

14394

No. _____

Supreme Court of Illinois

Barclay

vs.

Ross.

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 186

Barclay
vs
Ross
14394

1863

W. H.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1868.

ROBERT BARCLAY }
 vs. } *Appeal from Mercer.*
HARVEY L. ROSS. }

BRIEF AND POINTS OF APPELLEE.

I.

1. The plaintiff below agreed to make a *conveyance*, which does not mean a *deed with covenants of general warranty*. There is no averment of fraud or deception in either of the pleas.

The defendant, in the third plea, avers that the notes were given in consideration of the conveyance of certain land by plaintiff below and his wife to defendant, by a *deed with covenants of general warranty*, &c. To this plea, plaintiff craves oyer of the bond, because it contained matter qualifying the part stated in the plea, and because the bond was not truly stated, thereby making it a part of the plea, and thereupon demurred to the plea. This was the proper course, and the demurrer was properly sustained, because the bond set out on oyer did not require the plaintiff to make a "deed with covenants of general warranty."

1 Chitty Pl. 666.

2. The 3^d plea also sets forth, that before plaintiff was to deed the land, he (defendant) *was to pay the money*, and fails to show that he ever paid or offered to pay the money. As drawn, the plea alleges two independent covenants.

1st. That defendant was to pay the money.

2d. After such payment, plaintiff was to make a deed ; *but not such a deed as the plea calls for.*

Under this plea the defendant must allege either *a payment or tender* of the money. *Being eady* to pay does not fill the contract as alleged.

3. The 3d plea is also contradictory in this :

1st. It alleges the consideration of the notes was the *conveyance by plaintiff, by a good and sufficient deed of conveyance with covenants of general warranty*, of the land.

2d. It alleges that the consideration of the notes was title bond, obligating himself to convey.

Now, here is a plain and obvious contradiction. A "conveyance" is not a "title bond," and *vice versa*. For this reason, also, this plea was bad.

II.

1. The 4th plea proposes, in the commencement, to answer both the first and second counts, and only answers one count in the conclusion, without stating which. The commencement of the plea is as follows :

"And now comes the said defendant, and for further plea in this behalf, by leave of the Court first had and obtained, and defends, &c., when, &c., as to said first count, and says, as to said second count, that the sole and only consideration of the note sued on in said count, and also of another note, and which is described in said first count, was a certain title bond," and sets out the bond *hæc verba*. Then he says, "and said defendant further avers, that both of said notes described in said title bond have long since and before the commencement of this suit, become due according to their tenor and effect," &c., and concludes as

follows: "and the defendant in fact says, that the consideration of said note has wholly failed, and this he is ready to verify, whereupon he prays judgment if the said plaintiff should have or maintain his action ~~in~~ said Court, described and alleged," &c.

Which note? Which count?

2. It is totally defective for uncertainty.

Nagy vs. Lane, 3 Scam. 237.

3. If the plea was intended as an answer to both the first and second counts, it could not be sustained. The payment of the first note was independent, and plaintiff was entitled to a recovery as to that note, without a tender of a conveyance on his part.

Duncan vs. Charles, 4 Scam. 561.

4. Where an agreement for a conveyance, without covenants of warranty, is set up as a defense to the payment of the notes given in consideration therefor, it is no defense to the payment of the notes that the plaintiff had no title, or had conveyed the land to some other person, unless there was some fraud or deceit on part of the plaintiff.

Kirkland vs. Lott, 2 Scam. 14.

Snyder vs. Laframboise, Breese, 343.

5. This plea fails to state that the notes sued on are the same notes mentioned in the bond.

6. The plea is also defective in defendant failing to aver a tender of the money, or at least a readiness and willingness to perform on his part, and accept the conveyance for; *non constat*, he was unwilling on his part to perform the contract and accept the conveyance, and had so notified the plaintiff, which would render it unnecessary for the plaintiff to make a tender of the deed.

Sage vs. Ranney, 2 Wend. 532.

Morton vs. Lamb, 7 Term. R. 125.

West vs. Emerson, 5 Johns. 179.

Rawson vs. Johnson, 1 East, 203.

Robb vs. Montgomery, 20 Johns 15.

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Robb vs. Montgomery, 20 Johns 15.

See precedent for such pleas in such case

Glazebrook vs. Woodward, 8 Term. 374.

7. There are also two distinct defences set up by this plea.

1. That plaintiff failed to make a deed according to the stipulations of the bond.

2. That plaintiff had no title to the land, and that the consideration for the note has failed.

The demurrer was therefore properly sustained.

C. M. HARRIS,
H. M. WEAD, and
A. G. KIRKPATRICK,
Pl. Appellees.

Barclay
vs
Ross

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pt 1863

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1863

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

ROBERT BARCLAY }
vs. HARVEY L. ROSS. } *Appeal from Mercer.*

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Court

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C. M. HARRIS,
H. M. WEAD, and
A. G. KIRKPATRICK,
For Appellee.

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Barclay

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Brief of Appelle

Filed May 1st 1833
L. Leland
Clerk

Supreme Court of Illinois,
THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

ROBERT BARCLAY,

vs.

