No. 12562

Supreme Court of Illinois

Merritt

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vs.

Merritt

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138 = 1858 Stephen Merritt

vs

Nathan Merritt

53

Merritt

vs.

Merritt

12562

1858

Referred

State of Illinois } Pleas before the Honorable Edwin
LaSalle County } S. LeSand presiding Judge of the
ninth Judicial Circuit of the State of Illinois at a Circuit
Court Commenced and held in and for the County
of LaSalle and State of Illinois at the Court House in
Ottawa on the Second Monday of November in the
year of our Lord one thousand eight hundred and
fifty four and of the Independence of the United States
the seventy eighth

Present

The Honorable Edwin S. LeSand Presiding Judge
Wm Bridley Clerk
W. H. L. Wallace States Attorney
Richard Thorne Sheriff

On the 24th day of July 1854 an affidavit & praecipe
were filed in the words and figures following viz:

State of Illinois LaSalle County and Circuit Court
thereof — To the November Term A.D. 1854,

Stephen Merritt
vs
Nathan Merritt } Action Debt, by
Attachment,

Stephen Merritt, who is
about to commence an action in the LaSalle Circuit
Court, as above entitled, being duly sworn says—
that he is a creditor of Nathan Merritt, against
whom he is about to commence said action, and
that said Nathan is justly indebted to affiant
in the sum of fifteen hundred and thirty three

$1535.62

(2) dollars ($ 1533.00) upon a promissory note, made by said Nathan, & delivered by him to said Stephen Merritt, — dated October 11th 1841, by which said Nathan promised for value received, to pay to said Stephen the sum of One hundred dollars $100 — on the 2nd day of November 1842, which has never been paid nor any part thereof, and the interest thereon which has accrued amounts to about $33.00 / Six hundred and thirty three dollars — the principal and interest amounting to fifteen hundred and thirty three dollars. Affiant further states that said Nathan Merritt is not a resident of the State of Illinois.

Subscribed & sworn to
before me this 24th day
of July A.D. 1854.
P Landley Clerk

Stephen Merritt.

State of Illinois
La Salle county & Circuit Court thereof to the
Nov. Term 1854.

Stephen Merritt plaintiff
vs
Nathan Merritt, defendant

Debt
$ 1533-
Damages
$ 1000

Clerk of Circuit Court will

(3) upon filing the foregoing affidavit & a suitable bond — please issue attachment to Sheriff of said County, directing him to summon one Daniel Merritt as Garnishee as a debtor of Nathan Merritt, also an attachment to the Co of Stark to summon Elisha C Merritt as garnishee as a debtor of Nathan Merritt,

Lackey Wallace & Eastman
for Pltff.

And afterwards to wit: on the 25th day of July 1854 the plaintiff filed an Attachment bond in the words and figures following viz:

Attachment Bond. Chicago Democrat Print.

Know all Men by these Presents, That we, Stephen Merritt
Zachariah Merritt

are held and firmly bound unto Nathan Merritt

in the penal sum of Three thousand & one hundred dollars,
~~cents~~, lawful money of the United States, for the payment of which said sum. well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 24th day of July A. D. 1854

The Condition of the above Obligation is such, That whereas the above bounden
Stephen Merritt

has on the day of the date hereof, prayed an attachment out of the Circuit Court of LaSalle County, at the suit of himself

against the estate of the above named Nathan Merritt

for the sum of fifteen hundred & thirty three dollars, cents, and the same being about to be sued out of said Court, returnable on the ~~first~~ second Monday of November next, to the term of the said Court, then to be holden. Now, if the said Stephen Merritt shall prosecute his said suit with effect, or in case of failure therein, shall well and truly pay and satisfy the said Nathan Merritt

all such costs in said suit, and such damages as shall be awarded against the said Stephen Merritt his heirs, executors, or administrators, in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, then the above obligation to be void; otherwise to remain in full force and effect.

Stephen Merritt Seal
Zachariah Merritt Seal

Signed, Sealed and Delivered In presence of
Osmond P. Lindley Clk

[illegible]

(4) After the filing of said bond and on the said 25th day of July 1854 a writ of Attachment was issued to the Sheriff of LaSalle County in words and figures following viz:

Attachment Writ—Ottawa Republican Print.

STATE OF ILLINOIS, LaSalle County. } ss. *The People of the State of Illinois to the Sheriff of said County, GREETING:*

WHEREAS, Stephen Merritt of the county of LaSalle and State of Illinois, hath complained on oath to Phile Lindley Clerk of the Circuit Court of LaSalle county, that Nathan Merritt is justly indebted to the ~~of the county of~~ said Stephen Merritt ~~and State of Illinois~~ in the sum of fifteen hundred and thirty three dollars and that said Nathan Merritt is not a resident of the State of Illinois

And the said Stephen Merritt having given bond and security according to the act in such cases made and provided:

WE THEREFORE, COMMAND YOU, that you attach so much of the estate, real or personal, of the said Nathan Merritt to be found in your county, as shall be of value sufficient to satisfy the said debt and costs, according to the said complaint; and such estate so attached in your hands to secure, or so to provide that the same may be liable to further proceedings thereupon, according to law, at a Circuit Court to be holden at Ottawa within and for the county of LaSalle on the 2d Mon day of November next; so as to compel the said Nathan Merritt to appear and answer the complaint of the said Stephen Merritt and that you also summon Daniel Merritt as garnishee to be and appear before the said Court on the said 2d Mon day of November next, then and there to answer what may be objected against him; when and where you shall make known to the said Court how you have executed this writ. And have you then and there this writ.

WITNESS Phile Lindley Clerk of our said Court, and the seal thereof at OTTAWA, this 25th day of July in the year of our Lord One Thousand Eight Hundred and Fifty-four

P. Lindley **Clerk.**

[12562-3]

said writ was filed in the Office of
said Clerk on the 10th day of August 1854
with the following endorsement of the
Sheriff thereon viz:

"Served this writ by
reading the Garnishee to the within named
Nathan Merritt — no property found in my County
July 28. 1854 R. Thomas Sheff"

(53) And afterwards to wit: on the 26th day of July 1854 an Attachment was issued to the Sheriff of Stark County in words and figures following viz

Attachment Writ—Ottawa Republican Print.

STATE OF ILLINOIS, La Salle County. } ss. *The People of the State of Illinois to the Sheriff of ~~said~~ Stark County, GREETING:*

WHEREAS, Stephen Merritt of the county of La Salle and State of Illinois, hath complained on oath to Wm B Lindley Clerk of the Circuit Court of La Salle county, that ~~Stephen~~ Nathan Merritt ~~of the county of and State of Illinois~~ is justly indebted to the said Stephen Merritt in the sum of fifteen hundred and sixty three dollars and that said Nathan Merritt is not a resident of the State of Illinois

And the said Stephen Merritt having given bond and security according to the act in such cases made and provided:

WE THEREFORE, COMMAND YOU, that you attach so much of the estate, real or personal, of the said Nathan Merritt to be found in your county, as shall be of value sufficient to satisfy the said debt and costs, according to the said complaint; and such estate so attached in your hands to secure, or so to provide that the same may be liable to further proceedings thereupon, according to law, at a Circuit Court to be holden at Ottawa within and for the county of La Salle on the 2d Monday of November next; so as to compel the said Nathan Merritt to appear and answer the complaint of the said Stephen Merritt and that you also summon Elisha C. Merritt as garnishee to be and appear before the said Court on the said 2d Monday of November next, then and there to answer what may be objected against him; when and where you shall make known to the said Court how you have executed this writ. And have you then and there this writ.

WITNESS Wm B Lindley Clerk of our said Court, and the seal thereof at OTTAWA, this 26th day of July in the year of our Lord One Thousand Eight Hundred and Fifty-four

[13962-4]

Seal

Wm B Lindley **Clerk.**

(6)

said writ was returned filed in the Office of said Clerk on the 22d day of August 1854 with the following endorsements of the Sheriff thereon viz:

" I cannot in my county find any property on which to levy the within attachment

Clinton Fuller
Sheriff of Stark Co. Ill"

" I have served the within garnishee upon the within named Elisha L. Merritt by reading the same to him this 18th day of August 1854 Clinton Fuller Sh'ff
of Stark Co. Ill"

(7)

The defendant filed a plea on the 14th day of November A.D. 1854 in the words and figures following viz:

Merritt vs. Merritt

La Salle County Circuit Court

Nov. Term A.D. 1854

1st And now comes the said defendant by Glover & Cook his attys & defends &c when &c and says actio non &c because he says that he is not indebted to the plaintiff in manner & form as the said plaintiff hath above thereof declared against him & of this he puts himself upon the Country

2d And for a further plea in this behalf said defendant says actio non because he says that after the Making of the note in plaintiffs declaration mentioned, and before the Commencement of this Suit to wit on the 21st day of May A.D. 1854 to wit at the County aforesaid defendant fully paid to the plaintiff the several sums of money in said declaration mentioned & this he is ready to verify wherefore he prays Judgt &c

3d And for a further plea in this behalf defendant says actio non &c because he says that the several causes of action in plaintiffs' declaration mentioned accrued before the 1st day of April A.D. 1849 and that none of said causes of action accrued within five years next before the Commencement of this Suit and this he is ready to verify wherefore he prays judgment &c.

[illegible]

4th And for a further plea in this behalf defend-ant says actio non &c because he says that the said Plaintiff on the first day of August A D 1836 to wit at the County aforesaid exe-cuted and delivered to Daniel Merritt his promissory note under his hand & seal by which he agreed and promised to pay to said Daniel Merritt or bearer nine hundred & Sixty Seven dollars with interest from date at Seven per cent per annum and the said Daniel Merritt afterwards to wit on the day and year aforesaid endorsed & delivered said note then & still unpaid to the defendent whereby the said plaintiff became liable to pay to the defendant the aforesaid Sum of money accord-ing to the tenor of said note, and although then requested said plaintiff hath not paid said Sum of money or any part thereof and defendant offers to set off so much of said sum as may be necessary to liquidate the plain-tiffs demands and claims Judgement for the remainder & this he is ready to verify Wherefore he prays Judgt &c.

5th And for a further plea in this be-half defendant says Actio non &c because he says that on the 1st day of August A.D 1836 to wit at the County aforesaid the plaintiff by his promissory note of that date under his hand and seal promised one Daniel Merritt to pay him Nine hundred & Sixty Seven dollars with interest from the date at Seven per cent per Annum And afterwards and within Sixteen years next before the Commencement

of this Suit to wit on the 1st day May AD 1841 to wit at the County aforesaide said plaintiff agreed with said Daniel Merritt to pay him the Sum of Money in said note mentioned according to its tenor and effect said note being then & Still unpaide, And the said Daniel Merritt afterwards to wit on the day and year aforesaid at the County aforesaid endersed & delivered said note then & Still unpaid to the defendant by Means whereof the said plaintiff then & there became liable to pay to defendant the Sum of Money in said note mentioned according to its tenor and effect, Whereby & by reason of said note remaining unpaid an action hath accrued to the defendant to demande and have from the plaintiff the Sum mentioned in said note, Yet though often requested the plaintiff hath never paid the Same or any part thereof and the defendant offers to Set off against the plaintiffs claim So much as may be necessary to ballance the Same & Claims Judgment for the ballance & this he is ready to verify wherefore he prays Judgt &c

Glover & Cook

P.A.

~~On this 16th day of April AD 1835 the plaintiff~~
~~filed his declaration in these words and figures~~
~~following viz~~

(10) On Wednesday November 18th 1834 the same being one of the days of the November term of said Court for the year 1834 an order was entered of record in said cause in the words and figures following viz:

"Stephen Merritt
vs
Nathan Merritt } Ma Summons
This day comes the plaintiff by Dickey and Wallace his attorneys and the defendant Nathan Merritt enters his appearance herein by Glenn & Cook his attorneys. Thereupon the plaintiffs attorneys move the Court to strike the defendants pleas from the files in this cause. Thereupon the defendants attorneys object to the Court that the pleas were not those of Nathan Merritt but of Daniel Merritt for whom they also appear as attorneys— Thereupon the Court sustains the motion to strike the pleas from the files herein. The defendants attorneys then move the Court to quash the writ for a variance between the writ and declaration which motion is overruled by the Court. Thereupon the defendants attorneys excepts to the opinion of the Court in overruling said motion."

And afterwards to wit; on Thursday November 18th 1834 the same being also one of the days of said November term of said Court the following further order was entered of record in said cause viz:

"Stephen Merritt
vs
Nathan Merritt } Ma Summons
This day again come the plaintiff by Dickey & and Wallace his attorneys

12562-H

(11) and moves the Court for a rule upon the Defendant to file his plea herein Instanter which motion is overruled by the Court, Thereupon the Defendant by Shaw & Cook his Attorneys moves the Court to strike the plaintiffs declaration from the files, which motion is sustained by the Court, Thereupon the plaintiffs Attorney asks a motion to continue this cause until the next Term of this Court which motion is also sustained by the Court."

On the 16th day of April 1833 the plaintiff filed his declaration in the words and figures following viz:

(12) State of Illinois,-
La Salle County, and Circuit Court thereof
To November term AD 1854,

Stephen Merritt plaintiff complains of Walker Merritt defendant, attached &c of a plea that he render unto him the said plaintiff the sum of one thousand five hundred and thirty three dollars, which he the said defendant owes to and unjustly detains from said plaintiff

For that whereas heretofore to wit, on the eleventh day of October in the year of our Lord one thousand eight hundred and forty one, at the county aforesaid, the said defendant - by his certain promissory note of that date - by him subscribed, and delivered to said plaintiff - then and there promised for value received to pay said plaintiff on the third day of november one thousand eight hundred and forty two, one hundred dollars, - yet said defendant though often requested had not paid said sum or any part thereof, but so to do hath ever neglected and refused, and still doth neglect and refuse,

For that also at the county aforesaid, heretofore to wit on the 11th day of October AD 1841, said defendant, executed and delivered to the plaintiff, his other promissory note - and thereby promised for value received, to pay him the said plaintiff on the third day of November AD 1842 three hundred dollars without defalcation, being in consideration of Plaintiffs quit claim to his Walkers estate

$12562-8

(13) yet though often requested so to do said defendant hath not paid said sum of money or any part thereof. but so to do hath wholly neglected and refused. and still doth neglect and refuse

And for that also heretofore to wit on the 11th day of October A.D 1841. at the county aforesaid. said defendant executed and delivered to said plaintiff his other promissory note which was. and is as follows viz:

$100 For value received I promise to pay Stephen Merritt on the third day of November one thousand eight hundred and forty two, one hundred Dollars without defalcation being in consideration of Stephen Merritts quit claim to his Fathers Estate,
Peru October 11th 1841. Nathan Merritt,

And plaintiff avers that said third day of November 1842 mentioned has long since passed. and that the sum of money mentioned in said promissory note remains wholly unpaid.

Nevertheless plaintiff says that said defendant. though often requested so to do. hath not paid. said sum of one thousand five hundred and thirty three dollars above demanded. or any part thereof. but so to do has wholly neglected and refused. and still does neglect and refuse. To the damage

of plaintiff, one thousand dollars, and therefore he sues,

Dickey & Wallace
Atty's for Pltff.

Copy of Note sued on

$ 900.

For value received I promise to pay Stephen Merritt, on the third day of November one thousand eight hundred and forty two Nine hundred dollars, without defalcation, being in consideration of Stephen Merritt's quit claim to his Father's estate Peru October 10th 1841.

Nathan Merritt

On Wednesday May 16th 1855 the same being one of the days of the May Term of said Court for the year 1855 another order was made and entered of record in said cause viz:

"Joseph Merritt }
vs } In Debt - Attachment
Nathan Merritt }

On motion of Dickey & Wallace for the plaintiff, defendant is ruled to plead in this case by to morrow morning - The defendant by Shaw & Cook his counsel comes and upon consideration the Court orders that the deposition of Joseph Merritt on file in this case be suppressed."

(16) 16

On the 16th day of May 1855 the defendant files his plea in the words and figures following that is to say!

Stephen Merritt
vs
Nathan Merritt

State of Illinois La Salle County
Circuit Court thereof,
May Term 1855,

1st And now comes the said defendant by Glover & Cook his attys. and defends &c when &c and says actio non &c, because he saith, that after the accruing of the several causes of action in said plaintiffs declaration mentioned, and before the commencement of this suit on the 21st day of May AD 1854 to wit at the county aforesaid defendant fully paid to the plaintiffs the several sums of money in said declaration mentioned, and this he is ready to verify, wherefore he prays Judgment

2 3d And for a further plea in this behalf defendant says actio non &c because he says that the several causes of action in plaintiffs declaration mentioned accrued before the 1st day of April AD 1849, and that none of said causes of action accrued within five years next before the commencement of this suit, and this he is ready to verify, wherefore he prays Judgment &c,

This is the 3rd plea, as Amended—

3d 4th And for a further plea in this behalf, defendant says, actio non &c, because he says that said plaintiff on the first day of August AD 1836, to wit at the county aforesaid

5/2582-10

(17) executed and delivered to one Daniel Merritt his promissory note under his hand & seal, by which he agreed and promised to pay to said Daniel Merritt or bearer, nine hundred and sixty seven dollars, with interest from date at seven per cent per annum, and the said Daniel Merritt afterwards to wit on the day and year aforesaid endorsed and delivered said note then & still due & unpaid to the defendant whereby the said plaintiff became liable to pay to the defendant the aforesaid sum of money, according to the tenor of said note, and although often requested said plaintiff hath not paid said sum of money or any part thereof, and defendant offers to set off so much of said sum of money in said note mentioned as may be necessary to ballance & satisfy the plaintiffs demand and claims, Judgment for the remainder and this he is ready to verify wherefore he prays Judgment &c

4th And for a further plea in this behalf, defendant says, actio non &c, because he says that on the first day of August AD 1836, to wit at the County aforesaid the plaintiff by his promissory note in writing of that date under his hand & seal promised one Daniel Merritt to pay him nine hundred and sixty seven dollars with interest from date at seven per cent per annum and afterwards, and within sixteen years next before the commencement of this suit to wit on the 1st day of may AD 1841 to wit at the County

(18) aforesaid, to wit at the County aforesaid. Said plaintiff agreed with said Daniel Merritt to pay him the sum of money in said note mentioned according to its tenor & effect, said note being then and still unpaid, and the said Daniel Merritt, afterwards to wit, on the day & year last aforesaid at the County aforesaid, endorsed and delivered said note, then & still unpaid to the defendant by means whereof the said plaintiff then & there became liable to pay to said defendant the sum of money in said note specified, whereby & by reason of said note remaining unpaid an action hath accrued to the defendant, to have ~~and to~~ & recover from the plaintiff the sum of money in said note mentioned, with interest on the same, amounting in all to a large sum of money, to wit the sum of two thousand five hundred dollars, and defendant offers to set off so much of said sum as may be necessary to satisfy the claim of the plaintiff & and he claims Judgment for the remainder of said sum & this he is ready to verify, wherefore he prays Judgt & c

5th And for a further plea defendant says actio non &c because he says he does not owe the plaintiff in manner & form as the plaintiff hath above thereof declared against him & of this he puts himself upon the country

6th And for a further plea in this behalf defendant saith actio non &c because he saith that on

(19)

19

the 1st day of August A.D. 1836. Court at the county aforesaid the said plaintiff made executed and delivered to one Daniel Merritt his certain promissory note by him subscribed, and sealed with his seal by which he agreed to pay to said Daniel Merritt or bearer nine hundred and sixty seven Dollars with interest from date, at seven per cent per annum. and the said Daniel Merritt afterwards to wit on the day and year aforesaid, at the County aforesaid, indorsed and delivered said note then & still due & unpaid to the defendant, by means whereof the said plaintiff then & there became liable to pay to the defendant the sum of money in said note specified, and at the time when the note mentioned in plaintiffs declaration was given by the defendant to the plaintiff, it was agreed by and between the said plaintiff & this defendant that the last mentioned of said notes should be set off against & sufficient amount of the other to ballance the same, & that the exchange should be made of said notes as soon as convenient thereafter and the defendant avers that he has always since been the owner of the note given by the said plaintiff as aforesaid & has always been ready & willing to set off said sum of money in said note specified a sufficient sum to ballance the sum claimed in the note in the plaintiffs declaration mentioned. & this defendant offers to set off so much of said sum of money mentioned in the said note given by the plaintiff aforesaid as may be necessary to ballance the claim of the plaintiff. & he claims Judgment for the balance thereof. & this he is ready to verify wherefore he prays Judgment &c

Glover & Cook
p.d.

(20) On the 15th day of May 1855 the same being one of the days of the May term of said Court for the year 1855 the deposition of Daniel Merritt was opened and placed on file in the words and figures following viz:

Stephen Merritt vs Nathan Merritt } ~~State of Illinois~~ La Salle Circuit Court May Term 1855;

The above named plaintiff will take notice that on the 11th day of April AD 1855; at the house of Daniel Merritt in La Salle County Illinois I shall take the deposition of said Daniel Merritt to be read in evidence on the trial of the above entitled suit; said depositions to be taken between the hours of ten o'clock A.M. & 4 o'clock P.M. of said day.

Nathan Merritt by
Glover & Leonard
his attys

Received a copy of the above this 23d day of March AD 1855;

Dicken & Wallace
Pr W.R.M. Wallace

2/2512-12

(21) Stephen Merritt vs William Merritt } State of Illinois La Salle county. Before Warren Brown Justice of the peace

Deposition of Daniel Merritt, aged about forty eight years a witness in the above entitled suit taken by Warren Brown, a Justice of the peace in and for the county of La Salle, and State of Illinois, on the 11th day of April AD 1855, at the residence of said witness in said county,

La Salle county } ss

Daniel Merritt being duly sworn deposes and says in answer to the following interrogatories,

1 Interrogatory, What is your name, age and occupation,
Ans't, —— My name Daniel Merritt, age about forty Eight, occupation a Farmer

2d interrogatory, are you acquainted with the parties to this suit
Ans't, I am,
3 interrogatory,
do you or do you not remember of Stephen Merritt giving to Daniel Merritt a note for nine hundred and sixty seven dollars about the 1st of august AD 1836,
Ans't —— There was such a note given about

(22) 1st August A D 1856.

