

No. 13215

Supreme Court of Illinois

Franey

vs.

True et al

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 144.

*Traney
vs
True*

13215

1861

STATE OF ILLINOIS—SUPREME COURT,

THIRD GRAND DIVISION—APRIL TERM, 1831.

144

THOMAS FRANEY,
vs.
WILLIAM M. TRUE et al.

Appeal from La Salle County Court.

I.—The Statute requires a copy of the instrument upon which suit is brought to be given, but an endorsement upon a note is no part of the note itself. The note is perfect without the endorsement. If the suit had been brought on the endorsement against the endorsee, then the endorsement would have been part of the instrument sued on; he gave a copy to the defendant of the very instrument which he signed, and which he wanted him to pay; the endorsement was a separate instrument by which the note was transferred.

A copy of the endorsement could have been of no conceivable use.

The covenant was, that, Solyman Bell by the name and style of S. Bell, endorsed and delivered the note; that was all the information on the subject that could be given. The rule is that if an instrument be set out in *haec verba*, in the declaration no copy need be given, the endorsement was set out in the declaration in *haec verba*.

Benjamin vs. Delahay 2, Scam. 574.

II.—But admitting for the sake of the agreement that the endorsement was a part of the instrument sued on, and that setting out the endorsement in *haec verba* in the declaration would not do. Yet there is no exception saved, there is no bill of exceptions, and a statement in the record that the party excepted is of no consequence because it is no part of the record; the party should have filed his bill of exceptions and so have preserved the exception.

Dickhut vs. Durrell 11 Ills. 72.

Petty vs. Cott 5 Gilm. 209.

McBain vs. Enloe 13 Ills. 572.

Miller vs. Doleson 1 Gilm. 573.

Pottle vs. M. Worter 13 Ills. 455.

The same reason applies to prevent this Court from examining the question whether a new trial should have been granted. See two cases last cited.

III.—If the replication was faulty in any respect, it must have been because it was double, this is the *objection* ~~objection~~ ^{which is made to it, and that al-} ~~ligation~~ ^{objection} ~~can not be taken upon ground~~ ^{general} demurrer.

IV.—But the replication was not double ; the covenants of the plea, are
1st. The note was assigned after it became due.

2d. The consideration of the note was the sale of a machine by warrantee, those facts are admitted by the replication.

3d. The machine would not work properly and so the consideration failed. This single fact is traversed by the replication.

The replication is good on general demurrer, and this demurrer is exceedingly general, if it can be called a demurrer at all.

B. C. COOK, Att'y for Appellees.

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enough energy, it can be called a demurmer at all.

The replication is good on several grounds, and this demurmer is ex-

cluded. The single fact is reversed by the replication.

3d. The machine would not work properly, and so the consideration
under those facts is admitted by the replication.

3d. The consideration of the note was the sale of a machine by way

1st. The note was assigned after it became due.

IV.—But the replication was not double; the correctness of the first was

if it can not be taken upon it, and it is not.

III.—If the replication was really in any respect, it must have been in

tion of other, and this should have been stated. But the first is
The same reason applies to prevent this Court from examining the first.

STATE OF ILLINOIS—SUPREME COURT,

THIRD GRAND DIVISION—APRIL TERM, 1861.

144

THOMAS FRANEY,
vs.
WILLIAM M. TRUE et al.

Appeal from La Salle County Court.

I.—The Statute requires a copy of the instrument upon which suit is brought to be given, but an endorsement upon a note is no part of the note itself. The note is perfect without the endorsement. If the suit had been brought on the endorsement against the endorsee, then the endorsement would have been part of the instrument sued on; he gave a copy to the defendant of the very instrument which he signed, and which he wanted him to pay; the endorsement was a separate instrument by which the note was transferred.

A copy of the endorsement could have been of no conceivable use.

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McBain vs, Enloe 13 Ills, 572.

Miller vs. Doleson 1 Gilm. 573.

Pottle vs. M. Worter 13 Ills. 455.

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IV.—But the replication was not double ; the covenants of the plea, are
1st. The note was assigned after it became due.

2d. The consideration of the note was the sale of a machine by warrantee, those facts are admitted by the replication.

3d. The machine would not work properly and so the consideration failed. This single fact is traversed by the replication.

