

No. 13182

Supreme Court of Illinois

Hankinson

vs.

Lombard

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STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 189.

Hankinson
vs
Lambert.

13182

[]

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION—APRIL TERM, 1861.

AMBROSE C. HANKINSON and ALFRED FREEMAN, Appellants,
vs.
BENJAMIN LOMBARD, Appellee.

APPELLANTS' BRIEF.

1st. The motion to suppress depositions of Stewart and Lombard should have prevailed; the latter part of Stewart's answer to 6th interrogatory is incompetent testimony.

1. Being a recital in a deed between strangers, it could not bind defendants nor be evidence against them for any purpose.

2. It details the contents of a writing, and is not, therefore, the best evidence.

Lombard's deposition should have been suppressed.

1. Because there was no fair compliance with our statute, as to notice.

It is the right of the party served with notice to be present, by himself and counsel, to cross-examine the witness; this is the plain import of our statute; and anything done by the party taking the deposition, in chief, to interfere with this right will be cause of objection to the deposition.

Here the defendants were called by the plaintiff, himself, to be, at the same time, at a point 90 to 95 miles distant, to take the deposition of another witness; they attended there, and were thus prevented from being present to cross-examine Lombard. See Freeman's affidavit.

In Vermont, a notice to take a deposition *in term time*, was held insufficient, on the ground that the party was entitled to be present with his counsel, when it was taken; and this could not be required of him during term time.

Stephen vs. Thompson, 28 Vermont Rep., 77.

2. Lombard's testimony is, for the most part, mere hearsay ; and so; incompetent.

For these reasons, and that the whole of Stewart's testimony is of too loose a character to establish the fact sought to be proved ; both depositions were improperly admitted.

2d. On the proof, as it stood, the note was not properly let in evidence.

It had been endorsed to, and was the property of, Babcock ; the legal title was in him, and not in plaintiff. See brief, &c., in case *Wears vs. Parrish*, preceding.

3d. Mileham's testimony about the bonds and deeds stated to be given in the name of Hankinson and Freeman to Babcock and Mulford, and by Wiley to Hankinson and Freeman, was improperly admitted ; on the points really in issue, it was proving the contents of written instruments *by parol*, which cannot be done except on notice to produce. See books, *passim*.

4th. Defendants should have been allowed to read in evidence the contract of May 4, 1857, from Babcock to Mulford.

This was material, to disprove the statements of Mileham, made on part of the plaintiff, and to discredit his whole testimony ; as also, to show that the sanction by Hankinson and Freeman, of the endorsement of the note, if ever given, was fraudulently obtained.

For similar reasons, the testimony of Mulford about the gold watch and chain, was improperly excluded.

This latter evidence, moreover, was not objected to by plaintiff when first given ; this was only done after cross examination by the plaintiff, which brought the evidence more directly home to the case.

5th. The instructions for plaintiff are believed to be all, in form or substance, or both, more or less faulty ; the attention of the court is, however, more particularly asked to the following :

The 2d instruction shuts the jury up to find for plaintiff, on the sole condition that defendants did not object to Mileham's act in endorsing their names when made known to them ; tho' wholly unauthorized and without any consideration.

Under this, the plaintiff, nor any other, need have sustained any injury from their silence ; and the endorsement may have been obtained by fraud within the meaning of the statute, and the subsequent parties, including the plaintiff, may have known it.

The 3d and 4th instructions are too broad, and in their application to this case calculated to mislead the jury; upon the 4th, also, it may be remarked, that merely putting the note in circulation before due, is not enough; the subsequent holders must be so, *in good faith*, and for value.

The 5th instruction is wholly objectionable in this: The court tells the jury, in terms, that the endorsing of notes is a usual incident to trading in lands and disposing of the notes received in exchange; this was a fact for the jury to find, *on evidence*, and not for the court; and, in so instructing, the court mistook its province, and usurped that of the jury.

The law is for the court, the facts for the jury.
16 Ill. Rep., 286-416.

Instruction 6, is quite too loose—but means this, if anything: That a *general* authority to negotiate notes in the name of the principal, precludes the principal from showing fraud in the execution or want of consideration, *in any particular case*, as against a *bona fide* holder; nor is any exception made of cases of endorsement after maturity.

This instruction is not law, and could only confuse and mislead the jury.

The 7th instruction assumes that the non-residence of the maker of the note in suit, when it fell due, has been proved, and tells the jury that this, and the mere giving of the note in evidence, concludes defendants, unless they have “shown a good defence;” the court was not authorized to take these facts for granted, and deduce the consequence indicated; it was in fact, taking the case from the jury to find out, if they could, what made a “good defence,” and leaving them after the case was *established* by the court against the defendants.

The distinction designed by the 8th instruction to be taken under our statute, is not well founded; the substance of the instruction, as applied to the case, if rightly apprehended, is this; That tho’ the endorsement of the note by Mileham was a mere fraud upon the defendants, or forgery of their names; yet, if Babcock, the immediate assignee, had no hand in it, the defendants are bound by it.

This cannot be law.

The 10th and 11th instructions for plaintiff do not state the rule of law, in the matter referred to, correctly; while the jury may not arbitrarily disbelieve a witness, they are yet to judge of the truth of his testimony from his manner and appearance in giving it, as well

as from facts and circumstances sworn to, and the general harmony of the evidence; this, the jury would not understand from either of these instructions.

The 2d instruction asked for defendants, is law; and should have been given, as asked.

As modified and given by the court, the rule is so emasculated and uncertain as to be, in truth, no rule—but a medley of words, rather, tending to confuse and mislead the jury in their deliberations.

6th. For reasons assigned in the motion, and in part before indicated, the new trial asked should have been granted; there was, moreover, no sufficient or proper evidence that the maker of the note was a non-resident, or absent from the State, was to authorize suit against the assignees; and if the depositions of Stewart and Lombard be excluded, there is no evidence on this point.

The weight of evidence is also against the validity of the assignment, on which defendants are held.

J. K. COOPER, for Appellants.

1890-70

Hankinson vol.

es. es.

Lombard

appellants

Brief

Filed Apr. 24th 1861

Lorenzo Leland

Clerk

1.

State of Illinois }
Peoria County } Supreme Court April term 1861

Ambrose C. Hankinson & }
Alfred Freeman }
vs } Appeal from Peoria
Benjamin Lombard } County Court.

Argument of M. Williamson for deft

This suit was brought by Lombard against Hankinson and Freeman as endorsers of a note executed by ~~them~~ D. Mulford to them and by them by their agent assigned in blank and delivered to one Babcock and by him transferred to Lombard

The note was executed and dated at Peoria Illinois - and the first Count of the declaration avers that at the time of the maturity of the note Mulford the maker of the note was a non resident of the state of Illinois & was without the state so that process could not be served on him and so continued to the time of the commencement of the suit. The note matured on the 4th of May 1859 and suit was brought to the August term 1859 - There are but two questions

2.

properly arising ~~on the merits of~~ ⁱⁿ this case going to the merits which are

First

Was Mulford the maker of the note a non resident at the time of the maturity of the note? If so and if he was beyond the reach of process that fixed the liability of the endorser.

Second

Did Melham the agent of Hankinson and Freeman have authority to negotiate the note?

If the maker of the note had become non-resident at the maturity of the note and the agent had authority to negotiate it these questions must necessarily determine the case even if the Court erred in giving instructions to the jury or in admitting improper evidence. The Court will look at the merits of the case as presented by the bill of exceptions to determine whether injury has been done to the parties or not and if substantial justice has been done although error may have intervened they will refuse to reverse the case. There is no other way of putting an end to litigation which is and should be the aim of every Court when it does not do injustice to any person. Our own supreme court have

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uniformly acted upon this principle
 In 23^d Illino^s the Court say if they can
 see from the whole record that justice has
 been done the case will not be reversed even
 though the Court gave erroneous instructions
 or refused proper instructions or erred in
 allowing or refusing testimony
~~giving or refusing instructions~~

23 Ills Rep 502

18 " " 454

3 Gill R. 216

The foregoing authorities as well as numerous
 others clearly establish this rule - Then as
 to the first question whether Mulford the
 maker of the note was a non resident or beyond
 the reach of process at the maturity of the note

James C Stewart swears that he knows
 Mulford & has known him for three years
 did not know certainly where he resided in
 April May June & July 1859 but that he had
 no permanent residence & spends considerable
 of his time in trading - Most of the time he
 knew him he resided in Cincinnati Ohio
 that he corresponded with him mainly at
 that point - That on the 31st of July (which
 was after suit was brought) Mulford made
 an assignment to witnes reciting that his
 residence was in Cincinnati Ohio

Isaac G Lombard testified that

he had occasion to enquire after the residence of Mulford and did so in february 1859 at Cincinnati Ohio and found ^{him} in an office up stairs in a building on corner of Main and East seventh Streets Cincinnati Ohio where he had a safe and kept his papers - That Mulford told him he lived in Cincinnati Ohio gave him the number of his post office box told him where he stopp'd &c. - Witness further states that he enquired of as many as six persons in Illinois - That about the 5th of May 1859 (the day after the maturity of the note) he enquired in Galveston Illinois at Galva and at Cambridge - The witness now swears positively that Mulford's residence from the middle of April 1859 to the first of August 1859 was at or near Cincinnati Ohio That up to August first 1859 Mulford did not reside in Illinois

The depositions of either of the foregoing witnesses would raise a prima facie case that ~~the~~ Mulford did not reside in the State of Illinois between the 4th day of May 1859 and the commencement of the suit in June 1859 - But this is particularly so when the Defendants below Hawkins & Freeman got the Case continued at several terms for the express purpose of procuring the atten-

5,

dance of David Mulford the maker of the note and whom they introduced as a witness on the stand but never asked him a solitary question as to his residence. This was after the plaintiff below has closed his case and it would then be improper for the plaintiff to go into evidence in chief but proper for defendants to prove that Mulford was a resident of the State of Illinois by him and not having done so nor attempted it when they had the power in their hands to do it beyond controversy, ^{if it were true} they should not now be heard to complain that the jury decided against them on that point without sufficient light.

On page 32 of brief & record is the following "Defendants next called David Mulford who said my name is David Mulford and being shown the note sued on said 'I gave it at time it bears date I gave at the same time another note the same as this only payable ⁱⁿ one year'". If anything was untrue in either of the depositions or if any injustice had in any wise been done them they had it in their power then by the testimony of the maker of the note to put all right beyond controversy, but not having even attempted to do so their lips should be forever sealed on that

point - The man who voluntarily suffers a wrong to be done him should not be heard to complain that it was done

But even if the Court should be of the opinion that defendants are not estopped to complain on that point - I still contend that the depositions of Lombard and Stewart were properly in evidence for the following reasons

- 1 The first objection to the depositions is that they were not taken before any legally authorized officer. They were both taken in the State of Illinois before Notaries public who by our Statute have power to take and certify depositions

This power is expressly given to Notaries public by the 3^d section of Chapter entitled Oaths and Affirmations page 796 Statutes

- 2 The second objection to Stewards deposition is the latter portion of the answer to the 6th interrogatory and which states that in the assignment made by Mulford to him he (Mulford) stated his residence to be in Cincinnati Ohio. I apprehend that in proving residence the same strictness is never required as would be to prove a direct liability. It is merely a collateral fact - more analogous to a question of reputation and one to prove which the best evi-

7⁴ dence the case may admit of ~~and~~ ^{and} ~~con~~ facts
~~but a~~ ~~go~~ to be solved by such proof as
was introduced in that case. This was
peculiarly so in that case for the wit-
nesses state that Mufford had no per-
manent place of residence but was a
trading roving character and whose
home and residence for the time being
might be wherever he chose to locate it.
But taking this part of the answer in con-
nection with the ballance of even Stewarts
deposition and it is worse than folly or
nonsense to say that the defendants were
injured by it = If they were we might
here again ask the question why they did
not set it right by the testimony ^{of} their wit-
ness Mufford the only man perhaps
on the face of the earth who could pos-
itively swear where his place of residence
was and give facts and circumstances
convincing to the jury and which would
have overturned the testimony of both
Stewart & Lombard if their depositions
were not true. The truth is and which
was well known to them at the time that
no injustice whatever was done to them
by either the deposition of Lombard or
Stewart but that the depositions were

far more favorable to them than the full facts in the case would have left it

Such are the objections to Stewart's testimony. The defendant was present and cross examined Stewart - See page 1 plaintiffs brief. So that the objection that the time set for the taking of the depositions of Lombard & ~~Stevens~~ ^{Stewart} being the same time cannot affect the deposition of ~~Stevens~~ ^{Stewart}. And I insist that under the circumstances of the case the deposition of ~~Stevens~~ ^{Stewart} raises at least a prima facie case that Mulford was not in the State of Illinois at the maturity of the note nor after the commencement of the suit until about the time of the trial when the defendants brought him from Cincinnati Ohio to be used as a witness.