HARVEY L. ROSS.

APPEAL FROM MERCER.

BRIEF.

This was an action of assumpsit, brought by appellee, to recover the amount of two notes of \$250 each.

3 The declaration alleges in the

1st Count: That on the 22d of June, 1858, defendant made to plaintiff his note for \$250, due January 1st, 1860, with 10 per cent. after maturity, that it is over due, unpaid, &c.

4 2d Count: That on the 22d of June, 1858, defendant executed and delivered to the plaintiff, another note for \$250, due January 1st, 1861, with ten per cent. after maturity, that it is over due, unpaid, &c.

7 3d Count: Includes the common counts—Pleas General Issue—Joinder to this.

10 Plea to 2d Count.

That the sole consideration of the note described in the count was that this note, and the one named in the 1st Count, were given by defendant, to plaintiff, in consideration that the plaintiff and wife should, by warrantee deed, convey to defendant the S.W. $\frac{1}{4}$ 25—13—4.

- 11 That at the time of the execution and delivery of the notes, the plaintiff, as the sole and only consideration for said notes, executed and delivered to defendant a title bond, &c., in the final sum of \$1,000, conditioned that if said plaintiff and wife should make, or cause to be made to defendant a warrantee deed to said land, on the payment of the notes described in 1st and 2d counts, when due then said bond to be void, &c. That defendant was, at the time the notes became due, ready and willing to pay the notes, and ever since has been, but plaintiff did not, at the time mentioned in the bond, nor has he since made, or caused to be made, to said defendant a
- 12 warrantee deed of said premises, and has never tendered defendant such a deed.

Demurer to plea craving oyer of bond.

- 13 Further plea as to said 2d count alleges that the sole and only consideration of the note, and also a note mentioned in 1st count, was a certain title bond, and the covenants therein contained as follows:

Know all men by these presents that I, Harvey L. Ross, of the county of Fulton, and State of Illinois, am held and firmly bound to Robert Barclay in the penal sum of \$1,000 good and lawful money of the United States, for the payment of which well and truly to be made, I bind myself, my heirs, my executors, and administrators firmly by these presents: dated this 22d day of June, 1858.

- 14 Now the consideration of the above obligation is such that if the said H. L. Ross shall make, or cause to be made, a deed of conveyance from himself and wife to the said Robert Barclay, for the S.W 25—13 N. 4 W., on the payment of two promisory notes, bearing even date with this instrument, and calling for \$250 each, one due the 1st of January, 1860. and the other due the 1st of January 1861, with ten per cent. interest on said notes after they are due, then the above obligation to be void, otherwise to remain in full force and virtue. Given under my hand and seal this 22d day of June, 1858.

HARVEY L. ROSS, [SEAL.]

And the defendant avers that both of said notes described in said title bond, have long since, and before the commencement of this suit, became due, according to their tenor and effect; and the said defendant further avers that although the said notes became due by their tenor and effect long before the commencement of this suit, said plaintiff, in fact, says that the said plaintiff did not make or cause to be made to said defendant, from the said plaintiff and wife, a deed of conveyance to said real estate at any time before the commencement of this suit, and that neither at the time of the making of said title bond, nor at any time since, has the said plaintiff had any title whatever to said land; and so the defendant says that the consideration of said note has wholly failed, &c.

15 Demurer to said plea.

Demurer sustained to both of said pleas last set forth.

16 Trial by the court on the plea of General issue and joinder, finding for the plaintiff, and damages assessed at \$591.24, April 23th, 1862.
Motion for a new trial, and in arrest of judgment.
Overruled by the court. Exception by the defendant.
Judgment in favor of plaintiff for \$591.24 and costs.

BILL OF EXCEPTIONS.

The plaintiff read in evidence notes as follows :

\$250. On or before the 1st of January, 1860, for value received, I promise to pay H. L. Ross, or bearer, two hundred and fifty dollars, with ten per cent. interest after maturity. June 22, 1858.

ROBERT BARCLAY.

\$250. On or before the 1st of January, A. D., 1861, for value received, I promise to pay H. L. Ross, or order, two hundred and fifty dollars, with ten per cent interest after maturity. June 22, 1858.

ROBERT BARCLAY.

This was all the evidence.

ERRORS ASSIGNED.

1st. The court erred in sustaining the said plaintiff's demurer to the said 3d and 4th pleas of defendant, and each of them.

2d. The court erred in finding for said plaintiff.

3d. The court erred in overruling the motion for a new trial, and in arrest of judgment, and each of them.

4th. The court erred in rendering judgment aforesaid in manner aforesaid.

5th. The court erred in assessing plaintiff's damages at \$591.24.

POINTS FOR APPELLANT.

The 3d plea is good, the making of the deed for the land sold, for which the notes were given, and the payment of the notes were concurrent, and dependants acts.

Bank of Columbia v. Hayner, 1 Peters, 455.

Tyler v. Young, 2 Scam., 444.

Mason v. Wait, 4 Scam., 135.

