

No. 14655

Supreme Court of Illinois

Hitt et al

vs.

Sharer

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

Vol. 34

J. H. ... & Co., Stationers, 196 Lake St.

W. H. ...

Shaw

1863

Howe

1864

W. H. ...

Henry Sharr appellee
vs

Appl from
Ogle

Andrew White
Robert S White +
John M White Executors
of the Estate of Samuel
White deceased

Now comes the
said Henry Sharr Appellee in
said Cause & enters his motion
having to strike from the files
a certain manuscript having
filed Apr 19th 1864 as an A-
mended Bill of Exceptions
in said Cause and for
Cause Assigns

That said Supposed Bill
of Exceptions in reality forms
no part of the record in said
Cause

Because there is no order
of the Judge of said Court that
said Bill be made part of
said Record

Because said Supposed Bill
of Exceptions has never been
filed in said Cause

And the Copying of this paper by
the Clerk this certificate that
it is the Bill of Exceptions
does not make it so & does
not make it constitute any
part of the Record.

3 Helms 366 -

5 Helms 126 -

4 Scam 419 -

11 Dees 586 -

1. Scam 567 -

The Clerk has no right to
incorporate into the record
any paper whatever that
does not appear & spread
upon the records of his of-
fice or is not filed with
~~the~~ as a paper in the
Cause - & in the Case of 1. Scam
567. above cited the appeal was dis-
missed, when the record contained papers
~~not marked filed~~
And if this paper is now or
at any time has been ^{placed} among
the papers in said Cause
& not marked filed, then in
by some oversight of the
Clerk the proper remedy of
the party ^{who} placed the paper

among the files is to enter his
motion in the Court below
that Clerk have leave to
mark the Bill "filed June
pro tunc" And until this
is done we submit that
this Court should not
consider it as forming any
part of the record

And that any other prac=
tice would be so loose
and uncertain as to open
a wide door for fraud
Holmes v Parker 1. Scam 567
Campbell
for Appellee

Hill

vs

34

Shaver

Motion to

Strike answers
Bills & exceptions
from the files
ann

Filed Apr. 21. 1864

J. S. Shaw

Hitt as Shaver.

Attorneys below made agreement
to settle Bill of exceptions in free & easy way for
Mutual convenience - Undoubtedly carried it out
in good faith. - Do not think new agents here should
repudiate - I don't believe in repudiation. So bill
was settled & signed do not think it matters when
it was placed among the files below. No mat-
ter whether date of filing labeled on it or not.
Getting old - wear spectacles - fall into habit
of hunting for justice - More apt to overlook straws -
If date necessary would like to write & see whether
accidentally omitted or not. If date appears below
would like time to make it appear ^{ie} here, if justice
cannot be done without this date

Beland

Hitt vs Shann

Suggestions of Hitt
in error in the subject
of striking out &c

Filed Apr. 22 1864
J. Veland
Ch.

State of Illinois / Martin L. Eltinger being duly
Ogle County / sworn on his oath says that
he is a deputy of the clerk
of the Circuit Court of said county & that
he prepared the certified copy of the record
sent to the Supreme Court of said State
in the matter of the appeal of Andrew Mc
Hitt Robert S. Hitt & John N. Hitt
Executors of Samuel Mc. Hitt deceased
from a judgment recovered against
them by Henry Shaver in the Circuit
Court of said Ogle County at the
March Term thereof A.D. 1862. That the
bill of exceptions in said cause set out in
said certified copy of the record is not
marked filed and that there is no endorsement
or writing upon the said bill of exceptions
showing that it was ever filed as a record
in said Court. This affiant further says
that he has no recollection when said
bill of exceptions was first placed among
the papers of said cause but that he does
not recollect that he ever saw the same
previous to the time when he prepared said
certified copy which was in vacation
after the June Term A.D. 1862, ^{although he may have seen it previous to that time} This
affiant further says that he has been the
only deputy of said Circuit Clerk since
the 24th day of May A.D. 1862 & has been

since said time employed almost wholly
in said office & further on the not

Martin L. Ettinger

Subscribed & sworn to before me, a Notary Public
in & for the County of Ogle, by said Martin L. Ettinger
this 30th day of April AD 1863

Mortimer Smith

Notary Public



W.C. 37447
State of New Jersey

Office of Clerk of
Superior Court

Justice May 1863
Delaware, CH

me to which are
all of which are
Referred

Andrew M. Hill	}	Appeal from Ogle
John M. Hill +		
Robert S. Hill		
Executors of James		
Hill deceased		
vs		
Henry Sharer		

Now comes the said Appellee Henry Sharer by Glover, Book Clerk = bell his Attorney and enters his motion herein that the writing pur = porting to be a Bill of Exceptions ^{taken} in said Cause upon the trial thereof in the Court below and set out upon pages 13 to 25 of said Record be stricken from the said Record for the follow = ing reasons

Said Supposed Bill of Excep = tions has never been filed in said Cause, but only placed among the papers

See Record page 13 — + 25

Said Bill of Exceptions does not purport to have been ^{made} during the term at which the trial

was had nor at any time what-
ever thereafter (30 days was allowed)

Said supposed Bill of Exceptions is
~~not~~ certified under the Seal of
the Judge of the Court below

5 Denio 234.

See Record page 25

2 How Jr 102. Saw v Jackson 8 Cowen 746

Said Writing Contains no order
~~of the Judge~~ of said Court that
the same shall be made a part
of the Record in said Cause

And of Course the Clerk
could not have any authority
to incorporate it into the record

There is no order of Court ex-
tending the time of filing the Bill
of Exceptions ^{for more than 30 days from March 27th 1862.} There is copied into
the Record a paper which he
says was placed among the
Papers in the Case (see page 13)
by which it would seem to
have been agreed by the Attyys
in the Case that the trial for
settling the Bill of Exceptions
should be extended till the next
Term of the Circuit Court

This Agreement is entitled

"In vacation after March Term"
at which the Cause was tried
and may have been within the
30 days or not -

This did not extend the time
and if it had the Bill of Ex-
ceptions does not purport to
have been signed one single
day before the one in which
the Clerk certified that he found
it among the papers to wit
Dec 7th 1862

The Bill cannot then be said
to be in any sense a part of
the Record

Moore, Book Keeper
for Appellate

The record has evidently been altered
the bill of exceptions has been changed
since the record was made this will
appear on inspection, on the 22 page
the words "which was all the evidence
in the case," has been interlined in
different ink. This alteration should
be explained

B. C. Cook

Stevens v. Key note
2 Salem 454 -

324 *Hitt* 141
Shaver 106

Motion by Applee
to strike the Bill
of Exemptions
from the Record

Done

With all assent

46 16

Supreme Court of Illinois,

THIRD GRAND DIVISION,

AT OTTAWA.

APRIL TERM, 1863.

ANDREW M. HITT, JOHN W.
HITT & ROBERT S. HITT,
Executors of the Estate of Samuel M. Hitt, deceased,—Appellants.

VS.

HENRY SHARER,

APPELLEE.

ABSTRACT OF RECORD.

LELAND & BLANCHARD,

ATTORNEYS FOR APPELLANT.

Filed April 22 1863

L Leland
clerk

ORÉON:

PRINTED AT THE OGLE COUNTY REPORTER OFFICE.

1863.

ABSTRACT OF RECORD.

ANDREW M. HITT, JOHN W. HITT, }
 and ROBERT S. HITT, Executors of } APPELLANTS,
 the estate of Samuel M. Hitt, deceased, }

vs.

HENRY SHARER, } APPELLEE.

1 Action of Assumpsit commenced by Appellee, in Ogle County
 Court, upon the following account :

	ESTATE OF SAMUEL M. HITT, to HENRY SHARER,	Dr.
2	To money paid for his use to A. Quimby Allen,	\$300 00
	To goods and chattels sold and delivered,	15 00
		\$315 00

4 Pleas—General issue and statute of limitations.
 5 Submitted to Court for trial, June term 1861.
 6 July 15, 1861—Judgment for plaintiff (appellee) \$200.
 7 Appealed to the Circuit Court of Ogle County, July 17, 1861,
 by appellants.
 11 March 25, 1862—Cause tried by jury; verdict for plaintiff (ap-
 pellee) \$299.68.
 12 Defendants (appellants) moved in arrest of judgment, and for a
 new trial.
 12 March 27, 1862—Plaintiff (appellee) remits \$39.68.
 12 Motion in arrest and for new trial overruled.
 12 Judgment for plaintiff (appellee) \$260.

BILL OF EXCEPTIONS:

14 James B. McCoy testified: Was at Winnebago County when suit
 was settled. Saw no money paid. Did not see Sharer and Hitt to-
 gether. Sharer acted as mediator between Hitt and Allen. Hitt said
 the matter was getting along satisfactory to him. Never saw note.—
 Hitt said nothing to me about settlement; was in Rockford when note
 given; said he was going to let Sharer have piece of land reserved

from sale, and worth \$20 per acre. Hitt said in first conversation that they were getting along very well, except costs; suit in Rockford settled before Hitt conveyed land to Thompson. Hitt contended that Allen's claim was not his debt; that he had paid Allen his share, and the amount Allen claimed belonged to Captain Swingley to pay. Hitt said he was going to let Henry have the land; he did not say for what purpose or object; it was in conversation about settlement at Rockford; he simply said it was for Sharer; it was ten acres and was not conveyed to Thompson. 15

Aaron Q. Allen testified.—I commenced suit in this county, for my services as a teacher, against Hitt and Swingley; change of venue to Winnebago county; it was there settled by my receiving from Henry Sharer, his note for \$200.00, due in 6 or 12 months; Sharer paid the note to me—the last of it in the fall of 1855 or 1856; note may be at home among my papers,—don't know; Sharer got my notes and gave them for his; he paid it all in that way, except \$7.00; I gave him up his note at that time; the \$7 remained in account, which he subsequently paid me in flour; think settlement was in fall of 1855 or summer of 1856, though it may have been in 1856; settlement between Sharer and me was some time after note due—cannot say how long; if the suit was dismissed in the fall of 1854, the settlement was in the fall of 1855; if the suit was settled in 1855, Sharer and I adjusted in fall of 1856. 15 16

Nathaniel Swingley.—Mr. Hitt came to see me in spring of 1853 or 1854, to borrow money. I refused. Wanted I should pay the Allen matter; I replied it was right for me to pay part of it; Hitt said he did not owe the debt, and ought not to pay it, but he had got Sharer to give his note for it, and he (Hitt) had to pay it, and wanted me to let him have the money; Hitt said the \$200 was coming to him; he had settled the matter with Sharer, in the sale of land he had made. I paid him the \$200. 16

Cross Examined—I returned from Cal., in 1853 or 1854; Hitt said nothing about what land; Sharer had given his note for it; did not say what he wanted money for; I went to Cal., in spring of 1850; came home in November 1852; it was two or three months after I got home before I had the above conversation, which was after the suit was settled at Rockford; I don't know when suit was settled at Rockford. 17

Defendants read in evidence deposition of Thomas J. Turner.—Was present at a settlement of a suit in Winnebago Circuit Court, wherein A. Q. Allen was plaintiff, and Samuel M. Hitt and Nathaniel Swingley were defendants; Swingley was absent; suit had been litigated for a long time; Henry Sharer, of Ogle County, Martin Reynolds, of LaSalle County, and many others had frequently attended as witnesses; do not know who made the proposition for settlement; I 19

- was attorney for A. Q. Allen; Sharer told me they had settled the suit; that Hitt was stubborn, and would do nothing about it, but his friends had settled and would pay Allen—some one; cannot tell who paid Allen some money and gave him some obligations, but Henry Sharer appeared to be the active man in settling the matter; Samuel
- 20 M. Hitt was present during a portion of the conversation about settlement; said he would not pay a dollar, for he did not owe Allen; if his friends settled, they did it upon their own responsibility; he was not present when the money was paid and obligation made out; the settlement was made in the City Hotel at Rockford, at the time the suit was disposed of on the docket of the Winnebago Circuit Court.
- 21 Defendants introduced in evidence a transcript of record of an order bearing date September 27th 1854, as follows:

AARON Q. ALLEN,

vs.