Third

1. As to the objections to Lombard's deposition. The two first objections to Lombard's deposition are the same as those to Stewart above. The next objection to Lombard's deposition is that notice was given to the defendants to take depositions of Stevens & Lombard on the same day at a place 70 or 80 miles distant from ^{each other}. The Statute provides that in taking the depositions of witnesses the

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party taking the same shall give the opposite party reasonable notice of the time and place of taking the same and then defines what reasonable notice shall be

Statute of 1845 page 234 Sec 11

The 12th Section of the same Chapter then provides how the same shall be certified & returned to the Court where the suit is pending ~~and then provides that any "every such deposition taken thus taken and subscribed"~~

Section 13 of same Chapter then provides that "every examination and deposition which shall be taken and returned according to the provisions of this Chapter may be read as good and competent evidence in the cause in which it shall be taken as if such witness had been present and examined in open Court on the hearing of the trial thereof"

Now it is not pretended but that the Statute was strictly complied with in the giving of notice but they seek to get in extrinsic matter to quash the deposition when the Statute says it shall be competent evidence - This they can not do - My belief is that it would be good cause to continue the case in order to give time to cross examine if the defendants desired to do so and on application for that purpose - but that was not the motion

And besides the Case was continued after the motion to quash was overruled at the October term 1859 (See page 17 of record) and the Cause was not tried until the March term 1860 - Here there were four terms of the County Court intervened after the motion was overruled but the defendants never made any effort to take the deposition of Lombard nor to Cross examine nor do they show any reason for not doing so but the affidavit shows that Lombard's deposition might have been taken at any time thereafter as he was only, about 40 miles ^{distant} ~~absent~~ - I know the practice of giving notice to take depositions at the different places to the same party at the same time ought not to be encouraged - but I do know in this case the defendants themselves were consulted by me as to the time they would prefer and that would be most convenient to them and they stated to me positively that they did not intend to rest their defence ~~on~~ that point and should not attend the taking of depositions in either place - I then gave them the notices and they expressed no dissatisfaction whatever - The idea to suppress the depositions for that cause was an after thought of Counsel intended

Where the objection to depositions are that they are irrelevant - it depends so much upon other testimony and the attitude of the case on the trial that it must be a very clear case of irrelevancy indeed before the court will hold the testimony improper
C. Brown (Plaintiff) 234 //

to baffle and delay the case when they might have retaken the deposition half a dozen times even after their motion was overruled - As I stated before this would be good cause to continue the case at the first term after the deposition was filed to enable the party to cross examine but the statute makes it absolutely evidence if due notice was given and therefore the deposition should not have been quashed - And besides there does not appear that any injury or wrong was done to the defendants as there were two of them and one might have attended the taking of the depositions in ^{each} both places or they might have employed counsel to attend the same - Where the statute is complied with the court will not suppress the deposition but may give time to repair any advantage that may have been taken of the opposite party

2 The other objection to Lombard's deposition I do not consider well taken - that is that the deposition was irrelevant - # The deposition very properly states ~~that~~ the degree of diligence that the witness used in order to ascertain the residence of Mulford and where he found him - The truth of this objection is that the witness stated the

full facts instead of inferences of his own and it was thereby left to the Court or jury to determine the weight to be given to the facts detailed by the witness - All this evidence would have been eminently proper under cross examination and I think was proper in examination in chief - If any part of Lombards deposition is irrelevant it could not possibly have injured the defendants as it merely detailed facts having a tendency to throw light on the question of diligence used to ascertain the residence of the maker of the note

The witness then states that Mulford the maker of the note resided from the middle of April 1859 (the note maturing on the 4th of May) until the first of August 1859 at Cincinnati Ohio - He also states that the said Mulford did not reside in the State of Illinois up to August 1859 and that after that time witness did not know where he resided - I apprehend it will not be contended that portion of the deposition is irrelevant

Now as to the second point that is Head Miehans the agent of the defendants

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Authority to negotiate the note - A great deal of effort was made to get in evidence that would not throw any light on this question and much more was attempted to be introduced of the same character. Mileham the agent for the defendants testified that he was agent for defendants and had been for a year previous to the execution of the note - testified what the note was given for that he had no written authority to act as their agent in that case - The witness states (page 29) I assigned said Mulford's notes by writing the names of Hankins & Freeman thereon and delivered them to Babcock - ~~This he says was in a trade with Babcock~~ He says he traded lots to Mulford and took his notes and then traded the notes to Babcock for three patent titles that he had previously traded to Babcock of defendants and that defendants got the benefit of the trade - Witness previously stated that defendants gave him orders to do the best he could in trading the lots and lands. This was a general power - Witness then states ~~I gave~~ when I returned to Peoria I gave the defendants the deed from Wiley for 5 Salva lots and told them all

14 ✓ ~~all~~ about the trade - That they found no fault and he understood them to ratify his doings in the matter - He says the defendants knew Mulford and they were engaged in the same business that he was - He was considered solvent at that time and the witness thought him to be a man of considerable means says he executed the assignment of the note by virtue of his general power as agent of the defendants and had done so before to which ~~plaintiff~~ defendants made no objection -

✓ On cross examination he says that the defendants threw patent titles that he had previously ^{were the consideration for the endorsement of the notes} traded to Babcock - That defendants told witness that when he was out selling lands he should sell the notes at ten per cent discount

On reexamination by the ~~defendant~~ plaintiff the witness states he told the defendants when he came home that he had endorsed the note sued on - That defendants never said anything to him about endorsing notes without recourse - That two of the titles he got of Babcock for which he traded the notes in suit he traded to Holloway & Boyzess for \$250. or \$300

The witness further states that in the trade with Babcock to whom he assigned the notes in suit that he got a note of Babcock for \$175 which he gave to the defendants. He afterwards says this \$175 was for one of the titles he sold of defendants.

Now from the whole of this testimony it can not be doubted but that the agent had authority to assign the note in question. Even if they did not expressly authorize him to do the identical act before he started on his journey to sell the lands yet being their general agent for more than one year previous thereto - having possession of the note assigned - having authority direct from them to discount any notes taken at 10 per cent discount and their approval when he returned and told them all about the trade and the assignment of the note sued on - it can not for a moment be doubted but that it is sufficient to bind them - To allow them to escape after such recognition and approval of their agent's acts would be to enable them to perpetrate a fraud upon innocent parties - The rule of law is that even if the agent did not have authority to do the particular act before he did it

yet if when he was informed thereof
 and did not object or approve the
 act he could not be heard afterwards
 to complain - A subsequent recog-
 nition is as binding as previous
 authority upon the principal - nor
 can he keep silent and apparently
 acquiesce in the act of the agent until
 he can determine whether the act
 will be of profit or disadvantage
 but he is bound in justice to all par-
 ties to disaffirm the act of the agent
 immediately upon learning what it
 is or he will be bound thereby - The
 principal in this case had no right
 to acquiesce in the act of the principal
 for the space of two years - reap all the
 benefits of the trade - Collect the note
 for \$175 - sell the lands received for the
 assignment of the notes and utter no
 word of complaint to any person until
 after the maker of the note had absconded
 and left the state - If ~~such~~ the princi-
 pal were suffered to pursue such a course
 it would deprive the party injured of any
 redress against the agent until perhaps
 many years after the act complained of
 were done and until the principal

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Should be sued on the contract of his agent when for the first time as in this case he would be met on the trial with the defence that the agent acted without authority - The law and the reason of the law is against such a course of conduct. When the agent on his return home informed his principals that he had made the trade and negotiated the note in suit it was the duty of the principals to disaffirm the act and give notice thereof ^{see following authorities}. The sole question to be proven by the agent after fixing the non residence of Mulford by the testimony of Stewart & Lombard's depositions was the authority of the agent to negotiate the note - The testimony that the defendants endeavored to get to the jury was all improper because it went to the original consideration between the original parties to the note and was improper - It would have been proper between the original parties to the note in a suit between them but not in a suit of endorsee against the endorser. It has been so often decided by this Court and all others that want or failure of consideration can not be interposed by the defendant when the note has been

of time - If no more protection is afforded by the law to persons who take negotiable paper it is far better that paper should not be suffered to be negotiated at all - If they wished to avoid liability on it why not instruct their agent to negotiate without recourse. This he swore they never did - There is no doubt but if Melford had remained solvent not one word of complaint would ever have been heard from them - Now under the whole facts of the case who can say that any wrong has been done to them or that the record does not show that substantial justice has ~~not~~ been done between the parties - whatever errors may have intervened on the trial of the cause either in giving or receiving instructions or admitting or rejecting testimony.

"The recognition of the agent's acts may be express or implied from the subsequent conduct of the principal as by his receiving the benefit of the act with knowledge - not because he has received the benefit of the act but because it was his own act in law"

"The principal must affirm or reject in toto he can not separate that which is beneficial to himself & reject the remainder

Bateman's Com Law Sec 455

In this case the principals received the benefit of the sale of the notes and have never rejected anything until sued on the assignment and even then do not offer to return anything received but hold to what they receive and deny their liability with the benefit of the trade in their own hands

"The subsequent ratification is equivalent to an express authority"

B Commercial Law Sec 457

1 Math & Ser pag 106

"When the principal has been informed what has been done he must either dissent and give notice of such dissent to the third party within reasonable time or in the absence of such dissent and notice thereof, ^{he} ~~it~~ will be presumed ~~that~~ to have ~~been~~ ratified the unauthorized act of his agent"

Bateman Com Law Sec 459

8 Pick R 9 1 John Cases 110

2 Kent C. 616 12 John Rep 300

14 Ser & R 30 6 Mass " 193

3 " " 70

12 " " 60

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In 14 Ser & Rawle page 30 the court judge Gibson says - "I take it to be indisputable that a principal who neglects promptly to disavow an act of his agent by which the latter has transcended his authority makes it his own act. He is bound to disavow it the first moment it comes to his knowledge"

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As to the point made by the appellant, that the note should not have been introduced in evidence because it had been endorsed in blank and delivered to Babcock there is certainly nothing - The law is certainly well settled that a promissory note or any other negotiable instrument may be endorsed in blank and delivered to any person and he may fill it up to himself and sue in his own name. This has been so long the rule in relation to negotiable paper that I shall not collect any authorities on this point.

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Mitcham's testimony, about the bonds and deeds given in the name of Hankinson & Freeman to others was proper - These were merely collateral questions arising on the trial and in such cases the party

Can not be presumed to be prepared to know all such collateral questions - Such a course would be manifestly unjust to require the assignee of a note before maturity to go prepared with the highest evidence to prove that the note was executed between the original parties upon a valuable consideration - The truth is he was not bound to show that there was any consideration moving between the original parties but having done more than the law required of him in that matter the defendants can not be heard to complain that he did not do enough or that what was proven was not by the highest evidence - All that the plaintiffs were required to prove on that point was that the agent had authority to transfer the note - and if he had that authority it makes no difference whether he received value for it or not - particularly when it comes into the hands of other than the parties receiving it from the agent They did not attempt to show any fraud in plaintiff in procuring the execution of the note or indorsement - Their sole effort was to prove that they were defrauded by their own agent - whom they had

held out to the world as worthy of confidence and trust - They even failed in this. But if any one had been defrauded by the agent it is better and more just that the principal who holds him out to the world as worthy of confidence should suffer than that any other person should - at all events they should have repudiated the act of their agent when it first came to their knowledge and thereby given the defrauded party his action against the agent and not rested two years before disavowing the agents acts. -

For the reason that all the evidence sought to be introduced by the defendants below went to the original consideration of the note it was properly rejected as well also was the evidence properly excluded by the Court for the same reason.

For the above reasons it is apparent that the verdict of the jury was right and that substantial justice has been done between the parties.

5 The defendants then offered David Mulford as a witness to impeach the consideration of the note between the original parties. He first swore that he executed the note sued on

and was then asked as to the consideration with a view to impeach the consideration between the original parties - No rule is better established than that a party to a negotiable note shall not be heard to impeach it when in the hands of an indorsee - The only thing that was proper for the defendants to establish by Mulford was that of his residence - This they refused to do

6 As to the instructions of plaintiff below

There is no doubt but the 8th instruction was proper. The case in 1 Scam Rep page 105 settles the objection to this 8th instruction and fully sustains the distinction made in that instruction that the fraud contemplated by the statute in order to avoid a promissory note or indorsement in the hands of an indorsee must be fraud in the obtaining of the note or indorsement and not fraud in the contract =

Taking all the instructions together there is no doubt but in connection with the evidence they truly state the law arising upon the case - In the case of Fortier vs Ballance the supreme court say "Errors have been assigned upon the giving and

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refusing instructions which we do not deem it necessary to notice in detail - Some of the instructions taken separately and by themselves would be erroneous, but when considered in connection with the evidence and other instructions given at the same time we can not say that the law was wrongly stated to the jury. Taken as a whole they lay down the law correctly and as they all went to the jury together we can see no error in them.

5 Gill. R 47

The objection to the ~~first~~^{second} and ~~second~~^{third} instructions is fully answered by the authorities first above quoted - where it is shown that it is the duty of the principal to disaffirm the act of his agent when it comes to his knowledge and give notice thereof and if he neglects to do so he will be bound by the act - The instructions were not as strong as the law would warrant for the plaintiff.

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As to defendant's instructions

They were all given but one and that was given modified by the Court and properly modified - The Court modified the instruction by telling the jury that if Milham was impeached in the material

parts of his testimony. They might take that into consideration in determining whether they would disregard his testimony. It is true that a jury are not bound to disbelieve a witness because another has sworn differently - but it is evidence that they may consider to determine whether they will disregard it or not -

But before a witness can be impeached it must be upon some material point in the case at issue - The defendants never attempted to contradict or impeach the witness upon any material point at issue in the case - Their efforts were directed to show that the consideration of the note was not in all respects as stated by the witness - This was wholly immaterial upon the issues formed and tried in the case and as there was no evidence whatever tending to impeach him upon any material point - or upon his authority to negotiate the note the instruction should have been wholly refused

A court should not encourage attempts to give impertinent evidence or instructions but parties should be confined strictly to the issues proper to be tried In no other way ~~the~~ can justice be

27= insured to parties litigant. Any other rule only tends to promote confusion and confounds a jury until they wholly lose sight of the questions at issue. A verdict for the defendants in this case would have been unjust and would have been reversed upon this record and therefore one for the plaintiff will not be disturbed - Both parties in the evidence took too wide range but as no injustice was done the verdict will not be disturbed.

W. Williamson

att'y for defendant

189-70
Ambrose C. Hawkins
Alfred Freeman
vs
Benjamin Lombard

argument of
Mr. Williamson

Filed May 9 1861
L. Leland
Clerk

SUPREME COURT OF ILLINOIS.

Third Grand Division.—April Term, 1861.

AMBROSE C. HANKINSON,	}	<i>Appellants.</i>	}	<i>Appeal from County Court of Peoria County</i>
ALFRED FREEMAN,				
VS.				
BENJAMIN LOMBARD, <i>Appellee.</i>				

ABSTRACT.

- Pages.* This is an action of assumpsit brought to the August Term, A. D., 1859, of
1, 2. the County Court of Peoria County, by appellee against appellants, as endorsers of the following note:
- \$275 PEORIA, May 4, 1857.
3. "Two years from date, I promise to pay Hankinson & Freeman, or order,
"Two Hundred and Seventy-Five Dollars for value received at six per cent. in-
"terest from date." (Signed) "D. MULFORD."
Endorsed.
"Pay Benjamin Lombard."
"HANKINSON & FREEMAN."
- 2, 3. The declaration contains one special count in the common form, with averment that at the maturity of said note and at all times since, said Mulford was, and yet is, a non-resident of Illinois; and without said State, so that process could not be served on him. There is also a count for money had and received.
5. 1st. General issue.
6. 2d. Non est factum, sworn to by defendants.
- 3d. That said Mulford was not a non-resident, &c.
7. 4th. That said Mulford was not without the State, as in said declaration alleged.
- Issue joined on all said pleas.
9. Motion by Defts to suppress depositions of Stewart & Lombard. Overruled.
10. Agreement that notice to Freeman for taking of depositions sufficient.
- 14, 15. Trial by jury at March Term, 1860. Verdict for plffs., March 29, 1860. Motion for new trial. Motion overruled.
16. Appeal prayed.
17. Bill of exceptions filed October 24th, 1859, shows that Defts moved to suppress depositions of John C. Stewart & Isaac G. Lombard. Because,
- 1st. Not taken before a legally authorized officer.
- 2d. Latter part of Stewart's answer to 6th question, incompetent testimony.
- 3d. Lombard's deposition incompetent and irrelevant testimony.
18. 4th. Same time set to take deposition of Lombard as of Stewart and at a different and distant point. That defendant's were present to cross examine Stewart, and thus prevented from attending to cross examine Lombard as shown by affidavit of Freeman, set out. See affidavit, pages 19 and 20 of Record which shows service of notices to take both said depositions at same time, viz: that of
- 19, 20.

