

13648

No. \_\_\_\_\_

# Supreme Court of Illinois

Diversy<sup>E</sup>

---

vs.

Will

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133

STATE OF ILLINOIS,  
SUPREME COURT,  
Third Grand Division.

No. 215

*Drousey*  
*vs*  
*Wells*

1862

13648

*[Faint handwritten text]*

# SUPREME COURT OF ILLINOS,

THIRD GRAND DIVISION.

APRIL TERM THEREOF, A. D. 1862.

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MICHAEL DIVERSEY, }  
                          *vs.* } *Appeal from Snp. Court, Chicago.*  
HENRY WILL.        }

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The appellant makes the following points.

## I.

The testimony before the Court shows that Rose was merely an agent, and not a partner; and the exclusion of his testimony was erroneous, and injurious to the appellant.

## II.

The copartnership consisted of Johnson as well as Diversey, and no statement of Diversey can be received against Johnson's estate to introduce a third person into the partnership.

## III.

Diversey represents the interest of the deceased partner, and any decision excluding a witness who would be admissible for him, would be injurious to his estate, and erroneous.

## IV.

The articles of copartnership, as a deliberate agreement of the partners, fix and show the relation and character of Mr. Rose to the partnership, and no casual declaration of one of the partners can alter it to the prejudice of the other.

We contend that the Court erred in depriving the appellant of the benefit of Rose's testimony. We all know how easy a general remark is to be misunderstood. Rose had failed in business, and was unable to set up again, or even to hold any property, and Diversey was willing to assist him, as his son-in-law, by employing him as an agent and general salesman in a liquor house; he may even have invested his capital or credit in the business, with a view to give employment to his son-in-law, and in speaking of it, the witness throws in his own construction of the transaction, and attributes it to Diversey's words. Both Diversey and Rose declare that no such statement was ever made; it is inconsistent with the truth; he has and never has had any other right or interest than as agent and employee.

But Mr. Otto would not only make Johnson & Diversey liable for all Rose's contracts as a partner, but would likewise throw upon Rose all the liabilities of Johnson & Diversey. Such witnesses are extremely dangerous, and Courts ought to weigh carefully and well all their statements; nor should a mere casual conversation, imperfectly understood and recollected, be allowed to outweigh the solemn deed of the parties, in entering into business together as a copartnership. They had not only carried on business under these articles, but Johnson had died, and now those interested in his estate have rights to the surplus, after the partnership creditors are paid. All these interests are represented by Diversey; they are all sacrificed by excluding testimony upon no better foundation than the casual remark of Diversey, to which Johnson was not assenting, nor would he, because it was against the truth and his solemn agreement. It was his right, and is now the right of his estate, to have the testimony of Rose in all the transactions of the firm of which he was cognisant as acting agent, pursuant to the partnership articles. Those articles, the power of attorney, and the business letters sent in due course of their trade, all show that Rose was but an agent. Defendant took the note of Johnson & Diversey, and makes out his against them. Besides all this, the defendant did not know anything of any such statement as is attributed to Diversey, and did not give credit to any such state of facts.

We think injustice is done the appellant and the estate of the deceased partner, and the ruling below ought to be reversed, and appellant allowed the benefit of Rose's testimony in the case.

W. B. SCATES,  
*Of Counsel for Appellant.*



# SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION, }  
APRIL TERM, A. D. 1862. }

---

Michael Diversy,

vs.

Henry Will.

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}  
APPEAL FROM  
SUPERIOR COURT OF CHICAGO.

## ABSTRACT OF RECORD.

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Rec. p. 3 This was an action of assumpsit.

The **first count** is against Diversy as survivor, upon a promissory note given by Johnson & Diversy as a firm, under the name, style and firm of Johnson & Diversy, dated 22d June, 1860, payable six months after date, for the sum of \$407.48.

4 The **second count** is against Diversy as a surviving partner, for goods, wares, &c. Common count, purchased 20th May, 1860.

5 The **third**, is a common count for \$1000, for goods, wares, &c., purchased 25th October, 1860, against Diversy as surviving partner.

The **fourth**, is a general *indebitatus* count, for goods, wares, &c., against Diversy as surviving partner.

9           **Plea**, general issue.

**The jury** returned a verdict as follows, viz :

11           “ We, the jury, find issues for said plaintiff, and assess damages herein  
“ against said defendant, as surviving partner of Frank Johnson, deceased,  
“ to the sum of seven hundred and thirty-three dollars and fifty-three  
“ cents.”

12           **Appellant** entered his motion for a new trial, which was overruled  
and excepted to, and appeal prayed and allowed.

15           **Bill of Exceptions** shows, that after the plaintiff below closed his  
evidence, the appellant called Orrin J. Rose as a witness, and offered to  
have said Rose sworn as a witness, and to prove by him that the goods,  
wares and merchandise, to wit, liquors and wines sued for, were greatly  
overcharged, and that many packages were wholly worthless and unsale-  
able, and that the plaintiff admitted the same, and promised to make a  
fair deduction out of the note sued on, and out of the open account, upon  
final settlement.

The plaintiff below objected on the ground that said Rose was inter-  
ested. And thereupon, to prove such interest, the plaintiff called

**Augustus F. Otto,**

16           Who Testified : That Diversy came with Rose to his place of business,  
to obtain letters of recommendation to some New York house to enable  
the firm of Johnson & Diversy to purchase liquors. That witness sent  
Diversy to another house for such letters. That afterwards Diversy re-  
turned and stated to witness, that the house to which witness sent him,  
would not give him letters. That Diversy then, in the presence of Rose,  
stated that he Diversy knew nothing about the business—that he could  
not give it his personal attention. That Rose was in a condition that he

could not do business in his own name, but that he Diversy lent Rose his (Diversy's) name and used it; and that Rose was the real party in interest.

This conversation was in Otto's store in Chicago. That witness then gave Diversy a letter to plaintiff below.