The replication is good on general demurrer, and this demurrer is exceedingly general, if it can be called a demurrer at all.

B. C. COOK, Att'y for Appellees.

144
Thomas. Franey
vs
W. M. Torue et al.

Filed May 1st 1861
L. Leland
Leland

B. C. COOK, Clerk of the Court.

STATE OF ILLINOIS—SUPREME COURT,

THIRD GRAND DIVISION—APRIL TERM, 1861.

144

THOMAS FRANEY,
vs.
WILLIAM M. TRUE et al.

Appeal from La Salle County Court.

I.—The Statute requires a copy of the instrument upon which suit is brought to be given, but an endorsement upon a note is no part of the note itself. The note is perfect without the endorsement. If the suit had been brought on the endorsement against the endorsee, then the endorsement would have been part of the instrument sued on; he gave a copy to the defendant of the very instrument which he signed, and which he wanted him to pay; the endorsement was a separate instrument by which the note was transferred.

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Benjamin vs. Delahay 2, Scam. 574.

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1st. The note was assigned after it became due.

2d. The consideration of the note was the sale of a machine by warrantee, those facts are admitted by the replication.

3d. The machine would not work properly and so the consideration failed. This single fact is traversed by the replication.

The replication is good on general demurrer, and this demurrer is exceedingly general, if it can be called a demurrer at all.

B. C. COOK, Att'y for Appellees.

144
Thomas. Tracy
vs
W. M. Toru et al.

Filed May - 1st 1861

L. Leland
Clerk

STATE OF ILLINOIS—SUPREME COURT,

THIRD GRAND DIVISION—APRIL TERM, 1851.

141

THOMAS FRANEY,
vs.
WILLIAM M. TRUE et al.

Appeal from La Salle County Court.

I.—The Statute requires a copy of the instrument upon which suit is brought to be given, but an endorsement upon a note is no part of the note itself. The note is perfect without the endorsement. If the suit had been brought on the endorsement against the endorsee, then the endorsement would have been part of the instrument sued on; he gave a copy to the defendant of the very instrument which he signed, and which he wanted him to pay; the endorsement was a separate instrument by which the note was transferred.

A copy of the endorsement could have been of no conceivable use.

The covenant was, that, Solyman Bell by the name and style of S. Bell, endorsed and delivered the note; that was all the information on the subject that could be given. The rule is that if an instrument be set out in *haec verba*, in the declaration no copy need be given, the endorsement was set out in the declaration in *haec verba*.

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The same reason applies to prevent this Court from examining the question whether a new trial should have been granted. See two cases last cited.

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IV.—But the replication was not double ; the covenants of the plea, are
1st. The note was assigned after it became due.

2d. The consideration of the note was the sale of a machine by warranty, those facts are admitted by the replication.

3d. The machine would not work properly and so the consideration failed. This single fact is traversed by the replication.

The replication is good on general demurrer, and this demurrer is exceedingly general, if it can be called a demurrer at all.

B. C. COOK, Att'y for Appellees.

144
 Thomas, Franey
 vs
 W. M. Torue et al.

Filed May - 1st 1861

L. Leland
 Clerk

Accordingly General, if it can be called a demurrer at all.
 The replication is good on General's demurrer, and this demurrer is over-
 ruled. This single case is reversed by the replication.
 2d. The machine works not work properly and so the consideration
 failed; those facts are admitted by the replication.
 3d. The consideration of the note was the sale of a machine by way
 of bar. The note was assigned after it became due.
 4th. The replication was not double; the consideration of the note was
 assigned after it was taken up of General's demurrer.
 5th. If the replication was faulty in any respect, it must have been by
 error. It was double, this is the effect of the replication which is made to be the same as
 the original. The replication was faulty in any respect, it must have been by
 error.
 The reasons are applied to prevent the Court from examining the case.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

THOMAS FRANEY
vs.
WILLIAM M. TRUE, *et al.* }

PLAINTIFF'S BRIEF.

1st. The endorsement of a note is the instrument (or a part thereof) sued on, and under the Statute the plaintiff should give a copy or the defendant is entitled to a continuance.

2d. The second replication is bad because it does not present a single issue. It is the object of all pleading to ascertain a single issue to be tried.

