

12563

No. _____

Supreme Court of Illinois

Morse

vs.

Freeman et al

71641  7

Chickadee

212

Moore

VS

5

from

12563

1858

X

1/2 of 1/2

United States of America
State of Illinois, Kane County, ss.

Pleas before the Honorable Isaac
G. Wilson Judge of the Thirteenth
Judicial Circuit and Presiding
Judge of Kane County Circuit Court
in the State of Illinois at a regular
Term of said Court begun and held
at the Court House in Geneseo in said County on the
Eighteenth day of January in the Year of Our Lord
One thousand Eight Hundred and fifty Eight.

Present The Hon Isaac G. Wilson Judge
Edward S. Joslyn State Attorney
George E. Corwin Sheriff
Attest Paul Wright
Clerk

Be it remembered that heretofore to wit on the
14th day of September A.D. 1857 a Summons
was issued from the office of the Clerk of said Kane
County Circuit Court in the words & figures following.
To wit:

State of Illinois)
Kane County ss. The People of the State of Illinois
to the Sheriff of said County: Greeting

We command you that you summon Elisha Sprague
and George W. Waite if they shall be found in your County
personally to be and appear before the Circuit Court of said
County on the first day of the next term thereof to be holden at
the Court House in Geneseo in said County on the Second
Monday of November next to answer unto Gustavus

2.

H. Morse in a plea of Trespass on the case on promises to the damage of said plaintiff as he says in the sum of One thousand Dollars, And have you then & there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Paul A. Wright, Clerk of our said Court and the Seal thereof at Geneva, in said County, this 14th day of September A.D. 1857.
P. A. Wright
Clerk

Which summons was returned on the 15th day of September 1857, Endorsed as follows to wit:

Executed this writ by reading to the within named Elisha Freeman Geo. H. Waite Sept 14th 1857
G. E. Corwin, Sheriff Kane County.

And afterwards to wit on the 19th day of October 1857 a Declaration was filed in the office of the Clerk of said Court in the words & figures following, to wit:

Kane Co Cir Court
Nov Term 1857
State of Illinois }
Kane County to wit: Gustavus H. Morse plaintiff
in this suit complains of Elisha Freeman and George H. Waite defendants in this suit in a plea of trespass on the case upon promises, Nor that the said defendants heretofore to wit on the first day of August A.D. 1857 at Kane County aforesaid were indebted to the said plaintiff in the sum of One thousand Dollars for so much money by the said defendants before that time had and received to and for the use of the said plaintiff

3.

and being so indebted, they, the said defendants, in consideration thereof afterwards to wit on the day & year aforesaid, to wit at Kane County aforesaid undertook and then and there faithfully promised the said plaintiff to pay him the said sum of One thousand dollars, when they, the said defendants should be thereunto afterwards requested. Yet the said defendants have not paid the said sum of one thousand dollars nor any part thereof but to pay the same have hitherto wholly neglected and refused and still do neglect and refuse to pay the same altho after requested so to do to the damage of the said plaintiff of One thousand dollars and therefore he brings this suit. &c.

J. C. Moore

Plffs atty

Copy of a/c declared on Elisha Freeman
+ George W. Waite in a/c with Gustavus
W. Morse. \$1000.00 money had & received
to the use of the said Morse

Moore atty

And afterwards to wit on the 10th day of November A.D. 1857, a plea and replication were filed in the Office of the Clerk of said Court in the words and figures following to wit.

Kane Co. Cir Court
Elisha Freeman &
George W. Waite

Ads

Gustavus W. Morse

And the said defendants
by J. W. Ferguson their

4.

attorney come and defend the wrong and
injury when so and say that they did not
undertake or promise in manner & form as
the Plaintiff hath above thereof complained
against them and this they put themselves
upon the country &c

J. H. Ferguson

~~Deft's Atty~~

And the Plaintiff doth the like by
Morris his atty

And afterwards to wit on the 8th day of Decr
A D 1858, the same being one of the days of the
said January Term of said Court, the following
among other proceedings was had and entered
of Record. to wit.

Gustave W. Morris

v

Elisha Freeman

George W. Wait

Appear

This day comes the
Plaintiff by Morris his

attorney and the defendants by Eastman
their Attorney also come, and on motion of
the Plaintiff it is ordered by the Court that a
jury come whereupon a jury of good and
lawful men to wit: Daniel Smith J.E.
Lorr, Thomas O. Clark John P. Wheeler, John
J. Chambers, Abner Currier Jason Houser
J. A. Schmoldt William Wright George Scott
S. P. Bixby John Andrus, who being duly
tried elected and sworn also come and
after hearing the evidence in the cause are

5 allowed to disperse and meet the Court tomorrow morning at nine o'clock.

And afterwards to wit on the 9th day of day of Feb'y 1858 the same being one of the days of the said January Term of said Court. the following among other proceedings was had. and entered of Record. to wit.

Gustavus W. Morse	}	Aperumpsit
Elisha Freeman		
George W. Waite		

This day comes again the said parties by their respective Attorneys and the Jury heretofore empanelled herein also come and after hearing the arguments of counsel and instructions of the Court retire under charge of an officer of the Court to consider of their verdict Subsequently return into Court and for a verdict upon their oaths say. we the Jury find the issues joined in favor of the Plaintiff and assess the damages at the sum of Three hundred & forty one dollars and Eighty five cents Thereupon comes the defendant by Eastman their Attorney and moves the Court for a new trial herein.

And afterwards to wit on the 15th day of February AD 1858 the same being one of the days of the said January Term of

6. Said Court, the following proceedings was
had and entered of Record to wit

Gustavus W. Morse

Elisha Freeman

George W. Wait

} Appraisers

This day comes the
Plaintiff by Morse his Attorney and remit
the sum of Twenty three dollars and two
cents from the finding and verdict of the
Jury heretofore entered of Record in this
cause. And the said Defendants motion
for a new trial coming in to be heard after
argument of Counsel the Court being fully
advised in the premises overrules said motion
To which ruling of the Court in overruling said
motion the Defendants by their Counsel except
Therefore it is considered by the Court that
the Plaintiff have and recover of the defend-
ants the sum of Three Hundred and Eighteen
dollars and Eighty three cents damages
and also his costs in this behalf expended
and have execution therefor.