The conversation between Diversy and witness was in the German language, and that a German by the name of Dischauer was in the same room at the time. That it was about the time, and previous to the day, that Mr. Johnson first went to New York, and after the commencement of the partnership between Johnson & Diversy, in the Spring or Summer. Rose was then, and is now, Diversy's son-in-law.

The plaintiff below, also called

**Mr. Lamperts,**

Who Testified: That Rose acted there in Diversy's place, signing letters and notes in the partnership name, without signing as agent, and acting apparently as agent for the firm. Witness kept his office there for about two years before the partnership. That the partnership continued for three months, by agreement, after Johnson's death. Johnson and Diversy both knew of Rose making notes in the partnership name, as aforesaid.

**On Cross Examination,**

17 Witness Stated: That he first knew Rose after beginning of partnership of Johnson & Diversy; does not know that Rose acted as agent. Witness knows Johnson's hand writing. Johnson & Diversy kept copies of their business correspondence. Witness knows the letter book of Johnson & Diversy—witness here identifies letter book, and letter, from copy of of letters, hereinafter read in evidence, by appellant.

Witness says he was employed by Johnson & Diversy to rectify for the firm, and did so for them. As a general thing Rose was understood to be an agent. Witness had a dispute with the firm of Johnson & Diversy since he left their employment.

**This was all the evidence** offered by the plaintiff below in support of the objection to Rose, on the ground of interest.

The appellant then called

**Bruce Quigg,**

Who Stated : That he was acquainted with the hand writing of Johnson & Diversy, and of O. J. Rose, and was book keeper of the firm under this partnership.

The articles of copartnership between Johnson & Diversy, and a power of attorney to Rose, from them, were shown witness, and their respective hands and execution proven, and that the power of attorney was in Johnson's hand writing.

Appellant then read the articles of copartnership in evidence to the court, as follows, viz :

19

“ ARTICLES OF COPARTNERSHIP between Frank Johnson and Michael Diversy, both parties of the city of Chicago, county of Cook and State of Illinois. The said Johnson party of the first part, and said Diversy party of the second part, and Orrin J. Rose agent to represent the interest of said Diversy, party of the third part: Have agreed, and by these presents do agree, to become partners in the wholesale liquors and rectifying business, under the style and firm of F. Johnson & Co., to buy and sell such goods as are usually kept in such business—the said copartnership to continue from this (3d of April, 1860) date to the first of May, 1861, with the privilege of three years from this date. The said Johnson has estimated his stock in trade now in store, together with the fixtures, at ten thousand dollars ; and for and in consideration of Michael Diversy's notes payable to the order of O. J. Rose, and by him endorsed, at one, two, three, four and five years after this date, bearing six per cent. interest for one thousand dollars each, has this day sold to said Diversy one half interest in full of said stock and fixtures, to be retained in said business as above specified, so that both the first and second parties have contributed the sum of five thousand dollars in stock in trade to the new firm of F. Johnson & Co. ; the interest of said Diversy to be represented by said

20 Rose, party of the third part, as his agent; the said second party hereby fully empowers him to act in his stead, as his true and lawful attorney.

“In case of death of either party, the business to be continued three months by surviving party, (if so much time shall elapse before the expiration of the partnership) charging to deceased so much salary as to employ a competent person to take his place.

“Correct books of account are to be kept, in which shall be entered all matters of account relating to the business of the firm, which shall be in common, and accessible to both parties, or their agent. Once a year, a correct account shall be taken and stated in the ledger, of all stock, property and assets of the firm, and of all the debts and liabilities. All expenses of the business, and all losses, are to be borne in common, and the profits and losses are to be equally divided between the first and second parties, to share and share alike.

“That neither partner, nor their agent, is to draw from the concern, for personal or other expenses, exceeding twelve hundred dollars the first year. That the name of the firm is not to be used as endorser or acceptor, unless at the consent of both parties; nor is the firm permitted to exchange checks with any other party or parties. And neither party is to contract any debt in the name of the firm, unless the consent of both parties be obtained.

21 “It is agreed that our stock shall be replenished, not exceeding five or six thousand dollars; and when the purchase shall become due, if the concern is not able to pay the same, the said Diversy is to furnish the means by endorsement, or otherwise, or otherwise to pay the same; the discount, and interest, and principal to be paid by the firm of said Johnson & Co. And the said Diversy further agrees to use his influence in procuring orders and trade for said new firm. All securities taken for debts due to the partnership, and all notes and obligations given shall be in the name of the firm, and all business of the firm shall be transacted in that name.

F. JOHNSON, [ SEAL ].

M. DIVERSY, [ SEAL ].

O. J. ROSE, [ SEAL ].

*Chicago, Ill., April Third, A. D. 1860.*

Witness, BRUCE QUIGG, [ SEAL ].”

“ It is agreed, that the style of the firm shall be Johnson & Diversy, instead of F. Johnson & Co., as at first agreed.

F. JOHNSON, [ SEAL ].

M. DIVERSY, [ SEAL ].

April 4, 1860.

O. J. ROSE, [ SEAL ].”

The defendant also offered, and read in evidence to the court, the said power of attorney, which is as follows, that is to say :

22 “ THIS IS TO CERTIFY, That Mr. O. J. Rose, is duly empowered to collect any debts, dues or demands that is owing us on book account, note, acceptance or otherwise, by suit if necessary, we recognizing any act of his in such matters as our own, and as binding as if done by us in person. We also constitute and appoint him an agent to solicit orders for liquors, wines or other goods or merchandise we have for sale.

Given under our hand and seal this Sixth day of July, A.

D. 1860, at Chicago.

JOHNSON & DIVERSY, [ SEAL ].

Witness, BRUCE QUIGG.”

The defendant also offered, and read in evidence to the court, the said copy of the letters, from the letter book, which is as follows, that is to say :

“ CHICAGO, 17th July, 1860.

Messrs. LEOPOLD & Bro., Eagle River :

*Gents* :—Our agent, Mr. Rose, has ordered the enclosed bill of ale. We shipped to your address, for this trip “ Lady Elgin,” which we trust will arrive safe in due time, prove entirely satisfactory, and lead to further orders.

Respectfully, yours. &c.,

JOHNSON & DIVERSY.