Stewart at Galesburg, in Knox county, and that of Lombard at Henry, in Marshall county—the former 55 miles west, and the latter 40 miles north-east from Peoria. That Deft's attended at Galesburg at the time named; but were prevented by distance, &c., from being present to cross-examine Lombard.

Notice to take deposition of said Stewart, at Galesburg, on the 14th of Sept. 1859, between 8 A. M. and 6 P. M., of said day.—Page 20 of Record.

21. Deposition of James C. Stewart: Am thirty-seven years old, reside in Galesburg, Illinois: am a dealer in Real Estate, know David Mulford, have known him about three years, do not know certainly where he resided during April, May, June and July, 1859. Is a widower and has no permanent home, spends considerable time in trading. Most of the time I have known him, he has lived in Cincinnati, Ohio. Have corresponded with him mainly at that point. The same is true of the four months referred to above. He has spent part of his time with his children at Geneseo, in this State; he was there on the thirty-first of July last, and made a deed of assignment to me, in which he stated his residence to be Cincinnati, Ohio. The recital in Mulford's assignment about his residence, here given, is the part of answer to 6th int. Excepted to.

23. Deposition of Isaac G. Lombard: I reside in the town of Truro, Barnstable County, Mass.; had occasion to enquire after the residence of David Mulford; did so on February 19th, 1859, at Cincinnati, Ohio, and found him in an office up stairs, in a building on corner of Main and East Seventh streets, Cincinnati, Ohio, where he had a safe and kept his papers. Mulford told me he lived about Cincinnati, Ohio, most of the time: that his post office box was 382, Cincinnati, Ohio; that when there for any length of time he stopped at Mrs. Cranston's, Covington, Kentucky, but when he arrived on night trains he stopped at the U. S. Hotel, Cincinnati. I enquired of as many as six persons, about his residence. 24. About May 5th, '59, I enquired at Galesburg, Illinois, of John C. Stewart. About the first of July, '59, I enquired at Galva and at Cambridge, Illinois. David Mulford's residence from the middle of April, 1859, to the first of August, 1859, was at or near Cincinnati, Ohio. Don't know his residence since August 1, 1859. Up to Aug. 1, 1859, Mulford did not reside in Illinois.

25. Notice to take deposition of said Lombard, at Henry, Marshall County, on the 14th of September, 1859, between 8 A. M. and 6 P. M. of said day.

26. Motion to suppress overruled, and Defts except.

26. Bill of Exceptions No. 2: filed March 30th, '60, shows that on the trial, plaintiff offered first the note and endorsement above set out, to the reading of which to the jury Defts. objected. Plff. then called John Mileham and offered to prove by him that the endorsement is in his (witnesses) hand writing; that the same was done in absence of Defts. That witness made said endorsement, as their agent, and with their authority. To the calling of said witness for which purpose Defts. objected. Objection overruled and Defts. excepted. Said Mileham then testified that he had seen said note. It was given in May, 1857. I was agent for Defts. and had been for some time, perhaps a year previously. Defts. were land dealers in Peoria, doing an extensive business. Witness was their general agent to sell lands and take notes. Had no written authority from Defts. This note was given for lots in Town of Galva, Henry Co. Ill. Defts. had land in Henry Co. and one piece in Warren Co. I traded the patent titles to four tracts, three in Henry and one in Warren Co., with one Babcock, for 5 Galva Lots. The titles to lands, so traded we did not expect to get anything for. They were worthless, I

deemed them no titles. Defts. had often told me to trade them off so as to get their money back. When I traded them for the Lots I executed a Bond to Babcock in the name of Hankinson and Freeman for them, and took a deed to Hankinson and Freeman for the lots from Wiley who held the title. These lots I afterwards sold to Mulford. There were five of them. I think I executed a Bond to Mulford in name of Hankinson and Freeman for title to the lots, and took from Mulford note sued on, and one other of the same amount for the lots. At Mulford's suggestion I brought the deeds from Wiley for the lots to Hankinson and Freeman, a week or ten days after the trade, and they executed deeds to Babcock for the same lots for which I had made Bond to Mulford. This testimony about said bonds and deeds objected to by Defts., and production of said bonds and deeds called for. Objection overruled. Evidence admitted, and Defts. except. Witness further testified, I assigned said Mulford notes, by writing names of Hankinson and Freeman thereon and delivered them to Babcock. This was on Monday, May 4, '57. I traded the lands to Babcock May 2, '57. Next day I traded the lots to Mulford, and on Monday I traded the notes to Babcock. I got for Defts. from Babcock, for endorsing the notes to him, three of the patent titles I had traded to him for the lots. The other Patent title he retained and surrendered the bond I had given him. I made him a new bond for the tract he retained. Defts. afterwards made a deed to Babcock therefor. (Defts. here objected to this evidence unless said bond be produced. Objection overruled, and evidence admitted and Defts. except.) Defts. got the benefit of lands taken back from Babcock, for the Patent title which Babcock retained—

~~He~~ gave me notes amounting to 175 dollars, which I gave Defts. (Objection by Defts to evidence about said notes unless produced, or notice to Defts. Overruled, and Defts except.) Witness further stated. When I returned to Peoria, I delivered to Defts the deed from Wiley for the 5 Galva lots, and told them all about the trade. I don't remember what they said, but they found no fault, and I understood them as ratifying my acts in the matter. They knew Mulford—were engaged in the same business. I don't know whether they knew his pecuniary circumstances. I never heard them speak of his property. He was generally considered solvent at that time. I thought him to be a man of considerable means. I don't know what his means were when note fell due. I executed this assignment by virtue of my general agency. I had once before discounted and assigned for Pliffs, a note of theirs on Holloway & Boggess, to which Pliffs made no objection. Pliffs here again offered said note and endorsement in evidence, which were admitted by the court and read to jury, against objection of Defts, to which Defts excepted.

Cross Ex. Witness said. This endorsement was made either the day of date of note, or day after, I am not certain which. The trade for the lots was on Saturday, May 2d, '57. Babcock had bought the Lots from Wiley and had Wiley make deed direct to Defts. I had a written authority from Defts sometimes, where I was not known. I made Bonds under seal in their names without written authority. Defts knew of Bonds I made to Mulford in this case. I told them of it. The deed which Defts made for Lots to Babcock, I mailed to H. D. Ward, of Galva, a week after the trade, to be delivered to Babcock, when Mulford would surrender Defts Bond for the lots to him. I afterwards got the deed from Ward and delivered it to Babcock. I don't know whether Babcock gave any Bond to Mulford for the lots. The only Bond I know anything of as having passed for these lots is the one I gave Mulford in name of Defts as above stated. I suppose Mulford still holds this Bond for the lots. All Defts got for endorsing these notes was the three patent titles, I had traded Babcock. The \$175 was given for title retained by Babcock. The titles taken back I considered scaly. Defts told me, when I was out and sold lands I should sell the notes for 10 per cent. discount. Don't

know whether I ever endorsed notes for them, except in case of Holloway & Boggess.

Re-Ex. Told Defts when I came home, I had endorsed this note. Nothing was ever said to me about endorsing notes without recourse. Two of the titles I took back from Babcock, I sold to Holloway & Boggess, I think for \$250 or \$300 and and took their notes to Alfred Freeman. Freeman has sued Holloway & Boggess for same in this Court, and recovered judgment, and Holloway & Boggess, have appealed to Supreme Court.

31. 2d Cr. Ex. Two of tracts I took back, were in same Township one on section 18, one on sec. 20, 9 north, 1 west, I think. Can't clearly recollect the numbers. The other lay in another county. I sold two of them to Holloway & Boggess, can't recollect the numbers, have memorandum at my office from which I can tell. Witness here requested by Defts. Atty. to go and consult his memoranda to fix definitely the lands sold to Holloway & Boggess and went out but did not return, tho' twice called. Plff. next offered and read in evidence to jury, subject to objections before taken, the Depositions of Stewart & Lombard, above set out. Plff. then rested. Defts. then offered and read following note, viz:

\$401. PEORIA, April 24, 1857.

32. One year after date we promise to pay to the order of Alfred Freeman, four hundred and one dollars for value received, bearing interest at six per cent. from date.
HOLLOWAY & BOGGESS.

34. Having first identified said note by Mr. Williamson, as same referred to in testimony of Mileham, as taken by him on sale of land to Holloway & Boggess, and on which judgment was rendered, and appealed from to Supreme Court. Deft next called David Mulford, who said my name is David Mulford, and being shown note sued on, said, I gave it at time it bears date, I gave at same time another note, the same as this, only payable in one year. The consideration of the note was the purchase from Babcock of Galva property. Babcock, at the same time gave me his title Bond for said property. Witness here produced a contract, dated May 4th, 1857, executed by Franklin Babcock to witness, covenanting to convey to witness lots 111 and the N. W. qr. of Lot 109 part of the N. W. qr. of sec. 34 T. 14 N. R. 4 E., upon the payment by witness of two notes drawn by witness. Two notes in favor of Hankinson & Freeman in the sum of \$275 each. One payable May 4th, 1858, the other payable May 4th 1859, and taxes on said lots. And said this is the Bond referred to. It was executed to me at time it bears date, by Babcock. Is the only Bond I ever held or have any recollection of receiving for the lots for which these notes were given. Defts. then offered said Bond in evidence. Plff. objected. Objection sustained and Defts. excepted. Witness further said I never received any Bond from Hankinson & Freeman, or their agent for Galva Lots. My trade was with Babcock. I did not know Hankinson & Freeman, or Mileham, to my recollection in it, any further than the notes were made to Hankinson & Freeman, and I did this, simply because it was requested and it was immaterial to me to whom they were payable. I bought no Galva Lots except those named in this Bond. There was one lot and a quarter sold to me by Babcock for which the two notes of \$275 each were given.

36. Cr. Ex. My impression is my trade for the lots was entirely with Babcock.—Mileham was present and drew the notes. The Bond Babcock drew—Mileham and Babcock figured together for sometime. I don't remember knowing Mileham

or Hankinson & Freeman in the trade. I know nothing of the Bond I hold, being given in consequence of any trade between Mileham and Babcock. I only know of my trade with Babcock. Know nothing of any other.

Re. Ex. In addition to the notes given by me in this trade, I also gave as part consideration for the lots, a gold watch and chain valued at \$150, as the cash, payment.

37. 2 Or. Ex. I cannot say whether Mileham knew said watch and chain were given in the trade, I think he and Babcock were both present. I afterwards saw the chain in Mileham's hands and talked with him about trading for it. Plff. then moved court to exclude this evidence about the watch and chain, as being irrelevant. Motion sustained and Defts. excepted. This was all the evidence in the case.

Plff. asked the following instructions :

1st. If jury believe from the evidence that Mulford executed the note sued on, to Defts. and Defts. or their authorized agent, assigned the note in blank, and delivered it to Babcock before due, and that it afterwards, before due, came to the hands of Plff. they will find for Plff.

38. 2d. If jury believe from the evidence that Mileham had no authority to act as Defts. agent when he assigned the note, yet if his acting as such agent, subsequently came to their knowledge, and they did not object. Plff. shall recover.

3d. Even if the agent exceeds his authority, if when his principal is informed of his act, he does not object to it, or approves it, this amounts to a ratification of the principal, and is as binding as if the agent had authority before so acting.

4th. It makes no difference what the consideration of the note is, between Mulford and Defts. or whether there was any for making it. If the note was assigned and put in circulation by Defts. or their authorized agent—or which was subsequently ratified by Defts., Plff. must recover.

39. 5th. If Mileham had authority from Defts. to buy, sell and trade lands or dispose of notes taken in such sale or trades, for them and in their name, the law presumes he was authorized to do whatever is usual and customary in such business, (except making deeds, which he could only do by power under seal.) And the giving, taking and endorsing notes is a usual incident to such transactions.

6th. If Mileham had authority to negotiate paper in their name, either for purposes of trade or discount, any bona fide holder, of paper indorsed by him in the name of his principals is entitled to recover on it, notwithstanding there may have been fraud in execution of indorsement on part of agent, or want of consideration for the indorsement.

7th. Jury are instructed, that when Plff. gave in evidence the note sued on, and proved the non-residence of the maker, at the time it fell due, the liability of Defts. is established and the burden of proof is on Defts. to show a good defence, and if Defts. have failed to show a good defence, you must find for Plff.

40. 8th. Jury are instructed, that the fraud which will vitiate a note in the hands of bona fide holders, is not fraud in the *execution* ; but in *obtaining* the execution of the note ; and though they may believe that as between Mileham and Defts

there was fraud in the execution of the note, yet if there was no fraud on the part of the immediate assignee, in obtaining the execution by Mileham, this fraud cannot vitiate the note.

9th. Fraud is never presumed against any one, and the party setting up fraud must prove it by clear and positive evidence.

10th. The Jury must consider all the evidence in the case, and circumstances sworn to, to determine truthfulness of the witness, also, length of time that has elapsed since the occurrence of the events sworn to; and unless they believe from all the facts and circumstances sworn to, that the witness swore false, they are bound to believe him.

11th. The Jury are bound to believe the testimony of witnesses, unless impeached, or unless they cannot reconcile their testimony, and make it harmonize with all the facts and circumstances proven. All of which were given to the jury and to the giving of which Defts. excepted.

Instructions asked by Defts.

1st. Unless the Jury believe from the evidence that the assignment on the back of the note was made by Defts., or one of them, or by their authority, or if without authority, was afterwards expressly sanctioned by them, with a full understanding of all the facts, they must find for Defts.

2d. The only proof before the jury of authority to make said assignment, or of acquiescence in it, is that of Mileham, and if the jury believe he stands successfully impeached in any one material part of his testimony, they may properly disregard his testimony altogether, as unworthy of credit, and in that event find for Defts.

3d. The maxim of law in regard to credit of witnesses is, that where a witness is shown to have sworn wilfully false in any one material particular in the suit, he may properly be regarded as unworthy of credit in all other parts of his testimony not corroborated by other evidence.

Which instructions were given as asked except the second, which the court refused to give as asked and gave the same, modified as follows, viz :

2d The only proof before the jury of authority to make said assignment, or of acquiescence in it, is that of Mileham, and if the jury believe he stands successfully impeached in the material parts of his testimony, they may properly take such impeaching evidence into consideration, to determine them in disregarding his testimony altogether, as unworthy of credit, and in that event find for Defts

To the modifying of which 2d instruction and giving the same only as modified. Defts. objected and excepted. Jury returned verdict for Plff. for \$322 85. Motion for new trial and in arrest of judgment. Because :

1st. Court admitted improper evidence on part of Plff. and erred in refusing to compel production of papers called for by Defts.

2d. Exclusion of proper evidence offered by Defts.

3d. Error in instructions given for Plff.

4th. Refusal of proper instructions asked by Defts.

