

14512

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 183

1863

Morgan
vs
Pelt

14512

SUPREME COURT OF ILLINOIS.

Third Grand Division.—April Term, 1863.

EDMUND P. MORGAN,	} <i>Plffs. in Error,</i>	} <i>Error to Peoria Cir. Court.</i>
RALPH R. ROOT,		
vs.		
ERASTUS PEET, <i>Defendant in Error.</i>		

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This was an action of assumpsit brought by said Plffs. in Error, remote endorsees, against said Erastus Peet, first endorser, to the August Term, 1861, of the Circuit Court of Peoria County. The declaration filed July 22, 1861, contains 3 special counts and the common counts. The first count sets out, (p. 3,) that the firm of Burdick & Peet, consisting of B. Burdick and Nelson Peet, on the 27th Aug., 1860, at Cleveland, Ohio, viz: at said Peoria Co., made their promissory note in writing, promising to pay at the Bank of Commerce, Cleveland, Ohio, to said Erastus Peet, the defendant, at 60 days from date, \$304⁴⁰, value received, and delivered the same to Deft., who then and there endorsed it to one M. A. Earl, who then and there endorsed it to Plffs.—that Plffs. presented said note for payment, at maturity, at said Bank of Commerce, that payment was refused, and that thereby, by the laws of Ohio, where said contract was made, Deft. became liable to pay said note on request—that being so liable he undertook, &c.

The second count sets out the execution and endorsement of said note as before, and avers that when said note fell due, and at all times since, said firm of Burdick & Peet and each member thereof, have and has been insolvent, and that suit against them would have been unavailing, whereby said Deft. became liable, and being so liable promised to pay, &c.

Said third count sets out execution, endorsement, &c., of the note, same as above, and avers that since making said note the firm of Burdick & Peet dissolved partnership and transferred their remaining property to Deft., with the understanding that he should pay said note—that since said note became due, Deft., in consideration thereof, and that Plffs. would forbear to sue said note till the latter part of June, 1861, promised to pay said note, before said last named time, with interest at the rate of 10 per cent. per annum from the time said note fell due—which time has elapsed, that Deft. thereby became liable, and being so liable, promised to pay, &c.

Pp. 8 & 9 Common counts—for goods sold and delivered, work and labor, money lent, and upon account stated, claiming \$400 in each—damages \$500.

P. 10. Copy of note sued on, with endorsements, for which see Bill of exceptions, p. 21.

P. 10. Aug. 8, 1861, plea of general issue filed by Deft.

17 Leave given Deft. to file additional pleas.

11 Nov. 14, 1861, Deft. files amended pleas, as follows :

1. To first count of declaration—that said note was made and endorsed in Peoria Co., Ill., and not in Ohio—that when said note fell due the makers were good for the amount, and that the same by due diligence might have been made, and that said makers then lived and still live in said Peoria County.

12 2. To whole declaration—that said note was made and endorsed by Deft. in Peoria County—that the makers, then, and still live there, and during all the time have had property, real and personal, out of which, by reasonable diligence, the amount of the note might have been made.

13 Replications of Plffs. to 1st amended plea, filed Dec. 3, 1861 :

1. Said note not made and endorsed in said Peoria Co.
2. That when said note fell due the makers were not good for the amount, and the same could not have been made of them by suit.

14 Special demurrer to 2d amended plea, filed Dec. 3, 1861.

17, 13. June 9, 1862, demurrer to 2d amended plea sustained and leave granted to plead double.

14 June 11, 1862,—further amended pleas to said 2d and 3d counts filed :

15 To 2d count, that when said note fell due and long thereafter, said Burdick & Peet were not insolvent, so that suit could have been availing.

15 To 3d count—that Burdick & Peet, since making note have not transferred their property to Deft., nor was there any understanding that Deft. should pay it, nor did Deft. promise to pay the same or any part of it.

Issue joined on both pleas.

18, 19, 20. Nov. Special Term, 1862—trial by jury. Verdict for Deft, and motion by Plffs for new trial. Motion continued to next Term.

20 Dec. Term, 1862, motion for new trial overruled. Judgment rendered against Plffs for costs and order of court entered, upon agreement of parties, that Bill of Exceptions be signed in vacation.

P. 21. Bill of exceptions, filed Feb. 14, 1863, sets out, that on the trial before the Court and a jury, the Plffs. read in evidence, first, the following note with endorsements, viz :

Endorsed, "Erastus Peet."
do. "M. A. Earl."

Pp. 21 & 22. Also, certificate of E. P. Ingersoll, Notary Public, showing presentation of note for payment, with protest for non-payment, and notice, all in due time.

P. 23. Plffs. next called William S. Moss, jr., who being duly sworn, said :
I have seen this note—the same read in evidence---before. First saw it about Feb. 25, 1861, when it came for collection, to J. K. Cooper, in letter from Plffs, in Ohio—I was then reading law as a student, in said Cooper's office, and knew when the letter and note came—I also know the time from entry made in docket kept by Cooper for purpose of minuting down memoranda of notes received for collection, and other business. A few days after the receipt of this note, about beginning of March, I think I went with it, at request of said Cooper, to try and get it paid, or secured—[I had understood Deft was the party expected to pay it,] (This testimony included in brackets excluded by the Court, and Plffs. excepted,) and went to his house, but he was not at home—I found, however, his son, Nelson Peet, of the firm of Burdick & Peet, and talked with him—also saw Burdick. On my return I met Deft. in the road and told him my business. As it was nearly dark, and Deft said he could not see well, he requested me to read the note to him, which I did, carefully, naming particularly the amount, names of parties and date—I also read the names of endorsers on back. Deft. then said he expected to have the note to pay, but had not the money then, but if Plffs would wait till June he would pay it—that he had corn enough to pay it, which he had hauled to Chillicothe, but the price was

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low and he did not want to sell then—thought corn would sell better about June, and wished me to write Plffs and tell them if they would wait till 20th of June, he would then pay the note, with ten per cent. interest, on it. I told him it was best to give himself time enough, but that I should want the money certainly at the time fixed, and if he would pay ten per cent. interest from the time the note fell due, he might have all of June to pay the note in. This he agreed to, and the time so specified was given by Plffs. At one of the interviews after this, in reply to an enquiry whether Burdick & Peet had not put property in his hands to pay the firm debts, he spoke of some sewing machines that had been left with him, but did not say they were left for that purpose. My enquiry arose from some remark he made, to the effect that the payment of the note would be a dead loss to him. He said also, he had put his name on the note to help his son, Nelson, who was in partnership with Burdick when the note was given. When I talked with Deft, the firm was dissolved, and Nelson was living at home with his father. Nothing was said then about Burdick & Peet, or either, having any property. Since then, and since this suit, some 6 to 8 months ago, Deft. called at my office to talk the matter over, and he then said Burdick had not much of any property. I said to him, Burdick never did have much of anything, did he? His reply was, he did not. At this last time, Deft said Nelson Peet was then between 21 and 22 years old—he also said he had no redress if he paid the note.

Cr. Ex. I have no interest in this suit—am not attorney in the case. This was old business of Mr. Cooper's, which he had on hand, before I went into partnership with him, with which I am not connected, as attorney. This note was received by Mr. Cooper, Feb. 25, 1861. Our partnership commenced May 1, 1861. I went to see Defendant about a week after the note came to hand—saw Burdick and young Peet and the old man, all on same day—no one else present when I saw Deft. Went in buggy—took my sister from Peoria to father's, left her there and went on alone. Nothing said by Deft at this time, about returning machines. Read the note to him—he said he would pay it. Did not tell Deft he was released, as endorsee—nothing said on that subject. Gave him no advice about his legal rights. Did not try to keep this from him—don't remember to have thought about his being released from payment. Interview in public road, no one else present. Said he would pay the note—not all legal demands. M. A. Earl spoken of--Defendant said he was a fine man. Witness then asked by Defendant's counsel what Defendant said, at second interview, about paying for sewing machines left at Chillicothe. Plaintiffs objected—Court overruled objection and allowed question to be put, and Plffs

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excepted. Witness then said: Defendant, at second interview, stated that what he said about paying in 1st interview, referred to two sewing machines sent by Earl to Burdick & Peet, after the others, which were shipped to, and still at Chillicothe, and if B. & P. would receive them, Deft would pay for them—they were worth from \$30 to \$35 apiece, he said.

RE-EX. by Plffs. I understood Deft to say he endorsed the note when given. He said Earl would not take the note unless he became security, and he did it to help his son. At my 1st interview with Deft nothing said about machines at Chillicothe. Plffs here rested.

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Tracy B. Burdick called by Deft, said: Am one of makers of note sued on. The other is Nelson Peet, son of Deft. Young Peet and I were partners and gave the note in our firm name. It was given to M. A. Earl, for 12 sewing machines—was executed and endorsed by Deft in Akron, Peoria Co. Ill., and mailed to Earl at Cleveland, Ohio. It was put in P. O. at Akron. It was endorsed by Deft same day it was made. Machines sent to us by express—bargained for them in writing. B. & P. owned six when note fell due. I had 3, and Nelson Peet 3—think this was so. Mine were at my house in Akron. Nelson lived at his father's and had his there. They were then good as ever—never were sold—not mortgaged. All are now in the hands of Wm. N. Peet. He had another machine when note fell due, called "Lester's Patent"—still has it—is worth \$60. Had also pair horses and double harness, some books, jewelry, notes and accounts. Horses and Harness worth \$250—had these when note fell due, and from 4 to 6 months after. Jewelry worth about \$15, books \$20. W. N. Peet not housekeeper then—I was. No incumbrance on this property. Nelson Peet had no other property. The firm had besides, a horse and single harness, with two spring wagons, one single—the other double. Harness worth \$20, horse worth \$150, double spring wagon \$75; single, \$50. This all mortgaged when note fell due, for \$250—\$35 paid, balance since paid—think the winter after note fell due. Have got this property yet, except double spring wagon. Other 6 machines sold, not good for anything. After running 4 or 6 weeks had to be every hour or two tinkered—were two-needled. The under needle would get loose—could not be remedied. I experimented with them over a year. Earl came out Dec. 1860, at my request—was here two weeks trying to make them run---would run a few minutes. Under needle can't be made to stay in its place. Don't know the maker—were patented by Daniel Harris, of Boston. Don't know that Earl was clerk of Plffs---don't know that Morgan & Root had any connection with the machines---none were good. 2 out of our 6 had been sold and returned---4 never

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P. 30. disposed of. Earl called on us for payment of note---said he was agent for Morgan & Root to collect it. We offered to turn out the machines on the note—he refused, saying he did not own the note. Before this Morgan & Root had written to us to pay the note. This the only effort to collect of Burdick & Peet, that I know of.

To all of this evidence, about consideration of note and defects of machines, Pliffs objected, when offered, but it was admitted by Court upon Deft's counsel stating that they expected to prove the Pliffs were not bona fide holders of said note, or that the same had been endorsed to them after it fell due. If not proved, Court said it would be excluded.

Deft then offered letter from Earl to Burdick, substantially as follows :

Cleveland, Cuyahoga Co., O., Sept. 3, 1859.

To P. Burdick :

P. 31. Dear Sir--Yours of the 29th came to hand, and in answer would say, my machines are of a good quality---made here and warranted---all tested and satisfy me---if imperfect are returned to maker. Warrant all that leave my office-- if defective will change them or refund money. Do n't wish to humbug any one---buyers can rely on what I say. Have as much right to sell out of this state as any one here, Braman & Co. not excepted, as the machines have been improved---are no more those sold by Braman than day to night. Don't know nor care how they heard I sent you circulars. Holden, one of the firm, was here when I mailed you the first. I have as good machines as they have in Cincinnati. Give me the other name for these machines, terms to agents, what they say about the Harris machines as a humbug, and confer a favor. Wish to act in a fair, business, and honorable way. Can prove mine are more saleable, larger, and not so complicated---will compare with them any time. You say I can't humbug you. I never thought of it---have n't been in the business long enough to put on such a face. You say you have written to B. & C. for machines, on certain conditions. Better order 3 or 4 from each place, and judge between them. I will send you 3 or 4 at 25 dollars each, or 10 or more at the same rate. They may send you as many, or more, but I can't afford mine any less. Tell me if they say my machines are worth less. Expect to be at the Ohio State Fair with my machines, and would like to see you there---I expect to get orders for 100 machines---if not, shall be disappointed. Do as you think best in the matter, and this letter will hold me responsible for all my machines.

Yours, &c.,

M. A. EARL.

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P. S Answer soon as convenient. I would have sent you more circulars, but just being out, have none to spare.

Yours, &c,

M. A. E

To reading of which Pliffs at time objected Objection overruled and same admitted with limitations as to further proof, as above.

Witness further testified: Firm of Burdick and Peet bought from Earl on terms of said letter—we sold on terms we bought. These machines not turned over to Deft, as consideration of liability to pay said note. He had no consideration for putting his name on the note, nor was he indemnified against liability. Two other machines were ordered before these for which the note was given, and which yet remain at the depot in Chillicothe, because they turned out bad.

P. 33.

CR. EX Earl came here about Dec. 1st, 1860. 'T was then he wanted pay on the note for Morgan & Root. Asked him if he would take back the machines for the note. He said, no, he din n't own the note. We had sold some of the machines then. This was first time Earl was here that I know of—we negotiated for the machines by letter. Had a good many letters from him. About 4 or 6 weeks before the lot came for which the note was given, we had a machine sent to us. The note was given for 12, which came to hand a number of months before the note was given. They were received, probably, in April or May—can't fix time certainly. The 2 at Chillicothe came between the 1st and the 12th. Partnership of Burdick & Peet began in fall of 1859. Machines were shipped to order of B. & P. We got them at Chillicothe. Probably sold three or four before we gave the note. The note was endorsed by Deft on day of date, and sent at once to Earl, at Cleveland, O., his residence. Deft got nothing for signing the note. Signed for the benefit of B. & P., as required by E., who required us to get some good endorser. I was called on for pay by none but Earl and Moss. Don't know time Moss came. Referred him to N. Peet, for payment. Had no machines then. Division was made a few days after Jan. 1, 1861, but to bear date from that time, which was time of dissolution. N. P. received 2 horses, harness and wagon, and all the sewing machines. When Earl came I had 3 and N. Peet 3. After division I had one horse, wagon, harness, some books, notes and accounts. I had the mortgaged property, except the 2 horse wagon, which Peet had.

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Olive Peet next called by Deft, said: Am daughter of Deft, and live with him. Was at home in the fall of 1860. Brother Wm. N.

Peet, or Nelson, as we call him, lived at home then. Had 3 sewing machines there then—Harrison's Patent—no other of that kind there. He owned, also, one of Lester's Patent—owned a span of horses, two horse spring wagon and harness. Only knew that they were selling books and jewelry. Burdick had a 1 horse wagon. Don't know that he took any sewing machines to father's. Don't know value of this property. Don't know that father had any interest in it. Burdick has one horse and wagon. One of brother's horses was sold in the winter of 1860-61. Earl out in fall of 1860—did n't see note, or hear anything said about it.