CHICAGO, 17th July, 1860.

CHAS. KUNZ, Eagle Harbor :

At the request of our agent, Mr. Rose, we ship this trip “ Lady Elgin,” the enclosed bill of ale and lager, \$29.25, which we wish safe to hand,

(7)

and trust will reach you in due time, prove satisfactory, and lead to further orders for goods in our line.

Respectfully, yours, &c.,

JOHNSON & DIVERSY."

CHICAGO, 17th July, 1860.

J. L. ARMSTRONG, Esq., Marquette, Mich. :

*Dear Sir* :—Enclosed, we hand you a bill of sundries, ordered through our agent, Mr. Rose, which we ship to day per "Lady Elgin," and trust will reach you safe, prove satisfactory, and lead to further orders.

Respectfnlly, yours, &c.,

JOHNSON & DIVERSY."

55

To all which the plaintiff objected, but the court admitted them.

Appellant also offered, and read in evidence, the note sued on, as follows, viz :

\$407.48.

CHICAGO, June 22, 1860.

Six months after date, we promise to pay to the order of Henry Will, four hundred and seven dollars and forty-eight cents, at Hoffman & Gelpcke's bank, Chicago, with current rate of exchange on New York, value received.

JOHNSON & DIVERSY."

Defendant also offered, and read in evidence, the account sued on, as follows, namely :

JOHNSON & DIVERSY, To HENRY WILL, Dr.

Oct. 25, 1860.	5 barrels XX Monong. Whisky, 40, 40½, 40, 40½, 39½—202½ gals. @ 75,.....	\$151.88
	1 bbl Prime Monong. Whisky, 41½ gals. 190	78.85
	1 puncheon Santa Cruz Rum, 113½ gals. (½ gal. out) net 113 gals., 95,.....	107.35
	Cartage .....	75
	Insurance on \$360 at 2½.....	9.90

\$348.73"

26

**This was all the evidence.**

( 8 )

The court decided that Rose was interested, and excluded him from giving testimony in this cause for appellant, and refused to allow him to be sworn as a witness.

To which decision, the appellant then and there excepted.

Appellant made his motion for a new trial, which was overruled; to which he then and there excepted.

#### ASSIGNMENT OF ERRORS.

- 1.** The court decided that Rose was interested and incompetent.
- 2.** The court refused appellant a new trial.
- 3.** The court rendered a judgment for appellee.

~~#~~ 215-133  
Michael Diversy  
13

Henry Will  
Abstract-

Filed April 22<sup>d</sup> 1862  
L. Leland  
Clerk.

# SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1862.

---

MICHAEL DIVERSEY }  
vs. } *Appeal from Superior Court of Chicago.*  
HENRY WILL. }

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## POINTS AND AUTHORITIES OF APPELLE.

### I.

The Court did not err in excluding witness Rose as interested and incompetent. Defendant in the Court below, offered Orrin J. Rose as a witness to prove certain facts, p. 15. The plaintiff objected on the ground that Rose was interested; and thereupon, to prove such interest, called one Augustus F. Otto, who testified to certain admissions of Diversey (of firm of Johnson & Diversy) before purchase of goods for which note was given. As to interest of Rose, see p. 15. Other testimony was given by plaintiff and defendant, and the Court below decided Rose incompetent upon the ground of interest.

The interest of a witness may be shown by either examining him on his *voir dire* or by *other evidence*.

- 1 Phillip's Evidence, 120, n. 6.
- 1 do 98 n. 2,
- 1 do 99, n. 48, C. & H.
- 1 Greenleaf's Evidence, § 423.

What the party who offers the witness said as to his interest, is competent to prove interest.

Pierce vs. Chase, S Mass. 487.  
1 Harr. & Johnson Maryd. 135.  
1 Phillip's Evid., p. 104, note 49.  
1 Dev. & Batt. 442, 445.

Can not in such case disprove interest by witness himself.

1 Phil. Evid. 104, n. 49.  
21 Penn. 443.  
14 do State Rpts. 390.  
1 Aiken, (Vermt.) 71.  
3 Connecticut, 319.

It can make no difference in this suit, that the admission of Diversey was made when he was co-partner with Johnston, as this action could have been maintained against Diversey without describing him as survivor.

1 Chitty's Pldg. 10 Ed. p. 50, and notes.  
Colyer on Partnership, § 740.

The admission was in Rose's presence, as follows: "He, Diversey, knew nothing about the business; that he could not give it his personal attention; that Rose *was in a condition that* he could not do business in his own name, but he (Diversey) lent Rose his, Diversey's, name and credit, and that Rose was the *real party in interest*."

This was the admission of Diversey himself, as to the partnership concerns, good against Diversey, (and good against both partners); and the Court has nothing to do in this case with Johnston's estate or interest in the co partnership, but it would be admissible against Johnston. "After co partnership is proven (in this case it was not disputed,) <sup>and was proven Admitted</sup> ~~the~~ admissions of a partner are admitted because of an unity of interest, and will be received even after a *nolle prosequi* as to one partner."

Colyer on Partnership, 500.  
3 J. J. Mar. 498.

Declaration of deceased partner allowed.

1 Tyler, (Vermt.) 452, Adams vs Brownson.

The evidence was very strong as to Rose's interest. Not only the positive evidence of Diversey's declaration that Rose was the real party in interest, &c., but the articles of co-partnership bear on their face evidence sustaining the witness, Otto. Johnston is party of first part, Diversey of second, and Rose of the third part. Diversey gives notes—\$5,000.00—for one half interest, payable to *Rose's order, endorsed by Rose*, p. 18. Rose was in habit of signing the firm name, not signing as agent. This was known to both parties, p. 16. Rose consents to change the firm name, p. 21.

The admission of Drwisy would have been good as against him in a suit against both partners and we could <sup>have</sup> excluded Rose in a suit against ~~the surviving partner~~ ~~the surviving partners~~ Why could not the court do so in a suit against the surviving partner (who alone the law recognizes) and who made the admission admission of partner that property was his separate property - held admissible in an action by both partners Lucas v. Wall & Co. / Monte & Selw. 249

Having proved the partnership alimide the acts and declarations are binding upon all  
Gerr on Part 5 63  
Case cited

The appellee contends, that inasmuch as the bill of exceptions does not contain all the evidence in the case, the finding of the Court will be sustained.