Subsequently come the said Defendants
by Eastman their Attorney and pray and
appeal to the Supreme Court of the State
of Illinois herein. which is allowed by
the Court on condition that they file their
appeal bond within thirty days, in the
sum of Seven Hundred Dollars, condition-
ed according to law.

7.

And afterwards to wit on the 13th day of March A.D. 1858. an Appeal bond was filed in the Office of the ~~Chief~~ Clerk of said Court. in the words and figures following to wit:

Know all men by these presents that we Elisha Freeman and George W. Waite of St Charles Kane County and State of Illinois and Elisha Freeman Surety are held and firmly bound unto Gustavus W. Morse of Batavia Kane County & State aforesaid in the special sum of Sum of Seven Hundred Dollars of lawful money of the United States of America to be paid to the said Gustavus W. Morse or their certain Attorney heirs Executors administrators or assigns for which payment well and truly to be made we bind ourselves our heirs Executors and administrators jointly severally and firmly by these presents. Witness our hands and seals the 6th day of March A.D. 1858.

The condition of the above obligation is such that whereas at the January Term A.D. 1858. of the Kane County Circuit Court State of Illinois held at Geneva in said County the said Gustavus W. Morse recovered a judgment against the above named Elisha Freeman and George W. Waite in a certain action of Assumpsit for the sum of Three Hundred Eighty ^{Four} Dollars from which said judgment the said Elisha

Freeman and George W. Wait has prayed
 and appeal to the Supreme Court. of the
 said State of Illinois which has been granted
 by the said Circuit Court. of Kane County
 on the condition that the said Elisha
 Freeman and George W. Wait filing a Bond
 with security to be approved by the Clerk of
 said ^{Circuit} Court. of Kane County in the penal
 sum of seven hundred dollars conditioned
 according to Law. Now if the said Elisha
 Freeman and George W. Wait shall prosecute
 their appeal with effect or in case of failure
 therein shall well and truly pay or cause
 to be paid to the said Gustavus W. Morse
 or his assigns all such Judgment costs and
 damages in case said Judgment shall
 be affirmed then this obligation to be void
 otherwise to remain in full force and effect
 Elisha Freeman Seal
 Geo W. Waite Seal
 Elisha Freeman Seal

And afterwards to wit on the 20th day of Feb'y
 A.D. 1858. a Bill of exceptions was filed in
 the Office of the Clerk of said Court. in the
 words and figures following to wit:

State of Illinois	}	Kane County Circuit Court. January Term A.D. 1858.
Kane County		
Gustavus W. Morse		
v		
Elisha Freeman	}	And now on this the 8 th day of
George W. Waite		

9.

February A.D. 1858 it being one of the days of the said Kane County Circuit Court come on to be heard before said Court the above entitled cause the Plaintiff appearing by his counsel J. C. Morse Esq and the defendants by their Counsel D. S. Eastman, on motion of the said Plaintiff a Jury came who being duly sworn the Plaintiff introduced the following witnesses. Warren Hoyt being sworn testified as follows.

Direct

I am acquainted with the parties to this suit. In January A.D. 1857 the Plaintiff let Warren Hoyt have \$718. for a note made by one Boardman of Chicago payable to said Warren Hoyt and by him endorsed I called at Elisha Freeman & Co with my Brother & Mr Corwin in January 1857 I think. I told Mr Freeman. I think it was Freeman. he was the lawyer of the two. that Morse the Plaintiff had a note which my Brother could have to aid him in his difficulties. that Brother would let them have this note to collect and if it could be collected or any part of it they could apply the proceeds on a Judgment in their favor against Warren Hoyt and another man Langdon Miller I think. I made a memorandum of the mans note (witness here examined his memorandum and stated) the note to be for \$646.13 dated December 13th A.D. 1856 due in four months. In June last I called on Mr Freeman for Mr Morse and presented him an order. of which the following is a copy

Messrs Freeman & Harte. Please pay to H Hoyt
 the bearer of the Note of \$300.00 sent you
 for collection - If not collected, please
 return the Note
 Yours Truly
 Batavia June 23rd 1857. G. H. Morse

Mr Freeman looked at it and handed it
 back to me and said he did not know Mr
 Morse and refused to have any thing to do
 with it. Freeman stated that he had col-
 lected \$350. or \$360. on the note, the order is
 in the hand writing of Mr Morse.

Cross Examination

Freeman gave no reason for not paying
 the order. Said he should not pay the order
 for he had a demand against my Brother
 in which the money collected was to be
 applied, I was acting as the agent of Morse
 & Brother both when first had the interview
 with Mr Freeman. I never called on C.
 B. Wait at Chicago at the instance of my
 Brother to my recollection my Brother may
 have asked me to call to see about this
 note, I rather think he did. Defendants

Counsel, then presented witness with a paper
 \$466.66 Batavia Ill. Nov 19, 1856

Four months after date, for value received
 me jointly and severally promised to pay to
 Harris Hays or order \$17 Hundred and fifty ¹³21/100 Dollars
 with interest at the rate of ten per cent per annum,
 after due, being for money loaned - payable at the
 Office of Harris Hays in the Village of Batavia, in the
 County of Kane and State of Illinois, J. H. Bauman
 Endorsed (~~A Hays~~ Harris Hays) J. H. Bauman
 And asked witness if such was a copy of
 the note first spoken of by the Witness.