5th. Court erred in modifying instructions asked by Defts.

6th. Verdict against law and instructions given.

7th. Verdict against evidence.

8th. Verdict should have been for Defts.

Motion overruled and judgment for Plff. Exception by Defts.

ASSIGNMENT OF ERRORS.

1st. In overruling motion to suppress depositions of John C. Stewart and Isaac G. Lombard and admitting the same and each part thereof in evidence.

2d. In admitting Mileham to prove assignment of note, and allowing said note to be read in evidence.

3d. In permitting evidence of writings to be given without producing the same.

4th. In excluding proper evidence offered by Defts.

5th. Error in instructions given for Pltff.

6th. In refusing proper instructions asked by Defts., and in modifying the same.

7th. In overruling motion for new trial and arrest, and rendering judgment for Plff.

8th. In not rendering judgment for Defts.

J. K. COOPER, *for Appellants.*

Joined in error by M. WILLIAMSON, *for Appellees.*

~~174~~ 189

SUPREME COURT OF ILLINOIS.

Third Grand Division—April Term, 1861.

AMBROSE C. HANKINSON, } Appellants.
ALFRED FREEMAN, }
vs.
BENJAMIN LOMBARD, Appellee.

APPEAL FROM PEORIA Co. COURT

ABSTRACT.

H. COUCH, Printer, Peoria, Ill.

Filed Apr. 16th 1861
L. Leland

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\$401.

PEORIA, April 24, 1857.

32. One year after date we promise to pay to the order of Alfred Freeman, four hundred and one dollars for value received, bearing interest at six per cent. from date.
HOLLOWAY & BOGGESS.

34. Having first identified said note by Mr. Williamson, as same referred to in testimony of Mileham, as taken by him on sale of land to Holloway & Boggess, and on which judgment was rendered, and appealed from to Supreme Court. Deft next called David Mulford, who said my name is David Mulford, and being shown note sued on, said, I gave it at time it bears date, I gave at same time another note, the same as this, only payable in one year. The consideration of the note was the purchase from Babcock of Galva property. Babcock, at the same time gave me his title Bond for said property. Witness here produced a contract, dated May 4th, 1857, executed by Franklin Babcock to witness, covenanting to convey to witness lots 111 and the N. W. qr. of Lot 109 part of the N. W. qr. of sec. 34 T. 14 N. R. 4 E., upon the payment by witness of two notes drawn by witness. 35. Two notes in favor of Hankinson & Freeman in the sum of \$275 each. One payable May 4th, 1858, the other payable May 4th 1859, and taxes on said lots. And said this is the Bond referred to. It was executed to me at time it bears date, by Babcock. Is the only Bond I ever held or have any recollection of receiving for the lots for which these notes were given. Defts. then offered said Bond in evidence. Plff. objected. Objection sustained and Defts. excepted. Witness further said I never received any Bond from Hankinson & Freeman, or their agent for Galva Lots. My trade was with Babcock. I did not know Hankinson & Freeman, or Mileham, to my recollection in it, any further than the notes were made to Hankinson & Freeman, and I did this, simply because it was requested and it was immaterial to me to whom they were payable. I bought no Galva Lots except those named in this Bond. There was one lot and a quarter sold to me by Babcock for which the two notes of \$275 each were given.

36. Cr. Ex. My impression is my trade for the lots was entirely with Babcock.—Mileham was present and drew the notes. The Bond Babcock drew—Mileham and Babcock figured together for sometime. I don't remember knowing Mileham

or Hankinson & Freeman in the trade. I know nothing of the Bond I hold, being given in consequence of any trade between Mileham and Babcock. I only know of my trade with Babcock. Know nothing of any other.

Re. Ex. In addition to the notes given by me in this trade, I also gave as part consideration for the lots, a gold watch and chain valued at \$150, as the cash, payment.

37. 2 Cr. Ex. I cannot say whether Mileham knew said watch and chain were given in the trade, I think he and Babcock were both present. I afterwards saw the chain in Mileham's hands and talked with him about trading for it. Plff. then moved court to exclude this evidence about the watch and chain, as being irrelevant. Motion sustained and Defts. excepted. This was all the evidence in the case.

Plff. asked the following instructions :

1st. If jury believe from the evidence that Mulford executed the note sued on, to Defts. and Defts. or their authorized agent, assigned the note in blank, and delivered it to Babcock before due, and that it afterwards, before due, came to the hands of Plff. they will find for Plff.

38. 2d. If jury believe from the evidence that Mileham had no authority to act as Defts. agent when he assigned the note, yet if his acting as such agent, subsequently came to their knowledge, and they did not object. Plff. shall recover.

3d. Even if the agent exceeds his authority, if when his principal is informed of his act, he does not object to it, or approves it, this amounts to a ratification of the principal, and is as binding as if the agent had authority before so acting.

4th. It makes no difference what the consideration of the note is, between Mulford and Defts. or whether there was any for making it. If the note was assigned and put in circulation by Defts. or their authorized agent—or which was subsequently ratified by Defts., Plff. must recover.

39. 5th. If Mileham had authority from Defts. to buy, sell and trade lands or dispose of notes taken in such sale or trades, for them and in their name, the law presumes he was authorized to do whatever is usual and customary in such business, (except making deeds, which he could only do by power under seal.) And the giving, taking and endorsing notes is a usual incident to such transactions.

6th. If Mileham had authority to negotiate paper in their name, either for purposes of trade or discount, any bona fide holder, of paper indorsed by him in the name of his principals is entitled to recover on it, notwithstanding there may have been fraud in execution of indorsement on part of agent, or want of consideration for the indorsement.

7th. Jury are instructed, that when Plff. gave in evidence the note sued on, and proved the non-residence of the maker, at the time it fell due, the liability of Defts. is established and the burden of proof is on Defts. to show a good defence, and if Defts have failed to show a good defence, you must find for Plff.

40. 8th. Jury are instructed, that the fraud which will vitiate a note in the hands of bona fide holders, is not fraud in the *execution* ; but in *obtaining* the execution of the note ; and though they may believe that as between Mileham and Defts

there was fraud in the execution of the note, yet if there was no fraud on the part of the immediate assignee, in obtaining the execution by Mileham, this fraud cannot vitiate the note.

9th. Fraud is never presumed against any one, and the party setting up fraud must prove it by clear and positive evidence.

10th. The Jury must consider all the evidence in the case, and circumstances sworn to, to determine truthfulness of the witness, also, length of time that has elapsed since the occurrence of the events sworn to; and unless they believe from all the facts and circumstances sworn to, that the witness swore false, they are bound to believe him.

11th. The Jury are bound to believe the testimony of witnesses, unless impeached, or unless they cannot reconcile their testimony, and make it harmonize with all the facts and circumstances proven. All of which were given to the jury and to the giving of which Defts. excepted.

41.

Instructions asked by Defts.

1st. Unless the Jury believe from the evidence that the assignment on the back of the note was made by Defts., or one of them, or by their authority, or if without authority, was afterwards expressly sanctioned by them, with a full understanding of all the facts, they must find for Defts.

2d. The only proof before the jury of authority to make said assignment, or of acquiescence in it, is that of Mileham, and if the jury believe he stands successfully impeached in any one material *part* of his testimony, they may properly disregard his testimony altogether, as unworthy of credit, and in that event find for Defts.

3d. The maxim of law in regard to credit of witnesses is, that where a witness is shown to have sworn wilfully false in any one material particular in the suit, he may properly be regarded as unworthy of credit in all other parts of his testimony not corroborated by other evidence.

42.

Which instructions were given as asked except the second, which the court refused to give as asked and gave the same, modified as follows, viz :

2d The only proof before the jury of authority to make said assignment, or of acquiescence in it, is that of Mileham, and if the jury believe he stands successfully impeached in the material parts of his testimony, they may properly take such impeaching evidence into consideration, to determine them in disregarding his testimony altogether, as unworthy of credit, and in that event find for Defts.

43.

To the modifying of which 2d instruction and giving the same only as modified, Defts. objected and excepted. Jury returned verdict for Plff. for \$322 85. Motion for new trial and in arrest of judgment. Because :

44.

1st. Court admitted improper evidence on part of Plff. and erred in refusing to compel production of papers called for by Defts.

2d. Exclusion of proper evidence offered by Defts.

- 3d. Error in instructions given for Plff.
45. 4th. Refusal of proper instructions asked by Defts.
- 5th. Court erred in modifying instructions asked by Defts.
- 6th. Verdict against law and instructions given.
- 7th. Verdict against evidence.
- 8th. Verdict should have been for Defts.
- Motion overruled and judgment for Plff. Exception by Defts,

ASSIGNMENT OF ERRORS.

- 1st. In overruling motion to suppress depositions of John C. Stewart and Isaac G. Lombard and admitting the same and each part thereof in evidence.
- 2d. In admitting Mileham to prove assignment of note, and allowing said note to be read in evidence.
- 3d. In permitting evidence of writings to be given without producing the same.
- 4th. In excluding proper evidence offered by Defts.
- 5th. Error in instructions given for Pltff.
- 6th. In refusing proper instructions asked by Defts., and in modifying the same.
- 7th. In overruling motion for new trial and arrest, and rendering judgment for Plff.
- 8th. In not rendering judgment for Defts.

J. K. COOPER, *for Appellants.*

Joined in error by M. WILLIAMSON, *for Appellees.*

~~191~~ 189-70

SUPREME COURT OF ILLINOIS.

Third Grand Division—April Term, 1861.

AMBROSE C. HANKINSON, } *Appellants.*
ALFRED FREEMAN, }
VS.
BENJAMIN LOMBARD, *Appellee.*

APPEAL FROM PEORIA Co. COURT

ABSTRACT.

H. Couch, Printer, Peoria, Ill.

Filed Apr. 16th 1861

L. Leland

Clerk

Ambrose C. Hankinson } In the Supreme
Alfred Freeman } Court - 3^d Grand
as } division - April
Benjamin Lombard } Term A.D. 1861 -
 appcal from Peoria Co Ct -

On behalf of the appellants herein the following suggestions, in addition to printed Brief, and mainly in reply to statements & points made & discussed in the argument of appellee's counsel, are respectfully submitted for the consideration of the Court. - And first, Mr Williamson commences by assuming that the note sued on was assigned by Hankinson & Freeman, "by their agent," and delivered to Babcock & by him transferred to Lombard; and then states that it "was executed & dated at Peoria, Illinois." Whether the agent, referred to, was authorized to endorse this note is the material point in dispute, as will appear hereafter, and as to the statement that the note was, "executed &c at Peoria" it is simply untrue, as shown by the record (see testimony of Milham & Mulford). The whole transaction occurred at Galva, in Henry county, in the absence & without the knowledge (as clearly appears) of appellants, and in the presence of Babcock. - And the fact that it purports to have been done at Peoria, where appellants were known to reside, together with the form of the endorsement, which does not assume to be made by procuration, or by

any one, as agent, but as done by appellants, or
one of them, in person, is significant, as man-
ifesting collusion between Wheeler & Babcock,
to have the thing in a shape to pass ^{as} the actual
signature of appellants, and so avoid troub-
lesome inquiries, which might otherwise
arise, about the authority of the agent to make
the endorsement. It will be noted too, that Bab-
cock escapes liability by having the endorsement,
in blank, and passing the note upon the credit,
so far as the endorsement goes, of Appellants a-
long. And this case affords another instance,
as it seems to me, of the propriety of the construc-
tion of our statute, on this subject of blank en-
dorsements, presented briefly in my written ar-
gument in the case of Chas. C. Parish, at the
present term. to which the court is referred in
printed brief herein. For it is a fact, tho' perhaps
not distinctly appearing in the record, that, up
to or about the time of this trial, and the testi-
mony of Mulford, appellants were quite in
the dark as to the character of this transaction -
Babcock's connection with it, and how their
names came to appear in the note - ~~these~~ ^{these} cir-
cumstances also (not to speak of others br'd out
in the evidence) help to show what force is due
to the remark of counsel - that justice has been
done, and that therefore this court will not
disturb the verdict & judgment below.

Whatever errors may be found in the record. The point at issue, (assuming the non residence of the maker of the note to be properly established) is simply, whether a gross fraud or forgery, was or was not perpetrated upon the appellants by the endorsement of their names upon the note, and the court cannot well know that justice has been done without looking into the record to see what opportunity was afforded to have that question fairly determined; and inspection of the record, it is believed, will exhibit most undue bias, on the part of the Court, against these appellants, throughout. While the nature of the issue, (especially when the man charged with the actual perpetration of the fraud and the only witness relied on to disprove it, rendered it eminently proper that the leaning, if any, should have been the other way - but of this more hereafter -

Next as to the non residence of Mulford, the maker of the note. The averment in the declaration is, that Mulford is a non-resident, and at the maturity of the note, and at all times since, has been without the state, so that process could not be served upon him - and in this form issue is taken. It is not enough either under this declaration or the statute, that the maker of the note, be simply a non-resident of the state. If he be found here, so that he may be served with process, when the note matures, he must be duly proceeded against, before the assignor can be

held = The only proof on this point is the deposition of Stewart & Isaac S. Lombard. For reasons indicated in the printed brief, the deposition of Lombard should have been suppressed. But it is sought to parry the force of the objection - first by the suggestion that we might have continued the case, and cross-examined the witness afterwards - and secondly - That we had Mulford himself on the stand, and might have got the truth out of him, on the subject. To the former of these positions it is deemed sufficient to reply, that there is neither ~~precedent~~ precedent, nor authority for any thing of the kind. The deposition was taken & returned, and so quite out of the reach of the defendants below in so far as any opportunity for cross-examination was concerned - and if irregularly taken, as ^{the} argument admits, it was clearly the duty of the court to suppress it, and require the plaintiff himself to take it over again, on proper notice, if he wanted it, and not impose ^{upon} the defendants the necessity of making the witnesses their own, in order to get in an attitude to cross-examine him. The other suggestion is founded on a misapprehension of the relation of the parties to the suit. It was plainly not the business of the defendants to disprove, but for the Plaintiff below to prove that Mulford was a non-resident and absent, so

that he could not be ~~seen~~; and if Plff failed to establish the fact affirmatively by Mulford, who was present at the trial, it will not do, for him to turn round & charge the Dft with letting an opportunity slip, which the law did not call upon them but upon him to embrace. As to the remark of counsel that defendants told him they did not rest their defence on this ground & should not attend the taking of either of these depositions, and that the idea of suppressing for this cause was an after thought &c. &c. it is enough to say, that it is entirely outside the record, and is, besides, inconsistent with the affidavit of Pindeman, and the fact that we did attend to cross-examine Stewart.