- 21 SAMUEL M. HITT, IMPEADED WITH
NATHANIEL SWINGLEY.

By agreement of parties herein, as per stipulation filed, it is ordered that this cause be dismissed, and that the plaintiff pay one-third of the costs herein, and that the defendant pay two-thirds of the costs herein. It is therefore ordered and considered by the said plaintiffs have and recover of the said defendant two-thirds of the costs herein, and that he have execution therefor.

- 21 The above was all the evidence introduced on the trial.
The following instruction was given for plaintiff:

Defendant excepted to the giving of said instruction.

The following instruction were given for defendant:

- In order to maintain this action, the plaintiff must prove to the satisfaction of the jury, either that he became liable to Allen for the amount agreed upon in settlement of the suit in Winnebago county,
- 23 at the express request or agreement of S. M. Hitt, or that said Hitt expressly agreed or promised to pay said note, given by the plaintiff, or to indemnify him against the same.

2. If the jury find from the evidence that the plaintiff gave his note for the settlement of the suit in Winnebago county, voluntarily, without the request of Hitt, then the giving of such note created no legal liability against said S. M. Hitt, and unless the proof shows a

promise or agreement of said Hitt, to pay the same the jury will find for the defendant.

3. That, if the jury find that the plaintiff ever had a legal claim against said S. M. Hitt, arising out of the transaction, given in evidence by the plaintiff, it accrued when said plaintiff took up and paid his note, given to Allen, and if the jury find that said note was taken up five years prior to February 5, 1861, then the jury will find for the defendants.

4. If the jury find from the evidence that the friends of S. M. Hitt settled said suit at Rockford, as stated in the deposition of T. J. Turner, and that said plaintiff gave this note to perfect said settlement, then the defendants are not liable for the same, unless the plaintiff has also proved a promise or agreement of said S. M. Hitt, made within five years prior to February 5, 1861, to pay said note.

24

The fourth instruction was refused, to which defendants (appellants) excepted.

ERRORS ASSIGNED ARE :—

1. Admitting improper testimony.
2. Excluding proper testimony.
3. Giving improper instructions asked by plaintiff.
4. Repressing instructions asked by defendants.
5. Overruling motion in arrest and for new trial.

[REDACTED]

THE SUPREME COURT
OF THE
STATE OF ILLINOIS;
THIRD GRAND DIVISION, APRIL TERM, A. D. 1863.

ANDREW M. HITT, ET. AL.,
EXECUTORS OF SAMUEL M. HITT, APPELLANTS, }
vs. } APPEAL FROM OGLE.
HENRY SHARER, APPELLEE.

BRIEF OF THE APPELLANTS.

With no other means of arriving at the truth, except from the meagre, loose and disjointed evidence in this record, it seems to us that this is one of those unjust and fictitious claims, which are too frequently trumped up to defraud the estate of the departed.

We think it is fairly to be inferred from the evidence, that Sharer received the consideration for giving the note to Allen for Hitt, at, or about the time it was given, and that the consideration Sharer received, was a deed or contract for ten acres of land at \$20 per acre.

The deceased, Hitt, as appears by the evidence of McCoy, (Record p 15) had reserved from the contemplated sale of a tract of land to one Thompson, ten acres for Sharer, letting Thompson have the tract minus the ten acres, and Sharer the ten acres. McCoy says Hitt did not say for what purpose or object he was going to let Sharer have the land; he mentioned the land in conversation about the Rockford settlement; and McCoy says he inferred it was for this matter. By this matter, he evidently means, that Hitt let Sharer have the ten acres, because Sharer had given his note to Allen for the \$200.

It also appears from McCoy's evidence that Hitt claimed that he had paid Allen his share of the amount due Allen for teaching school, and that the balance which Allen claimed belonged to Swingley to pay.

The facts appear to us clearly to be, that Hitt and Swingley were to pay Allen for teaching a school. Hitt had paid half, and Hitt and Swingley were sued by Allen for the other half. By the evidence of Swingley, it appears that Hitt

called upon him for the \$200, (the Swingley share, because Hitt had paid his part before suit,) and that Hitt then and there told him that he, Hitt, had to pay the note, and that he had settled the matter with Sharer, in the sale of land, and that the money was coming to him, Hitt. The expression, "had to pay the note," when construed by the light of the context, clearly means that Hitt had paid the note by the ten acres of land, which he had let Sharer have. By changing the expression to the first person, it would be substantially this: I got Sharer to give the note to Allen; I had to pay it; I settled the note with Sharer in the sale of land; now, Swingley you ought to pay me the \$200 I thus paid for you! Swingley says that he therefore did pay Hitt the \$200, and that the latter manifested no further interest in his health, &c.

Would this claim of a security for cash paid for a principal, have been left standing five years and more? No! The death of the principal rendered it safe to try to get a second payment of it. Why did Sharer give his individual note to Allen? Why did not Hitt give his own note? We are not disposed to adopt the theory of the defence in the court below. Sharer did not volunteer to give Allen a note for \$200, without a *quid pro quo*. The *quid pro quo*, was a deed of ten acres of land, or a contract for a deed of it, or some other *quid pro quo* growing out of the sale by Hitt to Thompson, and the reservation of ten acres for Sharer. If Hitt gave Sharer a contract to convey him land, in consideration that he should give his note to Allen for his debt, this would substitute the remedy of Sharer upon the contract for that of one to collect the money of Hitt, what Sharer should pay for him on the note to Allen, and this would be an answer to the claim for the money paid for Hitt.

Let us now admit, for the sake of the argument, that Sharer never did receive any consideration for giving his note for \$200 to Allen, and that he really had a claim against Hitt, for money paid to Allen for him. We think our clients have the legal and moral right to urge that the case was barred by the statute of limitations. They occupy the position of fiduciaries, whose duty requires it. They believe the claim to be unjust, and it was for a shield in just such cases, as they believed this to be, that the statute was made. There is no doubt as to the time when Sharer took up the note. Allen says distinctly, that if the suit was dismissed in the fall of 1854, the settlement with Sharer, when the note was taken up, was in the fall of 1855, (Record p. 16.) The time when the suit was dismissed is fixed clearly by the date of the order of dismissal, on the 27th of September 1854, (Record p. 21.) This suit for money paid by Sharer for the deceased, was commenced in February, 1861—the summons bears date on the 5th, and it was served on the 8th, (Record p. 2.) The bar is clearly five years—(Purple's statutes p. 731). The cause of action accrued when Sharer took up the note in the fall of 1855, and the five years elapsed in the fall of 1860. We suppose it may be said upon the other side, that though the note was taken up in the fall of 1860 that there was an amount of \$7 which was permitted to remain in the form of an account as Allen calls it, and which was subsequently paid in flour. Whatever might be the effect of the balance of \$7 remaining unpaid till within the five years, if the payment had been endorsed and Allen still retained the note, with seven dollars due upon it, it is, we think, exceedingly plain that a cause of action accrued against Hitt in favor of Sharer for the whole amount due on the note, the

moment the latter took up the note from Allen. The fact that Allen took a parole or written promise of Sharer to pay the \$7 at a future time, as part of the payment of the note, would be of no consequence, as between Allen and Sharer, and of course, as between Hitt and Sharer. Sharer had paid and taken up the note, and it would have been no defense as to the \$7, in an action by the latter against Hitt, before Sharer had paid Allen the \$7, for Hitt to say that Sharer had not yet paid the \$7, and therefore, he could not recover it. Allen could not have recovered the \$7 in an action against Sharer, *on the note*, after Sharer had taken it up, and Sharer could have sued Hitt and recovered the whole amount of the note immediately after the note was so taken up by Sharer. Sharer's cause of action therefore accrued in the fall of 1855, and it was barred in the fall of 1860. Suppose Sharer had never paid Allen the \$7, could he never have recovered of Hitt, neither the sum he actually did pay Allen, nor the amount due according to the tenor of the note. It must be that he could have recovered the whole of the note of Hitt, whether he had or had not paid the \$7, and that his cause of action for the whole accrued the day he took up the \$200 note. If Sharer could have a cause of action against Hitt for money paid on the note, for each item of cash paid, then the law is well settled that the items paid within the five years would not be barred and those paid before the five years would be barred. In case of mutual running accounts, the items within the five years would drag within the five years the other items. When they are not mutual accounts, or in other words when the account is *all on one side*, those only within the five years can be recovered—(Angell on Limitations, 135, sec 6.) Therefore, the whole claim, or all of it older than five years was barred.

A word as to the evidence about the \$7 item, and we have done: All the evidence on the subject of the \$7 being paid within the five years, is as follows: The witness, Allen, was asked "if he did not see, on the trial below, on Sharer's books, charges of flour delivered in the summer of 1856. He does not even say that he saw such charges. He says: "if so, it was the flour delivered on the \$7 balance charged in account." The account of the plaintiff itself containing such charges, would not prove the fact. How can the "if so" of Allen amount to proof of the fact that the flour was delivered within the five years. Therefore, as the cause of action of Sharer for all, or a large part of the amount of the note, (and we think for all,) accrued before the five years, the judgment should be reversed. The first instruction of the plaintiff is wrong, because it may all be true, and yet if Hitt actually paid Sharer in land, or by a contract for land, he cannot recover, and there is evidence tending to establish this hypothesis. The part of the instruction in the words "or any part thereof," was calculated to mislead the jury. This payment of the \$7 after the note had been paid and taken up was not a payment of part of the note, and there is no evidence upon which to base that part of the instruction. This instruction conflicts with the third instruction of the defendants, which is right. Though we do not adopt the theory that the giving the note by Sharer was without expectation on the part of Sharer, to be repaid if he paid it, it may well be that Sharer gave the note for Swingley, not for Hitt, for the reason before stated, and that Hitt never did expect to pay it, except he did it for Swingley, and get the amount of him as he did. Whether Sharer got the land or the contract for it at the time he

gave the note, or afterwards is not clear, but it is clear that he received a consideration for giving the note, either at the time, or afterwards. The fourth instruction asked for defendants, and refused, may be objectionable, on account of its reference to the evidence of Turner, instead of stating the fact in it. We tried unsuccessfully, in the case of *Schoonover vs. Myers*, at the last term, to convince the Court that a reference to the declaration for facts, was not proper in an instruction. We do not readily see why a reference to a deposition, is any more improper. The facts in Turner's deposition are that Hitt absolutely refused to acquiesce in the settlement; that he did not consider that he owed Allen and would not give a dollar; that if his friends did it, they did it on their own responsibility, &c. If this was so, Hitt was not liable, unless he promised, or agreed within five years, to pay the amount of the note, which Swingley ought to pay, if anybody.

H. A. MIX, AND
LELAND & BLANCHARD,
For Appellants.

106 34 145

Witt et al

vs

Shaver

Appellants Brief

Filed May 4, 1863

L. L. C. W.

State of Illinois }
22nd Judicial Circuit }
County of Ogle. ss. }

At a Circuit Court, begun and holden
at the Court House in Oregon, in said
County and State, on the first Monday of November A.D. 1861.
to-wit: on Tuesday the 5th day of said November A.D. 1861. then
and there being present-

The Honorable William W. Heaton, Judge 22nd Jud. Cir.