The Record shows that it contains only the evidence introduced by plaintiff to sustain his objection, see p. 17, and all offered by defendant below to rebut plaintiff's testimony tending to show Rose's interest, page 26.

How, unless from the whole evidence of the cause, is the Court to know that Rose's evidence would not have been merely cumulative,—that there was not evidence to the same facts, same conversation, that was offered to be proven by Rose?

Perhaps there was evidence offered by plaintiff, that would have waived any damages offered to have been proven by Rose,—that would have made his, Rose's, evidence, even if it had gone to the jury, of no weight.

Does it not devolve upon appellant to show, by his bill of exceptions, (which is a *mere pleading*, and to be taken most strongly against him,) that the evidence excluded, *might* have produced a different result?

If the bill of exceptions, where decision of lower Court overruling motion for a new trial is founded upon newly discovered testimony, must state all the evidence at the trial, as well as newly discovered evidence, it appears to us that in this case the Court will require that the bill of exceptions state all the evidence in the case, as well as what was offered to be proven by witness, so that the Court can determine whether or not substantial justice has been done.

BARKER & TULEY,  
*For Appellee.*

Michael Diversy

vs

Henry Will

Points & brief

of

Appellee

Filed May 6, 1862

L. Leland  
Clerk

UNITED STATES OF AMERICA,  
STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the Second day of December in the year of our Lord One Thousand Eight Hundred and Sixty one and of the Independence of the United States of America the Eighty seventh

Present, The Honorable John M. Wilson Chief Justice of the Superior Court of Chicago.

Wm H Higgins  
and Grant Gordon } Judges.

Charles Warren Prosecuting Attorney.

Anthony O'Hering Sheriff of Cook County.

Attest, Thomas P. Carter Clerk.

(1) Be it remembered that hereunto to wit, on the twenty second day of May in the Year of our Lord One Thousand Eight Hundred and Sixty one there issued out of the office of the Clerk of the Superior Court of Chicago, the People's writ of Summons which said writ with the Sheriff's return thereon endorsed in words and figures following to wit:

State of Illinois  
County of Cook ss  
The People of the State of Illinois,  
to the Sheriff of said County - Greeting:  
We Command You that You summon Marshall  
Diversey surviving partner of Thomas Johnson  
deceased, if he shall be found in Your County.

personally to be, and appear before the Superior  
Court of Chicago, of said Cook County, on the  
first day of the next term thereof, to be holden at  
the Court House in Chicago in said Cook County  
on the first Monday of June next. to answer unto  
Henry Will in a plea of Trespas in the Case upon  
promises, to the damage of the said Plaintiff as is  
said, in the sum of One Thousand Dollars

And have you thro this writ, with an endorsement  
thereon in what manner you shall have executed  
the same



Witness Walter Kimball Clerk of  
said Court, and the seal thereof, at  
Chicago aforesaid, the 22<sup>d</sup> day of  
May A.D. 1861  
Walter Kimball Clerk

(2)

Served by reading the within writ to the within named  
defendant this 22<sup>d</sup> day of May 1861

Augustus Kering Sheriff  
by John A. Nelson Deputy

And afterwards to wit on the twenty fourth day  
of May in the Year aforesaid Henry Will by  
Danker & Tuley his Attorneys filed in the office  
of the Clerk of said Court his Certain declaration  
in words and figures following to wit:—

Superior Court of Chicago  
June Term A.D. 1861

State of Illinois  
Cook County ss.

1. Henry Will Complainant of  
Michael Direrney surviving partner of Frank  
Johnson deceased lately trading under name & style  
of Johnson & Direrney, for that whereas the said  
Michael Direrney and one Frank Johnson now  
deceased (whom the said Michael Direrney survives)  
on the 22<sup>nd</sup> day of June A.D. 1860 at Chicago  
to wit at Cook County and State of Illinois made  
this Certain Note in Writing Commonly called a  
promissory Note bearing date the day and Year  
therein mentioned to wit the day and Year last  
aforesaid, and then and there delivered the said Note  
to said Henry Will by which said Note, the said  
defendant & said Frank Johnson deceased then & there  
promised to pay to the order of Henry Will under  
the name, style and firm of Johnson & Direrney six  
months after the date thereof (meaning the date of  
said Note) the sum of Four Hundred and forty <sup>48</sup>/<sub>100</sub>  
dollars at Hoffman & Gelpke's Bank Chicago  
with Current rate of exchange on New York value  
received

By means whereof and by force of the Statute  
in such Case made and provided the said defendant  
became liable to pay said Plaintiff said sum of

(3)

of Money mentioned in said Note and being so liable  
in Consideration thereof then and there together with  
said Frank Johnson Indenture and promised  
to pay the same to the said Plaintiff according  
to the tenor and effect true intent and meaning  
of the said Note to wit at the place aforesaid

2

And also for that whereas the said Michael  
Dirsey and one Frank Johnson (now deceased  
(whom in the said Frank Johnson Survived) on the  
twentieth day of May A D Eighteen Hundred and  
fifty one at Chicago to wit at Cook County  
aforesaid were indebted to the said Henry Will in  
the sum of one thousand dollars for Goods wares and  
Merchandise by him the said Henry Will to the  
said Michael Dirsey and Frank Johnson in the  
life time of him the said Frank Johnson and at the  
Special instance and request of the said Michael  
Dirsey and Frank Johnson before that time  
sold and delivered, and being so then indebted  
they the said Michael Dirsey and Frank Johnson  
in the life time of the said Frank Johnson then and  
there in Consideration thereof assumed upon themselves  
and to the said Henry Will then and there faithfully  
promised that they the said Michael Dirsey and  
Frank Johnson in the life time of the said Frank  
Johnson the said sum of Money to said Henry Will  
when they should be thereto afterwards required  
will and faithfully pay the same