4 Interrogatory

State whether or no you have ever heard Stephen Merritt promise to pay that note, if so state the times when such promises were made,

Ans. — I think in A D 1844 in May, Stephen ~~Nathan~~ Merritt, and myself had a conversation relative to that note, in which, he said he would pay it & requested me, as I was a going East, that I would let my Father have the note,

5th Interrogatory

State whether or no you have ever had any conversation with Stephen Merritt, since May A D 1841, in reference to this same subject, if so state the same fully & particularly

Ans. — I think in the Spring of 1844, probably in April, he stated he had it to pay, or the same as pay or paid by giving it in his portion coming from his Father, I think that I understood from Stephen in the Spring of 1844 that Nathan Merritt, still held that note, the one described above, and that he Stephen Merritt took one of Nathan Merritt, for one hundred dollars, for his interest in his Fathers estate

6th Interrogatory

State whether or no in any of the conversation of which you have spoken, Stephen Merritt refused to pay the note, or claimed that he had paid it,

Ans — I have no recollection of Stephen Merritts refusing to pay the note, but said he had it to pay, or paid it by giving it in his

S 12562-13

(23) portion coming from his Father, that on letting my Father have the note, his Father said that there would be coming to Stephen about nine hundred dollars, & at first he did not like to take the note because the note amounted to more than the nine hundred dollars, but did finally conclude to take it, & did take it,

by consent of parties, we adjourned unto the 12th April 1855, at 9½ o clock a.m. to the house of Daniel Merritt, in La Salle County Ill, —— 1855. Apl 12. I Warren Brown, a Justice of the peace for Lasalle county, have appeared at the House of Daniel Merritt, in accordance with the adjournment made by consent of the parties on the 11th day of April 1855, at the house of Daniel Merritt & the parties did not come in until half past 2 o'clk P.M., at which time Dickey for Pltf, & Ware for Dft attended, & proceeded with the depositions of Daniel Merritt, as follows, D Merritt questions & answers having been read. Witness wishes a correction in the answer to the 6th interrogatory to wit * "or the same as paid,"

7 interrogatory

State fully what you know in reference to this note, how it came into your Fathers possession, and, where you last saw it, that is the note mentioned in interrogatory 5

Ans.

I think in July 1841 I let Father have the note, some two or three weeks before his death I think I saw the note again in the fall of 1841 in the hands of Nathan Merritt, Executor of

(24) Fathers estate, I think in April 1858 I saw it again passed from Nathan Merritt into the hands of Benton Cook, that is the last I saw it, it was put into Cook's hands for collection the note that I let my Father have, at the time he took it amounted with the interest to about ten hundred and twenty five or six dollars.

Direct examination closed

Cross interrogatory 1st

Are you and the Plff & Dft all Brothers, and what was your Fathers name

Ans

We are called so, my Fathers name was Elisha Merritt,

2d cross interrogatory

Where did your Father reside,

Ans

In Rensselaer in the State of New York.

3d cross interrogatory

Are you the payee mentioned in said note spoken of in your answer to the last direct interrogatory

Ans

I think as near as I can recollect the note was made payable to me or bearer,

4 cross interrogatory,

Did you ever assign it and when

Ans

I did, I think in Apl 1858,

5/25/22-14

5. crop interrogatory did you put any date to the assignment.

Ans I do not recollect.

6 crop interrogatory did you and your Brother Stephen come into Illinois at first together: and in what year.

Ans — Yes,

7 crop Interrogatory in what year did you first stop in Illinois.

Ans. (Object to the question by ware)
In the year 1833,

8 crop interrogatory. in what year did Stephen first come to this country.

Ans. —
— in the year 1834.

9 th crop interrogatory did you come with him in that year.

Ans — Yes

10 crop interrogatory did you & he do business together in Illinois: for some time, and if so, when did you commence your joint operations, & when did did they cease

Ans — no.

(24) 11. crop interrogatory

did you & he give to your Father a note or notes signed by both of you on about the year 1834.

Ans

I think not.

12 crop interrogatory

did your Father about that time make any advancement of money to either you or Stephen.

Ans.

I do not know what he done to Stephen (I was objected to this question) — I hired some of him at different times.

13. crop interrogatory

about what amount of money did you ~~paid~~ receive from your Father within two years before Stephen came out in 1834. (I was objected to this question)

Ans — I do not think it is necessary for me to answer this question.

14. Cross interrogatory,

did Stephen bring you any money from your Father when he came out in 1834. Objected

Ans — I do not like to go into an examination of this Question (as Stephen Merritt is owing me a considerable amount, and I don't know but it

(27) might be used to my disadvantage.

15th crop interrogatory

did you ever sign a note to your Father, in whole or in part for money furnished by your Father to you & Stephen, or to Stephen.

Ans— not to my knowledge.

16 crop interrogatory. ~~at the~~

at the time of your Fathers Death, did he hold your note or notes, & if so for about how much

Ans— (Ware objects to this question) I cannot tell whether he held any note or not,

17 crop interrogatory

did you at that time owe your Father for money before that time received of him

Ans— that I dont know,

18 crop interrogatory

did you sell your share of your Fathers Estate to the executor Nathan, (Ware objects to this question)

Ans— I did

19 crop interrogatory

for about what ~~time~~ price

(28) Ans— I dont recollect exactly

20. Crop interrogatory
Was it as much as two thousand dollars,
Ans— I should think it was not, & think it less than one thousand dollars,

21 Crop interrogatory,
How was it paid,
Ans— (Ware objects to this question) a garnishee by the pltf has been served on me, & it may not be be proper for me to state relative to the payment,

22. Crop interrogatory
do you refuse any further answer to the last question,
Ans— to my mind the last Ans is sufficient to show that I am interested in the garnishee

23d Crop interrogatory
from the best of your knowledge and belief what was your Fathers Estate worth over & above its debts (Objected to by Ware)
Ans— I suppose about Eight or nine thousand dollars,

24th Crop Interrogatory, in your answer to the 6 direct interrogatory, when you speak of your Father being unwilling to take the note because about nine hundred dollars was coming to Stephen were you giving the declaration of your Father to you, or the declaration of Stephen to you,

5/2542-16

Ans— my Father. declared it to Daniel Merritt,

25. crop interrogatory

when and where did Stephen say, and in whose presents. what you say he did in the answer to your 6 interrogatory

Ans.— I think in the Spring of 1844, at Peru before Henry Headley, Grinell Lathrop, Burton Ayres. while they were acting as arbitrators between myself and Stephen.—

26. crop interrogatory, was not this note given to you for money that Stephen had had of his Father and for which you had made yourself liable to your Father.

Ans.— the note was given to me for personal property which I sold to Stephen, and that Stephen told me frequently that his Father never had let him have any money, and never would be brought,

27 crop interrogatory

did you never let Stephen have money which you got of your Father for him

Ans.— not to my recollection

28th crop interrogatory, a

where was the personal property which you speak of having sold to him at the time of sale,

Ans— in Bureau County, about two miles from Peru, on a farm which I improved

(30) 29 crop interrogatory

did Stephen have any or claim any interest in the personal property on that farm before that time

Ans. to 29 crop interrogatory

I think he had one cow, one horse, and a few things in the house, which he bought on with his wife about two months before.

30. crop interrogatory.

had he and you been living together on that farm for some time before that

Ans— I think not

31. crop interrogatory

where did he live from the time he came to Illinois in 1834, until the time when he purchased the personal property,

Ans. — he lived a spell with me, some six or eight months, he lived a while with a man by name Saph, perhaps six or eight months, I am not certain the rest of the time he was here he boarded with two different families

32d crop interrogatory, had he any connection with you in business during that time if so what

Ans— I think not,

33d crop interrogatory

do you mean to say that Stephen before the purchase of the personal property spoken of never claimed to have an interest in that personal property to your knowledge

(31) Ans — not to my knowledge

34 cross interrogatory

when before the referees Stephen as you say spoke of having to pay this note or the same as pay it, did he not assert or say in substance that it had been given to you to secure you against your liability for money which he had in some way, or through some medium received from his Father # & that you had never paid any thing for him on that account, and that it was unjust and wrong in you to turn over the note to your Father and that, as he had it to pay or the same as pay, that for that reason the arbitrators ought to allow him that amount against you,

Ans — (Ware objects to this question) I think not # and the note was given for personal property I owned I think Stephen talks of such things before the arbitrators & have no knowledge of Stephen buying Father any thing I let him have the note

35 interrogatory.

when you let your Father have that note, did it pay all that you owed him, if not, about how much did it fall short (Ware object)

Ans — I stated before that the Plff in this suit had had a Garnishee served upon me, therefore I do not wish to say anything to implicate my self

36 cross interrogatory.

at the time Stephen spoke of this note before the arbitrators, was it while he

(32) was stating the state of affairs between you and him under oath to the arbitrators

Ans – yes

87. crop interrogatory what connection did that have or did he allege that it had with the matters then before the arbitrators (objected to)

Ans – I don't know that he alleged that it had any connection. he stated that among other things as a payment.

88. crop interrogatory did your Father receive that note of you as payment, as far as it went on what you owed him, or did he receive it as collateral to be applied as payment for you when paid or adjusted by Stephen, ~~Ans~~

Ans. – he received of me as payment as far as it went towards what I owed him,

89. crop interrogatory did you not claim before the arbitrators an allowance against Stephen for the amount of that note (objected to) Ans – I claimed before the arbitrators that Stephen justly owed me about fourteen thousand dollars without that note, that I had let Father have that note in part payment for what I owed Father in the summer of 1841,

40th interrogatory was the personal property

(33) for which you say that note was given or the price of it presented by you as a part of your claim before the arbitrators.

Ans— No - the note had passed out of his hand into my Fathers hands

41 cross interrogatory

Did you afterwards file a bill in Chancery, or an amendment thereto in a suit in the Beaver Circuit Court between you and Stephen, allege or set up, as one of the items which was claimed by you before the arbitrators, the amount of this note, or the personal property for which it was given, or the price thereof, (Objected to)

Ans— I think not.

42. cross interrogatory

Did Stephen in the Statement you speak of before the arbitrators claim that you and he had been in partnership,

Ans— I think not: the first that I ever heard of it was in Judge Dickeys answer as attorney, to a suit in the Beaver Circuit Court, in Dickeys answer to the claim I set up against Stephen on note

43 cross interrogatory,

what has been the social relations between you & Stephen for the last ten or twelve years, have they been friendly or unfriendly

Ans— sometimes appear friendly, and some times not,

44 cross interrogatory, have you felt friendly towards Stephen for any considerable time since

(34) the Spring of 1844.
Ans I dont think I owe him any great deal of friendship
45; cross interrogatory
Have you not repeatedly since the Spring of 1844 ~~asserted~~ asserted or alledged that Stephen swore falsly before the arbitrators, and that by on had suffered injustice at his hands to the extent of thousands of dollars, or words to that effect.
Ans, I think that you are trying to implicate me in asking such a question,

46 cross interrogatory
dont you now believe that Stephen Emmitt has unjustly caused you more trouble and unhappiness than any body else has caused you—
Ans— ~~I think that I am not a party in this suit~~ I think that I am not called on to answer such a question, as I am not a party in this suit,
Daniel Memitt

State of Illinois }
La Salle county } ss I the subscriber a justice of the peace of said county, do certify that the above, and foregoing deposition was taken by me at the time and place mentioned in the caption &c, that the said witness was first duly sworn, and that the same was carefully read to said witness, and signed by him
Dated this 12th day of april AD 1855;
my fees & going to Daniel Emmitts,
two days to take the deposition in all is $3.00 and paid me by Ware Olly for Dft,

Warren Borden, Justice of the peace

[12562-19]

The plaintiff on the 20th day of November 1855, the same being one of the days of the November term of said Court for the year 1855 filed his replication & demmur in the words and figures following viz:

LaSalle Circuit Court -
November Term A.D. 1855

Stephen Merritt
vs
Nathan Merritt } Debt

And now comes the Said plaintiff by Dickey & Wallace his attorneys, and for replication to Said defendant first plea by him above pleaded the Said plaintiff saith that defendant hath not fully paid to the Said plaintiff the Said several Sums of money in Said declaration mentioned as Said defendant hath in Said first plea alleged - and this the Said plaintiff prays may be inquired of by the Country &c.

Dickey & Wallace
for Pl'ff.

And as to defendant fifth plea by him fifthly above pleaded and the matters therein whereof the Said defendant hath put himself upon the Country plaintiff doth the like -

Dickey & Wallace
for Pl'ff.

5/1256-20]

(36) And as to the Second, third, fourth, and Sixth pleas of said defendant by him Secondly, Thirdly, fourthly and Sixthly above pleaded and as to Each of them respectively and the matters therein respectively contained, Plaintiff Says that the Same are, and each of them is, not Sufficient in law to bar his aforesaid action, and that he is not bound by law to answer the Same respectively, and this he is ready to verify, wherefore he prays Judgt &c

Dickey & Wallace
for Plff.

And afterwards to wit on Friday November 23 1855 the same being one of the days of the November term of said Court for said year the following further order was entered of record in said cause viz:

"Stephen Merritt }
vs } Motion to Amend
Nathan Merritt } This day the plaintiff comes by Dickey & Wallace his attorneys and the defendant by Starr & Cook & DeLand & DeLand his attorneys and after hearing the arguments of counsel ~~&c~~ the Court do sustain the plaintiffs demurrer to defendants Second, third and fourth pleas and overruled as to the Sixth plea. Whereupon the defendant asks leave of the Court to amend his third plea, abides by the demurrer as to the Second and fourth pleas and withdraws his Sixth plea; And on motion

(37) of defendants Attorneys the plaintiff is ordered to file his application herein to said Amended plea on or before to morrow morning."

And afterwards to wit; on Saturday November 24th 1855 the same being one of the days of said November term of said Court, another order was entered of record in said cause viz;

"Stephen Merritt
vs
Nathan Merritt } Attachment
On motion of plaintiff by Wallace his Attorney, it is ordered that he have leave to file several applications to defendants third plea."

Before the entry of the above order, the plaintiff caused make the following affidavit to wit;

"State of Illinois LaSalle County & Circuit Court thereof Nov. T. 1855 = Stephen Merritt vs Nathan Merritt Debt = W. H. L. Wallace of said County being duly sworn on oath says that he is attorney for the plaintiff in the above entitled Cause, and that he verily believes that it is necessary for the purposes of justice that the said plaintiff should be allowed to file several applications to the third fourth and fifth pleas of said defendant in said cause W. H. L. Wallace
Subscribed and sworn to before me this 24th day of November AD 1855
J. Ackard Clerk"

(38) On the 26th day of November 1855 the same being one of the days of this November Term of said Court for the year 1855 the plaintiffs filed their further replications in the words and figures following viz:

La Salle Circuit Court – November Term A.D. 1855 –

Stephen Merritt
vs
Nathan Merritt
1st

Debt –

And now again comes the said plaintiff by Dickey & Wallace his attorneys and for replication to the said defendants third plea by him above pleaded, said plaintiff saith *precludi non* &c because he saith that the said indebtedness of said plaintiff to said defendant on the promissory note or writing obligatory in said plea mentioned accrued before the first day of January A.D. 1837, and that the same did not nor did either of them accrue within Sixteen years next before the commencement of this suit, and this the said plaintiff is ready to verify wherefore he prays Judgement &c

Dickey & Wallace
for plff –

2nd And for further replication to said defendants third plea by him above pleaded, said plaintiff by leave of the Court for that purpose first had and obtained saith *precludi non* &c because he says that after the making of the said promissory note or writing obligatory in said plea mentioned and before the Commencement of this suit, to wit on the 16th day of April

3 (1856-28)

(39) A.D. 1844. The Said Daniel Merritt and Said plaintiff submitted themselves (that is to say) by two mutual bonds of arbitration bearing date respectively the day and year last aforesaid to the arbitration of, and engaged in all things well and truly to Stand to, obey abide perform fulfil and keep the awards order arbitrament final end and determination of Burton Ayres. Dixwell Lathrop and Henry Headly arbitrators indifferently Chosen, elected and named as well on the part and behalf of the Said Daniel Merrit as of the Said plaintiff to arbitrate award, order, judge and determine of and Concerning all and all manner of action and actions, cause and causes of action suits, bonds, bills, specialties, judgments, executions, and quarrells controversies, trespasses, damages and demands whatsoever both at law and in equity at any time heretofore had made moved brought commenced or depending by and between the Said Daniel Merritt and the Said plaintiff, So as the Said Awards Should be made in writing by the Said Arbitrators under their hands or under the hands of Any two of them and ready to be delivered to the Said Daniel Merritt and Said plaintiff the parties in difference or Such of them as Should desire the Same on or before the first day of May then next ensuing, and the Said plaintiff further Saith that the Said arbitrators before the expiration of the time limited for making their awards, to wit on the Seventeenth day of April A.D. 1844 to wit at the County aforesaid took upon themselves the burthen of the Said arbitration, and having

duly examined and considered the Subject matter in dispute between the Said Daniel Merritt and the Said plaintiff they the Said arbitrators did make their awards in writing under their hands and Seals of and Concerning the premises and of and Concerning the Said promissory note and writing obligatory in Said plea mentioned, and ready to be delivered to the Said Daniel Merritt and Said plaintiff, and did thereby then and there award that the Said plaintiff or his heirs should on or before the first day of May next ensuing the date of Said award make and execute a good and Sufficient warrantee deed to the Said Daniel Merritt his heirs or assigns for the South half of the South West quarter of Section Seven in Township Thirty three north of Range one East of the third principal Meridian - also the South East fractional quarter of Section twenty five and the South West quarter of Section twenty five, and the South half of the West of the North East quarter of Section Thirty five all in Township Sixteen North of Range Eleven East of the fourth principal Meridian, and the North half of the East half of the North West quarter of Section two Township fifteen North of Range Eleven East of the fourth principal Meridian also a certain forty acre lot now owned by Said Stephen Merritt and lying upon Tiger Creek in the County of Bureau and State of Illinois — and the Said arbitrators did then and there further award that Said plaintiff

[12562-23]

(41)

his executors or administrators should pay to the said Daniel Merritt his executors or administrators the sum of two hundred dollars in manner and form following that is to say. Twenty five dollars on or before the first day of May then next ensuing, and one hundred dollars in one year from said first day of May with six per cent interest from the date of said awards and the said arbitrators by their said award in writing did then and there further award that the said Daniel Merritt should on or before the first day of May then next ensuing, give into the possession and entire control of said plaintiff all bonds, mortgages, notes and obligations of whatsoever kind or nature that were then held by the said Daniel Merrit against the said plaintiff, and that the said Daniel Merritt and said plaintiff should on or before the first day of May, then next Seal and execute unto each other mutual and general releases of all actions, causes and causes of action, suits controversies, trespasses, debts, duties, damages, accounts, reckonings and demands whatsoever for by reason of any matter or thing whatsoever from the beginning of the world to the day of the date of said bonds of submission, as by the said awards bearing date the 17th day of April A.D. 1844 reference being thereunto had will more fully appear and the said plaintiff avers that the promissory note and writing obligatory in the said plea mentioned and pleaded was at the time of said arbitration and awards, then held by the said Daniel Merritt, and the same was not endorsed by the said Daniel Merritt until long after the same fell due, and this the said Plaintiff

(42) is ready to verify, wherefore he prays Judgement &c

Dickey & Wallace

for Plff

3rd And for further replication to the said defendants third plea by him above pleaded the said plaintiff by leave of the Court first had and obtained says precludi non &c because he says that after the making of the said promissory note in said plea mentioned and before the commencement of this suit to wit on the first day of July A.D. 1839, to wit at the County aforesaid the said plaintiff fully paid to the said Daniel Merritt the sum of money mentioned in said promissory note set forth in said plea - and that said note was assigned by said Daniel Merritt after it fell due & not before - and this the said plaintiff is ready to verify wherefore he prays Judgement &c

4th And for further replication to said defendants third plea by him above pleaded said plaintiff by leave of the Court &c says precludi non &c because he says that after the giving of said promissory note in said plea mentioned and after the same fell due, to wit on the first day of January A.D. 1837 to wit at the County aforesaid the said Daniel Merritt assigned and transferred said note to One Elisha Merritt, and that afterwards and while the said Elisha Merritt was the owner of said note, to wit on the first day of June A.D. 1839, to wit at the County aforesaid the said plaintiff fully paid to the said Elisha Merritt the said sum of money in said note mentioned

4256-84

(43) & this The Said plaintiff is ready to verify, wherefore he prays judgt &c

5th Replication And for further replication to Said defendant's third plea by him above pleaded Said plaintiff by leave of the Court &c Says precludi non &c because he Says that after the giving of Said promissory note in Said plea mentioned and after the Same fell due, to wit on the first day of May A.D. 1841, to wit at the County aforesaid the Said Daniel Merritt assigned and transferred Said promissory note to one Elisha Merritt who was the father of Said plaintiff and defendant and afterwards and while Said Elisha Merritt was the owner of Said note to wit on the 1st day of August A.D. 1841 to wit at Said County he the Said Elisha Merritt departed this life, and that afterwards to wit on the first day of September A.D. 1841 to wit at the County aforesaid the Said defendant was duly appointed and qualified as executor of the estate of Said Elisha Merritt deceased - and that afterwards and while Said defendant was such executor and before the commencement of this Suit, to wit on the Eleventh day of October A.D. 1841 to wit at the County aforesaid an account was had and Stated between the Said plaintiff and the Said defendant, in his own right and as such executor as aforesaid of and concerning the Said Sum of Money in Said note mentioned, and of and concerning the estate of Said Elisha Merritt, and upon that occasion the Said defendant was then and there found in arrear and indebted to Said plaintiff over and above the amount

(44) of Said note in Said plea mentioned in a large Sum of money, to wit in the Sum of Nine hundred dollars, for which Sum he the Said defendant then and there executed and delivered to plaintiff the promissory note in Said declaration mentioned and this the Said plaintiff is ready to verify wherefore he prays Judgement &c

6th And for further replication to Said defendants third plea by him above pleaded the Said plaintiff by leave of the Court &c says precludi non &c because he says that after the making of the Said promissory note in Said plea mentioned and before the Commencement of this Suit, to wit on the Eleventh day of October A.D. 1841 to wit at the County aforesaid he the Said plaintiff fully paid to the Said defendant the Said Sum of money in Said promissory note mentioned, and this the Said plaintiff is ready to verify wherefore he prays Judgement &c

Dickey & Wallace
pltffs Attys

And afterwards to wit: on the 26th day of November 1853 the same term, one of the days of the November term of said Court for the year 1853 the defendant by his Counsel filed his rejoinder in words and figures following viz:

La Salle County Circuit Court
November Term A.D. 1853.