P. 35. Cr. Ex. Brother was between 20 and 21, in August, 1861. Sold one of his horses in winter of 1860-61, to William E. Smith, to pay debt, I think—brother and father disposed of it. Don't know what became of the wagon—2 machines there now. Were more when Earl there—do n't know how many—quite a number brought there in the summer. Do n't know if all or not. Do n't know about division, nor when Burdick & Peet dissolved. Suppose both horses gone—brother is in the army—went in 11th Illinois Cavalry, August, 1861. None of the property there now, except 2 machines. 1 horse disposed of in winter, or spring after Earl there.

William Evans called by Deft: Live in Chillicothe. Know Burdick & Peet. Had in my possession, in October, 1860, property as follows: Books worth \$22, jewelry \$15, teams 180 or \$190, double spring wagon 60 to \$65, double harness 10 to \$15, and a Lester's sewing machine, from 60 to \$75. Burdick had other property in his possession—saw him with horse, buggy and other sewing machines. Horse worth 140 to \$150, buggy 40 to \$50. Was employed to peddle by the month—thought Harris's patent sewing machines a perfect humbug---used one 4 or 5 months. Could sometimes make them work, sometimes not. Under needle could n't be made to work right.

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This evidence about deficiency of machines, objected to by Plffs, and admitted by Court as before.

CR.-EX. (of Evans.) I had possession of this property, October 20, 1860---do n't know what became of it after this. Some taken by Burdick, some by Peet. I gave up the Lester machine sometime in January, 1861---got it in August or September---could n't sell it---thought it good---did n't make any great effort to sell it. Commenced on April 24, 1860, and continued to canvass for sale of other machines till Oct. 1860. Burdick & Peet received one before I commenced—do n't

know how long. They had received one in the winter previous---do n't know whether this one sold---don't know if tried. Selling price of these was \$30. I delivered one and got 15 or \$16 on it. Delivered another in Chillicothe to paid for, if it worked. It didn't work well and was returned. Do n't know if they got their 12 machines. I carried one as a sample. Deft here rested.

Burdick, recalled by Plffs, said: Suppose Deft knew for what note was given---do n't know. Supposed he knew about working of machines, because he was there, and had means of knowing, but can't say positively.

P. 37. W. L. Moss jr, next recalled by Plffs, said: When I talked with Deft 2d time, he spoke of the machines. Said the machines would have worked, he thought, if they had understood them. That Earl, when out, made them work. Said, also, the two horse wagon not paid for. That he had taken it, and was to pay for it.

This all the evidence in the case. Plffs then asked instructions to the jury, as follows, viz:

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P. 37. 1. If jury believe from evidence, that firm of Burdick & Peet made note read in evidence, to Deft, that Deft endorsed it to M. A. Earl, and that E. endorsed same to Plffs, before maturity, and if jury further believe from the evidence, that after the note fell due, Deft promised to pay same to Plffs, with 10 per cent. interest per annum, after maturity, within a specified time, and that the time asked by Deft was granted by Plffs, the jury should find for Plffs the amount of said note, with 10 per cent. interest, (from time due.)

P. 34. 2. The law is that notes drawn on time, and endorsed in blank, and without date to endorsement, are presumed to have been endorsed before maturity, and in such case the person to whom the note is endorsed, is not affected by any defence to the note which might be set up against the original payee, unless it be fraud in obtaining the making, or execution of such note, or the endorsee knew of the defence when he took the note, and unless proved affirmatively to satisfaction of jury that said note was endorsed to the Plffs, after due, or Plffs knew what the consideration of the note was, and that such consideration had failed, Plaintiffs cannot be affected by the defence set up of such failure of consideration.

5. If the jury believe, from the evidence, the note was endorsed to Plffs before due, they are presumed in law to be bona fide holders of note till contrary is proved.

P. 39. 6. Ignorance of the law does not excuse, but ignorance of fact may, (and if the jury believe from the evidence that Deft promised to pay the note, after due, the fact that he may not have known the law released him from liability, because suit was not brought against the makers, is no reason why the promise should not bind him.)

Instructions 2, 4 and 5 given by Court. Numbers 1, 3 and 6 the Court refused to give, as asked, and against objections of Plffs, modified and altered same, as follows: In No. 1, words included in brackets the Court erased, and substituted: "Of such promise, provided such new promise was made upon a good consideration." At conclusion of No. 3, the Court added: "Provided such promise was made with a knowledge of the facts on his part, and also, provided the makers of the note were insolvent, at the time of the maturity of the note." And in No. 6, all of said instruction within brackets, was excluded, and the same given to the jury thus modified. To all which Plaintiffs excepted.

P. 40. The Court then instructed the jury for the Deft, as follows, viz:

1. If the jury find from evidence that note in suit was made and executed in County of Peoria, and endorsed by Deft in Co. of Peoria, then Defendant's liability, as endorser, is to be determined by the law of this State.

2. If the jury find the fact that Plffs commenced no suit upon the note against B. & P., the makers, then Deft's liability, as endorser, was released by laches of Plffs, unless Plffs have affirmatively proven that a suit against the makers would have been unavailing—unless such liability was continued by some act of Deft.

P. 41. 3. If the makers had at the time of maturity of said note, belonging to them, property out of which the amount due could have been made, and Plffs failed to commence suit against them upon the note, the Deft was legally released as endorser, and is entitled to your verdict, unless bound by some subsequent act of Deft.

4. The burden of proof is on Plaintiffs to show to satisfaction of jury, that the makers of note were insolvent at maturity of note, and that suit against them would have been unavailing, and if Plffs have failed to prove that fact, Deft is entitled to verdict, unless jury believe from evidence there was a promise of Defendant to pay the note, in which the burden of proof would be upon Defendant.

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7. If the jury find that the note was given for worthless sewing machines, falsely warranted by Earl, and that Earl was agent of Plffs in sale of machines, and taking the note, then proof of the worthless character of the consideration is proper to be considered on trial of this cause.

8. If the jury believe from the evidence that a suit brought on the note against T. C. Burdick and Wm. N. Peet, at the maturity thereof, would have resulted in the collection of any part of the note, then, unless such suit *was* brought, Deft cannot be held as endorser, unless with knowledge of the facts, he promised to pay the note.

9. If Burdick & Peet owed for one of wagons, at maturity of the note, this has no effect on the law of the case, unless the creditor is found to have a lien upon it.

To the giving of which instructions Plaintiffs excepted.

P. 43.

Verdict of jury for Defendant. Motion for new trial by Plaintiffs, because,

- 1st. The Court refused proper evidence offered by Plffs.
- 2d. The Court admitted improper evidence offered by Defendant.
- 3d. The Court refused proper instructions asked by Plaintiffs.
- 4th. The Court improperly modified the instructions asked by Plffs.
- 5th. The Court gave improper instructions for Defendant
- 6th. The verdict is against law, evidence, and instructions of the Court.

Motion overruled. Judgment for costs rendered for Deft. To all which Plaintiffs excepted,

ASSIGNMENT OF ERRORS.

P. 45.

1. In exclusion of evidence offered by Plaintiffs on trial below.
2. Admission of improper evidence for Defendant below.
3. Refusal and modification of instructions to the jury asked by said Plaintiffs.
4. The giving of improper instructions for Defendant.
5. In overruling motion of Plffs for new trial.
6. In rendering judgment for Defendant and against Plaintiffs for costs.
7. Verdict and judgment should have been for Plaintiffs, for amount of note sued on.

J. K. COOPER,
For Plaintiffs in Error.

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JOINDER IN ERROR.

JOHNSON & HOPKINS,
Attorneys for Deft. in Error.

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SUPREME COURT OF ILLINOIS.

Third Grand Division—April Term, 1864.

EDMUND P. MORGAN, }
RALPH R. ROOT, } Plffs. in Error.

versus

ERASTUS PEET, Deft. in Error.

Abstract

*Filed April 23,
1863*

J. Leland clk

Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

EDMUND P. MORGAN,
RALPH R. ROOT,

vs.

ERASTUS PEET.

} ERROR TO PEORIA.

BRIEF OF PLAINTIFFS IN ERROR.

1st. Assuming that defendant was liable as a mere endorser, on this note, and was discharged by the laches of the plaintiffs, he was bound by his subsequent promise, and the verdict and judgment should have been for the plaintiffs.

Forbearance of suit is a good consideration for a promise to pay the debt of another.

Silvis v. Ely, 3 *Watts and S.*, 420.

Jennison v. Stafford, 1 *Cush.*, 168.

Parsons Mercantile Law, p. 27, 28.

And it is not material that the party has no interest in the transaction and is not benefitted by the delay.

Chitty on contracts, p. 28.

1 *Parsons on contracts*, p. 368.

2d. But the undertaking of this defendant was more than that of an ordinary endorser. He had an interest in aiding his minor son, a member of the firm of Burdick & Peet, and stands clearly identified with the original consideration of the note. But for him, Burdick & Peet could not have got the ma-

chine, so that, in fact, the credit was given to him. This created a moral, if not a legal obligation, on his part, to see the note paid, at all events.

In this view, a mere promise to pay, without any new consideration, was sufficient.

A debt barred by the statute of limitations is a moral obligation, which will support a new promise to pay.

Keener v. Crull, 19 Ill., 189.

Horner v. Starkey, 27 Ill., 13.

So payment by the drawer of part of a bill after due, is a *waiver* of presentment for acceptance.

Curtin v. Martin, 20 Ill., 557, see p. 587

So it would seem, a surety may renew his obligation by a new promise without further consideration, on the ground that his right to a discharge is a personal privilege, which he may waive if he pleases.

1 *Parsons on notes*, 242 *Ref. to Fowler v. Brooks* 13 N. H., 429.

3d. The proof of failure of consideration, was all improperly admitted, and should have been excluded by the court; there being no evidence that the note was assigned to plaintiffs after maturity, or that they were not bona fide holders, for value, or had anything to do with the machines for which the note was given.

4th. Plaintiffs' first instruction was law, as asked, and the modification made by the court, which assumes that forbearance to sue, was not a sufficient consideration to support the new promise, is improper.

So of plaintiffs' 3d instruction. The proviso attached by the court tells the jury that a promise to pay, by an endorser of a note, after it is due, is no waiver of proof of the insolvency of the maker, unless such maker be actually insolvent. This is neither good law nor good sense.

Plaintiffs' 6th instruction was designed to guard against the inference the jury were liable to draw from the 6th instruction given for defendant, viz: That ignorance of his *legal rights*, under given state of facts, would render his promise not binding, and should have been given as asked. What the court struck out, would have done this. What was left, tho' good law, explains nothing.

5th. The fifth instruction given for defendant, was inapplicable ; and therefore calculated to mislead the jury. There was positive proof, uncontradicted, that time was given, as the consideration of the promise to pay. The jury could only construe this instruction to mean that this was not sufficient.

Instruction six for defendant, is specially objectionable, for the reason assigned in comments on refusal to give plaintiffs' 6th instruction, as asked.

The objection to defendant's instruction 7 is, that there was not only no evidence that Earl was plaintiffs' agent in selling the machines and taking the note, but the proof was just the reverse. The instruction was, therefore, wholly impertinent and improper.

Upon defendant's 8th instruction we remark, that the ground of discharge of an indorser for failure to sue the maker, is damage presumed from the neglect. Where but a part of the debt, therefore, could be made, the damage being only partial, the discharge should be only *pro tanto*, and hence the instruction is not law.

6th. For reasons stated, the application of plaintiff below, for a new trial, should have been granted.

JONATHAN K. COOPER,
For Plaintiffs in Error.

Organ & Root
Erastus ^{as} Peet
Brief of Peff. in error

Filed May 6, 1863
J. L. Leland
CM

ПОСВЯЩЕНА КЪ СЪОБЩЕСТВО

For Blauvelt in 1904:

SUPREME COURT OF ILLINOIS.

Third Grand Division.—April Term, 1863,

ERASTUS PEET, *Defl. in Error,*

ATS.

EDMUND P. MORGAN, } *Plffs. in Error.*
RALPH R. ROOT, }

DEFENDANT'S BRIEF.

This suit below was by the Plaintiffs in error vs. Defendant in error, as endorser upon a promissory note.

- 1 The first count is upon a note made and endorsed at Cleveland, Ohio, with protest and notice.

Under this count there could be no recovery because the evidence shows that the only note in suit was made and endorsed at Akron in the county of Peoria, Illinois, and Defendant's liability is therefore governed by the laws of this state.

Holbrook vs. Hibbard, 2 Scam. 465.

- 2 The note sued on fell due October 27, 1860. Suit against endorser was commenced July 22d, 1861, during which interval no suit was brought against the makers, although the November, March and May terms of the Circuit Court intervened.

Laws of 1859, page 63.

The second count alleges that suit against the makers would have been unavailing, on account of insolvency. There could be no recovery under this count, for the reason, as shown by the evidence, that the makers at the time of the maturity of said note, and long thereafter, owned and had in possession in said county, and subject to execution, property of more than sufficient value to pay said note.

- 3 The third count alleges that makers had placed property in the hands of Defendant with which to pay the said note, and in consideration thereof and of Plaintiff's promise to extend time, Defendant promised pay said note. This, if true, would entitle the Plaintiff to recover, but the proof shows that the defendant never did receive any property of makers, nor make any promise to pay, except that made to witness Moss, Plaintiff's attorney's clerk.

- 4 The question remains, was this promise testified to by witness Moss, one upon which Plaintiff must recover? Is the finding of the jury, so obviously against the evidence that it must be disturbed by this Court?

Defendant's original liability was only a conditional one.

Rev. Stat. 1845, ch. 73, sec. 7.

The condition had been broken by Plaintiff's laches eight months before said promise, and Defendant discharged from all liability.

Has the defendant waived the latches which discharged him, and revived his original liability? This is a question of fact for the jury.

Curtiss vs. Martin, 20 Ill., 557.

They have ~~not~~ passed upon it and done it fairly.

The finding and judgment below were based mainly on the opinion that Defendant had not waived his discharge, and that there was no consideration for said promise to Moss. *that the same was unfairly obtained*

Thirdly. It is doubtful from the evidence whether the Defendant promised to pay this note which was given for twelve sewing machines, or to pay for two other sewing machines then at Chillicothe.

Fourthly. The defendant being wholly discharged by latches, and his said promise being made in total ignorance of such discharge, and with no intention to waive it and the *prima facie* presumption of liability being also wholly removed by proof, his said promise is disconnected with any former liability and stands upon the same footing as other promises to pay the debt of another, which, to be valid, must be in writing and based upon a consideration.

There is no pretense of any writing, but there has been an attempt throughout to make it appear that Defendant's promise to pay was made in consideration of an extension of time to the makers. Such is not the evidence. Defendant said he would pay the note at a future date, but never stipulated for or desired a moments delay as to the makers.

5 We also insist that the Court did not err in modifying the instructions asked by the Plaintiffs. Nor in giving those given for the Defendant.

6 All the evidence relative to the defective character of the sewing machine for which the note was given, warranty, representation and failure of consideration, was offered under a belief that Defendant would be able to show that Earl was Plaintiffs agent, and they therefore chargeable with his acts, but with express notice to the jury that unless such proof was made the evidence aforesaid, must be disregarded, and at the close of the case the court fully advised the jury upon this point by the Defendant's second instruction.

JOHNSON & HOPKINS
For Defendants in error.