(4)

3 & Also For that Whereas the said defendant, together with one Frank Johnson now deceased in his life time hereinafter, to wit, on the 25<sup>th</sup> day of October in the Year of our Lord one thousand eight hundred and 60 at Chicago, in said County, became and was indebted to the said Plaintiff in the sum of One thousand dollars dollars of lawful Money of the United States of America for divers Goods, Wares, and Merchandises, by the said Plaintiff before that time sold and delivered to the said defendant & said Frank Johnson deceased in his life time and at the special instance and request of the said defendant, and said Frank Johnson deceased and being so indebted to the said Plaintiff the said defendant & said Johnson deceased in Consideration thereof, afterwards, to wit, on the same day and Year, and at the place aforesaid undertook, and then and there faithfully promised the said Plaintiff well and truly to pay unto the said Plaintiff the sum of Money last mentioned, when the said defendant & said Johnson deceased should be therunto afterwards requested

(5)

4 And Whereas, also, the said defendant & said Frank Johnson deceased in his life time, afterwards, to wit, on the same day and Year, and at the place aforesaid, in Consideration that the said Plaintiff had before that time, at the like special instance and request of the said defendant & said Frank Johnson deceased in his life time, sold and delivered to the said defendant & said Frank Johnson in his life time, divers

These goods, wares and Merchandises of the said Plaintiff  
the said defendant & Francis Johnson now deceased, then  
and there undertook and faithfully promised the said  
Plaintiff that the said defendant and said Johnson  
now deceased, should well and truly pay to the said  
Plaintiff so much money as the said aforesaid goods  
ware and Merchandises at the time of the sale and  
delivery thereof, were reasonably worth, when the said  
defendant & Francis Johnson deceased, should be thereunto  
afterwards requested; and the said Plaintiff avers that  
the said goods, wares Merchandises last mentioned, at  
the time of the sale and delivery thereof, were reasonably  
worth the further sum of one thousand dollars of like  
lawful money as aforesaid, to wit, at the place aforesaid,  
whereof the said defendant & said Francis Johnson  
afterwards, on the same day and year, and at the place  
aforesaid, had notice

(6)  
Nevertheless the said Michael  
Dirrsey and Francis Johnson in his life time of  
the said Francis Johnson and the said Michael Dirrsey  
after the death of the said Francis Johnson this several  
promises and assumptions aforesaid in form aforesaid  
made, not regarding nor either of them any way  
regarding nor either of them any way regarding but  
contrary and fraudulently intending the said Henry  
Will in this behalf craftily & slyly to deceive and  
defraud the said several sums of money or any part thereof  
& the said Henry Will has not paid nor has either

7

of them said although to do the said Michael  
 Diversy and Frank Johnson in the lifetime of the  
 said Frank Johnson afterwards, to wit the 25<sup>th</sup> day of  
 October A.D. 1860 at Chicago aforesaid in the County  
 aforesaid and the said Michael Diversy after the  
 decease of the aforesaid Frank Johnson to wit, the 20<sup>th</sup>  
 day of May 1861 at Chicago aforesaid by the said  
 Henry Will were required, But the said Michael  
 Diversy and Frank Johnson in the life time of the  
 said Frank Johnson and the said Michael Diversy  
 after the death of the said Frank Johnson thereunto the  
 said Henry Will to pay or any way for the same to  
 satisfy him altogether refused and the said Michael  
 Diversy thereon to the said Henry Will hitherto to pay  
 doth altogether refuse to the damage of him the said  
 Henry Will of one thousand dollars and therefore he  
 brings suit by Parker & Talbot this attorney

Copy of instrument and account filed on

\$407<sup>45</sup> Chicago Jan 20<sup>th</sup> 1860  
 Six months after date we promise to pay  
 to the order of Henry Will Four hundred & seven  
 48<sup>1/2</sup> dollars at Hoffmann & Seligson Bank Chicago  
 with current rate of exchange on New York value  
 received Johnson & Diversy

Johnson & Dirrney To Henry Will Dr

Oct 25 1860 Five bbls xx Monong Whiskey  
 40. 42 1/2 40. 40 1/2 39 1/2 202 1/2 gals 75 \$151.88  
 1 bbl prime Monong Whiskey  
 41 1/2 gals \$1.90 78.85  
 1 bunch Santa Cruz Rum  
 11 3/4 gals (1/2 gal out) 113 gal 959 107.35  
 Cartage 75  
 Insurance on 360 at 2 1/4 % 9.90  
 348.73

(8)

And afterwards to wit on the fourth day of June in  
 the year last aforesaid Michael Dirrney by Seate  
 McAllister & Jewett his attorneys filed herein his  
 Certain plea and affidavit of merits in words and  
 figures following to wit:

State of Illinois?  
 County of Cook Sp In Superior Court of Chicago  
 June Term A.D. 1861

Michael Dirrney Survivor &  
vs  
Henry Will

And the said Defendant  
by Scates McAllister & Jewett his attorneys Comes  
and defends the Verge and injury whate and says  
that he did not undertake or promise in manner  
and form as the said Plaintiff hath above things Com-  
plained against him, and of the the said Defendant  
Prays may be inquired of by the Country &c  
Scates McAllister & Jewett  
Atty for Deft

Superior Court of Chicago  
June Term A.D. 1861

(9)

Henry Will  
vs  
Michael Dirrney Survivor  
of Frank Johnson

State of Illinois County of Cook ss  
Michael Dirrney being first duly  
Sworn deposes and says that he is the defendant in  
the above entitled Cause and that he has a good and  
substantial defence to said actions upon the merits as  
he verily believes  
Michael Dirrney  
Subscribed & Sworn to before me this  
4<sup>th</sup> day of June A.D. 1861  
Walter Kimball Clerk

And afterwards to wit on the Twenty fifth day  
of November in the Year aforesaid, said day being  
one of the days of the November Term of said Court the  
following among other proceedings was had in said  
Court and entered of record to wit