Stephen Merritt
vs
Nathan Merritt } Debt

$12.50-08

(45) And now comes the defendant and for rejoinder to the first replication to the defendants third plea plea says, that within Sixteen years next before the bringing this suit, to wit, on the first day of May A. D. 1841. the said plaintiff agreed with Daniel Merritt then the holder of said note to pay the amount due thereon - and this the said defendant is ready to verify -

And for a rejoinder to the Second replication of the plaintiff to the defendants third plea the said defendant says, That the said note was not at the time of said arbitration & award held & owned by the said Daniel Merritt - And of this he the said defendant puts himself upon the Country - and plaintiff doth the like -

by Wallace

And for a rejoinder to the third replication to the defendants third plea said defendant says, that the plaintiff did not pay Daniel Merritt as in said replication is alleged - and of this the defendant puts himself upon the Country -

And plff. doth the like

By Wallace

And for a rejoinder to the fourth replication of the plaintiff to defendants third plea defendant says, that said plaintiff did not pay Elisha Merritt as in said replication is alleged - and of this defendant puts himself upon the Country - And plff. doth the like

Wallace, p. a.

(46)

And for a rejoinder to the fifth replication of the plaintiff to defendants third plea defendant says, that there was no accounting in which the defendant was found indebted to the plaintiff in the sum of nine hundred dollars, or any other sum, over and above the amount of said notes as in said replication is alleged — and of this the said defendant puts himself upon the Country —

And pltff. doth the like

Wallace p.p.

And for a rejoinder to the sixth replication of the plaintiff to the defendants third plea defendant says, that said plaintiff did not pay to the defendant said note as as plaintiff hath in said replication alleged, & of this said defendant puts himself upon the Country —

And pltff. doth the like

Wallace p.p. Leland & Leland
for dft.

And said rejoinder the plaintiff on said 26th day of November 1855 filed his surrejoinder in the words and figures following viz:

La Salle Circuit Court
Nov Term A.D. 1855 —

Merritt }
vs } Debt
Merritt }

And the said plaintiff by Wallace his attorneys

(47)

comes & for Surrejoinder to the first rejoinder to said plaintiffs first Replication to defendants third plea herein, Said plaintiff saith that he did not at the said time when &c nor at any other time within Sixteen years next before the bringing of this Suit agree with said Daniel Merritt to pay the Amount due therein as said defendant hath in said rejoinder alleged & this the said defendant prays may be enquired of by the Country.

And dft doth the like

Wallace

Leland & Leland for dft.

for Plf

Attachment Bond. Chicago Democrat Print.

Know all Men by these Presents, That we, Stephen Merritt and Edmund S. Colbert

are held and firmly bound unto Nathan Merritt

in the penal sum of Three thousand & one hundred dollars, cents, lawful money of the United States, for the payment of which said sum. well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this twenty fourth day of July A. D. 1854

The Condition of the above Obligation is such, That whereas the above bounden

Stephen Merritt

ha~~s~~ on the day of the date hereof, prayed an attachment out of the Circuit Court of La Salle County, at the suit of Kinsley

against the estate of the above named Nathan Merritt

for the sum of fifteen hundred & thirty three dollars, ~~cents~~, and the same being about to be sued out of said Court, returnable on the ~~first~~ second Monday of November next, to the term of the said Court, then to be holden. Now, if the said Stephen Merritt

shall prosecute his said suit with effect, or in case of failure therein, shall well and truly pay and satisfy the said Nathan Merritt

all such costs in said suit, and such damages as shall be awarded against the said Stephen Merritt

his heirs, executors, or administrators, in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, then the above obligation to be void; otherwise to remain in full force and effect.

Stephen Merritt Seal

Edmund S. Colbert Seal

Signed, Sealed and Delivered In presence of

A Jewett

12562-27

(48) And afterwards to wit: on Friday December 7th 1855 the same being one of the days of the November term of said Court for the year 1855. another order was made and entered of record in said cause viz:

"Stephen Merritt }
vs } Attachment
Nathan Merritt } This day again comes the plaintiff by Wallace his attorney, and by leave of the Court withdraws the attachment bond which was filed at the commencement of this suit and substitutes a new bond with E. L. Hulbert as his security."

Said bond is in words and figures following viz:

(49) And afterwards to wit on Friday December 14th 1838 the same being also one of the days of the said Summer term of said Court for the year 1838 an order was made and entered of record in said cause in the words and figures following viz:

"Stephen Merritt
vs
Nathan Merritt } Attachment
This day again came the parties hereto by their Counsel together with the following jurors of a jury to wit: John D. Schuler, Abraham Lyda, C. P. Ferdon, J. E. Shaw, D. H. Fredenburgh, Norman Beaton, A. E. Gow, Thomas Franklin, Lemuel Hadley, Stephen Ryles, William Bevins & Frederick Richardson who are duly elected tried and sworn to well and truly try the issues herein according to the evidence, and after hearing a part of the evidence, the further hearing of this cause is postponed until nine o'clock to morrow morning."

"Saturday December 15th"

"Stephen Merritt
vs
Nathan Merritt } Attachment
This day again came the parties hereto by their attorneys together with the jury sworn herein, and after hearing the balance of the evidence, the further hearing of this cause is postponed until ten o'clock next Monday morning."

"Monday December 17th"

(50)

"Stephen Merritt
vs
Nathan Merritt } Attachment

This day again come the parties hereto by their Attorneys, and after hearing a part of the arguments of Counsel, the further hearing of this cause is postponed until the coming in of the Court to morrow morning."

"Tuesday December 18th"

"Stephen Merritt
vs
Nathan Merritt } Attachment

This day the parties hereto again come by their Attorneys, together with the jury sworn herein, and after hearing the balance of the arguments of Counsel, and the Instructions of the parties read by the Court, the jury retire to Consider of their verdict."

"Wednesday December 19th"

"Stephen Merritt
vs
Nathan Merritt } Attachment

The parties hereto again come by their Counsel together with the jury sworn herein, who, after due deliberation thereon had, say that they are unable to agree upon a verdict. Thereupon the Court discharge the jury from their deliberation herein".

[10562-27]

(51) The depositions of Elisha C. Merritt were opened and published on file in said Cause on the 12th day of May 1856. the same being one of the days of the May term of said Court for the year 1856 and due in the mode and form of Storing &c:

The deposition of Elisha C Merritt, of the town of Carmel, County of Putnam, and State of New York, a witness of lawful age, produced, sworn and examined, upon his corporal oath, on the sixth May, in the year of our Lord one thousand. Eight hundred and fifty-six, at the house of said Elisha C. Merritt, in the town of Carmel, in the County of Putnam and State aforesaid, by me, James D. Lottle, a Commissioner duly appointed by a Dedimus Potestatem or Commission issued out of the Clerks office of the Circuit Court of La-Salle County, in the State of Illinois, bearing Teste in the name of John F. Nash, Esq. Clerk of the said Circuit Court, with the Seal of said Court affixed thereto, and to me directed as such Commissioner for the examination of the said Elisha C. Merritt, a witness in a certain Suit, and Matter in Controversy, now pending and undetermined in the said Circuit Court, wherein Stephen Merritt is plaintiff and Nathan Merritt is defendant, in behalf of the said defendant, upon the interrogatories which were attached to or inclosed with the said Commission, and upon none others. The said Elisha C. Merritt being first duly sworn by me, as a witness in the said Cause, previous to the Commencement of his examination to testify

(51) the truth as well on the part of the plaintiff, as the defendant, in relation to the matters in controversy between the Said Plaintiff and defendant so far as he Should be interrogated, testified and deposed as follows:

"Interrogatory First:" What is your name, age, occupation, and& place of residence?

"Answer to first Interrogatory:" Elisha C. Merritt; thirty eight years of age; farmer; town of Carmel, Putnam County and State of New York

"Interrogatory Second:" Are you acquainted with the parties plaintiff and Defendant in this Suit, and& what relation are you to them?

"Answer to interrogatory Second;" I am acquainted with the parties; I am a brother to both.

"Interrogatory Third," Did you ever hear Stephen Merritt say anything on the Subject of whether he and& Daniel Merritt had ever been in partner-ship in business; if so, what did he say and& when did he say it?

"Answer to Interrogatory Third;" I have heard Stephen Merritt Say Something about partnership with Daniel Merritt; He Said they were not then in partnership nor never had been in partnership. He said this in the Summer of 1842 or 1843

(52) "Interrogatory Fourth;" Did you ever hear Stephen Merritt say anything on the subject of the amount for which he sold his interest in his father's estate to Nathan Merritt? if so, what did he say on the subject, and when was it?

"Answer to Interrogatory Fourth;" I think I have heard him say something about it; I do not recollect what he said, nor the time.

Elisha C. Merritt

Sworn and subscribed before me this sixth day of May 1854

J. D. Little

Commissioner

I, James D. Little, of the County of Putnam, and State of New York, a Commissioner duly appointed to take the deposition of the said Elisha C. Merritt a witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the Commencement of the examination of the said Elisha C Merritt as a witness in the said Suit between the said Stephen Merritt, plaintiff and Nathan Merritt defendant, he was duly Sworn by me as such Commissioner to testify the truth in relation to the matters in Controversy between the said Stephen Merritt plaintiff & Nathan Merritt Defendant, so far as he should be interrogated Concerning the Same; That the said deposition was taken at the house of said Elisha C. Merritt, in the town of Carmel, County of Putnam

[42563-3]

and State aforesaide, on the Sixth day of May A.D. 1856; and that after said deposition was taken by me as aforesaid, the interrogatories and answers thereto, as written down, were read over to the said witness, and that thereupon the same was signed and Sworn to by the said deponent, Elisha C. Merritt, before me, as such Commissioner, at the place, and on the day and year last aforesaid

J. D. Little.

Commissioner

(54)

Also on said 12th day of May 1856. the same being one of the days of the May term of said Court for the year 1856 the deposition of Elisha C. Merritt was opened & placed on file in the records and papers pertaining thereto.

State of Illinois.
La Salle County & Circuit Court thereof

Stephen Merritt
vs
Nathan Merritt } Debt

To Said defendant or Glover & Cook his attorneys -

Take notice that on the eighteenth day of March A.D. 1856, between the hours of nine O'Clock in the forenoon and five O'Clock in the afternoon of said day, I shall proceed to take the deposition of Elisha C. Merritt before Peter S. Shaver, a justice of the peace in and for Stark County in said State - at the office of said justice in said County of Stark said deposition when so taken to be used on the trial of said cause as evidence -

Yours &c Stephen Merritt
by W.H. Wallace his atty.

Received a copy of the within notice this 3rd day of March A.D. 1856

Glover & Cook
defts attys —

In Justices Court before P. S. Shaver Justice

Stephen Merritt
vs
Nathan Merritt } Deposition of Elisha C.

5/12/20-38

(58) Merritt aged Thirty Eight years a witness in the above entitled Suit, taken by Peter S. Shaver, Esquire a Justice of the Peace of the County of Stark on the 18th day of March 1856, at the office of the said Justice in said County in the presence of the said Plaintiff

1st Interrogatory

Qr. (Are you acquainted with the parties?

Answer: I am.

2 qr) How long have you known them

Ans: Thirty years

3 qr) What is your Relation with them if any

Ans: Brother

4 qr) Did Stephen Merritt ever pay you any money to Elisha Merritts order if So how much and at that time.

Ans: he did. Two hundred and Twenty Eight dollars in the Summer of 1837.

5 qr) Was Elisha Merritt your Father

Ans: he was

6 qr) Was Nathan Merritt appointed executor in your Father's Estate

Ans: I believe he was

Elisha C. Merritt

State of Illinois } ss I, the Subscriber a justice of the
Stark County } Peace of the said County, do certify that the above deposition was taken by me at the time and place mentioned in the Caption Thereof; that the said witness was first duly Sworn and that the said deposition was carefully read to the witness and

(67) Signed by him. Dated this 18th day of March 1856

Peter S. Shaver
Justice of the Peace

(57) On the 12th day of May 1855. the same being one of the days of the May term of said Court for the year 1855. the deposition of Nehemiah Merritt was opened and placed on file in the words and figures following to wit.

State of Illinois }
La Salle County } Circuit Court thereof —

Stephen Merritt
vs
Nathan Merritt } Debt

To the said defendant or to Glover & Leech his attorneys

Take notice that on the 21st day of March AD 1856. between the hours of 9 o'clock A.M. & 5 o'clock P.M. of said day I shall proceed to take the deposition of Joseph Merritt and Nehemiah Merritt before — Prescott esq. a Justice of the peace of Marshall county in said State, at the office of said Justice in Henry in said Marshall county - said depositions when taken to be used as evidence in the trial of said cause

Stephen Merritt
by Wallace his atty.

Received a copy of the within notice this 3rd day of March A.D. 1856.

Glover & Leech
Defts attys

S125.60-34

(58)

State of Illinois
La Salle County ss

In the Circuit Court of
La Salle County!

Stephen Merritt,
vs
Ira Vroom Merritt

Deposition of Nehemiah Merritt aged about fifty years, a witness in the above entitled suit, taken by James Wescott Esq a Justice of the Peace of Marshall County, State of Illinois on the 21st day of March A.D. 1856, at the office of said Justice in Henry in said Marshall County between the hours of 9 o'clock AM, and 5 o'clock PM, in the presence of the plaintiff:

Marshall County, ss Nehemiah Merritt being duly sworn deposes and says as follows to wit,

I live in Henry Township Marshall County Illinois aged fifty four — occupation a farmer, I am acquainted with the parties in this suit, Brother to each of the parties

Question by Plaintiff. Did you ever have any conversation with the defendant in reference to his having purchased the Plaintiffs interest in his fathers estate!

Answer — I have

2nd When and Where?

(59) As near as I can recollect about three years ago in Henry.

What was that conversation?

He said he had purchased the Plaintiffs interest and had given him his note for it.

Do you recollect the amount of the note?

My impression is that it was for nine hundred dollars

Was there anything said in that conversation in relation to a settlement between the Plaintiff, and the defendant as executor of his Fathers Estate?

There was.

What was it?

The defendant told me he could not get a Settlement in any other way but by giving Stephen (the Plaintiff) his note, He Statham said the reason why he Statham gave his note instead of paying the money was because of a deed between Stephen and Daniel, I understood from him that all matters between the estate of Elisha Merritt, his Father and Stephen Merritt were settled at the time he Statham gave his note to Stephen

Are you acquainted with Daniel Merritt?

I am

(60) Is he a relative of yours

He's a brother of mine

Do you know of any partner ship that existed between Daniel Memitt and Stephen Memitt. if so when was it and where was it.

In 1836 Daniel Memitt and Stephen Memitt resided a little North west of Peru in La Salle County and did business together as partners holding personal property jointly

How did you learn these facts;

I lived in the house with them at the time and gathered it from their conversations between them and from the manner of their doing business. To what extent this partnership existed I do not know,

Have you been intimate with Daniel Memitt for a length of time past if so how long;

Yes from Childhood

What is the state of his mind compared with what it was formerly.

I think his mind is considerably impaired

In what respect,

I think in memory, especially and somewhat in

(61) in judgment, I have observed on conversation with him that he is more forgetful than he used to be, I think his memory is so impaired that his statements in regard to things long past is not to be relied on implicitly, not that he would swerve from the truth knowingly, but is liable to get wrong impressions from his forgetful nes, as far as I know. This is the opinion of his friends and relatives. I have heard him state that he dare not trust his own memory.

What do you think was the cause of his mind becoming impaired

I think from sickness. He has been sick a good deal I was at his house two years ago, and I thought he would not live a month

Do you know the state of feeling of Daniel Merritt towards Stephen Merritt?

I know that for some time past he has held ill will towards him. This feeling has existed since a certain law suit between them

Zekeriah Merritt,

State of Illinois
Marshall County } ss I James Wescott a Justice of the peace within and for said County of Marshall and State of Illinois do certify that the foregoing deposition was taken by me at the time

Feb 8 1/5

and place mentioned in the caption thereof that the said witness was first duly sworn, and that the same was reduced to writing by me and carefully read to said witness and signed by him in my presence

Given under my hand and seal at Henry this 21st day of March A.D. 1856

James Prescott

Justice of the Peace

State of Illinois } ss
Marshall County }

I Washington E Cook, clerk of the county court in and for said county, do hereby certify that James Prescott Esq whose signature appears to the within and foregoing attached instrument of writing was at the date thereof and now is an acting Justice of the Peace within and for the county aforesaid as such duly commissioned and sworn into office according to law, and authorized by the Statutes and laws of Illinois to take the acknowledgments of Deeds Mortgages, and other instruments of writing for the conveyance of Real Estate, and administer oaths as appears on record in my office, and his official acts are entitled to full faith and credit that I am well acquainted with the hand writing of said Justice, and believe the signature to said instrument to be genuine

In witness whereof I have hereunto subscribed my name and attached the seal of said county at Lacon this 21st day of March in the year of our Lord one thousand eight hundred and fifty six

Washington E Cook Clerk,

(63)

On the 12th day of May 1855. the same being one of the days of the May term of said Court for the year 1855. the deposition of Joseph Memtt was opened. and placed on file. in the following words and figures viz:

State of Illinois }
La Salle county } ss

In the Circuit Court of
La Salle County

Stephen Memtt }
vs }
Nathan Memtt }

Deposition of Joseph Memtt aged about Fifty two years. a witness in the above entitled suit taken by James Wescott Esq. a Justice of the Peace of Marshall County State of Illinois on the 21st day of March AD. 1856. at the office of the said Justice in Henry in said Marshall County. between the hours of 9 o.clock A.M. and 5 O. clock PM in the presence of the Plaintiff

Marshall County ss.

Joseph Memtt. being duly sworn deposes and says as follows to wit.

What is your age. occupation. and where do you reside

Fifty second year. Farmer. Malo Townsship Bureau County Illinois

[12562-3]

(64) Are you acquainted with the parties to this suit,

I am.

What is your relationship if any to the parties?

I am a Brother

Did you ever have any conversation with the defendant Nathan Merritt in reference to his having purchased Stephen Merritts interest in his fathers Estate, if so when and where,

The Nathan Merritt came to my house in the fall of I think 1841 or 1842 in the Town of Perrysburg in County Chautauque State of New York he stated that he had been West, and purchased the rights of the heirs of Fathers Estate, I asked him how he got along with Stephen, he said he had given Stephen his note I asked him why he did so, he said Stephen would not settle in any other way

Did he state for what amount he gave his note?

I think he said Nine hundred Dollars,

How many heirs were living in the west at the time

I should think there was four or five, I do not recollect exactly,

(65) What did your Fathers estate consist of principally

It consisted of Notes and Obligations. Chiefly, and some money

What was the value of it

The best knowledge I have of it, is the evening before the settlement with the Surrogate of Putnam County New York. the next year after Fathers decease I was at defendants House, and saw the interest cast on the notes and Obligations, and the full amount of the assets of the Estate added up. and they amounted to a little over Eleven Thousand dollars probably Two or Three Hundred dollars, over

Was there an offer made you by Nathan Merritt not to appear against him at the Settlement of the Estate before the Surrogate

There was

What was it,

He offered me Two Hundred dollars

Are you acquainted with Daniel Merritt

Yes

What relation is he to you

Brother,

(66) Have you been intimate with Daniel Merritt the last twenty years

I have,

Have you within a few years past observed any failure of the faculties of his mind

I think I have, I think I have discovered a failure very plain

In what does it consist.

Principally in his memory, he tells things now that he would not have told if his memory was as good as years before. I could not rely on his statements of things past on account of his memory being impaired, I think it very treacherous, I think his memory has been impaired on account of ill health. He has been sick a good deal, this is also the opinion of his relatives and friends so far as I know,

Was there any further conversation at your House in Perrysburg in regard to his Walkers settling with Shepherd, if there was, State what that further conversation was, as near as you can recollect, or the substance of the same if unable to recollect the precise language

I cannot recollect the precise Language, but the substance was this, that he had settled with

(67) Stephen, and had bought his right to his fathers Estate

Did Nathan Merritt act as Executor of his fathers Estate

He died,

Joseph Merritt

State of Illinois } ss I, James Wescott a Justice
Marshall County } of the Peace within and for said County of Marshall and State of Illinois do certify that the foregoing deposition was taken by me at the time and place mentioned in the caption thereof, that the said witness was first duly sworn, and that the same was reduced to writing by me and carefully read to said witness and signed by him in my presence

Fees $1,50

Given under my hand and seal at Henry this 21st day of March A.D. 1856.

James Wescott, (Seal)
Justice of the Peace

State of Illinois } ss I, Washington E Cook, Clerk
Marshall County } of the County Court, in and for said county, do hereby certify that James Wescott Esq, whose signature appears to the within and foregoing instrument of writing was at the date thereof, and now is an acting Justice of the peace, within and for the county aforesaid

S 12 S 62-37

as such duly commissioned and sworn into office according to law, and authorized by the Statutes and laws of Illinois to take acknowledgments of Deeds Mortgages, and other instruments of writing for the conveyance of Real Estate, and administer oaths, as appears on record in my office; and his official acts are entitled to full faith and credit that I am well acquainted with the hand writing of said Gusher, and believe the signature to said instrument to be genuine

In witness whereof, I have hereunto subscribed my name, and affixed the seal of said county at Macon this 21st day of March in the year of our Lord one thousand eight hundred and fifty six

Seal

Washington E Cook, Clerk

(69) And again afterwards to wit: on Thursday May 25th 1836 the same being one of the days of the May term of said Court for the year 1836 the following further proceedings appear of record in said cause viz:

"Stephen Merritt
vs
Nathan Merritt } Attachment
This day comes the plaintiff by Dickey, Wallace & Gray his attorneys and the defendant by Leland & Shurtleff his attorneys and thereupon come the following jurors of a jury to wit: James Pickens, Isaac Robinson, John B. White, Jeremiah Canty, C. M. Van Doren, James Prescott, Orange Pearsons, William Jacoby, Rhesa Bliss, M. W. Dimmick, Leroy Hardy, and Isaac Goss who are duly elected tried and sworn to well and truly try the issues herein according to the evidence, and after hearing a part of the testimony, the further hearing of this cause is postponed until the coming in of the Court to-morrow morning."

