

13020

No. _____

Supreme Court of Illinois

Allison

vs.

Holdham

Allison

STATE OF ILLINOIS,

SUPREME COURT.

Third Grand Division.

No. 173.

Allison
vs

Waldham

Allison
vs
Waldham

Deposed 8/10

173070

STATE OF ILLINOIS. SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1860.

ALEXANDER ALLISON, PLAINTIFF IN ERROR,

vs.

JAMES F. WALDHAM, DEFENDANT IN ERROR.

APPEAL FROM PEORIA.

ABSTRACT.

Page
Record

March 29, 1859, Waldham filed the following declaration in the case, copy of notes, endorsements and account:

1 JAMES F. WALDHAM, plaintiff in this suit by MANNING & MERRIMAN his Attorneys, complains of ALEXANDER ALLISON, defendant in this suit, of a plea of trespass on the case upon promises; for that whereas heretofore, to wit, on the 31st day of March, A. D. 1857, at Princeton, to wit, at the county of Peoria and State
2 of Illinois, one JOHN RAMSAY made his certain promissory note in writing, and delivered the same to JOSEPH P. ALLISON and said ALEXANDER ALLISON, and thereby then and there for value received promised to pay to the said Joseph P. and Alexander by the name, style and firm of J. P. Allison & Co., the sum of eighty-four dollars, three months from date, which period has now elapsed. And the said Alexander Allison afterwards, to wit, on the day and year aforesaid, for value received endorsed and assigned said note to said plaintiff and then and there guarantied the collection thereof provided the said plaintiff would use legal diligence to collect the same, and the said plaintiff avers that at the time of the maturity of the said note, the said John Ramsay and up to the time of the commencement of this suit continued to be wholly insolvent, so that the prosecution of a suit against him would have been wholly unavailing, by means whereof the said defendant became liable to pay to said plaintiff the said sum of money in said promissory note specified according to the tenor and effect thereof and being so liable, he the said defendant in consideration thereof afterwards, to wit: on the day and year aforesaid, promised to pay to said plaintiff the said sum of money in said promissory note mentioned, when he should be thereunto afterwards requested.

3 And whereas also to wit: on the day and year aforesaid to wit at Peoria county aforesaid, the said John Ramsay made his certain other promissory

note in writing and delivered the same to the said Joseph P. Allison and Alexander Allison and thereby then and there, for value received promised to pay to said Joseph P. and Alexander by the name, style and firm of J. P. Allison & Co., the sum of one hundred dollars, six months from date thereof, with use, which period has now elapsed, and the said Alexander Allison afterwards, to wit: on the day and year aforesaid, for value received endorsed and assigned said note to the plaintiff and then and there guaranteed the collection thereof, provided the said plaintiff would use legal diligence to collect the same, and the said plaintiff avers, that at the time of the maturity of said note the said John Ramsey was, and up to the time of the commencement of this suit, continued to be wholly insolvent, so that the prosecution of a suit against him would have been wholly unavailable, by means whereof the said defendant became liable to pay to said plaintiff the said sum of money in said promissory note, specified according to the tenor and effect thereof, and being so liable, he the said defendant in consideration thereof afterwards, to wit: on the day and year aforesaid, promised to pay to said plaintiff the said sum of money in said promissory note mentioned with use, when he should be thereunto afterwards requested. And

4 for that whereas heretofore, to wit: on the 31st day of March, A. D. 1857, at Princeton, to wit: at the county aforesaid, one John Ramsey made his certain promissory note in writing and delivered the same to Joseph P. and Alexander Allison, and thereby for value received promised to pay to said Joseph P. and Alexander by the name, style and name of J. P. Allison & Co., the sum of eighty-four dollars, three months from date, which period has now elapsed; and the said Alexander Allison afterwards, to wit: on the day and year last aforesaid, at the county aforesaid, in consideration that the said plaintiff would accept the said note in part payment for certain horses then and there sold and delivered by said plaintiff to said defendant, endorsed and assigned the said note to said plaintiff and then and there guaranteed the collection thereof to said plaintiff, provided said plaintiff would use legal diligence to collect the same; and said plaintiff avers that in consideration of the guaranty aforesaid he did receive and accept the said note in part payment for said horses so sold and delivered to said defendant as aforesaid; and the said plaintiff further avers that at the time of the maturity of the said note the said Ramsey was wholly insolvent and so continued to be, to wit: hitherto by means whereof the said defendant became liable to pay to said plaintiff the said sum of money in said promissory note specified according to the tenor and effect thereof; and being so liable he the said defendant afterwards, to wit: on the day and year last aforesaid, to wit: at the county aforesaid undertook and promised to pay said plaintiff the said sum of money in said promissory note specified upon request.

5 And whereas heretofore, to wit: on the day and year aforesaid, at Princeton, to wit: at the county aforesaid, the said John Ramsey made his certain other promissory note in writing and delivered the same to Joseph P. Allison and Alexander Allison and thereby for value received promised to pay to said Joseph P. and

Alexander by the name, style and firm of J. P. Allison & Co., the sum of one hundred dollars, six months from date thereof with use, which period has now elapsed, and the said Alexander Allison afterwards to wit: on the day and year last aforesaid at the county aforesaid in consideration that the said plaintiff would accept the said note in part payment for certain horses, then and there sold and delivered by said plaintiff to said defendant, endorsed and assigned the said note to said plaintiff and then and there guarantied the collection thereof to said plaintiff provided said plaintiff would use legal diligence to collect the same, and said plaintiff avers that in consideration of the guaranty aforesaid, he did receive and accept the said note in part payment for said horses, sold and delivered to said defendant as aforesaid. And the said plaintiff further avers that at the time of the maturity of the said note the said Ramsey was wholly insolvent and so continued to be, to wit: hitherto by means whereof the said defendant became liable to pay to said plaintiffs the said sum of money in said promissory note specified according to the tenor and effect thereof, and being so liable he the said defendant afterwards, to wit: on the day and year last aforesaid undertook and promised to pay said plaintiff the said sum of money in said promissory note specified upon request.