Assuming then that the deposition of Cornbarrel was improperly admitted in evidence the case ought to be reversed for that reason, as the court cannot know but that it was this testimony which determined the jury to find the facts of non-residence & absence of the maker of the note, so as to authorize suit against the endorser. As to the testimony of Stevens, except what is said of the recital in the Mulford assignment, and which is plainly illegitimate evidence, there is certainly not enough to raise a legal presumption that Mulford was a non-resident or absent, so as to prevent service of process on him, between the maturity of the note

& suit brought. It is true the witness says - "most
of the time I have known him he has lived" (not
resided, ^{the counsel for} as appellee has it) in Cincinnati, Ohio,
And that witness has corresponded with him
mainly there, but he also says explicitly, that he
does not know, "where he resided during April,
May, June & July 1839" - That "he is a wid-
ower and has no permanent home, & spends
considerable time in trading, (which in the
connection, mean, I suppose, trafficking at dif-
ferent points) and that "he has spent part of his
time with his children at Genesee" (in Henry
county, where the note was given), in this state"
and "was there on the 31st of July last" (1839)
"and made a deed of assignment to witness" - Now,
the note matured on the 4th of May 1839, and suit
was brought in July 1839, to the August term fol-
lowing - and here is a witness who knew him for
three years, corresponded with him & was on such
terms of intimacy as to be made the assignee of
his property, who yet says that in the months of
April, May, June & July 1839 he did not know
where he resided, but that his children (he being
a widower) lived in this state during the time,
and that he had spent part of his time with
them, and was found there, assigning his property,
near the time the suit commenced. From all
which it seems to me the legitimate inference
rather is, that he was not absent from the state

or a non resident within the meaning
of the law, or the pleadings in this case =

On the 2^d point discussed by Appellee's counsel
viz: the authority of Milham to bind the appel-
lants by enclosing the note in their names,
(which is traversed under oath in the pleadings).
I remark generally, (without replying specially
to all that is said, which would be tedious) - First -
That it all stands on Milham's testimony alone;
And admitting that to be consistent & true, a
good deal is yet stated or insinuated that is
not sustained by the record - Of this character
I instance what is said, (see page 16 of argument)
about appellants acquiescing for two years, in the
act of their agent and until the maker of the note
had absconded & left the state - They reaping all
the benefits of the trade - collecting the \$175. note
&c. &c. with other passages of similar import - some
of which there is absolutely no proof, and none of
it sustained to the extent indicated, even by
Milham's testimony - and here a word or two
relative to the admissibility of this witness to
prove his authority in a case like the present -
I am aware that the general rule, founded, it is
said, on necessity, admits the agent to do this -
But it would seem that it was more Milham's
intent to maintain his authority in this in-
stance, than the contrary, at least to the extent of

the costs in this suit, for which, as well as the debt itself; it is submitted, he is liable to the plaintiff below, if his authority is overthrown - and at any rate, his position rendered him a dangerous witness - since, if guilty of the fraud charged upon him, he would hardly fail to back his conduct by his oath - and this General certainly furnishes a most unimstructive comment on this suggestion - For I take it to be impossible to compare carefully his testimony with the other proofs actually in, and proposed to be introduced into the case, without arriving at the conclusion, not only that the witness has sworn recklessly & untruthfully, but that, if his whole story is not told perjury, a gross swindle has been perpetrated by him & his co-conspirator, Babcock, ^{concealing} and embezzling a large proportion of the proceeds of Appellant's property, out of which the transaction is alleged to have grown -

In the next place, Appellee's counsel, seems entirely to misconceive the object of the proof put in & attempted to be introduced by Dft. below - On page 17 he says - "the testimony that 'Dft.' attempted to get to the jury was all improper because it went to the consideration between the original parties to the note" - And again, page 18, "the Dft. seek to show a failure

"of consideration between ~~the original~~
"themselves & the maker of the note,
"which they had themselves assigned
"and put in circulation" again, page 23.
"all the evidence sought to be introduced
"by the Dft below went to the original con-
"sideration of the note" & was therefore "properly
"rejected" - so - The Dft then offered David
"Moulford, as a witness, to impeach the con-
"sideration of the note between the original
"parties" - &c &c. And Mr Williamson sagely
concludes that the only thing for which
Moulford could properly be called by Dft, was
to ~~prove~~ ^{prove} his residence, "and this they refused to do"

It is not easy to see how a gentleman of Mr William-
son's acuteness could come to this conclusion, or so
far mistake the evident purposes for which testimo-
ny was offered. It was no part of the object to im-
peach the consideration of the note between the
original parties. And no such use was attempt-
ed to be made of it. But a very clear purpose in it,
was to disprove & break down the testimony of Mil-
ham. To do which, a glance at the evidence will
show, required that the whole transaction should
be gone into. The question at issue was, the authority
of Milham to endorse the notes, sued on, in the
name of Hankinson & Breman; and to establish
this, Milham was himself called by the Dft, and
detailed a state of facts, from which, if true, such

authority might be inferred. The leading features of his statements are these, that he was the general agent of the Dfto to sell lands & take notes for them. That he had been allowed on some occasions, to discount the notes so taken, and had once, with the knowledge of the Dfto, endorsed & sold a note given to Dfto by Holloway & Boggess. That on this occasion he sold 4 patent titles, belonging to Dfto, to one Babcock, for 5 Galva lots. That he sold all of these 5 lots to Mulford, and received the note sued on, and one other of same amount & date, as the full price, and gave Mulford a bond for the lots in name of Hankinson & Freeman, ^{and} then traded these notes to Babcock, for 3 of the patent titles which he had before sold him, and now took back, and endorsed the notes in blank to Babcock. And that when he came home to Provia, he told Dfto all about "the trade and they found no fault, and understood them as ratifying my acts in the matter." This is substantially Williams' testimony on the subject; and it will be seen that much the most material part of it is what relates to the subsequent ratification by Dfto, and the extent to which they were bound by this, (supposing they did so ratify his acts) depended, of course, on the truth of the narrative, which, he says, he gave them. Now, it so happened, that at every point in the history, at which we were able to find proof,

it disproved his statement. And that the story he says he told the Jfts when he got home, if not a tissue of lies from beginning ^{to end}, was so wide of the truth, as to make their pretended ratification of his acts, of no force whatever against them. For instance two or three particulars. Mileham testifies that he sold the Galva lots to Mulford, gave him a bond for title in name of Shankinson ~~and~~ ^{and} Freeman, and took Mulford's notes, directly to them there for. Mulford testifies positively, that, altho Mileham & Babcock were figuring together - he did not know Mileham or Shankinson & Freeman in the trade - that he dealt entirely with Babcock, and got his bond from Babcock, which he produced in confirmation, but which the court refused to allow to be read - and that he gave the notes to Shankinson & Freeman, as payees, simply because he was requested to do so, and it was of no moment to him, to whom they were ^{made} payable. Next, Mileham states he sold, the whole 5 lots to Mulford, and that the ~~note~~ ^{two notes} of \$275, each constituted the entire consideration paid. Mulford testifies that instead of 5 lots, he bought only one lot & a quarter of another, and this the Bond also shows - and that, ~~beside~~ ^{besides} the two notes, he gave a gold watch & chain, valued at one hundred & fifty dollars, which was taken as the cash payment. That he gave the watch & chain to Babcock, but afterwards saw the chain in Mile-

have possession, & talked of trading with him
for it - which testimony about the watch
& chain, the Court ~~seemingly~~ concluded was
~~irrelevant~~ ~~irrelevant~~, after it had been put in, without
objection, and excluded it from the jury -
Mileham also told of a note for \$250, or
\$300, given by Holloway & Boggess to Freeman,
which the Jff made to figure in the case -
and Dft. were able to prove that no such
note had been given =

Comment upon this proof, as exhibited
in the record, seems unnecessary. It was
certainly proper, in the way indicated, to
impeach & discredit before the jury, the
whole of Mileham's testimony; and also to show
that the subsequent pretended ratification
by Dft. of his acts, in endorsing these notes
was, at best, a sheer exception & fraud, prac-
ticed upon them, by which they cannot be
bound - and in excluding the Mulford Bond,
and the testimony about the watch & chain, which
tended so strongly to these ends, the Court
manifestly erred = So also, it is submitted,
the Court erred in permitting Mileham
to testify as to the Bonds & notes referred to
in his testimony, without requiring their
production, or some proper reason for not
producing them; if indeed, the evidence
was proper in any form.

As nothing in the remarks of Mr Williamson, relative to the instructions, seems to require special notice, I merely call the attention of the Court to the points made in printed brief, thereon, with the single remark, that, by misplacement of words, the sense of the last clause of the structure on instruction 7, is obscured or destroyed. It was intended to read thus: "It was in fact taking the case from the jury, and leaving them to find out, if they could, what made a good defence, after the case was established by the court against the defendants."

J. K. Cooper
for Appellants

Peria May 8th 1861.

Apr 1870. — 270
Hankinson & Freeman
vs

Lombard et al
Argument for ap-
pellants =

Filed May 9. 1861
L. Leland
Clerk

1

Be it remembered, That on the 6th day of September
A.D. 1859. Thus issued from the Clerk's office
of the County Court of Peoria County,
a Summons. in words and figures following
To Wit.

State of Illinois, }
Peoria County. } The People of the State of Illinois, to the Sheriff
of Peoria County. Greeting:

We command You that you Summon. as heretofore
commanded Ambrose C. Hankinson and Alfred
Greenman if they shall be found in your County, personally
to be and appear before the County Court of said Peoria
County on the first day of the next Term thereof, to be
holden at the Court House, in Peoria, in said Peoria
County, on the Fourth Monday of September 1859
to answer unto Benjamin Lombard
in a plea of Trespass on the Case on Promises
to the damage of the said Plaintiff, as he says, in the
sum of Two hundred Dollars. And have you
then and thence this writ, with an endorsement thereon
in what manner you shall have executed the same

2

Witness, Charles Kettell, Clerk of aforesaid Court,
and the seal thereof, at Peoria, aforesaid, this 6th
day of September A.D. 1859.

Seal

Charles Kettell Clerk

County Court Summers
Peoria County Court

Benz Lombard

vs.
Amb C Hankinson

State of Illinois }
Peoria County }

I have duly served the within
by reading the same to the within
named Ambrose C Hankinson and
Alfred Freeman, this 15th day
of September 1859.
as I am thereto commanded

John P. Rogers Sheriff
Per E. J. Rogers

Geo. Lewis

Filed in County Court this 24th
day of Sep. 1859
C. Kettell Clerk

William W. Atty

And also, To Wit on the 8th of July A.D. 1859,
there was filed in the Clerk's office aforesaid, the
Declaration of the Plff. in words and figures, as
follows To Wit

State of Illinois } County Court in & for the County
Peoria County } of Peoria, August term 1859

Benjamin Lombard the plaintiff, vs
this suit complains of. Ambrose C. Hankinson and
Alfred Freeman of a plea of trespass on the case on
promises To wit Whereas To Wit on the 4th day of
May A.D. 1857, at Peoria to wit at the County of
Peoria on David Mulford by the name and style
of D. Mulford made, and executed and delivered to the
said defendants by the name and style of Hankinson
& Freeman or order his certain promissory note of that
date and thereby then and there two years after the date

3

3

thereof promised to pay the said defendants the sum of two hundred and seventy five dollars for value received with six per cent interest from the date of said note which period has long since elapsed And the plaintiff avers that afterwards to wit on the said 4th day of May 1857. aforesaid the defendants then and there by their certain endorsement on the back of said Note Assigned and endorsed the said promissory to the plaintiff And thereby then and there ordered the said sum of money to be paid to the said plaintiff for value received. And the plaintiff further avers that at the time of the maturity of said promissory note to wit on the 4th day of May 1859 And at all times since the said maturity of said note the said David Mulford was a non resident of the State of Illinois and yet is a non resident of the State of Illinois And was at the time of the maturity of said note And at all times since the maturity of said note he the said Mulford was without the State of Illinois & yet is without the State of Illinois so that the said plaintiff could not at any time hereafter And cannot now have process served on said Mulford. Whereby the said defendants became liable to pay the plaintiff the said sum of money on said promissory Note mentioned together with the interest thereon according to the tenor and effect of said promissory note

And being so liable they the said defendants afterwards to wit on the 1st day of July 1859 at the County of

4

Peoria aforesaid, it did take And promised to pay
the said Plaintiff the said Sum of Money in
said promissory Note according to the tenor And
effect thereof. And for that Whereas to wit on
the second day of July 1859 at the County of Peoria
aforesaid the said Defendants were indebted to the
said Plaintiff in the further Sum of five hundred
dollars for that much money before that time had
and received by the defendants of the Plaintiff at
their request. And being so indebted as aforesaid
the said Defendants afterwards to wit on the day
& year last aforesaid at the County aforesaid un-
der took And promised to pay the said Plaintiff the
aforesaid Sums of money on request.

Yet the said Defendants although often requested
have not paid the said Sums of money above de-
manded nor either of them nor any part thereof
although often requested to the damage of the Plaintiff
five hundred dollars & therefore he sues &

By M. Williamson his atty.

Copy of Note sued on.

275 \$.

Peoria May 4/57.

Two years from date I promise to pay Hankinson
& Freeman or order two hundred & seventy five dollars
for value Received at six per cent interest from date

D. Mulford

Copy of Assignment

"Pay. Benjamin Lombard"
Hankinson & Freeman

5

Copy of account

Hankinson & Freeman

To Benjamin Lombard Or

To Money had and received \$ 500. 00

Benjamin Lombard

vs.

Hankinson & Freeman

Declarations

Filed July 8 1859
Clerk of Court

And afterwards, To Wit. on the 26th Day of September
A.D. 1859, there was filed the Clerk's Office aforesaid
certain *Pleas* of said *Defts.* which in words &
is as follows. To Wit:

Benjamin Lombard

vs.

Ambrose C. Hankinson
Alfred Freeman

In the County Court
Peoria County, Illinois
of the September Term
A.D. 1859.

And the said Defendants by J. H. Cooper their
Attorney ^{came} and defend the wrong and injury
when &c and say that they did not undertake or
promise in manner & form as the said plaintiff
above thereof complained against them and of this
they put themselves upon the Country &
And the plaintiff doth the like

W. Williamson

Atty for self

Cooper for Dfts.

10 2 And for a further plea in this behalf, the said defen-
dants, say, Actio Non, because they say that the said
supposed Assignment of the said note in said dec-
laration mentioned is not their act & deed, nor that
of any person by them or either of them authorized
to make the same, And of this they put themselves
upon the Country, Wherefore &c.

And the plaintiff doth

the like

W. Williamson
att. for plff.

Ambros C. Hankinson

Alfred Freeman

By J. H. Cooper their atty.

Ambros C. Hankinson & Alfred Freeman the defen-
dants above named being duly sworn say that the said
plea by them secondly above pleaded, is true in substance
And in fact, - And further say not.

Sworn to & subscribed

before me September

17th 1859

Owen Doulevy N.P.

A. C. Hankinson

Alfred Freeman.