"Friday May 26th

"Stephen Merritt
vs
Nathan Merritt } Attachment
This day again come the parties hereto by their counsel together with the jury sworn herein, and after hearing a part of the testimony, the further hearing of this cause is postponed until nine o'clock to-morrow morning"

"Saturday May 27th"

[12582-43]

(70)

"Stephen Merritt
vs
Nathan Merritt } Attachment

This day again come the parties hereto by their attorneys together with the jury herein, and after hearing a continuance of the testimony, the further hearing of this cause is postponed until ten o'clock one half o'clock next Monday morning."

"Monday May 26"

"Stephen Merritt
vs
Nathan Merritt } Attachment

This day again come the parties hereto by their attorneys together with the jury herein, and after hearing the balance of the evidence and a part of the arguments of counsel, the further hearing of this cause is postponed until the coming in of the Court to-morrow morning."

"Tuesday May 27th"

"Stephen Merritt
vs
Nathan Merritt } Attachment

This day again come the parties hereto by their attorneys together with the jury herein, and after hearing the balance of the arguments of counsel the jury are discharged from further deliberation herein until the coming in of the Court to-morrow morning"

"Wednesday May 28th"

(71) "Stephen Merritt
vs
Nathan Merritt } In Attachment

This day again come the parties hereto by their Attorneys together with the jury herein, who after hearing the Instructions of the parties from the Court, retire to consider of their verdict: And after due deliberation thereon had, return into Court the following verdict to wit: "We the jury find the issues joined in favor of the defendants, and that the plaintiff is indebted to the defendants in the sum of One hundred and seventy nine dollars and forty nine cents."

"Now the plaintiffs counsel move the Court for a new trial."

And afterwards to wit: on Saturday May 31st 1856 the same being one of the days of said May term of said Court for the year 1856. the following order was entered of record in said cause viz:

"Stephen Merritt
vs
Nathan Merritt } Attachment

After due deliberation thereon had it is ordered by the Court that the plaintiffs motion for a new trial herein be overruled.

It is therefore considered by the Court that the defendant have and recover of the plaintiff the sum of one hundred and seventy nine dollars and forty nine cents for his debt, and also his costs and charges by him herein expended and that he have execution therefor."

3/18.662-H1

(72) And afterwards to wit: on Friday June 6th 1856 the same being one of the days of the May term of said Court for the year 1856 another order was made and entered of record in said cause viz:

"Stephen Merritt
vs
Nathan Merritt } Attachment

By agreement of parties it is ordered by the Court that a Bill of Exceptions be filed nunc pro tunc in this cause within ten days after the adjournment of the present term of this Court".

And afterwards, to wit: on the same 6th day of June last aforesaid, a final order was entered of record in said cause viz:

"Stephen Merritt
vs
Nathan Merritt } Attachment.

The plaintiff by his counsel prays the Court for an appeal herein to the Supreme Court, which is granted upon condition that the plaintiff within thirty days from this date file an appeal bond pay able to the defendant in the penal sum of three hundred dollars with Nehemiah Merritt or Joseph Merritt as his security."

A stipulation extending the time for tendering a Bill of Exceptions was filed on the 13th day of June 1856 in the words and figures following, that is to say:

(73) Circuit Court of La Salle County Ill

Stephen Merritt } Judgment rendered against
vs } Stephen Merritt at May term
Daniel Merritt } 1856

"It is hereby stipulated that the time for tendering a bill of Exceptions in the above case shall be extended to the 20th day of June ~~A.D.~~ 1856
June 13th 1856

T. L. Dickey for Pltff
E. S. Leland for Defft

"By agreement the time for tendering bill of Exceptions is extended to the 25th day of this month
June 18. 1856 T. L. Dickey
E. S. Leland for Defft

On the 25th day of June 1856 a bill of Exceptions was filed in said cause in the words and figures following to wit

State of Illinois } May Term AD 1856
La Salle County }

Stephen Merritt }
vs } Action of Debt.
Nathan Merritt }

Be it remembered that upon the trial of this cause the plaintiff read in evidence to the jury a promissory note in the words and figures following—Court

3/12.563-42

(74) # 900. For value received I promise to pay Stephen Merritt on the third day of November one thousand eight hundred and forty two nine hundred dollars without defalcation. being in consideration of Stephen Merritts quit claim to his fathers estate Peru October 10th 1841.

Nathan Merritt

and there plaintiff rested his case thereupon defendant offered to read in evidence a promisory note, signed & sealed by the plaintiff dated august 1st 1836, payable on its face to Daniel Merritt or bearer, for the sum of nine hundred and sixty seven dollars with interest from its date at seven percent per annum xx, — on the back of which promisory note was entered a credit of $233,88, dated Sept 1- 1837, and on the back of which note was an assignment as follows,

" Pay Nathan Merritt or order. without recourse

Daniel Merritt

to the reading of which in evidence the plaintiff objected, on the ground that the necessary foundation had not been laid by proof to authorize the same to be read in evidence to the Jury.

The plaintiffs objection was then and there overruled by the Court, to which decision of the Court the plaintiff then and there excepted, and said last mentioned promisory note, and the written endorsements thereupon aforesaid were read to the Jury by the defendant, Defendant then called as a witness Daniel Merritt who upon a preliminary examination swore that he

(75) was the original payee mentioned in the note read in evidence by defendant and that the written assignment thereof was made by him, in the year 1853. in October of that year. Defendant then offered to prove by said witness, the making by plaintiff of the new promise to pay said note set up in defendants rejoinder to plaintiffs replication, setting up the statute of limitations as a bar to said note as a set off. The plaintiff objected that said witness was not competent to testify upon that point upon the ground of his implied guarantee, arising from his assignment of said note, disqualifying him on account of interest. No other proof had then been offered to the Court upon the said point of competency.

The Court overruled the plaintiffs objection to the competency of said witness in that behalf and permitted him to testify, as hereinafter set forth to which decision of the Court the plaintiff then and there excepted. said witness Daniel Merritt then testified in substance, that sometime in May 1841, witness being the holder of the note offered in evidence by defendant as aforesaid did at the same time being indebted to his father, Elisha Merritt (which indebtedness he desired to have liquidated) he applied to Stephen Merritt to ascertain when he could pay this, and certain other notes. that said Stephen Merritt, the plaintiff desired the witness to get Elisha Merritt, the father to accept this note in part payment of the indebtedness of the witness to the father. and that plaintiff said that he would pay said note whenever the

[12562-43]

father should demand. To the admission of all which testimony the plaintiff objected. The Court overruled his objection, and the plaintiff excepted to the decission of the Court. upon cross-examination witness testified that sometime in July 1841, in the State of New York, he turned over sold and delivered to his father Elisha Merritt the note read in evedence by the defendant as above, as a part payment of what witness then owed his father, and his father accepted the same, and allowed the witness a credit for the then amount of said note, upon the indebtedness of witness to the father, — that his father then lived in Putnam county, in the State of New York, that his father died in said county, in the month of August 1841 that the credit indorsed upon the said note was made by the witness and entered upon the said note before it was transferred to his father as above; that after transferring said note (read in evedence by defendant as aforesaid) witness next saw the note in the fall of 1841 in the hands of Nathan Merritt the defendant then an Executor of his fathers estate. — That plaintiff, the witness and defendant are brothers to each other, and all sons of Elisha Merritt, who died in Putnam county New York on August 1841, on re-examination by defendant, the witness Daniel Merritt stated, that at the time of the arbitration between himself and Stephen ~~Merritt~~ the plaintiff in 1844, witness had no interest in the note read in evidence in this suit by the defendant, that

(77) he was not then either the owner or holder thereof nor had he since any interest therein,

To this testimony when it was offered. the plaintiff objected, that it was not competent, the objection was overruled by the Court, the testimony admitted and the plaintiff excepted to the decision of the Court in that behalf, witness further testified that Nathan Merritt the defendant was in 1841, a man of wealth and property and abundantly able to pay the amount of plaintiffs note, and though he lived in the State of New York, he had been in this State some three or four times since 1841, he could not say that Stephen Merritt knew of Nathans being in this State, but that he was in the same neighborhood. on cross examination plaintiff offered to prove by witness Daniel Merritt that from 1843 to 1850 the plaintiff Stephen had been engaged in an expensive important and strenuously contested litigation with the witness Daniel. to which testimony the defendant objected, on the ground of its irrelevancy - the court sustained the objection and the plaintiff excepted to the decision of the Court

The defendant then called Milo Kendall, an Attorney at law of the County of Bureau who was permitted by the Court (the plaintiff objecting) to testify that he was employed as an Attorney in 1853 or 1854 to commence a suit for the defendant in the Circuit court of Marshall County, in the State of Illinois upon the promissory note pleaded as a set off in this case by the defendant, and that he

did commence a suit, drew and signed the declaration, that Mr Cook, and the witness were employed together on the suit; that he signed the names of both himself and Mr Cook as attorneys to the declaration; that he did not attend to the suit when court came on but wrote to Mr Cook to do so, and supposed he would be there The above testimony of Miles Kendall, and each part of it, the plaintiff objected to, at the time it was given, the objection was overruled by the Court, the testimony admitted and the plaintiff then and there excepted to the decision of the court in that behalf

Henry G Colton, a witness called by the defendant, testified that he had been a practising Lawyer in the State of New York, and was skilled and learned as to the laws of New York in 1841, — and that in the year 1841 by the law of the State of New York, a promissory note payable on its face to bearer or to a payee specially named or bearer, was transferrable by sale and delivery, without assignment in writing, and that by such sale and delivery the purchaser of such a note, acquired by the then laws of New York, the right to sue upon such note in his own name, to all which testimony of Henry G Colton aforesaid and to each and every part thereof, the plaintiff then and there objected, at the time the same was offered, and insisted that the same was incompetent, — the Court overruled the objection, and admitted the testimony, and to the decision of the Court in

(74) that behalf. The plaintiff then and there excepted.

The defendant then read in evidence to the Jury a certified copy of the last will and testament of Elisha Merritt deceased which was in the words and figures following to wit,

(80) The last will and testament of Elisha Merritt of the town of Carmel in the County of Putnam and State of New York, I Elisha Merritt considering the uncertainty of this mortal life, and being of sound mind and memory— blessed be Almighty God for the same— do make and publish this my last will and testament in manner and form following, that is to say

First. I give and bequeath unto my beloved wife Desire Merritt notes to the amount of about six hundred dollars given by Nathan Merritt and payable to my wife Desire Merritt, and I further bequeath to my wife the interest of one thousand dollars during her natural life to be paid to her by my executors yearly from the proceeds of one thousand dollars which is to be put on interest with landed security, and likewise all my household furniture, beds and bedding and such provisions as shall remain on hand at the time of my decease and to have the disposal of all my wearing apparel after my decease— also my cow. I give and bequeath to my son Nathan Merritt three hundred dollars and to his heirs and assigns forever to be paid one year after my decease— I give and bequeath to my daughter Martha Ballard five hundred dollars to be paid one year after my decease— I do also bequeath to my youngest son Elisha C. Merritt one dollar to be paid to him one year after my decease which sum will make him equal with what I have already given him. I give devise and bequeath all the rest and residue of my estate after the foregoing requisitions be complied with in manner following that is to say to my sons Hackaliah Merritt, Elijah Merritt, Nehemiah Merritt, Joseph Merritt, Daniel Merritt, John Merritt Stephen Merritt a thir

[12562-42]

(41) heirs or assigns forever to be paid to them one year after my decease of each an equal proportion.
I also give and bequeath to my sons Hackaliah Merritt Elijah Merritt, Nehemiah Merritt Joseph Merritt, Daniel Merritt, John Merritt Stephen Merritt or their heirs or assigns forever after the death of my widow Desire Merritt the sum of one thousand dollars to be divided equal amongst them or their heirs one year after the death of my widow.

I also order my said executors if at the time of my decease I shall hold obligations against either of my own sons above named that amounts to his dowry in my estate you are not to collect the obligation but give it up to him and take his receipt for his dowry and if there should be found any obligations against either of my own sons that amounts to more than his dowry in my estate you are not to collect any more from him than what is necessary to pay up those that fall short in their dowry— I do hereby appoint my son Nathan Merritt and my friend Asahel Cole of Kent in said County, executors of this my last will and testament hereby revoking all former wills by me made.

In witness whereof I have hereunto set my hand and seal this fourteenth day of July in the year of our Lord one thousand eight hundred and forty.

Elisha Merritt L. S.

Signed Sealed, published and delivered by the above-named Elisha Merritt to be his last will and testament in the presence of us who have hereunto subscribed our names as witnesses in presence of the testator Nathan Whiting Alvah Colwell.

State of New York }
(82) Putnam County } ss: I Ambrose Ryder, Surrogate of said County of Putnam, do hereby certify that the foregoing is a true and correct copy of the last will and testament of Elisha Merritt late of the town of Carmel in said County, deceased, as the same appears recorded in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of office of the Surrogate of said County of Putnam this 10th day of May 1856

Ambrose Ryder Surrogate

(83) and also letters testamentary under the seal of the Surrogate of the County of Putnam in the State of New York, dated November 25th 1841, with the aforesaid Will annexed by which it was officially declared that said Last will and testament had been duly proved before said Surrogate, and approved by him and that the administration of the estate of Elisha Merritt was granted to the said Nathan Merritt and one Asabel Cole, as Executors of said Estate

Defendant then read in evidence a deed from Stephen Merritt, the plaintiff to Nathan Merritt the defendant, of which the following is a copy,

(Copy made by W.H.L. Wallace May 27, 1856)

Know all men by these presents that I Stephen Merritt of La Salle County, and State of Illinois for the consideration of one dollar in hand paid have sold, and by these presents do grant assign and convey unto Nathan Merritt of the town of Carmel County of Putnam and State of New York, all the right title, and interest which I now have or hereafter may have in the personal & real estate (or either of them) whereof Elisha Merritt died seized & possessed and also all my right title and interest which may hereafter accrue to me as heir, legatee, devisee or otherwise of said Elisha Merritt (deceased) late of Carmel County and State aforesaid. To have and to hold the same unto the said Nathan Merritt, his

L 2562-48

executors, administrators, and assigns forever to and for the use of said Nathan Merritt hereby constituting and appointing said Nathan my true and lawful attorney irrevocable, in my name, place and stead for the purposes aforesaid to ask, demand, sue for, attach, levy, recover and receive all such sum and sums of money which now are, or hereafter may become due owing and payable, for or on account of all or any of the accounts, dues, debts and demands above assigned, and all such right title & interest of every name and nature, that may accrue to me as such heir, legatee devisee or otherwise, giving and granting unto the said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution & revocation, hereby ratifying and confirming all that the said attorney or substitute shall lawfully do or cause to be done by virtue hereof. In witness whereof I have hereunto set my hand and seal the eleventh day of October one thousand eight hundred and forty one

(signed), Stephen Merritt (Seal)

in witness of Isaac Abrahams,

The defendant also read in evidence similar deeds to himself executed respectively, one by Ezekiah Merritt, dated November 6th 1841, one by Nehemiah Merritt

(85) dated October 5th 1841, one by Elijah Merritt
dated October 6th 1841, one by Joseph Merritt
dated October 29th 1841, one by John Merritt
dated October 29th 1841, and one by Daniel Merritt
dated November 3d 1841,

To the introduction of each of which deeds in evidence, when the same were offered respectively the plaintiff objected upon the ground that they were incompetent and irrelevant, which objections were respectively overruled by the Court, and said deeds respectively permitted to be read in evidence, to each of which decisions of the Court the plaintiff excepted, at the time of the making thereof

Defendants then offered to read in evidence the following certified copy of proceedings had before the surrogate of Putnam County in the State of New York, to the reading of which the plaintiff, by his counsel objected, insisting that the same were not properly authenticated, and that the substance of the same was incompetent, and irrelevant, which objections of plaintiffs counsel were respectively overruled, and said certified transcript read in evidence to the jury, to which decision of the court the plaintiff excepted, at the time when the same was made, the following is a copy of said certified transcript, and the authentication thereof;

5/10/1849

~~(The above transcript is not among the papers as sent~~
~~& are not on file in my office)~~

(86)

Putnam Surrogate Court

In the matter of the final accounting of the executors of the estate of Elisha Merritt dec'd

At a surrogates Court held before Azer B. Crane Surrogate of the county of Putnam at his office in the town of Carmel in the said County on the nineteenth day of October 1845. On the day and at the place aforesaid Nathan Merritt and Ashel Cole Executors of the last will and testament of Elisha Merritt late of the said county deceased appeared and requested a citation to be issued by the said Surrogate directed to all persons interested in the estate of the said deceased to appear and attend a final Settlement of their accounts as such executors.

And whereas it appears of record in the office of the said Surrogate that more than eighteen months have expired since the granting of letters testimentary on admitting the said will to probate—

Whereupon it is ordered that a citation issue, and directed to the creditors, next of kin, legatees and all interested in the estate of the said Elisha Merritt deceased to appear before the said Surrogate at his office in the town of Carmel in the said

County on the twenty fifth day of December inst. at ten oclock in the forenoon of that day to attend a final Settlement of their accounts, and that a copy of said citation be published for three months in the state paper before the said return day.

At a Surrogate court held before Isaac B. Crane Surrogate of the County of Putnam at his office in the town of Carmel in said County on the twenty fifth day of December 1845

On the day and at the place aforesaid the citation issued in behalf of the executors of the last will and testament of Elisha Merritt deceased, and directed to the creditors, next of Kin, and all persons interested in the estate of the said deceased, being this day returned and filed in the office of the said Surrogate, and an affidavit made and filed of the personal service of the said citation on Desire Merritt, widow of the said Elisha Merritt deceased — And an affidavit of publication in the state paper for three months and also

(88)

admission of service of citation on Enos Ballard and Martha his wife daughter of said deceased by Abraham Smith their Attorney:

Whereupon on the day and at the place aforesaid the following persons appeared pursuant to the said citation to wit—

Nathan Merrett and Ashel Cole executors in their proper persons — Abraham Smith counsel for Enos Ballard and Martha his wife, daughter of said deceased & Joseph Merrett in his proper person for himself and his brother John Merrett sons of the said Elisha Merrett deceased.

Whereupon at the request of the parties in interest the said cause was adjourned to the twenty seventh instant at the hotel of Lewis Luddington in Carmel in said county; at which said last mentioned day, at the hotel of Lewis Luddington in Carmel in the county of Putnam aforesaid pursuant to the said adjournment the said executors personally appeared, Abraham Smith appeared ~~for~~ as counsel for the said executors and

[12512-51]

Benjamin Baily also appeared as Counsel for Asel Cole one of the Executors and William Watson Esq appeared as counsel for Nathan Merrett, the ~~executor~~ other executor, and the said Joseph Merrett appeared in person and James Stephenson as counsel in lieu of Charles Gahen Esq for the said Joseph Merrett in behalf of John Merrett his brother aforesaid.

And first the said Ashel Cole executor as aforesaid presented a Schedule now in file in my Office, marked A. purporting to be an exhibit of the amount of the estate of the said Elisha Merrett deceased, of notes mortgages and bank bills, jointly received by the said executors before the probate of said will or the granting of letters testamentary with which said Schedule the said Ashel Cole also presented his return of his proceedings as such executor and reported as follows — that shortly after the decease of the said testator he, with Nathan Merrett the other executor met at the late residence of the said deceased

and took in our possession and examined the notes and bonds of the said decd a short account of which was then taken — and is herewith presented — and further that at that time the said Nathan Merritt took the possession and charge of the said papers — that he has never received the same since — and that no other property or effects belonging to the said Estate has come to his possession as such executor — that he proceeded with the proof of the said will and took out letters testamentary — that he has never received any compensation for his services as such executor — and prays the said Surrogate to allow and decree him such sum for his expenses and per centage as shall be according to law — Which said report now on file in my office marked B and proved to be correct by the oath of said executors and admitted by the said Nathan Merritt his coexecutor. And the said Asael Cole further presented an account for counsel fee and

(41)

Services rendered & amounting to the sum of twelve dollars and also a charge of the half of the percentage on $800. to wit, twenty dollars, amounting in all to thirty two dollars.

And the said Nathan Merritt executor as aforesaid also submitted his report of his proceedings as such executor and reports as follows, to wit,— The executor Nathan Merritt states to the Surrogate that the citation in this cause was issued at the special instance and request of his coexecutor Ashel Cole who suppond and stated that it was necessary to have some action in the matter in order Legally to absolve him the said Ashel Cole from all responsibility as such executor.

The said executor Nathan Merritt also states and admits to the Surrogate that his coexecutor is in no way liable or responsible for any of the property or effects of the testator — that he has in no way had the charge or management of the same, so as to make himself in any way liable or responsible for the same or any part thereof

(92)

nor has he paid or received any part or portion of the property or effects of said Estate — and that the said executor Nathan Merritt also admits & states to the Surrogate that he is the only person who has had the charge management or settlement of the property and effects of the said testator as an executor of his will and that he alone is anyway responsible for said property and effects —

And the said Nathan Merritt also states to the Surrogate that he is the assignee and owner of all the property and effects of the said testator, both real and personal and ~~personal~~ all the interest of the several and representative legatees and devisees under said will — they the said ~~devisees~~ legatees and devisees, severally and respectively having duly sold transferred and assigned to him the said Nathan Merritt all their several & respective rights and interests in and to the said estate both real and personal, and released him the said Nathan from their and each and every of their respective rights titles and interests in and to the said estate, all of which

$120.00-53

the said Nathan is ready to prove and verify — That the whole of the said estate has been settled as above stated and in pursuance of the provisions of the will of said testator —

That all the debts and funeral expenses of the testator, as well as the pecuniary legacies given by his will have been paid by the said Nathan Merritt — That the widow of the testator is and has been satisfactorily secured for the interest due & payable to her under said will, which interest has always been paid to her from time to time when she required it to be paid.