6 And for that whereas heretofore, to wit: on the 1st day of March, A. D. 1859, the said defendant was indebted unto the said plaintiff in the sum of five hundred dollars for certain goods, chattels, and horses by said plaintiff before that time sold and delivered to said defendant at his special instance and request, and being so indebted he, the said defendant in consideration thereof afterwards to wit: on the day and year last aforesaid, undertook and promised to pay to said plaintiff the said last mentioned sum of money upon request.

And for that whereas, also heretofore to wit: on the day and year last aforesaid at the county aforesaid said defendant was indebted unto said plaintiffs in the further sum of five hundred dollars for money before that lent and advanced by said plaintiff to said defendant, at his special instance and request, and in the further sum of five hundred dollars for money before that time paid laid out and advanced by said plaintiff to and for the use of said defendant at his like special instance and request, and in the like sum for money before that time had and received by said defendant to and for the use of said the plaintiff and in like sum for interest upon and forbearance of divers large sums of money before then due and owing by and from said defendant to said plaintiff, and in the like sum for money then and there found due and owing by and from said defendant to said plaintiff on an account then and there stated between them, and being so indebted he the said defendant afterwards to wit: on the day and year last aforesaid in consideration thereof, undertook and promised to pay the said last mentioned sums of money when he should be thereunto afterwards requested.

7 Yet the said defendant not regarding his said promises and undertakings, but contriving &c., although often requested so to do, has not paid said plaintiff either of said sums of money or any part thereof, but so to do has hitherto wholly neglected and refused and still does neglect and refuse to the damage of said plaintiff of five hundred dollars and therefore he brings suit &c.

MANNING & MERRIMAN.

Attorneys for Plaintiff.

Also the following copy of notes and indorsements thereon, and an account.

COPY OF NOTES AND ACCOUNTS SUED UPON.

\$100.00

PRINCETON, March 31, 1857.

8 For value received, I promise to pay J. P. Allison & Co., the sum of One Hundred Dollars, six months from date, with use.

JOHN RAMSAY.

(Endorsed,) A. ALLISON.

\$84.00

PRINCETON, March 31, 1857.

For value received I promise to pay J. P. Allison & Co. the sum of eighty-four dollars, three months from date.

JOHN RAMSAY.

(Endorsed,) A. ALLISON.

ACCOUNT.

ALEXANDER ALLISON,

To JAMES S. WALDHAM, Dr.

To money on notes guarantied,	\$184.00
To money on notes taken in part payment for horses,	184.00
To money for goods, chattels and horses,	500.00
To money for money lent and advanced,	500.00
To money paid, laid out &c.,	500.00
To money had and received,	500.00
To money for interest,	500.00
To money found due on account stated.	500.00

The defendant below filed the following pleas:

10 1. General issue.

11 2. Set off.

The cause came on to be heard before a jury and the following proceedings were had as shown by the Bill of Exceptions:

15 The plaintiff offered in evidence a promissory note and the indorsements written thereon in the words and figures following to wit:

\$84.00.

PRINCETON, March 31, 1857.

For value received, I promise to pay J. P. Allison & Co. the sum of eighty-four dollars, three months from date,
(Endorsed.)

JOHN RAMSAY.

For value received, I assign the within note to James F. Waldham and guarantee the same on due diligence to collect.

A. ALLISON.

Judgment rendered on within on my docket,

JOS. S. WILLIAMS, J. P.

Whereto the defendant made the following objections, to wit :

1. As an assignment of the note, the indorsement is void.
2. Due diligence to collect has not been shown.
- 16 3. The guaranty contains a condition precedent of due diligence to collect, yet the plaintiff has not shown a compliance with that condition.
4. Said note and indorsement are not admissable under the declaration in this case.

But the court overruled the said objections, and the plaintiff read said note and indorsements to the jury, whereto the defendant ~~then and there excepted~~.

The plaintiff then offered in evidence another promissory note and the indorsement written thereon, in the words and figures following to wit :

\$100.00.

PRINCETON, March 31, 1857.

For value received I promise to pay J. P. Allison & Co., the sum of one hundred dollars, six months from date with use.

JOHN RAMSAY.

(Endorsed.)

For value received I assign the within note to James F. Waldham and guarantee the collection of the same if due diligence be used to collect.

A. ALLISON.

Whereto the defendant made the same objections as to the note and indorsement first herein above set out, but the court overruled said objections, the plaintiff read said last mentioned note and indorsement to the jury, and the defendant then and there excepted thereto.

- 17 The plaintiff then called George W. Stone, who testified that in August 26, 1857, he was a constable of Bureau county, Illinois, where John Ramsay resided then, and held an execution against John Ramsay, the maker of said notes, de-

manded property to satisfy said execution, but Ramsay said he hadn't any property; looked for property but found none. Ramsay left Princeton in the latter part of the summer of 1857, couldn't say whether before or after the first of October. There was an omnibus in his barn, but the barn was locked up and I couldn't levy on it. Ramsay said it didn't belong to him. I examined the records of deeds in Bureau county about three weeks ago; there were no lands in said John Ramsay, after May 16, 1857; couldn't say when I went to Ramsay with the execution; this execution was in favor of Eli U. Battle. The omnibus was taken away before I returned the execution. I received the execution on the day of July and returned it Ramsay had no other property that I knew of in this State, subject to execution up to the commencement of this suit.

Before and upon the giving of the foregoing testimony the defendant made the following objections thereto, to wit:

1. Insolvency cannot be shown under the contract alleged in the declaration.
- 18 2. Insolvency cannot be shown by general reputation, or any like evidence, but must be established by some judicial determination.
3. The testimony of a mere witness is incompetent to show that the maker of the notes did not own any real estate in Bureau county.

But the court overruled said objections, and allowed said testimony to go to the jury, whereto the said defendant then and there excepted.

The plaintiff then called William Jones, who testified, against the same objections of the defendant which were made to the testimony of said George W. Stone, as follows viz:

I don't think \$84.00 could have been made on execution against said John Ramsay in July, 1857. I was constable of Bureau county, Illinois, at that time, where John Ramsay resided, and had an execution against him, but could not make anything on it; I returned this execution on the 8th of July, 1857, unsatisfied. When I had the execution I searched round the premises of Ramsay for property. He had an omnibus locked up in his barn. I saw it through the cracks in the barn, but couldn't levy on it because it was locked up. He said he didn't own the omnibus. I left Bureau county before Ramsay did. I didn't break into the barn because I was advised that I had not authority to do so. I received the said execution in June. I do not recollect the precise date. There was an omnibus in the barn—the barn was locked up. A few days after I had seen the omnibus in the barn, I went to the barn and the omnibus had
19 been taken away; all this was while I had the execution in my hands. I don't know of any other property which Ramsay had in this State.