Henry Will

vs  
Comptest  
Michael Dineroy Sheriff  
Partner of Thomas Johnson deceased

(10) This day comes the said  
Plaintiff by Parker & Tully his attorney and the said  
defendant by Leates McAllister & Jewett his attorneys also  
comes and issues being joined herein upon agreement of  
the parties it is ordered that a jury of ten persons come to  
try the issues joined whereupon comes the jury of good and  
lawful men to wit, C. W. Fuller, John Jenks, J. W. Pendry,  
J. W. King, A. Roberts, Jr., Israel Thordike, William Kolbe,  
J. P. Brewster, J. P. Jones and G. H. Kilder, who being duly  
elected took and sworn to try the issues joined as aforesaid  
after hearing part of the testimony and the hour of adjournment  
having arrived it is ordered upon agreement of the parties  
that the jury separate and quit the Court tomorrow morning

And afterwards to wit on the Twenty fifth day of  
November in the Year aforesaid, said day being one of the  
days of the November term of said Court the following among other  
proceedings was had in said Court and entered of record to wit:-

Henry Will

vs

Assumpsit

Michael Dirrney Surviving  
Partner of Thomas Johnson deceased

(11)

This day again comes  
the said plaintiff by Parker & Tully, his attorneys and the  
said defendant by Seates M. Allitt & Jewett his attorneys  
also comes, and the jury empanelled herein on yesterday  
for the trial of said cause also comes, and after hearing  
all the evidence arguments of Counsel and instructions of  
the Court retire to consider of their verdict, and afterwards  
return into Court submit their verdict and say, That the  
jury find issues for said plaintiff and assess his damages  
herein against said defendant as surviving partner of Thomas  
Johnson deceased to the sum of seven hundred and thirty  
three dollars and fifty three cents

And therefore the said defendant submit his motion  
herein for a new trial in said cause

And afterwards to wit, on the Twentieth day of  
December in the Year aforesaid - said day being one  
of the days of the December Term of said Court, the  
following <sup>other</sup> proceedings was had in said Court and  
entered of record. To wit: -

Henry Will

vs

Assumpsit

Michael Dirrney Surviving  
Partner of Thomas Johnson deceased

This day again Comes said Plaintiff by Parker & Daly his  
Attorney, and the said defendant by Seaton McAllister  
& Jewett his attorneys also Comes, and this Cause coming  
in to be heard upon the motion of said Defendants hereto-  
fore submitted herein at the November Term last past of  
this Court for a new trial in said Cause, and Counsel  
being heard therein and the Court being fully advised in  
the premises overrules the defendants said motion, to which  
ruling of the Court said defendant excepts and therefore  
enters his exceptions herein to the ruling of the Court in overrul-  
ing his said motion for a new trial whereupon the said Plaintiff  
ought to have and recover his damages and have judgment  
entered upon the verdict of the jury rendered herein and  
for his damages assessed thereon by the jury as aforesaid  
against said defendant as surviving Partner of Thomas  
Johnson deceased

(12)

Therefore it is Considered that the said plain-  
tiff do have and recover of said defendant as  
surviving Partner of Thomas Johnson deceased his damages  
of Seven hundred and thirty three dollars and fifty three  
Cents in form aforesaid by the jury here found and assessed  
together with his Costs and Charges in this behalf expended  
and have execution therefor

And therefore the said defendant having  
entered his exceptions forays an appeal herein to the  
Supreme Court of this State from the judgment of this  
Court, which is allowed to him upon filing his bond in  
penalty of twelve hundred dollars with <sup>Wm</sup> Williams Sill

as Security in Twenty days and with bill of exaction  
to be filed within thirty days from this day

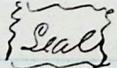
And afterwards to wit on the Eleventh day  
of January in the Year of our Lord One Thousand Eight  
hundred and Sixty two the said Michael Diney  
filed herein his Appeal Bond in words and figures  
following to wit

(13) I know all Men by these Presents that  
we Michael Diney and William Hill are hold &  
firmly bound unto Henry Hill in the special sum  
of Fifteen Hundred & Sixty Seven <sup>or 1100</sup> Dollars lawful  
Money of the United States for the payment of which  
we have ourselves our administrators heirs and assigns  
jointly severally and firmly by these Presents  
Signed with our hands, sealed with our seals and  
dated this 4<sup>th</sup> day of January Eighteen hundred  
& Sixty two

The Condition of the above obligation is such  
that whereas the said Henry Hill on the 26<sup>th</sup> day  
of December Eighteen hundred and Sixty one  
received a judgment against the above bounden  
Michael Diney for the sum of Seven hundred and  
thirty three <sup>83</sup> 1/2 dollars in the Superior Court of  
Chicago together with his Costs in that behalf expended  
from which said judgment the said Diney has prayed

An appeal to the Supreme Court of the State of  
Illinois

Now if the said obligors shall pay to the  
said Henry Will the said judgment interest & costs  
in Case the same shall be affirmed and also  
whatever judgment shall be rendered against him  
in the Supreme Court, then this obligation shall  
be void, else to be and remain in full force

Wm H Higgins  Judge  
M Derry   
William Sell 

(14)  
And afterward to wit on the twenty first day  
of January in the Year last aforesaid the said  
Michael Derry by Lewis McAllister & son  
his attorneys filed in the office of the Clerk of the  
said Court his other Certain Bill of Expositions  
in words and figures following to wit:—

Of the December Term of the  
Superior Court of Chicago 1861.

F. Hill  
vs  
Michael Diversy  
surviving partner of  
Johnson & Diversy

} Assumpsit.