This replication (if it puts anything in issue) puts several distinct propositions stated in the pleas in issue, any one of which if untrue would defeat the pleas.

3 Scam. 423.

Section 14, Chap. 83, R. S., specifies the manner in which the plaintiff may be permitted to reply severally, and thereby make as many distinct issues as his rights demand.

3d. This replication only denies the conclusion drawn from the facts stated in the pleas, viz.: "that the consideration had thereby failed."

4th. A general replication or replication *de injuria* can only be properly pleaded in actions for tort, and then only in reply to an *excuse* pleaded, and not a right.

(E. C. L. R.) 2 Bingham N. C. 359.

This rule modified somewhat.

1 Chitty Pl. 579.

5th. This subject is discussed in the following cases :

Boone vs. Stone, 3 Gilm. 539.
Moore et al. vs. Capps, 4 Gilm. 315.
Judy vs. Kelly, 11 Illinois, 216.
Lytle vs. Lee & Ruggles, 13 Ill. 84.
Ayers vs. Kelly, 11 Ill. 17.
Ambrose vs. Root, 11 Ill. 499.

But they all refer to actions for tort.

6th. If this is a general replication, it is improperly pleaded, because the defense set up is not an *excuse* for non-performance.

1 Chitty Pl. 579.

GRAY, AVERY & BUSHNELL,
Attorneys for Plaintiff.

174

SUPREME COURT OF ILLINOIS:

APRIL TERM, 1861.

THOMAS FRANEY

vs.

WILLIAM M. TRUE, *et al.*

BRIEF.

GRAY, AERY, & BUSHNELL,

Attorneys for Plaintiffs in Error.

Filed April 20, 1861

L. Leland

clerk

1
State of Illinois
LaSalle County ss.

Plaus. Proceedings, Orders
Judgments and Decrees held and taken in and
before the LaSalle County Court at a regular
term thereof commenced and held at the
Court House in Ottawa in said County on the
First Monday, (being the Third day) of December
in the year of our Lord One Thousand
Eight Hundred and Sixty, and of the
Independence of the United States of
America the Eighty Fifth

Present Hon John C. Champlin Judge
Phil Lindley Clerk
Eri L. Waterman Sheriff

Be it remembered that heretofore to wit
on the 28th day of July A.D. 1860, a certain
declaration was filed in the clerk's office
of said Court, in the words and figures
following to wit:

Declaration

State of Illinois } And County Court Clerk
 LaSalle County } to September Term A.D. 1860

William M. True and Isaac V. Wabennan
 plaintiffs in this suit, by Glover, Cook & Campbell
 their attorneys complain of Thomas Francey
 defendant summoned, &c., of a plea of assumpsit.
 For that the said defendant at Ottawa, to wit
 of the County of LaSalle, heretofore, to wit, on
 the 28th day of August A.D. 1857, by his certain
 promissory note of that date, by him subscribed
 by Marcus S. Deys, for value received, promised
 to pay Solomon Bell by the name and
 style of S. Bell the sum of One hundred
 and fifty five dollars, one year after the date
 of said note. And afterwards, to wit, on the
 same day of July A.D. 1860 the said

Solomon Bell by the name & style of S.
 Bell endorsed and delivered the said note
 then and still unpaid, to the plaintiffs,
 of all of which the said defendant then and
 there had notice and then and there became
 liable; and in consideration thereof, then and
 there promised the said plaintiffs to pay then
 the said sum of money in said note
 mentioned according to the tenor and effect
 thereof, when the same should become due

and payable. And the plaintiffs aver^s that the said one year time limited in said note for the payment thereof had long since elapsed, yet, though often requested, the said defendant has never paid the same nor any part thereof. And for that the said defendant at the County aforesaid, heretofore, to wit, on the 1st day of September A. D. 1857 being justly indebted to the plaintiffs in the sum of two hundred dollars for so much money before that time had and received by said defendant to and for the use of the said plaintiff and in the like sum for so much money before that time laid out and expended by said plaintiffs to and for the use of the said defendant at his special instance and request; # and in the like sum for goods, wares and merchandise before that time sold and delivered by said plaintiffs to said defendant at his request; and in the like sum for work and labor before that time done and performed by said plaintiffs for said defendant at his request; in consideration thereof then and there promised the said plaintiff to pay then the said

and in the like sum for so much money loaned by said plaintiffs to said defendant at his request

4

several sums of money when he should be thereto afterwards requested. Yet, though often requested, the said defendant has never paid the same nor any part thereof. Whereby the plaintiffs have suffered damage in the sum of two hundred dollars, and therefore they bring their suit.