3 And for a further plea in this behalf, the said def-
endants say Actio Non, because they say, that at the
maturity of said note And all times since And before
commencing this suit, the said David Mulford
was not, and has not been a non-resident of this state
as in said declaration is alleged, And of this they put
themselves upon the Country &c.

And the plaintiff doth the like
W. Williamson for Plff.

Cooper for Dfts

p 7 4

And for a further plea in this behalf the said defendants say Actio Non because they say that at the time of the maturity of said note & at all times since up to the commencement of this suit, the said David Mulford was not without the State of Illinois, so that process could not be served upon him, as in said declaration is alleged: And of this they put themselves upon the country &c.

And the plff doth the like Cooper for dfts.
At Williamson his atty

Lombard

ss.

Hankinson & Freeman

pleas

Filed Sep 26 1859
C. H. Miller Clerk.

And Afterwards To Wit on the 29th March 1860
thus was filed in the Clerk's office aforesaid.
a certain *Verdict*, which is as follows

To Wit

We the Jury find the issues for the Plaintiff And assess the damages at. \$ 322. 85

Stark, R. Reed Foreman

R. C. Robinson

James Daugherty

Orin Doty

Charles Rotts

Aaron Oakford

John M Shaw

J. Withnell

William Kearns

James F. Munder

Anson Adams.

W. G. Arledge

Verdict Filed March 29. 1860

B Proceedings of the County Court of Peoria County,
State of Illinois began and held at the Court house in
the City of Peoria in said County on
Monday September 26th 1859.

for judicial and other business. Present Hon Wellington
Wellington Loucks Judge, Charles Kettelle Esq and John
Byrner Sheriff

Benjamin Lombard

vs.

Ambrose O. Hankinson

Alfred Freeman

This day came the said Plaintiff
by M. Williamson his Attorney and the said defendants by
J. K. Cooper their attorney and on motion of the said defen-
dants leave is given them to plead by Tomorrow morn-
ing

Wednesday September 28th 1859

Benjamin Lombard

vs.

Ambrose O. Hankinson

Alfred Freeman.

This day came the said Plain-
tiff by M. Williamson his attorney and the said defen-
dants by J. K. Cooper his attorney and this cause came
on to be heard on the motion of the said defendants to suppress
the Deposition of Stewart Esq Lombard

10. Taken in this case in favor of the said Plaintiff
The Court being sufficiently advised in the premises doth
overrule the said motion

Proceedings of the County Court of Seona County
began and held at the Court House in the City of Seona
in said County on

Monday October 24th 1859.
for judicial and other business. Present. Hon. Will
ington Loucks Judge. Charles Chetelle Clerk and John
Byrner Sheriff

Benjamin Lombard

vs.

Assumpsit.

Ambrose C. Hankinson
and Alfred Freeman.

This day came the said Plaintiff
by M. Williams his atty. and the said defend
ants by J. K. Cooper their attorney. And it is agreed be
tween the parties that all the depositions taken in this
cause on the part of the plaintiff by giving notice to
Alfred Freeman may be read against Ambrose C. Han
kinson as well as his co-defendant Freeman subject
to the exceptions which the defendants may take to the
reading and introduction of the same on trial. And that
this cause be continued at defendants costs.

11 Proceedings of the County Court of Peoria County
under its extended jurisdiction began And held at the
Court House in the City of Peoria, County of Peoria
State of Illinois on

Monday November 28th 1859.
for judicial And other business Present. Hon Wellington
Loucks Judge Charles Kettelle Clerk And John Bryner
Sheriff.

Wednesday November 30th 1859.

Benjamin Lombard

vs:

Assumpsit

Ambrose C Hankinson
Alfred Freeman.

By agreement of parties this
cause is ordered to be continued untill December
Term 1859.

Proceedings of the County Court of Peoria County State
of Illinois began And held at the Court House in this
City of Peoria in said County on

Monday December 26th 1859.
for judicial And other business. Present Hon Well-
ington Loucks Judge. Charles Kettelle Clerk And John
Bryner, Sheriff.

Benjamin Lombard
 vs. Ambrose C. Hankinson
 Alfred Freeman. Assumpsit

On Motion of Atty for Plain-
 tiff this cause is ^{ordered} to be continued, to the 4th Mon-
 day of January A.D. 1860

Proceedings of the County Court Peoria County, State
 of Illinois began and held at the Court House in the City
 of Peoria in said County and State on
 Monday, January 23^d 1860
 for judicial and other business Present Hon Wellington
 Loucks Judge, Charles Pettelle Clerk and John
 Bryner Sheriff.

Friday January 27th 1860.

Benjamin Lombard
 vs. Ambrose C. Hankinson
 and Alfred Freeman Assumpsit

By agreement of parties this cause
 is ordered to be continued untill the 4th Monday in
 February A.D. 1860, at defendants costs. Therefore
 it is considered by the court, that the said Benjamin
 Lombard do have and recover of and from the said Ambrose

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C. Hankinson And Alfred Freeman the sum of his costs
And charges by him about this suit at his behalf expen-
ded at this term And that he have Execution therefor

Proceedings of the County Court Peoria County State
of Illinois, began And held at the Court House in the
City of Peoria in said County on

Monday February 27th 1800
being the 4th Monday of said month, for judicial and
other business Present Hon Wellington Loucks,
Judge, Charles Keltell Clerk And John Bryner, Sheriff.

Tuesday February 28th 1800

Benjamin Lombard

Ambrose C. Hankinson Assumpsit

Alfred Freeman

On Motion of J. R. Cooper Esq. ally
for the defendants this cause is ordered to be continued
until the 4th Monday of March 1800 at the Defend-
ants Costs: Therefor It is Considered by the Court that
Benjamin Lombard do have And recover of and from
the said Ambrose C. Hankinson And Alfred Freeman her
costs And charges by him in this suit in his behalf expended
at this term And that he have execution therefor

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Proceedings of the County Court of Peoria County, ^{4th}
State of Illinois, held at Peoria, for Judicial and other pur-
poses, And Presiding Wellington Loucks, Judge; Charles
Kittitts Clerk And John Boyner Sheriff

on

Monday March 26th 1860
Benjamin Lombard

vs

ass't.

Ambrose C. Hankinson
Alfred Freeman.

On Motion of atty for Pltff This
cause is ~~ordered~~ to be continued until the 4th Monday of
April 1860

Wednesday March 28th 1860.

Benjamin Lombard
vs.

Ambrose C. Hankinson
Alfred Freeman

This day came ^{the} said plaintiff,
by M. Williamson his attorney And the said defendants
by J. K. Cooper their atty And by agreement of parties
it is ordered by the Court, that the order made by this
Court, continuing this cause be set aside
Thereupon, it is ordered by the Court, that a jury
be empannelled to try said cause. whereupon came
a jury of twelve good And lawful men To wit:

William Leams, Aaron Oakford, Isaac Wetherell,
 Orrin Doly, James Daugherty, William G. Wright,
 James J. Menden, Anson Adams, John M. Shaw,
 Stark R. Reed, W. C. Robinson, Charles R. Otis - who
 were duly chosen tried And sworn And having heard
 the evidence in the case retired to Consider of their
 verdict.

Thursday March 29th 1850

Benjamin Lombard
 Ambrose C. Hankinson ^{assumpsit}
 And Alfred Freeman

This day came again the parties
 to this suit respectively by the attorneys And also the
 jury empannelled. yesterday who returned into Court
 the following Verdict. "We the jury find the issues for
 the plaintiff And assess the Damages at. (\$ 322. 85)
 Three hundred And Twenty two. And ⁸⁵ 100 dollars.
 Whereupon the said defendants entered their motions
 for a new trial And arrest of judgment in this cause.
 The Court being sufficiently advised in the premises
 doth overrule the said motion.

Therefore it is considered by the Court. that the said
 Benjamin Lombard do have And recover of And from the
 said Ambrose C. Hankinson And Alfred Freeman the
 sum of. (\$ 322. 85) Three Hundred And Twenty two
 And ⁸⁵ 100 dollars. his damages aforesaid in form.

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aforesaid assessed And also his costs And charges by him
about this suit in his behalf expended. And that he
have Execution therefor Thereupon the said defend
ants prayed an appeal of this cause to the Supreme
court of this State. which is allowed on his entering
into Bonds in the penal sum of. Six Hundred Dol
lars conditional according to law within twenty
days. the Security to be approved by the court

And afterwards, To Wit: on the 24 day of October
A.D. 1859. There was filed in the Clerk's office
aforesaid, the following Bill of Exceptions, which in words
is as follows To Wit

Benjamin Lombard } On the County Court. Peoria County
vs. } Ills. October Term 1859
Ambrose C. Hankinson
Alfred Freeman

But remembered that on the
coming on to be heard of the motion of
the said defendants & affidavit of Freeman filed at the
last term of this Court, to suppress the depositions of John
C Stewart & Isaac G Lombard taken by the said
Plaintiff herein: which said motion & affidavit & said
depositions are in words & figures following

Benjamin Lombard } Co. Court. Peoria Co. Ills.
vs. }
Ambrose C. Hankinson } After Sept. Term 1859
Alfred Freeman

The said depts. move to suppress the depo-
sitions of John C Stewart & Isaac G Lombard taken on
the part of the Plaintiff herein, for reasons following:

- 1st Said depositions are not taken before any officer legally
authorized to take the same
- 2nd The concluding sentence of the answer of said Stewart
to the Oth interrogatory is objected to as incompetent to prove
the fact in question
- 3rd The whole of the deposition of said Lombard is ob-
jected to as incompetent & irrelevant testimony & because
said Witness is manifestly not the best witness to prove
the fact aimed to be established

p/8 4th Said deposition of said Lombard is further objected to for the reason that at the same time of taking the same the said deposition of said Stewart was by said plff. appointed to be taken & was taken by said plff. at another & distant place, at which time & place Defendants were present to attend to the taking of said Stewart's deposition, and were thus prevented from being present at the taking of the deposition of said Lombard & deprived of the opportunity of cross-examining said witness as shown by the affidavit of said Freeman filed herewith & made part of this motion

5th Said Depositions are defectively certified & are otherwise informal, defective & insufficient

J. K. Cooper. atty for dfts:

Lombard
vs.
Hankinson & Freeman

Motion to Suppress
Depositions

Presented
Sept 29th 1859
J. K. Cooper
Clerk of Court

Filed Sept 27th 1859
C. H. Allen Clerk

Benjamin Lombard
vs.
Ambrose C. Hankinson
Alfred Freeman.

County Court.
Peoria Co. Ills.
Sept. Term 1859.

Alfred Freeman one of the defendants herein, being first duly sworn says that on the 30th day of August 1859, as he was informed at the time and verily believes, notices were duly served by Marion Williamson Esq. as attorney for said plaintiff upon J. K. Cooper Esq. the attorney of the defendants herein,

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that the depositions of John C. Stewart & Isaac G. Lombard would be taken on the part of said plaintiff on the same day & between the same hours, to wit, on the 14th day of September A.D. 1839, between the hours of 8 o'clock A.M. & 6 o'clock P.M. of said day one of which depositions to wit - that of said Stewart was appointed to be taken at the office of E.W. Hazard Esq. in the City of Galisburg County of Knox & State of Illinois, And the other of said depositions was by the notice referring thereto, appointed to be taken at the office of John C. Ferguson in the Town of Henry County of Marshall & State of Illinois - That said City of Galisburg, is 55 miles or thereabouts distant from the City of Teoria where defendants & their said Attorney resides in about, or nearly a due west course, that said Town of Henry is distant from said Teoria in a North Eastern direction 40 miles Affiant further states that he on behalf of said defendants attended at the City of Galisburg at the time & place named to take the deposition of said Stewart And was present at the time of taking the same. But there was no attendance on the part of the defendants at the taking of the depositions of said Isaac G. Lombard for the reason that affiant could not be there And at Galisburg at the same time And it was not convenient to procure the services of any other person at that time to attend to the taking of the same. Affiant further states that but for the fact that the deposition of said Lombard was

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appointed to be taken at the same time with the deposition of said Stewart he would have been present on the part of said Defendants to cross examine the said witness And attend to the taking of said deposition And further faith not,

Subscribed And sworn

to before me this 27 day Alfred Freeman
of Sep 1859.

Chittelle Clerk. 1859
H. H. H. H.

(Copy of Notice -)

To Jonathan K. Cooper Esq. You are hereby notified that on the fourteenth day of September 1859 between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of said day at the office of E. W. Hays Esq in the city of Galena County of Knox and State of Illinois I will take the deposition of John C. Stewart to be read in evidence on the trial of a certain cause now pending in the County Court of Peoria County Illinois Wherein said Lombard is plaintiff and Ambrose C. Hankinson and Alfred Freeman are defendants And you can appear and cross-examine said witness if you are put at the time and place aforesaid Peoria August 30 1859. M. Williamson
Atty for pl.

("Red Copy Aug 30/59 Cooper for Freeman.") Endorsed

Deposition taken in a cause pending in the County Court of Peoria County State of Illinois Wherein. Benjamin Lombard is Plaintiff & Ambrose C. Hankinson And Alfred Freeman are defendants taken at this time and place specified in the Notice hereto attached John C. Stewart of the County of Knox State of Illinois of Lawfull age being first duly sworn according to Law deposes as follows.

Interrog 1st What is your age place of residence And occupation?

Answer My age is thirty seven years I reside in Galena Illinois And am a dealer in real estate

Inter 2 Are you acquainted with the parties to this Suit.

Answer I am with the plaintiff And the Defendant Freeman

Inter 3 Are you acquainted with David Mulford

Answer I am.

Q^y
July 4th How long have you been acquainted with said
Mulford

Answer About three years.

July 5th Please state where said Mulford resided during the Months of April May June and July of this year.

Answer I am not able to state Certainly when his residence was during said period

July 6th Please state what facts you know in relation to his place of Residence during the time referred to above.

Answer Mr Mulford is a widower and has no permanent home, but spends a considerable part of his time in trading. During the principal part of the three years I have known him he has lived in Cincinnati Ohio and I have corresponded with him mainly at that place. The same is true of the four Months referred to above he has spent a part of his time with his children at Geneseo in this State who reside with his sister at said Geneseo. on the thirty first day of July last he made a Deed of assignment to me in which he stated his residence to be Cincinnati Ohio.

A. C. Wilkey fees \$1.50

Witness
total 2.00

J. M. Stewart

State of Illinois }
County of Knox } J. A. C. Wilkey a Notary
Public in and for said City do certify that the foregoing

going Deposition was taken by me at the time and place specified in the Notice hereto attached that the said Witness was first duly sworn and that the same was carefully read to said Witness and subscribed by him.

Dated this 14 day of September A.D. 1859



A. C. Wiley

Notary Public

State of Illinois

Marshall County.

vs.