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Depts Brief

Filed May 11th 1863
Leland
Clerk

SUPREME COURT OF ILLINOIS.

Third Grand Division.—April Term, 1863,

ERASTUS PEET, *Deft. in Error*,

ATS.

EDMUND P. MORGAN, } *Plffs. in Error.*
RALPH R. ROOT, }

DEFENDANT'S BRIEF.

This suit below was by the Plaintiffs in error vs. Defendant in error, as endorser upon a promissory note.

- 1 The first count is upon a note made and endorsed at Cleveland, Ohio, with protest and notice.

Under this count there could be no recovery because the evidence shows that the only note in suit was made and endorsed at Akron in the county of Peoria, Illinois, and Defendant's liability is therefore governed by the laws of this state.

Holbrook vs. Hibbard, 2 Scam. 465.

The evidence upon this point taken from the abstract of the record is as follows

Tracy B. Burdick called by Deft, said: Am one of makers of note sued on. The other is Nelson Peet, son of Deft. Young Peet and I were partners and gave the note in our firm name. It was given to M. A. Earl, for 12 sewing machines—was executed and endorsed by Deft in Akron, Peoria Co. Ill., and mailed to Earl at Cleveland, Ohio. It was put in P. O. at Akron. It was endorsed by Deft same day it was made.

- 2 The note sued on fell due October 27, 1860. Suit against endorser was commenced July 22d, 1861, during which interval no suit was brought against the makers, although the November, March and May terms of the Circuit Court intervened.

Laws of 1859, page 63.

The second count alleges that suit against the makers would have been unavailing, on account of insolvency. There could be no recovery under this count, for the reason, as shown by the evidence, that the makers at the time of the maturity of said note, and long thereafter, owned and had in possession in said county, and subject to execution, property of more than sufficient value to pay said note.

2
The evidence upon this point is as follows, witness

Burdick says Machines sent to us by express—bargained for them in writing. B. & P. owned six when note fell due. I had 3, and Nelson Peet 3—think this was so. Mine were at my house in Akron. Nelson lived at his father's and had his there. They were then good as ever—never were sold—not mortgaged. All are now in the hands of Wm. N. Peet. He had another machine when note fell due, called "Lester's Patent"—still has it—is worth \$60. Had also pair horses and double harness, some books, jewelry, notes and accounts. Horses and Harness worth \$250—had these when note fell due, and from 4 to 6 months after. Jewelry worth about \$15, books \$20. W. N. Peet not housekeeper then—I was No incumbrance on this property. Nelson Peet had no other property. The firm had besides, a horse and single harness, with two spring wagons, one single—the other double. Harness worth \$20, horse worth \$150, double spring wagon \$75; single, \$50. This all mortgaged when note fell due, for \$250—\$35 paid, balance since paid—think the winter after note fell due. Have got this property yet, except double spring wagon.

P. 29.

The note sued on was given
for twelve Sewing machines
\$304.⁴⁰ One half of them were
owned by the makers when the
note fell due & long after \$152.²⁰
One Lester machine 60.
Horses & harness 250.
Jewelry 15.
Books 20.
Unincumbered property 497.²⁰
Besides this was
Harness with \$ 20
Horse " 150
Double spring wagon 75
Single " do 50
mortgage for 293
\$250, paid thereon 335 220
75
\$372.²⁰

2
3

And in the winter following
the maturity of said note &
before the suit below was
commenced thereon, being
as soon as judgment & execu-
tion could have been had
thereon as a suit of Plaintiffs
against the makers, had one
been brought, certainly during
the life of an execution on
such judgment, the mortgage
was paid off upon said property
leaving property of the makers
subject to payment of said debt

$$\$497^{\frac{20}{100}} + \$295 = \$792^{\frac{20}{100}}$$

3

The third count alleges that makers had placed property in the hands of Defendant with which to pay the said note, and in consideration thereof and of Plaintiff's promise to extend time, Defendant promised pay said note. This, if true, would entitle the Plaintiff to recover, but the proof shows that the defendant never did receive any property of makers, nor make any promise to pay, except that made to witness Moss, Plaintiff's attorney's clerk.

The burden of proving that
makers put property in
hands of Defendant & contracted
with him to pay Plaintiff's debt
is upon the Plaintiff. This he
not only fails to do but the
proof shows the contrary
Witness Burdick says

These ma-
chines not turned over to Deft, as consideration of liability to pay said
note. He had no consideration for putting his name on the note, nor
was he indemnified against liability.

4

4

The question remains, was this promise testified to by witness Moss, one upon which Plaintiff must recover? Is the finding of the jury, so obviously against the the evidence that it must be disturbed by this Court?

Defendant's original liability was only a conditional one.
Rev. Stat. 1845, ch. 73, sec. 7.

The condition had been broken by Plaintiff's latches eight months before said promise, and Defendant discharged from all liability.

Has the defendant waived the latches which discharged him, and revived his original liability? This is a question of fact for the jury.

Curtiss vs. Martin, 20 Ill., 557.

They have ~~not~~ passed upon it and done it fairly.

The finding and judgment below were based mainly on the opinion that Defendant had not waived his discharge, and that there was no consideration for said promise to Moss. *And that the same was unfairly obtained*

First. It is essential to the validity of such a promise, as a waiver of latches and reviver of the original liability of the endorser, that he should make it *with full knowledge of the facts*, of the latches and his discharge thereby.

Taylor vs. Berly, 26th Ill., 426, and cases there cited, viz:

Tebbitts et al. vs. Dowd, 23 Wend. 379.

Duryee vs. Dennison, 5 John. 248.

First Parsons on Debt 225 Note p. 3 N.H. 346

In this case the promise was made in total ignorance of the facts and under circumstances which justify a belief that they were adroitly kept from him while his promise was elicited.

Witness Moss says

P. 25.

CR. EX. I have no interest in this suit—am not attorney in the case. This was old business of Mr. Cooper's, which he had on hand, before I went into partnership with him, with which I am not connected, as attorney. This note was received by Mr. Cooper, Feb. 25, 1861. Our partnership commenced May 1, 1861. I went to see Defendant about a week after the note came to hand—saw Burdick and young Peet and the old man, all on same day—no one else present when I saw Deft. Went in buggy—took my sister from Peoria to father's, left her there and went on alone. Nothing said by Deft at this time, about returning machines. Read the note to him—he said he would pay it. Did not tell Deft he was released, as endorsee—nothing said on that subject. Gave him no advice about his legal rights.

The contract of an indorser to waive his discharge & pay the bill or note notwithstanding, although it binds its consideration in the original liability, is yet a new & substantive undertaking and requires a "consenting mind" as much as any other contract

Witness Moss says

Here we derive two points in our favour

1st no notice of facts at time of new promise is shown but contrary is proven Moss demanded payment for Plff but was careful to let Debt know nothing of the facts from him "Debt then said he expected to have the note to pay but had not the money then" This reply shows his ignorance of his discharge He believed himself not discharged at that time

2nd Notice that Plaintiff had not brought + prosecuted with effect a suit against the makers, or that makers had property out of which the debt might have been made at its maturity, cannot be presumed from the fact that makers + Debt lived in the same neighbourhood + Debt was akin to one of the makers

Hence it cannot be made
 ignorantly & unintentionally ^{on} He
 cannot make a contract
 on which he may be sued
 without knowing it or
 intending it

"The discharge from liability
 " arising from such delay or
 " omission may be waived by
 " an express promise to pay
 " made after such discharge
 " but not by a promise made
 " before such delay or omission"

1 Parsons on Contracts 223

If he make such promise before
 such discharge he has reason to
 believe he ~~is~~ but promising to waive
 his existing legal liability & if that
 liability is supposed to expire, his
 said promise cannot be en-
 forced against him. So if he
 make it after such discharge
 but before the fact comes to his
 knowledge he still makes it
 upon the supposition of affirm-
 ing a subsisting legal obligation
 and his said promise cannot
 be enforced if there being no
 such legal liability

(The fact of such knowledge of discharge in the indorser at the time of his new promise is indispensable to its validity as a legal obligation and this knowledge must be shown affirmatively by the plaintiff before he can recover on account of such promise

1 Parsons on contracts page 225 note p reads thus "It must be shown affirmatively however that the indorser when he made the promise knew that no demand had been made on the maker, & this is Huesey 3 N.H. 346"

In this case no proof of such knowledge is exhibited by the plff but the defence shows that he was entirely ignorant of said facts. There is something unfair & unjust, which does not commend itself to a court or jury, in the holder of indorsed paper, when he knows that his own negligence has discharged the indorser, & knows that

the indorser is ignorant of the fact
~~and~~ goes, concealing his own knowl-
edge & catches, & taking advantage of
the others ignorance, induces him
to make a promise to pay
We think the case of Leavitt vs
Martin 26 Ill 426 fully recog-
nizes & establishes the rule as
above claimed

Secondly. Such promise of an endorser is in the nature of an admission, or pre-
sumption that the legal steps necessary to charge the endorser have in fact been
taken, and this is only a *presumption prima facie* until the contrary is shown.

Toby vs. Berly, 26 Ill., 426.

Lundie vs. Robertson, 7 East. 231.

Tibbitt et al. vs. Dowd, 23 Wend. 379.

But in this case the evidence conclusively rebuts the *prima facie* presumption by
showing that none of the legal means to charge the endorser were ever attempted—

Witness Burdick one of the
makers testifies as follows

Earl called on us for payment of note---said he was agent
for Morgan & Root to collect it. We offered to turn out the machines
on the note—he refused, saying he did not own the note. Before this
Morgan & Root had written to us to pay the note. This the only effort
to collect of Burdick & Peet, that I know of.

P. 30.

Cr. Ex Earl came here about Dec. 1st, 1860. 'T was then he
wanted pay on the note for Morgan & Root. Asked him if he would
take back the machines for the note. He said, no, he din n't own the
note. We had sold some of the machines then. This was first time
Earl was here that I know of—

P. 33.

The note was endorsed by Deft on day of date, and sent at once
to Earl, at Cleveland, O., his residence. Deft got nothing for signing
the note. Signed for the benefit of B. & P., as required by E., who
required us to get some good endorser. I was called on for pay by
none but Earl and Moss. Don't know time Moss came. Referred him
to N. Peet, for payment.

P. 34.

The doctrine of the English law
as understood by this court &
expressed in Toby vs Berly, and ex-
pressed thus by Lord Ellenborough

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in *Lundie vs Robinson* 7 Case
231 thus "It is therefore to be pre-
sumed prima facie from the
promise so made that the bill
had been presented for payment
in due time & dishonoured &
that notice had been given
of it to the defendant" clearly
authorizes the defendant to
rebut by proof the prima facie
case, that the necessary steps
to charge him as indorser, by
showing that in fact they have
not been taken his promise
by presumption of fact, makes a
prima facie case against him.
The testimony rebuts the presump-
tion & overturns the prima facie
case

Thirdly. It is doubtful from the evidence whether the Defendant promised to pay this note which was given for twelve sewing machines, or to pay for two other sewing machines then at Chillicothe.

The plaintiffs case is made
entirely by proving Defendants
admissions and a part of one of Defendants
conversations with Mrs. which
Plaintiff offered in evidence was

Witness then said: Defendant, at second interview, stated that what he said about paying in 1st interview, referred to two sewing machines sent by Earl to Burdick & Peet, after the others, which were shipped to, and still at Chillicothe, and if B. & P. would receive them, Deft would pay for them—they were worth from \$30 to \$35 a piece, he said.

2
Which renders it doubtful wheth.
the defendant did not understand
he had made one promise while
Moss understood he made another
The jury were the proper judges
~~as to~~ which promise he did make

Fourthly. The defendant being wholly discharged by latches, and his said promise being made in total ignorance of such discharge, and with no intention to waive it and the *prima facie* presumption of liability being also wholly removed by proof, his said promise is disconnected with any former liability and stands upon the same footing as other promises to pay the debt of another, which, to be valid, must be in writing and based upon a consideration.

There is no pretense of any writing, but there has been an attempt throughout to make it appear that Defendant's promise to pay was made in consideration of an extension of time to the makers. Such is not the evidence. Defendant said he would pay the note at a future date, but never stipulated for or desired a moments delay as to the makers.

We concede that as between debtor & creditor, if a third person steps in & undertakes to negotiate for an extension of time for the debtor &, in consideration of such extension, promises to pay the debt in case of the default of the debtor, such promise has a sufficient consideration. But that promise must still be in writing, or it is void by the Statute of Frauds. But if one demands of another the payment of a debt which he does not owe, but a third person does, & he promises to pay it in the future making no stip-

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relation whatever as to the cred-
itor's right to pursue the maker
at once, this promise is without
consideration & voidum pactum,
And that is this case

P. 23. Plffs. next called William S. Moss, jr., who being duly sworn, said :
I have seen this note—the same read in evidence---before. First saw it
about Feb. 25, 1861, when it came for collection, to J. K. Cooper, in
P. 23. letter from Plffs, in Ohio—I was then reading law as a student, in said
Cooper's office, and knew when the letter and note came—I also know
the time from entry made in docket kept by Cooper for purpose of
minuting down memoranda of notes received for collection, and other
business. A few days after the receipt of this note, about beginning
of March, I think. I went with it, at request of said Cooper, to try and
get it paid, or secured—

and went to his house, but he was not at home—
I found, however, his son, Nelson Peet, of the firm of Burdick & Peet,
and talked with him—also saw Burdick. On my return I met Deft. in
the road and told him my business. As it was nearly dark, and Deft
said he could not see well, he requested me to read the note to him,
which I did, carefully, naming particularly the amount, names
P. 24. of parties and date—I also read the names of endorsers on back. Deft.
then said he expected to have the note to pay, but had not the money
then, but if Plffs would wait till June he would pay it—that he had corn
enough to pay it, which he had hauled to Chillicothe, but the price was
low and he did not want to sell then—thought corn would sell better
about June, and wished me to write Plffs and tell them if they would
wait till 20th of June, he would then pay the note, with ten per cent.
interest, on it. I told him it was best to give himself time enough, but
that I should want the money certainly at the time fixed, and if he
would pay ten per cent. interest from the time the note fell due, he
P. 24. might have all of June to pay the note in. This he agreed to, and the
time so specified was given by Plffs.

Moss claims of the Defendant pay-
ment of the note, as a legal ob-
ligation then due from the Defendant,
not ~~on~~ ^{on} Burdick & Peet's accounts
but on his own, & makes him believe
it is his own debt, & Defendant,
who in fact owed nothing, nei-
ther hindered nor delayed Plaintiff
action against the makers, not

speculated for time on his own
debt, for he owed none; but simply
promised to pay the debt the following
year out of the proceeds of his
corn crop

Now a promise to pay in future
requires a consideration to
give it validity just as much
as one to pay in present
We insist therefore that this
promise is not binding in law

1st Because the Plaintiff
procured it by taking an un-
fair advantage of Defendant
2nd Because Defendant at
the time of said promise had no
knowledge of Plaintiff's charges dis-
charging him

3rd Because the prima facie
of duress, presumed from
such promise is rebutted

4th Because said promise
is not in writing

5th Because said promise
is wholly without consideration

5 All the evidence relative to the defective character of the sewing machine for which the note was given, warranty, representation and failure of consideration, was offered under a belief that Defendant would be able to show that Earl was Plaintiff's agent, and they therefore chargeable with his acts, but with express notice to the jury that unless such proof was made the evidence aforesaid, must be disregarded, and at the close of the case the court fully advised the jury upon this point by the Defendant's second instruction.