Glover, Cook & Co. Plffs Attys

Copy of Note sued on.

\$155-

Ottawa August 28th 1857

One year after date I promise to pay to the order of S. Bell One hundred and fifty five dollars without interest value received

Thomas Franey
by Marcus S. Dwyer.

Account sued on.

Thomas Franey

To. Price & Waterman Dr.

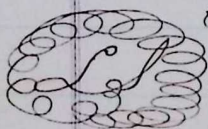
To money had & received \$200.

The note mentioned above is all the evidence that will be offered under the 2^d count.

And afterwards. to wit in the 28th day of
 5th July A. D. 1860, a certain summons
 issued out of the Clerk's office of said
 Court in the words and figures following
 to wit.

The People of the State of Illinois
 To the Sheriff of our County of LaSalle.
 Greeting.

We command you, that you summon
 Thomas Francis if he shall be found in
 your County, personally to be and appear
 in our LaSalle County Court, before our
 Judge, on the first day of the next term
 of said Court, to be held at the Court-
 house in Ottawa, on the first Monday
 in September next, at ten o'clock in the
 forenoon, then and there to answer unto
 Wm M Dru & Isaac V. Wateman in
 a plea of Assumpsit to the damage of
 said plaintiffs as they say in the sum
 of Two hundred dollars, And have
 you then and there this writ, and the
 manner in which you shall have executed
 the same. In Witness whereof we have caused the
 seal of our said Court to be hereto affixed
 and attested by Phil Lindley, our Clerk thereof
 at Ottawa this 28. day of July, 1860



Phil Lindley Clerk
 By Ben Van Bantke Deput

4 And afterwards to wit on the 3rd day of September A. D. 1860, said summons was returned to, and filed in said clerk's office with the following endorsement thereon to wit:

"Served this writ by reading the same to the within named Thomas Francis on the 20th of August 1860.

F. Warner Shiff
by G. W. Fox Depty."

And afterwards to wit on the 3rd day of September A. D. 1860, being one of the days in the September Term 1860 of said Court certain proceedings in said cause were had and entered of record in said Court in the words and figures following to wit:

William M. True &

Isaac V. Waterman

vs

Thomas Francis

Assumpsit:

3 This day came the defendants by Bushnell & Avery his attorneys and enter their motion for a continuance herein for want of copy of endorsement, whereupon came the plaintiffs by Glover

7 Cook & Campbell their attorneys, and after hearing the arguments of counsel said motion is overruled, to which ruling the defendant by his said attorneys then and there accepted.

And afterwards to wit on the 4th day of September A.D. 1860, certain pleas were filed in the clerk's office of said court in the words and figures following to wit:

State of Illinois }
LaSalle County } And County Court Clerk
Dd November Term A.D. 1860

William M. Greer &
Isaac W. Waterman }
vs } Assumpsit.
Thomas Graney }

And now comes the said defendant by Bushnell & Covery his attorneys and says ad hoc now because he says that he did not undertake and promise in manner and form as the plaintiffs hath alleged against him and of this he puts himself upon the country &c

& Plff doth the like.

Glover, Cook & Campbell.

And for further plea in this behalf said defendant says actio non because he says that the cause of action in both said counts are one and the same and not different, and that said promissory note was assigned to said plaintiff long after the same became due and payable according to the tenor and effect thereof, viz on the third day of July A.D. 1860, and that then & there said Bell was a manufacturer of mowing & reaping machines, and the entire and only pretended consideration of said note was a reaping and mowing machine, contracted by the said Solomon Bell to be sold to the defendant, and the said Bell then & there warranted said machine to be a good article and to answer the purpose for which it was bought, and that the sickle would not clog in grass or grain, and thereupon said defendant relying on said warranty did buy such machine and gave the said note therefor.

