes, book accounts, debts, set of Tinners' tools and one Iron Safe aforesaid.

"Yet the said defendant not regarding his said promises and undertakings, but contriving and wrongfully "and unjustly intending, craftily and subtilely to defraud the said plaintiff in that behalf, did not, nor would "pay to the said plaintiff the said sum of $350, when afterwards requested so to do by said plaintiff, to wit, "on the 20th day of March, 1859, to wit, at Geneva, in the County & State aforesaid, but hath hitherto "wholly neglected and refused, and still neglects and refuses so to do, to the damage of said plaintiff of $2000.

To test the declaration, suppose you include in brackets, as I have done in the copy given, is there any uncertainty as to whom the promise was made to pay the $350. The Court will see, that the inducement set out in the declaration is, that Stephens owned one-half of a Hardware Store, and that Herrington wanted

and did purchase it, and agreed to do certain things, each of which are distinctive and separate acts, and each or all might have been left out, or treated as surplusage, except that particular one complained of; and the only one to which a breach is alleged, the payment of the $350 in money. In this view, can there be any doubt as to whom the promise was made to pay the $350. The declaration no where professes or attempts to show an inducement that Stephens' partner, Krom, is selling anything, neither any breach assigned, that Herrington has not paid Krom the $350, and there can be no doubt in the mind of any one, reading the whole declaration together, as to whom the contract was made to pay the $350.

The plaintiff in error complains of the redundancy and grammatical errors in the recital of the inducement as set out in the declaration. This is not error; the redundancy will not vitiate the declaration, and the grammatical errors, if any, cannot be raised here, upon this demur, were not thought of, specified or considered in the Court below. Allow there are grammatical errors, yet they will not render the declaration obnoxious to a demur, unless they render it uncertain and void.

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I submit to the Court, whether the plaintiff in admitting that the contract is well stated as regards Stephens owning the Iron Safe, does not admit the validity of the declaration, and whether Herrington in agreeing to pay $350, was paying too much, this Court will not inquire.

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Hemington

v

Stephens

Argument D.C.

Filed Apr. 24th 1861

L. Leland

Clerk

SUPREME COURT.
THIRD GRAND DIVISION.

JAMES HERRINGTON, Pltff in Error,
vs.
CHARLES C. STEPHENS, Deft. in Error.

APRIL TERM, A. D. 1861.

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The Abstract of Record filed by the plaintiff in Error is so meagre, that it does not present the Errors Assigned, so that the Court can understand them; it is therefore incumbent upon the defendant to present a full statement. Whether the plaintiff intentionally omitted, or intentionally garbled the Record for the purpose of misrepresentation and unfair criticism, is not for the defendant to determine.

The first question presented as error is, ought not the demur to have been sustained to the declaration. In order to present the subject fairly, and to test the *remarkable grammatical criticisms* made to the declaration by the plaintiff in Error, I present the whole declaration printed, so the Court can see the unfairness of presenting isolated portions of it, for examination without taking the connections. The Court will find it on Page of the Record.

"For that whereas heretofore, to wit: on the 9th day of March A. D. 1859, at the Village of Geneva, "in the County of Kane and State of Illinois, the said plaintiff was engaged in conducting, managing and "carrying on a Hardware Store, in the said village of Geneva, in equal copartnership with one Simon Krom, "under the name and style of Stephens & Krom. And whereas the Stock of Hardware in said Store "of the said Stephens & Krom, including the Stock of Goods or Hardware on hand and in said Store, book "accounts, notes and debts due, or to become due to said firm; and the set of Tinners' Tools then in use in "said Store and belonging to said firm, and one Iron Safe in use of said firm and belonging to said Stephens "were then and there of great value and worth a large sum of money, to wit, the sum of $4,000, and the "plaintiff's individual interest in the said Stock of Hardware then in said Store, and the debts, notes and "book accounts, and set of Tinners' Tools in said Store and in use, and the Iron Safe in use and belonging "to said Stephens, was worth a large sum of money, to wit, $2,000, as the defendant then and there had full "knowledge, and in consideration that said plaintiff would then and there at the special instance and request "of the said defendant sell and deliver to him, the said defendant, all his interest in said firm of Stephens & "Krom, which included his interest in said Stock of Hardware in bulk then in the said Store and his inter- "est in the debts due the said firm, including notes, book accounts and the set of Tinners' tools then in said "Store, and the Iron Safe used by said firm and belonging to said Stephens, he the said defendant then and "there agreed and promised, that is to say, to assume and pay one half of the debts owing by the said firm "of Stephens & Krom, or that they were holden for and to keep and protect said Stephens free and harmless "from all debts and claims then outstanding against said firm of Stephens & Krom, (and for which they were "liable, and also allow or pay to the said Krom his, said Stephens' individual account on the books of said "Stephens and Krom,) and to pay him the sum of $350 in money.

"And the said plaintiff in fact saith that he, confiding in the promises and undertaking of said defendant, "as aforesaid, and afterwards, to wit, on the 9th day of March, A. D. 1859, at Geneva in the said County of "Kane and State of Illinois, did sell and deliver to said defendant on the terms aforesaid, his interest in said "Stock of Hardware, notes, book accounts, debts, set of Tinners' tools and one Iron Safe aforesaid.

"Yet the said defendant not regarding his said promises and undertakings, but contriving and wrongfully "and unjustly intending, craftily and subtilely to defraud the said plaintiff in that behalf, did not, nor would "pay to the said plaintiff the said sum of $350, when afterwards requested so to do by said plaintiff, to wit, "on the 20th day of March, 1859, to wit, at Geneva, in the County & State aforesaid, but hath hitherto "wholly neglected and refused, and still neglects and refuses so to do, to the damage of said plaintiff of $2000.

To test the declaration, suppose you include in brackets, as I have done in the copy given, is there any uncertainty as to whom the promise was made to pay the $350. The Court will see, that the inducement set out in the declaration is, that Stephens owned one-half of a Hardware Store, and that Herrington wanted

and did purchase it, and agreed to do certain things, each of which are distinctive and separate acts, and each or all might have been left out, or treated as surplusage, except that particular one complained of; and the only one to which a breach is alleged, the payment of the $350 in money. In this view, can there be any doubt as to whom the promise was made to pay the $350. The declaration no where professes or attempts to show an inducement that Stephens' partner, Krom, is selling anything, neither any breach assigned, that Herrington has not paid Krom the $350, and there can be no doubt in the mind of any one, reading the whole declaration together, as to whom the contract was made to pay the $350.

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The question is not competent, because it only states part of the agreement as charged in the declaration. The question leaves out entirely, that part charging the agreement to pay $350 in money. The declaration

charges that Herrington agreed to pay Stephens $350, for his interest in the Hardware Store. Herrington admits it by the pleading. A default admits *all facts* well pleaded: 22 Ill. 205, Peck vs Wilson. The evidence of White, (See page of Record,) shows that Herrington told him that he had *bought out* Stephens, and that his (Stephens) interest was worth $400 to $500. Herrington's mouth is closed as to the amount as to what he agreed to give. Perhaps the evidence was unnecessary; but the Court was justified in rendering the judgment it did, and done perfect justice between the parties, as Herrington well knows, and it ought not to be disturbed.