11
Same Second instruction is this

p. 33.

2. The law is that notes drawn on time, and endorsed in blank, and without date to endorsement, are presumed to have been endorsed before maturity, and in such case the person to whom the note is endorsed, is not affected by any defence to the note which might be set up against the original payee, unless it be fraud in obtaining the making, or execution of such note, or the endorsee knew of the defence when he took the note, and unless proved affirmatively to satisfaction of jury that said note was endorsed to the Plffs, after due, or Plffs knew what the consideration of the note was, and that such consideration had failed, Plaintiffs cannot be affected by the defence set up of such failure of consideration.

6

We also insist that the Court did not err in modifying the instructions asked by the Plaintiffs. Nor in giving those given for the Defendant.

Plaintiff complaining that their Instructions No. 1, 3 & 6 were erroneously modified by the Court. They were asked as follows

p. 37.

1. If jury believe from evidence, that firm of Burdick & Peet made note read in evidence, to Deft, that Deft endorsed it to M. A. Earl, and that E. endorsed same to Plffs, before maturity, and if jury further believe from the evidence, that after the note fell due, Deft promised to pay same to Plffs, with 10 per cent. interest per annum, after maturity, within a specified time, and that the time asked by Deft was granted by Plffs, the jury should find for Plffs the amount of said note, with 10 per cent. interest, (from time due.)

3. A promise by the endorser of a note, after due. to pay it, amounts to waiver of demand and notice, and of proof of insolvency of maker.

p. 39.

6. Ignorance of the law does not excuse, but ignorance of fact may, (and if the jury believe from the evidence that Deft promised to pay the note, after due, the fact that he may not have known the law released him from liability, because suit was not brought against the makers, is no reason why the promise should not bind him.)

Instructions 2, 4 and 5 given by Court. Numbers 1, 3 and 6 the Court refused to give, as asked, and against objections of Plffs, modified and altered same, as follows: In No. 1, words included in brackets the Court erased, and substituted: "Of such promise, provided such new promise was made upon a good consideration." At conclusion of No. 3, the Court added: "Provided such promise was made with a knowledge of the facts on his part, and also, provided the makers of the note were insolvent, at the time of the maturity of the note." And in No. 6, all of said instruction within brackets, was excluded, and the same given to the jury thus modified. To all which Plaintiffs ex-

12

By the 1st instruction as asked
 the Court are required to tell
 the jury that if they find that De-
 fendent promised to pay the note
 of Berchick & Bear after its ma-
 turity, whether he knew of Plain-
 tiff's laches or not, & in the ab-
 sence of any contract to extend the
 time on the note as to the maker
 but simply promised to pay
 in the future & Plaintiff waited
 until this time arrived, that Plain-
 tiff is entitled to recover.

The court by their modification
 held, that such promise, not being
 a contract for time upon his
 own note because he owed none
 & not being a contract for time
 extended to the maker, must
 have a valuable consideration
 And we think correctly for the
 reasons before stated

The instruction does not hold
 as claimed by the Plaintiff, that for-
 bearing to sue is not a suffi-
 cient consideration for a new
 promise, but simply that a promise
 to pay in the future, where no
 right to sue the promisor existed

at the time of such promise &
no right to see Burdick &
Peas was suspended or delayed
that such promise required
a consideration to support it.

We doubt whether the 3rd
instruction is law either as
given or as refused.

If not law as refused then
it was properly refused. If
not law as given then the
Plaintiff has no right to
complain.

The promise named in said instruc-
tion is only prima facie evidence
of the facts therein named & for
that reason should not have
been given as asked.

And the court was certainly
correct in amending the instruc-
tion so as to require that the
said new promise should
have been made with knowl-
edge of the facts.

But if there should be found er-
ror in this instruction it should
not reverse the case, first

13
because the law upon the same points is, once fully given to the jury (and more favorably for the plain tiff than it should have been) in his 4th instruction

4. A subsequent promise by an endorser to pay a note, with knowledge of the facts, presumes that the promiser is liable, and that all the conditions required to fix his liability, had been complied with.

It is secondly because justice has been done upon the whole case

The fifth instruction as given states the legal principle correctly and the specific application contained in brackets could not fairly be given without largely modifying it as to ~~the~~ the effect of concealment is ignorance of the fact of P's latches, as to p's, concealing such fact, as to the proof rebutting the prima facie case made by such promise & the same as asked was properly refused

Plaintiff claims that

5th. The fifth instruction given for defendant, was inapplicable; and therefore calculated to mislead the jury. There was positive proof, uncontradicted, that time was given, as the consideration of the promise to pay. The jury could only construe this instruction to mean that this was not sufficient.

It is as follows

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14
5. A promise to pay after Defendant was legally released, without any consideration, if proven, is voidable, and not binding upon Defendant, and may be disregarded by jury.

In the first place, there is no attempt in this instruction to inform the jury whether forbearance to sue is, or is not, a good consideration for a promise, but simply that some consideration must exist.

Secondly the proof is positive & uncontradicted that time was not given, nor asked, as a consideration. Plaintiff claimed payment, now, but had no demand, ~~but~~ Defendant made a promise, maturing in future & interfered to stay no existing cause of action in plffs - favour against himself or anybody else. This point we have already discussed.

Plaintiff further insists that

Instruction six for defendant, is specially objectionable, for the reason assigned in comments on refusal to give plaintiffs' 6th instruction, as asked.

It is as follows

6. Such promise made by Defendant, in ignorance that his liability has been released by the laches of the Plaintiffs, is not binding on Defendant.

This instruction has reference to Defendant's ignorance of the facts

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15
which constitute his discharge,
upon which our views & authorities
have been already expressed.

Plaintiff further claims that

The objection to defendant's instruction 7 is, that there was not only no evidence that Earl was plaintiffs' agent in selling the machines and taking the note, but the proof was just the reverse. The instruction was, therefore, wholly impertinent and improper.

Which instruction is this

P. 42.

7. If the jury find that the note was given for worthless sewing machines, falsely warranted by Earl, and that Earl was agent of Pliffs in sale of machines, and taking the note, then proof of the worthless character of the consideration is proper to be considered on trial of this cause.

There is some evidence in the case to which this instruction is applicable. Earl sold the machines, made the false representations, took the note and acted as the plaintiffs agent for the collection of it. And it may be a fair question whether the change of apparent ownership of the note was not merely colourable to procure a defence.
Plaintiff further claims.

Upon defendant's 8th instruction we remark, that the ground of discharge of an indorser for failure to sue the maker, is damage presumed from the neglect. Where but a part of the debt, therefore, could be made, the damage being only partial, the discharge should be only *pro tanto*, and hence the instruction is not law.

14
Our 3rd instruction is this

8. If the jury believe from the evidence that a suit brought on the note against T. C. Burdick and Wm. N. Peet, at the maturity thereof, would have resulted in the collection of any part of the note, then, unless such suit was brought, Deft cannot be held as endorser, unless with knowledge of the facts, he promised to pay the note.

We conceive that the condition upon which the assignee's liability arises, the unavailability of a suit against the maker & that this may be established either by our actually prosecuted with due diligence or by ~~proof~~ other satisfactory proof, and a suit which would result in a payment of part of the note is not "unavailable"

A cause will not be reversed on account of the misdirection of the Court below if this Court is satisfied upon the whole case that justice has been done
Gillette et al vs Sweet 1 Sil 473
Greenup vs Stoker 3 Sil 202

Johnson & Hapkins
Defendants Attys

183
Erastus Peet
acts

Edmund P Morgan
et al

Defts. Argument

Filed May 13. 1863
L. Leland
Clerk

Edmund S. Morgan, Supreme Court =
 Ralph R. Root, } April Term A.D. 1862 =
 vs. } Error to Georgia =
 Erastus Beet = }
 Argument for plffs in Error =

This suit was brought by the plffs in Error, second
 Endorsers, against deft in Error, first Endorser,
 upon a note given by Burdick & Beet, to said
 deft, by him endorsed to M. A. Earl, and by
 Earl endorsed to plffs = The consideration
 of the note was a lot of sewing Machines,
 which Earl sold Burdick & Beet = The note
 is dated August 27/60, and drawn at 60 days
 so that it fell due October 26th - 27th 1860 =
 No suit was bro't against the Makers, and
 there is evidence that at, & for some time
 after the note fell due, they had property, out
 of which a part at least of the Note might
 have been made = The note was endorsed by
 Erastus Beet, to help the firm of Burdick
 & Beet, or, more specially, his son Nelson
 Beet, a young man, living at home with
 him, and one of the firm - and because Earl
 would not accept the note of Burdick & Beet,
 and required deft, or some good security, to go
 upon the note with them - It was endorsed
 by deft the day of its date, and immediately,
 or very soon thereafter, (so far as we know) by

Carl, to these plffs = Some complaint having been made about the Machines not working well, Carl came out from Cleveland, Ohio, (where both he and plffs reside) to see about it, and put the Machines in order; and at the request of plaintiffs, he brought the note along and endeavored to collect it for plffs, but failed - previous to which, plffs had written to Burdick & Beet to get them to pay it: (see Test. of Burdick p. 6, at top, and p. 7, on Cr. Sf.) = About the beginning of ^{March} 1861, the defendant, when called on, promised to pay the note - Said, he expected to have it to pay - had not the money then, but if plffs would wait till June he would pay it = The last of June was agreed on, as the time when he should pay, and to which plffs should wait, Sept to allow interest at the rate of 10 per ct. per annum, on the note from the time it fell due = Plffs gave the time agreed on = Sept failed to pay, and this suit was then brought = (Test. of Molp p. p. 3 & 4, of Abstract) The foregoing embraces, perhaps all the material facts, so far as undisputed - tho' some ^{other} points having an incidental bearing, may be hereafter noticed =

If I have correctly apprehended the views of the court, there will be no occasion for any very extended argument upon these facts = The only point to be ~~made out~~ determined, as I understand it, (except so far as questions may arise upon

instructions), is this - Did Erastus Peet know, when he promised to pay the note, that the makers had not been sued, and that a suit against them would have been availing? In other words was the promise made, with knowledge, on his parts, of the facts which entitled him legally to a discharge, as endorser of said note?

To determine the question, it becomes necessary to enquire as to the rule of law affecting it - In other words, what is the measure of proof required in the case? In the case of *Hemion vs. McRea & Porter* (Ala.) Rep. on p. p. 183-4, Ch. J. Collier lays down the rule thus - "If a promise or acknowledgment be made under a misapprehension of fact; as - if under an impression that a demand was made of the maker of a note, or that a notice was regularly sent, through the post office - an endorser promise payment, or acknowledge his liability, the consequence of laches is not waived. But a promise or acknowledgment, will entirely dispense with proof of presentment or notice, and will throw on the defendant the double burthen of proving laches, and that he was ignorant of it." And cites a number of cases to prove each position.

The case of *Martin vs. Winslow*, 2 Mason's Rep. 241, is this - R. made his note to W. on the 4th of Sept. 1819, payable, on demand, at the New England Bank &c. The note was never lodged at the Bank, and no demand on R. in his lifetime, for payment - R. died

on the 6th of May 1820. After his death, demand was made of his Administrators, notice of non-payment to Dept as soon as could then be done; and payment demanded of Dept who said he had endorsed the note, & received the notice, and being then insolvent, had no objection to its coming in with his other debts: It did not appear whether at time of this conversation Dept knew that payment had never been demanded of the maker in his life, or that the note had never been lodged at the Bank, ~~for~~ the note was a renewal of a former, drawn at 9 mos, & endorsed by Dept for accommodation of Rousmaniere: Judge Story, who tried the case, says -

1st 11 - A note payable on demand must be demanded in a reasonable time or the indorser is discharged - and that, the delay in this case was unreasonable &c. =

2nd 11 - A promise to pay, with full knowledge of the facts is binding on the indorser, though discharged - but if the promise in ignorance of ~~those~~ material facts affecting ^{his} right, it is not a waiver of those rights: The question then is, had the indorser here such knowledge? - It may be inferred, he says - from the connexion between the parties, their relationship, & the interest Dept had, after death of maker, to ascertain his own responsibility as indorser, & from the language used by him, and that he did not object to the delay, tho' he knew the length of time since the note was given =

Chancellor Kent - see COMM. 2d. 3. 113-114, says the ~~note drawn there~~. After stating that a subsequent promise by a party entitled to discharge, is a waiver of the want of diligence if clearly & unequivocally made, with full knowledge of the

facts, tho', under a mistake of the law - lay down
the rule as to proof of this knowledge, thus - "The weight
of authority is, that this knowledge may be inferred as a
fact, from the promise, under the attending circumstan-
ces, without requiring clear & affirmative proof of the
knowledge:-

Without stopping to quote further from the authori-
ties, the Court is respectfully referred to Walker vs.
Sanerly 6 Munf. 487, cited with approbation in Bate
vs. McClure, 4 Rand. R. 170; ~~And the cases of~~ Jeb-
bott vs. Dowd 23 Wend. R. 378, where all the cases, appa-
rently, up to that time, are reviewed & discussed. And the
case of Robbins vs. Sineken, 5 Smiles & Marshalls
(Miss.) Rep. 51, which last case was reversed, on er-
ror, because (among other things) the court below refused
to give this charge to the jury - (rep. 69) - "that if the witness
admitted his liability, knowing that notice had been given,
or, if no notice was given, and, knowing that, he admitted his
liability, the jury must find for the plffs; And that his
knowledge of the fact, whether notice was or was not
given, might be inferred by the jury, from his promise,
and the attending circumstances, and did not re-
quire affirmative proof of such knowledge:-"

If the rule as laid down by Ch. J. Collier, as above,
is to govern, that settles this question for the plffs:
As the promise is distinctly proved, and there is nothing in
the record, even to form a remote suspicion upon, that
when the promise was made, Deft did not know the facts
which entitled him to a discharge. Certainly nothing

approaching proof that he was ignorant of them =
That he may not have understood certainly his legal rights,
at the time, is possibly, & I think probably, true, judging from
the effort made before jury, which however, the record
cannot show =

But viewed in the light of ~~the~~ light of the
more moderate rule, as given by Kent & others, how does
the case stand? =

Defendant knew for what the note was given
and put his name on it, to give it currency, & enable
the firm of Bencick & Co., the makers, to obtain the
credit. His son was a member of that firm, and it was
to help the firm, or him, through the firm, that he was
induced to endorse the note; showing, as was natural, that
he felt interested in their success. The business of the
firm was conducted right under his eye, this
son actually living at home with him; and, after the
dissolution of the firm, which was not long after the note
matured, brought his share of the partnership effects
to defendant's house, where, it would appear, some
part of these effects, still is, the remainder, or part
of it, being disposed of by the defendant, and this son -
(see test. of Olive Beets, 7. 8 of abstr.) And that Paul was
there, with the note, about the first of December
1860, a month after the note fell due, trying to get
it paid, but without success = These are circumstan-
ces from which the jury not only might, but should
have inferred that, at the time he made the promise