And defendant avers that said machine was not a good article and would not answer the purpose for

3
which it was bought, and that the sickle
9 did clog in both grass & grain and
that the pitman and boxes were not
properly made and were not of good
material and kept continually breaking
and said machine became and was
entirely worthless and incapable of being
used, wherefore said defendant says that
the consideration has entirely failed,
and this he is ready to verify, wherefore
he prays judgment &c.

And for further plea said defendant
says action now, because he says that said
note was assigned to plaintiff long after
it was due, that said Bell was then
to wit August 4. D. 1857 was a manu-
facturer of reaping & mowing machines,
and that in consideration that said
defendant would buy of said Solomon
Bell a reaping & mowing machine
and give said note therefor said
Bell then & there to wit at the time of
the making of said note, agreed &
promised to the defendant that such
machine was made in a workmanlike
manner and of good material and
was worth the money to be paid for it

10 and the defendant avers that he relying on said promises did buy such machine and did give said note therefor, and that the machine was the only consideration of said note, and that said machine was not made in a workmanlike manner nor of good materials and did clog in cutting grain & grass and said machine became and was entirely useless to the defendant, wherefore defendant avers that the consideration of said note has wholly failed and this he is ready to verify &c.

and for further plea in this behalf said defendant says acts now, as to one hundred and fifty four dollars of the said note, because he says that said note was assigned to the plaintiff after the same became due and payable, and that in consideration that said defendant would buy of said Solomon Peel a Reaping and Mowing machine and give said note therefor, the said Peel then & there to wit at the time of the making of said agreed and promised to the defendant that said machine would answer every

purpose for which the defendant wanted
11 it. And defendant avers that he relying
on said promises did buy such machine,
and did give therefor said note, and
the said machine was the only considera-
tion therefor, and that said machine
failed & would not answer the purpose
for which defendant wanted it, and
that the sickle did clog in cutting
both grass & grain, and that the sickle
fitment and boxes were not properly
made and of good material, and
defendant avers that said Peck was
then, to wit, at the time of said pur-
chase, a manufacturer of reaping and
mowing machines, and was the
maker of said machine, wherefore
the defendant says that the sum
of viz. One hundred and fifty four
dollars of ^{the} consideration of said note
has failed, and this he is ready
to verify &c.

Pushnell & Avery
Defts attys

And afterwards to wit on the 5th day of
September A.D. 1860, certain replications
were filed in said clerk's office in the words

12 and figures following to wit:

William M. True &
Isaac V. Wateman vs
Thomas Francey
Assumpsit, In the
County Court of LaSalle
County. September Term
A.D. 1866

And now come the said pliffs and for replication
to the second third and fourth pleas, plaintiffs say
precludi' now, &c, because they say that the note
in plaintiffs declaration mentioned was assigned
to the plaintiffs before the same became due, and
of this they put themselves upon the country.

And doth the like. &c.

Bush & Avery his attys

And for further replication to the second third and
fourth pleas aforesaid, and each of them severally
by leave of the Court. Pliffs say that the consider-
ation of the note mentioned in plaintiffs decla-
ration has not failed in manner and form as
in either of said pleas is alleged and of this
they put themselves upon the country

Glover, Cook & Campbell
Pliffs attys.

Afterwards to wit on the 3rd day of December
A.D. 1866, a certain demurrer was filed
in the Clerk's office of said Court in the

words and figures following to wit:

13

State of Illinois
 LaSalle County, County Court. December
 Term A. D. 1860

William M. Gros &
 Isaac V. Waternan
 vs
 Thomas Francis Assumpsit.

The defendant
 says said second replication of said
 plaintiff is not sufficient in law
 wherefore he prays &c.

Pushnell & Co. v.
 his atty.

15 And afterwards to wit in the 3rd day of
December A.D. 1866, at said December Term of
said Court, certain proceedings were had
and entered of record in said Court in said
Cause in the words and figures following
to wit.

William M. True and
Isaac V. Waterman

vs.
Thomas Franey

Assumpsit.

This day comes the
said defendant by Bushnell and Avery his attorneys,
and files his demurrer to the plaintiffs
second replication to the defendants second
Third and Fourth pleas herein. Whereupon
come the plaintiffs by Glover, Cook and Campbell
their attorneys, and after hearing the arguments
of counsel said demurrer is overruled by
the Court, to which ruling of the Court the
defendant by his said attorneys then and
there excepted, and abides by his said
demurrer.