Deposition

of Isaac Lombard of the County of Barnstable in the State of Massachusetts a Witness aged about twenty-four years, produced, sworn and examined before Peleg S. Perley a Notary Public in and for the city of Henry in the County of Marshall in the State of Illinois, on the fourteenth day of September in the Year of our Lord one Thousand Eight Hundred and fifty-nine between the hours of Eight O'clock in the forenoon and six o'clock in the afternoon of said day at the office of John G. Ferguson in the town of Henry in the County of Marshall and State of Illinois, according to the notice hereto attached, to be read in evidence in the trial of a certain cause now pending and undetermined in the County Court of Peoria County Illinois, wherein Benjamin Lombard is Plaintiff and Ambrose C. Hankinson and Alfred Freeman are defendants.

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Interrogatory 1st When do you reside and have you ever had occasion to enquire or make search to ascertain the residence of David Ellulford, if so when did you enquire and what did you ascertain about his residence?

To the first interrogatory this deponent says that he resided in the town of Truro in the County of Barnes table and State of Massachusetts - that he has had occasion to enquire and has enquired to ascertain the residence of David Ellulford and that on the nineteenth day of February A.D. 1859, at Cincinnati Ohio he did enquire about the residence or place of residence of David Ellulford and found him Ellulford in an office, up stairs in the building on the South East corner of Main and East Seventh Streets Cincinnati Ohio, in which he had a Safe where he kept his papers. That said David Ellulford told this deponent that he lived about Cincinnati Ohio, most of the time - that his Post Office Box was 389, Cincinnati Ohio, - that when he was about Cincinnati for any length of time he stopped at Mrs Cranston's Covington, Kentucky but that when he arrived at Cincinnati on night trains he stopped at the United States Hotel Cincinnati.

2^d Interrogatory. When and where did you make the Enquiries, and of about how many persons?

To the second interrogatory this Deponent says. That on the 19th day of February A.D. 1859, at Cincinnati Ohio, he made Enquiries for David Ellulford

and concerning his residence, of as many as six persons

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3^d

Interrogatory. Did you at any time make any enquiries in the State of Illinois as to the residence of said Mulford? When and where did you make such enquiries? State fully.

To the third interrogatory, this Deponent says. That on or about the fifth day of May, A.D. 1859, he did make enquiries at Galesburgh in the State of Illinois, as to the residence of David Mulford, of John C. Stewart, and also, made enquiries concerning or as to the residence of said Mulford at Galva and at Cambridge in the State of Illinois, about the first of July A.D. 1859.

4th Interrogatory. Where was the residence of said Mulford from the middle of April 1859 up to the first of August, 1859? And since if you know? Was it in the State of Illinois or not? If in the State of Illinois, What place?

To the fourth interrogatory this deponent says That the residence of said David Mulford from the middle of April 1859 up to the first of August 1859 was at or near Cincinnati, Ohio, and that since the first of August A.D. 1859, he does not know the place of said Mulford's residence. That from the middle of April A.D. 1859, up to August, 1st 1859, the residence of said David Mulford was not, in the State of Illinois

Isaac G. Lombard

Subscribed and sworn to before me
this 14th day of September A.D. 1859, Percy S. Perley Notary Public

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State of Illinois
Marshall County

ss.

I, the subscriber, a Notary Public in and for said City in said County and State, do certify, that 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 the same was carefully read to said Witness, and signed by him

Peleg S. Peley

Notary Public

Dated this fourteenth day of September

A.D. 1859, Given under my hand and Notarial Seal.

Seal

Deposition
of
Isaac G. Lombard
in case of
Benjamin Lombard
vs.

Ambrose C. Hankinson
and
Alfred Freeman

Filed and opened
under general order
of Court Sep 20 1859

C. Hittite
Clerk

To Jonathan K Cooper Esq. You are hereby notified that on the 14th day of September 1859 between the hours of Eight o'clock in the forenoon and Six o'clock in the afternoon of said day I will take the deposition of Isaac G. Lombard at the office of John G. Ferguson in the town of Henrynd County of Marshall State of Illinois to be read in evidence, on the trial of a certain cause now pending and undetermined in the County Court of Peoria County Illinois, wherein Benjamin Lombard is plaintiff and Ambrose C. Hankinson and Alfred Freeman are defendants And that you can appear at the time and place aforesaid and cross interrogate said Witness August - 30 - 1859

Red copy Aug 30/59
Cooper
for Freeman

Wm Williamson atty for plff.

Which said motion was overruled by the court, and said depositions allowed to be read in evidence in said cause. To which decisions of said court, in overruling said motion and permitting said depositions to be read, the defendants by their counsel then & there excepted. And now at this term of said court, by agreement of parties it is ordered by the Court, that the Bill of Exceptions of the said Defendants to the said ruling of said Court, be signed & sealed by the Court hereina; Nunc pro tunc, which is done

Wellington Loucks *CL*
County Judge

And afterwards To Wit. on the 30th March 1860. there was filed in the Clerk's office aforesaid certain *Bill of Exceptions*, which in words & sense is as follows

To Wit.
Benjamin Lombard } In the County Court
vs. } Peoria County, Ills.
Ambrose C. Hankinson } March Term 1860
Alfred Freeman }

But remembered that on the coming on of this cause for final hearing before said court & a jury, the said plff. to maintain the issues on his part, offered first in evidence the Note & Endorsement sued on in this case, which said Note & Endorsement are in words & figures as follows

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275. &

Peoria May 4/57.

Two years from date I promise to pay
Hankinson & Freeman or order two hundred
& seventy five dollars for value Received at
Six Percent interest from date

Dolluford

Copy of assignment

"Payt Benjamin Lombard"

Hankinson & Freeman "

to the reading of which in evidence to the jury depts
by their counsel objected. plff then called John Mil-
ham and offered to prove by him that the endorsement
of the names "Hankinson & Freeman" on the back
of said Note is in his Witness handwriting. That
the same was done in the absence of depts. That
Witness made said endorsement as their agent, and
had authority from them so to do. To the calling of
which Witness for which purpose, defendants objec-
ted. But the court overruled the objection & permitted
said Witness to be sworn to testify to said matters.
And defendants by their counsel, then & there excep-
ted. Said Milham then, in answer to interroga-
tories by plff's counsel, stated that he had seen said
note. That in May 1857, when said note was given
he was agent for defendants, and had been for sometime
perhaps a year previously. Defendants were land dealers
in Peoria, & doing an extensive business in trading in
lands in the Military tract in Illinois, and witness

was their general agent to sell lands & take notes I
 had no written authority from Dfts. The consideration
 of this note was certain lots in the Town of Galva
 Henry County, Ills. - Dfts had lands in Henry County
 and one piece in Warren County. I traded the Patent titles
 to four tracts, three of which lay in Henry County &
 one in Warren County, with one Franklin Babcock
 of said Town of Galva, for five Galva lots. The
 title to the lands. I so traded, we did not expect to get
 any thing for. They were worthless. I deemed them no
 titles. Dfts had frequently told me to trade off or get rid
 of these lands so as to get their money back. When I
 traded them for the Galva lots I executed a Bond to
 Babcock in the name of Hankinson & Freeman for the
 lands, and took a deed to said Hankinson & Freeman for
 the lots from one Wiley who held the title. These lots
 I afterwards sold to David Mulford. There were five
 of them I think I executed a Bond to Mulford in
 the name of Hankinson & Freeman for title to the
 lots, and took from Mulford the note sued on - & one
 other of the same amount to Dfts, as the consideration
 for the lots. At Mulford's suggestion I brought the
 deeds from Wiley for the lots to Hankinson & Freeman
 a week or ten days after the trade and they executed
 deeds to Babcock for the same lots for which I had made
 the Bond to Mulford. To all which testimony about
 the execution of said Bonds & deeds, dfts, by their
 counsel, at the time objected, without the product
 ion of said Bond & deeds, or some excuse for the

non production thereof. But the Court overruled the objection & permitted said Evidence to go to the jury, and defts excepted:

Witness then further stated: I assigned the Mulford notes taken as above, by writing the names of Hankinson & Freeman thereon, in blank, and delivered them to Babcock: This was on Monday the 4th of May 1857. I had traded the lands to Babcock on May 2nd 1857. The next day I traded the lots to Mulford, and on 11th day I traded the Notes to Babcock. The consideration I got for Dfts from Babcock for endorsing the Notes to him was three of the patent titles I had traded to him for the Lots. The other patent title he retained, and surrendered the Bond I had given him for the four. And I made him a new Bond for the track he retained (Dfts counsel here called for said Bond) and Dfts afterwards made a deed to Babcock therefor (Dfts counsel here called for said Bond & also objected to the Evidence unless the same were produced or accounted for but the Court overruled the objection & permitted the evidence to go to the jury. And defts excepted) Dfts got the benefit of the lands which were so taken back from Babcock for the Patent title which Babcock retained, he gave me notes amounting to One Hundred & Seventy five dollars, which I gave to defendants:

(Objections to Evidence about these notes unless produced or notice to dfts. overruled by Court & excepted to by dfts) - Witness then further stated When I returned to Peoria I delivered to dfts the deed from Wiley for the

five Galva lots & told them all about the trade. I don't remember what they said but they found no fault & I understood them as ratifying my acts in the matter. They knew Mulford & were engaged in the same business that he was: but I do not know whether they knew what his pecuniary circumstances were = I never heard them speak of his property. He was generally considered solvent at that time & I thought him to be a man of considerable means = I don't know what his means were when the note came due. I executed this assignment by virtue of my general agency. I had once before discounted & assigned for ~~defts~~^{defendants} a note of theirs on Holloway & Boggess to which ~~defts~~^{defendants} had made no objection. Deft here again offered said Note & Endorsement in evidence, which were admitted by the Court. I read to the jury against the objections of defendants, who, by their Counsel, then & there again excepted =

On Cross Examination, witness said = This indorsement was made either the day of the date of the note or the day after. I am not certain which. The trade for the lots was on Saturday May 2/57. Babcock had got the lots from Wiley & had Wiley make the deeds direct to defts. I had a written authority from defts sometimes, when I went when I was not known. But I made Bonds under seal in their names without any written authority. Defts knew of the Bond I had made to Mulford in this case. I told them of it. The deed for said Lots which Defts made to

Babcock I mailed to H. Q. Ward, of Galva a week after
 the trade to be delivered to Babcock whenever Mulford
 would surrender Defendants' Bond to him for said Lots.
 Afterwards got this deed from Ward & gave it to
 Babcock myself. I don't know whether Babcock
 ever gave any Bond to Mulford for the Lots. The only
 Bond I know anything of as having passed for these
 Lots is the one I gave Mulford in the name of defen-
 dants, as above stated. And I suppose Mulford still
 holds this Bond for the Lots. The only consideration
 Defendants got for the indorsement of the notes was the
 three Patent titles I had before traded to Babcock.
 The \$175, was given for the Patent title which Bab-
 cock retained. The three titles taken back, I consid-
 ered scaly. Defendants have told me when I was
 out & sold lands I should sell the Notes at 10 per
 cent discount. Don't know whether I ever end-
 orsed notes for them, except in this case & one other -
 the Holloway & Boggess note. Re-~~ed~~ I told
 Defendants when I came home that I had end-
 orsed this note. There was nothing ever paid to me
 about endorsing Notes without recourse.
 Two of the Patent titles which I took back from Bab-
 cock afterwards sold for defendants to Holloway
 and Boggess, I think for \$250. or \$300. and took
 their notes to Alfred Freeman therefor.
 Freeman has since then sued Holloway & Boggess
 for the same, in this court, and recovered judgment.
 and which Holloway & Boggess appealed to the

Supreme Court: 2nd Cr. Ct. Two of the tracts I took back from Babcock lay in the same Townships. One on sections 18 & one on sec. 20. T. 9 N R. 1 W. I think. Can't clearly recollect the numbers. The other lay in another county. I afterwards sold two of them to Holloway & Boggess. Can't recollect the numbers of those I sold to Holloway & Boggess. Have Memoranda at my office from which I can tell. Witness here was requested by defendant's attorney to go & consult his Memoranda, so as to fix definitely the lands sold to Holloway & Boggess. And thereupon went out but did not return, And, tho' twice called at a subsequent stage of the case. did not appear again to testify. No attachment was asked for the witness And the court offered to have defendant send for him by Subpoena which was not acted on.

Plff next offered & read in evidence to the jury subject to objections & exceptions as heretofore taken, the depositions of John C. Stewart & Isaac G. Lombard. for which see previous Bill of Exceptions herein:

~~Defendants then to Mr.~~

Plff. requested.

Defendants then, to maintain the issues on their part. offered & read in evidence to the jury the following note viz.

401 \$

Peoria Apr 24 1857

One year after date we promise to pay to the order of Alfred Freeman four hundred and one

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dollars for value Received bearing interest at six per cent from date

Holloway & Boggess.

Having first identified said note by the testimony of Marlon Williamson, Esqr. as the same note referred to in the testimony of said Mileham as having been taken by him on Sale of lands to Holloway & Boggess and on which judgment was recovered by said Freeman in said County court, and appeal taken as stated by said Witness Mileham:

Defendant next called David Hulford, who being duly sworn said - My name is David Hulford Witness being here shown the note on which this suit is bro't, against defendants as Endorsers, then stated further I gave this note at the time it bears date. I gave at the same time one other note in the same sum, drawn in the same way & payable in one year from date. The consideration of these two notes was the purchase from Franklin Babcock of some Galva property. And Babcock at the same time executed to me his title Bond for said property. Witness here produced said Bond which is in Words & Figures as follows

"Articles of Agreement. Made this Thursday of May in
"the Year of our Lord One Thousand Eight Hundred
"and Fifty Seven Between Franklin Babcock of the
"county of Henry and State of Illinois party of the

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first part, and David Mulford of the same place party
 of the second part, Witnesseth, that if the party of the second
 part shall first make the payments and perform the coven-
 ants hereinafter mentioned on his part to be made and performed
 the said party of the first part, hereby covenants and agrees to convey
 and assure to the party of the second part, in fee simple, clear of
 all incumbrances whatever, by a good and sufficient Warranty
 Deed, the following lots pieces or parcels of ground, viz.
 Lot number One Hundred and Eleven (111) and the North
 West Quarter of Lot number One Hundred and Nine (109)
 one Section number Thirty four, and on the North West Quar-
 ter of said section. Township No Fourteen (14) N. Four
 (4) E. of 4th P.M. State of Illinois. And the said party of
 the second part hereby covenants and agrees to pay the said party
 of the first part the Sum of Five Hundred and Fifty Dollars
 (\$550.) in the manner following. Two Hundred and Seventy five
 dollars in Note drawn by me, favor Hankinson & Freeman
 of Peoria which by these presents the party of the second part a-
 grees to pay at Galva Ill. May 4th A.D. 1858. Also Two Hundred
 and Seventy five (275) dollars in Note same maker and payee payable at
 Galva May 4th A.D. 1859. And to pay all taxes, assessments or impositions
 that may be legally levied or imposed on said Lot; and in case of failure of the said party
 of the second part to make either of the payments, or perform any of the covenants on his part
 this contract shall be forfeited and determined, at the election of the said party of the first part; and
 the party of the second part shall forfeit all payments made by him on this contract; and such payments
 shall be retained by the said party of the first part, in full satisfaction and in liquidation of all damages by
 him sustained; and shall have the right to re-enter and take possession. It is mutually agreed that the
 time of payment shall be an essential part of this contract; and that all the covenants and agreements
 herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of
 the respective parties. In Witness Whereof, the parties to these presents have hereunto set their hands
 and seals this day and year above written.