Defendant knew the facts relied on for his discharge - And I make no doubt they did understand; And that their difficulty was not here, but in the impression, studiously inculcated on the trial, and countenanced, if not enforced, in some at least, of the instructions, that he must also understand his legal rights growing out of those facts, and particularly, that there must be some new consideration, to support the promise, or it would not bind him: There was also, one or two other things used improperly to the prejudice of the plffs, which may have influenced the verdict, to which attention will be called hereafter =

But what are the facts which it was incumbent on the deft should know, to make his promise hold? ~~They were~~ Just these, as I apprehend, and nothing more = 1st - That suit was not brought and duly prosecuted against the Makers of the note; and 2nd, that the Makers had property out of which, with due diligence, the debt or some part of it, might have been made: And indeed, I suppose the whole thing resolves itself substantially into the last named fact: For, tho' suit had been bro't to the first term after the note matured, judgment obtained, & execution issued, at the earliest practicable moment, and the latter retained by the sheriff for its full life, and duly returned Nulla bona; this would still have made only a prima facie case, and it would have been in the

power of the defendant to discharge himself from liability, by proving, (as he easily shows now he could), that there nevertheless was property, subject to execution, which, with reasonable diligence, might have been found & taken for the debt = This is clearly the doctrine of Dixon vs. Weyrich, 20 Ill. 600 = Now, can anyone suppose for a moment that, in March 1861, when this promise was made, the defendant did ^{not} know both these facts, especially the latter, & really important one? = One, perhaps two terms of Court, had passed, to which suit might have been brought and judgment obtained, of which he was, of course, bound to take notice - the former, commencing the 3^d Monday of November 1860, in ample time after the maturing of the note, and to which suit upon it against the makers must have been brought, to hold the endorser, in that way. And it is to the utmost degree improbable that, in March 1861, he should have supposed that suit had been regularly brought to this term, upon the note, and duly prosecuted to judgment & execution, against these defendants, one of whom was his son ^{that} ~~at~~ home with him; and especially, that proper efforts to find property to satisfy the execution, had been made ~~still~~ when nothing of the kind had happened = Still less is it possible, that he should not have known there was property which might have been taken in execution, had any such issued =

And this is the complexion to which the thing really comes - for unless he did labor under the impression, when he made the promise, that suit had been duly prosecuted, and that there was no property out of which the debt could have been made; then he made ^{that} ~~the~~ promise understandingly, and under no mis^{con}ception of facts, behind which he can now take refuge =

Add to this, that Earl was there with the note, for collection, after maturity, and after this November term of court, and that debt was the party to whom the credit was given, and looked to, chiefly, for payment of the note, (and that he ran with Earl, at this time, appears in the proof) and the conclusion is inevitable, not only that he was called on for payment, but that he must have had positive knowledge then, that the note had not been sued = Mr. Hopkins, in his written & printed argument, remarks upon the statement of defendant to Mof's, that "he expected to have the note to pay, but had not money then," as showing that he was ignorant that he was discharged - "that he believed himself not discharged, at the time." If this is meant to refer to ignorance of the law applicable to the case, I will not stop to dispute the point. But if it be, that the language implies that he did not know the facts, I think it a forced construction, and much likelier the remark was induced by the fact that he knew the holders looked to him for payment. That, from

These facts, Mops had every reason to believe and would not believe, dependent upon quite as well if not much better than himself-particularly as to what property the makers had, as a matter of fact it is true, that up to the time of trial we had no idea it could be proved that the makers had property, out of which the debt could be, but believed the allegations of the declaration to be true.

He felt it to be due to these plaintiffs that it should be paid; and from this further fact. (which however, I admit is not shown by the record) that he had before, through Earl, very positively assured the plaintiffs that he would see it paid, and believed that if he did not pay it himself nobody else would.

But, it is said, that the promise was made not only "in total ignorance of the facts", but "under circumstances which justify a belief that they were adversely kept from him, while his promise was elicited." And the same charge of management unfairness is insinuated in another part of Appellee's argument: For this charge, thus rather ungraciously obtruded, there is certainly no foundation either in the record, or in fact: It is true, the witness, Mops, in his testimony, on cross-examination, as quoted on page 4, of argument, says, he did not tell Dept he was released as endorser nothing said on that subject. Gave him no advice about his legal rights." But this does not prove very much, that the "facts" were adversely kept from the Dept: ^{# further, the} ~~the~~ whole drift of the interrogatories which elicited these replies, had simply to do with the law of the case, or the "legal rights" of the Dept, upon the facts, as they were known, on all hands, to exist, and not as to what was or was not said about the "facts" themselves. The purpose was, to prove

to the jury, by the witnesses, that advantage was taken
of the defendant's ignorance of law, not of fact.
about which latter not one question was ~~asked~~
asked. Tho' a still further one was asked, imme-
diately after the foregoing, viz: Whether the witnesses did
not try to keep from Dept the Law governing the
the case, his reply to which (not quoted by Mr. Hop-
kins, tho' the next sentence), was, that he "did not".
Now, the simple fact that this line of interrogatory
was indulged in by Dept's Counsel, shows that they
either tho't then, that ignorance of the Law would
nullify the promise, or that, proving it, would
have its effect upon the minds of the jury;
as, there is hardly a question, but the course of re-
mark it gave occasion to these gentlemen to lead
of in before the jury, had: And this, together with the
wholesale denunciation about the worthlessness
of the Machines, equally foreign to the Case, left
on the proof, and equally unwarranted, but in
which, it was assumed the plffs were invol-
ved, had doubtless much to do, with the verdict
rendered in the Case =

Another thing mentioned by Appellee's Counsel,
in Brief + Argument, (see p. 7 of Argument) deserves
a passing notice - It is this - "It is doubtful from the
evidence whether the deft promised to pay this
note, which was given for 12 Sewing Machines,
or to pay for 2 other Sewing Machines then at
Chillicothe". The evidence on that point is this

(See Test. of Hops, p. 3 of Abstr.)

"On my return I met Dept in the road & told him
"my business. As it was nearly dark & Dept said
"he could not see well, he requested me to read the note
"to him, which I did, carefully, naming particularly
"the amount, names of parties & date. I also
"read the names of endorses on back. Dept then
"said he expected to have the note to pay, but had not
"the money then, but if plffs would wait till June he
"would pay it - that he had corn enough to pay it,
"which he had hauled to Chillicothe" &c., And on Cross-
"Examination (p. 4) - Dept "said he would pay the
"note - Not all legal demands": This was at the
"first interview, at which not a word was said about
"any machines at Chillicothe. (See p. 5) - But Dept's
"counsel were allowed, against objection by plffs, to ask
"the witness what Dept said at a second interview.
"about paying for sewing machines kept at Chillicothe"
"to which witness answered - Dept said, at second
"interview, that what he said about paying in first
"interview, referred to two sewing machines sent by
"Earl to Burdick & Beet, after the others, which
"have shipped to, and still at Chillicothe, and if Bur-
"dick & Beet would receive them he would pay for
"them - they were worth from \$30. to \$35. apiece he said.
"There was no conversation called out by plffs, of which
"this was necessary to explain, or of which it formed
"any part; And I submit that it was all wrong
"to permit Dept thus to manufacture evidence

after the fact, and is itself ground for re-
versing this judgment; and is relied on, as such.
But, upon this, Appellee's Counsel remark - "Which renders
it doubtful whether the Dept did not understand he
had made one promise, while Mofs understood he
had made another - The jury were the proper judges
which promise he did make" - I can hardly suppose
the Counsel serious in this - the thing, upon the face
of it, is so palpably & unmistakably free from all
doubt. There was no talk about any machines at all,
anywhere, at the first interview, as an examination
of the whole testimony of Mofs will show. Beside - the
note was read over, date, amount, names of par-
ties, endorsements full, and Dept said he would
pay it - How then can it be said Dept supposed he
was promising to pay for two sewing Machines, at Child
Licotte, "worth \$30, to \$35, apiece"; (the note read was for
over three hundred), on a contingency which had not
yet happened? It is palpable the statement of Dept
at the 2nd interview (which he seems to have volunteered,
and came for the purpose of making,) was untrue - and
it is equally clear, I think, for the reason above gi-
ven, that it ought never to have gone to the jury
at all - It is however, in itself, a little significant, as
showing that this Dept was, somehow or other, con-
nected with Bendick & Coet, & interested with them,
in this sewing Machine business - Else, why pay
for the st. of the same stripe and pattern as the
others, as Bendick says. (See his test. p. 7) in Case Bendick

But would receive them? ~~And not~~ And what is there to show that he is not equally bound to pay for the others, which they did receive, and to help them obtain which he engaged to do, and go upon this note?:-

Some other points I pass over for want of time, and because, contrary to expectation, when I commenced, I am swelling these loose suggestions to, I fear, a tedious length. Upon some of the instructions I wish to remark very briefly:-

It is understood to be now conceded that the modification made by the court to plffs 3^d instruction, is not law; and that it prejudiced the plaintiffs, there can be no doubt. For, under it, notwithstanding the promise, made with knowledge of the facts, the jury could not find for plffs, unless the Makers were also insolvent; which the proof, at least tended to show they were not. But it is sought to conclude plffs from taking advantage of this, upon the ground that the instruction, as originally asked, was not law. It is submitted, this is not a good answer. If a bad instruction, too favorable to plffs, was asked, the court had one of two courses to pursue - either to refuse the instruction altogether, or to amend so as to make it conform to the law, and give it in that shape; and, in neither case, would the plffs, or the opposite party, ^{then} have cause to complain. But if the court undertook to amend, he was bound to give the law correctly; otherwise one party or the other must

necessarily be prejudiced: And the hurt would
be now the less, that it was inflicted by the vol-
untary act of the Court, than if done at the
instance of a party. It might, in fact, be
greater, as the jury would be apt to think that
what the Court, (supposed to be entirely disinter-
ested, and to know the law) did, of its own mo-
tion, would be ^{more} likely to be well considered & free
from undue bias, than instructions, got
up by the counsel for either party =
Suppose the Court had ^{marked} ~~refused~~ the instruction, as asked,
refused, in which case, as the practice is, it would
neither have been read, nor sent before the jury at all;
And ~~but~~, in lieu of it, the Court had then made a new
instruction, out & out, embodying the same doc-
trines contained in this one, as modified by the
Court, and given that to the jury; could there then
have been any question about about the right
of the plffs to except? And what is the differ-
ence? I can conceive no ground on which the right of ex-
ception could be taken away ^{from} or lost to the plffs, in the
case at bar, except it be, that the Court below might
rightfully punish them, for asking an instruction too
favorable to themselves, by giving one as much, or worse,
against them: But this, I am afraid, if adopted as a
rule, would make sad work of the Administration
of justice in the lower courts =

By excepting, the plffs did what they could to prevent the
mischief; And if the defendant did not ~~mean~~ the

the instruction, in the form the court had given it, it was his duty to except also; in which case, neither party wanting it, the court would doubtless have withdrawn it altogether. By not objecting, after exception taken by plffs, the defendant is to be considered as adopting the instruction, as his own. And so preserve the right of exception to plffs complete:-

The 5th instruction given for Defendants, I respectfully submit, is not law, in the broad form in which it stands. It runs thus, as set out in the Record. See p. 41. of Record:-
"A promise to pay the note after defendant was legally released, without any consideration, if proven, is voidable, and not binding upon the defendant, and may be disregarded by the jury"=-

This instruction does not distinguish between the case of a promise made, with or without knowledge of the facts essential to the discharge; but is in a general, unlimited form, broad enough to cover the case of a promise made with full knowledge of the facts; and, upon well established principles, is to be taken, ^{for purposes of exception} most strongly against the party asking it, and, of course, in the widest sense the ~~same~~ language used, admits: And ~~that is~~ ^{truly understood}, it is certainly not law. It is perhaps still more objectionable because of the new test by which it tells the jury the

validity of the promise is to be determined - viz: on
new consideration, to support the promise; for
this is unmistakably its plain import = Under
this instruction, the jury could not find for the plffs,
except upon the ground that such consideration
was shown = Had it been needed, I suppose there was
sufficient shown, in the general stipulation of plffs
to forbear suit, for a limited time, (really meant
to extend to all parties on the note, makers as well
as indorsees, and acted on, in that view, by plffs)
But this the court also ignored, as will be seen by the
limitation of plffs' first instruction, by the court =
This error indeed, pervaded the whole case. As will
be seen by the following, ^{among other things,} in printed brief of Sept. (p. 2)
"The finding & judgment below were based mainly
"on the opinion that defendant had not waived
"his discharge, and that there was no consid
"eration for said promise to Moss." And the same
thing is still affirmed in the written & printed ar
gument filed for Sept = That it was calculated
to mislead, & did mislead the jury, to the prejudice of
the plffs, I think there is no doubt =

Without dwelling upon Sept's 6th inste
tion, I simply ask the attention of the court to its
terms, remarking merely, that it seems to me calcula
ted to fix the attention of the jury upon what was so
strenuously insisted on in argument before them,
viz: That ignorance of the law, no less than igno
rance of the fact, would enable Sept to avoid his

promise =

Upon defendant's 7th instruction, I more-
ly repeat, that it ought not to have been given,
for the reason, that there is positively no evidence
that Earl was agent of plaintiffs in the sale of
the Machines, and in taking the note = All there is
on the subject is, that he brought the note out with
him when he came to the country, for collection,
but expressly disclaimed any ownership or prop-
erty in - said it belonged to the plffs; and that,
on this account, he could not take back the
Machines, to apply upon it = In this state of the
case, the Counsel for defendant should have ab-
andoned this line of defence altogether, another
court, conformably with the pledge under
which this proof about the worthless character
of the Machines was let in, instead of giving
this instruction, should have told the jury,
that all that line of defence was out of the
case = As to these Machines themselves, counter
proof might have been relied on, and doubtless still
further obtained - As it will be seen, that the Sept of
Earl, as being a fine man - ~~who~~ said he could
make the Machines work, and that he thought
Burdick & Co might have done the same
had they understood them - It also appears from
the proof, that Earl offered to let them take them, or
one of them, on trial, and that they actually
had one, which had been sent on for that

purpose, in the winter or early spring before
many months before this note was given, and
so had ample opportunity of testing it, and know-
ing what they were about, when they gave the note-
and when Carl's letter, (read in evidence by
Depts) is looked at, it will be seen, that the atten-
tion of Depts had been pretty thoroughly called
to the subject. But all this was plainly un-
necessary, as, upon the proof, the whole thing
was foreign to the case.

I respectfully submit then, that
justice has not been done in this case.
That it was not fairly submitted to, & pas-
sed upon, by the jury; and that judgment
should be reversed, and the case remitted
for a new trial before another jury, when,
in the light of the decision to be rendered by
this Court, the law governing it, will be bet-
ter understood & applied.

Ottawa, May 18/63.

Jonathan K. Cooper
for plffs in error

Morgan & Root
vs. =
Erastus Root.

Argument
for Replevin Error.

Given May, 18. 1863

J. Leland
CWR

Received of the Court
the sum of \$100.00
on the 10th day of May 1863.