CHARLES B. WELLS,
Att'y for Def't in Error.

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Herrington

v

Stephens

Argument &c

for Deft

Filed Apr. 24th 1861

Lorenzo Leland

Clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

JAMES HARRINGTON
vs.
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At the December term, 1860, the Court heard proof and made another assessment, $384.56. Defendant moved to set aside the assessment, which was refused, and defendant excepted—and judgment that plaintiff recover.

The following is an abstract of the bill of exceptions taken to the refusal to set aside the last assessment of damages:

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Defendant's Evidence.

Simon Krum heard the above conversation between White and Harrington. It was about two weeks after Stephens sold out. Harrington & Krum paid to Tuttle & Co., in Chicago, $210, for Stephens. Harrington assumed Stephens' account in the store. Harrington also assumed one half of the debts of Stephens & Krum—about $2,000. Witness was acquainted with the stock of goods at the time. Harrington asked witness, "What was that interest worth, if anything, after assuming to pay one half of all the debts owing by said firm of Stephens & Krum, or that they were holden for, and to keep and protect said Stephens free and harmless from all debts and claims then outstanding against said firm of Stevens & Krum, and for which they were liable, and also to allow or pay to the said Krum his (Stephens') individual account on the books of Stephens & Krum. To which plaintiff objected; objection sustained, and defendant excepted. Amount of Stephens' account was $321.

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SUPREME COURT OF ILLINOIS:

APRIL TERM, 1861.

JAMES HARRINGTON
vs.
CHARLES C. STEPHENS.

ABSTRACT AND POINTS.

Filed April 18. 1861
A. Leland
Clerk

State of Illinois } Supreme Court. Third Grand Division
April Term AD 1861.

James Newington. Plff in Error.

v

Charles C. Stephens. Defft in Error.

} Error to Kane

The above named Plaintiff will take Notice that the defendant in Error will cause his appearance to be entered in the above entitled Cause, at the next April Term AD 1861. of the Supreme Court of said State, and proceed to a hearing of said Cause

Geneva Ill April 4th 1861.

Chas C Stephens

State of Illinois
Supreme Court April Term thereof 1861.

Charles B Wells first being duly Sworn doth depose and Say that he served a true and perfect of the within Notice upon James Herrington the within named plaintiff in Error. on the 4th day of April AD 1861.

Chas B Wells

Sworn and Subscribed to
before me this 18th day
of April AD 1861

R. Leland Clk Supr Ct
By J R Leland Dep

Filed April 18. 1861
R Leland
Clerk

13
Charles Herrington
vs
Charles G. Stephens
Notice

SUPREME COURT OF ILLINOIS,

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"For that whereas heretofore, to wit: on the 9th day of March A. D. 1859, at the Village of Geneva, "in the County of Kane and State of Illinois, the said plaintiff was engaged in conducting, managing and "carrying on a Hardware Store, in the said village of Geneva, in equal copartnership with one Simon Krom, "under the name and style of Stephens & Krom. And whereas the Stock of Hardware in said Store "of the said Stephens & Krom, including the Stock of Goods or Hardware on hand and in said Store, book "accounts, notes and debts due, or to become due to said firm; and the set of Tinners' Tools then in use in "said Store and belonging to said firm, and one Iron Safe in use of said firm and belonging to said Stephens "were then and there of great value and worth a large sum of money, to wit, the sum of $4,000, and the "plaintiff's individual interest in the said Stock of Hardware then in said Store, and the debts, notes and "book accounts, and set of Tinners' Tools in said Store and in use, and the Iron Safe in use and belonging "to said Stephens, was worth a large sum of money, to wit, $2,000, as the defendant then and there had full "knowledge, and in consideration that said plaintiff would then and there at the special instance and request "of the said defendant sell and deliver to him, the said defendant, all his interest in said firm of Stephens & "Krom, which included his interest in said Stock of Hardware in bulk then in the said Store and his inter- "est in the debts due the said firm, including notes, book accounts and the set of Tinners' tools then in said "Store, and the Iron Safe used by said firm and belonging to said Stephens, he the said defendant then and "there agreed and promised, that is to say, to assume and pay one half of the debts owing by the said firm "of Stephens & Krom, or that they were holden for and to keep and protect said Stephens free and harmless "from all debts and claims then outstanding against said firm of Stephens & Krom, (and for which they were "liable, and also allow or pay to the said Krom his, said Stephens' individual account on the books of said "Stephens and Krom,) and to pay him the sum of $350 in money.

"And the said plaintiff in fact saith that he, confiding in the promises and undertaking of said defendant, "as aforesaid, and afterwards, to wit, on the 9th day of March, A. D. 1859, at Geneva in the said County of "Kane and State of Illinois, did sell and deliver to said defendant on the terms aforesaid, his interest in said "Stock of Hardware, notes, book accounts, debts, set of Tinners' tools and one Iron Safe aforesaid.

"Yet the said defendant not regarding his said promises and undertakings, but contriving and wrongfully "and unjustly intending, craftily and subtilely to defraud the said plaintiff in that behalf, did not, nor would "pay to the said plaintiff the said sum of $350, when afterwards requested so to do by said plaintiff, to wit, "on the 20th day of March, 1859, to wit, at Geneva, in the County & State aforesaid, but hath hitherto "wholly neglected and refused, and still neglects and refuses so to do, to the damage of said plaintiff of $2000.

To test the declaration, suppose you include in brackets, as I have done in the copy given, is there any uncertainty as to whom the promise was made to pay the $350. The Court will see, that the inducement set out in the declaration is, that Stephens owned one-half of a Hardware Store, and that Herrington wanted

and did purchase it, and agreed to do certain things, each of which are distinctive and separate acts, and each or all might have been left out, or treated as surplusage, except that particular one complained of; and the only one to which a breach is alleged, the payment of the $350 in money. In this view, can there be any doubt as to whom the promise was made to pay the $350. The declaration no where professes or attempts to show an inducement that Stephens' partner, Krom, is selling anything, neither any breach assigned, that Herrington has not paid Krom the $350, and there can be no doubt in the mind of any one, reading the whole declaration together, as to whom the contract was made to pay the $350.

The plaintiff in error complains of the redundancy and grammatical errors in the recital of the inducement as set out in the declaration. This is not error; the redundancy will not vitiate the declaration, and the grammatical errors, if any, cannot be raised here, upon this demur, were not thought of, specified or considered in the Court below. Allow there are grammatical errors, yet they will not render the declaration obnoxious to a demur, unless they render it uncertain and void.