The 4th plea is good; in addition to the facts stated in the 3d plea, it is averred that the plaintiff, at the time he sold the land for which the notes were given, had no title to the land, and has had no title since.

Davis v. McVickers, 11 Ill., 329.

Gregory v. Scott, 4 Scam., 393.

Duncan et al., v. Charles, 4 Scam., 467.

The judgment was for too much, for the pleas to the second count are certainly both good, as shown by all the authorities above cited, and judgment ought only to have been rendered upon the 1st count in any event.

The amount of the note in the 1st count mentioned was upon the day judgment was rendered, only \$308.11, and the court found the damages to be \$591.24.

The condition of the record was as follows :

To the 1st count the general issue was pleaded.

And to the 2d count was pleaded the two special pleas which all the authorities above cited show, were each good and sufficient answers to that count.

But the court sustained a demurrer which had been filed to the pleas, and rendered judgment upon both counts. This was plainly error.

GLOVER, COOK & CAMPBELL,

Attorneys for Appellant.

Barclay

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Ross

absts of Brief

Filed May 12, 1863
L. Leland
Clerk

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State of Illinois Mercer Circuit Court
Mercer County^s April Term (21st) 1862

Pleas before the Honorable Charles B. Lawrence Jud^{ge} of
of the tenth Judicial Circuit of the State of Illinois
at a Court began and held at the Court House in
the town ofledo in said County on the third
Monday in the month of April in the year of our
Lord One thousand eight hundred and Sixty two
it being the 21st day of said month in said year

Present

Honorable Charles B. Lawrence Jud^{ge}
James K. Stewart States Attorney
Anderson K. Rodgers Sheriff
James M. Mannon Clerk

Be it known that heretofore to wit on the 11th day of March 1862
came Harris & Young attorneys of this Court and filed
the Clerk's office of said Court a Receipt for Summons
in the word and figure following to wit:

"State of Illinois } April Term 1862 of the Circuit Court
County of Mercer } of said County.

Harvey L. Ross

Respondent on the case on promise

Robert Barclay } Damages \$1000.

The Clerk of said Court will in said case
please issue Summons Harris & Young
Attys for Plff

Upon the filing of which Receipt for Summons
Summons issued against the said Robert Barclay

in the words and figures following to wit:

State of Illinois The People of the State of Illinois,
Mercer County To the Sheriff of Mercer County, Greeting:

We Command you to Summon Robert Barclay if he 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 held at the Court House inledo, on the third Monday of April next, then and there to answer unto Harveyl. Ross of a plea of Trespass on the case upon promises to be damages in the sum of One thousand (1000) Dollars as he says and have you then, then and this writ and make return thereon in what manner you see to the same.

Witness James M. Marrison Clerk of our Circuit Court and the seal thereof, at Iledo this 11th day of March 1862
year of our Lord one thousand eight hundred and Sixty two
J. M. Marrison Clerk

By N. O. Brown Deputy

Upon the back of which summons is the following endorsement to wit:

I have served the within summons by reading the same to the within named Robert Barclay this 15th day of March 1862
S. H. Rodgers Sheriff

Filed 15th March 1862

J. M. Marrison Clerk

And afterwards to wit: on the 18th day of March 1862 came the said attorney Harriest Young and filed in said Clerk's Office a Declaration in the above stated case in the words and figures following to wit:

State of Illinois } ss In the Circuit Court of said County
Mercer County } April Term A.D. 1862

Harvey S. Rofs the Plaintiff in this suit complains of Robert Barclay the Defendant in this suit, who has been summoned to answer unto the Plaintiff in a plea of trespass on the case upon promises: For that whereas the said Defendant, heretofore, to wit, on the twenty second (22) day of June A.D. 1858 at the County of Mercer and State of Illinois, made his certain promissory note in writing to the said Plaintiff in the name of H. S. Rofs, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby, then and there promised to pay to the said Plaintiff or bearer the sum of two hundred and fifty (250) dollars, on or before the first (1) of January A.D. 1860 with ten per cent interest after maturity, for value received, and then and there delivered the said promissory note to the said Plaintiff: by means whereof, and by force of the Statute in such case made and provided, the said Defendant then and there became liable to pay, to the said Plaintiff the said sum of money in the said promissory note; and being so liable, he the said Defendant, in consideration thereof, afterwards, to wit, on the day and year first aforesaid at the County aforesaid, undertook, and then and there faithfully promised the said Plaintiff to pay him the said sum of money in the said promissory note specified, according to the tenor and effect thereof. And also for that whereas the said Defendant, heretofore, to wit, on the twenty second (22) day of June A.D. 1858, at the County of Mercer and State of Illinois, made his certain other promissory note in writing to the said Plaintiff in the name of H. S. Rofs, bearing date a certain day and year therein mentioned, to wit, the day and year last aforesaid, and thereby then and there promised to pay to the said Plaintiff or order, the sum of two