And thereupon by agreement of
said parties a jury is waived, and this
Cause is submitted to the Court for trial
and after hearing the evidence the Court
finds the issues herein for the plaintiffs

16 and assesses their damages herein at the sum of One Hundred and Seventy five dollars and ninety two cents.

It is therefore considered by the court that said plaintiffs have and recover of said defendant said sum of One Hundred and Seventy five dollars and ninety two cents for their damages, and also their costs and charges by them herein expended, and that they have execution therefor.

Whereupon the said defendant by his said attorney enters a motion for a new trial herein, and after hearing the arguments of counsel said motion is overruled by the court, to which ruling of the court the said defendant by his attorney then and there excepts.

And the defendant by his attorneys prays an appeal herein to the Supreme Court of this State which is allowed upon his entering into an appeal bond in the sum of Three Hundred Dollars, with Julius Avery as security conditioned as the statute requires, and leave is given to file said bond within Twenty days from the last day of the present term of this court.

Afterwards to wit on the 15th day of
17 December A.D. 1860, an appeal bond
was filed in the Clerk's office of said
Court in the words and figures following
to wit:

Know all men by these presents that
we Thomas Francis and Julius Hoey
are held and firmly bound unto
William M. True, and Isaac V. Waterman
in the penal sum of Three hundred
dollars, for the payment of which we
& truly to be made we bind ourselves
our heirs, executors and administrators
jointly, severally and firmly by these
presents.

The condition of the above obligation
is such that whereas the said William
M. True & Isaac V. Waterman did at
the December term A.D. 1860 of the County
Court in & for LaSalle County & State of
Illinois, recover a judgment against
said Thomas Francis for the sum of One
hundred and seventy five dollars and
ninety two cents and costs of suit, from
which said judgment said Francis has
prayed an appeal to the Supreme Court of
said state for the Third Grand Division

18 Now if said Franey shall make due
prosecution of said appeal and shall pay
whatever judgment costs interests and
damages may be awarded against him
in case said judgment shall be affirmed
then this obligation is to void, otherwise
to remain in full force and effect.

Witness our hands & seals this fifteenth
day of December A.D. 1861.

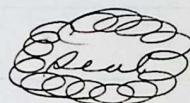
Thos. ^{his} X Franey
mark



attest

W. Bushnell }

Julius Avery



19 State of Illinois
LaSalle County

Phil Lindley
Clerk of the County Court in and for the County
of LaSalle, and State of Illinois, hereby
certify the above and foregoing to be a true
full and complete Transcript of the
Recd and proceedings in the case wherein
William M. True and Isaac O. Waterman
are plaintiffs and Thomas Franey is
defendant, as the same appear on file
and of record in my office

Witness my hand and the seal
of said Court at Ottawa this
13th day of March A.D. 1861.

Phil Lindley Clerk
Frank J Crawford Deputy.



Clerk fees on this Transcript \$5-⁰⁰

Assignment of Errors.

And now comes the said Thomas Franey, plaintiff in error, and says that in the Record and Proceedings aforesaid, there is manifest error, and now assigns to the Court here the following, viz:

First. The Court below in overruling the motion of defendant below for a continuance, on account of the plaintiff below having failed to file with his declaration, a copy of the endorsements or assignments on the back of the note sued upon.

Second. The Court below erred in overruling the Demurrer of the defendant below to the Second Replication of the plaintiff below to the Second, third and fourth Pleas, and each of them severally, of the defendant below.

Third. The Court below erred in overruling the motion of the defendant below for a New Trial.

Fourth. The Court below erred in
rendering judgment against the
defendant below, when by the laws
of the land, the said judgment should
have rendered in his favor.

Fifth. And for other errors.

Gray, Avery & Bushnell
Attys. for Plff. in error.

And now come the said appel-
lus by Glover, Book Campbell their
Attys and say that in the record &
proceedings aforesaid there is no
error

Glover Book &
Campbell
Attorneys for appellus

Filed April 18. 1861

Leland
Clerk

144
Thomas Francis
vs
William M. Inu & Fab
Transcript

Filed March 18. 1861
L. Leland
Clerk