I am disposed to review the remarkable grammatical criticisms, of the plaintiff in error. The critic evidently labors under the often mistake made of assuming that grammar is arbitrary, and language conformble, when right the reverse is the fact. A sentence may be formed, clearly ungrammatical, the science of grammar is applied to it to fix the meaning contemplated by its author. In the first sentence quoted from the declaration by the plaintiff in error, on page 3d of his points, in the pronouns referred to, he commits another error, by assuming that they necessarily refer to the immediate next preceding antecedent. The pronoun *his* as used, is in the possessive case, and the sense of the sentence is to determine what is its antecedent, and in my judgment any well versed grammarian will have no hesitancy in determining that *plaintiff* and not defendant is that which it refers. So it is with all of the other personal pronouns.

I submit to the Court, whether the plaintiff in admitting that the contract is well stated as regards Stephens owning the Iron Safe, does not admit the validity of the declaration, and whether Herrington in agreeing to pay $350, was paying too much, this Court will not inquire.

To the second quotation from the declaration, on page 3 of printed points, made by plaintiff in error, and his remarks thereon. I reply that it is not true that they were intended to be traversable allegations; the defendant was not called on to answer them. There was no breach alleged, on any one of them, or all col lectively.

The Court will observe, that the objections made by the plaintiff in error to that part of the declaration quoted on page 4 of his printed points are not well taken, when that part of the declaration is taken in connection with what precedes it. This unfair way of taking a part of a sentence, and attempting to determine the author's meaning, will not, I think, mislead any one. The whole sentence is to be taken together, and in the light in which I have heretofore examined it.

The demur was filed to the special Count of the declaration, and general issue to the common Counts. The demur was overruled by the Court below, the defendant elected to stand by the demur, the plaintiff then immediately withdrew his common Counts. See page of Record, also 11 & 19. There was no error in deciding the demur, the general issue was disposed of, when the common Counts were *not prosed*. At the term when the demur was sustained and the common Counts were *not prosed*, the suit was continued. At the next term thereafter, for the first time plaintiff in error came into Court to file the general issue to the special Count, which the Court in its description properly refused, and it cannot here be assigned for error. See 1 Scam. 543 & 46; 2 Scam. 186. The defendant did not ask for leave to plead over, until after the next Term after he elected to stand by the demurrer. See page of Record.

What are the defendant's rights at the inquest?

The defendant in error answers: his rights are defined in the case of C. & R. I. R. R. Co. vs Ward, 16 Ill. 522. In that case and in all the cases where the damage is an open question, and to be estimated by witnesses, then the defendant may be permitted to introduce witnesses to reduce the amount claimed, but when the declaration charges a specific *contract* and the amount of damages agreed on, then the defendant may not be permitted to offer any defence that contradicts the contract set out in the declaration, which is *admitted* as in this case by the default. The demur admits everything that is well pleaded. See 12 Ill. 295; also 3 Scam. 175, Weatherford vs Fishback.

The plaintiff in error on page 6 of printed statement, preserves one question for the consideration of this Court on this subject. The defendant asks the witness Krom, (Stephens' former partner) "What was Stephens' *interest worth*, &c." That is not the issue; it was, what did Herrington agree to give. They could not show that there was no such contract, nor any evidence that would invalidate it, or that would require a plea to enable the defendant to introduce evidence under it.

The question is not competent, because it only states part of the agreement as charged in the declaration. The question leaves out entirely, that part charging the agreement to pay $350 in money. The declaration

charges that Herrington agreed to pay Stephens $350, for his interest in the Hardware Store. Herrington admits it by the pleading. A default admits *all facts* well pleaded: 22 Ill. 205, Peck vs Wilson. The evidence of White, (See page of Record,) shows that Herrington told him that he had *bought out* Stephens, and that his (Stephens) interest was worth $400 to $500. Herrington's mouth is closed as to the amount as to what he agreed to give. Perhaps the evidence was unnecessary; but the Court was justified in rendering the judgment it did, and done perfect justice between the parties, as Herrington well knows, and it ought not to be disturbed.

CHARLES B. WELLS,
Att'y for Def't in Error.

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Hennington

v

Stephens

Argument for Deft

Filed Apr. 24th 1861

Lorenzo Leland

Clerk

SUPREME COURT.

THIRD GRAND DIVISION.

JAMES HERRINGTON, Pltff in Error,
vs.
CHARLES C. STEPHENS, Deft. in Error.

APRIL TERM, A. D. 1861.

ARGUMENT AND BRIEF.

The Abstract of Record filed by the plaintiff in Error is so meagre, that it does not present the Errors Assigned, so that the Court can understand them; it is therefore incumbent upon the defendant to present a full statement. Whether the plaintiff intentionally omitted, or intentionally garbled the Record for the purpose of misrepresentation and unfair criticism, is not for the defendant to determine.

The first question presented as error is, ought not the demur to have been sustained to the declaration. In order to present the subject fairly, and to test the *remarkable grammatical criticisms* made to the declaration by the plaintiff in Error, I present the whole declaration printed, so the Court can see the unfairness of presenting isolated portions of it, for examination without taking the connections. The Court will find it on Page of the Record.

"For that whereas heretofore, to wit: on the 9th day of March A. D. 1859, at the Village of Geneva, "in the County of Kane and State of Illinois, the said plaintiff was engaged in conducting, managing and "carrying on a Hardware Store, in the said village of Geneva, in equal copartnership with one Simon Krom, "under the name and style of Stephens & Krom. And whereas the Stock of Hardware in said Store "of the said Stephens & Krom, including the Stock of Goods or Hardware on hand and in said Store, book "accounts, notes and debts due, or to become due to said firm; and the set of Tinners' Tools then in use in "said Store and belonging to said firm, and one Iron Safe in use of said firm and belonging to said Stephens "were then and there of great value and worth a large sum of money, to wit, the sum of $4,000, and the "plaintiff's individual interest in the said Stock of Hardware then in said Store, and the debts, notes and "book accounts, and set of Tinners' Tools in said Store and in use, and the Iron Safe in use and belonging "to said Stephens, was worth a large sum of money, to wit, $2,000, as the defendant then and there had full "knowledge, and in consideration that said plaintiff would then and there at the special instance and request "of the said defendant sell and deliver to him, the said defendant, all his interest in said firm of Stephens & "Krom, which included his interest in said Stock of Hardware in bulk then in the said Store and his inter- "est in the debts due the said firm, including notes, book accounts and the set of Tinners' tools then in said "Store, and the Iron Safe used by said firm and belonging to said Stephens, he the said defendant then and "there agreed and promised, that is to say, to assume and pay one half of the debts owing by the said firm "of Stephens & Krom, or that they were holden for and to keep and protect said Stephens free and harmless "from all debts and claims then outstanding against said firm of Stephens & Krom, (and for which they were "liable, and also allow or pay to the said Krom his, said Stephens' individual account on the books of said "Stephens and Krom,) and to pay him the sum of $350 in money.