Clocks recd for this Recd

\$10.00

Recd above from J. H. Cooper,

att. for pmt

E. J. Loan, clu

1. Pleas before the circuit court, within and for the county of Peoria and state of Illinois, on the Thirtieth day of December in the year of our Lord one thousand eight hundred and Sixty-two.

Be it Remembered that heretofore to wit, on the Eleventh day of July A.D. 1861, there was filed in the office of the clerk of the circuit court of said Peoria county, a Precipe, in words and figures following to-wit:-

Precipe

Edmund P. Morgan	}	In the circuit court of
Ralph R. Root	}	Peoria county, Illinois-
as	}	Of the August term A.D. 1861
Erastus Peet	}	Damages \$500.

Clerk of said court will please issue Summons in assumpsit in above entitled

in words and figures following to wit.

The People of the State of Illinois,

To the Sheriff of Peoria County, Greeting.

We command you to summon

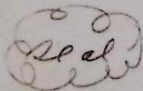
Erastus Peet

If *he* may be found in your county, to appear before our Circuit Court on the first day of the term thereof, to be held at Peoria, within and for the said county of Peoria on the *first* Monday of *August* next, then and there in our said Court to answer unto

Edmund P. Morgan and Ralph R. Root

of a plea ⁱⁿ ~~of~~ assumpsit, to *their* damage *Five Hundred* Dollars as *they* say, and make return of this writ, with an endorsement of the time and manner of serving the same, on or before the first day of the term of said Court, to be held as aforesaid.

WITNESS, ENOCH P. SLOAN, Clerk of our said Court, and the seal thereof, at Peoria, this *11th* day of *July* in the year of our Lord One Thousand Eight Hundred and Sixty *one*



Enoch P. Sloan, Clerk.

J. I. Newton, Sept

Which Jammon was afterwards returned into said Clerks office Indorsed in words and figures following to wit:

Return

I have duly served this writ on the within named Erastus Peet by reading to him the same. July 25th 1861.

James Stewart, Shff

Fees \$1.80

By Murray Deputy

And afterwards to wit: on the 17th day of July A.D. 1861, there was filed in said clerks office a Bond for costs in words and figures following to wit:-

Peoria County Circuit Court:

Edmund P. Morgan

Ralph R. Root

versus

Erastus Peet

} To the August term A.D. 1861
 } In assumpsit
 } Damages \$500.00

I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this state.

Dated at Peoria this 10th day of July A.D. 1861

Jonathan R. Cooper.

And afterwards to wit, on the Twenty-second day of July A.D. 1861, there was filed

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in said clerk's office a Declaration, in words and figures following to wit:-

Declaration

State of Illinois } In the circuit Court.
Peoria County ss } of the August term 1861.

1.

Edmund P. Morgan and Ralph R. Root complain of Erastus Peet of a plea of trespass on the case on promises - For that whereas B Burdick and Nelson Peet by the name style and firm of "Burdick & Peet" heretofore to wit: on the 27th day of August 1860, at Cleveland Ohio, to wit, at Peoria County aforesaid, made their certain promissory note in writing bearing date a certain day and year therein mentioned, to wit: the day and year aforesaid, and thereby then and there promised to pay at the Bank of Commerce, Cleveland Ohio, sixty days after the date thereof to the said defendant, or order, the sum of Three Hundred four & ⁴⁰/₁₀₀ Dollars for value received, and then and there delivered the said promissory note to the said defendant, and the said defendant then and there indorsed and delivered the said promissory note, to one "M. A. East" who then and there indorsed and delivered the same to the said plaintiffs; And the said plaintiffs aver, that afterwards, when the said promissory note became payable according to the tenor and effect thereof, to wit: on the 29th day of October AD 1860, at the Bank of

Commerce Cleveland Ohio, to wit: at Peoria County aforesaid, the said promissory note was duly presented and shown for payment thereof, and payment of the said sum of money therein specified, was then & there duly required, according to the tenor and effect of the said promissory note, but that neither the said "Bank of Commerce" nor the said "Burdick & Peet" nor any person or persons on behalf of the said Burdick & Peet did or would, at the said time when the said promissory note was presented and shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected and refused so to do, of all which said several promises the said defendant, afterwards, to wit: on the day and year aforesaid, at Peoria County aforesaid, had notice: by means whereof, and by force of the Statute in said State of Ohio (where said plaintiffs aver said contract was made) in such case made and provided, the said defendant then and there became liable to pay to the said plaintiffs the said sum of money in the said promissory note specified, when he the said defendant should be thereunto afterwards requested; and being so liable, he the said defendant, in consideration thereof afterwards, to wit: on

5. the day and year last aforesaid, at Peoria county, aforesaid, undertook and then and there faithfully promised the said plaintiffs to pay them the said sum of money in the said promissory note specified, when he the said defendant should be thereunto afterwards requested.

2 And whereas also the said "Burdick & Peet," heretofore, to wit: on the 27th day of August A.D. 1860, at Cleveland, Ohio, to wit: at Peoria County aforesaid made their certain other promissory note in writing 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 at the Bank of Commerce Cleveland, Ohio, sixty days after the date thereof, to the said defendant, or order, the sum of Three Hundred Four & 40/100 Dollars, for value received, and then and there delivered the said promissory note to the said defendant and the said defendant then and there indorsed and delivered the said promissory note to one "M. A. Earl" who then and there indorsed and delivered the same to the said plaintiffs, and said plaintiffs aver that at the time said note became due and payable and at all times since said firm of Burdick & Peet and each and every member thereof, were and still are wholly insolvent, and suit against them at the maturity of said note and at all times since would have been

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wholly unavailing, 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 plaintiffs the said sum of money in the said promissory note specified, when he the said defendant should be thereunto afterwards requested: and being so liable he the said defendant, in consideration thereof, afterwards to wit: on the day and year last aforesaid, at Peoria county aforesaid, undertook and then and there faithfully promised the said plaintiffs to pay them the said sum of money in the said promissory note specified, when the said defendant should be thereunto afterwards requested,

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And whereas also the said Burdick & Peet afterwards, to wit: on the 27th day of August A.D. 1860, at Cleveland Ohio to wit, at Peoria county aforesaid made their certain other promissory note in writing, bearing date a certain day and year therein mentioned to wit: the day and year after ward, and there by then and there promised to pay at the Bank of Commerce Cleveland Ohio, sixty days after the date thereof to the said defendant, or order, the sum of Three Hundred Four and $\frac{40}{100}$ Dollars for value received, and then and there delivered the said promissory note to the said defendant, and the said defendant then and there indorsed and delivered the said

7 promissory note to one "M. A. East," who then and there indorsed and delivered the same to the said plaintiffs. And said plaintiffs aver that since the making of the said promissory note the said firm of Burdick & Peet have dissolved partnership, and assigned and transferred their remaining property to the defendant herein, with the understanding that said defendant should pay and satisfy the note herein declared on, and said plaintiff further aver that since said note become due and payable, said defendant in consideration of the premises and that said plaintiffs would forbear to sue upon said note until the latter part of June A.D. 1861, that he, the said defendant would before that time pay to the said plaintiffs the said sum of money in the said promissory note mentioned with interest thereon at the rate of ten per cent per annum from the time the said note became due and payable which time plaintiffs aver has long since elapsed 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 specified with interest thereon from the time said note, according to the tenor & effect thereof became due and payable at the rate of ten per cent per annum, when

he the said defendant should be thereunto afterwards requested, and being so liable he the said defendant in consideration thereof, afterwards to wit, on the day and year aforesaid, at Permi County aforesaid undertook and then and there faithfully promised the said plaintiffs to pay them the said sum of money in the said promissory note specified, with interest thereon as above averred who he the said defendant should be thereunto afterwards requested.

4.

And whereas also the said defendant afterwards, to wit on the day of July AD 1861 was indebted to the said plaintiffs in the further sum of Four Hundred (400) dollars for the price and value of goods wares and merchandise before that time sold and delivered by the said plaintiffs, to the said defendant, at the special instance and request of the said defendant - And also in the further sum of Four Hundred Dollars for the work & labor care and diligence of the said plaintiffs, by the said plaintiffs before that time done, performed and bestowed, in and about the business of the said defendant, and at his special instance and request - And also in the further sum of Four Hundred Dollars, for money by the said plaintiffs, before that time lent and advanced to and paid, laid out, and expended for the said defendant and at his like special instance

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and request. And also in the further sum of Four Hundred Dollars for other money by the said defendant, before that time had and received to and for the use of the said plaintiff, and also in the further sum of Four Hundred dollars for other sums of money before that time found to be due and owing from the said defendant to the said plaintiff upon an account then and there had and stated between them, which is still in arrear and unpaid; and being so indebted, he the said defendant in consideration thereof, afterwards to wit: on the day and year last aforesaid at Peoria county aforesaid, undertook and then and there faithfully promised the said plaintiff to pay them the said several sums of money in this count mentioned, when he the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant not regarding his said several promises and undertakings, hath not as yet paid the said several sums of money, or any or either of them, or any part thereof, to the said plaintiff (altho' often requested so to do) but he the said defendant to pay them the same hath hitherto wholly neglected and refused and still doth neglect and refuse. To the damage of the said of Five Hun-

dred (500) Dollars and therefore they bring
their suit &c. J. K. Cooper, plffs atty

(Copy of note sued on)

"\$304.40"

Cleveland, O., Aug 27th 1860.

"Sixty days after date, we promise to pay
"to the order of Erastus Peet, at the Bank of
"Commerce, Cleveland, O., three hundred
"Four $\frac{40}{100}$ Dollars value received"

Signed "Burdick & Peet"

1st indorsement "Erastus Peet"

2^d indorsement "M. A. Earl"

And afterwards to wit, on the 8th day of
August AD 1861, there was filed in said clerks
office a plea in words and figures follow-
ing to wit:-

Plea Edmund P. Morgan $\sum$ Peoria County, Circuit
" $\sum$ court, August Term
Erastus Peet $\sum$ 1861 = Assumpsit.

And the said defendant comes
and defends the wrong and injury when
he and pleads and says he did not assume
and promise in manner and form as the
said plaintiff in his said declaration hath
alleged and of this he puts himself upon
the country for trial

by his attorneys Johnson & Hopkins
Plff atth likewise

Cooper for plff

11 And afterwards to-wit, on the 14th day of November A.D. 1861, there was filed in the office of said clerk, "Amended Pleas" in words and figures following to-wit:—

Amended Pleas

Edmund P. Morgan et al. } Peoria county
vs } Circuit court, November
Erastus Peet } Special term of the circuit
court of Peoria county.

1 And the said defendant by leave of court first had and obtained— for further plea as to the first count in the said declaration says action non because he says, the said supposed note in the said declaration described was made, executed and endorsed by this defendant in the county of Peoria and state of Illinois and not in the state of Ohio or Elsewhere— and that at the time said note become due and payable the makers of said note were in good pecuniary circumstances and that the said note at maturity might have been made and collected out of the said makers of said note, had proper diligence by the commencement and prosecution of a suit against the said makers been had and taken— and that said makers then and still live and reside in the county of Peoria and state of Illinois, and service in such suit might and could have been obtained or had upon said makers of said note.

And for further plea to said suit in this behalf by leave of Court first had and obtained the defendant says actis non because he says the said note in said declaration described was endorsed by him in the county of Peoria and state of Illinois and not elsewhere - that the said note was also made and executed in the county of Peoria and state of Illinois and not elsewhere and that the makers thereof were at the time of the making, execution endorsement and maturity of said note and ever since have lived and do live and reside in the said county of Peoria and state of Illinois, and during all said time have had in their possession property real and personal, out of which the amount of said note could have been made by the exercise reasonable diligence and this the said defendant is ready to verify wherefore he prays judgment &c

By his attys.

Johnson & Hopkins

And afterwards to wit on the 3^d day of December A.D. 1861, there was filed in said Clerk's office "Replication & Demurrer" in words and figures following to wit:-

Rep. & Dem.

Edmund P. Morgan	{	In the circuit court Peoria County, Ills. December Term 1861.
Ralph R. Root		

Erastus Peet.

And the said pleffs for replica-
tion to the first amended Plea of the
said dependant herein, say, procludi non
because they say, that said promissory note
in said first count of said declaration
mentioned, was not made, executed & en-
dorsed by said dependant in said county
of Peoria & State of Illinois, as in said plea
is alleged; and this plaintiffs pray may
be enquired of by the country, wherefore &c
Cooper for pleffs

And the deft doth the like

by his attys Johnson & Hopkins.

And for further replication to said plea
said plaintiffs by leave of court first had
& obtained, say, that at the time of the ma-
turity of said note the said makers thereof
were not in good pecuniary circumstances
so that the amount thereof might then
have been made from or out of said makers
by the use of due diligence in the institution
& prosecution of a suit against them, as in
said plea is alleged; and this pleffs pray may
be enquired of by the country, wherefore &c
Cooper for pleffs

And the deft doth the like

by his attys Johnson & Hopkins, attys

And as to the amended plea of said de-
pendant herein by him secondly above

pleaded, plaintiffs say that the same and the matters & things therein contained, is & are not sufficient in law as the same are therein pleaded, to bar the pffs from maintaining their said action against said defendant, and that pffs are not bound further to answer the same, wherefore, by reason &c pffs pray Indgt. and their damages by them sustained &c.

And for cause of demurrer pffs show that said plea professes to answer the whole of said declaration, whereas the same only answers the same in part.

2nd Said plea is no answer to the 3^d & 4th counts of said declaration while it professes to answer the same - wherefore & for other good & sufficient reasons pffs demur to said plea.

Cooper for pffs

And afterwards to wit, on the 11th day of June AD 1862, there was filed in said clerks office, "a mended pleas to 2 & 3^d counts, in words and figures following to wit:-

Morgan vs Peet

And now for further plea to the second count in said declaration the deft says actis non because he says that at the time the said note in said count mentioned

15. become due and payable and a long time
thereafter the said Burdick & Peet and each
and every member thereof were not wholly
insolvent and suit against them at the
maturity of said note would not have been
wholly unavailing, and of this the said de-
pendant puts himself upon the country for
trial, by his atty Johnson & Hopkins

And as to this plea peff }
doth likewise - Cooper for peff }

And for further plea to the third
count of the said declaration the depend-
ant says actio non because he says that
the said Burdick & Peet since the making of
the said promissory note have not assign-
ed and transferred their property to this
dependant as stated in said peff nor has
there ever been any agreement or under-
standing that dept should pay and satis-
fy the said note in said count described
as stated in said count nor has the said
dept ever at any time promised to pay the
said note or any part thereof as stated in
said count and of this the said dependant
puts himself upon the country for trial.
by his attys Johnson & Hopkins.

And peffs do likewise
Cooper for peffs

And afterwards to wit, on the 20th day of

November 4th 1862, there was filed in said
Clerks office, a "motion for new trial," in
words and figures following to wit:-
Edmund P. Morgan & Co

Erastus Peet } Circuit Court, Nov-
December Special T. 1862

And now come the said plain-
tiffs, and move the court to set aside
the verdict of the jury & for a new trial
herein and for cause show

- 1st The court refused proper evidence offered by plffs.
- 2^d The court admitted improper evidence offered by defendants.
- 3^d The court refused proper instructions asked by plffs.
- 4th The court improperly modified the instructions asked by said plffs.
- 5th The court gave improper instructions on the part of the Deft.
- 6th The verdict of the jury is against the law - the evidence & the instructions of the court.