Witness answered. I would not swear
 it was. I think this is the original note
 itself. I know my Brother's hand writing.
 Counsel for defense asked witness to examine
 endorsement on back of said note and state
 whose ~~name~~ hand writing it was. Witness
 replied. I would not positively swear, but to
 the best of my opinion it is my brother. I
 had conversation with Freeman out side
 this county. He said he did not know
 Mower in the transaction. At the time
 Brother & myself went to Freeman & Waiter
 to make arrangements about their taking
 the note for collection. Freeman said
 they would take the note for collection, if
 collected they would assign the Judgment
 over to Mower. Mr George W. Waiter was
 present. at this time. I think Mr Waiter was
 not present at the time with Brother Corwin
 I did not tell G. B. Waiter in Chicago that
 what my Brother lost ^{with} Freeman & Waiter

would come out of me. I probably told him in Chicago that my Brother had desired me to call and see how he got along collecting this note. I probably told him I should look to Freeman and Wait for the proceeds of this of this note. for I had paid out a good deal of money for him.

Direct record I told C. B. Wait in Chicago that I had been informed that Judgment was all paid. I was acting as agent for Moses. I was acting as agent for brother & Moses both. at the interview first spoken of it was agreed that Corwin should bring up the note.

Re Cross examined In April Freeman & Wait told me the Judgment was all paid. Soon after I came back from Kansas.

Harrie Hoyt sworn for Plaintiff
Defendants by their counsel objected to this witness being allowed to testify. for the reason he was the endorser of the note sent to defendants for collection and to be applied on his indebtedness when collected. or so much thereof as should be collected. Such making him an interested witness. Objection was overruled by the Court and defendants excepted to the ruling of the Court.

Witness stated that he was acquainted with the parties to the suit. Defendants held a Judgment against myself and partner. I went to see them with a view to make arrangements to pay them. this Judgt. I talked with Mr Wait. Mr

Freeman and I had had some difficulty I said to Mr Waite that I held a note against G. P. Borman for \$100. and odd dollars I think note was against Borman & Brother but not sure. (Defendants Counsel here asked the Court to rule out from the Jury all evidence as relative to the note as the note described by the witnesses and the one mentioned in Plaintiffs bill of particulars are not the same notes, the one given in bill of particulars having but one maker and the note described & referred to by the Witnesses has two makers. The Court overruled the objection and allowed the testimony to go to the Jury) I had sold the note to Morse. Morse had agreed to let me take it, to assist me in my matters. I was very much involved at the time. to apply on this Judgment provided the defendants when the Judgment was paid would assign it over to Morse. if the note was collected. I agreed with Waite he was to take the note, collect it, and when it was collected to apply it on the Judgment & assign the Judgment to Morse. I told Waite I had sold the note to Morse.

Cross Examined

The agreement with defendants was in January or February 1857. Freeman Waite Corwin & myself were present and the Book Keeper I stated to Waite that Morse had agreed to let me use the Note / Counsel here showed the same paper to Witnesses shown to Morace Hoyt.) Witness thinks it

is a facsimile copy of note in question Endorsement is not my signature. I think it is a copy. I know my Brother went to Chicago about the Note in question.

George E. Corwin sworn.

While Sheriff of Hamilton County I had Judgment in my hands against Harris Hoyt in favor of Defendants don't recollect the amount - I have not the Execution, don't know whether the Execution against Harris Hoyt was returned satisfied

Crop Examined

I was at Freeman & Wait once with Harris Hoyt and his brother, at that interview Mr Harris Hoyt said to Freeman & Wait that the Note in question, if collected was to apply on the Judgment against Harris Hoyt. I could not say who the note belonged to positively. The Hoyts were to send the note by me to Freeman & Wait Harris Hoyt wanted the note collected any way

Main resumed

Was something said that Morse would or could purchase the note, that Hoyt could contract the note. (paper shown withup purporting to be a copy of the note) I do not know positively but I think this is a copy of the Note. Harris Hoyt has talked with me about the note. I could not say who gave me the note to carry to Mr Freeman & Wait, I have had several talks with Harris Hoyt about it either Harris Hoyt or Morse gave it to me

15- I can't say which.

Re Crap Ex.

Did Harris Hoyt succeed in convincing you that he gave the State to you to carry up to Defendants, if he had, I should have so testified.

Mr Allen Sworn, I was Deputy Sheriff in Jan'y 1857. had Execution against Harris Hoyt in favor of Defendants, it was satisfied do not know where it is. the last I saw of it the Execution I had it in the office some two months ago at the instance of Harris Hoyt for him to look at. then put it back in its place, have made search for it since cannot find it (Deft Counsel here waived all objection to parole testimony as to contents of the Execution on the grounds that it had been mislaid) it was satisfied in full by order of the Plaintiffs in Execution by Mr Wait,

Crap Examination The note in question was left with me by Mr Corwin to hand to Freeman & Wait. (same paper purporting to be copy of State Chamber writing) this is not the original note, that was a printed blank Judgment note. I think this is a copy. I was present at Batavia when property was sold of Harris Hoyt. Heard Hoyt speak of the note in question there. Harris Hoyt. he said if Freeman & Wait collected the note he was to have credit for it. I took the note to St Charles, delivered it to Freeman & Wait at the instance of Harris Hoyt. Harris Hoyt told me he had given a note to Corwin to

sent to Freeman & Waite. I understood the note I took up to be the same note,

Direct resumed The Execution was satisfied by property turned out by Hoyt, the note formed no part of it. Part of the Property was sold conditionally. Direct Harris Hoyt recalled. Mr Morse delivered the note to Corwin, I received pay for it in full.

Cross examined The two Bowmans were in business in Chicago. Morse gave me \$718. for this note & two times the balance I paid back in money he let me have the \$718. in January AD 1857. I knew Mr Morse before he came here, he now lives on my farm or on I have the recollection of. he owns a Piano. I cannot say he owns any other property.

Re-direct Mr Morse gave Mr Corwin the note at my house Corwin called at my house to see Morse at my request. I have spoken to Corwin who delivered him the note. I let Morse have the note, two or three weeks previous to his letting Corwin have it. Morse owns a Piano. He has in his possession some horses and other property. He is a man of some property.