"And the said plaintiff in fact saith that he, confiding in the promises and undertaking of said defendant, "as aforesaid, and afterwards, to wit, on the 9th day of March, A. D. 1859, at Geneva in the said County of "Kane and State of Illinois, did sell and deliver to said defendant on the terms aforesaid, his interest in said "Stock of Hardware, notes, book accounts, debts, set of Tinners' tools and one Iron Safe aforesaid.

"Yet the said defendant not regarding his said promises and undertakings, but contriving and wrongfully "and unjustly intending, craftily and subtilely to defraud the said plaintiff in that behalf, did not, nor would "pay to the said plaintiff the said sum of $350, when afterwards requested so to do by said plaintiff, to wit, "on the 20th day of March, 1859, to wit, at Geneva, in the County & State aforesaid, but hath hitherto "wholly neglected and refused, and still neglects and refuses so to do, to the damage of said plaintiff of $2000.

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CHARLES B. WELLS,
Att'y for Def't in Error.

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Harrington

v

Stephens

Argument &c

for Defft.

Filed Apr. 24th 1861

Lovell Leland

Clerk

Know all men by these presents that we James Hennington as principal and Alex B. Moore as surety, are held and firmly bound unto Charles C. Stephens in the penal sum of eight hundred dollars, lawful money of the United States, for the payment of which we bind ourselves, our heirs, and executors, and administrators, jointly by these presents.

Witness our hands and seals this fourth day of January, A.D. 1861.

The condition of this Bond is such that whereas, heretofore, to wit, at the November Term of the Circuit Court of Boone County, Illinois, a certain suit in assumpsit pending in the said Court wherein the said James Hennington was defendant and the said Charles C. Stephens was plaintiff, and whereas, upon the trial of said suit at said November Term of said Court the issues in said cause were found for said Stephens, the

the said plaintiffs; and whereas the said Herrington asks the Supreme Court of the State of Illinois for a Supersedeas and Writ of Error Now therefore if the said James Herrington shall prosecute his said appeal with effect and shall pay and satisfy all costs and judgments which may be rendered by said Supreme Court, either upon affirmance of the judgment of said Circuit Court, or upon dismissal of the same by the said Supreme Court, then this obligation to be void, otherwise to be and remain in full force and effect.

Witness our hands and seals the day and year first above written.

James Herrington Seal

A D Moore Seal

State of Illinois }
Kane County } ss Henry B Peirce being first duly
sworn doth depose and say that he is well
acquainted with the pecuniary circumstances of Alex-
ander B Moore and considers him sufficient security
on the foregoing bond and amply able to pay the
penalty thereof

H. B. Peirce

State of Illinois }
Kane County } ss I Thomas le Moore Clerk
of the Circuit Court in and for said
County in the State aforesaid do hereby certify
that Henry B Peirce who is personally known
to me as the real person whose name is subscribed
to the foregoing affidavit appeared before me
this day in person and made oath to the said
affidavit in due form

Witness my hand and the seal of
said Court at Geneva this 8th day
of January A D 1861

T le Moore
Clerk

James Herrington

v

Charles C. Stephens

Susp'd Bond

Filed Feb. 13 1861

L. Leland

Clerk

United States of America } ss.
State of Illinois Kane County }

Pleas before the Honorable Isaac G. Wilson Judge of the Thirteenth Judicial Circuit of the State of Illinois, and presiding Judge of the Circuit Court of Kane County in the State aforesaid, at a regular Term of said Court, begun and held at the Court House in Geneva in said County on the Third Monday (being the Nineteenth day) of November in the year of our Lord One Thousand Eight Hundred and Sixty and of the Independence of the United States the Eighty Fifth.

Present, The Honorable Isaac G. Wilson Judge.
Edward S. Joslyn States Attorney.
Attest Ethan J. Allen Sheriff.
Paul R. Wright Clerk.

Be it remembered that heretofore, to wit, on the Thirty first day of March A. D. 1859. there was filed in the office of the Clerk of the Kane County Circuit Court a Praecipe, in the words and figures following, to wit;

State of Illinois } ss. Kane County Circuit Court
Kane County } May Term A. D. 1859.
Charles C. Stevens } Assumpsit
James Remington } Demand $2000.

The Clerk will please issue a Summons in the above entitled cause, returnable at the above Term, Directed to the Sheriff of said County to execute

Chas B. Wells

Geneva March 31st 1859. Atty for Plff.

Upon which appears the following endorsement, to wit,-

Filed March 31st 1859.

P. W. Wright Clerk.

And thereafter, to wit,- on the Thirty first day of March aforesaid, there was issued out of the Clerks office aforesaid, under the seal of the said Court, a Summons in the words and figures following, to wit,-

State of Illinois } ss.
Kane County } The People of the State of Illinois to the Sheriff of said County, Greeting:

We command you that you Summon James Herrington, if he shall be found in your County, personally to be and appear before the Circuit Court of said County on the first day of the next Term thereof, to be holden at the Court House, in Geneva, in said County, on the third Monday of May next, to answer unto Charles C. Stephens in a plea of Assumpsit, to the damage of said Plaintiff as he says in the sum of Two Thousand Dollars

And have you then and there this writ, with an endorsement thereon, in what manner you shall have

executed the same.

Court Seal.

Witness Paul R. Wright, Clerk of our said Court, and the Seal thereof, at Geneva, in said County, this 31st day of March A.D. 1859.

P. R. Wright Clerk.

Upon which appear the following endorsements, viz:- Executed this Writ this 25th day of April A.D. 1859 by reading the same to James Herrington.

Ethan J. Allen
Sheriff of Kane County
by A. E. Lewis Deputy.

Also,

Filed April 25 1859

P. R. Wright Clerk

And afterwards, to wit on the Fourth day of May in the year last aforesaid there was filed in the Clerks office aforesaid a Declaration, in the words and figures following, to wit:-

State of Illinois } Kane County Circuit Court
Kane County } May Term 1859.

Charles B Stephens plaintiff in this suit by Charles B. Wells his Attorney, complains of James Herrington defendant in this suit of a plea of Trespass on the case upon promises; For that whereas the said Defendant, heretofore, to wit, on the 30th day of March in the year of our

Lord One thousand eight hundred and fifty nine at the County of Kane and State of Illinois, was indebted to the said Plaintiff in the sum of two thousand dollars for goods then and there sold by the Plaintiff to the said Defendant at his request; and in the sum of two thousand dollars for work then and there done, and materials for the same, provided by the Plaintiff for the said Defendant at his request; and in the sum of two thousand dollars for money then and there lent by the Plaintiff to the said Defendant; at his request;- and in the sum of two thousand dollars for money then and there paid by the Plaintiff for the use of the said Defendant at his request;- (and in the sum of two thousand dollars for money then and there received by the Defendant for the use of the Plaintiff) and in the sum of Two thousand dollars for interest then due from said Defendant to said Plaintiff for the loan and forbearance of larger sums of money before then by the said Plaintiff loaned and advanced to the said Defendant at his request; and in the sum of two thousand dollars for money found to be due from the said Defendant to the said Plaintiff upon account then and there stated between them. And in consideration of said indebtedness the Defendant then and there promised the Plaintiff to pay him the several moneys aforesaid upon request.