Frederick G. Petrie, Clerk

John A. Hughes, Sheriff

and David McCartney, State Attorney

Attest F. G. Petrie Clerk

Be it remembered that theretofore to-wit: on the 30th day
of October A.D. 1861, a Summons, account, affidavit, Trans-
cript, and Appeal Bond were filed in said Court, which
are severally in the words and figures following to-wit:—

Summons

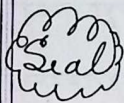
State of Illinois } The People of the State of Illinois, to the
County } ss. Sheriff of said County, Greeting:—

We command You that you
summon Andrew M. Hitt, Robert S. Hitt, and John W. Hitt
Executors of the Estate of Samuel M. Hitt Dec^d. if they shall be
found in your County, personally to be and appear before the County
Court of said Ogle County, on the first day of the next Term
thereof, to be holden at the County Clerk's Office in Oregon in
said Ogle County, on the 3rd Monday of February, 1861, to
answer unto Henry Sharer in a plea of akumpet to the
damage of said plaintiff as he says in the sum of Three

2

Hundred and fifteen Dollars. And have you then and there this Writ with an endorsement thereon. in what manner you shall have executed the same -

Witness Elbert K. Light. Clerk of our said Court, and the seal thereof, at Oregon aforesaid. this 5th day of February A.D. 1861 -



Elbert K. Light. Clerk -

Endorsed as follows to wit - "State of Illinois"

"Ogle County"

I have duly served the "within by reading the same

to the within named Andrew M. Hitt, Robert S. Hitt & John W. Hitt by reading the same in their presence and hearing this 8th day of February 1861. as I am therein commanded

"Fees - Service \$1.50. Mileage 1.20"

J. A. Hughes Sheriff

"Return .10 = 2.80"

By J. A. Hughes Jr. Deputy

"Filed in County Court this 11th day February 1861."

"E. K. Light Clerk By J. D. C. arty Dep"

"Filed October 30th 1861 - F. H. Petrie Clerk" -

Account

Estate of Samuel M. Hitt

To Henry Sharer Dr

To money paid for his use to A. Quimby Allen \$ 300.00

To goods & chattels sold & delivered 15.00

\$ 315.00

To damages on breach of contract for sale of Real Estate 300.00

Sub for plff - Jas B. McCoy Catharine Livingly. et. al. Allen -

Endorsed to wit: - Filed Feb 5th 1861 - E. K. Light Clerk

Filed October 30th 1861. F. H. Petrie Clerk

Affidavit

3

State of Illinois: Ogle County

Henry Sharer

vs

Andrew M. Hitt, John W. Hitt and
Robert S. Hitt, Executors of the Estate of Samuel
M. Hitt, deceased

Henry Sharer being
first duly sworn deposes and
says that he is plaintiff in the above entitled suit, and that
he is unable to prove the item in his account for goods and
chattels sold and delivered, except by his own oath or that of
Andrew M. Hitt or John W. Hitt, two of the defendants herein
and further saith not -

Subscribed & Sworn to before me this Henry Sharer
20th day of June A.D. 1861 -

Elbert K. Light Clerk

Endorsed to wit: - Filed June 20, 1861, E. K. Light Clerk

Filed October 30th A.D. 1861, F. L. Petrie Clerk

Transcript

County Court of Ogle County Ill. Feby Term A.D. 1861
Monday Feby 18th

Henry Sharer

vs

Andrew M. Hitt et al Executors -
the Estate of Samuel M. Hitt, dec^d

Now on this day comes the
Plaintiff by J. Seare his Attorney and
the defendants in person, and by the agreement of parties, it is
ordered by the Court that this cause be continued until the April
Term of this Court next ensuing on the first day of the Term

State of Illinois. Ogle County Court. April Term 1861.
Monday April 15th

Henry Sharer
vs

Andrew M. Hitt et al. Executors of the
Estate of Samuel M. Hitt. dec'd

It is ordered by the Court
that this cause be continued until
the next term of this Court.

State of Illinois. Ogle County Court May Term 1861.

Monday May 20th

Henry Sharer
vs

The Estate of Samuel M. Hitt. dec'd

By the agreement of
parties, it is ordered by the Court
that this Cause be continued until Friday next -

State of Illinois. Ogle County Court. May Term 1861.

Friday May 24th

Henry Sharer
vs

The Estate of Samuel M. Hitt dec'd

Now on this day comes the
plaintiff by J. Sears his atty. and
the defendant by Geo O. Jacobs his atty. and after being joined
the defendant pleads the general issue. Statute of limitations and
that the Estate does not owe the said Sharer said sum & more
for a continuance of this cause until the next Term of this Court
on the 4th day of thereof - It is ordered by the Court that this

5- cause be continued until the next Term of this Court on the 4th day of the Term.

State of Illinois. Ogle County Court. June Term A.D. 1861.
Thursday June 20th

Henry Sharer

vs

The Estate of Samuel M. Hitt, dec^d } It is ordered by the Court
that this cause be continued
until to morrow morning —

State of Illinois. Ogle County Court June Term 1861.
Friday June 21st

Henry Sharer

vs

Andrew M. Hitt, Robert S. Hitt & John W. Hitt }
Executors of the Estate of Samuel M. Hitt, dec^d } And now on this
day again comes the said

Plaintiff by Sears his attorney & the said defendants by H. A. Chip
Esqr their attorney & the issue having been joined and the cause
being submitted to the Court for trial & now coming on to be heard
upon the testimony of witnesses & other evidence produced upon the
part of the plaintiff & defendants respectively & the Court having
heard the evidence herein produced by the said plaintiff and
defendants respectively, and the arguments of Counsel, but desiring
to hold the matter of its decision under advisement until the next
term of this Court, and the said parties by their said Attornies agreeing
that this cause shall stand continued to the next Term of this Court
for a determination & decision thereof, it is therefore ordered that

6

this cause stand continued to the next Term of this Court for such determination & decision -

State of Illinois. Ogle County ~~County~~ Court. July Term A.D. 1861
Monday July 1st

Henry Shaver

Andrew M. Hitt. Robert S. Hitt & John W. Hitt

Executors of the Estate of Samuel M. Hitt. deceased

And now on this day
Comes the said plaintiff by Sears
his attorney & the said defendants by their attorney & the Court
having now fully considered the evidence herein & the arguments of Counsel
and being fully advised in the premises finds the issue for the plaintiffs
and assesses his damage at Two hundred dollars. it is therefore ordered
by the Court that the said Plaintiff have & recover of the said defendants
Executors as aforesaid the sum of Two Hundred Dollars. to be paid
in due course of administration & it appearing to the Court that the
said demand of the said Plaintiff was not duly presented to said
defendants or filed in this Court until after the day fixed upon in
pursuance of law for an adjustment of the claims of said Estate
it is further ordered that the costs in this cause be paid by the
Plaintiff -

State of Illinois

Ogle County ss J. Elbert K. Light Clerk of the County Court
in and for said County. do hereby certify, that the
foregoing is a full, true and complete Transcript of the record and
orders of Court in said cause as therein set forth. and that the
papers herewith enclosed as the files and papers in said cause. are

7
all of the papers in said cause filed in said Court—

In Testimony Whereof. I have hereunto set my hand and affixed the seal of said Court. at my office in Oregon this 28th day of October A.D. 1861.

Seal

Elbert K. Light Clerk

Endorsed to wit: - Filed October 30th A.D. 1861. F. G. Petrie Clerk

Appeal Bond

Know all men by these presents: That we Andrew M. Hett Robert S. Hett and John W. Hett. Executors of the Estate of Samuel M. Hett. deceased as principals and H. A. Chip as surety are held and firmly bound unto Henry Sharer in the penal sum of Four hundred Dollars. lawful money of the United States. for the payment of which said sum. well and truly to be made, we bind ourselves, our heirs executors and administrators. jointly and severally. by these presents. Witness our hands and seals, this seventeenth day of July A.D. 1861. —

The Condition of the above Obligation is such. That whereas the said Henry Sharer did, on the 15th day of July A.D. 1861. before the County Court. in and for the County of Ogle. recover a judgment against the above boundens Andrew M. Hett. Robert S. Hett and John W. Hett. Executors of the Estate of Samuel M. Hett deceased for the sum of Two hundred dollars. from which said judgment of the said Justice. the said Andrew M. Hett. Robert S. Hett and John W. Hett Executors of the Estate of Samuel M. Hett deceased have taken an appeal to the Circuit Court of the said County of Ogle and State of Illinois. Now if the said Andrew M. Hett. Robert S. Hett & John W. Hett. Executors as aforesaid. shall prosecute his appeal with effect. and shall pay whatever judgment may be rendered by the Court upon dismissal or trial of said appeal. then the

above obligation to be void, otherwise to remain—full force and effect.

Approved by me, at my office this } A. M. Hitt Seal
23^d July A.D. 1861- } R. S. Hitt Seal
Elbert K. Light Clerk } Jno. W. Hitt Seal
H. A. Chip — 3

Execution of the Estate of
Samuel M. Hitt deceased

Endorsed to wit!—Filed, this 23^d day of July A.D. 1861. E. K. Light Clerk
Filed October 30th A.D. 1861. F. L. Petrie Clerk

And afterwards to wit! on the 30th day of October A.D. 1861,
the Clerk of said Ogle Circuit Court, issued a Summons in said
Cause, in the words & figures following to wit!—

Appeal Summons

State of Illinois } The People of the State of Illinois, to the Sheriff
Ogle County ss } of said County. Greeting!—

We command you
that you summon Henry Sharer if he shall be found in your County
personally to see and appear before the Circuit Court of said Ogle
County, on the first day of the next term thereof, to—begin and
holden at the Court House, in Oregon, in said Ogle County, on
the first Monday of November next, to answer an appeal taken
by Andrew M. Hitt, Robert S. Hitt and John W. Hitt Executors
of the Estate of Samuel—Hitt deceased, from a judgment rendered
by Virgil A. Bogue Judge of the County Court of said County
on the 15th day of July A.D. 1861, against the said Executors
and in favor of the said Sharer, and have you then and
there this writ.—

Witness, Frederick L. Petrie, Clerk of our said Court

9 and the Seal thereof, at his office, in Oregon, in said County of Ogle, this 30th day of October A.D. 1861 -

F. H. Petrie Clerk

By B. F. Sheets Depty

Endorsed to wit: - "The within named defendant not found in my County. Nov 2nd 1861" "J. A. Hughes Sheriff" - Ret. 10-

Filed Nov 6th A.D. 1861. F. H. Petrie Clerk By B. F. Sheets Depty

And afterwards to wit: on Monday November 11th A.D. 1861. the same being as yet of the said November Term A.D. 1861. of said Court the following proceedings among others, were had and entered of record to wit: -

Henry Sharer

vs

Andrew M. Hitt, Robert S. Hitt & John W. Hitt

Executors of the Estate of Samuel M. Hitt dec^d (Aft^r)

} Appeal

And now on this day comes the said plaintiff by Sears and Fouke his attorneys, and enters his motion to dismiss appeal for want of sufficient Bond. And now come the said defendants by their attorney, and enter their cross motion for leave to amend Bond, by filing bond on appeal by the 1st day of next term of Court. And now after argument of counsel and consideration by the Court, it is ordered that said defendants cross motion be sustained and that he have leave to file amended Bond by the first day of the next term of this Court -