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hundred and fifty (250) dollars, on or before the first (1) of January
AD 1861, with ten per cent interest after maturity for value received, and
then and there delivered the said promissory note to the said Plaintiff,
by means whereof, and by force of the Statute in such case made and
provided, the said defendant then and there became liable to pay, to the
said Plaintiff, the said sum of money in the said promissory note; and being
so liable, the said defendant, in consideration thereof, afterward, to wit,
on the day and year first aforesaid, at the County aforesaid, undertook,
and then and there faithfully promised the said Plaintiff to pay him
the said sum of money in the said promissory note specified, according
to the tenor and effect thereof. And also for that whereas the said
defendant, on the ~~the~~ first of January AD 1860, at the County aforesaid
was indebted to the said Plaintiff in the sum of two hundred and fifty
(250) dollars, for money then and there lent by the Plaintiff to the
defendant at his request. And in the sum of two hundred and fifty
(250) dollars for money then and there received by the defendant for
the use of the Plaintiff; And in the sum of two hundred and fifty (250)
dollars for money found to be due from the defendant to the Plaintiff
on an account then and there stated between them. And also for that
whereas the said defendant, on the first of January AD 1861, at the County
aforesaid, was indebted to the said Plaintiff in the sum of two hundred
and fifty (250) dollars for money then and there lent by the Plaintiff
to the defendant at his request. And in the sum of two hundred and
fifty (250) dollars for money then and there received by the defendant
for the use of the Plaintiff; And in the sum of two hundred and fifty
(250) dollars for money found to be due from the defendant to the Plaintiff
on an account then and there stated between them; and the defendant
afterward, on the day and year last aforesaid, in consideration of the
premises respectively, then promised the Plaintiff to pay the said several

moneys respectively to the said Plaintiff on request; yet he hath disregarded his promises, and hath not paid any of the said moneys or any part thereof, though often requested so to do; to the Plaintiff's damage of one thousand (1000) dollars, and therefore he brings this suit, &c.

Warrior & Young
Atty: for Plaintiff

Copy of Note sued on

\$250.

Ow or before the 1st of January 1860 for value recd. I promise to pay H. S. Rops or bearer two hundred and fifty dollars with ten per cent interest after maturity. June 22. 1858

Robert Barclay

\$250

Ow or before the 1st of January AD 1861, for value recd. I promise to pay H. S. Rops or order two hundred and fifty dollars with ten per cent interest after maturity. June 22. 1858

Robert Barclay

Copy of Account sued on

January 1, 1860	Robert Barclay to Harvey S. Rops	Dr	
" " "	To money lent you at your request		\$ 250
" " "	To money had and received		\$ 250
" " "	To money due on account stated		\$ 250
January 1, 1861	To money lent you at your request		\$ 250
" " "	To money had and received		\$ 250
" " "	To money due on account stated		\$ 250

And afterwards, to wit, on the 24th day of April AD 1862 came the aforesaid defendant, by his Attorney, and filed his pleas in said case, which pleas are in the words and figures following, to wit:




6
State of Illinois, } ss
County of Mercer }

Circuit Court 3^d April Term 1862

Harvey S. Rofs vs. Robert Barclay.

And the said Defendant by the
1 say his Attorneys, comes & defends &c when &c and says that the said
Plaintiff ought not to have or maintain his aforesaid action thereof
against him, because he says that the sole and only consideration
of the promissory notes sued on in this action and described in Pffs.
first & second Comts. of said Declaration was, a certain title bond
and the covenants therein contained, executed by the said Plaintiff to
the said Defendant and bearing date a certain day & year therein
mentioned to wit; on the 22^d day of June AD 1858 under the hand and
seal of said Plaintiff and then & there delivered by the said Plaintiff to
the said Defendant to wit, at the County aforesaid. And which said
bond or writing obligatory is now to the Court here shown and is in the
words & figures following to wit: "Know all men by these presents that
" J. Harvey S. Rofs of the County of Fulton and State of Illinois am held
" firmly bound to Robert Barclay in the penal sum of one thousand
" good and lawful money of the United States for the payment of which
" and truly to be made I bind myself, my heirs, executors and administrators
" firmly by these presents. Dated this 22nd day of June 1858.
" Now the consideration of the above obligation is such that if the said
" H. S. Rofs shall make or cause to be made a deed of conveyance from
" himself and wife to the said Robert Barclay to the S.W. 25 1/2 24th and
" the payment of two promissory notes bearing even date with this instru-
" ment and calling for Two hundred and fifty dollars each, one due
" the 1st of January 1860 and the other due the 1st of Jan 1861 with ten
" per cent interest on said notes after they are due then the above obli-
" gation to be null and void, otherwise to remain in full force and virtue

Given under my hand and seal this 22nd day of June 1858

Harvey L. Prop 

And the said defendant avers that the notes sued on in this action & described in said first & second counts of said declaration are the identical notes described in said title bond or writing obligatory. And the said defendant further avers that he has at all times when said notes became due & payable and ever since & now is ready & willing to pay the same and the interest legally due thereon according to their tenor and effect, but the said Plaintiff did not at the time mentioned in said title bond or writing obligatory for the making thereof, make or cause to be made to the said defendant a deed of conveyance to the land therein in said title bond or writing obligatory described, from himself and wife nor has he at any time since before the commencement of this suit. And the said defendant further avers that the said Plaintiff did not, nor did any one for him, offer a deed of conveyance to said land from him the said Plaintiff & said Plaintiff's wife, to said defendant at the time specified in said writing obligatory or title bond for the making thereof nor at any time since before the commencement of this suit, but so to do hath hitherto wholly neglected and refused. And the said defendant further avers that the said promissory notes mentioned in said title bond or writing obligatory are the only supposed causes of action sued on in this suit: And this he is ready to verify, wherefore he prays judgment if the said Plaintiff ought further to have or maintain his aforesaid action thereof against him &c. Thompson & Ray Attys. for Deft.