Nevertheless, the said Defendant (although often requested, &c to wit;- on the day when the said money be

came due and payable, according to the tenor and effect thereof, and oftentimes since, to wit, at the place aforesaid) has not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said Plaintiff, but to pay the same or any part thereof to the said Plaintiff, the said Defendant has hitherto altogether refused, and still doth refuse, to the damage of the said Plaintiff of two thousand dollars, and therefore the said Plaintiff brings suit &c

Chas B. Wells Atty for Plff.

Copy of account declared on.

James Herrington

to Charles C. Stephens Dr

To goods sold delivered	———	$2000.
" Work & Labor		2000
" Money lent		2000
" " paid &c		2000
" " had & received &c		2000
" Interest due &c.		2000
" a/c stated		2000
" Money lent		2000

Wells for Plff.

Upon which appears the following endorsement, to wit:

Filed May 4 1859

P. R. Wright Clerk.

And afterwards, to wit on the 18th day of May A.D. 1859 there was filed in the office of the Clerk

of the said Court a certain plea in the words and figures following, to wit;-

State of Illinois } ss. Kane County Circuit Court
Kane County } May Term 1859.

6830 James Herrington
ats
Charles C. Stephens } Assumpsit.

And now come the said defendant by Plato & Harvey his Attorneys and defends the wrong and injury when &c and says that he did not undertake or promise in manner and form as the said Plaintiff in his said declaration hath above complained against him, and of this the said Defendant puts himself upon the country &c
And the said Plaintiff doth the like. Wells & Mayborne Attys for Plff.

Plato & Harvey
for Deft.

Upon which appears the following endorsement, to wit:
Filed May 18 1859
P. R. Wright Clerk

And afterwards, to wit, on the 18th day of May last aforesaid, the same being one of the days of the May Term of the Kane County Circuit Court A. D. 1859 the following, among other proceedings, was had and entered of Record in said Court, to wit;-

6838 Charles C. Stephens
v
James Herrington } Assumpsit.

This day comes the Defendant by Plato & Harvey his Attorneys and moves for a Rule upon the Plaintiff to file a bill of particulars herein.

And afterwards, to wit;- on the 20th day of May A.D. 1859 there was filed in the office of the Clerk of the said Court, an Affidavit in the words and figures following, to wit;-

State of Illinois } Kane County Circuit Court
Kane County } May Term A.D. 1859.

Charles C. Stephens
v
James Herrington } Charles C. Stephens first being duly sworn doth depose and say that his claim in the above entitled cause against the defendant is for the sale of his said affiants undivided one half interest of a Stock of Hard Ware Tin Ware Stoves &c to the said defendant which he owned in connection with Simon Kimm in Geneva in said County worth about Two Thousand dollars which said interest in said Stock of Hard Ware &c was so sold to said Defendant in bulk without taking an Inventory or account of Stock & said defendant was put into pos-

session of said Stock & has since remained in possession, & it is therefore out of the power of this affiant to give a Bill of Items of his claim against the defendant.

Sworn and subscribed to before me this 19th day of May A.D. 1859. P.R. Wright Clerk } Chas C. Stephens

On which appears the following endorsement, to wit:

Filed May 20 1859

P.R. Wright Clerk.

And afterwards, to wit; on the 20th day of May A.D. 1859 the same being one of the days of the May Terms aforesaid of the Kane County Circuit Court the following, among other proceedings was had and entred of Record, to wit;-

6830 Charles C. Stephens v James Herrington } Assumpsit.

This day comes the Plaintiff by Wells his Attorney and files his Affidavit in answer to defendants motion for Bill of particulars whereupon said motion is overruled.

And afterwards, to wit. on the 25th day of November A.D. 1859, the same being one of the days of the

November Term of the Kane County Circuit Court A.D. 1859, the following, among other proceedings was had and entred of Record in said Court, to wit;-

6830 Charles C. Stephens
v
James Herrington
} Assumpsit.

This day comes the Plaintiff by Wells & Mayborne his Attorneys and the Defendant by Plato & Harvey his Attorneys also come, and on motion of the Plaintiff it is ordered by the Court that a jury come, whereupon come a jury of good and lawful men of the County, to wit;
Samuel Maw, L. C. Carlow, Byron Kendall, Albert Cripps, T. L. Alexander, John Boyd, George Marshall Daniel Smith, William Warford, Lucien N. B. Burr, Benjamin A. Read, & John Cox, who are severally tried elected and sworn to try the issue herein, and after hearing a portion of the evidence, the Jury are allowed by the Court to separate and meet the Court on the coming in thereof tomorrow morning.

And afterwards, to wit, on the 26th day of November A.D. 1859 it being one of the days of the November Term of the Court last aforesaid, the following, among other proceedings was had and entred of Record in said Court, to wit;

6830 Charles C. Stephens
v
James Herrington
} Assumpsit

This day come ~~again~~ the parties to this suit by their respective attorneys, and the Jury heretofore impannelled herein also come, and after listening to the remainder of the evidence, the arguments of counsel, and instructions of the Court the Jury retire to consider of their verdict. Subsequently the Jury return into Court, and for a verdict upon their oaths do say, We the Jury find the issues joined for the Plaintiff and assess his damages at the sum of Two Hundred and fifty eight dollars. Which is ordered by the Court to be entered of Record. Thereupon comes the Defendant and moves for a new trial herein.

And afterwards to wit, on the same day, it being yet one of the days of the said November Term of the said Court, there was filed in the office of the Clerk of said Court a verdict in the words and figures following, to wit;

We the Jurors in the suit of

Charles C. Stevens
vs
James Herrington

} find for the Plaintiff and assess the damages at $258 00/100 Two Hundred and fifty eight dollars

John Cox Foreman.

Upon which appears the following endorsement, viz,-

Filed Nov 26 1859

P. R. Wright Clerk.

And afterwards, to wit,- on the 17th day of December, A.D. 1859 the same being one of the days of the November

Term of the said Court, the following, among other proceedings was had and entred of Record, to wit;-

6830 Charles C. Stephens
v
James Herrington } Assumpsit.

This day it is ordred by the Court that the Defendants motion for a new trial herein, be continued to the next Term of this Court.

And afterwards, to wit on the 21st day of February A.D. 1860, it being one of the days of the February Term of said Court, the following, among other proceedings, was had, and entred of Record in said Court, to wit,-

6830 Charles C. Stephens
v
James Herrington } Assumpsit.

This day come the parties to this suit by their respective Attorneys, and the Defendants motion for a new trial entred herein at the last Term of this Court coming on to be heard, after argument of Counsel the Court being fully advised, sustains said motion and orders the verdict of the jury heretofore entred herein, to be set aside and a new trial granted. Thereupon comes the Plaintiff by Wells & Mayborne his Attorneys, and on his motion it is ordred by the Court that the Plaintiff have leave to amend his declar-

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ation and add new counts.
And afterwards, to wit, on the 22d day of February A.D. 1860 there was filed in the office of the Clerk of said Court, an amended Declaration in the words and figures following to wit;-

State of Illinois } ss. Of the February Term of the Kane
Kane County } County Circuit Court for 1860.