Plaintiff recall Horace Hoyt. After I saw the return on the Execution, I told my Brother I would not consent to any other arrangement with Freeman & Waite as it was returned satisfied and that I did not believe by law, any of the proceeds of note could be applied on it.

Defence

John Waite sworn

I was present, saw ~~Warriss~~^{Warriss}
 Woyt present order from Morse to Defendants

Freeman said he did not recognize Mr Morse in the transaction. I was present & Mr Freeman said to me Mr Woyt present order from Mr Morse to use ~~from~~ proceeds of the Bournum note. I was Bookkeeper, we don't know Mr Morse in the transaction. I was present when Mr Allen delivered the note in question, to Mr Freeman. Allen said Mr Woyt sent up this note to apply on your Judgment when collected. I knew the note if it could be collected was to be applied on the Judgment. I was afterwards present and saw Warriss Woyt & Mr Geo W Waite together at the Bank. Woyt wanted to settle the whole matter as to note and Judgment and made a proposition to do so. in this proposition Woyt proposed to allow one of the proceeds of the note collected the price of certain articles bid off to apply on the Judgment and not delivered by Woyt. was a Melodican worth \$70. for one thing a carpet and something

else. Wait declined Hoyt's proposal, but made Hoyt one, which he declined. The difference was as to amount. of interest to be allowed Hoyt offered six per cent. Wait claimed 7 per cent.

Debit

C. B. Wait sworn. (Copy of note shown other witnesses given him) I obtained this copy from the original note, from the files of the Court., the original note was sent me for collection from E. Herriman's in Jan'y 1854. I considered the makers insolvent the note was not paid on presentation, called several times on makers it was not paid. I entered up Judgment on the note. got out. Execution return Sheriff to levy on goods in a grocery Store, the defendants were going to reply and we had good deal of difficulty, claimed not to own the goods, I thought or considered the claim very doubtful and finally arranged the levy by taking the Bormans note endorsed by Gentford who was good. I collected and had endorsed on the Judgment \$318. my fee for collecting Bormans agreed to pay in consideration of the arrangement \$20. & costs about \$12. They paid me in all on account of the whole matter \$350. Amount sent to Herriman & Wait by me was less than \$300 \$288 or \$298. I think it was just \$288. I discharged the Bormans from the Judgment so far as Herriman & Wait were concerned leaving them (the Bormans) to settle the balance with Hoyt as they could

19 I know Horace Hoyt. he come to my house
in Chicago to see me about this note. I think
he wished me to account. about this note.
I think he wished me to account. to him
for the note for this Barth

Cross Examination I went several times to see the Bormans
about the note. I recd \$318, on the Judgment
Bormans paid my fees & costs besides \$20 fees
\$12, costs. I think Bormans & Waite paid me \$10.
fees also. making ~~to~~ fee \$30. I do not think
this to much had good deal of trouble with
this matter. I cannot account for the difference
of \$308, + \$288. unless it was for costs about
debt it might be ~~about~~ it was for some
other matters between me & Bormans & Waite.

Direct resumed Was \$318. on the Judgment.

Horace Hoyt recalled. Barnes was in
Batavia 8 or 10 days dealing in Pianos I do not
know his name.

Cross Examination My Brother showed me the execution and
its return.

Direct John Waite recalled. I was present at the time
Horace Hoyt and his brother come to defendants
to make a Settlement of the note in question
and Judgment. Horace Hoyt & Horace & Geo W.
Waite were all present. at the time the proposition
for Settlement was made.

Cross Examination I am positive Horace Hoyt was present
at the time.

Mr Allen recalled. Was you present when
Mr Waite caused the Hoyt Judgment to be
satisfied. if you please to state what Mr
Waite said if anything as to the propriety

bid off not being delivered by Hoyt and relating to the application of the proceeds of the note in question objected by plttf as plaintiff or the Hoyts were not present at the time objection sustained by the Court excepted to by Deft.

Defendants proposed to prove by Witness that at the time Mr Waite Deft signed Repr satisfying the Hoyt Execution he stated to Mr Allen the Sheriff that all the property which he Waite had bid off to satisfy said Execution was not delivered by Hoyt but as there would be something collected on the note in question it could be applied in that way and would probably be enough to cover the deficiency the above was denied on the ground that the plaintiff was not present at the time which ruling was excepted to by Defendants counsel.

Direct

Henry W Clark sworn for Defrmer.

Know the parties was sent down to Batavia for the Property bid off to satisfy the Hoyt Execution Warren Hoyt refused to deliver the Melodeon and carpet & some other things said the Defendants had a note of "hisn" which was to be applied on this Judgment and if he delivered up these things they would get pay twice.

Cross examined

I was sent after the things for Freeman & Waite Mr Hoyt said they had a note of "hisn" and if he delivered up the Melodeon carpet & such like, they would get pay twice.

Direct

Warren Hoyt recalled by Pltfs.

I went up to St Charles with my brother

to make settlement with defendants Freeman & Waite I went into the Bank Street from 2 to 5 minutes Mr Waite took my Brother behind the Counter & I went out - I was not present at the time any propositions were made as spoken of by John Waite. I gave no authority to my Brother to make such

Cross Examination I went into a saloon near by & smoked a cigar my Brother when he came out told me what had been done, I was not near the gate at the counter when my Brother made the proposition. I did not have any conversation with Mr Freeman there.

Direct Warrie Hoyt recalled by Plaintiff.

My Brother was not present at the time last spoken of by the Witness John Waite he went out when Mr Geo W. Waite & myself went behind the counter, Mr Worcester did not authorize me to make the proposition for settlement.

X Examination Worcester was not present I went behind the counter with Mr Waite & we sat down by the stove our talk was there he did not figure upon the desk at all my Brother did not talk with Freeman at the gate at all.