And afterwards to wit: on the 17th day of January A.D. 1862 an Amended Appeal Bond was filed in said Court, in the

words and figures following to wit:

Amended Appeal
Bond —

Know all Men by these Presents: That we Andrew M. Hitt Robert S. Hitt and John W. Hitt. Executors of the Estate of Samuel M. Hitt deceased as principals and Henry A. Chip as security are held and firmly — unto Henry Sharer in the penal sum of Four Hundred Dollars lawful money of the United States for the payment of which said sum well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents — Witness our hands and seals this eighth — of January A.D. 1862 —

The Condition of the above obligation is such: That whereas the said Henry Sharer did on the 15th day of July A.D. 1861. before the Honorable the County Court in and for the County of Ogle and State of Illinois, recover a judgment against the above boundens Andrew M. Hitt. Robert S. Hitt and John W. Hitt. Executors of the Estate of Samuel M. Hitt deceased for the sum of Two Hundred Dollars to be paid in due course of Administration: from which said judgment of said County Court the said Andrew M. Hitt Robert S. Hitt and John W. Hitt Executors of the Estate of Samuel M. Hitt deceased, have prayed an appeal to the Circuit Court of said County of Ogle and State of Illinois

Now if the said Andrew M. Hitt. Robert S. Hitt and John W. Hitt Executors of the Estate of Samuel M. Hitt deceased shall prosecute their appeal with effect and shall pay whatever judgment with costs in due course

of administration as may be rendered by the Court upon dis-
mikal or trial of said appeal. then the above obligation to
be void, otherwise to remain in full force and effect—

A. M. Hitt Seal
Robt S. Hitt Seal
Jno W. Hitt Seal
H. A. Mix Seal

Executors of the Estate of
Samuel M. Hitt dec'd

Endorsed to wit: Filed Jan'y 17th 1862. F. H. Petrus Clerk —

And afterwards to wit:— on Tuesday March 25th A.D. 1862
the same being one of the days of the March Term A.D. 1862.
of said Court. the following proceedings were had and entered of
record to wit:—

Henry Shaver

vs

vs

} Appeal

Andrew M. Hitt. Robert S. Hitt John W. Hitt

Executors of the Estate of Samuel M. Hitt, deceased } This day come, said
plaintiff by Sears, Fouke &

Dutcher his attorneys. and said defendants by Mix their attorney.
and thereupon come a jury to wit:— Oscar W. Garrison. Joseph F.
Hawthorn. Daniel Stout. Thomas Keinkle. James Randall. Gilbert
Grimes. George Stocking Henry A. Mix 2nd. E. J. Bortel. James
Rea. Charles F. Emerson and Isaac W. Norton. who being em-
pannelled and sworn well and truly to try the issues joined between
the said parties. and a true verdict render according to the
evidence, returned their verdict as follows to wit:— "We the jurors
find for the plaintiff and award the damages at Two hundred
and ninety nine dollars and sixty eight cts" and thereupon

come the said defendants and enter their motion in arrest of judgment and for a new trial herein -

And afterwards to wit: on Thursday March 27th A.D. 1862, the same being as yet of the said March Term A.D. 1862, of said Court, the following proceedings were had and entered of record to wit:

Henry Sharer
vs

Andrew M. Helt, Robert S. Helt & John W. Helt

Executors of the Estate of Samuel M. Helt dec'd

}
}
} Appeal

This day come the said parties again by their attorneys and now the said plaintiff remits (\$39⁶⁵) Thirty nine & 68/100 dollars, from the verdict herein. And thereupon the said defendants motion in arrest of judgment, and for a new trial herein is by the Court overruled: It is therefore considered that said plaintiff have and recover of said defendants the sum of Two hundred and Sixty dollars his damages found in form aforesaid, and that he have execution therefor. And it is further ordered that said plaintiff pay the costs herein, and that said defendants recover of said plaintiff their costs herein expended, and that they have execution therefor. And thereupon the said defendants pray an appeal of this cause to the Supreme Court of this State, which is allowed by the Court, upon said defendants filing Bond in the penal sum of Five hundred dollars, with Daniel J. Pinckney or Lyman Barle or Henry A. Chip as security within sixty days from this date, and that Bill of Exceptions be filed in thirty days from this date

13

And afterwards, a Stipulation was placed among the files in said cause in the words and figures following to wit:—

Stipulation

State of Illinois } Circuit Court of said County—
Ogle County } In Vacation after March Term —

Henry Sharer
vs

Andrew M. Heitt, Robert S. Heitt & John W. Heitt
Ex - of late Samuel M. Heitt —

It is agreed by the undersigned that the trial for settling the Bill of Exceptions in the above entitled cause may be extended until some time during the next Term of the Lee County Circuit Court, of which the plaintiff shall have a reasonable notice April 25, 1862.

Sears & Dutcher Attys for Pltff
H. A. Chip. Atty for Deft

And afterwards, the Bill of Exceptions in said cause was placed among the files in said Court, which is in the words and figures following to wit:—

Bill of Exceptions

State of Illinois } Circuit Court of said County
Ogle County } March Term 1862—

Henry Sharer
vs

Andrew M. Heitt, Robert S. Heitt & John W. Heitt
Executors of the Estate of Samuel M. Heitt, deceased

Be it remembered that on the

Trial of the above entitled cause, the Plaintiff, to maintain the issues on his part introduced as witnesses James B. McCoy Aaron L. Allen and Nathaniel Swingley, and the said McCoy being duly sworn on his oath states as follows -

I have known the parties to this suit for twenty odd years that is Esq. Hitt. Allen I have known for some ten years -

I was at Winnebago County when the suit was settled. I do not know of any money being paid. Sharer acted between parties in trying to adjust the suit, do not recollect of seeing Sharer and Hitt together. Mr Sharer was a mediator between Allen & Hitt. I asked Hitt how the matter was getting along, he said satisfactory to him, I never saw note. Hitt never said anything to me about settlement. I was in Rockford when note - given, but did not see it. I asked him how - getting along he said satisfactory. I had a conversation with Hitt when going from here to Mt Morris. I asked him what - going to do with piece of land, reserved from sale, he said he was going to let Sharer have it. We had been talking about the Allen matter & the settlement at Rockford, land worth \$20. a cre -

On Cross examination witness said, that Hitt said in first conversation, that they were getting along very well except costs, that costs had been divided into three parts, and he did not like to pay costs. The suit in Rockford settled before Hitt conveyed land to Thompson. Hitt contended that Allens claim was not his debt, that he had paid Allen his share and that the amount Allen claimed belonged to Captain Swingley to pay, and that he did not wish to be beat. I asked Hitt, the question what he was going to do with the

15
land. he said he was a going to let Henry have it. he said nothing. in regard - for what purpose or object. he was going to let him have it. I inferred that it was for this matter. it was in conversation about settlement at Rockford. He simply said it was for Sharer. it was ten acres & was not conveyed to Thompsons -

Aaron L. Allen being produced and sworn on part of Plaintiff, deposed as follows. I know Hitt, Swingley and Sharer I commenced a suit in this County for my services as a teacher against Hitt & Swingley. this suit was afterwards removed to Winnebago County. while there it was settled by receiving "I" from Henry Sharer. his note for \$200. due in six or twelve months which I cannot state. Sharer paid the note to me the last of it was paid in the fall of 1855. or in the fall of 1856. I do not know where the note is now. it may be at home among my papers. Sharer got my notes and gave them for his He paid it all in that way. except \$7.00 I gave him up his note. at that time. this \$7. remained in account. which he subsequently paid me in four - I think settlement in the fall of 1855. or spring or summer of 1856. though it may have been in the fall of 1856. when we settled. we cast up the amount due on the notes. he held against me and the amount due on the note I held against him. I gave him up his notes. and received my note from him - Witness was asked. if on the trial below he did not see charges on plaintiffs book of flour delivered to him in the summer of 1856. Witness replied if so it was flour delivered on the \$7. balance charged in account.

Cross Examination

The settlement between Sharer & me was had some time after the time the note matured. I cannot say how long. I cannot tell as he had notes against me & I held the note against him. I cannot say whether - matured in six months or a year. my impression is that the settlement was made in the Autumn. when we so settled I gave Sharer up his note. If the suit dismissed in the fall of 1854. the settlement was in the fall of 1855. If the suit settled in 1855. Sharer and I adjusted in fall of 1856 -

Nathaniel Swingley being produced and sworn, deposed as follows. - In Spring of 1853, or 1854. Mr Hitt called to see me (now let me tell my own story in my own way. I am not agoing to be humbugged by you) -

I was sick Mr Hitt manifested a great interest in my welfare he left and called again. he found me a little better. still seemed deeply interested in my health. he called a third time he wanted to borrow money. I declined to let him have any he then asked if he would bring a friend, that would be satisfactory to me. if I would let him have some. - He then asked me how I felt about paying the Allen matter. I replied that a part of it was right for me to pay. In order to get the matter settled Mr Hitt told me. that he did not owe the debt. and he ought not to pay it. but that he had got Sharer to give his note for it. and he Hitt had to pay the note that he did not want his family or any one else to know it and wanted me to let him have the money to pay the amount. I wanted to know of him, to whom the amount of \$200. was to be paid. he said the money was coming to him. that

17

he had settled the matter with Sharer in the sale of land he had made. I paid him the \$200. After Hitt got the money he manifested no farther interest in my health

On Cross Examination. witness stated -

I returned from California in 1853 or 1854. Hitt said nothing about what land. He said Sharer had given his note for it. He did not say what he wanted money for - I came back from California in the fall of 1853 or 1854. I went to California in the Spring of 1850. I remained in California two & one half years. left for home in the fall of 1852. and reached home in November 1852. I was sick a while after I got home. and it was some two or three months. after I got home. before I had the conversation with Hitt as above stated -

Direct Examination resumed

The conversation with Hitt as above stated was after the suit was settled at Rockford -

Cross Examination resumed

I do not know any thing about the settlement of the suit at Rockford. and do not know when it was settled: and did not know whether or not witness was a party to suit or not -

The Plaintiff having closed his testimony. thereupon the defendant read in evidence, the Deposition of Thomas J. Turner taken in this cause. which was in the words and figures following to wit: -

Deposition

State of Illinois } In Ogle County County Court. In vacation
County of Ogle } after May Term A.D. 1861.

Henry Sharer

vs

Estate of Saml M. Hitt dec'd

Sir - Take notice that on the

fifth day of June A.D. 1861. between the hours of nine in the morning and nine in the evening of the same day and continuing from day to day if necessary, at the office of the Clerk of the Circuit Court of Stephenson County and State of Illinois at Freeport in said County and State and before said Clerk. I shall proceed to take the deposition of Thomas J. Turner of the said County of Stephenson to be read as evidence on the trial of the above entitled suit said witness being a resident of said County of Stephenson

Dated the 28th day of May A.D. 1861.

Yours &c

H. A. Misp Atty for deft

To Henry Sharer or Joseph Sears his Attorney -

I acknowledge due service of the within by copy and waive the ten days notice

J. Sears. Atty for Plff -

State of Illinois }
Stephenson County ss }

Henry Shearer

vs

Estate of Samuel M. Hitt dec'd

Ogle County, County Court
Vacation after May Term
A.D. 1861.