Signed, sealed and delivered in presence of
 Franklin Babcock

And said, this is the Bond refused to. It was executed to me at the time it bears date, by said Babcock, And is the only Bond I ever held or have any recollection of having received for the lots for which these notes were given. Defendants then offered to read said Bond in Evidence to the jury, where Plff. by his Counsel objected, And the court sustained the objection & refused to allow said Bond to be read in evidence. To which ruling of the Court in refusing to permit said Bond to be given in Evidence, Defendants by their counsel, then & there accepted. Said Witness then further testified I never received any Bond from Hankinson & Freeman or their agent for any Galva Lots. My trade was with Babcock & I did not know Hankinson & Freeman or Milcham to my recollection in it, any farther than the Notes were made payable to Hankinson & Freeman, And I did this simply because it was requested they should be so drawn & it was immaterial to me to whom they were made payable. I bought no other Galva Lots of Babcock or any one else than those named in this Bond. There were two lots $\frac{1}{4}$ of another sold to me by Babcock And for these, the two notes of \$275 each were given. Afterwards on looking at his Bond & refreshing his memory therefrom said Witness stated it was but one whole lot & one quarter of another which I bought, And for which said notes were given.

36 On Cross-Ex. This witness stated. My impression as my trade for the Galva Lots was entirely with Babcock. Milham was present and drew the notes and the Bond was drawn by Babcock and he Milham & Babcock had been figuring together for some time. But I do not remember knowing Milham or Hankinson & Greenaw in the trade. Nor ^{do} I know any thing of the Bond which I hold being given in consequence of any trade between Milham & Babcock. I only know my own trade with Babcock. Know nothing of any other.

On Re-examination by Jpts, this witness further said In addition to the two notes of \$ 275, each given by me in said trade, I also gave as part consideration of the purchase of said Galva Lots, a Gold Watch & chain valued in the trade at one hundred & fifty dollars. This was taken as the Cash or down payment.

2nd Cross Examination. I am not say certainly whether Milham knew that said Watch & chain were so given, or formed any part of the consideration of said purchase. But I think he & Babcock were both present. And I afterwards saw the chain in Milham's hands, and talked with him about trading for it. Plaintiffs counsel then moved the Court to exclude the whole of this testimony of said Witness about said Watch & chain from the jury as being irrelevant to

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the issues in the case, which Motion was sustained by the Court. And the whole of said Evidence, so objected to, withdrawn by the Court from the jury To which decisions of said Court in sustaining said Motion & withdrawing said Evidence from the consideration of the jury, the defendants by their counsel then & there accepted:

This was all the evidence in the case. Plff, by his counsel then asked the following instructions to the jury

Instructions for plaintiff

1 If the jury believe from the evidence that Mulford executed the Note sued on in this Suit to the defendants And that the defendants by themselves or their authorized agent assigned the note in blank, and delivered it to Babcock before the same became due And that said note so assigned afterwards came into the hands of Lombard the plaintiff before it became due, then your verdict should be for the plaintiff

2 Even if the jury believe from the evidence that Mulham had no authority to act as the agent of defendants at the time the Note was assigned, yet,

if the jury believe from the evidence, that the fact of Mills
ham's acting as their agent, as aforesaid, came subse-
quently to the knowledge of defendants And they, did
not object to it. then the plaintiff should recover.

3 The jury are instructed that even if the agent
exceeds his authority if, when his principal is
informed of his acts, the principal does not ob-
ject to it, or approves it, this amounts to a rat-
ification of the acts of the principal, and is forever
as binding as though the agent, had full authority
before he so acted as such agent.

4. The jury are instructed that it makes no dif-
ference in this suit, as to what was the considera-
tion of the Note as between Mulford, and the defen-
dants or whether there was any consideration whatever
for the making of the Note, but if the Note was assigned
and put in circulation by defendants or their agent
having authority so to do or which was subsequently
ratified by defendants then the plaintiff, must recover
in this case.

5 If the jury believe from the Evidence that Mylorn
had authority from Defendants to buy, sell and
trade lands or dispose of Notes received in such sale
or trades for them and in their name, then the law presumes
that he was, authorized to do whatever is customary
and usual in such business, (except making deeds,

39 which he would be authorized to do only by power under seal) And the giving, taking And indorsing of promissory Notes is a usual incident to such ^{trans}actions

6 If the jury believe from the testimony that Mylorn had authority to negotiate paper in their name, either for purposes of trade or discount, then any bona fide holder of paper indorsed by him in the name of his principals, would be entitled to recover upon it notwithstanding there may have been fraud in the execution of the indorsement on part of the agent, or want of consideration for the indorsement

7 The jury are instructed that when the plaintiff gave in evidence the Note, sued on, and proved the nonresidence of the maker of the Note at the time it became due that establishes the liability of the Defendants in this case And the burden of proof is then on the Defendant to show a good defence to the Note sued on And if the Defendants have failed to prove a good defence, you must find for the plaintiff

8 The jury are instructed that the fraud which will vitiate a note in the hands of a bona fide holder is, not a fraud in the execution, but in obtaining the execution of the Note, And though the jury may believe that as between Mylorn and the Defendants there may have been fraud in the execution of the note

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yet if there was no fraud on the part of the immediate assignee of the note in obtaining the execution by Mylorn then the fraud cannot vitiate the instrument sued on

9. Fraud is never to be presumed against any one and the party setting up fraud must prove it by clear and positive evidence

10 The jury are instructed that the jury must take into consideration all the evidence in the case and the circumstances sworn to in order to determine the truthfulness of the witness also the length of time that has elapsed since the occurrence of the events sworn to and unless they believe from all the facts and circumstances sworn to that the witness swore false you are bound to believe him

11. The jury are bound to believe the testimony of witnesses unless they are impeached or unless the jury can not reconcile their testimony and make it harmonize with all the facts & circumstances proven in the case.

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which were given by the Court. And to the giving of which, Defs: by their counsel, then & there, excepted =
 Defs. by their counsel then asked the following instructions to the jury.

Lombard } Instructions for Defs:
 Hankinson & al }

1 Unless the jury shall believe from the Evidence that the Assignment on the back of the note sued on was made by the defendants or one of them or by their authority, ^{if without any authority} or was afterwards expressly sanctioned by them with a full understanding of all the facts, the jury must find for the defendants.

2 That the only proof before the jury of authority to make said assignment or acquiescence in it, is that of the Witness Melham. And if the jury shall believe that said Melham stands successfully impeached in any one material part of his testimony the jury may properly disregard his testimony altogether as unworthy of credit and should in that event, find for the defendant.

3 The Maxim of Law in regard to the credit of witnesses is, that where a witness is shown to have sworn wilfully false in any one material particular ^{in the suit} he may properly be regarded as unworthy of credit in all other parts of his testimony not corroborated by other Evidence

which said Instructions were given as asked, except the Second, which the Court refused to give as asked and modified the same in manner following.

1. Unless the jury shall believe from the evidence that the Assignment on the back of the Note sued on was made by the defendants or one of them or by their authority ^{if without any authority} or, was afterwards expressly sanctioned by them with a full understanding of all the facts, the jury must find for the defendants.
2. That the only proof before the jury of authority to make said assignment or acquiescence in it, is that of the Witness Mileham. And if the jury shall believe that said Mileham successfully ^{attempts} impeached ^{in this} material parts of his testimony the jury may ^{take such impeaching evidence into consideration to determine if they are} properly disregard ^{ing} his testimony altogether as unworthy of credit, and should in that event find for the defendant.

43 3 The maxim of law in regard to the credit of witnesses
is, that when a witness, is shown to have sworn
wilfully false in any one material particular ^{on the case}
he may properly be regarded as unworthy of credit
in all other parts of his testimony not corroborated
by other evidence

After which the Court gave said instructions as
modified to the jury. To which decisions of
the Court. In refusing to give said instructions
as asked and in modifying the same. And in
giving said instructions only as so altered & mod-
ified by their Counsel then & there objected &
excepted. And thereupon the jury after having retired
returned into court the following verdict

"We the jury find the issues for the Plaintiff And
Assess the Damages at. \$ 3622. 85

Nath R Reed
 James Laughlin
 Charles R. Ols.
 John M Shaw
 William Skams
 Anson Adams
 R C Roberson
 Am. L. O. L.
 Aaron Oakford
 J. Witherell
 James H. Menden
 W. G. Orledge

Whereupon Defendants entered their motion for a new trial in said Cause in words & figures following

Benjamin Lombard	} In the County Court Perry County, Ills. March Term 1860
Ambrose C. Hankinson	
Alfred Streuman	

And now come the said defendants and move the Court for a new trial herein, And for cause shown

- 1 The Court admitted incompetent & improper evidence on the part of the Plaintiff, And erred in refusing to compel the production of papers called for by deffs.
- 2 The Court excluded proper evidence offered by Defts.
- 3 The Court erred in the Instructions given to the jury on the part of the plff.

45 4th The Court refused proper instructions asked by
Dfts.

5th The Court erred in modifying the instructions
asked by Dfts.

6th The verdict of the jury is against Law. And the
Instructions of the Court.

7th The Verdict of the jury is against the weight
of Evidence in the case

8th The Verdict should have been for the Dfts.
Cooper Atty for Dfts.

Which said Motion was overruled by the Court
& Judgment rendered on said verdict. To which
decisions of said court in overruling said Motion
for new trial & rendering judgment against defendants
on said verdict they, then & there, by their Counsel
excepted And pray that this their Bill of Ex-
ceptions may be signed & sealed by the Court
which is done

Wellington Lou B. [Signature]
County Judge

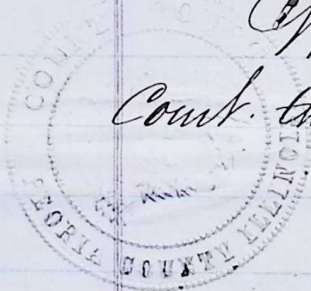
State of Illinois
 Peoria County

I Charles Kettelle, Clerk of
 the County Court of Peoria County, State of
 Illinois Do hereby Certify That the Forego-
 ing is a Full, True and Perfect Transcript
 from the Files and Records of my office in a certain
 Cause in said court wherein

Benjamin Lombard is Plaintiff
 And Ambrose C. Hankinson and
 Alfred Freeman are Defendants

Witness my Hand and Seal of said
 Court this 16th day of April. A.D. 1860.

Charles Kettelle Clerk



Rec'd of dts \$14.75 cost transcript

Kettelle clerk
 per Geo. H. Kettelle Jr.

And now come the said Appellants, Al-
 fred Freeman & Ambrose C. Hankinson, and
 say, that manifest error in the record, pro-
 ceedings & judgment of said County Court
 herein hath intervened to their prejudice
 in this Court =

125
 71

Said Court erred in overruling the motion of

depts to suppress the depositions of John C. Stewart & Isaac G. Sourhard, and in permitting the same ^{and every part thereof} to be read in evidence to the jury =

2nd = In admitting said Mitham to testify to the execution of the affixture of said note, and in allowing said note to be read in evidence to the jury =

3rd = In permitting said witnesses to testify about certain Bonds & deeds, ^{notes} with ^{out} producing or accounting for the non-production of the same =

4th = Said Court erred in ~~refusing to admit~~ ^{excluding} proper evidence offered by depts, ^{from} to be read to the jury =

5th = Said Court erred in the instructions given for the plaintiff below to the jury =

6th = The Court erred in refusing to give instructions as asked by defendants, and in modifying said second instruction =

7th = The Court erred in overruling the motion of depts, for new trial in arrest of judgment, and in rendering judgment for plff on said verdict =

8th = Said Court erred in not rendering judgment for said defendants =

Wherefore & for other good & sufficient reasons appearing in said record, Appellants pray that said judgment may be set aside reversed, annulled & wholly for naught esteemed

L. K. Cooper
att'y for App^{nts} =

Alfred Freeman
Ambrose & Hankinson

^{vs}
Benjamin Lombard

} forida in error

And now the said Benjamin
Lombard and says that there is no
error either in the record or proceedings
aforesaid or in giving the judgment
aforesaid and therefore he prays
that the judgment may be affirmed
and that his costs may be adjudged
to him

By M Williamson
his atty

45 4th The Court refused proper instructions asked by
Dfts.

5th The Court erred in modifying the instructions
asked by Dfts.

6th The verdict of the jury is against Law. And the
instructions of the Court.

7th The Verdict of the jury is against the weight
of Evidence in the case

8th The Verdict should have been for the Dfts.
Cooper Atty for Dfts.

Which said Motion was overruled by the Court
& Judgment rendered on said verdict. To which
decisions of said Court in overruling said Motion
for new trial & rendering judgment against defendants
on said verdict they, then & there, by their Counsel
excepted And pray that the then Bill of Ex-
ceptions may be signed & sealed by the Court
which is done

Wellington Louis B. [Signature]
County Judge

And afterwards Took on the 11th of October 1860
 then was Filed in the Clerk's office a power & a
 certain *Appeal Bond* as follows

Town

Know all men by these presents that we, A. C. Hankinson, Alfred Freeman & Isaac Underhill are held and firmly bound unto Benjamin Lombard in the penal sum of Six Hundred dollars for the payment whereof well & truly to be made we bind ourselves, our heirs & personal representatives jointly & severally, firmly by these presents.

The condition of this obligation is such that Whereas the said Benjamin Lombard recovered a judgment against the said Hankinson & Freeman in the sum of Three Hundred & Twenty two ⁸⁵/100 dollars & costs, in the County Court of Peoria County Illinois, at the March term thereof A.D. 1860, in a certain suit then pending in said Court, between said Lombard as plaintiff & said Hankinson & Freeman as defendants, from which judgment the said Hankinson & Freeman have prayed an appeal to the Supreme Court of said State Now if the said Hankinson & Freeman shall duly prosecute their appeal, and shall pay the judgment costs, interest & damages in case said judgment shall be affirmed then this obligation to be void, otherwise of force in the Law. Given under our hands & seals this 2nd day of April A.D. 1860.

A. C. Hankinson
 Alfred Freeman
 Isaac Underhill

Filed April 11th 1860
 Clerk of the Court

Approved W. Loucks
 Judge

189 ~~77~~ 70

Hankinson & Greenman

Appellants =

versus

Benj. Lombard

Appellee =

Filed April 16. 1861

L. Leland
Clerk