That said widow of the testator resides with him, said Nathan, and he provides for and takes care of her.

The said Nathan therefore claims that no further accounting can or ought to be required of him and prays that the Surrogate if he makes any order or decree in the premises may declare the said estate and the property and effects thereof to be settled as above mentioned, or that such property is in the hands of the said Nathan as such assignee and purchaser of the interests of all

the legatees and devisees as aforesaid in the said property and effects aforesaid, and as such assignee and purchaser is entitled to have and to hold the same against all or either of the legatees and devisees under ~~the~~ said will, without further accounting for the same, except as far as he admits that he is bound to account with his mother Desire, the widow of the testator for the interest of $1000— agreeably to the provisions of the said will.

The said Nathan Merritt wishes to be understood in the foregoing statements that he purchased the rights and interests of the several legatees under said will who were entitled to the residue of the said estate after the payment of the specific pecuniary legacies given by said will, to wit- the several ~~sons~~ of the testator, namely, Hackeliah Elijah Jeremiah Joseph Daniel Stephen & John Merritt who were entitled to such residue, all of whose interests in said Estate the said Nathan Merritt now owns and from whom and each and every ~~one~~ of whom he has been regularly and duly released and discharged, and the specific and

pecuniary legacies given and payable under said will be the said Nathan has duly paid and discharged. Which foregoing statements were admitted by said co executor Ashel Cole

And the said Nathan also produced in court a receipt in full for six hundred and sixteen dollars and seventy five cents (principle and interest included) made by Enos H Ballard and Martha his wife, daughter of said testator, together with assignments, duly and severally executed by each and every of the seven above named residuary legatees of all their interest in the estate of the said Elisha Merritt deceased, to wit, Elijah Mott. Hackaby Mott Hannah Mott Stephen Mott Joseph Mott Daniel Mott ——— ——— which said receipt and assignments are now on file in my office

Whereupon from the foregoing statements and evidence submitted by the said Executors, and that after the said Nathan Merritt has duly satisfied and discharged the several items and demands hereafter set forth and enjoined, to wit, the expenses

and fees of accounting which I the said surrogate have taxed to the sum of nineteen dollars the expense of publishing in the State paper included and to the said Ashial Cole the sum of twenty three dollars, and honestly and faithfully discharging the annual intent of dower as pr will, I the Surrogate aforesaid do adjudge and declare the estate of the said Elisha Mott deceased to be duly and legally vested in the said Nathan Mott the executor as aforesaid.

And I the said Surrogate do finally order and decree in the premises that the foregoing statements be confirmed and further that the accounts of the said Executors be finally settled as above set forth.

In testimony whereof I the ~~said~~ surrogate aforesaid have hereunto affixed my seal of office at Carmel in the County of Putnam the 27 day of Dec 1845.

A B. Crane Surrogate

Surrogate Seal

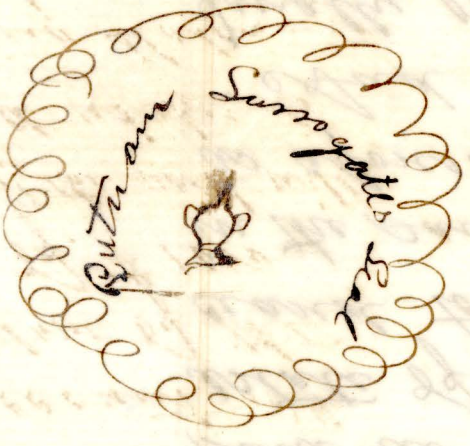
[12512458]

(97)

State of New York }
Putnam County } ss: I Ambrose Ryder Surro=
gate of the said county do hereby
certify that the within is a true
and correct copy of the decree
made by the Surrogate of the said
County in the matter of the
final accounting of the executors
of the estate of Elisha Merritt
late of said county deceased
as the same appears upon the
records in my office

In testimony whereof I
have hereunto set my hand
and affixed the seal
of the Surrogates office
of said county of Putnam
this twentieth day of November
in the year one thousand
eight hundred and fifty four

Ambrose Ryder



(98)

State of New York }
Putnam County } ss I Ambrose Ryder
Presiding judge of the County Court
of said County do hereby certify
that the above certificate of attestation
is in due form of law, and is made
by the proper Officer

Ambrose Ryder
County Judge
of Putnam County.

State of New York }
Putnam County } ss I Isa Mead Clerk
of the County court of said County
do certify that Ambrose Ryder whose
name is attached to the above cer=
tificate was on the day of the date
of such certificate Judge of the
County Court of said county
duly commissioned and qual=
ified, and full faith and credit
are due to all his official acts
as such

In testimony whereof I have
hereunto set my hand and the
seal of said Court this Eleventh
day of May A.D. 1855

Seal

[125 Cents]

(99) Daniel Merritt testified that he sold his share in his fathers estate to Graham Merritt for less than One Thousand dollars and have defendant rested his cause,

Plaintiff then proved that the widow of Elisha Merritt deceased was eighty years of age in the fall of 1855; and that she was still alive,

Plaintiff then read in evidence the Deposition of Joseph Merritt, taken March 1856 in which he testified, that he was 52 years of age, a farmer, and a resident of Bureau County Illinois; that he was a brother of the plaintiff and defendant, that his fathers estate consisted chiefly of notes and obligations, and some money. that the best knowledge he had of the value of the estate was that the evening before the settlement with the surrogate of Putnam County New York, witness was at the house of defendant, and saw the interest cast on the notes and obligations and the full amount added up, amounting to a little over Eleven Thousand dollars, probably two or three hundred dollars, over, that Graham Merritt offered the witness two hundred dollars not to appear against him, at the Settlement of the estate before the surrogate

Plaintiff offered to read in evidence the following questions and answers thereto from said depositions to wit;

Have you been intimate with Daniel Merritt

[12542-57]

(100) — the last twenty years?
I have.
Have you within a few years past observed any failure of the faculties of his mind?
I think I have. I think I have discovered a failure very plain
In what does it consist
Principally in his memory. He tells things now that he would not have told, if his memory was as good as years before. I could not rely on his statements of things past on account of his memory being impaired. I think it very treacherous. I think his memory has been impaired on account of ill health. He has been sick a good deal. This is also the opinion of his relatives and friends. So far as I know

The defendant objected to the foregoing questions & answers respectively upon the ground that it was incompetent and the court sustained said objection to each part of said evidence so offered and objected to. — and excluded the same to which decisions of the court in sustaining said objections and excluding said evidence the plaintiff excepted.

It was proved by plaintiff that Stephen Merritt the defendant acted as executor of his fathers estate.

Joseph Merritt being called to the stand as a witness testified that Stephen Merritt the plaintiff had lived in this State since 1836, and that he had always been a man of such property that a thousand dollars

could have been collected of him by execution

Joseph Merritt on answer to a question by defendant, said that he sold his share of his fathers estate to Strahan the defendant for $850, — but that he never could find out what was the value or extent of the estate — that he never did believe that the eleven thousand & odd dollars counted up in his presence at Strahans house as spoken of in his deposition — was really the whole of the estate — that Strahan never did, and never would make an inventory.

Here Plaintiff closed his testimony Defendant then called again Daniel Merritt who testified (plaintiff objecting) that on May 1844, at Peru, at the arbitration between witness & plaintiff — before Burton Ayers — Durell Salmon and one other arbitrator named Headley — Stephen Merritt, (speaking about the note given in evidence by the defendant in this cause) said he had this note to pay or the same as pay. that he turned at in the settlement of his share of his fathers estate with Strahan, and that he was then liable on that note for about $150. To the admission of the above testimony of Daniel Merritt and each part of it plaintiff objected when the same was offered — the court overruled the plaintiffs objections & the plaintiff excepted

Daniel Merritt further testified by permission of the court — the plaintiff objecting, that in July A.D 1841. his father Elisha Merritt said to the witness, that he (Elisha Merritt)

[12562-58]

(102) thought that the share of each of the boys - that would be coming to them from his estate would be about $900, 00 To this evidence of the declarations of the Father, plaintiff objected, when it was offered. The Court over ruled the objection and plaintiff excepted,

Defendant here called Benton Cook ~~one of his attorneys~~, as a witness, who testified (plaintiff objecting to the competency of the evidence) that he was employed by Statham Merritt in the suit spoken of by Mr Rendall - that he had seen the note offered in evidence by defendant in this case, in the hands of Statham Merritt - before the assignment note upon it was written upon it, and that witness did not attend the Marshall Court at that term, on account of sickness - To so much of Cooks testimony as related to the bringing of suit in Marshall County and to his connection therewith, and to so much as related to whether he attended the court or not plaintiff objected, when the same was offered. The court overruled the objection, and the pltff. excepted.

Here defendant again rested his case. This was all the evidence in the case, after the evidence was closed the plaintiff asked the Court among other things to instruct the Jury as follows,

"1" If the jury believe from the evidence that the plaintiff and defendants and the witness Daniel Merritt are brothers of each other, and are sons of Elisha Merritt dec'd and

(103) and that in 1836 Stephen Merritt the plaintiff gave to Daniel Merritt the witness the note or bond produced on this trial by the defendant Nathan — and that afterwards and in the lifetime of said Elisha Merritt the father, said Daniel Merritt to whom said note is payable on its face sold and transferred said note or bond to said Elisha Merritt so that he (said Elisha) became the legal holder and owner thereof — and that afterwards in the summer of 1841 the said Elisha Merritt (still being the owner and holder of said note) died, leaving as his last will and testament, the will read in evidence in this case — that in such case by operation of law and the will aforesaid the share of Stephen Merritt in his fathers estate constituted in the excess (if any) of the amounts of the residuary part of said estate including the note of said defendants over all legacies and claims which Elisha Merritt at his death held against said Stephen — and if afterwards on or about the 11th day of October 1841 said Nathan Merritt being then executor of said will, and as such holding said note, bought of said Stephen Merritt his said share in his fathers estate, and took from him the quit claim thereof read in evidence by the defendants and gave him therefor the promissory note sued on in this suit by the plaintiff, and if there is no proof of any other terms or conditions of said sale than those that appear on the face of those two papers — in such case, such purchase was in law a settlement of said note so held by said Executor, and in such case is not a proper matter of set off in favor of defendant in this case

Rejected

[12512-59]

The Court at the request of defendant (as a qualification to said instruction so given for plaintiff) instructed the jury as follows

"as a qualification to the 10th instruction asked by plaintiff, defendant asks the following —

"If however the terms and conditions of said sale and the other proof in the case shows that at the time of the giving of the note sued on it was the understanding of the parties that the note sued in evidence by defendant was a distinct claim and that both notes were to be in force, to be set off one against the other, or otherwise paid — in such case the note offered by defendant is a proper set off — if plaintiff has agreed to pay it within 16 years and if it has not been paid or discharged".

Given

"If Elisha Merritt died the legal holder and owner of the note which the defendant has offered in evidence, that note with the other portions of his estate not bequeathed to others passed by the will to the heirs named in the will. Stephens interest was one seventh part of this note and one seventh of the other portions of the estate not bequeathed to others, and if he transferred all his interest in said estate while this note was unpaid and belonged to said estate (and said estate had not been divided) it carried as well his interest in this note as in the other portions of the estate".

Given

To the giving of which qualification to said instruction plaintiff objected and excepted to

the decision of the Court in giving the same when it was done.

Plaintiff asked the Court to instruct the jury as follows

"1st If Elisha Merritt was the owner and holder of the note offered by defendant - and held the same as such owner at the time of his death then upon his death the legal title and right to sue became vested in his Executors as such - and the same could only be sued on in the name of the Executors of said Elisha Merritt or in the name of some one to whom said Executors transfered the same - and in that state of case it could not be set up as a defence to a suit brought against the Executors in his individual capacity"

Refused

"2d The defendant in this case having set up a title by endorsement to the note pleaded as a set off in this suit cannot sustain that plea by proving title by sale and delivery under the laws of the State of New York."

Refused

"3d If the jury believe from the evidence that the note mentioned in defendants third plea as signed by Stephen Merritt was not assigned and endorsed by Daniel Merritt the payee therein named, until the year 1833, and that the note was made in the year 1836, then in law Daniel Merritt held the legal title to said note at the time of the arbitration mentioned in the pleadings - and if the Daniel Merritt was in contemplation of law the owner and holder said note at the time of said Submission and award, and said note was satisfied by said award."

Refused

(13563-60)

(106) to each of which instructions so asked by plaintiff defendant by his counsel objected, and the Court refused to give each of said instructions respectively, to each of which decisions of the Court, the plaintiff excepted when the same were made.

The Court at the request of defendant gave the following instructions to the jury viz:

"2° If upon the arbitration between Stephen Merritt and Daniel Merritt, the note offered in evidence by defendant had been sold and delivered by Daniel Merritt to his father for a valuable consideration and with the knowledge of Stephen, and the father held the note at the time of the arbitration, then Stephens liability to pay said note was not affected by said arbitration even though Daniels name had not been placed on the back of said note at the time of arbitration."

Given

"4° That if the pleadings in this cause the execution of the note mentioned in defendants 3d plea is admitted and the assignment of it by Daniel Merritt to the defendant is admitted and that the note was given for a valid consideration is admitted".

Given

"5° The defendant requests the Court to instruct the jury, that if Daniel Merritt upon the arbitration sold and delivered the note in defendants 3d plea mentioned to Elisha Merritt & if Elisha Merritt died the owner of said note, and if Nathan Merritt being one of the Executors of the estate of Elisha Merritt paid up all the debts due of the deceased, and brought out

(107) all the interests of the widow and all the heirs of the said Elisha Merritt, he thereby became the owner of said note, and being the owner of Daniel Merritt not being the owner and holder at the time of the arbitration, endorsed it after the arbitration, and if Stephen Merritt within the last sixteen years agreed to pay the note, and if it has not been paid or otherwise satisfied the jury should after deducting the amount of the note in the declaration mentioned and such payments as have been made on the note in the defendants 2d plea mentioned find a verdict for the defendants for the balance — Interest should be computed on the note in the 3d plea mentioned at the rate of seven per cent & on the note in the declaration mentioned at the rate of six per cent per annum".

Given

"6th — If the jury believe from the evidence that the note given by Stephen Merritt to Daniel Merritt was sold and delivered by Daniel Merritt to his father Elisha Merritt, before the arbitration between Daniel Merritt & Stephen Merritt, and if Daniel was not the holder and owner of the note at the time of the arbitration, and if they further believe from the evidence that while Daniel owned the note and within sixteen years last past the said Stephen Merritt agreed that he would pay it, and desired the said Daniel Merritt to turn it over to his father to pay a debt which said Daniel Merritt owed his father & that he would pay it to the father & the note has not been paid or satisfied in any way, the jury should allow the amount of the note and interest, or such amount as may be due after deducting payments if any, and after deducting payments if any & the amount of the

Given

[12 Feb 1851]

note from Nathan to Stephen they should find a verdict for the defendant for the balance due if any Interest should be computed on the note given by Stephen to Daniel at the rate of seven per cent per annum, and on the note given from Nathan to Stephen at the rate of six per cent per annum, provided the jury believe that the defendant at the Commencement of this suit was the owner of said note"

7th. If at the time of the arbitration between Stephen Merritt & Daniel Merritt the note from Stephen to Daniel had been paid and delivered by Daniel to his father & Daniel was not then the holder, the note was not affected by the arbitration. And if Stephen has within sixteen years last past agreed with Daniel that he would pay it, and it has not been paid or satisfied in any way, then Nathan should be allowed the amount of the note in this suit, although Daniel may not have put his name on the back of the note till after the arbitration. Provided the jury believe from the evidence that Nathan was at the Commencement of this suit the owner thereof."

Given

"8th The assignment "prima facie" vests the title of the note in Nathan Merritt & unless it is proven that the note was not the property of Nathan he is to be considered as the owner of it."

Given

"9th. If at the time Daniel Merritt put his name on the back of the note Nathan Merritt had bought out all the persons to whom Elisha Merritt had willed his property & the estate had been settled, and if the note in the 3 plea mentioned belonged to Elisha

Given

(109) when he died, then Nathan Merritt was the owner of the note when the suit was brought, unless it had been paid to Daniel or Elisha, or paid or cancelled in a settlement between Nathan & Stephen.

"10th The jury in determining whether the note on which this suit is brought is a valid and subsisting debt, should take into consideration the length of time which it has run, and the circumstances of the parties and their usual mode of doing business, the payment or settlement of that note may be inferred from circumstances Omitted with the lapse of time since the note was given, if the circumstances from one coupled with such lapse of time lead the minds of the jury to the conclusion that said note has been paid or settled either by the understanding of the parties being at issue and the note held by defendant, or in any other way."

Given

"11th The question whether at the time the note was given by Nathan to Stephen on which this suit is brought, the note which had been given by Stephen to Daniel was settled, is a question of fact for the jury to determine, and in determining that question the jury will consider all the circumstances connected with the transaction which are proved, all that the evidence shows in relation to the cause of dealing between the parties, the amount of the interest which Stephen had in the estate of his father, and the statements which Stephen has made concerning the transaction, and the burden of proof to show that the note offered in evidence by defendant has been settled is upon the plaintiffs, and the jury ought not to presume that said note has been settled, unless it has been proved"

Given

[12512-63]

(110) "12th = The only questions which the jury are to determine in relation to the note spoken in evidence by defendant are

1st has the plaintiff promised to pay said note within sixteen years?

2d = has that note ever been paid?

3d = was David the holder & owner of that note at the time of the arbitration between him and Stephen?

4th = was that note ever settled between Nathan & Stephen Merritt or was there ever a statement or account between them in which Nathan was found to be indebted to Stephen ever and above the amount of this note?

And if the jury believe that it is found that Stephen has promised to pay this note within sixteen years

And if it is not found in this cause that David Merritt was the holder and owner of this note at the time of the arbitration between him and Stephen

And if it is not proven that said note has been paid — And if it is not proven that this note was ever settled between Nathan & Stephen Merritt and if it is not proven that there has been a statement or accounting between Nathan & Stephen in which that note was settled or in which it was found that Nathan was indebted to Stephen ever & above the amount of this note. And if it is proven that the defendant was the owner of this note at the time of the commencement of this suit

Then the jury should allow to the defendant the amount unpaid upon said note & interest at the rate of seven per cent per annum"

(111)

Evans

"14th = The plaintiff is not permitted to deny on this trial that the note offered in evidence by defendants has been duly assigned to him so as to vest the absolute property of the note in him".

In the giving of each of said instructions as asked by defendants and given by the Court the plaintiff objected when the same were offered - and excepted to the decisions of the Court in giving each of them respectively -

After verdict the defendants moved the Court for a new trial. which motion the Court overruled and plaintiff excepted to the said decision of the Court in overruling his motion for a new trial - And thereupon plaintiff prayed that this his Bill of Exceptions should be then and there signed sealed and made a part of the record which is done

M. E. Collester Seal

$12562-63

(112) On the 6th day of July AD 1856 the plaintiff filed his appeal bond in the words and figures following that is to say:

"Know all men by these presents that we Stephen Merritt as principal and Nehemiah Merritt as surety are held and firmly Bound unto Nathan Merritt in the penal sum Three hundred dollars. good and lawful money of the United States. to the payment of which sum well and truly to be made we do bind ourselves our heirs executors and administrators. jointly and severally firmly by These presents. Witness our hands and seals this fifth day of July A. D. 1856.

The condition of the above Obligation is such that whereas the said Nathan Merritt did at the may term of the Circuit court in and for the County of LaSalle and State of Illinois in the year of our Lord 1856. by the consideration and judgement of said court. recover against the above bounden Stephen Merritt a judgment for the sums of One hundred and Seventy nine dollars and forty Nine cents besides costs of suit from which Judgement the said Stephen Merritt prayed an appeal to the Supreme Court of said State. Now therefore if the said Stephen Merritt shall duly prosecute his said appeal and shall pay said Judgement. costs. interest and damages in case said Judgement shall be affirmed then the above Obligation to be void. Otherwise to be and remain of force

Stephen Merritt Seal

Nehemiah Merritt Seal

[12562-LH]

(113) State of Illinois } I, John F. Stark Clerk of the Circuit
La Salle County } ss Court in and for said County and
State do hereby certify that the above and
foregoing Contains a true full perfect and complete
record in the case of Stephen Merritt vs Nathan Merritt
as the same appears of record & among the files of
said papers in my office.

In Testimony Whereof I have hereunto set my
hand and the Seal of said Court at Ottawa
this 21st day of April AD 1857

J. F. Starkweather

CIRCUIT COURT LA SALLE COUNTY ILL.

State of Illinois - Supreme court

Stephen Merritt appellant
vs
Nathan Merritt appellee
} Appeal from La Salle

And now comes the said appellant by Dickey & Wallace his attorneys and shows to said court that in the record of the proceedings aforesaid there is manifest error, in this -

1st The court below erred in excluding proper testimony offered by appellant -

2nd The court below erred in admitting improper testimony offered by appellee -

3rd The court below erred in refusing to give the instructions asked for by appellant as they were asked

4th The court below erred in qualifying appellants instructions, and giving the qualifications asked by appellee -

5 The court erred in giving each of the instructions given on behalf of appellee -

6 The court below erred in overruling appellants motion for a new trial -

7th The court erred in rendering the judgment aforesaid in manner & form aforesaid -

[13249-LS]

Wherefore for these and other errors apparent on the face of said record, appellant prays that the judgment aforesaid may be reversed & said cause remanded to the court below for a new trial -

Dickey & Wallace
for appellant.

Stephen Stevens

vs Ex 3

Nathan Stevens

Recd

Filed May 17, 1858

L. Leland

Clk

Fees $
Paid by Plff

Supreme Court---State of Illinois.

Third Division, April Term, A. D. 1858.

STEPHEN MERRITT, }
vs. } *Appeal from LaSalle.*
NATHAN MERRITT, }

ABSTRACT OF RECORD.

This was an action of debt on a promissory note, originally commenced by appellant against appellee in the Circuit Court of LaSalle county, by attachment, at the November term, A. D. 1854.