The Deposition of Thomas J. Turner of Stephenson County - Witness produced, sworn & examined

19

before J. Wilson Shaffer Clerk of the Stephenson County Circuit Court on the 5th day of June A.D. 1861, at his office in said Stephenson County, in pursuance of annexed notice, to be read in evidence on the trial of the above entitled cause on the part of defendant — Thomas J. Turner being first duly sworn deponent and says as follows to wit: —

Int 1 What is your name, age and occupation

Ans My name is Thomas J. Turner, age Forty five, Lawyer by Profession

Int 2 Was you present at a settlement of a suit in the Winnebago Circuit Court, wherein A. L. Allen was plaintiff and Samuel M. Hitt & Nathaniel Livingley were defendants; if you were present state how that settlement was made, who made it, and what occurred at that settlement —

Ans I was present when the suit was settled. Livingley was not in the County, the suit had been litigated for a long time. Henry Sharer of Ogle County, Martin Reynolds of LaSalle County and a large number of other citizens of Ogle County had frequently attended the Winnebago Circuit Court as witnesses. I do not know who made the proposition for a settlement. I was the Attorney for A. L. Allen. Henry Sharer came to me and told me that they had settled the suit, that Hitt was stubborn, and would do nothing about it, but his Friends had settled it, and would pay Allen; some money was paid and some obligation was given to Allen but I cannot state who paid the money or gave the obligation, but Henry Sharer appeared to be the active man in settling the matter up. He told me that Hitt would not settle the matter, but the friends of Hitt had settled it.

Int 3^d

Was Samuel M. Hebb present during any portion of the conversation between you and Mr. Shaver. if he was present. what did he say in the presence of Shaver in regard to the Settlement—

Ans

He was present during a portion of the conversation in regard to the Settlement. he said he would not pay a dollar to settle the the matter. he did not consider that he owed Allen anything if his friends settled the matter. they did it on their own responsibility. that he would rather spend a thousand or Five thousand dollars in law. than pay an unjust claim. he was not present when the money was paid and obligations made out—

Int 4

When and where did this settlement take place

Ans

The settlement took place in the City Hotel in Rockford. I cannot state when it was. but it was the same time that the suit was disposed of on the Docket of the Winnebago Circuit Court—

Thos J. Yarnes

State of Illinois }
 Stephenson County ss }

J. J. Wilson Shaffer Clerk of the Circuit Court in and for said County of Stephenson State of Illinois. do certify that the above deposition. was taken by me at the time & place mentioned in the caption thereof that the said witness was first duly sworn and that the said deposition was carefully read to the witness and signed by him— Witness my hand and the seal of the Court this 5th day of June A.D. 1861—

Seal

J. Wilson Shaffer Clerk

Endorsed to wit:— Filed June 20th 1861— E. K. Light Clerk

Filed October 30th A.D. 1861. F. H. Petrie Clerk

21

And the defendant further introduced in evidence a Transcript of the record of an order in the Winnebago Circuit Court, in the cause referred to in the foregoing evidence, which was in the words and figures following to wit: -

State of Illinois }
Winnebago County } Pleas before the Hon. Benjamin R. Sheldon
Presiding Judge of the Fourteenth Judicial Circuit
of the State of Illinois, at a regular Term of the Circuit Court of
said County of Winnebago, began & held at the Court House in
Rockford, in said County, on Monday the 25th day of September
A.D. 1854.

Present the Hon. Benjamin R. Sheldon Judge
William Brown States Attorney
King H. Milleken Sheriff

Attest Charles H. Shafford Clerk -

And afterwards to wit: on the 27th day of September
1854, it being one of the days of the aforesaid term of Court the
following entry was made

Aaron L. Allen

vs

Samuel M. Heft, impleaded }
with Nathaniel Swingley } By agreement of parties herein, as
per stipulation filed: It is ordered
that this cause be dismissed, and

that the plaintiffs pay one third of the costs herein, and
that the defendant pay one two thirds of the costs herein
It is therefore ordered & considered by the said Plaintiffs have
and recover of the said defendant two thirds of the costs

herein. and that he have execution therefor

Caron D. Allen

vs

Samuel M. Hitt. impleaded
with Nathaniel Swingley

By agreement of the parties herein
by their attorneys. It is ordered that
this cause be dismissed as per
stipulation filed herein. and in terms of said stipulations: It is
ordered that the said defendant have and recover of the said
Plaintiff one third of his costs and charges herein expended. and
that he have execution therefor:—

State of Illinois

Winnebago County ss

I, Oliver A. Pennoyer Clerk of the
Circuit Court of said County, do hereby certify
that the foregoing are true copies from the Court record in
foregoing entitled cause in my office—

(Seal)

Witness my hand & the seal of said Court at
Rockford this 23^d May 1861—

Oliver A. Pennoyer Clerk—

Endorsed to wit:—Filed October 30, A.D. 1861

which was all the evidence offered in the case
and there upon the plaintiff asked the following instruction

"The Plaintiff asks the Court to instruct the Jury—That if the
Jury believe from the evidence that Sharer signed said note in
fact as security to Allen for the benefit of Hitt, and that Hitt
was to pay the same, Sharer is entitled to recover the amount
of Hitt or his Estate, if the Jury believe that said Sharer
paid said note or any part thereof within five years next

"Given"

23

preceeding the filing of said claim in the Probate Court
Feb'y 6, 1861. -

Endorsed to wit - Filed March 25th 1862. F. G. Petrie Clerk
To the giving of which. the defendant then & there excepted
And thereupon the defendant asked the following instructions

The Court is requested to instruct the Jury. that if they believe from
the evidence that -

1 In order - maintain this action. the plaintiff must
prove to the satisfaction of the Jury. either that he became liable
to Allen for the amount agreed upon in settlement of the suit in
Win. Co. at the express request or agreement of S. M. Hitt or
that said Hitt expressly agreed or promised to pay said note
given by the plaintiff. or to indemnify him against the same.

2 If the Jury find from the evidence that the plaintiff gave his
note for the settlement of the suit in Win. Co. voluntarily -
without the request of Hitt. then the giving of such note created
no legal liability against said S. M. Hitt & unless the
proof shows a promise or agreement of said Hitt. to pay
the same. the jury will find for the defendants -

Endorsed to wit Filed March 25. 1862. F. G. Petrie Clerk

3 That if the Jury find that the plaintiff ever had a legal
claim against said S. M. Hitt arising out of the transac-
tion given in evidence by the plaintiff it accrued when
said plaintiff took up & paid his note given to Allen. & if
the jury find that said note was taken up. five years prior to Feb
5. 1861. then the Jury will find for the defendants

Endorsed to wit: - Filed March 25. 1862. F. G. Petrie Clerk

cause of new trial assigns the following causes -

First - That the Court erred in giving the instructions asked by Plaintiff -

Second - That the Court erred in refusing an instruction asked by defendants

Third - That the verdict of the jury was contrary to the law and evidence

Fourth - That the damages were excessive and not authorized by the evidence -

Fifth - And for other causes, apparent on the records of the proceedings had in this cause

H. A. Chip for defts

Endorsed. Filed March 26. 1862. F. L. Petrie Clerk -

W. W. Heaton, Judge &c.

And afterwards to wit, on the 17th day of May A.D. 1862 an Appeal Bond was filed in said Court, in the words and figures following to wit: -

Know all men by these presents. That we Andrew M. Hett, Robert S. Hett and John W. Hett Executors of the Estate of Samuel M. Hett deceased, as principals and Daniel J. Pinckney as security are held and firmly bound unto Henry Shaver in the penal sum of Five Hundred Dollars lawful money of the United State - for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns jointly severally & firmly by these presents. We set our hands and seals this 9th day of May A.D. 1862 -

The condition of the above obligation is such that whereas the said Henry Shaver did on the 27th day of March A.D. 1862. it being one of the days of the then March Term A.D. 1862. of the Circuit Court in and for the County of Ogle and State of Illinois recover in a certain appeal suit from the County Court of said Ogle County aforesaid, a judgment in said Court to wit: said Circuit Court, against the above bounden, Andrew Mc. Hitt, Robert S. Hitt & John W. Hitt as Executors of the Estate of Samuel Mc. Hitt deceased for the sum of Two Hundred and sixty dollars, from which said judgment of said Circuit Court the above bounden - Andrew Mc. Hitt, Robert S. Hitt and John W. Hitt Executors of the Estate of Samuel Mc. Hitt deceased have prayed an appeal to the Supreme Court of the State of Illinois which appeal was by said Court allowed upon the above bounden Andrew Mc. Hitt, Robert S. Hitt & John W. Hitt Executors as aforesaid filing in said cause an appeal bond in the penal sum of Five hundred dollars with Daniel J. Pinckney Lyman Carll or Henry A. Chip as security to be filed in sixty days. — Now if the said Andrew Mc. Hitt, Robert S. Hitt and John W. Hitt Executors of the Estate of Samuel Mc. Hitt deceased shall prosecute their appeal with effect and without delay and shall well and truly pay in due course of administration whatever judgments costs, interest & damages that may be awarded against them in case said judgment shall be affirmed in said Supreme Court, then this obligation to be void, otherwise to remain in full force and effect The words "in due course of administration" interlined before execution

Attest
Geo O. Jacobs }

A. M. Hitt Seal

Robert S. Hitt Seal

John W. Hitt Seal

D. J. Pinckney Seal

Approved by me this 17th day of May A.D. 1862

F. G. Petrie Clerk

Endorsed to wit: Filed May 17th 1862. F. G. Petrie Clerk -

State of Illinois

Ogle County ss } I Frederick G. Petrie Clerk of the Circuit.

Court in and for said County & State aforesaid
do hereby certify that the above and foregoing is a true copy &
^{Transcript} of all the papers on file and of the proceedings had and entered
of record in said cause wherein Henry Shaver is plaintiff
and Andrew M. Hitt, Robert S. Hitt & John W. Hitt Executors
of the Estate of Samuel M. Hitt dec^d are defendants as the
same remains and appears by the files and records of my
said office.

In Testimony Whereof I have hereunto set my
hand and affixed the Seal of said Court, at my
office in Oregon in said County, this 4th day of
December A.D. 1862.

F. G. Petrie Clerk

By M. S. Eittinger Dep^y

Supreme Court of Illinois

3 Grand Division at Ottawa April 6th 1863

Andrew M. Hitt et al

Henry Shaver

Specimen of the Estates of
Samuel M. Hitt dec^d



And now comes said appellant by Mr. & Leland Blanchard
his attorneys say that in the foregoing judgment record and
proceedings there is manifest error and pray a
reversal of the same
Errors assigned

1. The court erred in admitting improper and
excluding proper testimony
2. In ~~mis~~ directing the jury
3. In refusing to give instructions asked by
appellant (defendant below)
4. In overruling motion for new trial and
in arrest of judgment
5. In rendering judgment for appellee (Plaintiff)
below
6. The judgment is against lawful evidence

A. A. M. & L.

Leland Blanchard

Filed April
8. 1863
L. Leland
Clerk

Record

Henry Shavers

Andrew M. Smith
et al

and appellee say? There
is no error in the record of pro-
ceedings and in rendering judgment
aforesaid in manner of fine
aforesaid

Wm. Cook clerk of the court

314 106 141

State of Illinois } Circuit Court of said
Ogle County } County March Term
1862.

Henry Sharer

- vs -

Andrew Mc Hitt

Robert S Hitt +

John W Hitt. Executors of the estate of Samuel Mc Hitt, deceased.

Be it remembered that on the trial of the above entitled cause the plaintiff to maintain the issues on his part introduced as witnesses James B Mc Coy, Aaron D Allen and Nathaniel Dringley, and the said Mc Coy being duly sworn on his oath states as follows.