The plaintiff here rested his case and the defendant called Iram M. Hughes, who testified as follows, to wit:

I left Princeton, where Ramsay resided, on the 26th of October 1857; saw him on the 25th of that month. In the month of July 1857, Ramsay had three sets of harness, three horses and an omnibus; the omnibus was worth at least five hundred dollars; two of the horses were worth one hundred dollars each, and the other horse was worth two hundred dollars; the harness was worth twenty dollars. He took this property away in September 1857. I think he had this property within three or four weeks before I left Princeton, he wanted me to go with him to help take the property to Iowa. I refused to go with him. He owed me one hundred and twenty dollars, and after I returned from Texas to Princeton, I found he was gone and followed him and attached the property; sold the same and bid it in for my debt. The omnibus stood a part of the summer by Ramsay's barn and a part of the time it was in a paint shop, in Princeton, being painted. The omnibus and these horses were run off by the defendant to Iowa, I should think some time in the month of September, A. D. 1857. I am not certain about the time. I think it was three or four weeks before I left Princeton. I had to follow the property to the State of Iowa where I attached it to get my pay. I didn't know of any other personal property that Ramsay had at that time nor until he removed from this State.

20 The defendant then called Philip Lefevre who testified as follows, to wit:

Ramsay, the maker of the notes, left Bureau county on the 26th or 28th day of November, 1857. He took the omnibus and horses away four or five weeks before that time. He had the omnibus from May, 1857, a part of the time it was running between Wyanette and Pond Creek in Bureau county. The omnibus was called worth a thousand dollars; two of the horses were worth a hundred dollars each, and the other, two hundred dollars. Waldham, the plaintiff, lived in Princeton. I have no distinct recollection when the omnibus was taken away. I knew it was gone only from not seeing it any more. I will not swear that I saw it there in September, but I think I saw it there four or five weeks before Ramsay left Princeton on the 28th day of November.

This was all the evidence.

The Court gave the following instructions for the plaintiff, to which, before and at the time when the same were given, the said defendant excepted, which exceptions were then and there heard and overruled by the court, and said instructions given to wit:

- 21 1. The endorsements on the notes offered in evidence as written on them is prima facie evidence of the contract between the parties at the time of the assignment of the notes.

2. If the jury believe from the evidence that at the time when the notes fell due, or either of them, the amount due on such notes could not, nor any part of them or either of them have been collected of Ramsay, the maker of the notes, by due diligence to collect the same; and that nothing could have been collected of him from that time until the time of the commencement of this suit the jury will find in favor of the plaintiff as to both notes, or if either of them could have been so collected; or if only one of them could not have been so collected, then the jury will find in favor of the plaintiff as to that note only.

3. In a case of this kind the plaintiff would not be bound to follow Ramsay out of the State to collect the notes.

The said defendant prayed the following instructions, which were then and there refused by the Court to which refusal the said defendant then and there excepted:

1. That the plaintiff cannot recover without having shown the prompt and complete prosecution of process and proceedings of law.

22 2. That the plaintiff cannot recover without having shown an express promise by the defendant upon notice of the insolvency of the maker of the notes respectively to pay them to plaintiff.

3. That the plaintiff cannot recover the amount of the note for \$100.00 without having shown due diligence by the institution and prosecution of a suit to collect the amount thereof.

6. It was the duty of the officer having the execution, under the circumstances stated by him, to have broken into the barn and taken the omnibus.

7. The testimony of the constables about the possession of property by the maker of the notes is confined to the times during which they actually held executions and made search for property.

9. Insolvency cannot be shown by general reputation, but must be established by some legal determination of the question.

11. The testimony of a person not a clerk in or otherwise officially connected with the office of the Recorder of deeds, is not sufficient to excuse the filing of a transcript from the docket of a Justice of the Peace and the putting of an execution into the hands of the sheriff for service; and without such transcript and execution the fact that an execution from a Justice of the Peace has been returned no property found—is not proof of insolvency.

23 12. The plaintiff cannot recover without having shown that he demanded

payment from the maker of the notes and a refusal of such payment and immediate notice thereof to the defendant.

The endorsements on the back of the notes are not evidence of anything except that the name of Allison is written thereon.

The plaintiff must go beyond the mere endorsement and show by additional proof that Allison for a valuable consideration made the contract and promise as stated in his declaration.

Unless the plaintiff has proved that he used due diligence to collect the notes from Ramsay and that he failed to collect the same and gave notice to Allison within a reasonable time, the plaintiff cannot recover.

The jury returned the following verdict to wit :

"We, the Jury, find for the plaintiff and assess the damages to the amount of one hundred and sixteen and twenty-five hundredths dollars."

The defendant filed and entered his motion for a new trial which with the reasons thereto attached is as follows to wit :

24 STATE OF ILLINOIS, } ss.
County of Peoria.

In the Circuit Court of the November Term, A. D., 1859.

JAMES F. WALDHAM, }
vs. } ASSUMPSIT.
ALEXANDER ALLISON.

The defendant moves for a new trial &c. for the following reasons, &c.

1. The Court refused proper instructions prayed by defendant.
2. The Court gave improper instructions for the plaintiff.
3. The verdict is against the weight of evidence.
4. The verdict is against the law of the land.
5. The evidence and verdict are otherwise manifestly irregular, illegal, and insufficient.

HENRY GROVE & CHARLES C. BONNEY,

For Defendant.

But the court overruled the motion for a new trial and gave judgment on said verdict, whereto the said defendant then and there excepted and prayed the court to sign and seal this bill of exceptions, which is accordingly done.

The plaintiff now assigns the following errors upon the record:

26 STATE OF ILLINOIS, ss.

In the Supreme Court at Ottawa, of the April Term, A. D. 1860.

27 ALEXANDER ALLISON }
vs. } Appeal from Peoria.
JAMES F. WALDHAM. }

ASSIGNMENT OF ERRORS.