2 And for further filed in this behalf the said defendant comes & defends the wrong & injury, when &c and says that he did not undertake & promise in manner & form as herein above alleged & charged against him in the said Plaintiff's declaration & of this he puts himself upon the country &c And Plaintiff doth like
Thompson & Ray Attys. for Plffs. Thompson & Ray, Defts. Attys.

And for further plea in that behalf the said Defendant comes & defends &
 and says that said Plaintiff ought not to have or maintain his aforesaid
 action against him, because he says that the said several promissory notes
 described in the first & second counts of said Declaration are the same
 only supposed causes of action sued on in this suit and that they were
 given by said Defendant to said Plaintiff solely and only in consideration
 of the conveyance by said Plaintiff & his wife to said Defendant, by a
 good and sufficient deed of Conveyance with covenants of general Warranty,
 of the following described real estate, lying & being in the County of Mercer
 & State of Illinois & described as being the South West quarter of Section No.
 Twenty five (25) in Township Thirteen (13) North in Range Four (4) West,
 containing 160 acres of land more or less; that at the time said notes were
 executed & delivered by said Deft. to said Plff. the said Plaintiff as sole
 & only consideration thereof, made, executed & delivered to said Defendant
 Title Bond or writing obligatory, under his hands & seal, and which is now
 to the Court here shown, bearing date a certain day & year therein mentioned
 to wit, on the 2^d day of June AD 1858 at the County aforesaid, in and by
 which said bond or writing obligatory the said Plaintiff bound himself to
 the said Defendant in the penal sum of One thousand dollars, for the payment
 of which the said Plaintiff therein bound himself, his heirs, executors & admin-
 istrators firmly, to said Defendant, with a condition thereunder written that
 if the said Plaintiff & wife should make or cause to be made to the said
 Defendant, a good and sufficient deed of conveyance with covenants of
 general Warranty to the said land, on the payment to said Plaintiff of the
 said promissory notes described in said first & second Counts of said
 Declaration, with the interest at two per centum per annum after said
 notes should become due, by the said Defendant, then the said writing
 obligatory or Title Bond should be void, otherwise to be & remain in full
 force & effect. And the said Defendant further avers that he has at all

times when said notes became due & has been ever since & is now ready & willing to pay said notes & the interest thereon according to their tenor & effect, but that the said Plaintiff did not at the time mentioned in said Title Bond or writing obligatory nor has he at any time before the commencement of this suit, make or cause to be made to the said Defendant a good & sufficient deed of conveyance with covenants of general warranty from him & his wife to the said Defendant to the said tract of land. And the Defendant further avers that the said Plff. did not, nor did any one for him, tender to said Defendant a good and sufficient deed of conveyance with covenants of general warranty, from the said Plaintiff & his wife, of said land, at the time specified in said Title Bond or writing obligatory for the making thereof nor at any other time before the commencement of this suit, but so to do hath hitherto wholly neglected and refused and still does neglect & refuse. And this he is ready to verify, wherefore he prays judgment if the said Plaintiff should further have and maintain his aforesaid action thereof against him &c

Thompson & Ray Attys for Defendant

And afterwards, to wit, on the same day and year last aforesaid came said Plaintiff by his Attorneys & filed his demurrer to Defendants pleas No one and there therein as follows, to wit:

State of Illinois }
 County of Mercer } April term A.D. 1862 of the Circuit Court of said County.

Harvey L. Ross }
 vs } In Assumpsit
 Robert Barclay }

Defendant comes and defends &c and says that pleas One and Three of said defendant herein and each of them are in law insufficient.

Warrior & Young
 Attys for Plff

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And afterward, to wit, on the 25th day of April 1862, being one of the days of the April term 1862 of said court, the following order was made in said case, to wit:

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Harvey L. Ropf }
 vs } Assumpsit.
 Robert Barclay }

This cause now coming on to be heard on Plaintiff's demurrer to Defendant's pleas No one & three, the court takes the same under advisement.

And afterward, to wit, on the 26th day of April 1862, being one of the days of said April Term 1862 of said court, the following order was made in said case, to wit:

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Harvey L. Ropf }
 vs } Assumpsit.
 Robert Barclay }

This cause now coming on again to be heard on Plaintiff's demurrer to Defendant's pleas, No's one and three, and the court being now fully advised in the premises sustains said demurrer. Whereupon, on Defendant's motion leave is given to file additional pleas herein by Monday morning next.