12. The declaration contains three counts. The first count sets out that heretofore, to wit, on the 11th day of October, 1841, at, &c., by his certain promissory note of that date, the defendant then and there, for value received, promised the plaintiff to pay him on the 3rd day of November, 1842, nine hundred dollars; yet, though often requested, &c.

12 & 13 The second count varies from the first only in stating the consideration for said note to be the plaintiff's quitclaim deed to his father's estate.

13 The third count sets out a copy of the note sued on in haec verba:

"$900. For valued received I promise to pay Stephen Merritt on the "third day of November, one thousand eight hundred and forty-two, nine "hundred dollars, without defalcation, being in consideration of Stephen "Merritt's quit-claim to his father's estate.

"Peru, October 11th, 1841.

"NATHAN MERRITT."

To which defendant pleads,

16 1st, Payment;

2nd, Statute of limitations, (five years);

16, 17 3rd, Defendant offers as a set off, a note under the hand and seal of the plaintiff, dated August 1st, 1836, payable to Daniel Merritt or bearer, for $967, with interest at 7 per cent. per annum, which note defendant avers, was then and there endorsed by said Daniel Merritt to him. He therefore offers to set off so much of said note as will satisfy plaintiff's claim, and claims judgment for the balance. (This is the substance of defendant's third plea, as it was afterwards amended.)

17, 18. 4th. The defendant's fourth plea is like his third, with the additional averment of a promise by the plaintiff to said Daniel to pay said note within sixteen years next before the commencement of this suit; and that said note was endorsed as aforesaid after said subsequent promise.

[1858-46]

5th. The general issue.

6th. Defendant afterwards withdrew his sixth plea.

Plaintiff, for replication, traverses defendant's first plea, joins issue on his fifth plea, and demurs to his second, third, fourth and sixth pleas, which demurrer was sustained except as to the sixth plea, which defendant then withdrew.

Defendant then took leave to amend his third plea, and abides by the demurrer as to the other pleas. The third plea, as amended, is set out above.

By leave of the Court, plaintiff filed several replications to defendant's third plea, in substance as follows:

1st. That said note claimed as set off is barred by the statute of limitations.

2d. That said note, while owned by said Daniel, and before it was assigned, was, among other matters of difference and indebtedness between the plaintiff and said Daniel, submitted by two mutual bonds of arbitration, under the hands and seals respectively of the said Daniel and the plaintiff, dated April 16th, 1844, to the arbitration of Dixwell Lathrop, Burton Ayres and Henry Headley. That in accordance with the terms of said submission, said arbitrators did, on the 17th day of April, 1844, make an award between the said partics, by which said note, as well as all other matters of obligation between said parties, was canceled. And further, that said note was not endorsed until long after it fell due.

3rd. Payment of said note to Daniel Merritt, July 1st, 1839, and that it was not assigned until after it fell due.

4th. That said Daniel transferred said note, after it fell due, to one Elisha Merritt, to whom the plaintiff fully paid said note while he, said Elisha, was the owner thereof.

5th. That after said note fell due, said Daniel transferred said note to Elisha Merritt, father of the plaintiff and defendant; that said Elisha died possessed of said note in August, 1841; that in September, 1841, defendant was duly appointed and qualified as executor of the estate of said Elisha; that in October, 1841, an account was had and stated between the plaintiff, in his individual capacity, as also as said executor; that at that accounting there was found to be due from the defendant to the plaintiff, over and above the note here pleaded as a set off, the sum of $900; for which balance the defendant then and there executed and delivered to the plaintiff the note on which this suit is brought.

6th. Payment of said note claimed as set off by plaintiff to defendant, October 11th, 1841.

6th. To the plaintiff's first replication defendant rejoins: that the plaintiff agreed with said Daniel to pay said note within sixteen years before the commencement of this suit.

See Record

Defendant traverses plaintiff's second, third, fourth, fifth and sixth several replications, and plaintiff joins issue thereon.

[12562-67]

Plaintiff traverses, by his surrejoinder, the defendant's rejoinder to the
47 plaintiff's first replication to the defendant's third plea, and defendant joins issue thereon.

69, 71. On the above issues this cause was tried at the May term of said court, 1856, and a verdict rendered in favor of the defendant of $179.49. Plaintiff moved for a new trial, which motion was overruled by the Court, and judgment entered for the above amount and costs.

72. A bill of exceptions was ordered to be filed within ten days after the
73 adjournment of said court, which time was afterwards extended to the 25th of June by agreement.

72. An appeal was granted to the Supreme Court on the filing of a sufficient
112. bond, which was done, and approved by the court.

BILL OF EXCEPTIONS.

74. Plaintiff read in evidence the note, a copy of which is set out in his declaration, and there rested his case.

Defendant then read in evidence a note signed and sealed by the plaintiff, dated August 1st, 1836, payable on its face to Daniel Merritt or bearer, for $967, with interest at seven per cent. per annum, on the back of which was a credit of $233.83, dated Sep't 1st, 1837, and also an assignment in these words: "Pay Nathan Merritt or order, without recourse. Daniel Merritt." The reading of said note was objected to by the plaintiff; objection overruled, and plaintiff excepted.

75. Defendant then called Daniel Merritt, who, on a preliminary examination, swore that he was the payee mentioned in said note pleaded as set off; that the written assignment thereon was made by him in October, 1853.

Defendant then offered to prove by said witness a promise by the plaintiff to pay said note, which would take it out of the statute of limitations. Plaintiff then and there objected that the interest of said witness disqualified him for that purpose; which objection the Court overruled, and plaintiff excepted to the ruling.

Said witness was then permitted to testify that in May, 1841, being the holder of said note, and wishing to liquidate an indebtedness to his father, Elisha Merritt, he applied to the plaintiff to know when he could pay said note; that plaintiff then requested witness to get their father to accept said note as part payment of witness' indebtedness to the father; and that plaintiff then said that he would pay said note whenever his
76 father should demand. To the admission of all which testimony the plaintiff objected; the Court overruled the objection, and the plaintiff then and there excepted to the ruling.

On cross-examination said witness testified that in July, 1841, he sold and delivered said note to Elisha Merritt, his father, who then lived in Putnam county, New York; that said Elisha died in said county in August, 1841; that the credit was made and endorsed on said note before the delivery of it to his father; that witness next saw said note in the fall of 1841 in the hands of defendant, then an executor of his father's estate;

that plaintiff, witness and defendant are sons of said Elisha Merritt, deceased.

On re-examination by defendant, said witness stated that at the time of the arbitration between himself and the plaintiff in 1844, he was not the holder of, had no interest in, nor had since had any interest in, said note. To the admission of which testimony plaintiff then and there objected; the court overruled his objection, and plaintiff then and there excepted to said ruling.

77 Said witness further testified that Nathan Merritt was, in 1841, a man of wealth and property, and abundantly able to pay the amount of plaintiff's note; and, though he lived in New York, he had been in this state some three or four times since 1841. Could not say that Stephen Merritt knew of Nathan's being in this state, but that he was in the same neighborhood.

On cross-examination, plaintiff offered to prove that from 1843 to 1850, said witness, Daniel, had been engaged in an expensive and strenuously contested litigation with the plaintiff. Defendant objected to such testimony as irrelevant; the Court sustained the objection, and the defendant then and there excepted to the ruling.

Defendant then called Miles Kendall, an attorney at law, who was permitted by the Court to testify that in 1853 or 1854, at the instance of Nathan Merritt, he commenced a suit in the circuit court of Marshall
78 county, Illinois, on the note here pleaded as a set off; that Mr. Cook was also employed in the case; that he drew the declaration and wrote to Mr. Cook to attend the case. The plaintiff objected to this testimony; the Court overruled the objection, and the plaintiff then and there excepted to the ruling.

Defendant then called Henry G. Cotton, who testified that he had been a practising lawyer in the state of New York, and was skilled and learned in the laws of that state in 1841; that at that time in that state a note payable to bearer, or to payee or bearer, was transferable by sale and delivery without an assignment in writing; and that such transferee had a right to sue upon such note in his own name. To all of which testimony plaintiff objected at the time it was offered; the Court overruled his objection, and plaintiff excepted to the ruling.

79 Defendant then read in evidence a certified copy of the last will and testament of Elisha Merritt, deceased, in which said testator, after making
80 several special bequests, provides that the residue of his estate shall be
81 equally divided between his seven sons — Hackeliah, Elijah, Nehemiah, Daniel, Joseph, John and Stephen; that if, at the time of his death, he should hold obligations against any of said seven sons which would amount to his dowry, he directs that his executors *shall not collect such obligations*, but shall give them up and take such son's receipt for his dowry; that if such obligation or obligations should exceed the amount of such son's dowry, then he directs that his executors shall only collect *so much of such excess as may be necessary to pay the legatees.*

He then appoints Nathan Merritt and Ashael Cole executors of said will.

82 Attached to said copy of the will of Elisha Merritt, was a certificate under the seal of the surrogate court of Putnam county, New York, and signed Ambrose Ryder, Surrogate, stating that the above was a true copy of said will, as it appeared of record in his office.

83 Attached to said will were letters testamentary, officially declaring, under the seal of said Surrogate, that the will had been duly proved and approved, and that the administration of said estate was granted to said Nathan Merritt and Ashael Cole.

Defendant then read in evidence a deed from plaintiff to himself, dated October 11th, 1841, by which said plaintiff released and quitclaimed to 84 defendant all his interest and claims of every kind or nature, present or prospective, in the estate of his father, Elisha Merritt, deceased, and by which deed he appointed the defendant his attorney in fact, to do all things which might be necessary to the full enjoyment of such interest.

Defendant also read in evidence similar deeds to himself from each of 85 the other residuary legatees, dated about the same time as the one from the plaintiff. To the reading of each of said deeds the plaintiff, at the time, objected as incompetent and irrelevant; the Court overruled the objections, and the plaintiff then and there excepted to the ruling.

Defendant then offered to read in evidence a certified copy of proceedings had before the Surrogate of Putnam county, New York; to the reading of which the plaintiff objected, insisting that the same were not properly authenticated, and that the substance of the same was incompetent and irrelevant; which objection was overruled by the Court, and the plaintiff then and there excepted to the ruling.

Said transcript was then read, and was, in substance, as follows:

86, 87. That on the 19th of October, 1845, at a surrogate court of the aforesaid county, at the request of Nathan Merritt and Ashael Cole, executors of Elisha Merritt, deceased, a citation was issued, directed to all persons interested, to appear before the said Surrogate at his office in the town of Carmel, in said county, on the 25th day of December next, at 10 o'clock A. M., to attend a final settlement of their accounts. And it was further ordered by said court, that a copy of said citation be published for three months before said return day in the state paper.

87 That on the 25th day of December, 1845, said citation was returned, and with it was filed an affidavit of personal service on the widow of said testator, Desire Merritt; an affidavit of publication in the state paper for three months; an admission of service on Enos Ballard and Martha Bal-88 lard his wife, (special legatees.) At the request of the parties in interest, the cause was then adjourned to the 27th inst., at the hotel of Lewis Luddington; at which time and place Nathan Merritt, Ashael Cole, John Merritt and Joseph Merritt entered their appearance in person or by attorney.

89 The said Ashael Cole then presented a schedule purporting to be an exhibit of the amount of said estate, and reported that said schedule had

been made by himself and Nathan Merritt at an examination of the estate shortly after the death of said Elisha Merritt; that said Nathan at that time took possession of the effects of said estate, and that no part of said estate had since come into said Cole's possession; that he and Nathan proceeded to prove said will, and took out letters testamentary. This report was admitted to be true by Nathan Merritt. Said Cole then requested to be discharged, with his reasonable charges, from acting further as an executor of said estate.

91 Nathan Merrit, the other executor, then reported that he had the exclusive possession and control of said estate, and that said Ashael Cole 92 was in no way responsible for any part of said estate; that he was the assignee and owner of all the property and effects of said estate, both real and personal, and of the interests of all the claimants under said 93 will; that the whole of said will has been settled as above stated, and in pursuance of the provisions of the will of said testator; that all the debts, funeral expenses and pecuniary legacies have been paid by him; that he provides for and takes care of the widow of said testator.

95 Said Nathan then produced releases from each of the legatees under said will except said widow, to whom he acknowledged that he was obliged to account for the interest on $1000; which report said Ashael Cole admitted to be true.

96 Thereupon said surrogate confirmed said reports of said executors; declared that said estate was duly and legally vested in the said Nathan; and did finally order and decree that the accounts of the said executors be settled in accordance with said reports.

Signed: A. B. Crane, Surrogate, and sealed with the seal of said court.

97 Attached to said transcript, and under the seal of said court, signed Ambrose Ryder, Surrogate, was a certificate that the same was a true copy of such proceedings, as they then appeared of record in his office. Also 98 a certificate of Ambrose Ryder, as County Judge of Putnam county, that the above certificate was in due form and according to law. Also a certificate under the seal of said county court, and signed Ira Mead, Clerk, that Ambrose Ryder was Judge of said court at the date of the above certificate.

99 Daniel Merritt testified that he sold his share in his father's estate to Nathan Merritt for less than $1000. Here defendant rested his case.

Plaintiff then proved that in the fall of 1855 the widow of Elisha Merritt was still alive, and was 85 years of age.

100 Plaintiff then read in evidence the deposition of Joseph Merritt, in which he testified that he was 52 years of age; a farmer of Bureau county, Illinois: a brother of the parties to this suit; that his father's estate consisted chiefly of notes, bonds, and some money; that on the evening before the settlement with the executors, he was at Nathan's house, and saw the interest computed on the notes and obligations, and the whole amount added up, amounting to a little over $11,000; that Nathan offered witness $200 not to appear against him before the surrogate.

Plaintiff then offered to read in evidence from said deposition, testimony tending to impeach the memory and reliability of defendant's witness, Daniel Merritt, which the Court would not permit, and plaintiff then and there excepted to the ruling of the Court.

Plaintiff proved that Nathan Merritt did act as executor of his father's estate.

Joseph Merritt, as a witness, testified that the plaintiff had lived in Illinois since 1836; that he had always been a man of such property that $1000 could have been collected of him by execution; that witness sold
101 Nathan his interest in the estate for $850; that he never could find out the value of said estate; that he never did believe that the $11,000, or thereabouts, spoken of in his deposition, was really the whole of said estate; that Nathan never did nor would make an inventory.

Defendant then recalled Daniel Merritt, who testified that at the arbitration between himself and plaintiff in 1844, plaintiff admitted that he had turned the note here pleaded as a set off, in the settlement of his father's estate, and that he was still liable on it for about $150; that his father
102 told him in July, 1841, that he thought the amount which would be coming to each of the boys to be about $900. To all of which testimony the plaintiff objected at the time it was offered, the court overruled the objection, and plaintiff excepted.

Defendant then called Burton C. Cook, who testified that he was employed by Nathan Merritt in the suit spoken of by Mr. Kendall; that he had seen the note offered in evidence by the defendant in this case in the hands of Nathan Merritt, before the assignment now upon it was written; that he did not attend the Marshall court at that term on account of sickness. To so much of Cook's testimony as related to the suit in Marshall county, and his not attending said court, the plaintiff objected; the court overruled the objection, and plaintiff excepted.

This was all the evidence in the case.

After the evidence was closed, the plaintiff asked the Court, among other things, to instruct the jury as follows:

"10. If the jury believe from the evidence that the plaintiff and defendant and the witness, Daniel Merritt, are brothers of each other, and
103 were sons of Elisha Merritt, now deceased, and that in 1836 Stephen Merritt, the plaintiff, gave to Daniel Merritt, the witness, the note or bond produced on this trial by the defendant, Nathan; and that afterwards, and in the life time of said Elisha Merritt, the father, said Daniel Merritt, to whom said note is payable on its face, sold and transferred said note or bond to said Elisha Merritt, so that he (said Elisha) became the legal holder and owner thereof; and that afterwards, in the summer of 1841, the said Elisha Merritt (still being the owner and holder of said note) died, leaving as his last will and testament the *will* read in evidence in this case; then, in such case, by operation of law and the will aforesaid, the share of Stephen Merritt in his father's estate consisted in the excess (if any) of the one-seventh of the residuary part of said estate, including the note

offered by defendant, over all obligations and claims which Elisha Merritt, at his death held against said Stephen.

"And if afterwards, on or about the 11th day of October, 1841, said Nathan Merritt, being then executor of said will, and, as such, holding said note, bought of said Stephen Merritt his said share in his father's estate, and took from him the quitclaim thereof read in evidence by the defendant, and gave him therefor the promissory note sued on in this suit by the plaintiff: and if there is no proof of any other terms or conditions of said sale than those that appear on the face of those two papers: in such case such purchase was in ~~lieu of~~ a settlement of said note so held by said executor, and in such case is not a proper matter of set off in favor of defendant in this case."

104 The Court, at the request of defendant, gave the following qualifications to the foregoing tenth instruction:

"If, however, the terms and conditions of said sale and the other proof in the case show that at the time of the giving of the note sued on, it was the understanding of the parties that the note read in evidence by defendant was a subsisting claim, and that both notes were to be in force to be set off, one against the other, or otherwise paid: in such case the note offered by defendant is a proper set off, if plaintiff has agreed to pay it within sixteen years, and if it has not been paid or discharged.

"If Elisha Merritt died the legal holder or owner of the note which defendant has offered in evidence, that note, with the other portions of his estate not bequeathed to others, passed, by the will, to the seven sons named in the will. Stephen's interest was one-seventh part of this note, and one-seventh of the other portions of the estate not bequeathed to others; and if he transferred all his interest in said estate while this note was unpaid and belonged to said estate, (and said estate had not been divided,) it carried as well his interest in this note as in the other portions of the estate."

To the giving of which qualifications to said instruction plaintiff objected, and excepted to the decision of the Court in giving the same, when it was done.

105 Plaintiff asked the Court to instruct the jury as follows:

"11th. If Elisha Merritt was the owner and holder of the note offered by defendant, and held the same, as such owner, at the time of his death, then upon his death the legal title and right to sue became vested in his executors as such; and the same could only be sued on in the name of the executors of Elisha Merritt, or in the name of some one to whom said executors transferred the same; and in that state of case it could not be set up as a defence to a suit brought against one of the executors in his individual capacity.

"12th. The defendant in this case having set up a title by endorsement to the note pleaded as a set off in this suit, cannot sustain that plea by proving title by sale and delivery under the laws of the state of New York.

"13th. If the jury believe from the evidence that the note mentioned

in defendant's third plea as signed by Stephen Merritt, was not assigned and endorsed by Daniel Merritt, the payee therein named, until 1853, and that the note was made in 1836: then in law Daniel Merritt held the legal title to said note at the time of the arbitration mentioned in the pleadings; and if so, Daniel Merritt was, in contemplation of law, the owner and holder of said note, at the time of said submission and award, and said note was satisfied by said award."

106 Each of which instructions the court refused to give to the jury, and plaintiff excepted.

The Court, at the request of defendant, gave the following instructions to the jury, viz:

"2nd. If before the arbitration between Stephen Merritt and Daniel Merritt, the note offered in evidence by defendant had been sold and delivered by Daniel Merritt to his father for a valuable consideration, and with the knowledge of Stephen, and the father held the note at the time of the arbitration, then Stephen's liability to pay said note was not affected by said arbitration, even though Daniel's name had not been placed on the back of said note at the time of arbitration.

"4th. That by the pleadings in this cause the execution of the note mentioned in defendant's third plea is admitted, and also the assignment of it by Daniel Merrit to the defendant is admitted, and that the note was given for a valid consideration is admitted.

"5th. That if Daniel Merritt, before the arbitration, sold and delivered the note in defendant's third plea mentioned to Elisha Merritt: and if Elisha Merritt died the owner of said note: and if Nathan Merritt, being one of the executors of the estate of Elisha Merritt, paid up all the debts due by the deceased, and bought out all the interests of the widow and
107 all the heirs of the said Elisha Merritt, *he* thereby became the owner of said note; and being so the owner, if Daniel Merritt, *not* being the owner and holder at the time of the arbitration: and if Stephen Merritt, within the last sixteen years, agreed to pay the note: and if it has not been paid or otherwise satisfied: the jury should, after deducting the amount of the note in the declaration mentioned, and such payments as have been made on the note in defendant's third plea mentioned, find a verdict for the defendant for the balance. Interest should be computed on the note in the third plea mentioned at the rate of seven per cent., and on the note in the declaration mentioned at the rate of six per cent per annum.

"6th. That if the jury believe from the evidence that the note given by Stephen Merritt to Daniel Merritt was sold and delivered by Daniel to his father before the arbitration between Daniel and Stephen: and if Daniel was not the owner and holder of the note at the time of the arbitration: and if they further believe from the evidence that while Daniel owned the note, and within sixteen years last past, the said Stephen agreed to pay it, and desired Daniel to turn it out to their father to pay a debt which Daniel owed to his father, and that he would pay it to the father, and the note has not been paid or satisfied in any way, the jury should allow the amount of the note and interest, or such amount as may be due

after deducting payments, if any; and after deducting payments, if any, and the amount of the note from Nathan to Stephen, they should find a
108 verdict for the defendant for the balance due, if any. Interest should be computed on the note given by Stephen to Daniel at the rate of seven per cent. per annum, and on the note given by Nathan to Stephen at the rate of six per cent. per annum: provided, that the jury believe that at the commencement of this suit defendant was the owner of said note.

"7th. If at the time of the arbitration between Stephen and Daniel, the note from Stephen to Daniel had been sold and delivered by Daniel to his father, and Daniel was not then the holder, the note was not affected by the arbitration; and if Stephen has, within sixteen years last past, agreed with Daniel to pay it, and it has not been paid or satisfied in any way, then Nathan should be allowed the amount of the note in this suit, although Daniel may not have put his name on the back of the note until after the arbitration: Provided the jury believe from the evidence that Nathan was, at the commencement of this suit, the owner thereof.

"8th. The assignment, 'prima facie,' vests the title of the note in Nathan Merritt, and unless it is proved that the note was not the property of Nathan, he is to be considered as the owner of it.

"9th. If at the time Daniel Merritt put his name on the back of the note, Nathan Merritt had bought out all the persons to whom Elisha Merritt had willed his property, and the estate had been settled: and if the note in the third plea mentioned belonged to Elisha when he died: then
109. Nathan was the owner of the note when this suit was brought, unless it had been paid to Daniel or Elisha, or paid or canceled in a settlement between Nathan and Stephen.