(15)

Be it remembered that on the trial of this cause, after the plaintiff closed his evidence the defendant called Orrin D. Rose as a witness, and offered to have said Rose sworn as a witness, and to prove by him that the goods wares & merchandise to wit liquors & wines, sued for were greatly overcharged, and that many packages were wholly worthless & unsaleable and that the plaintiff admitted the same, and promised to make a fair deduction out of the note sued on & out of the open account, upon final settlement - The plaintiff objected on the ground that said Rose was interested - and thereupon to prove such interest the plaintiff called Augustus F. Otto, who being duly sworn stated that Diversy came with Rose to his place of business to obtain letters of recommendation to some New York house to enable the firm of Johnson & Diversy to purchase liquors - that witness sent Diversy to another house for such letters - that afterwards Diversy returned and stated to witness that the house to which witness sent him, would not give

(16)

him letters. — that Diversy then in the presence of Rose stated that he (Diversy) knew nothing about the business — that he could not give it his personal attention — that Rose was in a condition that he could not do business in his own name, but that he (Diversy) lent Rose his (Diversy's) name and credit — and that Rose was the real party in interest. This conversation was in Otto's Store in Chicago. — that witness then gave Diversy a letter as plaintiff. The conversation between Diversy & witness was in the German language — that a German named Dischauer was in the same room at the time. — that it was about the time of & previous to the day that Mr Johnson first went to New York, and after the commencement of the partnership between Johnson & Diversy — in the Spring or Summer Rose was then known as Diversy's son in law. The plaintiff also called Mr Lampert, who being duly sworn, stated that said Rose acted there in Diversy's place, signing letters & signing notes in partnership name without signing as agent and acting apparently as agent for the firm. Witness kept his office there for about two years before the partnership — that the partnership continued for three months, by agreement, after Johnson's death, Mr Johnson & Diversy both knew of Rose making notes in partnership name as aforesaid.

On cross-examination witness stated — that he first knew Rose after beginning of partnership of Johnson

& Diversy, - does not know that, Mr Rose acted as agent. Witness knows Johnson's hand writing - Johnson & Diversy kept copies of their business correspondence. Witness know the letter book of Johnson & Diversy. Here a letter in the letter book was shown Witness - who testified to the same being a letter-press copy and in the handwriting of firm in their book of copies kept for that purpose. Witness stated that he was employed by Johnson & Diversy to rectify for the firm - and did so for them - as a general thing Rose was understood to be an agent, Witness had a dispute with the firm of Johnson & Diversy since he witness left their employment. This was all the evidence offered by plaintiff to support his objection.

(17)

The defendant then called Bruce Quigg who being duly sworn stated that he was vis acquainted with the handwritings of Johnson & Diversy & of C. J. Rose and was bookkeeper to the firm under this partnership. (The articles of copartnership - and a power of attorney from Johnson & Diversy were shown the witness - and after examination of each Witness stated that the signatures to the said articles are the signatures respectively & in the hand of said Johnson, Diversy & Rose - and that the name of the firm to the said power of attorney is in the handwriting of said Johnson).

The defendant then offered & read in evidence before the Court the articles of Copartnership which are as follows & that is to say -

Exhibit 'A'

Articles of Copartnership between Frank Johnson  
& Michael Diversey both parties of the City of Chicago,  
County of Cook and State of Illinois

The said Johnson party of the first part and  
said Diversey party of the second part, and Otwin  
J Rose Agent to represent the interest of said Diversey  
party of the third part - have agreed by these presents  
do agree to become partners in the Wholesale Liquor  
& Rectifying business under the style & firm of F  
Johnson & Co, to buy & sell such goods as are usually  
kept in such business the said Copartnership to  
continue from this (3<sup>rd</sup> April 1860) date to the first  
of May A D 1861 with the privilege of three years  
from this date, the said Johnson has estimated his  
stock in trade now in store together with the fixtures  
(excepting the safe) at Ten Thousand Dollars and  
for and in consideration of Michael Diversey's note  
payable to the order of O J Rose & by him endorsed at  
one, two, three, four, and five years after this date  
bearing six per cent interest, for Ten Thousand Dollars  
each has this day sold to said Diversey one half  
interest in full of said stock & fixtures to be retained  
in said business as above specified so that both the  
first and second parties have contributed the sum of  
Five Thousand Dollars in stock in trade to the new  
firm of F Johnson & Co, The interest of said Diversey to be  
represented by said Rose party of the third part as  
his Agent the said second party hereby fully empowered

19

Agree to act in his stead as his true & lawful Attorney  
In Case of death of either party the business to be Contin-  
ued three months by surviving party (if so much time  
should elapse before expiration of partnership) Charging  
to deceased so much Salary as to employ a Competent  
Person to take his place, Correct Books of Account are  
to be kept in which shall be entered all matters of  
Account relating to the business of the firm which shall  
be in Common and acceptable to both parties or their  
Agent, Once a Year a Correct account shall be taken  
and stated in the Ledger of all stock, property and assets  
of the firm & of all the debts & liabilities, All expenses  
of the business & all losses are to be borne in Common & the  
profits & losses are to be equally divided between the  
first & second parties, To Have and Share alike

(210)  
That neither partner nor their Agent is to draw from  
the Company for personal or other expenses exceeding  
twenty hundred dollars the first Year - That the Name  
of the firm is not to be used as endorser or acceptor  
unless at the Consent of both parties nor is the firm  
permitted to exchange Checks with any other party  
or parties, And neither party is to Contract any debt  
in the name of the firm unless the Consent of both parties  
be obtained, It is agreed that no stock shall ever be  
replenished not exceeding five or six thousand dollars  
and when the purchase shall become due, if the Company  
is not able to pay the same, the said Director is to furnish  
the means by endorsement or otherwise to pay the same

the discount and interest and principal to be paid by  
the firm of said Johnson & Co, And the said Dirney  
further agrees to use his influence in procuring orders and  
trade for for said new firm. All securities taken for  
debts due to the partnership and all notes and obli-  
gations given shall be in the name of the firm and all  
business of the firm shall be transacted in that name

Charles M. Apul  
Third A.D. 1860

R Johnson  
McDirney  
J. Row

Witness Bruce Dugg

(21) It is agreed that the style of the firm shall be Johnson  
& Dirney, instead of R Johnson & Co as at first agreed

April 4/60

R Johnson  
McDirney  
J. Row

The defendant also offered & read in evidence to the  
Court the said power of Attorney which is as follows  
that is to say

Exhibit "D"