Charles C. Stephens plaintiff in this suit by Charles B. Wells his Attorney complains of James Herrington Defendant of a plea of trespass on the case upon promises. For that whereas heretofore to wit on the Ninth (9) day of March A.D. 1859 at the Village of Geneva in the County of Kane and State of Illinois, the said plaintiff was engaged in conducting, managing and carrying on a hard Ware Store in the said Village of Geneva in Equal Copartnership with one Simon Krom under the name style and firm of Stephens and Krom. And whereas the Stock of Hard Ware in said Store of the said Stephens and Krom including the Stock of Goods or hardware on hand and in said Store. Book Accounts, Notes & debts due or to become due to said firm and the Sett of Tinners Tools then in use in said Store and belonging to said Firm and one Iron Safe in use of said Firm and belonging to said Stephens were then and there of great value and worth a large sum of money to wit the sum of Four Thousand dollars and the plaintiffs individual interest in the said Stock of Hard Ware then in said Store and the debts notes

and Book Accounts and Sett of Tinnus Tools in said Store and in use and the Iron Safe in use by said Firm and belonging to said Stephens was worth a large sum of money to wit, the sum of Two Thousand dollars as the said Defendant then and there had full knowledge and in consideration that said Plaintiff would then and there at the special instance and request of the said Defendant sell and deliver to him the said Defendant all his interest in said Firm of Stephens and Krom which included his interest in said Stock of Hard Ware in bulk then in said ston and his interest in the debts due the said Firm including Notes Book Accounts and the sett of Tinnus Tools then in said Store and the Iron Safe used by said Firm and belonging to said Stephens, he the said Defendant then and there agreed and promised that is to say, to assume and pay one half of all the debts owing by the said Firm of Stephens and Krom or that they were holden for and to keep and protect said Stephens free and harmless from all debts and claims then outstanding against said Firm of Stephens and Krom and for which they were liable; and also allow or pay to the said Krom his said Stephens individual account on the Books of said Stephens and Krom, and to pay him the sum of Three Hundred and Fifty Dollars ($350) in money.

And the said plaintiff in fact saith that he, confiding in the promises and undertakings of said Defendant as aforesaid, and afterwards, to wit, on the Ninth (9) day of March A.D. 1859 at Geneva in the said County of Kane

and State of Illinois did sell and deliver to said Defendant on the terms aforesaid his interest in said Stock of Hard Ware, Notes Book accounts, Debts, Sett of Tinners tools and one Iron Safe aforesaid.

Yet the said Defendant, not regarding his said promises and undertakings, but contriving, and wrongfully and unjustly intending craftily and subtley to defraud the said plaintiff in that behalf did not nor would pay to the said plaintiff the said sum of Three Hundred and Fifty dollars ($350) when afterwards requested so to do by said Plaintiff, to wit, on the twentieth day of March A.D 1859, to wit, at Geneva in the County and State aforesaid but hath hitherto wholly neglected and refused and still neglects and refuses so to do, to the damage of said plaintiff of Two Thousand dollars, for that whereas the said Defendant on the twentieth day of March A.D. 1859 at Geneva in said County of Kane and State aforesaid was indebted to the said plaintiff in the sum of Two Thousand dollars for the price and value of Goods and Chattels then and there sold and delivered by the said plaintiff to the said Defendant at his request and in the sum of [illegible] thousand dollars for the price and value of work then and there done, materials for the same provided by the said plaintiff for the defendant at his request and in the sum of Two Thousand dollars for money then and there lent by the said plaintiff to the defendant at his request, and in the like sum of two thousand dollars for money then and there paid

by the said plaintiff for the use of the said Defendant at his request, and in the like sum of Two Thousand dollars for money then and there had and received by the Defendant for the use of the said Plaintiff; and in the like sum of Two Thousand dollars for interest due from the said Defendant to the said plaintiff for and in respect of the said Plaintiff having forborne and given day of payment of money due from the defendant to the said plaintiff at the Defendants request, for a long time then elapsed and in the sum of Two thousand dollars for money found to be due from the Defendant to the said plaintiff on an account then and there stated between them. And whereas the said Defendant afterwards, to wit, on the day and year last aforesaid in the place and County last aforesaid, in consideration of the premises respectively promised to pay the said several sums of monies respectively to the said plaintiff on request yet he hath disregarded his said promises and hath not paid any of the said monies or any part thereof to the plaintiffs damage of Two Thousand dollars thereupon he brings his suit &c.

Chas B. Wells
Attorney for Plaintiff.

Copy of Plaintiff's Account.

James Herrington Dr to Charles C. Stephens

to goods sold and delivered	D 2000
" work and labour	2000

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" money lent 2000
" money received 2000
for interest 2000
on account stated 2000
Money due for goods sold as in the first
Count of this Declaration mentioned by
the plaintiff to the Defendant of 2000

An which appears the following endorsement
Filed Febry 22d 1860
P. R. Wright Clerk.

And afterwards, to wit, on the 27th day of February
A. D. 1860, the same being one of the days of the February
Term of said Court, the following, among other pro-
ceedings was had and entered of Record in said
Court, to wit; -

6830 Charles C. Stephens
&
James Herrington } Assumpsit

This day comes the plaintiff
by Wells and Mayborne his Attorneys and moves for
a Rule upon the defendant requiring him to plead
to the plaintiffs amended Declaration filed herein
and it is thereupon ordered by the Court that the
Defendant be ruled to plead to said Declaration
by Monday next, to which ruling of the Court

the Defendant by Plato his Attorney excepts. And the Defendant, by his Attorney aforesaid moves for a Continuance herein on account of material amendments of the plaintiffs declaration which motion is resisted by the plaintiff. After argument of counsel, the Court being fully advised, sustains said motion and orders the trial of this case continued to the next Term of this Court.

And afterwards, to wit, on the 5th day of March A. D. 1860 there was filed in the Clerks office of the said Kane County Circuit Court a certain "plea" in the words and figures following, to wit:—

James Herrington } February Term A. D. 1860
atts
Charles E. Stephens } To amended declaration.

The said defendant, by his Attorney says that he did not undertake and promise in manner and form as the plaintiff has above thereof complained against him in his (said defendants) second count ("Common Count") and of this puts himself upon the country &c

Plato & Harvey D/s Atty.

Upon which appears the following endorsement, viz.—

Filed March 5th 1860

P. R. Wright Clerk.

And afterwards, to wit, on the day last aforesaid there was filed in the Clerks office of the Court aforesaid a Demurrer in the words and figures following, to wit,

Kane County Circuit Court.

James Herrington
atts
Charles C. Stephens

} February Term A. D. 1860.