Wherefore & for other sufficient reasons plffs ask for a new trial herein.

Cooper for plffs.

Proceedings at a special term of the circuit court of Peoria county, Illinois, began and held at the court house in the city of Peoria, in said

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county and state, on the second Monday of November in the year of our Lord one thousand eight hundred and sixty one, the same being on the Eleventh day of said month. Present the Honorable J. L. Richmond, Judge of the 23^d Judicial circuit in said state, by interchange with the Honorable H. L. Merriman, Judge of the 16th judicial circuit in said state, James Stewart, sheriff, and Enoch D. Sloan, Clerk, to wit:-

Monday, November 11th 1861.

Edwin P. Morgan vs

Assumpsit

Erastus Peet

This day came dependant by Johnson his attorney, and on his motion leave is given him to file additional pleas, on motion of plaintiffs dependant is ruled to file his said pleas during the first week of this term.

Proceedings at a term of the circuit court of Peoria county, began and held at the court house in the city and county of Peoria, Illinois, on the first Monday in the month of June in the year of our Lord one thousand eight hundred and sixty two, it being the second day of said month. Present, the Hon. H. L. Merriman, judge of the 16th Judicial circuit in said state, James Stewart, sheriff and Enoch D. Sloan, Clerk, to wit:

Monday, June 9th 1862

Edmund P. Morgan vs

Erastus Peet

This day this cause come on to be heard on the demurrer to Defendant's plea, and the court being fully advised in the premises sustained said demurrer, on motion defendant has leave to plead double by to-morrow.

Proceedings at a special term of the circuit court began and held at the court house, in and for the county of Peoria and state of Illinois on the second Monday in the month of November in the year of our Lord, one thousand eight hundred and sixty-two, it being the tenth day of said month. Present, the Honorable W. L. Merriam, Judge of the 16th Judicial circuit in said state, James Stewart, Sheriff, Alexander McCoy, states attorney and Cook P. Sloan, Clerk to wit:-

Tuesday, November 18th 1862

Edmund P. Morgan

Ralph R. Root

Erastus Peet

This day come the plaintiffs by Cooper & his attorneys, and the defendant by Johnson & Hopkins his attorneys, and it is ordered that a jury be impanelled to try this cause, whereupon come a jury of twelve good and lawful men to wit:

19 John C. Craig, A. L. Conover, W. C. H. Barton, Geo. W. McMillon, Saml. Craig, Wm. Carter, Pat. Ward, N. D. Jay, John Murray, Henry Erford, J. H. Floyd & M. Notestine, who were duly chosen, tried and sworn to well and truly try the issues joined in this cause, and a true verdict give according to the evidence. And the said jury not having heard all the case were adjourned to meet the court at 9 o'clock to morrow morning.

19 Wednesday, November 19th 1862.

Edmund P. Morgan

Ralph R. Root

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Assumpsit

Erastus Peet

This day come the parties to this suit, and their attorneys and also come the jury sworn and impannelled to try this cause, and the said jury having heard the evidence &c., retired to consider of their verdict.

Thursday, November 20th 1862

21 Edmund P. Morgan

Ralph R. Root

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Assumpsit

Erastus Peet

This day come the parties to this suit and also come the jury impannelled to try this cause, and the said jury upon their oaths aforesaid do say, We the jury find

the issues for the defendant. The plaintiffs by their attorney, moved the court for a new trial, which motion is continued to next term of court.

Proceedings at a term of the circuit court begun and held at the court house in the city and county of Peoria, Illinois, on the first Monday, in the month of December in the year of our Lord one thousand eight hundred and sixty two. It being the first day of said month. Present - the Honorable A. L. Merriman, Judge of the 16th Judicial circuit in said state, J. A. J. Murray, Sheriff and Enoch Sloan, Clerk, to wit: -

Saturday, December 13th 1862.

Edmund P. Morgan

Ralph R. Root

Assumpsit

Erastus Peet

This day this cause come on to be heard on the motion of plaintiffs for a new trial, and the court being fully advised in the premises overruled said motion. Therefore it is considered by the court that said defendant have and recover of said plaintiffs his costs and charges by him about his defense in this behalf expended and that he have execution therefor. By agreement of parties it is ordered that the Bill of Exceptions herein, may be signed in vacation.

And afterwards to wit, on the 14th day of Feb.

request of the Commercial Branch Bank, I did present the original Promissory Note which is herewith annexed at the Bank of Commerce, Cleveland, Ohio where the same is made payable, and demanded payment thereof, which was refused. Whereupon, I, the said Notary, at the request aforesaid, did Protest, and by these presents do publicly and solemnly Protest, as well against the makers and indorsers of the said Promissory Note as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages and interests, already incurred, and to be hereafter incurred, for want of payment of the said Promissory Note. And I further certify, that on the day and year above written, I deposited in the Post office at Cleveland, in said county, notices of the foregoing Protest, signed by me, and addressed as follows: Notice for Erastus Peet, directed to Princeville, Peoria Co. Ill. said places being the reported places of residence of the persons to whom said notices were respectfully addressed. I further certify, that on the day and year last aforesaid I served notice of the foregoing Protest, as follows to wit: Upon M. A. Eastley, at his residence on Lake Street.

Thus done and Protested, in the city of Cleveland, on the day and year above written.

In testimony whereof I have herewith subscribed my name and affixed my official seal. E. B. Ingersoll, Notary Public.

Plffs next called William L. Moss, Jr., who being duly sworn said I have seen this note - the same read in evidence before I first saw it, on or about the 25th February 1861 - at which time it was received for collection by J. R. Cooper, in a letter from the plffs in Ohio - I was then reading law as a student in the office of said Cooper, in Peria, and knew when the letter & note came to hand. I also know the time the note was received from the entry made in the docket, or entry book kept by said Cooper in his office for the purpose of minuting down memoranda of notes sent for collection & other business - a few days after this note was received, about the beginning of March 1861, I think I took it & went at the request of said Cooper to try & get it paid or secured (I had understood that the defendant was the party expected to pay it) (This testimony included in brackets was excluded by the court, and to the exclusion of which plffs then and there excepted. And went to his house but he was not at home - I found however his son Nelson Peet, one of the firm of Burdick & Peet there, and talked with him about the note. I also saw Burdick, afterwards; on my return, I met the defendant in the road - told him my business - as it was pretty nearly dark and defendant said he could not see well he requested me to read the note to him,

which I did carefully, naming particularly the amount, names of parties & date. I also read the names of the endorsers on the back. Dependant then said he expected to have the note to pay, but had not the money to do it then - but said if the pepps would wait on him till June he would pay it. That he had corn enough which he had hauled to Chillicothe, to pay it - but that the price was low, and he did not want to sell them - that he thought corn would sell better about June, and he wished me to write to the pepps and tell them that if they would wait on him till the 20th of June, he would then pay the note with ten per cent, interest upon it. I told him it was best to give himself time enough, but that I should want the money certainly, at the time fixed. And that if he would pay ten per cent, interest, on the note from the time it fell due, he might have all the month of June to pay the note. This, dependant agreed to, and the time so specified was given to him by pepps - At one of the interviews subsequent to this, in answer to a question ~~to a question~~ I put to him, as to whether Burdick & Peet had not placed property in his hands to pay the firms debts, he spoke of some sewing machines that had been left with him, but nothing was said about their being left with him for that purpose. My enquiry was occasioned by some remark he made, to the effect that

the payment of the note would be a dead loss to him. He said also, he had put his name on the note to help his son Nelson Peet, who was in partnership with Burdick when the note was given - at the time I talked with dependant the firm was dissolved and Nelson was living at home with his father. Nothing was said at this time about the firm of Burdick & Peet, or either of them having any property - since that time & since this suit was brought - some six to eight months ago - I saw dependant again - He called at my office to talk the matter over. In this latter conversation he said Burdick had not much of any property. I said to him Burdick never did have much of anything did he? And his reply was that he did not. At the time of this last conversation dependant said his son Nelson was then between 21 & 22 years old. He said he had no redress if he had to pay the note.

On cross-examination witness said I have no interest in the result of this suit. Am not attorney in the case - This was old business of Mr. Cooper's which he had on hand before I went into partnership with him, and with which I have no connexion as atty. This note was received by Mr. Cooper on the 25th February 1861. The partnership of Cooper & Moss commenced May 1, 1861. I went

out to see dependant about a week after
 the note come to hand. I saw Burdick,
 young Peet & the old man, all on the same day.
 There was no one else present when I saw
 the dependant. I went out in a buggy -
 took my sister with me from Peoria, as far
 as my father's - left her there, and went
 on from that alone - nothing was said by
 dependant to me at this time about return-
 ing any machines - I read the note to him and
 he said he would pay it - I did not tell de-
 pendent he was released as endorsee on the
 note. Nothing was said on that subject - I
 gave him no advice one way or the other a-
 bout his legal rights. I did not try to keep
 this hid from him. I do not remember to
 have thought any thing about his being
 released from its payment. This interview with
 depts was in the public Road - no one else was
 present. He did not say he would pay all legal
 demands, but said he would pay this note. M.
 A. Carl was spoken of. Dependant said he was
 a fine man. Witness was then asked by depts
 counsel what dependant said at the second
 interview referred to above, about paying for
 certain sewing machines left at Chillicothe.
 To which question peff objected - but the court
 overruled the objection & allowed the question
 to be put, and peff by their counsel then an-
 swered excepted. Witness - then in reply to said

27 question stated, that defendant at said second interview stated that when he talked about paying at the first interview, he meant to be understood as referring to two sewing machines, which he said Carl had sent out to Burdick & Peet, after the others, and which were shipped to Chillicothe & still lying there - and that if Burdick & Peet should arrange to receive these two machines he dept would pay for them. These machines he said were worth from \$30 to \$35 a piece.

Re-Examination by Pepps. I understood dept to say he endorsed the note at the time it was given - He said Carl would not take the note unless he became security, and that he put his name on the note because he wanted to help his son. At my first interview with dept nothing was said about any machines at Chillicothe.

Pepps here rested.

Tracy B. Burdick then called by dept. said I am one of the makers of the note sued on. The other maker is William N. Peet, son of dept. Young Peet and myself were in partnership, & gave the note in our firm name. It was given to M. A. Carl for 12 sewing machines. The note was executed and endorsed by defendant, in Akron, Peoria County, Illinois. The note was mailed to Carl and directed to him at Cleve-

land Ohio. The letter was put into the Post office at Akron, in Peoria County. It was endorsed by the defendant the same day it was made. The machines were sent to us by Express. We bargained for them in writing. Burdick Peet owned six of these machines when the note fell due - I had three & Nelson Peet had three - I think this was so. These I had were at my house in the town of Akron. Nelson lived with his father & had his machines there. These machines were then all as when we received them & were worth as much as when we got them - They never were sold. They were not mortgaged - they are all still in the hands of William N. Peet. He had another machine when said note fell due known as Lester's Patent. This is still in the possession of Peet & is worth some \$60. He had also a pair of horses & double harness - some books & jewelry - some notes & acpts. The horses & harness were worth \$250. He had these when the note fell due & some 4 to 6 months after the note fell due. The jewelry was worth about \$15 - The books about \$20. William N. Peet was not a house keeper ^{at that time I was.} There was no mortgage or incumbrance on any of this property. ~~at that time - I was.~~ Nelson Peet had no other property - The firm had besides a horse & single harness - a two horse spring waggon & a one horse spring waggon. This harness was worth \$20. The horse \$150. The

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double Spring Wagon \$75. and the single Spring Wagon \$50. This was all mortgaged when the note fell due for \$250. of which \$35 was paid. The balance has ^{since} been paid. I think the mortgage debt was paid in the winter after the note fell due. Have got this property all yet, except the two horse spring wagon. The other six of the machines were sold. They were not good for anything. after being used a month or six weeks they would not run over an hour or two at a time, without tinkering at them. They were two needled machines & the under needle would get loose. This is a fault that cannot be remedied. I experimented with these machines over a year. Earl came out in December 1860. He came at my request, and was here two weeks trying to make the machines run. They would run a few minutes after he left them. The trouble is the under needle can't be made to stay in its place. I don't know who manufactured these machines. They were patented by Daniel Harris of Boston. I don't know that Earl was clerk of pelfs. I don't know that Morgan & Root ever had any connection with these machines. None of them were good. Two of the six we had on hand had been sold & returned. Four were never disposed of. When Earl was out he called on us for payment of the note, and said he was agent for Morgan & Root to collect it. We offered to turn out the machines on the note. He refused, saying he did not own the note. Before Earl came, Morgan & Root had written to us, asking us to pay the note. This is all

the effort made to collect of Burdick & Peet that I know of. To all of which evidence in relation to the consideration of said note, and the defective character of said machines, plff by their counsel objected, at the time the same was offered, but the same was admitted by the court upon the depts' counsel stating that they expected to follow it up by proof that the plffs were not bona fide holders of said note, or that the same had been endorsed to them after it fell due. The court then stating that it would be excluded if it was not proved up.

Deft next offered the following letter from said Carl to said Burdick, viz:-

Cleveland, Cuyahoga Co. O.

Sept. 3^d 1859

To P. Burdick - Dr. Sir.

Yours of 29th come to hand & in answer would say - First my machines I am now and have been offering to the people in the vicinity of Cleveland and surrounding country, since the first of May are of a good quality, they are made here in town and are warranted, they are all tested & tried to the satisfaction of myself, and if any imperfection is found, are returned to the manufacturer. I will warrant any and all machines that go out of my office if they fail in any point the machine can be returned & changed or the money refunded. I do not wish to humbug any one and if by chance any person buys of me they can rely on what I say. I have just as good a right to sell these machines in Illinois or anywhere else as any one in Ohio - Braman & Co, not excepted - as the machines have been improved both in working & in build -

ing and are no more the Machine that Braman sold than daylight is to darkness. I do not know how they heard that I had sent you my circulars only that Mr. Holden one of the firm was here in Cleveland when I mailed you the first circular and neither do I care - as for the Machines I have them just as good as they can get up in Cincinnati, you say they have another name for these Machines will you please give me the name of it - also the terms to agents, and what they say about the Harris Machine as a humbug and you will confer a favor on me. I do not wish to fill an order for Machines unless I can do so in a fair business & honorable way, I claim & can prove that my Machines are of a more saleable kind than these as these are of the larger kind and not so complicated as the Small Machine I will compare with them any time - you say I cant humbug you, it is the farthest thing I ever thought off as I am not of that stripe not being in the Sewing Machine trade long enough to put on that kind of a face. You say you have written to Braman & Co. for Machines on certain conditions, you have my conditions and perhaps to know for yourself the best way to do is to order three or four from each establishment and then judge for yourself I will send you three or four at \$25.00 each or 10 or more at the same rate, they may send you as many or more but seeing the matter is divided I do not wish to come down on my Machines as I cannot afford them any less. So they say my Machines are worthless, if so please write me - I shall be to the Ohio State Fair with some of my Machines & expect a good time - perhaps you will

try to be there - I shall like to see you there I expect to get orders for at least 100 machines if I do not I shall be disappointed and that number is a low estimate. Do as you think best in the matter and if machines are ordered from me this letter will hold me responsible for the good working of any & all machines ordered from my office. Excuse this ^{long} letter and believe me as ever. Yours with respect

M. A. East

P.S. = Please to answer as soon as convenient & much oblige

M. A. E.

I would have sent you more circulars but being just out had not any more to spare I have three thousand and will be out I think next week & will send you some if you want them

Yours &c M. A. E.