Direct John Waite recalled by Defendant. I have heard the Hoyts testify. I know that Mr Worcester Hoyt did stand at the gate spoken of at the time mentioned he was talking to Mr Freeman there, at the same time Mr George W. Waite was figuring at the desk immediately back say about 6 feet with

22

Harris Hoyt. I was 8 or 10 feet distant at my desk the proposition was then made and while Horner Hoyt was talking with Mr. Freeman. He also appeared to be noticing what George W. Waitt and Harris Hoyt were doing. I am positive of this

Copy of Note offered in Evidence

\$646 $\frac{13}{100}$ Bolonia Ill November 7 1882

Four months after date, for value received we jointly and severally promise to pay Harris Hoyt, or order six hundred and forty six $\frac{13}{100}$ dollars with interest at the rate of ten per cent per annum after due being for money lawfully payable at the office of Harris Hoyt in the village of Bolonia in the County of Kane and State of Illinois

(Signed) W P Roseman

A H Roseman

(Endorsed on its back)

Harris Hoyt

Defence rested

After argument of counsel the Court was asked to give the following instructions on part of the plaintiffs,

1st If the Jury believe from the evidence that the Defendants received a Note from the Plaintiff and agreed to apply whatever they might be able to collect on said Note towards the satisfaction of a Judgment which the Defendants held against Harris Hoyt & others and if they also believe that at the time the Defendants received said note as aforesaid they agreed to transfer or assign said Judgment to the Plaintiff or an amount thereof Equal to the sum which they might be able to collect on said note then the Plaintiff is entitled to recover in this action the amount which the Defendants have collected on said note with interest from the time they collected the same unless they also believe that the defendants assigned said Judgment to the Plaintiff as aforesaid.

2^d If the Jury believe from the evidence that the Defendants received a Note of the Plaintiff with an agreement between said Parties or their agents that defendants should apply whatever sum they might be able to collect on said Note in satisfaction of a Judgment which the defendants then held against one Harris Hoyt and if they also believe that the Defendants took a Judgment on said

and gave a release to Bowman as testified to by the witness C. B. Waite
note in their own name, and refused or
neglected to apply the same toward the
satisfaction of said Judgment against the
said Harris Hoyt. then the Plaintiff is
entitled to recover in this action the full
amount of said note with interest from
the time the same became due less the costs
of collection.

Which the Court ~~gave~~ refused.
but gave them as amended, by the Court,
as follows:

If the Jury believe from the evidence
that the defendants received a note from the
Plaintiff of which the Plaintiff was the owner
with the understanding and agreement that
they were to apply whatever they might collect
on said note toward the satisfaction of a
Judgment which the defendants had
against Harris Hoyt et al and if by the
terms of said agreement the defendants
were to transfer & assign to the Plaintiff said
Judgment or so much thereof as should
be equal to the amount which they should
collect on said note. And if the Jury
further believe that the defendants did not
assign said Judgment to the Plff. but went
on and collected the same by a sale of
the goods of Harris Hoyt and directed
the Sheriff to return the same satisfied
And if the Jury also believe that the
Defendants collected money on said note
and that they refused to pay the same
to the Plaintiff on being requested then

the Plaintiff is entitled to recover the money collected by the defendants on said note less the expenses of collecting the same.

To the amounting and giving of which the Defendants by their counsel then and there excepted.

The Defendant asked the following instructions

~~1st That the Court is asked to instruct the~~
 1st That before the Plaintiff can recover in this case he must affirmatively prove by competent testimony that the defendants have and received money to and for the use of said Plaintiff as set out in his declaration and that the only issue in this case is, whether or not the said defendants had & received money to and for the use of the Plaintiff as charged in the Plaintiff's declaration.

2^d That if the Jury believe from the evidence that Harris Hoyt at the time the note in question was left with the defendants for collection claimed to be the owner of such note (in the presence & hearing ^{agents of the Plaintiff} of the) and that there was an agreement between said Hoyt and the defendants that the proceeds of such note were to be applied when collected on an indebtedness from said Harris Hoyt to said defendants, such is proper evidence to go to the Jury on the question as to the true ownership of said note, and if the Jury believe from the evidence the note in question at the time aforesaid

26

was not the property of the Plaintiff but was the property of the said Harris Hoyt the said Hoyt had a right to make the agreement aforesaid and the Plaintiff cannot recover the proceeds such note in this action

3^d That in judging upon the ownership of said Note the Jury have a right to consider the Relation of the witnesses for the Plaintiff to said Plaintiff the relation they sustain to the subject matter of the suit their act and doings in the collection of the said note while in the custody of the said defendants or their attorney, and the involved pecuniary condition at the time of the witness Harris Hoyt. and if from all the facts in the case the Jury believe that said Harris Hoyt was the real owner of such note at the time it was left with the said defendants and that he is now really the owner or has an interest in the avails of said note the evidence of said Harris Hoyt. should be excluded entirely in making up your verdict in this case. And such is a question which the Jury have a right to consider in coming at a verdict in this case.

4th That in no event in this case can the Plaintiffs recover a larger amount than the defendants have actually received in money to and for the use of the said Plaintiff and the burden of

27. affirming is upon the Plaintiff to affirm-
atively show that the defendants have
actually ~~recd~~ money or something the par-
ties to this suit treated as money at the
time it was received to and for the use of
said Plaintiff and how much ~~of said~~
5th If the Jury believe from the evidence
"H" that after the order offered in evidence was
presented by Horace Hoyt, called upon the
Defendants in conjunction with Horace Hoyt
who was acting in this matter as the agent
of the Plaintiff and proposed to arrange
the Judgment and note in question and
that he there proposed to allow the defen-
dants from the amount collected on the
Borman note the sum bid by Waite on
a certain Melodeon and Carpet at Sheriff
sale and which said Horace Hoyt had
not delivered up to said Waite pursuant
to said sale and applied on the Judgment
spoken of by the witnesses. And that the said
Horace Hoyt, sat by during such negotia-
tions and in no manner dissented there-
from the above premises the assented there-
to and such facts and circumstances
are all proper for the Jury to take into
consideration, on the question of the real owner-
ship of said note