I have known the parties to this suit for twenty odd years, that is Esq Hitt, Allen I have known for some ten years, I was at Winnebago County when the suit was settled. I do not know of any money being paid Sharer acted between parties in trying to adjust the suit, do not recollect of seeing Sharer and Hitt together. Mr. Sharer was a mediator between Allen + Hitt, I asked Hitt how the matter was getting along, he said satisfactorily to him, I never saw note, Hitt never said anything to me about settlement, I was in Rockford when note given but did not see it; I asked him how getting along he said satisfactory, I had a conversation with Hitt when going from here to Mt. Morris I asked him what going to do with piece of land reserved from sale, he said he was going to let Sharer have it. We had been talking about the Allen matter + the settlement at Rockford, land worth \$20. acre -

On cross examination Witness said, That Hitt said in first conversation that they were getting along very well except casts, that casts had been divided into three parts, and he did not

like to pay costs. The suit in Rockford settled before Hitt conveyed land to Thompson. Hitt contended that Allen's claim was not his debt, that he had paid Allen his share, and that the amount Allen demanded belonged to Captain Swingley to pay, & that he did not wish to be beat. I asked Hitt the question what he was going to do with the land, he said he was going to let Henry have it, he said nothing in regard for what purpose or object, he was going to let him have it. I inferred that it was for this matter, it was in conversation about settlement at Rockford. He simply said it was for Sharer, it was ten acres & was not conveyed to Thompson.

Aaron D. Allen being produced & sworn on part of Plaintiff deposed as follows, I know Hitt, Swingley and Sharer, I commenced a suit in this County for my services as a teacher against Hitt & Swingley, this suit was afterwards removed to Winnebago County while there it was settled by receiving from Henry Sharer, his note for \$200, due in six or twelve months which I cannot state. Sharer paid the note ^{to me} the last of it was paid in the fall of 1855, or in the fall of 1856, ^{I do not know when the note is now, it may be at home among my papers} Sharer got my notes and gave them for his. He paid it all in that way except \$7.00 I gave him up his note at that at that time this \$7 remained in account which he subsequently paid me in flour. I think settlement in the fall of 1855, or spring of 1856, that I think it may have been in the fall of 1856. When we settled we cast up the amount due on the notes he held against me and the amount due on the note I held against him. I gave him up his notes and received my note from him. Witness was asked, if on the trial below he did not see charges on Plaintiff's Book of flour delivered to him in the summer of 1856. Witness replied if so it was flour.

delivered on the \$7, balance charged in account
Cross. Examination.

The Settlement between Sharer + me
was had some time after the time the note matured
I cannot say how long. I cannot tell, as he had notes
against me + I held the note against him. I cannot say
whether matured in six months or a year. my impression
is that the settlement was made in the autumn. when
we so settled I gave Sharer up his note. If the suit
disposed - in the fall of 1854, the settlement in the fall
of 1855. If the suit settled in 1855. Sharer and I adjusted
in fall of 1856.

Nathaniel Swingley being produced + sworn deposed as
follows.

In Spring of 1853, or 1854 Mer Hitt called to see
me. (now let me tell my own story in my own way. I
am not going to be humbugged by you) I was sick. Mer.
Hitt manifested a great interest in my well-fare. he left
and called again. he found me a little better. Still
seemed deeply interested in my health. he called a third
time. he wanted to borrow money. I declined to let him
have any. He then asked if he would bring a friend
that would be satisfactory to me. if I would let him have
some. He then asked me how I felt about paying the
Allen matter. I replied that a part of it was right for
me to pay. In order to get the matter settled. Mer. Hitt
told me. that he did not owe the debt. and he ought
not to pay it. but that he had got Sharer to give his note
for it. and he Hitt had to pay the note. that he did
not want his family or any one else to know it. and
wanted me to let him have the money to pay the amount.

I wanted to know of him to whom the amount of \$200. was to be paid, he said the money was coming to him that he had settled the matter with Sharer, in the sale of land he had made, I paid him the \$200. After Heitt got the money he manifested no further interest in my health.

On Cross Examination, Witness stated, I returned from California in 1853 or 1854. Heitt said nothing about what land, he said Sharer had given his note for it; he did not say what he wanted ^{money} ~~money~~ for. I came back from California in the fall of 1853, or 1854. I went to California in the spring of 1850, I remained in California two + one half years, left for home in the fall of 1852, and reached home in November 1852, I was sick a while after I got home, and it was some two or three months after I got home before I had the conversation with Heitt, as above stated.

Direct Examination resumed.

The conversation Heitt as above stated was after the suit was settled at Rockford.

Cross Examination resumed.

I do not know anything about the settlement of the suit at Rockford, and do not know when it was settled + did not know whether or not Witness was a party to suit or not.

The Plaintiff having closed his testimony; therefore the Defendant read in evidence the deposition of Thomas J. Turner taken in this cause which was in the words and figures following to wit:

State of Illinois } In Ogle County, County Court. In
County of Ogle } Vacation after May Term A.D. 1861

Henry Sharer }
vs }
Estate of Saml. }
Mc Hitt Decd. }

Sir

Take notice that on the fifth day of June A D 1861, between the hours of nine in the morning and nine in the evening of the same day and continuing from day to day if necessary at the office of the Clerk of the Circuit Court of Stephenson County and State of Illinois at Freeport in said County and State and before said Clerk I shall proceed to take the deposition of Thomas J Turner of the said County of Stephenson to be used as evidence on the trial of the above entitled suit, said Witness being a resident of said County of Stephenson. Dated the 28th day of May A D 1861.

Yours &c H A Meix. Atty for Deft.
To Henry Sharer, or Joseph Sears, his Attorney,

I acknowledge due service of the within by copy and waive the ten days notice

J Sears. Atty for Plff.

I hereby accept service of the within notice & acknowledge the receipt of a copy of the same this 28th day of May^{AD} 1861
J Sears. Atty for Sharer.

State of Illinois }
Stephenson County }

Henry Sharer }
vs }
Estate of Samuel }
Mc Hitt Decd. }

Ogle County County Court
Vacation after May Term
A D 1861.

The Deposition of Thomas J Turner of Stephenson County, Witness produced, sworn and examined before J Wilson Shaffer Clerk of the Stephenson County Circuit Court on the 5th day of June A D 1861 at his office in said Stephenson County in pursuance of annexed notice to be read in evidence on the trial of the above entitled cause on the part of Defendant.

Thomas J Turner being first duly sworn deposes and says as follows to wit:

Int. 1 What is your name age and occupation

Ans. My name is Thomas J Turner, age forty five, Lawyer by Profession.

Int. 2. Was you present at a settlement of a suit in the Winnebago Circuit Court, wherein A D Allen was Plaintiff and Samuel Mc Hitt and Nathaniel Swingley was Defendant, if you were present state how that settlement was made, who made it and what occurred, at that settlement?

Ans. I was present when the suit was settled Swingley was not in the County. the suit had been litigated for a long time Henry Sharer of Ogle County, Martin Reynolds of LaSalle County and a large number of other Citizens of Ogle County had frequently attended the Winnebago Circuit Court as witnesses. I do not know who made the proposition for a settlement. I was the Attorney for A D Allen. Henry Sharer came to me and told me that they had settled the suit that Mc Hitt was stubborn and would do nothing about it, but his friend had settled it, and would pay Allen.

Some money was paid and some obligation was given to Allen but I cannot state who paid the money or gave the obligation. but Henry Shearer appeared to be the active man in settling the matter up. he told me that Heitt would not settle the matter but the friend ~~would~~ of Heitt had settled it:

Int. 3^d

Was Samuel W Heitt present during any portion of the conversation between you and Mr. Shearer: if he was present what did he say in the presence of Shearer in regard to the settlement:

Ans.

He was present during a portion of the conversation in regard to the settlement. he said he would not pay a Dollar to settle the the matter. he did not consider that he owed Allen anything, if his friends settled the matter they did it on their own responsibility. that he would rather pay spend a Thousand or five Thousand Dollars in Law than pay an unjust claim. he was not present when the money was paid and obligation made out

Int. 4th

When and where did this settlement take place

Ans.

The Settlement took place in the City Hotel in Rockford I cannot state when it was. but it was the same time that the suit was disposed of on the Docket of the Winnebago Circuit Court.

Thos J. Turner.

State of Illinois }
Stephenson County } ss I. J. Wilson Shaffer Clerk of the Circuit
Court in and for said County of

Stephenson + State of Illinois Do certify that the above Deposition was taken by me at the time + place mentioned in the caption thereof, that the said Witness was first duly sworn and that the said Deposition was carefully read to the witness and signed by him,

Witness my hand + the seal of the Court this
5th day of June AD 1861.
J Wilson Shaffer clerk

Endorsed Filed June 20th 1861
E K Light. clerk

Endorsed. Filed October 30th AD 1861
F G Petrie clerk

Blks. Fees. Dep \$200. Recd fees of Defendant.
J W Shaffer clk

And the Defendant further introduced in evidence a transcript of the Record of an order in the Winnebago Circuit Court in the cause referred to in the foregoing evidence which was in the words and figures following:

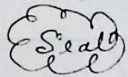
State of Illinois }
Winnebago County }³¹ Pleas before the Hon. Benjamin R
Sheldon Presiding Judge of the fourteenth Judicial Circuit
of the State of Illinois at a regular Term of the Circuit
Court of said County of Winnebago began + held at the
Court House in Rockford in said County on Monday
the 25th day of September AD 1864.

Present the Hon. Benjamin R. Sheldon Judge
William Brown States Attorney
King H. Milleken Sheriff
Attest Charles H. Schafford Clerk.

And afterwards to wit on the 27. day of September
1854 it being one of the days of the aforesaid term of Court
the following entry was made

Aaron L. Allen }
vs }
Samuel M. Hitt impleaded }
with Nathaniel Swingley } By agreement of parties herein
as per stipulation filed. It is
ordered that this cause be dismissed and that the
Plaintiff pay one third of the costs herein, and that the
Defendant pay ~~two~~ thirds of the costs herein. It is therefore ordered
& considered by the said Plaintiffs have and recover of the said
Defendant two thirds of the costs herein, and that he have
execution therefor.

Aaron L. Allen }
vs }
Samuel M. Hitt impleaded }
with Nathaniel Swingley } By agreement of the parties herein by
their Attornies. It is ordered that this
cause be dismissed as per stipulation filed herein and in
terms of said Stipulation. It is ordered that the said Defendant
have and recover of the said Plaintiff one third of his costs
and Charges herein expended and that he have Execution
therefor.

State of Illinois }
Winnebago County } ss I Oliver A Pennoyer Clerk of the
Circuit Court of said County Do
hereby certify that the foregoing are true copies from the
Court Record in foregoing entitled Cause, in my office
 Witness my hand and the seal of said
Court at Rockford this 23^d May 1861
Oliver A Pennoyer. clerk

Which was all the evidence offered in the case

And thereupon the Plaintiff asked the following instructions.

No 1- The Plaintiff asks the Court to instruct the jury. That if the jury believe from the evidence, that Sharer signed said note in fact as security to Allen for the benefit of Heitt and that Heitt was to pay the same. Sharer is entitled to recover the amount of Heitt or his Estate if the jury believe that said Sharer paid said note or any part thereof within five years next preceeding the filing of said Claim in the Probate Court. - Feby 5, 1861.