"10th. The jury in determining whether the note on which this suit is brought is a valid and subsisting debt, should take into consideration the length of time which it has run, and the circumstances of the parties and their usual mode of doing business. The payment or settlement of that note may be inferred from circumstances coupled with the lapse of time since the note was given, if the circumstances proven, coupled with such lapse of time, lead the minds of the jury to the conclusion that said note has been paid or settled, either by the understanding of the parties, being set off against the note held by defendant, or in any other way.

"11th. The question, whether at the time the note was given by Nathan to Stephen on which this suit is brought, the which had been given by Stephen to Daniel, was settled, is a question of fact for the jury to determine; and in determining that question, the jury will consider all the circumstances connected with the transaction which are proved; all that the evidence shows in relation to the course of dealing between the parties; the amount of the interest which Stephen had in the estate of his father, and the statements which Stephen has made concerning the transaction, and the burden of proof to show that the note offered in evidence by defendant has been settled, is upon the plaintiff, and the jury ought not to presume that said note has been settled, unless it has been proven.

(10 Sep 05)

110. "12th. The only questions which the jury are to determine in relation to the note offered in evidence by the defendant, are,

"1st. Has the plaintiff promised to pay said note within sixteen years?

"2nd. Has the note ever been paid?

"3rd. Was Daniel the holder and owner of that note at the time of the arbitration between him and Stephen?

"4th. Was that note ever settled between Nathan and Stephen Merritt? or was there ever a settlement or accounting between them, in which Nathan was found to be indebted to Stephen over and above the amount of this note?

"And if the jury believe that it is proved that Stephen has promised to pay the note within sixteen years: and if it is not proved in this cause that Daniel was the holder and owner of this note at the time of the arbitration between him and Stephen: and if it is not proven that said note has not been paid: and if it is not proven that there has been a settlement or accounting between Nathan and Stephen in which that note was settled, or in which it was proved that Nathan was indebted to Stephen over and above the amount of this note: and if it is proved that the defendant was the owner of this note at the time of the commencement of this suit: *Then* the jury should allow to the defendant the amount unpaid upon said note, and interest at the rate of seven per cent. per annum.

111. "14th. The plaintiff is not permitted to deny on this trial that the note offered in evidence by the defendant, has been duly assigned to him, so as to vest the absolute property of the note in him."

To the giving of each of said instructions, so asked by defendant and given by the Court, the plaintiff objected when the same were offered, and excepted to the decisions of the Court in giving each of them respectively.

After verdict defendant moved the Court for a new trial, which motion the Court overruled, and plaintiff excepted to the said decision of the Court in overruling his motion for new trial. And thereupon plaintiff prayed that his bill of exceptions should be then and there signed, sealed, and made a part of the record, which is done.

DICKEY & WALLACE, *for Appellant.*

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Merritt

as

Merritt

May 18

Abstract

Supreme Court - 3d Division - April Term 1858.

Stephen Merritt
vs.
Nathan Merritt } Appeal from La Salle -

Plff. declares on a note -
Deft. pleads thirdly as a set off a note given by plff. to Daniel Merritt Aug. 1st 1836. & that Daniel Merritt then & there assigned the note to deft. -

Plff. replies
1st Statute of limitations -

Rejoinder, agreement to pay within 16 years. Not agreement to pay Daniel the note in issue

2d - Note owned by Daniel Merritt, & while so owned, an arbitration was had between Daniel & plff. & note included.

Rejoinder that Daniel not owner & holder ~~of~~ the note at time of arbitration - Issue.

3d - Payment to Daniel Merritt & that it was assigned after maturity.

Rejoinder traversing payment to Daniel - issue.

4th Payment to Elisha Merritt to whom Daniel had transfered the note.

Rejoinder traverses payment to Elisha - Issue -

$12512-77

5th After maturity, Daniel transfered note to Elisha Merritt. Elisha died possessed of said note in Aug. 1841 – deft. Executor of Elisha in Sept. 1841. In Oct. 1841 an account was stated between deft. as Executor & also in his individual capacity, & plff. – a balance of $900 over the Set off note found due to plff. & the note sued given for the balance.

Rejoinder ~~traversing 5th dep. – above~~.

Rejoinder. Must no such accounting & balance.

The above are all the issues in relation to which there is any evidence.

The questions of fact in issue are all in relation to the Set off, & they are

1st Was there a promise to pay the note introduced as a Set off within 6 years next before Suit brought?

2d. Was Daniel Merritt the owner & holder ~~of~~ at the time of the arbitration?

3d. That the note was assigned after maturity by the payee to Elisha Merritt, & that he died possessed of it, and that afterwards the defendant being Executor, accounted as Executor & in his own right, with plff. & as

balance over the note was found due the plff. for which, the deft. gave plff. the note declared on.

In the replication setting up this matter, there is no denial of the allegation in the plea that Daniel Merritt assigned the note to the defendant on the day of its date. The allegation that he transfered the note to Elisha & that he died possessed of it, is an argument from which it may be infered that he could not have assigned the note to Nathan as alleged, but it is not a traverse of the allegation in the plea.

The execution of the assignment so as to vest in the assignee the cause of action, if any, of the assignor, against the maker, is admitted unless denied by a plea verified by affidavit. Pamphlet Stat. p. 529 Sec 5-9 That portion of the replication preceding the gist of it, which is, that there was an accounting & balance of $900 found due over the note, & a note given for ~~the~~ such balance, is mere inducement & would not alone have answered the plea. The rejoinder traverses only the material allegation in the replication - not the argumentative or inducement part of it. The issue was, whether there was such a settlement & balance found -

1254-78

The replication concedes the right of Nathan to set off the note against the debt for which the note declared on was given, insists that it was done, & the only real question is, Whether the set off note was paid, though not taken up, or whether both notes were left in force.

If there be no issue on the fact of the defendant having the same cause of action that Daniel would have had, if he had not assigned, and the action were that of Daniel vs. Stephen on a note payable by Daniel to Stephen, then a large portion of the evidence is irrelevant. It was introduced below, because the Court below required us to prove that Nathan was really the owner of the note - and this could only be done by proving that all the legatees had sold their interest in it to Nathan, & that being so the equitable owner the assignment in writing in 1857 made him the legal holder so he could set it off - Hence the will, the deeds, & the Surrogate proceedings, which we insisted then, & now insist here, are entirely irrelevant, because there was no proper traverse of the fact of assignment

Concede for the sake of the argument that there is an implied promise by the assignor of a note to the assignee that the note is genuine & unpaid there can be none surely that the note is not barred by the Statute of limitations. ~~[illegible]~~.

A Witness may be competent to testify as to one subject & incompetent as to another. An assignor is not incompetent in a suit between assignee & maker because it may be that the note is forged or because it may be that it had been paid when assigned. He would only be incompetent to testify on those subjects in relation to the determination of which he is interested.

The objection to the evidence that Daniel Merritt had parted with the note before the arbitration & that it was not included in the arbitration was not placed upon the ground that the witness was incompetent because interested, but on the ground that the evidence was not competent. It should have been placed distinctly on this ground & then we could have executed a release of the witness's liability if any to us. The only question raised was as to his interest in the question whether there was a subsequent promise. ✗ ~~[illegible]~~

(over)

✗ To make the seller of a chattel liable on his implied warranty it must appear that he was as the owner.

✗ It must appear that the witness was + interested not that he accepted a promise when he might or might not be

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3 Mass 224

7 " 470

Coates vs Hart et al 3 Conn 516

Daniel Merritt does not avoid liability by testifying so as to enable Nathan to recover the Note of Stephen because if he assigned a said Note to Nathan & Nathan recovered it of Stephen Daniel would be liable to Stephen for the consequences as It would only shift the liability and the interest of the witness would be balanced And the verdict in this case would not bar Stephens recovery of Daniel in another suit.

The note may have been assigned to Nathan & undoubtedly it was with a full knowledge on his part of the true condition of things & then there would have been no implied guaranty that it had not been settled by the arbitration. especially when there was nothing paid for the note The question in relation to which Daniel was interested was whether he fraudulently concealed the fact of the arbitration when he sold the note to Nathan. If ~~he was answered that~~ he answered that he concealed the fact he ~~would~~ might be interested otherwise not. His interest can only appear by his answer

× If ~~a lawyer~~ an answer testifies to the court that a note is not genuine then he is interested + his evidence of that fact shall not go to the jury if he says it was genuine he should be permitted to state first to the jury because he appears not interested

to require the dependant to prove it in any other or further manner than by introducing the assignment itself.

But the evidence that Nathan was really the owner, was sufficient to ~~warrant~~ authorize the jury to so find the fact.

There was proof that the Estate was amply sufficient to pay all the particular legacies & leave a surplus of several thousand dollars, to be divided among the seven residuary legatees, & that the note was a part of the residue after paying the particular legacies was apparent enough to any rational mind; & that the Seven residuary legatees conveyed all their interest in the estate to Nathan was proved by their Conveyances - and these deeds passed each one's interest in the note to Nathan, and being so the equitable owner, there was no objection to the legal title being vested in him by the assignment of Daniel in 1853.

Whether Stephen sold to Nathan his interest in the estate as the excess over the note & the note to be paid and

discharged by the operation, or whether the sale was of his interest & he to pay the note, was also a question of fact decided upon evidence sufficient to sustain the finding in this respect. The share of Stephen was worth about $900 - Some shares had been bought for $850 & some for $900, & the jury could not well have found that Nathan gave Stephen $1750 - Again the note would have been taken up, if paid. The $800 note would have been sued before the $850 note was barred by the Statute of limitations, & not immediately afterwards. The balance between the notes (about $150) was admitted by plff. to be due on the set off note at the time of the arbitration.

The weight of evidence is, that the two notes were left standing between the brothers as valid claims against each other till animosity had arisen between them, when Stephen sought to obtain an inequitable, but as he falsely supposed, a legal advantage. It is true that Stephen by the will might have taken the note as his share to that extent of his father's

estate, but he did not do so, & the jury were not disposed to let him get the full value of his interest in the estate & not pay his note to any one. It is evident that the note was not taken up by Stephen when he gave the $900 note, because he was not to have the $900 & his note too for his interest in his father's Estate.

The other two questions of fact, viz, the promise within 16 years, & that Daniel Merritt was not the holder & owner of the note at the time of the arbitration, were sufficiently proved by the evidence of Daniel Merritt, to sustain the verdict.

As to the questions of law —
Was Daniel Merritt a competent witness? He had endorsed the note without recourse & had no interest.

Bradley vs Morris 3 Scam. 182.

The plaintiff to impeach the evidence of Daniel Merritt offered to prove by him that he had been engaged in an expensive, important & strenuously

[1852-53]

contested litigation with the plaintiff from 1843 to 1857. The only object of this evidence, was to show an unfriendly state of mind; and the objection to it, is, that it is too remote & opens too wide a field of collateral enquiry. It is not a necessary ~~influence~~ inference, that men who are engaged in important, expensive, & strenuously contested litigation, are unfriendly. They sometimes are & sometimes are not. Again, to examine into the expensiveness, importance, & strenuousness of the controversy, would consume too much time. The question should be direct, as to whether there is unfriendly feeling, & an enquiry into business transactions from which ill feeling may be infered is too remote & would tend to intolerable prolixity in the trial of causes.

It is objected that Kendall was permitted to testify that he commenced a suit on the set off note in 1853. The fact though bearing somewhat remotely on the question of the settlement & finding a balance was competent & proper.

The objection that the evidence is secondary is not well taken. The fact that a suit was commenced, when it comes up collaterally may be proved without the record. The only thing material, was, that the defendant at that time, claimed the note to be one that the plaintiff ought to pay.

The evidence of Cotton was not introduced to prove what the law was in New York (but even this may be done in relation to the unwritten or common law) but to prove a custom or habit of business. Its ~~being~~ bearing was extremely remote upon the issues - so much so, that it is difficult to perceive any. Perhaps it was to account for Daniel not having assigned it to his father by a written endorsement, or to guard against the jury not allowing the note because it was not assigned in writing till 1853 as plaintiff claimed on the trial & afterwards insisted in his thirteenth instruction. * It certainly cannot be material whether Elisha had the equitable interest which would enable him to sue in the name of the payee, or the legal interest, so that he could sue in his own name. If the fact be material, we claim that in the absence of proof of the ~~Execution~~ existence of a Statute

* It is however entirely immaterial whether the title so passed that the person to whom it was transferred could sue in his own name or was bound to sue in the name of the payee

[12562-81]

the law spoken of by the witness Cotton, means the common law — and lastly having another case where this same question is involved & where we are on the other side, we claim that the statute law of a foreign State may be proved by parol, though our judgment is against it.

The only objection to the deeds is, that they are incompetent & irrelevant. We think so too, for the reason that the fact of the title of the defendant to the note was not in issue, as before stated. If that fact was in issue, they tended to show Nathan to be the equitable owner of the note as part of the assets of the estate — so that it was proper, that by the assignment in writing, the legal title should be added to the equity.

The proceedings before the Surrogate stand upon the same footing as the deeds — they were only in ~~Consideration~~ corroboration of Nathan's equitable right to the note. And admitting cumulative evidence on a point about which there is no conflict of evidence, ought to be no reason for disturbing a judgment when substantive

justice has been done. But we insist that the proceedings were regular in substance & form. ~~The record shows that the three months' publication was made, & the bond~~ ~~[illegible]~~ Three months' notice was to be given before Dec. 25th. The decree recites that the three months' publication was made before Dec. 25th. So that it is apparent that the Court had jurisdiction of the persons of the parties in interest. No objection to the authentication is perceived.

The testimony tending to impeach the memory & reliability of dept's witness Daniel Merritt, consisted of the opinion of witnesses that Daniel had been sick & had a bad memory. To admit such evidence would lead to a trial to guage the bodily & mental vigor of every witness by the opinions of others than the jury & would lead to a never ending collateral enquiry, which would too seriously obstruct the progress of trials to be tolerated.

The evidence of Cook is similar to that of Kendall & enough has already been said on that subject.

In relation to the instructions,

1256-82

We say, first, generally, that it does not appear that all the instructions in the case are in the bill of exceptions. Indeed, it is evident that some are left out - and the error, if any, in those in the bill may have been cured by the others not in it. The antidote may have been given with the bane. In order to a full & correct understanding of the ~~case~~ Cause, it is as important that all the instructions should be in, as that all the evidence should.

The 10th instruction & the qualifications were based upon facts not in issue, & qualifying an instruction upon facts not in issue, by other facts not in issue, is not a reason why a judgment right upon the facts in issue & the law as to those facts, should be reversed.

The instruction itself was not law as applicable to the case, even if there was an issue to which it was applicable, because there was enough upon the will & deed taken in connection with the value of the Estate, to satisfy the jury that Stephen was not to avoid the payment of his note, & ~~have~~ have $200 in addition, for an interest

worth to only $900 or $1000, & this, without any other evidence of any other terms & conditions of the sale, was enough to satisfy the jury that the understanding was, that Stephen was to pay the note — at any rate he was liable to the estate & to Nathan as the owner for the excess of the note over the $900, & that was the recovery — And that is all that the qualifications to the instruction ask for.

It is not error for the Court to qualify an erroneous instruction by erroneous qualifications. It is only when an instruction ~~is~~ is legal & so qualified as to make it illegal, that the party can fully except to the qualification. The instructions took from the jury the right to decide upon the effect of the evidence as to the price paid Stephen by Nathan for his interest & to draw the almost irresistable inference from it that Nathan would not have given $900 & the note for about the same amount for an interest worth only half as much.

The 1st qualification properly allows such inference to be drawn.

The second qualification

is right. If Stephen sold all his interest in the estate, while this note was unpaid & belonged to the estate, and the estate had not been divided, he could not avoid paying the note — that is, he could not sell all his interest in the estate & yet keep back enough to pay the note. If he had taken up his note & given a receipt for so much on account, & then sold the balance for $900, the note was discharged. If ~~the~~ he sold all his interest without receiving this note as part of it, & deducting it first, then he should pay the note —

And this was a question of fact for the jury — and the sale & amount of consideration being as they were, and the value of the estate as it was, there would be no conclusion of law that the note was settled, even if the facts stated in the deed & those omitted which would have probably been stated in it if they had existed, were the only facts before the jury in connection with the provision in the will.

The 11th instruction for Plff. is not law. By the law of this State, it is generally

understood that a note payable to bearer must be endorsed in order to enable a holder not the payee, to sue in his own name. Now whether Nathan Merritt was really the owner for his own use or the holder of the legal title for the use of others, he could maintain an action in his own name, & of course, use it as a set off. Which is only a cross action. But if he really owned it, as we say the evidence shows, then he certainly had the right to have it assigned to him & he could sue it in his own name. We also say that the assignment was not put in issue.

The 12th instruction is inapplicable. There was an assignment of the note — and an instruction based upon there being no assignment when there was no controversy about the fact of the assignment, should not have been given, & we again say, the assignment was not in issue.

The 13th instruction is not law. If Daniel Merritt was not the holder at the time of the arbitration & it was not submitted to the arbitrators, their award would not affect it. & there is evidence that the note was mentioned by Stephen as one not to be taken into account by the arbitrators, as a

$12562-83

Claim of Daniel against him, for the reason that it had been turned in a settlement of his father's estate, & that he was still liable on it for about $150. (This was, of course, the excess of the note over the $900 note & the balance for which the verdict was rendered.)

Enough has already been said to show that the defendants instructions laid down the law correctly. The conflict between ~~them & some~~ some ~~containing~~ which contain a proviso that "if Nathan was at the commencement of the suit the owner of the note", & those which state that the assignment is not in issue, was ~~avoided~~ occasioned by the proviso being added as a qualification by the Court to some of them, without noticing in the hurry of the trial, that there were others inconsistent with said proviso.

In conclusion, we say that substantial justice was done between the parties, & if this be so, trifling inaccuracies, if any, in relation to collateral matters not affecting the gist of the controversy, should not operate to reverse the judgment.

Leland & Leland
~~for deft in error~~
for Appellee.

52

Stephen Merritt

vs 53

Nathan Merritt

Brief of Appellee

Leland & Leland

Filed May 18. 1858

S. Leland

Clk

Supreme Court---State of Illinois.

Third Division, April Term, A. D. 1858.

STEPHEN MERRITT, } *Appeal from LaSalle.*
vs.
NATHAN MERRITT, }

ABSTRACT OF RECORD.

This was an action of debt on a promissory note, originally commenced by appellant against appellee in the Circuit Court of LaSalle county, by attachment, at the November term, A. D. 1854.

12. The declaration contains three counts. The first count sets out that heretofore, to wit, on the 11th day of October, 1841, at, &c., by his certain promissory note of that date, the defendant then and there, for value received, promised the plaintiff to pay him on the 3rd day of November, 1842, nine hundred dollars; yet, though often requested, &c.

12 & 13 The second count varies from the first only in stating the consideration for said note to be the plaintiff's quitclaim deed to his father's estate.

13 The third count sets out a copy of the note sued on in haec verba:

"$900. For valued received I promise to pay Stephen Merritt on the "third day of November, one thousand eight hundred and forty-two, nine "hundred dollars, without defalcation, being in consideration of Stephen "Merritt's quit-claim to his father's estate.

"Peru, October 11th, 1841.

"NATHAN MERRITT."

To which defendant pleads,

16 1st, Payment;

2nd, Statute of limitations, (five years);

16, 17 3rd, Defendant offers as a set off, a note under the hand and seal of the plaintiff, dated August 1st, 1836, payable to Daniel Merritt or bearer, for $967, with interest at 7 per cent. per annum, which note defendant avers, was then and there endorsed by said Daniel Merritt to him. He therefore offers to set off so much of said note as will satisfy plaintiff's claim, and claims judgment for the balance. (This is the substance of defendant's third plea, as it was afterwards amended.)

17, 18. 4th. The defendant's fourth plea is like his third, with the additional averment of a promise by the plaintiff to said Daniel to pay said note within sixteen years next before the commencement of this suit; and that said note was endorsed as aforesaid after said subsequent promise.

18. 5th. ~~The general issue.~~

18, 19. 6th. ~~Defendant afterwards withdrew his sixth plea.~~

35. Plaintiff, for replication, traverses defendant's first plea, joins issue on
35. his fifth plea, and demurs to his second, third, fourth and sixth pleas, which demurrer was sustained except as to the sixth plea, which defendant then withdrew.

Defendant then took leave to amend his third plea, and abides by the demurrer as to the other pleas. The third plea, as amended, is set out above.

Replications to Set Off plea

37. By leave of the Court, plaintiff filed several replications to defendant's third plea, in substance as follows:

38. 1st. That said note claimed as set off is barred by the statute of limitations. 16 years well

38, 42. 2d. That said note, while ~~owned~~ by said Daniel, and before it was assigned, was, among other matters of difference and indebtedness between the plaintiff and said Daniel, submitted by two mutual bonds of arbitration, under the hands and seals respectively of the said Daniel and the plaintiff, dated April 16th, 1844, to the arbitration of Dixwell Lathrop, Burton Ayres and Henry Headley. That in accordance with the terms of said submission, said arbitrators did, on the 17th day of April, 1844, make an award between the said parties, by which said note, as well as all other matters of obligation between said parties, was canceled. And further, that said note was not endorsed until long after it fell due.

42. 3rd. Payment of said note to Daniel Merritt, July 1st, 1839, and that it was not assigned until after it fell due.

4th. That said Daniel transferred said note, after it fell due, to one Elisha Merritt, to whom the plaintiff fully paid said note while he, said Elisha, was the owner thereof.

page 39 of record

43. 5th. That after said note fell due, said Daniel transferred said note to Elisha Merritt, father of the plaintiff and defendant; that said Elisha died possessed of said note in August, 1841; that in September, 1841, defendant was duly appointed and qualified as executor of the estate of said Elisha; that in October, 1841, an account was had and stated between the plaintiff, in his individual capacity, as also as said executor; that at that accounting there was found to be due from the defendant to the plaintiff, over and above the note here pleaded as a set off, the sum of $900, for which balance the defendant then and there executed and delivered to the plaintiff the note on which this suit is brought.