This is to Certify that Mr J. Row is duly empow-  
ered to collect any debts, dues or demands that is  
owing us on book account, note, acceptance or  
otherwise, by said J. Row or any one recognizing any  
act of his in such matters as our own and as binding

as if done by us in person, we also constitute and  
appoint him an agent to solicit orders for liquors  
wines or other goods or merchandises we have on sale,  
Given under our hand and seal this fifth day of  
July A D 1860 at Chicago  
Witness  
Bonce Daiggy  
Johnson & Diverney (Seal)

The defendant also offered & read in evidence to  
the Court the said Copy of the letter from the  
letter book of the firm which is as follows that is to say

Exhibit "C"

Chicago 17 July 1860

(22)

Messrs Leopold & Son

Eagle River Ont

Our Agent Mr  
Row has order'd the enclosed bill of Ale we ship'd to  
Yr address for the trip "Lady Elgin" which we trust will  
arrive safe in due time prove entirely satisfactory & lead  
to further orders  
Respectfully Yrs &c

Johnson & Diverney

Chicago 17 July 1860

Chas Kenny

Eagle Harbor

At the request of our  
Agent, Mr Row, we ship this trip of "Lady Elgin"

the enclosed bill of Ale & Lager \$29<sup>25</sup> which we wish  
safe to hand & trust will reach You in due time prove  
Satisfactory & lead to further orders for goods in our line  
Respectfully Yrs &c  
Johnson & Pirrony

Chicago 17<sup>th</sup> July 1860  
J. S. Armstrong Esq  
Marquette Mich  
Dear Sir Enclosed we send You  
a bill of sundries ordered through our agent Mr Rose  
which we ship to day by "Lady Elgin" & trust will reach  
You safe & prove Satisfactory & lead to further orders  
Respectfully Yrs &c  
Johnson & Pirrony

(23)

To the readings of which said articles of copartnership, power of attorney and letter respectively the plaintiff objected and the court overruled the said objections and allowed them to be read -

The defendant also offered and read in evidence to the court, the note sued on, which note is as follows that is to say -

\$ 40 <sup>48</sup>/<sub>100</sub> Chicago June 22<sup>nd</sup> 1860

Six months after date the promise to pay to the order of Henry Will Four hundred & seven <sup>48</sup>/<sub>100</sub> dollars at Hoffmanns & Gelpckes Bank Chicago with current rate of exchange on New York. Value Received.

Johnson & Dirning.

(25)

The defendant also offered & read in evidence the account sued on which is as follows, that is to say -

Johnson & Dirning To Henry Will Dr

Oct 25 1860 Five bbls x 7 Meaney Whiskey  
 40. 40 1/2 40 40 1/2 39 1/2 - 202 1/2 gal 75 \$151.88  
 1 bbl Prince Monong Whiskey  
 47 1/2 gal 1.90 78.85  
 1 purchase Santa Cruz Rum  
 113 1/2 gal (1/2 gal out) <sup>net</sup> 113 gal 95 107.35  
 Centage 75  
 Insurance on 360 at 2 3/4 % 9.90  
 348.73

This was all the evidence offered by defendant to rebut the plaintiff's testimony tending to show Rose's interest.

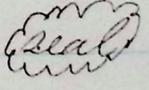
Whereupon the Court decided & held that said Rose was interested and that he was in-competent to give testimony for the defendant in this cause - and excluded the said witness and refused to allow him to be sworn as a witness for & on behalf of said defendant, or to testify in said cause.

To which decision in rejecting & excluding said Rose the defendant by his counsel then & there excepted.

After hearing the evidence and argument of counsel, the jury retired and afterwards returned into Court with a verdict for the plaintiff for the sum of \$733.53.

(26)

Thereupon the defendant moved the court for a new trial - and filed his reason therefor (amongst others) that the Court erroneously excluded & rejected the said Rose as a witness - and upon argument the Court overruled the said motion for a new trial - and rendered a judgment for the sum of \$733.53. upon the verdict of the jury aforesaid. To which said decisions in overruling said motion for a new trial and in rendering judgment for the plaintiff then & there excepted at the time. and prays that this his bill of exceptions to the said several rulings & decisions aforesaid may be allowed & made a part of the judgment in this behalf - which is done accordingly.

Van N. Higgins 

State of Illinois }  
County of Cook } ss.

I, Thomas P. Carter Clerk of the  
Superior Court of Chicago within and for the County  
and State aforesaid, do hereby certify that the above  
and foregoing is a full true and complete transcript of  
all the pleadings on file in any office, and of all  
orders and judgment entered of record in said Court  
in the case wherein Henry Hill is plaintiff, and  
Michael Diversy surviving partner of Frank  
Johnson deceased is defendant.

(27)  
In testimony whereof I hereunto subscribe  
my name, and affix the Seal of said  
Court, at the City of Chicago in said County  
this 31<sup>st</sup> day of March A.D. 1882  
Thomas P. Carter Clerk



State of Illinois Supreme Court  
Third Grand Division April Term 1862

Michael Diversy } Appeal from  
v } Superior Court of  
Henry Will } Chicago.

And the said Appellant by  
Scates McAllister & Gavett his Coun-  
sel Comes & says that in the Record  
and Proceedings, and in the rendition  
of judgment in this cause by  
the Superior Court of Chicago, there  
has manifest error intervened  
as follows

First The Court decided that said  
Witness A. J. Rose was interested  
& incompetent to testify, and  
refused & excluded him

Second The Court overruled the  
Appellant's motion for a new  
trial

Third The Court rendered judg-  
ment for the Appellee  
Wherefore for these & other errors in  
the record, he prays that the same  
may be reversed, annulled, and  
for nothing esteemed, and for his  
reasonable Cost

Scates McAllister & Gavett  
Counsel for Appellant

Hinder

The appellee prints in snow and says that  
there is no snow in the record

Bartholomew L. Tuley  
atty for appellee

Michael Diversy

vs

Henry Will

Record

from my copy  
"Dec. 16. 50."

Filed April 22. 1862  
L. Leland  
Clerk

Scates, McAllister &  
Jewett for Appellant