And hereupon comes the said ALEXANDER ALLISON, by HENRY GROVE and CHARLES C. BONNEY, his Attorneys, and says that in the record and proceedings aforesaid, and also in the rendition of the judgment aforesaid, there is manifest error in this to wit:

1. The said Circuit Court admitted improper evidence for the said James F. Waldham, against the objection of the said Alexander Allison, and to his manifest injury.
2. The said Circuit Court gave improper instructions for the said James F. Walham against the objection of the said Alexander Allison, and to his manifest injury.
3. The said Circuit Court refused to give proper instructions prayed by the said Alexander Allison, and which ought to have been given to the jury upon the trial below.
- 23 4. The verdict of the jury upon the trial below, is manifestly against the weight of the evidence, nevertheless the said Circuit Court refused the motion of the said Alexander Allison for a new trial &c.
5. The said declaration is manifestly insufficient to maintain the action of the plaintiff, yet the said Circuit Court overruled the motion of the said Alexander Allison in arrest of judgment &c.
6. The record, proceedings and judgment aforesaid, are otherwise manifestly informal, irregular, uncertain, illegal and insufficient:

Wherefore, the said Alex. Allison prays that the judgment aforesaid for the errors aforesaid, may be reversed, annulled and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of said judgment, &c.

HENRY GROVE & CHARLES C. BONNEY,

Attorneys for Appellants.

173-64

Allison

vs

Wardham

Abstract

Filed Apr 18. 1860

Leland

Clerk

The following are the full and correct copies of the record:

State of Illinois }
In the Supreme Court
Ottawa Term A.D. 1860

110. 173. Alexander Allison }
v. } Appeal from
James H. Waldham } Prior -

Reply of Charles C. Boney to the
points made by Manning Messman
for the Appellee -

1. It is said that the objection that
the declaration shows no cause
of action — that insolvency
of the maker is no excuse
for non-performance of the
condition precedent of legal diligence,
comes too late.

The objection, as a matter of fact,
was made by moving instructions
and by motion in arrest;
but as a matter of law, it is
time enough to make it an
error.

25
2. The case of *Harrison & al. v. Thornton* 2 Scam. R. 354, does not help the appellee. In that case "parol testimony was ~~also~~ given by both parties, as to the insolvency of the makers of the note &c.

As both parties, did the thing in question, neither could object that it had been done by the other. But that was upon a contract of indorsement, within the statute, — this a contract of guaranty, without the statute.

3. Whether Ramsay, the maker of the notes had property before the last note fell due, is not by any means immaterial. He had property subject to execution in July, the presumption is that he continued to hold the same property in October, and there is no evidence in the case, sufficient to rebut that presumption.

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4 The instruction that the officer was not bound to enter the barn by force, and take the omnibus, was relevant to the whole case. The refusal of that instruction led the jury to suppose that the court below held that as a matter of law, the secreting or forcible withholding of property was equivalent to insolvency.

5. Justice has not been done, because there is a verdict against the appellant, without the performance of the condition precedent by which he limited his liability.



173-64

15

Alison

Waldham

Waldham

Bonney's reply
to Manning &
Messier's points

Filed May 2. 1860

Edmund
Clark

Pleas before the Circuit Court within and for the County
of Peoria, and State of Illinois on the 19th day of
December in the year of our Lord one thousand
eight hundred and fifty nine, at the November
term thereof, to-wit:

State of Illinois
Peoria County } Be it Remembered that heretofore
to-wit on the twenty ninth day of March in the year of
our Lord One thousand eight hundred and fifty nine there
was filed in the office of the Clerk of the Circuit Court
in and for Peoria County, State of Illinois, a declaration
which with the precept thereto attached is in the words
and figures following to-wit:

Declaration

" State of Illinois } In Peoria Circuit Court
Peoria County } May Term 1859
James P. Waldham
vs } In Assumpsit.
Alexander Allison

[James P. Waldham, plaintiff
in this suit by Manning & Merriman his attorneys complains
of Alexander Allison defendant in this suit of a plea of]

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trespass on the case upon promises; for that whereas here-
before to wit: on the 31st day of March A.D. 1857 at
Princeton to wit at the County of Peoria and State of Illinois
one John Ramsey made his certain promissory note in
writing and delivered the same to Joseph P. Allison and
said Alexander Allison and thereby then and there for
value received promised to pay to said Joseph P. and
Alexander by the name, style and firm of J. P. Allison
& Co the sum of eighty four dollars, three months from
date which period has now elapsed. And the said
Alexander Allison afterwards to wit: on the day and year
aforesaid, for value received endorsed and assigned said
note to said plaintiff and then and there guaranteed
the collection thereof provided the said plaintiff would
use legal diligence to collect the same, and the said
plaintiff avers that at the time of the maturity of the
said note the said John Ramsey was and up to the
time of the commencement of this suit continued to be
wholly insolvent, so that the prosecution of a suit against
him would have been wholly unavailing, by means whereof
the said defendant became liable to pay to said plain-
tiff the said sum of money in said promissory note
specified according to the tenor and effect thereof and
being so liable he the said defendant in consideration
thereof afterwards to wit: on the day & year aforesaid
promised to pay to said plaintiff the said sum of money
in said promissory note mentioned, when he should be
thereunto afterwards requested.

And whereas also to wit on the day and year aforesaid to
wit: at Peoria County aforesaid the said John Ramsey
made his certain other promissory note in writing and
delivered the same to the said Joseph P. Allison and
Alexander Allison and thereby then and there for value
received promised to pay to said Joseph P. and Alexander
by the name, style and firm of J. P. Allison & Co. the sum
of One Hundred dollars six months from date thereof, with
use which period has now elapsed, and the said Alexander
Allison afterwards to wit: on the day and year aforesaid
for value received endorsed and assigned said note to
the plaintiff and then and there guaranteed the collection
thereof, provided the said plaintiff would use legal diligence
to collect the same, and the said plaintiff avers, that
at the time of the maturity of said note the said John
Ramsey was, and up to the time of the commencement
of this suit continued to be wholly insolvent so that the
prosecution of a suit against him would have been wholly
unavailable, by means whereof the said defendant became
liable to pay to said plaintiff the said sum of money
in said promissory note specified, according to the tenor
and effect thereof, and being so liable, he the said defend-
ant in consideration thereof afterwards to wit: on the day
and year aforesaid promised to pay to said plaintiff the
said sum of money in said promissory note mentioned
with use, when he should be thereunto afterwards re-
quested. And for that whereas heretofore to wit on the
31st day of March A.D. 1857 at Princeton to wit:

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promissory note specified upon request.