6th If the Jury believe from the evidence
"I" that the witness Horace Hoyt had control
of the note in question and that he in
conjunction with Horace Hoyt who was
the acting agent of the Plaintiff for such

28 purpose, made an agreement with the
defendants, that the said defendants should
receive the note in question for collection
at the expense of the said Hoyt and that
the proceeds when collected should be applied
in a Judgment against Harris Hoyt and
in favor of said defendants and that
even if the defendants succeeded in
collecting said note or some part thereof
and neglected or failed to apply the same
upon such Judgment when collected the
remedy is not in assumpsit for money had
and received as the Plaintiff has declared
in this case, but it is an action of the case
for a breach of such contract, and under
such a state of facts if the Jury shall believe
them proven by the evidence in this case
the Plaintiff cannot recover under the
Pleadings in this case. The words included
in (C) were ordered by the Court which
alterations the defendants then & thereby
their counsel excepted to, which instruct-
ions were given to the Jury excepting "H"
& "I" which were refused to which ruling
in refusing the instructions "H" & "I" the
Defendants by their counsel then and there
excepted.

The Jury returned under charge of
and officer of the Court and afterwards
came into Court, with the following Verdict.

We the Jury find for the Plaintiff and assess
the damage at Three Hundred and Forty one
dollars and Eighty five cents.

John Andrew
Foreman

29 Upon the rendition of which the said
defendants by their counsel entered their
motion for a new trial in the case and
filed their points in writing.

Gustavus W. Morse	{	Pending in the Hann County Circuit Court.
Elisha Ingram		
George W. Wait		

The Defendants by
Ingram their Attorney comes and files his
motion for a new trial and assigns the
following causes to wit:

- 1st The Court erred in giving the instructions asked on behalf of the Plaintiff
- 2^d The Court erred in giving instructions as qualified for the Plaintiff to the Jury
- 3^d The Court erred in refusing instructions as asked by Defs.
- 4th The Court erred in qualifying instructions asked by Defs.
- 5th The Court erred in allowing the Witness Harris Hoyt to be examined as a witness for the Pltff and allowing improper testimony to go to the Jury.

6th The Court erred in excluding
certain testimony offered on part of the
defendants.

7th The Verdict was against the law

8th The Verdict was against the Evidence

9th Newly discovered Evidence

Eastman Atty
for Defs

And afterwards to wit on the _____ day
of February A.D. 1858, it being one of the days
of the said January Term of said Kane
County Circuit Court aforesaid, the motion
for a new trial came on to be heard in
this case and upon argument of counsel
and the Court being fully advised in the
Premises overruls said motion for a
new trial to which ruling of the Court
the said defendants by their counsel
then and there excepted, and prayed
the appeal to the Supreme Court which
is allowed on the defendants executing
their Bond in the sum of \$1000 to be
approved by this Court, conditioned as
the law directs in such cases, and the
said defendants are to have 30 days from
this date to execute such Bond and
to prepare a bill of exceptions in this
case

Isaac G. Wilson Clk
Judge

31

State of Illinois }
 Hancock County }

I Paul B. Knight, Clerk of the
 Circuit Court of said County in the State
 aforesaid do hereby certify that the foregoing is a true
 and complete copy of the original Summons & Return
 thereon, Declaration, Plea, Appeal Bond, Bill of Excep-
 tions and all the Orders entered of record in said
 Court in the suit of Gustavus H. Morse vs Elisha
 Freeman and George H. Waite, as appears from
 the Records and files of my Office.

Witness my hand and the Seal of said
 Court at Geneva in said County this
 13th day of April A.D. 1858.

P. B. Knight
 Clerk



Kane Levent Levent
212
Gustav W. Moore

v

Elisha Freeman
George W. Waite

Record
Va srgt of Enos

Filed April 24 1848
Leland
C.C.K.



Dec 17, 1848

[10-15-57]

Supreme Court
April Term 90 1858

Freeman & Watts } Appell from
Gustave W. Moore } State -

The said Freeman
& Watts depts below as appellants
in this court - by D. L. Eastman
their atty comes and assigns the following
causes of Error -

1st The Court erred in admitting
improper evidence to the jury -

2^d The Court erred in excluding
legal evidence offered by depts to
the jury -

3^d The Court erred in allowing im-
proper instructions asked by plaintiff to the
jury - and also in qualifying those
asked for by depts -

4th The Court erred in refusing
instructions asked to the jury by the
depts -

5th The verdict was contrary
to the evidence & also contrary to
law -

6th The Court erred in not
granting a new trial in the case

D. L. Eastman
att'y for appellants

Incomen + Truete
S W Mues

Assessment of
Errors

Filed April 21 1858
S. Leland
clerk

D. L. Eusterman
att for
app'ts

Supreme Court
Gustavas A. Morse } April Term 1858
at }
Elisha Freeman } Appeal from N. H.
George A. Waite }

Defendants' Argument

1st Statement:

The evidence discloses the following facts:

The witness, Harris Hayt, received from the Browns a promissory note for \$643. This note the witness endorsed to the defendant, who was plaintiff in the Court below. Subsequent to the endorsement, the plaintiffs, who were defendants in the Court below obtained a judgment and execution against the witness Harris Hayt. After the above judgment was obtained, the note in question was delivered ~~was delivered~~ to Freeman and Waite, by Horace Hayt, a brother of the witness, as the agent of Morse, under the agreement, that they, Freeman and Waite, should collect the note, or as much of it, as they could — apply the proceeds in payment of the judgment, and assign

the judgment, or so much thereof as would be equal in amount to the sum collected on the note, to Morse, which he was to accept in lieu of the note or in consideration of the note.