To the giving of which the Defendant then & there excepted.
And thereupon the Defendant asked the following instruction -

The Court is requested to instruct the jury.
that if they believe from the evidence, that -
1 In order to maintain this action the Plaintiff must prove to the satisfaction of the jury either that he became liable to Allen for the amount agreed upon in settlement of the suit in Win. Co. at the express request or agreement of S M Heitt

or that said Hitt expressly agreed or promised to pay said note given by the Plaintiff or to indemnify him against the same.

2. If the Jury find from the evidence that the Plaintiff gave his note for the settlement of the State suit in Win. Co. voluntarily without the request of Hitt then the giving of such note created no legal liability against said S M Hitt & unless the proof shows a promise or agreement of said Hitt to pay the same, the Jury will find for the Defendants.

No 3

That if the Jury find that the Plaintiff ever had a legal claim against said S M Hitt arising out of the transaction given in evidence by the Plaintiff it accrued when said Plaintiff took up & paid his note given to Allen, & if the Jury find that said note was taken up five years prior to Feb. 5, 1861, then the Jury will find for the Defendants.

No 4

If the Jury find from the evidence that the friends of said S M Hitt settled said suit at Rockford as stated in the deposition of J J Turner, and that said Plaintiff gave his note to perfect said settlement then the Defendants are not liable for the same unless the Plaintiff has also proved a promise or agreement of said S M Hitt made within five years prior to Feb. 5, 1861, to pay said note.

The Court gave No 1, 2 & 3, but refused the 4th to which the Defendant then and there excepted.

The Jury having returned a verdict for the Plaintiff for the sum of Two Hundred and ninety nine Dollars and six Eight cents

as follows to wit:

We the Jury find for the Plaintiff and assess the damages at Two hundred and ninety nine Dollars and sixty Eight cts.

State of Illinois } Circuit Court of said County
Ogle County } March Term 1862

Henry Sharpe }
vs }
A. M. Witt et al }

The said Defendants came and entered their motion for new trial and in arrest. And for cause of new Trial assigns the following causes:

first

That the Court erred in giving the instruction asked by Plaintiff

second

That the Court erred in refusing an instruction asked by Defendants

Third

That if the verdict of the Jury was contrary to the law and evidence

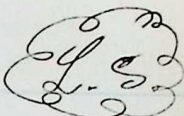
Fourth

That the damages were excessive and not authorized by the evidence -

Fifth

And for other reasons causes apparent on the records, files and proceedings had in said cause

H A Moix for
Deft.

W. W. Heaton 
Judge

State of Illinois of Ogle County Circuit Court
Ogle County 3 of November Term A.D. 1863

I hereby certify that the above bill of exceptions was signed and allowed by me at and during the Term of which it bears date, & that the omission to attach a seal to my name & signature was an oversight of mine & that it is now attached by me on the motion of H. A. Miss attorney for depts -

W. W. Heaton Judge -

State of Illinois of
Ogle County ss J. Frederick H. Petrie Clerk of
the Circuit Court in and for said
County. State aforesaid do certify, that the above and
foregoing is a true and correct copy of the amended
Bill of exceptions in the above entitled cause -

Witness my hand & the seal of said
Court at Oregon this 28th day of March
A.D. 1864

F. H. Petrie Clerk
By M. L. Loring Dep

Clk fas on this bill \$ 3.50

84 141
Andrew M. Hittell

Henry Shaver

Amended
Bill of Exemptions

Filed Apr 19, 1864
J. Leland & Co

[REDACTED]

THE SUPREME COURT
OF THE
STATE OF ILLINOIS;
THIRD GRAND DIVISION, APRIL TERM, A. D. 1863.

ANDREW M. HITT, ET. AL.,
EXECUTORS OF SAMUEL M. HITT, APPELLANTS,
vs.
HENRY SHARER, APPELLEE. } APPEAL FROM OGLE.

BRIEF OF THE APPELLANTS.

With no other means of arriving at the truth, except from the meagre, loose and disjointed evidence in this record, it seems to us that this is one of those unjust and fictitious claims, which are too frequently trumped up to defraud the estate of the departed.

We think it is fairly to be inferred from the evidence, that Sharer received the consideration for giving the note to Allen for Hitt, at, or about the time it was given, and that the consideration Sharer received, was a deed or contract for ten acres of land at \$20 per acre.

The deceased, Hitt, as appears by the evidence of McCoy, (Record p 15) had reserved from the contemplated sale of a tract of land to one Thompson, ten acres for Sharer, letting Thompson have the tract minus the ten acres, and Sharer the ten acres. McCoy says Hitt did not say for what purpose or object he was going to let Sharer have the land; he mentioned the land in conversation about the Rockford settlement; and McCoy says he inferred it was for this matter. By this matter, he evidently means, that Hitt let Sharer have the ten acres, because Sharer had given his note to Allen for the \$200.

It also appears from McCoy's evidence that Hitt claimed that he had paid Allen his share of the amount due Allen for teaching school, and that the balance which Allen claimed belonged to Swingley to pay.

The facts appear to us clearly to be, that Hitt and Swingley were to pay Allen for teaching a school. Hitt had paid half, and Hitt and Swingley were sued by Allen for the other half. By the evidence of Swingley, it appears that Hitt

called upon him for the \$200, (the Swingley share, because Hitt had paid his part before suit,) and that Hitt then and there told him that he, Hitt, had to pay the note, and that he had settled the matter with Sharer, in the sale of land, and that the money was coming to him, Hitt. The expression, "had to pay the note," when construed by the light of the context, clearly means that Hitt had paid the note by the ten acres of land, which he had let Sharer have. By changing the expression to the first person, it would be substantially this: I got Sharer to give the note to Allen; I had to pay it; I settled the note with Sharer in the sale of land; now, Swingley you ought to pay me the \$200 I thus paid for you! Swingley says that he therefore did pay Hitt the \$200, and that the latter manifested no further interest in his health, &c.

Would this claim of a security for cash paid for a principal, have been left standing five years and more? No! The death of the principal rendered it safe to try to get a second payment of it. Why did Sharer give his individual note to Allen? Why did not Hitt give his own note? We are not disposed to adopt the theory of the defence in the court below. Sharer did not volunteer to give Allen a note for \$200, without a *quid pro quo*. The *quid pro quo*, was a deed of ten acres of land, or a contract for a deed of it, or some other *quid pro quo* growing out of the sale by Hitt to Thompson, and the reservation of ten acres for Sharer. If Hitt gave Sharer a contract to convey him land; in consideration that he should give his note to Allen for his debt, this would substitute the remedy of Sharer upon the contract for that of one to collect the money of Hitt, what Sharer should pay for him on the note to Allen, and this would be an answer to the claim for the money paid for Hitt.

Let us now admit, for the sake of the argument, that Sharer never did receive any consideration for giving his note for \$200 to Allen, and that he really had a claim against Hitt, for money paid to Allen for him. We think our clients have the legal and moral right to urge that the case was barred by the statute of limitations. They occupy the position of fiduciaries, whose duty requires it. They believe the claim to be unjust, and it was for a shield in just such cases, as they believed this to be, that the statute was made. There is no doubt as to the time when Sharer took up the note. Allen says distinctly, that if the suit was dismissed in the fall of 1854, the settlement with Sharer, when the note was taken up, was in the fall of 1855, (Record p. 16.) The time when the suit was dismissed is fixed clearly by the date of the order of dismissal, on the 27th of September 1854, (Record p. 21.) This suit for money paid by Sharer for the deceased, was commenced in February, 1861—the summons bears date on the 5th, and it was served on the 8th, (Record p. 2.) The bar is clearly five years—(Purple's statutes p. 731). The cause of action accrued when Sharer took up the note in the fall of 1855, and the five years elapsed in the fall of 1860. We suppose it may be said upon the other side, that though the note was taken up in the fall of 1860 that there was an amount of \$7 which was permitted to remain in the form of an account as Allen calls it, and which was subsequently paid in flour. Whatever might be the effect of the balance of \$7 remaining unpaid till within the five years, if the payment had been endorsed and Allen still retained the note, with seven dollars due upon it, it is, we think, exceedingly plain that a cause of action accrued against Hitt in favor of Sharer for the whole amount due on the note, the

moment the latter took up the note from Allen. The fact that Allen took a parole or written promise of Sharer to pay the \$7 at a future time, as part of the payment of the note, would be of no consequence, as between Allen and Sharer, and of course, as between Hitt and Sharer. Sharer had paid and taken up the note, and it would have been no defense as to the \$7, in an action by the latter against Hitt, before Sharer had paid Allen the \$7, for Hitt to say that Sharer had not yet paid the \$7, and therefore, he could not recover it. Allen could not have recovered the \$7 in an action against Sharer, *on the note*, after Sharer had taken it up, and Sharer could have sued Hitt and recovered the whole amount of the note immediately after the note was so taken up by Sharer. Sharer's cause of action therefore accrued in the fall of 1855, and it was barred in the fall of 1860. Suppose Sharer had never paid Allen the \$7, could he never have recovered of Hitt, neither the sum he actually did pay Allen, nor the amount due according to the tenor of the note. It must be that he could have recovered the whole of the note of Hitt, whether he had or had not paid the \$7, and that his cause of action for the whole accrued the day he took up the \$200 note. If Sharer could have a cause of action against Hitt for money paid on the note, for each item of cash paid, then the law is well settled that the items paid within the five years would not be barred and those paid before the five years would be barred. In case of mutual running accounts, the items within the five years would drag within the five years the other items. When they are not mutual accounts, or in other words when the account is *all on one side*, those only within the five years can be recovered—(Angell on Limitations, 135, sec 6.) Therefore, the whole claim, or all of it older than five years was barred.

A word as to the evidence about the \$7 item, and we have done: All the evidence on the subject of the \$7 being paid within the five years, is as follows: The witness, Allen, was asked "if he did not see, on the trial below, on Sharer's books, charges of flour delivered in the summer of 1856. He does not even say that he saw such charges. He says: "if so, it was the flour delivered on the \$7 balance charged in account." The account of the plaintiff itself containing such charges, would not prove the fact. How can the "if so" of Allen amount to proof of the fact that the flour was delivered within the five years. Therefore, as the cause of action of Sharer for all, or a large part of the amount of the note, (and we think for all,) accrued before the five years, the judgment should be reversed. The first instruction of the plaintiff is wrong, because it may all be true, and yet if Hitt actually paid Sharer in land, or by a contract for land, he cannot recover, and there is evidence tending to establish this hypothesis. The part of the instruction in the words "or any part thereof," was calculated to mislead the jury. This payment of the \$7 after the note had been paid and taken up was not a payment of part of the note, and there is no evidence upon which to base that part of the instruction. This instruction conflicts with the third instruction of the defendants, which is right. Though we do not adopt the theory that the giving the note by Sharer was without expectation on the part of Sharer, to be repaid if he paid it, it may well be that Sharer gave the note for Swingley, not for Hitt, for the reason before stated, and that Hitt never did expect to pay it, except he did it for Swingley, and get the amount of him as he did. Whether Sharer got the land or the contract for it at the time he

gave the note, or afterwards is not clear, but it is clear that he received a consideration for giving the note, either at the time, or afterwards. The fourth instruction asked for defendants, and refused, may be objectionable, on account of its reference to the evidence of Turner, instead of stating the fact in it. We tried unsuccessfully, in the case of *Schoonover vs. Myers*, at the last term, to convince the Court that a reference to the declaration for facts, was not proper in an instruction. We do not readily see why a reference to a deposition, is any more improper. The facts in Turner's deposition are that Hitt absolutely refused to acquiesce in the settlement; that he did not consider that he owed Allen and would not give a dollar; that if his friends did it, they did it on their own responsibility, &c. If this was so, Hitt was not liable, unless he promised, or agreed within five years, to pay the amount of the note, which Swingley ought to pay, if anybody.