And whereas heretofore to wit on the day and year aforesaid at Princeton to wit: at the County aforesaid ^{the said} John Ramsey made his certain other promissory note in writing and delivered the same to Joseph P. Allison and Alexander Allison and thereby for value received promised to pay to said Joseph P. and Alexander by the name style and firm of J. P. Allison & Co. the sum of One hundred dollars six months from date thereof with use, which period has now elapsed; and the said Alexander Allison afterwards to wit: on the day and year last aforesaid at the County aforesaid in consideration that the said plaintiff would accept the said note in part payment for certain horses then and there sold and delivered by said plaintiff to said defendant endorsed and assigned the said note to said plaintiff and then and there guaranteed the collection thereof to said plaintiff provided said plaintiff would use legal diligence to collect the same; and said plaintiff avers that in consideration of the guaranty aforesaid he did receive & accept the said note in part payment for said horses so sold and delivered to said defendant as aforesaid And the said plaintiff further avers that at the time of the maturity of the said note the said Ramsey was wholly insolvent and so continued to be to wit: hitherto by means whereof the said defendant became liable to pay to said plaintiffs the said sum of money in said promissory note specified according to the tenor and effect

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thereof, and being so liable he the said defendant afterwards to wit: on the day and year last aforesaid undertook and promised to pay said plaintiff the said sum of money in said promissory note specified upon request.

And for that whereas heretofore to wit on the first day of March A.D. 1859 the said defendant was indebted unto the said plaintiff in the sum of five hundred dollars for certain goods chattels & horses by said plaintiff before that time sold and delivered to said defendant at his special instance and request, and being so indebted he the said defendant in consideration thereof afterwards to wit: on the day and year last aforesaid, undertook and promised to pay to said plaintiff the said last mentioned sum of money upon request.

And for that whereas also heretofore to wit: on the day and year last aforesaid at the County aforesaid said defendant was indebted unto said plaintiffs in the further sum of five hundred dollars for money before that time lent and advanced by said plaintiff to said defendant, at his special instance and request, and in the further sum of five hundred dollars for money before that time paid, laid out and advanced by said plaintiff to and for the use of said defendant at his like special instance and request, and in the like sum for money before that time had and received by said defendant to and for the use of said plaintiff and in the like sum for interest upon and forbearance

of divers large sums of money before then due and owing
by & from said defendant to said plaintiff and in the
like sum for money then and there found due and
owing by and from said defendant to said plaintiff
on an account then & there stated between them, and
being so indebted he the said defendant afterwards to
wit on the day and year last aforesaid in consideration
thereof undertook & promised to pay the said last-
mentioned sums of money when he should be thereunto
afterwards requested.

Yet the said defendant not regarding
his said promises and undertakings but contriving &c
although often requested so to do, has not paid said
plaintiff either of said sums of money or any part
thereof but so to do has hitherto wholly neglected and
~~and still does neglect and refuse~~
refused to the damage of said plaintiff of Five
hundred dollars and therefore he brings suit &c.

Manning & Mcerriman
Attys for plff.

Copy of Notes and account sued upon.
[\$ 100.00] Princeton March 31, 1857
For value received I promise to pay J. P. Allison & Co
the sum of One hundred dollars, six months from
date with use

John Ramsey
(Endorsed) A. Allison

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\$84.00
 Princeton March 31, 1857
 For value received I promise to pay J. P. Allison & Co.
 the sum of eighty four dollars three months from date
 John Ramsey

(Endorsed) A. Allison
 Account:

Alexander Allison

To James P. Waldham Dr.
 To money on notes guaranteed \$ 184.00
 To money on notes taken in part payment
 for horses \$ 184.00
 To money for goods chattels & horses \$ 500.00
 To money for money lent & advanced \$ 500.00
 To money paid laid out &c \$ 500.00
 To money had and received \$ 500.00
 To money for interest \$ 500.00
 To money found due on account stated \$ 500.00

James P. Waldham
 vs
 Alexander Allison } In Peoria Circuit Court
 To the May term A.D. 1859
 In Assumpsit
 Damages \$ 500.00

The clerk will please issue summons in the above
 entitled cause returnable to the May term 1859
 to the Sheriff of Peoria County
 To E. P. Sloan Esq.
 Clerk

Yours &c
 Manning & Merriman
 Attys for Plff

And afterwards to wit on the 29th day of March
A.D. 1859 there was issued out of the Clerk's office of
said Court under the seal thereof a summons directed
to the Sheriff of Peoria County which is in the words and
figures following to wit:

Summons

"The People of the State of Illinois to the Sheriff of Peoria
County Greeting: We command you to summon Alexander
Allison if he may be found in your County, to appear
before our Circuit Court on the first day of the term there
of, to be held at Peoria, within and for the County of
Peoria, on the first Monday of May next, then and there
in our said Court, to answer unto James P. Walsham
of a plea of assumpsit to his damage five hundred
dollars as he says, and make return of this writ with
an endorsement of the time and manner of serving the
same, on or before the first day of the term of the said
Court to be held as aforesaid, Witness Enoch P. Sloan
Clerk of our said Court and the seal thereof
at Peoria this 29th day of March in the year
of our Lord One thousand eight hundred and
fifty nine.

Enoch P. Sloan, Clerk

Which summons was afterwards returned by said Sheriff
endorsed as follows to wit:

Return

"State of Illinois,
Peoria County { I have ^{duly} served this writ by reading to the
within named Alexander Allison, this 29th day of March
A.D. 1859

John Pryner
for A. D. McEasley, Spt.

And afterwards to wit, on the 25th day of November
the defendant filed in the Clerk's office of said Court
his plea - General issue & notice of set-off in said
cause which is in the words and figures following to wit:

"State of Illinois

County of Peoria } ss.