To the reading of which peeps, by their counsel also, at the time objected. But the court overruled the objection & permitted the same to be read & subject to the same limitation as to further proof, as above stated.

Said witness then further testified. The firm of Burdick & Peet bought from East on the terms of said letter, and we sold on the same terms we bought - these machines were not turned over to defendant as a consideration of his liability to pay this note. He had no consideration for putting his name on the note - nor was he indemnified against liability - Two other machines were ordered before those for which the note was given, which came to the depot at Chillicothe, but have never

been taken away from there, because these turned out so bad.

Cr. Ex. = Earl came here about the first of December 1860 = It was then he wanted pay on the note for Morgan Root. I asked him if he would take back the machines for the note, ^{He said No, he did not own the note.} We had sold some of the machines then. This was the first time that Earl was here that I know of = we negotiated for the machines by letter = Had a good many letters from him = We had one machine sent to us a short time before the lot came for which the note was given - say a month or six weeks = The note was given for 12 machines which came to hand a number of months before the note was given. These machines were received in the spring probably April or May; but I can't fix the time with any certainty = The two machines at Chillicothe came between the receipt of the first one & the 12 for which the note was given. The Co-partnership of Burdick & Peet began in the fall of 1859. The machines were shipped to the order of Burdick & Peet = we received them at Chillicothe. We had probably sold 3 or 4 before we gave the note = the note was endorsed by dependant on the day of its date, and sent off at once to Earl, at Cleveland, Ohio, where Earl lived. Dependant got nothing for signing the note = He signed it for the benefit of Burdick & Peet, as required by Earl, who required us to get some good endorser. I was called on by no other person than Earl for payment, except Mr. Moss = I don't know the time Moss came = I referred him to Mr. Nelson

Peet for payment - I had none of the machines at that time. The division was made a few days after Jan 1 /61, but to bear date from that time, as it was then the partnership was dissolved. Nelson Peet received two horses, harness & wagon & all the sewing machines - When Earl called in December 1860, I had 3 sewing machines & Nelson Peet 3 - After the division, I had one horse, wagon, harness, some books, notes & acpts for my share. I had the mortgaged property, except the two horse wagon which Peet had.

Olive Peet, next called by Dept, said = I am a daughter of Dept & live with him - I was at home in the fall of 1860 - My Brother William N. Peet, or Nelson as we call him lived at home then. He had these 3 sewing machines there then, Harrison's Patent - He had no other there of that kind. He also had owned one of Lesters Patent. He owned a span of horses, a two horse spring wagon & harness - Don't know any thing about books & jewelry, except that they were selling books & jewelry - Burdick also had a one horse wagon in his possession. Do not know that Burdick took any sewing machines to father - Don't know any thing about the value of this property - Don't know that father had any interest in it. Burdick has one horse & wagon - One of the horses that brother had was sold in the winter of 1860-61 - Earl was out in the fall of 1860. I did not see the note nor hear any thing said about it.

Cor. Ex. - Brother was between 20 & 21 years old

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in August 1861 - One of the Horses Brother had was disposed of in the winter of 1860-61, ^{to} William C. Smith, to pay a debt I think - Brother & father disposed of it - I do not know what became of the wagon. There are two of the machines there now - There were more there when Earl was there - don't know how many - Quite a number brought there some time in the summer - Don't know whether all come there or not - I don't know about division - Nor when Burdick & Peet dissolved - I suppose both horses are disposed of - Brother is in the Army - He enlisted in the 11th Ills. Cavalry in August 1861 - None of the property is there now except two of the machines - One horse was disposed of in the winter or spring after Earl was there.

William Evans next called by debt - I live in Chillicothe Township - Know Burdick & Peet - I had in my possession in October 1860 property as follows, books worth \$22, Jewelry \$15 - a team of horses worth \$180 or \$190, a double spring wagon, worth \$60 to \$65, double harness worth \$10 to \$15, & a Lister's Sewing Machine - These machines were selling at \$60 to \$75, this machine was worth from \$60 to \$75. Mr. Burdick had other property in his possession - saw him with a horse, buggy & other sewing machines - The horse was worth \$140 to \$150 the buggy from \$40 to \$50. I was employed to peddle by the month. I consider the Harris Patent Sewing Machines as a perfect humbug - I used one of them 4 or 5 months.

I could sometimes make them work & sometimes not. The under Needle could not be made to work right. This evidence about the deficiency of the machines objected to by Peffs, and admitted as before by the court.

Cr. Ex. = (of Evans) I had possession of this property Oct 20/60. Don't know what became of it after this. Some of it was taken by Burdick & some by Peet = I delivered up the Lester Machine some time in January 1861. I got it in Aug. or Sept. but could not sell it. I consider it a good Machine. Don't know that I made any great effort to sell it. I commenced on the 24th of April 1860 to canvass for the sale of the other machines & continued till in October 1860. Burdick & Peet had received one Machine before I commenced. Don't know how long. They had received one Machine in the winter previous = Don't know whether this one was sold. Don't know whether they had made trial of it or not = The selling price of these machines was \$30. I delivered one Machine & got \$15, or \$16, on it. I delivered another at Chillicothe to be paid for if it worked. It did not work well & was returned. Don't know whether they got their twelve machines. I carried one as a sample.

Deft. here rested.

Burdick recalled by Peffs. said, I suppose Deft knew for what the note was given - ~~also~~ ^{also} don't know, ^{also} supposed he knew about the working of the machines. I suppose so because he was there, and had means of knowing - but I don't know positively.

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William L. Moss, Jr, next recalled by plffs said, when I talked with deft the second time, he spoke of the sewing machines = said the reason they did not get them to work well, he thought was because they did not understand them = that when Earl was out he made them work - He also said the two horse wagon was not paid for = that he had taken it, and was to pay for it.

This was all the evidence in the case. Plffs then asked the following instructions to the jury, viz:

Morgan & Root

vs

Erastus Peet

Circuit Court = Nov. Special Term 1862.

The court instructs the jury for the plffs as follows:-

- 1 If the jury believe from the evidence that the firm of Burdick & ^{Peet} ~~Root~~ made the note read in evidence to the defendant, that the defendant endorsed this note to M.A. Earl, and that Earl endorsed the same to the plffs, before maturity, and if the jury further believe from the evidence that after said note fell due, the defendant promised to pay the same to the plffs with ten per cent. interest, per annum thereon, after maturity within a specified time thereafter, and if the jury further believe from the evidence that the time asked by the defendant was granted by the plain tiffs the jury should find for the plffs the amount of said note with ten per cent. interest from the time [the same became due]
2. The law is that notes drawn on time & endorsed in blank & without date to the endorsement are presumed to have been endorsed before maturity, and

Given
(as modified below)

in such case the endorsee, or person to whom the note is endorsed is not affected by any defence to the note which might be set up against the original payee, unless it be fraud in obtaining the making or execution of the note, or the endorsee knew of the defence when he took the note. And unless it has been proved affirmatively to the satisfaction of the jury that said note was endorsed to the plaintiffs after it fell due, or that the plaintiffs knew what the consideration of the note was, and that such consideration had failed, the plaintiffs cannot be affected by the defence set up as to the failure of the consideration of the note.

Given

3 The Jury are further instructed that the law is that a promise by an indorser of a note after it has fallen due, to pay it, amounts to a waiver of a demand and notice and of proof of the insolvency of the maker.

Given
(as modified below)

4 The court further instructs the jury that a subsequent promise by an indorser to pay a bill or note with a knowledge on his part of the facts, it will be presumed that the promisor was liable, and that all the conditions necessary to fix his liability had been complied with.

Given

5 If the jury believe from the evidence that the note was endorsed to the plaintiffs before it fell due they are presumed in law to be bona fide holders of the note until the contrary is proved

Given

(39) 6
Given
(as modified below)

Ignorance of the law does not excuse but ignorance of fact may - [and if the jury believe from the evidence that defendant promised to pay the note, after it fell due the fact that he may not have known that the law released him from liability, because suit was not brought against the makers is no reason why the promise should not bind him.]

Said instructions 2, 4 & 5 were given by the court, but said instructions numbered 1, 3 & 6, the court refused to give as asked, and against the objections of peffs, modified and altered the same respectively as follows, viz:- In No. 1, the words included in brackets ([]) the court erased and in stead thereof inserted the following to wit: - "Of such promise, provided such new promise was made upon a good consideration." At the conclusion of No. 3, the court added the following to wit: - "Provided such promise was made with a knowledge of the facts on his part and also provided the makers of the note were insolvent at the time of the maturity of the note." And in No. 6, all of said instruction included within brackets ([]) the court cut off and excluded. - And gave the same to the jury as so altered & modified - to which decisions & proceedings of the court in refusing to give said in-

instructions as asked & in altering & modifying the same, and giving the same only as so altered & modified, the jefps by their counsel then & there excepted.

The court then again at the objections of the jefps gave the following instructions to the jury on the part of the depts:-

Morgan & al } Peoria County Circuit
 " } Court, Nov. Special
 Erastus Peet } Term Ad 1862.

Given

1 If the jury find from the evidence that the note in suit was made and executed in the county of Peoria and endorsed by the defendant in the county of Peoria - then the defendants liability as endorser is to be determined by the law of this state.

Given

2 If the jury find the fact that the plaintiffs commenced no suit upon the note against Burdick & Peet the makers - then the defendants liability as endorser was released by the laches of the plaintiffs unless the plaintiffs have affirmatively proven that a suit against the makers would have been unavailing - unless such liability was continued by some act of defendant.

3

Given

If the makers had in their possession at the time of the maturity of said note belonging to them property out of which the amount legally due upon the note could have been made, and the plaintiffs failed to commence suit against

41 them upon the note the defendant was legally released as endorser and is entitled to your verdict unless bound by some subsequent act of defendant.

4 The burden of proof is upon the plaintiffs to show to the satisfaction of the jury that the makers of the note were insolvent at the maturity of the note and a suit against them would have been unavailing and if the plaintiffs have failed to prove that fact the defendant is entitled to your verdict, unless the jury believe from the evidence that there was a promise of defendant to pay the note - in which the burden of proof of those facts would be upon defendant.

5 A promise to pay the note after defendant was legally released without any consideration if proven is voidable and not binding upon the defendant and may be disregarded by the jury.

6 Such promise made by Dept in ignorance that his liability had been released by the laches of the Plaintiff is not binding upon the Dept.

7 If the jury find the fact that the note was given for sewing machines which were worthless and were falsely warranted by Earl and that Earl was the agent of Morgan & Root in the sale of the machines and taking the note

then proof of the worthless character of the consideration is proper to be considered on the trial of this cause.

8 If the jury believe from the evidence that a suit brought on the note in question against T. C. Burdick & W. M. Peet, at the maturity thereof would have resulted in the collection of any part thereof, then, unless such suit was brought, Crastus Peet cannot be held as endorser, unless the defendant with knowledge of the facts promised to pay the note.

9 Whether Burdick & Peet owed for one of the wagons, they had at the maturity of the note, has no effect upon the law of this case, unless the creditor is shown to have a lien upon it.

To which decisions of the court in overruling the objections of the peff to said instructions, and giving the same to the jury, the peffs by their counsel then and there excepted.

And thereupon the jury having retired, returned into court a verdict for defendant, in words & figures as follows, "We the jury find for the defendant."

43 Whereupon peffs entered their motion for a new trial, in words & figures, as follows:
Edmund P. Morgan & al

¹¹ } Circuit Court - November
Erastus Peet } Special T. 1862.

And now comes the said plaintiffs and move the court to set aside the verdict of the jury & for a new trial herein and for cause show.

- 1st The court refused proper evidence offered by peffs.
- 2^d The court admitted improper evidence offered by defendant.
- 3^d The court refused proper instructions asked by peffs.
- 4th The court improperly modified the instructions asked by said peffs.
- 5th ~~The verdict of the jury~~ The court gave improper instructions on the part of the dept.
- 6th The verdict of the jury is against the law the evidence & the instructions of the court.

Wherefore & for other sufficient reasons peffs ask for a new trial herein.

Cooper for peffs.

which said motion was overruled by the court and judgment for costs rendered by the court for the dept. To which said decisions of said court in overruling said motion and rendering judgment for said defendant, the peffs by their counsel then & there objected & excepted, and pray that this their bill of exceptions may be signed & sealed by the court, which is done.

A. L. Morrison Esq.

44=

State of Illinois
 " } do.
 Peoria County

I, Enoch Sloan, Clerk of
 the circuit court in and for said
 county and state, do hereby certify
 that the foregoing is a full, true
 and complete transcript of the
 papers filed in the cause wherein
 Edmund P. Morgan & al. are plaintiffs
 and Crastus Peet is defendant, and
 of the proceedings of said court ap-
 pertaining thereto, as the same appear
 of record and on file in my office.

Given under my hand and
 seal of said court at Peoria
 this 28th day of March AD
 1863 Enoch Sloan, Clerk



Edmund P. Morgan } In the Supreme Court -
 Ralph R. Root } April Term A.D. 1863
 vs. } Error to Pleona Circuit Court =
 Erastus Peet }

And now come the said plain-
 tiffs in error, and say that Manifest Error in the
 Record, proceedings & judgment of said Circuit
 Court in this Cause, hath intervened to their pre-
 judice, in this, to wit =

- 1st The said Court erred in the exclusion of proper evidence
 offered & given by said plaintiffs, on said trial below =
- 2nd Said Court admitted improper evidence for said de-
 pendant below =
- 3rd Said Court erred in refusing & in modifying instructions
 to the jury, asked by said plaintiffs, on said trial =
- 4th Said Court gave improper instructions for said
 defendant below =
- 5th Said Court erred in overruling the Motion of said
 plaintiffs for a new trial =
- 6th Said Court erred in reversing judgment in favor of
 said defendant & against said plffs, for costs =
- 7th Said verdict & judgment should have been in
 favor of said plaintiffs, for the amount of ^{this} ~~said~~
 note sued on & for costs =

Wherefore & for other good & sufficient
 reasons appearing in said Record, plffs in error
 pray that the judgment of said Circuit Court herein,
 be set aside, reversed & wholly for naught & esteemed

L. K. Cooper
 for plffs in error
 John

46 =

And now comes the said defendant, Erasmus
Peet, by Johnson & Hopkins, ^{his attys} and joins in error
in, and says that there is ^{such} no error in said Record
proceedings & judgment, as is above by said / Off
alleged, and said defendant therefore prays
that the said judgment be affirmed =

Johnson & Hopkins

attys for Deft in Error

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E. P. Morgan +

R. Res Root

vs

Erastus Root

Record

Filed Apr 22, 1863

J. L. Loomis
Clerk