And afterward, to wit, on the 28th day of April 1862 came said Defendant, by his attorneys and filed his amended plea, No three, wherein are follows, to wit:

3/11/62

And for further plea in this behalf, as to the 3rd count the said Defendant comes & defends &c and says that said Plaintiff ought not to have or maintain his aforesaid action against him in that event because he says that the said promisory note described in the second count of said Declaration was, was with the one sued on in first count given by said Defendant to said Plaintiff solely and only in consideration of the conveyance by said Plaintiff & his wife to said Defendant, by a good and sufficient deed of conveyance with covenants of general warranty, of the

following described real estate, lying & being in the County of Mercer State of Illinois & described as being the South West quarter of section No Twenty four (20) in Township Thirteen (13) North in Range Four (4) West containing 160 acres of land more or less; that at the time said notes were executed & delivered by said Def. to said Plff. the said Plaintiff, as the sole & only consideration therefor, made, executed & delivered to said Defendant a Title Bond or writing obligatory, under his hand and seal, and which is now to the Court here shown, bearing date a certain day & year therein mentioned, to wit. on the 22 day of June A.D. 1858 at the County aforesaid, in and by which said bond or writing obligatory the said Plaintiff bound himself to the said Defendant in the penal sum of One thousand dollars, for the payment of which the said Plaintiff therein bound himself, his heirs, executors & administrators firmly, to said Defendant, with a condition thereunder written that if the said Plaintiff & wife should make or cause to be made to the said Defendant, a good and sufficient deed of conveyance with covenants of general warranty to the said land, or the payment to said Plaintiff of said promissory notes described in said first & second counts of said Declaration, with the interest at ten per centum per annum after said notes should become due, by the said Defendant, then the said writing obligatory or title bond should be void, otherwise to be & remain in full force & effect. And the said Defendant further avers that he has at all times when said notes became due & has been ever since & is now ready & willing to pay said notes & the interest thereon according to their tenor & effect, but that the said Plaintiff, did not at the time mentioned in said title bond or writing obligatory nor has he at any time before the commencement of this suit, make or cause to be made to the said Defendant a good & sufficient deed of conveyance with covenants of general warranty from him the said Plaintiff & his wife to the said Defendant to the said tract of land. And the Defendant further avers that the said Plff. did

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not nor did any one for him, tender to said Defendant a good and sufficient deed of Conveyance with covenants of general warranty, from the said Plaintiff his wife, of said land, at the time specified in said title bond or writing obligatory for the making thereof nor at any other time before the commencement of this suit, but so to do hath hitherto wholly neglected and refused and still does neglect & refuse. And this he is ready to verify. Wherefore he prays judgment if the said Plaintiff should further have any remedy in his aforesaid action in said second count declared on thereof against him or

Thompson May Atty for Defendant.

And afterward, to wit, on the day and year last aforesaid came the Plaintiff by his Attorneys and filed his demurrer to Defendant's amended plea No three, herein as follows, to wit:

State of Illinois } April Term AD 1862 of the Circuit Court of said County
County of Mercer }

Harvey L Rofs }
vs } In Assumpsit
Robert Barclay }

Said Plaintiff comes &c and

craves oyer of the writing obligatory and the condition thereof in Defendant's amended plea thirdly above pleaded and the same with such condition is read to him in the words and figures following to wit: Know all men by these presents, that I Harvey L Rofs of the County of Fulton and State of Illinois am held and firmly bound to Robert Barclay in the penal sum of one thousand Dollars good and lawful money of the United States for the payment of which well and truly to be made I bind myself, my heirs, executors and administrators firmly by these presents dated this 22 day of June 1858. Now the consideration of the above obligation is such that if the said H L Rofs shall make or cause to be made a deed of Conveyance from himself and wife to the said Robert Barclay

to the \$ 25- 13 or 24 on the payment of two promissory notes bearing
 even date with this instrument and calling for two hundred and fifty
 dollars each, one due 1st January 1860 and the other due the 1st of Jan 1861
 with ten per cent interest on said notes after they are due then the above
 obligation to be null and void otherwise to remain in full force and virtue.
 Given under my hand and seal this 22nd day of June 1858. Harvey S. Ropf
 And having heard the same and such conditions thereof says that said
 amended plea is in law insufficient. Harris & Young Atty. for Plff.