Alexander Allison

James P. Waldham

In the Circuit Court
of the November term A.D. 1859

In assumpsit
Plea - General issue

And the said defendant by
Bourney and O'Brien his attorneys comes and defends
the wrong and injury when &c and says that he did not
undertake or promise in manner and form as the said
plaintiff hath above thereof complained against him
and of this he puts himself upon the Country &c

Bourney & O'Brien

Attorney for defendant

And the plaintiff doth the like &c

Manning & Merriman

Attorneys for plaintiff

Notice of set-off

Between

James P. Waldham, plaintiff

and

Alexander Allison, defendant

To Manning, Merriman & McCulloch Esquires

Attorney for the above named plaintiff

Take notice that the above named defendant on trial

Plea =

General issue

of this cause will give in evidence and insist that the above named plaintiff before and at the time of the commencement of this suit was and still is indebted to the said defendant in the sum of One thousand dollars, for and for the work and labor, care, diligence and attendance of the said defendant by the said defendant and his servants before that time done, performed and bestowed in and about the business of the said plaintiff and at his request; and for divers materials and other necessary things by the said defendant before that time found and provided and used and applied in and about the said work and labor for the said plaintiff and at his like request; and for divers goods, wares and merchandize sold and delivered by the said defendant to the said plaintiff and at his like request; and for money by the said defendant before that time lent and advanced to and paid laid out and expended for the said plaintiff and at his like request; and for money by the said plaintiff before that time had and received, to and for the use of the said defendant; and for money due and owing from the said plaintiff to the said defendant, for interest upon, and for the forbearance of divers large sums of money due and owing from the said plaintiff to the said defendant; and by the said defendant foreborne to the said plaintiff, for divers long spaces of time before then elapsed, and for money due and owing from the said plaintiff to the said defendant upon an account stated between them, And that the said defendant will set off and allow to the plaintiff on the said trial

so much of the said sum of \$ 1000⁰⁰ to due and owing from the said plaintiff to the said defendant against any demand of the said plaintiff to be proved on the said trial as will be sufficient to satisfy and discharge such demand &c

Bonney & O'Brien

Attorney for defendant.

Proceedings at a Special term of the Circuit Court began and held at the Court house in the City and County of Peoria in the State of Illinois on the second Monday ^{is the report} of June in the year of our Lord one thousand eight hundred and fifty nine it being the thirteenth day of said month. Present the Honorable Elisha N. Powell judge of the 16th judicial Circuit in the State of Illinois, John Boyner Sheriff and Enoch P. Sloan clerk to wit:

Tuesday June 1st A D. 1859

James P. Waldham

vs

Assumpsit.

Alexander Allison

By agreement of parties this cause is continued and plaintiff has leave to amend his declaration.

Proceedings at a term of the Circuit Court of Peoria County began and held at the Court house in the City of Peoria in said County and State of Illinois on the third Monday in the month of November in the year of our Lord one thousand eight hundred and fifty nine, it being the twenty first day of said month. Present

the Honorable Elisha N. Powell judge of the 16th
judicial Circuit in said State, John Bryner Sheriff
and Enoch P. Sloan clerk to wit:

Wednesday, December 14th A.D. 1859
James F. Waldham

vs Assumpsit
Alexander Allison

This day come the plaintiff by
Manning his attorney and the defendant by Bonney and
Grove his attorneys and it is ordered by the Court that a
jury be empanelled to try the issues in this cause, where-
upon came a jury of twelve good and lawful men to wit:
James Elson, A. W. Burdwell, John White R. B. McCulloch
John Shaw, James C. Armstrong, David Lucas, J. G. Lane,
Sanford Meon James Dougherty, George W. O'Dell and
G. W. McMillen who being duly chosen, tried and sworn
to well and truly try the issues joined in this cause and
a true verdict give according to the evidence do say: We
the jury find the issues for the plaintiff and assess his
damages at the sum of One hundred and sixteen dollars
and twenty five cents. Whereupon the defendant by his
attorneys moved the Court for a new trial

Monday December 19th A.D. 1859
James F. Waldham

vs } Assumpsit
Alexander Allison

This day come the parties to this

suit by their respective attorneys and this cause come on to be heard on the motion for a new trial herein and the Court being fully advised in the premises do overrule said motion. The defendant then made a motion in arrest of judgment and the Court being satisfied in the premises do overrule said motion. Thereupon it is considered by the Court that the said James F. Waldham have and recover of the said Alexander Allison the said sum of one hundred and sixteen dollars and twenty five cents his damages aforesaid and also his costs and charges by him about his suit in this behalf expended and that he have execution therefor.

Friday December 30th A.D. 1859
 James F. Waldham
 vs
 Alexander Allison Assumpsit

This day came the defendant by his attorneys and prayed an appeal to the Supreme Court of this State which is allowed, on his filing his bond with Sidney Pulsifer or A. Frank as security in the penal sum of four hundred dollars payable to said plaintiff and conditioned as the law directs. Said bond to be filed with the clerk of this Court in twenty days.

And afterwards to wit on the 30th day of December A.D. 1859 there was filed in the office of the clerk of the Circuit Court in and for said County, a bill of

Bill of Exceptions

exceptions in said cause, which is in the words and figures following to wit:

State of Illinois }
County of Peoria } ss In the Circuit Court of the November
term A.D. 1859

James P. Waldham

vs

Assumpsit

Alexander Allison

Bill of Exceptions

Be it remembered that on the trial of this cause the plaintiff offered in evidence a promissory note and the indorsements written thereon in the words and figures following to wit:

\$ 84.00

Princeton March 31 1857

For value received I promise to Pa J. P. Allison & Co
the sum of eighty four dollars three munts from date
John Ramsey

(Endorsed)

For value recd I assign the within note to James P.
Waldham and guaranty the ^{same} ^{with} ^{the} ^{best} ^{possible} ^{diligence} to collect
J. P. Allison

Where to the defendant made the following objections
to wit:

1. As an assignment of the note the indorsement is
void
2. Due diligence to collect has not been shown.

3. The guaranty contains a condition precedent of due diligence to collect, yet the plaintiff has not shown a compliance with that condition.

4. Said note and indorsement are not admissible under the declaration in this case.

But the Court overruled the said objections, and the plaintiff read said note and indorsements to the jury whereat the defendant then and there excepted.