And now comes the said defendant, by his Attorney, and says that the first count of the said Plaintiffs amended Declaration is not in law sufficient for the said Plaintiff to have and maintain his said suit; wherefore on account of said insufficiencies the said Defendant prays judgment &c.

Plato & Barney Ffs Attorney

Special causes

1st No averment that Stephens & Kenyon owed at the time of alleged sale any amount

2nd No averment that payment was made before suit was commenced.

3rd No proper averment that the plaintiff owned the goods and that he sold them to Defendant.

4th No averment of what was owned by the Firm and what by Stephens individually.

5th Said Count is argumentative and uncertain It is "whereas" and not "aver"

Upon which appears the following endorsement, viz

Filed March 5th 1860

P. R. Wright Clerk.

And afterwards, to wit, on the Ninth day of March A.D. 1860 the same being one of the days of the said February Term of the said Court the following among other proceedings was had and entered of Record in said Court, to wit;

6830 Charles C. Stephens
v
James Herrington } Assumpsit.

This day comes the Plaintiff by Wells and Mayborne his Attorneys and the Defendant by Plato and Herrington his Attorneys also comes, And the defendants demurrer to the first Count of the Plaintiffs declaration coming on to be heard, after argument of Counsel, the Court being fully advised, overruled said demurrer to which decision of the Court in overruling the demurrer the defendant by his Attorneys aforesaid excepts, and elects to stand by his demurrer. Thereupon comes the Plaintiff by his Attorneys aforesaid, and enters a Nolle Prosequi as to all the common counts of his declaration.

And afterwards, to wit, on the Twenty third day of

May A. D. 1860 the same being one of the days of the May Term of the Kane County Circuit Court the following, among other proceedings was had and entered of Record in said Court, to wit;-

6830 Charles C. Stephens
v
James Herrington } Assumpsit.

This day comes the Plaintiff by Wells & Mayborne his Attorneys, and the defendant by Plato his Attorney also comes, and moves the Court for leave to file the General issue plea to the Special count of the plaintiffs declaration, which motion is denied by the Court, to which ruling of the Court the defendant by his counsel excepts. It is therefore ordered by the Court that the Plaintiff have judgment against the defendant by default for want of a plea, for his damages and costs herein, said damages to be assessed by the Court. And after hearing the evidence, the Court assesses the Plaintiffs damages at the sum of Three Hundred and Seventy one dollars, which is ordered to be entered of Record. Thereupon the Defendant, by his Attorney aforesaid, moves to set aside the said Assessment.

And afterwards, to wit, on the 22d day of June A. D. 1860 the same being one of the days of the May Term

of the said Court, the following, among other proceedings was had and entred of Record in said Court, to wit;-

6830 Charles C. Stephens
v
James Herrington } Assumpsit.

This day comes the Plaintiff by Wells & Mayborne his Attorneys, and the Defendant by Plato & Herrington also comes, and the defendants motion to set aside the assessment heretofore entred herein coming on to be heard, after argument of counsel, the Court being fully advised, sustains said motion, and orders a new assessment of damages be made by the Court.

Present
Hon I.G. Wilson J.
A.B. Coon S.A.
D. Clark . S.
I.C. Moore Clk.

And afterwards, to wit,- on the Fifteenth day of December A.D. 1860, the same being one of the days of the November Term of the Kane County Circuit Court, in the State aforesaid, the following, among other proceedings, was had and entred of Record in said Court, to wit;-

6830 Charles C. Stephens
v
James Herrington } Assumpsit

This day comes the Plaintiff by Wells & Mayborne his Attorneys, and the Defendant

by Plato and Harvey his Attorneys also comes, and this cause coming on to be heard befor the Court for the assessment of damages, after hearing the evidence the arguments of counsel, the Court, being fully advised, assesses the Plaintiffs damages, at the sum of Three Hundred and Eighty four dollars and fifty six cents.

$384 56/100

It is therefor considerd by the Court that the plaintiff have and recover of the defendant the sum of Three Hundred & Eighty four dollars and Fifty six cents. for his damages, assessed as aforsaid, and also his costs in this suit expended & that he have judgment and execution therefor.

And thereupon again comes the Defendant by his Attorney and excepts to the finding of the Court here in and prays an appeal to the Supreme Court, which is allowed by the Court on condition that the Defendant file his Bond, in pursuance of the Statute in such case provided, with A. B. Moore as surety in the sum of Eight Hundred dollars, and also his Bill of Exceptions herein, within twenty days from this time.

And afterwards, to wit, on the Seventh day of January A. D. 1861, there was filed in the office of the Clerk of the Kane County Circuit Court aforesaid a Bill of Exceptions in the words and figures following, to wit;—

State of Illinois } ss
Kane County } Kane County Circuit Court.
November Term 1860

Charles C. Stephens
v
James Herrington } Assumsit

Be it remembered that on one of the days of the said November Term of the Kane County Circuit Court A. D. 1860 the above entitled cause coming on to be heard before the Hon Isaac G. Wilson Judge of said Court, upon assessment of damages, without the intervention of a Jury, default having been heretofore entered herein, the plaintiff, in order to establish his damages, introduced as a witness A. L. White, who being sworn testified as follows, to wit, - Knew the firm of Stephens & Krum Know the time that Stephens left the firm; had a conversation with defendant about that time; he wanted to sell me Stevens interest in the Hard Ware Store; he went on and related what he had in; he told me Stevens had four hundred or five hundred dollars in and the rest they were owing for, and that would have to be paid to Stevens, and the rest I could have time for; he said Stevens had put in between four hundred and five hundred dollars; that would be all the money I would have to raise to go in with Krum; he said Stevens had offered it to him on certain terms, that he could buy it

cheaper of Stevens than I could; cant recollect exactly what he said; it is almost impossible for me to recollect precisely what he said. I went into the Store, and Mr Knuen and Mr Herrington were there. Defendant solicited me to buy Stevens interest, he called it the Stevens interest he said the thing was failing, and that Stevens had got discontented and wanted to go to Pikes Peak. He said he (Defendant) was holden on some notes and didnt feel secure secure and that he had bought it back or was going to buy it back of Stevens; my best recollection is he said he had bought it back; think it was in the Spring of 1859 should say it was after townmeeting, that is my impression.

Cross Examination - Had only the one conversation; at this time and up to this time Stevens had been about town; he said he wanted me to buy the Stevens interest; used the word Stevens; I didnt mean to be understood on my direct examination that he said he wanted to buy Stevens interest, He called it the Stevens interest; he said Stevens had put in four or five hundred dollars, and that would have to be paid; I did understand that Defendant had an interest in having a sale made I understood that I was to buy from Defendant he wanted I should buy from him, that is as I understood it. Herrington was liable on some that

had been bought before Stevens went in; my best recollection is that there were two or three notes that Defendant and Krumm were owing on their original purchase of about six hundred dollars each; Krumm was present during part of this conversation; have stated all the conversation that I recollect; my best impression is, it was after town meeting.

Direct resumed. Was in conversation an hour or more. Defendant did most of the talking.