And afterwards to wit, on the 28th day of April 1862, came the Defendant
 by his attorneys and filed his additional plea herein as follows, to wit:

State of Illinois }
 Mercer County } ss Circuit Court April Term 1862
 Harvey S Ropf }
 vs } Assumpsit.
 Robert Barclay }

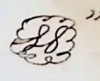
No 4

And now comes the said Defendant + of
 further plea in this behalf, by leave of the Court first doct
 as to said 1st Count
 + obtained, and defends +c when +c as says as to the second Count in said
 declaration that the sole and only consideration of the Note sued on in
 said Count + also of another Note + which is described in said first Count,
 was a certain title bond and the covenants therein contained executed
 by the said Plaintiff to the said Defendant bearing date a certain day +
 year therein named to wit: the 22^d day of June 1858 + is in the
 figures following to wit: "Know all men by these presents that I
 S. Ropf of the County of Fulton and State of Illinois am held and bound
 bound to Robert Barclay in the penal sum of One thousand dollars
 good and lawful money, of the United States for the payment of which
 well and truly to be made I bind myself, my heirs, executors and admin-
 istrators firmly by these presents, dated this 22nd day of June 1858. Now

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the consideration of the above obligation is such that if the said H. S. Roff shall make or cause to be made a deed of conveyance from himself and wife to the said Robert Barclay to the S^W 25-13 N 4 W on the payment of two promissory notes bearing even date with this instrument and calling for two hundred and fifty dollars each, one due the 1st of January 1860 and the other due the 1st of Jan 1861 with two per cent interest on said notes after they are due then the above obligation to be null and void otherwise to remain in full force and virtue. Given under my hand and seal this 2nd day of June 1858.

Harvey S. Roff 

And the defendant further avers that both of said notes described in said title bond have long since before the commencement of this suit become due according to their tenor and effect. And the said defendant further avers that although the said notes became due by their tenor & effect before the commencement of this suit, said Plaintiff in fact says that the said Plaintiff did not make or cause to be made to said defendant from the said Plaintiff & his wife, a deed of conveyance to said real estate at any time before the commencement of this suit and that neither at the time of the making of said title bond nor at any time since has the said Plaintiff had any title to said land. And so the defendant in fact says that the consideration of said note was wholly failed. And this he is ready to verify. Wherefore he prays judgment if the said Plaintiff should have or maintain his action in said Court described & alleged &c

Thompson & Hay Def's Atty^r

And afterwards to wit, on the 28th day of April 1862 came the Plaintiff by his attorneys and filed his demurrer to Defendants additional plea herein as follows to wit:

State of Illinois } April Term AD 1862 of the Circuit Court of said County
 County of Mercer }

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Harvey L. Rofs }
vs } In Assumpsit
Robert Barclay }

Said Plaintiff comes and vs and says
that the additional plea first above pleaded says that
it is in law insufficient. Harris Young Atty. for Plff.

And afterwards to wit, on the said 28th day of April 1862, the following
proceedings were had in said court, to wit:

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Harvey L. Rofs }
vs } Assumpsit
Robert Barclay }

Now comes Plaintiff by his Attorney and
enters his motion to strike Defendant's amended Pleas
3 + plea 104 from the files.

And afterwards, to wit on the same day and year last
aforesaid, the following order was made in said case, to wit:

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Harvey L. Rofs }
vs } Assumpsit
Robert Barclay }

This cause now coming on to be heard on
Plaintiff's demurrer to Defendant's third amended plea and
fourth plea herein, the court sustains said demurrer.

And afterwards to wit, on the 28th day of April 1862, being one of the days
of the April Term 1862 of said court, the following proceedings were had
in said court in said cause, to wit:

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Harvey L. Rofs }
vs } Assumpsit
Robert Barclay }

This day came the parties by their Attorneys
issue being joined, waived a jury and for trial submitted
this case to the court. And the court having heard the evidence finds the

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issues for the Plaintiff. Whereupon Defendant enters his motion for a new trial and in arrest of judgment, which the Court overrules, and orders that judgment be rendered on the finding. And the Court having assessed Plaintiff's damages at the sum of Five Hundred and Ninety one dollars and twenty four cents, orders that Plaintiff recover of Defendant the said sum of Five Hundred and Ninety one dollars and twenty four cents the damages aforesaid, together with his costs herein, and may have execution therefor. Thereupon Defendant excepted to the ruling of the Court in overruling his motion for new trial and in arrest and in rendering judgment on the finding, and prayed an appeal to the Supreme Court which is allowed on condition that he file an Appeal Bond herein in the penal sum of twelve hundred dollars with John S. Thompson as security within thirty days from the date hereof.

And afterward to wit, on the 28th day of April 1862 came the Defendant by his Attorneys and filed his bill of Exceptions herein in the words and figures following, to wit:

State of Illinois } ss

Mercer County } Circuit Court To April Term AD 1862

Harvey S. Rofs

vs Assumpsit

Robert Barclay

Be it Remembered that on the trial of this Cause the Plaintiff to maintain the issue on his part offered in evidence two promissory notes

of which the following are copies:

\$250. On or before the 1st of January 1860 for value recd. I promise to pay H. S. Rofs or bearer two hundred and fifty dollars with ten per cent interest after maturity. June 22, 1858. Robert Barclay.