The proof further shows that Freeman and Waite disregarded this agreement, but went on and collected the whole of their judgment against the Witness Hays, and that they also collected about \$350, on the note, which they refused to pay over after demand made in writing - and that they also refused to assign the judgment according to the agreement.

This action was brought by Morse, to recover of Freeman & Waite, the amount collected by them on the note.

The declaration is in Assumpsit and contains but one Count which is for money had and received.

~~The first error assigned relates to the admissibility of the testimony of the witness Harris Hays.~~

3

The Court will see from the ^{record, the} testimony
any, of the Witness Harris Hays,
relates only to the delivery of the
note and the terms ~~terms~~ on which
Freeman and Waite accepted it,
and the payment of the judgment
by himself — facts which could
in no way benefit himself, or tend
to exonerate him from any liability.
Any other statements made by this
witness were called out by cross-ex-
amination.

It is insisted that the
testimony of this witness tends to
establish the existence of a fund
which would go to discharge him
as indorser, but I resist his tes-
timony, so far as it is elicited by the
party calling him does not tend
to establish this fact; and even
if it did the contingency on ~~the~~
which his liability depends, as en-
dorser of the note, is too remote
to include his testimony, and only
goes to his credibility.

A party to any instrument, whether
negotiable or not, is a competent
witness to prove any fact to which

any other witness would be competent to testify; provided he is not insane and is not directly interested in the event of the suit.

1st Gl. Ev. pp 550 Sec 384
Stone v Vance 6 Ohio Rep 346
Drake v Aulry Walker 21st R 541
Webster v Ticken 3rd Seem 295.

Secondly

To disqualify a witness on account of interest, it must be shown that he has some legal, certain and immediate interest in the event of the suit itself — the interest must be real, and not merely apprehended by the party.

1st Gl. Ev Sec 387. 389-390. 391

Third

The liability of the witness Hoyt, as indorser, depended, if at all upon contingencies not involved in this suit, but on the insolvency of the maker and the exercise of proper diligence by the indorser — contingencies not shown to exist —

The questions raised by the other ex-
ams. assigned are so general and
implicit that I cannot anticipate
the points to be made by the counsel
for the plaintiff, and therefore, cannot
discuss them.

J. C. Moore
Deft, Atty

Supreme Court
Opinion Term 1858

212-93
G. H. Morse
at

E. Freeman &
G. H. Waite

Appeal from
Kane

Def't Argument

Filed May 18. 1858
S. Leland
clerk

S. C. Morse
at

Supreme Court, 3rd Grand
Division, Ottawa Illinois

Elisha Freeman }
George H. Waite }

Gustavus H. Morse }

~~Appel from State~~

This was an action on
Assumpsit, and the Declaration con-
tained but a single Count for money
had and received, with a Bill of
Particulars filed, claiming first some
\$700 for a note made by G. H.
~~Bowman~~ ^{Bowman} and also acc^{ount} for money
had and received of \$1000. ^{The} Defendant
pleaded the General Issue, and the case was
tried before Hon. Isaac G. Nelson and
a jury.

From all the evidence offered by
the Plaintiff, it appears the note
upon which was predicated the whole
cause of action, was made by G. H.
P. Bowman, and also by his brother, &
as the note set out in the Bill of par-
ticulars was made by only G. H.
Bowman the Defendants objected
to all the testimony tending to show
that the Defendants has for collection
the note of the two Bowmans, for the
reason of variance between the note
described in the Declaration and the
one offered in Evidence. ^{Bill of particulars} The Court
overruled the objection and allowed

the evidence to go to the jury, which
ruling presents the first error in
order.

Can a party be allowed to
set out a Note in his Declaration
or bill of particulars, and then offer
or show in Evidence another and
different Note in substance & fact?
The Statute provides that when a
written Instrument is the foundation
of the Cause of action, a copy must
be set out, and though this Declaration
contained but a single Count for
Money had and received, still the
Note was the foundation in writing
out of which the action grew, and
if the party is allowed to recover at all
it is by virtue of the Note in writing,
hence the Plaintiff very properly
attached a copy of the same to his
Declaration, and thus puts the De-
fendants to a defence, and
to them by his Pleadings.

The Defendants ~~do~~ deny
the Cause of action complained of
by their Plea, virtually saying he never
received from you a Note of which
you have given a copy, nor have
we received the avails of such. But
the Plaintiff under the direction of
the Court replies - You had some other
Note and for this you shall respond,
though it materially differs from the
one we claimed you held as appears

by our Declaration. Frauds of this
Class are not ^{permitted} ~~permitted~~ in Law.

It is a rule of Law as old as
any evidence of Law exists that a party
cannot take advantage of his own wrong
nor can the pleadings or statements of a
party made in a given case be
construed in his own favor - if this is
true, how can the evidence of another
and different State from the one
described in the Plaintiff's Declaration
be given in evidence in place of the
one of which a copy is fully given?
A statement of the proposition, is its
strongest argument, and requires
no authority to sustain it.

The State, the contents
of which was put in evidence, was
made by the two Romanes payable
to Harris Hoyt, and by him
endorsed in blank upon the back,
by which he became liable to pay
the State, under the contingencies
prescribed by Law.

He was objected to on
the ground of interest, but allowed to
testify as a said State. Thus arises
the second question in the case by the
Record presented.