Cross Examination resumed. I understood from Defendant that he had to buy Stevens' interest to secure himself; he said he didnt want to buy as he had other business; said he didnt feel safe; that there was no security for anything; he said it was a profitable business; he said he was engaged in the mill.

Samuel Fletcher, a witness produced and sworn on the part of the Plaintiff testified as follows; - Had a conversation with Defendant a little while after the Plaintiff went out of the concern; Knew that he and Krumm had been in business together; The conversation was a little before I built the Hard Ware store. It was in the street by Pattens Store; he (defendant) said he would let me have half of the Hard Ware store for Six Hundred dollars & share along with Mr Krumm; I was to pay one half of the outstanding debts

of which my share would be about two hundred dollars to be paid in two or three months; the debt was four hundred dollars, and my share would be two hundred dollars nothing paid by securing by mortgage; I went to see the goods afterwards and told Mr Krum I should have nothing to do about it; it was early in the Spring of 1859.

Cross Examination. Had talked with Krum about it before.

This was all the testimony offered by the plaintiff in the cause.

The Defendant then called Simon Krum a witness, who being sworn, testified in substance as follows. Think I heard a conversation between White and Defendant but cant recollect what it was, it was sometime in Spring of 1859. Know of only one conversation, dont know whether the conversation was before or after Stevens went out; my best recollection is, it was after Stevens went out; recollect this paper (paper shown witness) couldnt say whether the conversation was before or after this paper; think it was after the paper was signed; dont think my recollection is as good now as when I swore before. I remember the fact of their conversation. I recollect this paper, think the conversation might have been two weeks after this paper dont swear positively as to the time. Think my recollection when last sworn, would be better than now

Poor had no interest in the concern, at the time the paper was drawn, Stevens left the concern the day this paper was drawn. The first that I knew that Stevens had sold out was the day this paper was executed.

Question. Do you know of Defendant paying Stevens anything or paying others for Stevens?

To the asking and answering the above question the Plaintiff objected, and the Court overruled such objection to which the Plaintiff excepted. We paid in Chicago to Suthill, Hibbard & Co two hundred and twenty dollars. Defendants share would be one hundred and ten dollars; defendant also became accountable for Stevens account in the Store; dont know the amounts; Defendant also assumed one half of the indebtedness of the concern; could tell by looking. Stevens and Krumm owed about Two Thousand dollars, and defendant assumed one half when he came in, for the payment of which he provided. Was acquainted with the Stock of goods, at the time this paper was executed. Knew what Stevens interest was worth in it.

(The Defendants Attorney then asked the witness the following question.)

Question. What was that interest worth, if anything, after assuming to pay one half of all debts owing by said firm of Stevens & Krumm, or that they were holden for, and to keep and protect said Stevens free and harmless from all debts and claims

then outstanding against said firm of Stevens and Kruon, and for which they were liable, and also to allow or pay to the said Kruon his (Stevens) individual account on the books of said Stevens & Kruon?
To the asking and answering such question the Plaintiffs Counsel objected. The Court sustained such objection and overruled the question. To the ruling of the Court in sustaining such objection, and in not allowing said question to be asked and answered by the witness, the defendant then and there excepted.
The amount of Stevens' account was Three Hundred and and twenty one dollars.

Cross Examination That account accrued when Stevens was in company with me. Mr Poor assumed it; Herrington first assumed it; Herrington came to me first and said he was to pay one half of the indebtedness and also Stevens account on the Book; the date of the writing was Ninth of March A.D. 1859; that was about the day Herrington bought Stevens out. I paid the account to Suttle, Hibbard & Co we hind the money. Mr Herrington and myself. the borrowed money was paid after Poor came in as a partner. Herrington when he came back assumed one half of the indebtedness, the one half of the two hundred and twenty that Herrington and I borrowed to pay Suttle, Hibbard & Co was afterwards

paid by Krum and Poor. Herrington did not actually pay anything.

Direct resumed. On the day of the date of this paper (9th March) Herrington and Stearns were in the Store; we had received letters from Chicago notifying us that some of our notes were due. I told Stevens and Herrington that arrangements must be made to pay them (the notes) Stevens then said that I might consider Herrington in, that he had sold out to him, this was before the paper was signed, the same day. Mr Herrington replied that that should be understood that he had agreed to it, had before heard Herrington say that he talked of buying Stevens out. I dont think I had heard Stevens speak of it until that day; think he offered to sell to me before that. Upon reflection I think I had heard Stevens and Herrington talk about trading before that day; cant state the conversation that occurred between them before.

Cross examination resumed. Since the adjournment of Court last evening defendant has been trying to refresh my memory.

Direct resumed. Herrington wanted me to look over the books and papers and see if I could not refresh my memory in relation to the date of the conversation.

The above and foregoing is all of the evidence either offered or given on the trial of said cause.

The Court, on the Fifteenth day of December, being one of the days of the said November Term as aforesaid, assessed the plaintiffs damages at three hundred and Eighty four dollars and fifty six cents, whereupon the Defendant moved the Court to set aside the assessment of damages and for a new trial in this cause, which motion was by the Court overruled. To the ruling of the Court in overruling such motion, the defendant then and there excepted and prayed an appeal to the Supreme Court of the State of Illinois, which is allowed. The Defendant therefor presents this his Bill of Exceptions and asks that it may be signed and sealed by the Court. Which is done.

Isaac G. Wilson (Seal)

Upon which appears the following Endorsement to wit.

Filed Jan 7 1861

T. C. Moon Clerk.

State of Illinois }
Kane County } ss

I Thomas C. Moon Clerk of the Kane County Circuit Court, in the State of Illinois do certify that the foregoing is a complete Record of

the proceedings had in said Court, together with a Copy of the Bill of Exceptions in the case of Charles C. Stephens against James Herrington

Witness Thomas C. Moore Clerk of said Court and the Seal thereof this 8th day of January A. D. 1861.

T C Moore
Clerk

Supreme Court of the State of Illinois — April Term 1861 —

James Herrington
vs
Charles C. Stevens
} Error to Kane

And now comes the said James Herrington plaintiff in Error by T. Lyle Dickey his attorney — & says that in said record proceedings & judgment there is manifest error — and prays that said judgment & proceedings may be reversed & for naught held

And said plaintiff presents the following assignment of errors —

1st The Circuit Court erred in over-ruling the demurrer of the defendant below to the Special Count in said declaration —

2nd The Circuit Court erred in refusing to permit defendant below to plead —

3rd The Circuit Court erred in excluding proper evidence

4th The Circuit Court erred in

admitting improper testimony

4th The circuit court erred in refusing to set aside the last assessment of damages

5th The Court Erred in rendering judgment for the wrong plaintiff

6th The court erred in rendering judgment for the plaintiff below in the manner in which the same appears

T. Lyle Dickey
for
pltff in Error

Charles C Stephens

13 v 47

James Herrington

Record

Filed February 13. 1860

L. Lebaron

Clerk