\$250 On or before the 1st of January AD 1861 for value recd I promise to pay H. S. Rofs or order two hundred and fifty dollars with ten per cent interest after maturity. June 22, 1858 Robert Barclay

and the same were admitted in evidence without objection, by the Court.
This was all the evidence in the case. Whereupon the Court found the
issue for the Plaintiff and assessed his damages at Five Hundred and
Ninety one dollars and twenty four cents whereupon the Defendant moved
the Court for a new trial & in arrest of judgment for the following reasons.
1st that the Court erred in finding the issue for the Plaintiff & the
Court erred in assessing the damages at Five Hundred and Ninety
one dollars and twenty four cents but the Court overruled the motion for
new trial & in arrest of judgment and entered judgment on the finding as
follows: This day came the parties by their Attorneys, issue being joined,
trailed a jury and for trial submitted this case to the Court, and the
Court having heard the evidence finds the issue for the Plaintiff.
Whereupon Defendant enters his motion for a new trial and in arrest
of judgment, which the Court overrules, and orders that judgment be rendered
on the finding. And the Court having assessed Plaintiff's damages at the
sum of Five Hundred and Ninety one dollars and twenty four cents, orders
that Plaintiff recover of Defendant the said sum of Five Hundred and
Ninety one dollars and twenty four cents the damages aforesaid, together
with his costs herein, and may have execution therefor. Thereupon Defendant
excepted to the ruling of the Court in overruling his motion for new trial
and in arrest, and in rendering judgment on the finding, and prayed
an appeal to the Supreme Court which is allowed on condition that he
file an Appeal Bond herein in the penal sum of twelve hundred dollars
with John O. Thompson as security within thirty days from the date hereof,
to which decision of the Court in overruling said motions and entering
judgment on said finding the said Defendant by his Counsel in open
Court then & there objected and excepted and still objects & excepts.
Inasmuch as all the foregoing facts do not appear of Record, the said Defendant
prays that this his Bill of Exceptions may be signed and sealed & made
a part of the record, which is done accordingly. L. B. Laurence Seal

And afterward, to wit: on the 24th day of May 1862 came the Defendant and filed his Bond hermit as follows, to wit:

Know all men by these presents that We Robert Barclay as principal and John C Thompson as security of the County of Mercer and State of Illinois, are held & firmly bound unto Harvey S Ropf in the special sum of Three Hundred Dollars for the payment of which well & truly to be made, we bind ourselves, our heirs, executors & administrators, firmly, jointly & severally. Witness our hands & seals this 24th day of May A D 1862. The Condition of the above obligation is such that whereas on the 28th day of April A D 1862 at a Circuit Court in and for the County of Mercer & State of Illinois, at the April Term A D 1862, the above named obligee, Harvey S. Ropf recovered a judgment against the above bounden Robert Barclay in an action of Assumpsit for the sum of Three Hundred. Ninety one Dollars and twenty four cents. Damages and his costs in said suit, from which said judgment the said Robert Barclay then & there prayed for and obtained from said Court an appeal to the Supreme Court of the State of Illinois. Now if the said Robert Barclay shall well & truly pay whatever judgment, costs, interest and damages shall be rendered therein by said Supreme Court in case the said judgment shall be affirmed and shall duly prosecute his said appeal, then the above obligation to be void; otherwise to be & remain in full force and effect.

Robert Barclay Seal

John C. Thompson Seal

Filed 24th May 1862.

J. M. Mannon clk

State of Illinois / Mercer County & J. James M. Mannon Clerk of the Circuit Court in and for said County certify that

the foregoing is a full true and complete copy of the concerning
Order of Court as the April Term AD 1862 of the above named Court
of the Precept for Summons filed; of the Summons issued in the above
dated case with the return thereon made by the Sheriff of said County
of the Declaration filed in said case; of the Pleas Numbered One
two and three filed by Defendants attorney; of the Demurrers to
pleas Number one and three; of the plea amended Plea
number three; of the demurrers to amended plea number
three; of the additional plea filed and the demurrers to the
additional plea filed, and a full and true copy of all orders of Court
made in said case also a true and perfect copy of the Bill of Exception
and appeal bond filed in said case and which includes a full
and complete copy of all the record and files in said case
in said Court all of which appears to me from the books and
files of my office

In Testimony of all which I hereto subscribe
my name and affix the seal of our said Court
in my Office in Toledo this 2nd day of April
A.D. 1863.



J. M. Johnson Clerk
By H. P. Brown Deputy

Now comes the said Appellant
Robert Barclay by Glover, book keeper
and says that in the Record
of proceedings aforesaid and in the ven-
dition of judgment ~~to~~ in manner aforesaid
there is manifest error
in this to wit (over)

1st. The court erred in sustaining the said plaintiff's demurer to the said 3d and 4th pleas of defendant, and each of them.

2d. The court erred in finding for said plaintiff.

3d. The court erred in overruling the motion for a new trial, and in arrest of judgment, and each of them.

4th. The court erred in rendering judgment aforesaid in manner aforesaid.

5th. The court erred in assessing plaintiff's damages at \$591.24.

Glover, back Campbell
for Appellant

And now comes the said defendant
by H. M. Wood his attorney says that
no such error hath intervened as
is set forth above & that he prays
may be required of by the court
By H. M. Wood his attorney

1876
Robert Barclay
vs
Harvey A. Ross
Rec'd

Filed April 22nd 1883
L. Deland
Clerk