That the Court may
fully understand the application of
this testimony, I will state that Freeman
& Waite held a judgment against

any interest
to disprove
his testimony
of intent

Harris Hoyt the payer and endorser of
the Note in question—

That Harris Hoyt and his
Brother Horace Hoyt came to Freeman
& Waite, Horace Hoyt acting for Morse the
Plaintiff in the suit below as he claimed,
and represented that Morse owned the
Harris Hoyt have this Note to pay his
debts, write, and that Freeman and
Waite might have it for collection
and when the money was collected
it was to be endorsed or applied on
said judgment, but there was no
agreement that Execution should be
stayed until said Note could be col-
lected. Freeman and Waite received
the Note for collection under such
circumstances and sent it to Chicago
where the makers lived for collection,
to an Attorney. It was found to be a
desperate case and greatly doubtful
as to its collection, and after months
of effort to collect, without success, Fre-
eman and Waite caused Execution to
issue on their said judgment and
property was levied upon and sold
by the Sheriff to satisfy the same.
Waite on part of Plaintiffs in the
Execution, bid off property to satisfy the
Execution. It was not all delivered that
night, and the next day on sending
for it, Harris Hoyt refused to let a
Carpet and Melodion &c. that had
been sold and bid off by Waite

Why not
replevy
the carpet

saying that Freeman and Waite held
this State of "lien", and if he let this go
they would be paid twice. The Sheriff
made his return of items of property
sold and included therein the carpet
Melodion &c another by such return
appear delivered to Waite, and Waite
is asked to sign a receipt in full
satisfaction of said Execution which
he consented to do, but at the
same time asserting to the Sheriff
that the Plaintiffs in Execution had
not received all the property they had
bid off, mentioned in the receipt, but
that they held the State in question &
as something had been collected thereon,
that it could be applied in place of
the property not delivered, and would be
sufficient to make up the balance.

Such in brief are the
facts of the case as is shown by the
Record, and having made a full
statement of them to the Court the
objection was made to the testimony
of said Harris Hoyt as incompetent
which was overruled by the Court—
The admission of Hoyt's testimony
was erroneous—

Hoyt was payee and
Endorser of the State in question—If
Morse had any interest it was by
virtue of the same transfer to him
of the State so endorsed—Hoyt and
Morse could not both own the same

Note at the same time - It was left
 by Hoyt to be applied and paid by
 satisfying Hoyt's debt - hence all
 money collected on said Note was
 collected and received for Hoyt himself.
 And if so, he was directly interested
 in the application of the money by
 the Defendants below received - as
 his judgment was apparently, though
 not really satisfied by the sale of
 property - He was liable, as appears
 from the evidence, to Morse for the
 value of the Note in question - hence
 it was directly for his interest to have
 the Plaintiff recover below, for so
 much as he received must be a
 satisfaction there for upon such Note
 6 Cowens Reps. 471
 15 Johnson 240
 16 " 201

The money if collected
 at all was collected to & for the use
 of Harris Hoyt and not for the use
 of Morse. And if Morse had any
 claim whatever, it was upon the
 Contract of Freeman & Harte to apply
 it on Hoyt's judgment - as a collateral
 security to him

The next question in the
 case is - did the Court err in

Wente
all as to the declarations of Waite
Excluding the evidence of Waite as to
~~his declarations~~ at the time he
signed the receipt to the Sheriff
He thinks the Evidence was clearly
competent. The Plaintiff in Exe-
-cution did not in fact receive
all the property bid off by them to
satisfy this Execution, but Hoyt
retained a Carpet and Melodion,
the precise value of which does not
clearly appear from the Evidence,
yet it appears to be worth at least
from \$100 to \$200 or more, and in
fact was worth much more. The
Officers Return was not true in fact,
but had the Court allowed the whole
matter to be explained to the jury the
proper application would have been
made of the Money in question - so
received for Hoyt use upon said Chote -
But the Court excluded the testimony
and would not allow the explanation
of the receipt to be given in evidence
to fully and properly explain how or
what the real consideration of the
receipt was -

A Receipt is only *prima*
facie Evidence in any case, and
it may always be explained by parol
testimony - 5 Gilman 2441
The declarations of Waite at the time
were clearly a part of the transaction
explaining in what manner the
Execution would be satisfied, and

formed a part of the Res Gustae and
should have been allowed

1 Gillman

127

15 Illinois

174

Biggs & Co 4 Gillman

1836

McCloskey & Lewis 2 Scammon

1847

The Court manifestly erred in refusing
the Instruction marked "16" as proper
by the Defendant. It is imperfectly printed
yet by reference to the Record it will
fully appear, and is clearly Law
as applied to this case, when it is
applied to the evidence.

~~Harris~~ ~~Hayt~~ and Horace Hayt
who all the time professed to act for
Morse, after the sale of the Goods by
partly satisfy the Execution held by
Freeman & White, went in company with
Harris Hayt to St Charles and had
negotiations with Freeman & White
about said Note, and its proceeds.
talk was then had about applying
the proceeds of said Note to make good
the deficiency in the Goods sold and
but not delivered to pay their Execution,
which had a strong look at least as
if the State still belonged to Harris
Hayt, and to say the least was proper
evidence to the jury as to who really
owned the State - the Instruction was
Law and was wrongfully refused

Instruction "1" is also Law. If

Harris Hoyt virtually disposed of the state
in question to pay his indebtedness to them
when collected, and they agreed to apply
the same upon a certain judgment,
and Money was collected & not applied
as per such agreement the remedy
was by Hoyt or Appellants upon the
breach of such Agreement, and not by
an action by Morse or Appellants for
Money had and received for such was
not true -

Hence the ~~anterior~~ Instruction
was law, as there was evidence tending
to prove such a state of facts as was
therein contemplated, and it was for
the jury to determine the weight
of evidence upon that point.

As the Errors recited are
abundant to reverse this case, we
will only ask your Honors attention
to the Weight of Evidence, and the
manner and discrepancy so
shown in the Record of the Appellants
Witnesses - the Hoyts - They are indeed
Sworn Witnesses and testify in such a
manner as to cloud the whole case.

The injustice so apparent
in this case is only, a apology
in troubling your Honors attention
so long, but manifest injustice has
been done, and we are

reluctantly Compelled to appear
before you for redress, claiming
simply our legal rights at your
hands

Respectfully Submitted

Castro & Reed & Son
Atty for Appellants

Supreme Court
93 ~~212~~ 212

Elisha Freeman

and

George Waite

vs.

Gustavus N. Morse

212

Filed May 10, 1858

L. Leland
clerk

Eastman Recording
& Lombard
for appellants