The plaintiff then offered in evidence an other promissory note and the indorsement written thereon, in the words and figures following to wit:

" \$ 100.⁰⁰

Princeton March 31, 1857

For value received I promise to Pa J. P. Allison & Co. the sum of one hundred dollars six munts from date with use

John Ramsey "

(Indorsed)

"For value recd I assign the within note to James F. Wadham and guaranty the collection of the same if due diligence be used to collect.

A. Allison "

Whereat the defendant made the same objections as to the note and indorsement first herein above set out, but the Court overruled said objections, the plaintiff read said last mentioned note and indorsement to the jury, and the defendant then and there excepted thereto.

8

The plaintiff then called George W. Stone, who testified that in August 26, 1857 he was a constable of Bureau County Illinois, where John Ramsay resided then and held an execution against John Ramsay the maker of said notes, demanded property to satisfy said execution but Ramsay said he had 'nt any property - Looked for property but found none. Ramsay left Princeton in the latter part of the summer of 1857, could 'nt say whether before or after the first of October. there was an omnibus in his barn, but the barn was locked up and I could 'nt levy on it. Ramsay said it did 'nt belong to him. I examined the Records of deeds in Bureau County about 3 weeks ago - there were no lands in said John Ramsay after May 16, 1857 - can't say when I went to Ramsay with the execution, this execution was in favor of Eli M. Battle - the omnibus was taken away before I returned the execution. I received the execution on the day of July and returned it.

Ramsay had no other property that I knew of in this State subject to execution up to the commencement of this suit.

Before and upon the giving of the foregoing testimony the defendant made the following objections thereto to wit:

1. Insolvency cannot be shown under the contract alleged in the declaration.

2 Insolvency cannot be shown by general reputation, or any like evidence, but must be established by some judicial determination

3. The testimony of a mere witness is incompetent to show that the maker of the notes did not own any real estate in Bureau County.

But the Court overruled said objections, and allowed said testimony to go to the jury, where to the said defendant - then and there excepted.

The plaintiff then called William Jones who testified against the same objections of the defendant which were made to the testimony of said George W. Stone, as follows viz:

I don't think \$84 could have been made on execution against said John Ramsay in July 1857. I was a constable of Bureau County Illinois at that time, where Ramsay resided, and had an execution against him, but could not make anything on it, I returned this execution on the 8th of July 1857 unsatisfied. When I had the execution I searched round the premises of Ramsay for property. He had an omnibus locked up in his barn. I saw it through the cracks in the barn but could not lay on it because it was locked up. He said he didn't own the omnibus. I left Bureau County before Ramsay did. I did not break into the barn because I was advised that I had not authority to do so. I received the said execution in June, I do not recollect the precise date. There was an omnibus in the barn - The barn was locked up.

A few days after I had seen the omnibus in the barn, I went to the barn and the omnibus had been taken away - all this was while I had the execution in my hands. I don't know of any other property, which Ramsay had in this State.

The plaintiff here rested his case and the defendant called Frank M. Hughs, who testified as follows to wit:

I left Princeton where Ramsay resided on the 26, October 1857, saw him there on the 25th of that month, in the month of July 1857, Ramsay had 3 sets of harness, 3 horses and an omnibus the omnibus was worth at least \$500, two of the ~~2~~ horses were worth \$100. each and the other horse was worth \$200. The harness was worth \$20. He took this property away in September 1857, I think he had this property within 3 or 4 weeks before I left Princeton, he wanted me to go with him to help take the property to Iowa - I refused to go with him. He owed me \$120. and after I returned from Texas to Princeton I found he was gone and followed him and attached the property, sold the same ~~and~~ and bid it in for my debt. The omnibus stood a part of the summer by Ramsay's barn and a part of the time it was in a paint shop in Princeton being painted. The omnibus and these horses were run off by the defendant to Iowa I should think some time in the month of September A.D. 1857, I am not certain about the time, I think it was three or four weeks

before I left Princeton. I had to follow the property to the State of Iowa where I attached it to get my pay. I didn't know of any other personal property that Ramsay had at that time nor until he ~~left~~ removed from this state.

The defendant then called Philip Lefevre who testified as follows to wit:

Ramsay the maker of the notes left Bureau County on the 26th or the 28th day of November 1857. He took the omnibus and horses away 4 or 5 weeks before that time. He had the omnibus from May 1857, a part of the time it was running between Wyanette and Bond Creek in Bureau County. The omnibus was called worth a thousand dollars. Two of the horses were worth a hundred dollars each, and the other two hundred dollars. Waldham the plaintiff lived in Princeton. I have no distinct recollection when the omnibus was taken away. I knew it was gone only from not seeing it any more. I will not swear that I saw it there in September but I think I saw it there 4 or 5 weeks before Ramsay left Princeton on the 28th day of November.

This was all the evidence.

The Court gave the following instructions for the plaintiff, to which, before and at the time when the same were given the said defendant excepted, which exceptions were then and there heard and overruled by the Court and said instructions given to wit:

Given

1. The endorsement on the notes offered in evidence as written on them is prima facie evidence of the contract between the parties at the time of the assignment of the notes

Given

2. If the jury believe from the evidence that at the time when the notes fell due, or either of them, the amount due on such notes could not, nor any part of them or either of them have been collected of Ramsay, the maker of the notes by due diligence to collect the same, and that nothing could have been collected of him from that time until the time of the commencement of this suit, then the jury will find in favor of the plaintiff as to both notes if either of them could have been so collected; or if only one of them could not have been so collected then the jury will find in favor of the plaintiff as to that note only.

Given

3. On a case of this kind the plaintiff would not be bound to follow Ramsay out of the State to collect the notes

The said defendant prayed the following instructions which were then and there refused by the Court to which refusal ~~by the Court~~ the said defendant then and there excepted:

Refused

1 That the plaintiff cannot recover without having shown the prompt and complete prosecution of process and proceedings of law.

refused

2 That the plaintiff cannot recover without having shown an express promise by the defendant upon notice of the insolvency of the maker of the notes respectively to pay them to the plaintiff.

refused

3. That the plaintiff cannot recover the amount of the note for \$100. without having shown due diligence by the institution and prosecution of a suit to collect the amount thereof.

refused

6. It was the duty of the officer having the execution under the circumstances stated by him, to have broken into the barn and taken the omnibus.

refused

7. The testimony of the constables about the possession of property by the maker of the notes is confined to the times during which they actually held executions and made search for property.

refused

9 Insolvency cannot be shown by general reputation but must be established by some legal determination of the question.

refused

11 The testimony of a person not a clerk in or otherwise officially connected with the office of the Recorder of deeds, is not sufficient to excuse the filing of a transcript from the docket of a justice of the peace and the putting of an execution into the hands of the Sheriff for service, - and without such transcript

and execution the fact that an execution from a Justice of the peace has been returned no property found - is not proof of insolvency

12. The plaintiff cannot recover without having shown that he demanded payment from the maker of the notes and a refusal of such payment - and immediate notice thereof to the defendant.