44. 6th. Payment of said note claimed as set off by plaintiff to defendant, October 11th, 1841.

45. 6th. To the plaintiff's first replication defendant rejoins: that the plaintiff agreed with said Daniel to pay said note within sixteen years before the commencement of this suit.

Defendant traverses plaintiff's second, third, fourth, fifth and sixth sev-
45. eral replications, and plaintiff joins issue thereon.

[1842-84]

Plaintiff traverses, by his surrejoinder, the defendant's rejoinder to the
47 plaintiff's first replication to the defendant's third plea, and defendant joins issue thereon.

69, 71. On the above issues this cause was tried at the May term of said court, 1856, and a verdict rendered in favor of the defendant of $179.49. Plaintiff moved for a new trial, which motion was overruled by the Court, and judgment entered for the above amount and costs.

72. A bill of exceptions was ordered to be filed within ten days after the
73 adjournment of said court, which time was afterwards extended to the 25th of June by agreement.

72. An appeal was granted to the Supreme Court on the filing of a sufficient
112. bond, which was done, and approved by the court.

BILL OF EXCEPTIONS.

74. Plaintiff read in evidence the note, a copy of which is set out in his declaration, and there rested his case.

Defendant then read in evidence a note signed and sealed by the plaintiff, dated August 1st, 1836, payable on its face to Daniel Merritt or bearer, for $967, with interest at seven per cent. per annum, on the back of which was a credit of $233.83, dated Sep't 1st, 1837, and also an assignment in these words: "Pay Nathan Merritt or order, without recourse. Daniel Merritt." The reading of said note was objected to by the plaintiff; objection overruled, and plaintiff excepted.

"without recourse"
27. Maine 228
30. Maine 391
3. Seammon 260
6. Grattan 439-
9. Barbour S.C.R. 214
3. Iff 652-
Exception 1" - D. Merit interest not diverted by without recourse!

75. Defendant then called Daniel Merritt, who, on a preliminary examination, swore that he was the payee mentioned in said note pleaded as set off; that the written assignment thereon was made by him in October, 1853. Defendant then offered to prove by said witness a promise by the plaintiff to pay said note, which would take it out of the statute of limitations. Plaintiff then and there objected that the interest of said witness disqualified him for that purpose; which objection the Court overruled, and plaintiff excepted to the ruling.

Said witness was then permitted to testify that in May, 1841, being the holder of said note, and wishing to liquidate an indebtedness to his father, Elisha Merritt, he applied to the plaintiff to know when he could pay said note; that plaintiff then requested witness to get their father to accept said note as part payment of witness' indebtedness to the father; and that plaintiff then said that he would pay said note whenever his
76 father should demand. To the admission of all which testimony the plaintiff objected; the Court overruled the objection, and the plaintiff then and there excepted to the ruling.

On cross-examination said witness testified that in July, 1841, he sold and delivered said note to Elisha Merritt, his father, who then lived in Putnam county, New York; that said Elisha died in said county in August, 1841; that the credit was made and endorsed on said note before the delivery of it to his father; that witness next saw said note in the fall of 1841 in the hands of defendant, then an executor of his father's estate;

[12562-87]

that plaintiff, witness and defendant are sons of said Elisha Merritt, deceased.

On re-examination by defendant, said witness stated that at the time of the arbitration between himself and the plaintiff in 1844, he was not the holder of, had no interest in, nor had since had any interest in, said note. To the admission of which testimony plaintiff then and there objected; the court overruled his objection, and plaintiff then and there excepted to said ruling.

77 Said witness further testified that Nathan Merritt was, in 1841, a man of wealth and property, and abundantly able to pay the amount of plaintiff's note; and, though he lived in New York, he had been in this state some three or four times since 1841. Could not say that Stephen Merritt knew of Nathan's being in this state, but that he was in the same neighborhood.

On cross-examination, plaintiff offered to prove that from 1843 to 1850, said witness, Daniel, had been engaged in an expensive and strenuously contested litigation with the plaintiff. Defendant objected to such testimony as irrelevant; the Court sustained the objection, and the defendant then and there excepted to the ruling.

Defendant then called Miles Kendall, an attorney at law, who was permitted by the Court to testify that in 1853 or 1854, at the instance of Nathan Merritt, he commenced a suit in the circuit court of Marshall
78 county, Illinois, on the note here pleaded as a set off; that Mr. Cook was also employed in the case; that he drew the declaration and wrote to Mr. Cook to attend the case. The plaintiff objected to this testimony; the Court overruled the objection, and the plaintiff then and there excepted to the ruling.

Defendant then called Henry G. Cotton, who testified that he had been a practising lawyer in the state of New York, and was skilled and learned in the laws of that state in 1841; that at that time in that state a note payable to bearer, or to payee or bearer, was transferable by sale and delivery without an assignment in writing; and that such transferee had a right to sue upon such note in his own name. To all of which testimony plaintiff objected at the time it was offered; the Court overruled his objection, and plaintiff excepted to the ruling.

79 Defendant then read in evidence a certified copy of the last will and testament of Elisha Merritt, deceased, in which said testator, after making
80 several special bequests, provides that the residue of his estate shall be
81 equally divided between his seven sons—Hackeliah, Elijah, Nehemiah, Daniel, Joseph, John and Stephen; that if, at the time of his death, he should hold obligations against any of said seven sons which would amount to his dowry, he directs that his executors *shall not collect such obligations*, but shall give them up and take such son's receipt for his dowry; that if such obligation or obligations should exceed the amount of such son's dowry, then he directs that his executors shall only collect *so much of such excess as may be necessary to pay the legatees.*

Defendant allowed to raise a presumption of said payment from delay to sue & plaintiff denied the right to explain why he did not sue

The court admitted irrelevant proof Marshall suit not set up in pleadings

Parol proof of the laws in Mississippi

S12562-85

He then appoints Nathan Merritt and Ashael Cole executors of said will.

82 Attached to said copy of the will of Elisha Merritt, was a certificate under the seal of the surrogate court of Putnam county, New York, and signed Ambrose Ryder, Surrogate, stating that the above was a true copy of said will, as it appeared of record in his office.

83 Attached to said will were letters testamentary, officially declaring, under the seal of said Surrogate, that the will had been duly proved and approved, and that the administration of said estate was granted to said Nathan Merritt and Ashael Cole.

Defendant then read in evidence a deed from plaintiff to himself, dated October 11th, 1841, by which said plaintiff released and quitclaimed to 84 defendant all his interest and claims of every kind or nature, present or prospective, in the estate of his father, Elisha Merritt, deceased, and by which deed he appointed the defendant his attorney in fact, to do all things which might be necessary to the full enjoyment of such interest.

Defendant also read in evidence similar deeds to himself from each of 85 the other residuary legatees, dated about the same time as the one from the plaintiff. To the reading of each of said deeds the plaintiff, at the time, objected as incompetent and irrelevant; the Court overruled the objections, and the plaintiff then and there excepted to the ruling.

Exceptions Deeds of Shews

Defendant then offered to read in evidence a certified copy of proceedings had before the Surrogate of Putnam county, New York; to the reading of which the plaintiff objected, insisting that the same were not properly authenticated, and that the substance of the same was incompetent and irrelevant; which objection was overruled by the Court, and the plaintiff then and there excepted to the ruling.

Surrogates doings Exceptions

Said transcript was then read, and was, in substance, as follows:

86, 87. That on the 19th of October, 1845, at a surrogate court of the aforesaid county, at the request of Nathan Merritt and Ashael Cole, executors of Elisha Merritt, deceased, a citation was issued, directed to all persons interested, to appear before the said Surrogate at his office in the town of Carmel, in said county, on the 25th day of December next, at 10 o'clock A. M., to attend a final settlement of their accounts. And it was further ordered by said court, that a copy of said citation be published for three months before said return day in the state paper.

87 That on the 25th day of December, 1845, said citation was returned, and with it was filed an affidavit of personal service on the widow of said testator, Desire Merritt; an affidavit of publication in the state paper for three months; an admission of service on Enos Ballard and Martha Ballard his wife, (special legatees.) At the request of the parties in interest, 88 the cause was then adjourned to the 27th inst., at the hotel of Lewis Luddington; at which time and place Nathan Merritt, Ashael Cole, John Merritt and Joseph Merritt entered their appearance in person or by attorney.

89 The said Ashael Cole then presented a schedule purporting to be an exhibit of the amount of said estate, and reported that said schedule had

been made by himself and Nathan Merritt at an examination of the estate shortly after the death of said Elisha Merritt; that said Nathan at that time took possession of the effects of said estate, and that no part of said estate had since come into said Cole's possession; that he and Nathan proceeded to prove said will, and took out letters testamentary. This report was admitted to be true by Nathan Merritt. Said Cole then requested to be discharged, with his reasonable charges, from acting further as an executor of said estate.

Nathan Merrit, the other executor, then reported that he had the exclusive possession and control of said estate, and that said Ashael Cole was in no way responsible for any part of said estate; that he was the assignee and owner of all the property and effects of said estate, both real and personal, and of the interests of all the claimants under said will; that the whole of said will has been settled as above stated, and in pursuance of the provisions of the will of said testator; that all the debts, funeral expenses and pecuniary legacies have been paid by him; that he provides for and takes care of the widow of said testator.

Said Nathan then produced releases from each of the legatees under said will except said widow, to whom he acknowledged that he was obliged to account for the interest on $1000; which report said Ashael Cole admitted to be true.

Thereupon said surrogate confirmed said reports of said executors; declared that said estate was duly and legally vested in the said Nathan; and did finally order and decree that the accounts of the said executors be settled in accordance with said reports.

Signed: A. B. Crane, Surrogate, and sealed with the seal of said court.

Attached to said transcript, and under the seal of said court, signed Ambrose Ryder, Surrogate, was a certificate that the same was a true copy of such proceedings, as they then appeared of record in his office. Also a certificate of Ambrose Ryder, as County Judge of Putnam county, that the above certificate was in due form and according to law. Also a certificate under the seal of said county court, and signed Ira Mead, Clerk, that Ambrose Ryder was Judge of said court at the date of the above certificate.

Daniel Merritt testified that he sold his share in his father's estate to Nathan Merritt for less than $1000. Here defendant rested his case.

Plaintiff then proved that in the fall of 1855 the widow of Elisha Merritt was still alive, and was 85 years of age.

Plaintiff then read in evidence the deposition of Joseph Merritt, in which he testified that he was 52 years of age; a farmer of Bureau county, Illinois: a brother of the parties to this suit; that his father's estate consisted chiefly of notes, bonds, and some money; that on the evening before the settlement with the executors, he was at Nathan's house, and saw the interest computed on the notes and obligations, and the whole amount added up, amounting to a little over $11,000; that Nathan offered witness $200 not to appear against him before the surrogate.

Plaintiff then offered to read in evidence from said deposition, testimony tending to impeach the memory and reliability of defendant's witness, Daniel Merritt, which the Court would not permit, and plaintiff then and there excepted to the ruling of the Court.

Plaintiff proved that Nathan Merritt did act as executor of his father's estate.

Joseph Merritt, as a witness, testified that the plaintiff had lived in Illinois since 1836; that he had always been a man of such property that $1000 could have been collected of him by execution; that witness sold
101 Nathan his interest in the estate for $850; that he never could find out the value of said estate; that he never did believe that the $11,000, or thereabouts, spoken of in his deposition, was really the whole of said estate; that Nathan never did nor would make an inventory.

Defendant then recalled Daniel Merritt, who testified that at the arbitration between himself and plaintiff in 1844, plaintiff admitted that he had turned the note here pleaded as a set off, in the settlement of his father's estate, and that he was still liable on it for about $150; that his father
102 told him in July, 1841, that he thought the amount which would be coming to each of the boys to be about $900. To all of which testimony the plaintiff objected at the time it was offered, the court overruled the objection, and plaintiff excepted.

Defendant then called Burton C. Cook, who testified that he was employed by Nathan Merritt in the suit spoken of by Mr. Kendall; that he had seen the note offered in evidence by the defendant in this case in the hands of Nathan Merritt, before the assignment now upon it was written; that he did not attend the Marshall court at that term on account of sickness. To so much of Cook's testimony as related to the suit in Marshall county, and his not attending said court, the plaintiff objected; the court overruled the objection, and plaintiff excepted.

This was all the evidence in the case.

After the evidence was closed, the plaintiff asked the Court, among other things, to instruct the jury as follows:

"10. If the jury believe from the evidence that the plaintiff and defendant and the witness, Daniel Merritt, are brothers of each other, and
103 were sons of Elisha Merritt, now deceased, and that in 1836 Stephen Merritt, the plaintiff, gave to Daniel Merritt, the witness, the note or bond produced on this trial by the defendant, Nathan; and that afterwards, and in the life time of said Elisha Merritt, the father, said Daniel Merritt, to whom said note is payable on its face, sold and transferred said note or bond to said Elisha Merritt, so that he (said Elisha) became the legal holder and owner thereof; and that afterwards, in the summer of 1841, the said Elisha Merritt (still being the owner and holder of said note) died, leaving as his last will and testament the *will* read in evidence in this case; then, in such case, by operation of law and the will aforesaid, the share of Stephen Merritt in his father's estate consisted in the excess (if any) of the one-seventh of the residuary part of said estate, including the note

offered by defendant, over all obligations and claims which Elisha Merritt, at his death held against said Stephen.

"And if afterwards, on or about the 11th day of October, 1841, said Nathan Merritt, being then executor of said will, and, as such, holding said note, bought of said Stephen Merritt his said share in his father's estate, and took from him the quitclaim thereof read in evidence by the defendant, and gave him therefor the promissory note sued on in this suit by the plaintiff: and if there is no proof of any other terms or conditions of said sale than those that appear on the face of those two papers: in such case such purchase was in ~~law~~ a settlement of said note so held by said executor, and in such case is not a proper matter of set off in favor of defendant in this case."

104 The Court, at the request of defendant, gave the following qualifications to the foregoing tenth instruction:

"If, however, the terms and conditions of said sale and the other proof in the case show that at the time of the giving of the note sued on, it was the understanding of the parties that the note read in evidence by defendant was a subsisting claim, and that both notes were to be in force to be set off, one against the other, or otherwise paid: in such case the note offered by defendant is a proper set off, if plaintiff has agreed to pay it within sixteen years, and if it has not been paid or discharged.

"If Elisha Merritt died the legal holder or owner of the note which defendant has offered in evidence, that note, with the other portions of his estate not bequeathed to others, passed, by the will, to the seven sons named in the will. Stephen's interest was one-seventh part of this note, and one-seventh of the other portions of the estate not bequeathed to others; and if he transferred all his interest in said estate while this note was unpaid and belonged to said estate, (and said estate had not been divided,) it carried as well his interest in this note as in the other portions of the estate."

To the giving of which qualifications to said instruction plaintiff objected, and excepted to the decision of the Court in giving the same, when it was done.

105 Plaintiff asked the Court to instruct the jury as follows:

"11th. If Elisha Merritt was the owner and holder of the note offered by defendant, and held the same, as such owner, at the time of his death, then upon his death the legal title and right to sue became vested in his executors as such; and the same could only be sued on in the name of the executors of Elisha Merritt, or in the name of some one to whom said executors transferred the same; and in that state of case it could not be set up as a defence to a suit brought against one of the executors in his individual capacity.

"12th. The defendant in this case having set up a title by endorsement to the note pleaded as a set off in this suit, cannot sustain that plea by proving title by sale and delivery under the laws of the state of New York.

"13th. If the jury believe from the evidence that the note mentioned

in defendant's third plea as signed by Stephen Merritt, was not assigned and endorsed by Daniel Merritt, the payee therein named, until 1853, and that the note was made in 1836: then in law Daniel Merritt held the legal title to said note at the time of the arbitration mentioned in the pleadings: and if so, Daniel Merritt was, in contemplation of law, the owner and holder of said note, at the time of said submission and award, and said note was satisfied by said award."

106 Each of which instructions the court refused to give to the jury, and plaintiff excepted.

The Court, at the request of defendant, gave the following instructions to the jury, viz:

"2nd. If before the arbitration between Stephen Merritt and Daniel Merritt, the note offered in evidence by defendant had been sold and delivered by Daniel Merritt to his father for a valuable consideration, and with the knowledge of Stephen, and the father held the note at the time of the arbitration, then Stephen's liability to pay said note was not affected by said arbitration, even though Daniel's name had not been placed on the back of said note at the time of arbitration.

"4th. That by the pleadings in this cause the execution of the note mentioned in defendant's third plea is admitted, and also the assignment of it by Daniel Merrit to the defendant is admitted, and that the note was given for a valid consideration is admitted.

"5th. That if Daniel Merritt, before the arbitration, sold and delivered the note in defendant's third plea mentioned to Elisha Merritt: and if Elisha Merritt died the owner of said note: and if Nathan Merritt, being one of the executors of the estate of Elisha Merritt, paid up all the debts due by the deceased, and bought out all the interests of the widow and
107 all the heirs of the said Elisha Merritt, *he* thereby became the owner of said note; and being so the owner, if Daniel Merritt, *not* being the owner and holder at the time of the arbitration: and if Stephen Merritt, within the last sixteen years, agreed to pay the note: and if it has not been paid or otherwise satisfied: the jury should, after deducting the amount of the note in the declaration mentioned, and such payments as have been made on the note in defendant's third plea mentioned, find a verdict for the defendant for the balance. Interest should be computed on the note in the third plea mentioned at the rate of seven per cent., and on the note in the declaration mentioned at the rate of six per cent per annum.

"6th. That if the jury believe from the evidence that the note given by Stephen Merritt to Daniel Merritt was sold and delivered by Daniel to his father before the arbitration between Daniel and Stephen: and if Daniel was not the owner and holder of the note at the time of the arbitration: and if they further believe from the evidence that while Daniel owned the note, and within sixteen years last past, the said Stephen agreed to pay it, and desired Daniel to turn it out to their father to pay a debt which Daniel owed to his father, and that he would pay it to the father, and the note has not been paid or satisfied in any way, the jury should allow the amount of the note and interest, or such amount as may be due

after deducting payments, if any; and after deducting payments, if any, and the amount of the note from Nathan to Stephen, they should find a
108 verdict for the defendant for the balance due, if any. Interest should be computed on the note given by Stephen to Daniel at the rate of seven per cent. per annum, and on the note given by Nathan to Stephen at the rate of six per cent. per annum: provided, that the jury believe that at the commencement of this suit defendant was the owner of said note.

"7th. If at the time of the arbitration between Stephen and Daniel, the note from Stephen to Daniel had been sold and delivered by Daniel to his father, and Daniel was not then the holder, the note was not affected by the arbitration; and if Stephen has, within sixteen years last past, agreed with Daniel to pay it, and it has not been paid or satisfied in any way, then Nathan should be allowed the amount of the note in this suit, although Daniel may not have put his name on the back of the note until after the arbitration: Provided the jury believe from the evidence that Nathan was, at the commencement of this suit, the owner thereof.

"8th. The assignment, 'prima facie,' vests the title of the note in Nathan Merritt, and unless it is proved that the note was not the property of Nathan, he is to be considered as the owner of it.

"9th. If at the time Daniel Merritt put his name on the back of the note, Nathan Merritt had bought out all the persons to whom Elisha Merritt had willed his property, and the estate had been settled: and if the note in the third plea mentioned belonged to Elisha when he died: then
109 Nathan was the owner of the note when this suit was brought, unless it had been paid to Daniel or Elisha, or paid or canceled in a settlement between Nathan and Stephen.

"10th. The jury in determining whether the note on which this suit is brought is a valid and subsisting debt, should take into consideration the length of time which it has run, and the circumstances of the parties and their usual mode of doing business. The payment or settlement of that note may be inferred from circumstances coupled with the lapse of time since the note was given, if the circumstances proven, coupled with such lapse of time, lead the minds of the jury to the conclusion that said note has been paid or settled, either by the understanding of the parties, being set off against the note held by defendant, or in any other way.

"11th. The question, whether at the time the note was given by Nathan to Stephen on which this suit is brought, the which had been given by Stephen to Daniel, was settled, is a question of fact for the jury to determine; and in determining that question, the jury will consider all the circumstances connected with the transaction which are proved; all that the evidence shows in relation to the course of dealing between the parties; the amount of the interest which Stephen had in the estate of his father, and the statements which Stephen has made concerning the transaction, and the burden of proof to show that the note offered in evidence by defendant has been settled, is upon the plaintiff, and the jury ought not to presume that said note has been settled, unless it has been proven.

116. "12th. The only questions which the jury are to determine in relation to the note offered in evidence by the defendant, are,

"1st. Has the plaintiff promised to pay said note within sixteen years?

"2nd. Has the note ever been paid?

"3rd. Was Daniel the holder and owner of that note at the time of the arbitration between him and Stephen?

"4th. Was that note ever settled between Nathan and Stephen Merritt? or was there ever a settlement or accounting between them, in which Nathan was found to be indebted to Stephen over and above the amount of this note?

"And if the jury believe that it is proved that Stephen has promised to pay the note within sixteen years: and if it is not proved in this cause that Daniel was the holder and owner of this note at the time of the arbitration between him and Stephen: and if it is not proven that said note has not been paid: and if it is not proven that there has been a settlement or accounting between Nathan and Stephen in which that note was settled, or in which it was proved that Nathan was indebted to Stephen over and above the amount of this note: and if it is proved that the defendant was the owner of this note at the time of the commencement of this suit: *Then* the jury should allow to the defendant the amount unpaid upon said note, and interest at the rate of seven per cent. per annum.

117. "14th. The plaintiff is not permitted to deny on this trial that the note offered in evidence by the defendant, has been duly assigned to him, so as to vest the absolute property of the note in him."

To the giving of each of said instructions, so asked by defendant and given by the Court, the plaintiff objected when the same were offered, and excepted to the decisions of the Court in giving each of them respectively.

After verdict defendant moved the Court for a new trial, which motion the Court overruled, and plaintiff excepted to the said decision of the Court in overruling his motion for new trial. And thereupon plaintiff prayed that his bill of exceptions should be then and there signed, sealed, and made a part of the record, which is done.

DICKEY & WALLACE, *for Appellant.*

[1560-95]

Merritt
vs
Merritt

Abstract