The endorsements on the back of the notes are not evidence of any thing except that the name of Allison is written thereon.

The plaintiff must go beyond the mere endorsement & show by additional proof that Allison for a valuable consideration made the contract & promise as stated in his declaration.

Unless the plaintiff has proved that he used due diligence to collect the notes of Ramsay and that he failed to collect the same and gave notice to Allison within a reasonable time, the plaintiff cannot recover.

The jury returned the following verdict to wit:
"We the jury find for the plaintiff and assess the damages to the amount of One hundred and sixteen & 25/100 dollars"

The defendant filed and entered his motion for a new trial which with the reasons therefor

attached, is as follows to wit:

State of Illinois

County of Peoria

In the Circuit Court
Of the November term A D. 1859

James F. Waldham

vs

Assumpsit

Alexander Allison

The defendant moves for a new trial
for the following reasons:

- 1 The Court refused proper instructions prayed by defendant.
- 2 The Court gave improper instructions for the plaintiff
3. The verdict is against the weight of evidence.
4. The verdict is against the law of the land
- 5 The evidence and verdict are otherwise manifestly irregular illegal and insufficient

Henry Grove & Charles C. Roney
for deft.

But the Court overruled the motion for a new trial and gave judgment on said verdict, where to the said defendant then and there excepted and prayed the Court to sign and seal this bill of exceptions, which is accordingly done.

E. N. Powell Esq

And afterwards to wit on the 17th day of January A D. 1860 the defendant filed in the Clerk's office of said Court his appeal bond in said cause

Appeal bond

which is in the words and figures following to wit:

" State of Illinois }
County of Peoria } ss
James F. Waldham

In the Circuit Court

vs
Alexander Allison

Appeal Bond

Know all men by these presents that we Alexander Allison as principal and Abraham Frank as surety are held and firmly bound unto James F. Waldham, in the penal sum of four hundred dollars for the payment of whereof well and truly to be made, we do bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents.

Witness our hands and seals at Peoria this sixth day of January A.D. 1860.

The condition of the foregoing obligation is such that whereas the said James F. Waldham did at the November term A.D. 1859 of the Circuit Court within and for the County of Peoria in the State of Illinois recover a judgment by the consideration of said Court against the said Alexander Allison, for the sum of one hundred and sixteen dollars and twenty five cents together with costs of suit, from which said judgment the said Alexander Allison has taken an appeal to the Supreme Court of said State of Illinois. Now provided the said Alexander Allison shall duly prosecute his said appeal and shall well and truly pay said judgment and costs and all interest and damages in case

said judgment shall be affirmed by said ~~judgment~~ shall
~~be affirmed by said~~ Supreme Court - then this obligation
 shall be void, otherwise to remain in full force and
 virtue

Alexander Allison *Seal*
 A. Frank *Seal*

State of Illinois }
 Peoria County } ss I, Enoch P. Sloan Clerk of the
 Circuit Court in and for the County of Peoria in the State
 of Illinois do hereby certify that the foregoing is a full ^{complete}
 and correct transcript of the papers filed and of the
 proceedings of our said Court had in a certain cause
 wherein James F. Waldham is plaintiff and Alexander
 Allison is defendant; as the same remain on file and
 of Record in my office

Given under my hand and
 the seal of said Court herunto
 affixed this 7th day of
 March in the year 1860
 Enoch P. Sloan, Clerk
 per J. G. Schulze Dpty.

[State of Illinois }
 In the Supreme Court at Ottawa
 Of the April Term A.D. 1860.

Alexander Allison }
James F. Waldham } Appeal from Peoria

Assignment of Errors.

And hereupon comes the said Alexander Allison, by Henry Grove and Charles C. Bourney his attorneys, and says that in the record and proceedings aforesaid, and also in the rendition of the judgment aforesaid, there is manifest error in this, to wit:

1. The said Circuit Court admitted improper evidence for the said James F. Waldham, against the objection of the said Alexander Allison, and to his manifest injury.
2. The said Circuit Court gave improper instructions for the said James F. Waldham against the objection of the said Alexander Allison, and to his manifest injury.
3. The said Circuit Court refused

proper instructions prayed by the said Alexander Allison, and which ought to have been given to the jury upon the trial below.

4. The Verdict of the jury upon the trial below, is manifestly against the weight of the evidence, nevertheless the said Circuit Court refused the motion of the said Alexander Allison for a New Trial &c.

5. The said Declaration is manifestly insufficient to maintain the action of the plaintiff, yet the said Circuit Court overruled the motion of the said Alexander Allison in arrest of judgment, &c.

6. The Record, Proceedings and Judgment aforesaid, are otherwise manifestly informal irregular uncertain, illegal and insufficient:

Therefore the said Alexander Allison prays that the judgment aforesaid, for the errors aforesaid, may be reversed, annulled, and altogether held

for nothing, and that he may
be restored to all things which he
hath lost by occasion of said
judgment, &c.

Henry Grove &
Charles C. Bourne
attorneys for appellants

Finder in Error.

And hereupon comes
the said James F. Waldham by
Manning & Merriam his attorneys
and says that ~~in~~ there is no
error, either in the record and
proceedings aforesaid, or in the
 rendition of the judgment
aforesaid, and prays that the
said Supreme Court may
proceed and examine as well
the record and proceedings aforesaid
as the matters aforesaid above
assigned for error, and that
the judgment aforesaid in form
aforesaid given, may be in all
things affirmed &c.

Manning & Merriam
for appellee

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Y. Allison

Alexander Allison

W. H. King

James F. Waldham

Record of
Angt of rivers

Record
about
Bang

Filed April 12. 1860
L. Leland
Clerk

from