H. A. MIX, AND
LELAND & BLANCHARD,
For Appellants.

324 ~~186~~

Wett et al

vs

Sharer

Filed May 4 1863

J. J. Secunda
clerk

THE SUPREME COURT
OF THE
STATE OF ILLINOIS;
THIRD GRAND DIVISION, APRIL TERM, A. D. 1863.

ANDREW M. HITT, ET. AL.,
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The facts appear to us clearly to be, that Hitt and Swingley were to pay Allen for teaching a school. Hitt had paid half, and Hitt and Swingley were sued by Allen for the other half. By the evidence of Swingley, it appears that Hitt

called upon him for the \$200, (the Swingley share, because Hitt had paid his part before suit,) and that Hitt then and there told him that he, Hitt, had to pay the note, and that he had settled the matter with Sharer, in the sale of land, and that the money was coming to him, Hitt. The expression, "had to pay the note," when construed by the light of the context, clearly means that Hitt had paid the note by the ten acres of land, which he had let Sharer have. By changing the expression to the first person, it would be substantially this: I got Sharer to give the note to Allen; I had to pay it; I settled the note with Sharer in the sale of land; now, Swingley you ought to pay me the \$200 I thus paid for you! Swingley says that he therefore did pay Hitt the \$200, and that the latter manifested no further interest in his health, &c.

Would this claim of a security for cash paid for a principal, have been left standing five years and more? No! The death of the principal rendered it safe to try to get a second payment of it. Why did Sharer give his individual note to Allen? Why did not Hitt give his own note? We are not disposed to adopt the theory of the defence in the court below. Sharer did not volunteer to give Allen a note for \$200, without a *quid pro quo*. The *quid pro quo*, was a deed of ten acres of land, or a contract for a deed of it, or some other *quid pro quo* growing out of the sale by Hitt to Thompson, and the reservation of ten acres for Sharer. If Hitt gave Sharer a contract to convey him land, in consideration that he should give his note to Allen for his debt, this would substitute the remedy of Sharer upon the contract for that of one to collect the money of Hitt, what Sharer should pay for him on the note to Allen, and this would be an answer to the claim for the money paid for Hitt.

Let us now admit, for the sake of the argument, that Sharer never did receive any consideration for giving his note for \$200 to Allen, and that he really had a claim against Hitt, for money paid to Allen for him. We think our clients have the legal and moral right to urge that the case was barred by the statute of limitations. They occupy the position of fiduciaries, whose duty requires it. They believe the claim to be unjust, and it was for a shield in just such cases, as they believed this to be, that the statute was made. There is no doubt as to the time when Sharer took up the note. Allen says distinctly, that if the suit was dismissed in the fall of 1854, the settlement with Sharer, when the note was taken up, was in the fall of 1855, (Record p. 16.) The time when the suit was dismissed is fixed clearly by the date of the order of dismissal, on the 27th of September 1854, (Record p. 21.) This suit for money paid by Sharer for the deceased, was commenced in February, 1861—the summons bears date on the 5th, and it was served on the 8th, (Record p. 2.) The bar is clearly five years—(Purple's statutes p. 731). The cause of action accrued when Sharer took up the note, in the fall of 1855, and the five years elapsed in the fall of 1860. We suppose it may be said upon the other side, that though the note was taken up in the fall of 1860 that there was an amount of \$7 which was permitted to remain in the form of an account as Allen calls it, and which was subsequently paid in flour. Whatever might be the effect of the balance of \$7 remaining unpaid till within the five years, if the payment had been endorsed and Allen still retained the note, with seven dollars due upon it, it is, we think, exceedingly plain that a cause of action accrued against Hitt in favor of Sharer for the whole amount due on the note, the

moment the latter took up the note from Allen. The fact that Allen took a parole or written promise of Sharer to pay the \$7 at a future time, as part of the payment of the note, would be of no consequence, as between Allen and Sharer, and of course, as between Hitt and Sharer. Sharer had paid and taken up the note, and it would have been no defense as to the \$7, in an action by the latter against Hitt, before Sharer had paid Allen the \$7, for Hitt to say that Sharer had not yet paid the \$7, and therefore, he could not recover it. Allen could not have recovered the \$7 in an action against Sharer, *on the note*, after Sharer had taken it up, and Sharer could have sued Hitt and recovered the whole amount of the note immediately after the note was so taken up by Sharer. Sharer's cause of action therefore accrued in the fall of 1855, and it was barred in the fall of 1860. Suppose Sharer had never paid Allen the \$7, could he never have recovered of Hitt, neither the sum he actually did pay Allen, nor the amount due according to the tenor of the note. It must be that he could have recovered the whole of the note of Hitt, whether he had or had not paid the \$7, and that his cause of action for the whole accrued the day he took up the \$200 note. If Sharer could have a cause of action against Hitt for money paid on the note, for each item of cash paid, then the law is well settled that the items paid within the five years would not be barred and those paid before the five years would be barred. In case of mutual running accounts, the items within the five years would drag within the five years the other items. When they are not mutual accounts, or in other words when the account is *all on one side*, those only within the five years can be recovered—(Angell on Limitations, 135, sec 6.) Therefore, the whole claim, or all of it older than five years was barred.

A word as to the evidence about the \$7 item, and we have done: All the evidence on the subject of the \$7 being paid within the five years, is as follows: The witness, Allen, was asked "if he did not see, on the trial below, on Sharer's books, charges of flour delivered in the summer of 1856. He does not even say that he saw such charges. He says: "if so, it was the flour delivered on the \$7 balance charged in account." The account of the plaintiff itself containing such charges, would not prove the fact. How can the "if so" of Allen amount to proof of the fact that the flour was delivered within the five years. Therefore, as the cause of action of Sharer for all, or a large part of the amount of the note, (and we think for all,) accrued before the five years, the judgment should be reversed. The first instruction of the plaintiff is wrong, because it may all be true, and yet if Hitt actually paid Sharer in land, or by a contract for land, he cannot recover, and there is evidence tending to establish this hypothesis. The part of the instruction in the words "or any part thereof," was calculated to mislead the jury. This payment of the \$7 after the note had been paid and taken up was not a payment of part of the note, and there is no evidence upon which to base that part of the instruction. This instruction conflicts with the third instruction of the defendants, which is right. Though we do not adopt the theory that the giving the note by Sharer was without expectation on the part of Sharer, to be repaid if he paid it, it may well be that Sharer gave the note for Swingley, not for Hitt, for the reason before stated, and that Hitt never did expect to pay it, except he did it for Swingley, and get the amount of him as he did. Whether Sharer got the land or the contract for it at the time he

gave the note, or afterwards is not clear, but it is clear that he received a consideration for giving the note, either at the time, or afterwards. The fourth instruction asked for defendants, and refused, may be objectionable, on account of its reference to the evidence of Turner, instead of stating the fact in it. We tried unsuccessfully, in the case of Schoonover *vs.* Myers, at the last term, to convince the Court that a reference to the declaration for facts, was not proper in an instruction. We do not readily see why a reference to a deposition, is any more improper. The facts in Turner's deposition are that Hitt absolutely refused to acquiesce in the settlement; that he did not consider that he owed Allen and would not give a dollar; that if his friends did it, they did it on their own responsibility, &c. If this was so, Hitt was not liable, unless he promised, or agreed within five years, to pay the amount of the note, which Swingley ought to pay, if anybody.

H. A. MIX, AND
LELAND & BLANCHARD,
For Appellants.

10634-141

Witt et al

vs

Sharer

Appellants. Brief

Filed May 4, 1863

L. L. And
C. R.

106 327 141

Supreme Court of Illinois,

THIRD GRAND DIVISION,

AT OTTAWA.

APRIL TERM, 1863.

ANDREW M. HITT, JOHN W.
HITT & ROBERT S. HITT,
Executors of the Estate of Samuel M. Hitt, deceased,—Appellants.

VS.

HENRY SHARER,

APPELLEE.

ABSTRACT OF RECORD.

LELAND & BLANCHARD,

ATTORNEYS FOR APPELLANT.

*Filed Apr 22
1863
S. Leland
CR*

OREGON:

PRINTED AT THE OGLE COUNTY REPORTER OFFICE.

1863.

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vs.

HENRY SHARER, } APPELLEE.

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ESTATE OF SAMUEL M. HITT, to HENRY SHARER,	Dr.
To money paid for his use to A. Quimby Allen,	\$300 00
To goods and chattels sold and delivered,	15 00
	\$315 00

Pleas—General issue and statute of limitations.

Submitted to Court for trial, June term 1861.

July 15, 1861—Judgment for plaintiff (appellee) \$200.

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March 25, 1862—Cause tried by jury; verdict for plaintiff (appellee) \$299.68.

Defendants (appellants) moved in arrest of judgment, and for a new trial.

March 27, 1862—Plaintiff (appellee) remits \$39.68.

Motion in arrest and for new trial overruled.

Judgment for plaintiff (appellee) \$260.

BILL OF EXCEPTIONS:

James B. McCoy testified: Was at Winnebago County when suit was settled. Saw no money paid. Did not see Sharer and Hitt together. Sharer acted as mediator between Hitt and Allen. Hitt said the matter was getting along satisfactory to him. Never saw note.—Hitt said nothing to me about settlement; was in Rockford when note given; said he was going to let Sharer have piece of land reserved

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Cross Examined—I returned from Cal., in 1853 or 1854; Hitt said nothing about what land; Sharer had given his note for it; did not say what he wanted money for; I went to Cal., in spring of 1850; came home in November 1852; it was two or three months after I got home before I had the above conversation, which was after the suit was settled at Rockford; I don't know when suit was settled at Rockford.

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- 21 Defendants introduced in evidence a transcript of record of an order bearing date September 27th 1854, as follows:

AARON Q. ALLEN,
 vs.
 21 SAMUEL M. HITT, IMPEADED WITH
 NATHANIEL SWINGLEY.

By agreement of parties herein, as per stipulation filed, it is ordered that this cause be dismissed, and that the plaintiff pay one-third of the costs herein, and that the defendant pay two-thirds of the costs herein. It is therefore ordered and considered by the said plaintiffs have and recover of the said defendant two-thirds of the costs therein, and that he have execution therefor.

- 21 The above was all the evidence introduced on the trial.

The following instruction was given for plaintiff:

If the jury believe from the evidence that Sharer signed said note, in fact, as security to Allen for the benefit of Hitt, and that Hitt was to pay the same, Sharer is entitled to recover the amount of Hitt or his estate, if the jury believe that said Sharer paid said note or any part thereof, within five years next preceeding the filing of said claim in the Probate Court, February 6, 1861.

Defendant excepted to the giving of said instruction.

The following instruction were given for defendant:

- 23 In order to maintain this action, the plaintiff must prove to the satisfaction of the jury, either that he became liable to Allen for the amount agreed upon in settlement of the suit in Winnebago county, at the express request or agreement of S. M. Hitt, or that said Hitt expressly agreed or promised to pay said note, given by the plaintiff, or to indemnify him against the same.

2. If the jury find from the evidence that the plaintiff gave his note for the settlement of the suit in Winnebago county, voluntarily, without the request of Hitt, then the giving of such note created no legal liability against said S. M. Hitt, and unless the proof shows

promise or agreement of said Hitt, to pay the same the jury will find for the defendant.

3. That, if the jury find that the plaintiff ever had a legal claim against said S. M. Hitt, arising out of the transaction, given in evidence by the plaintiff, it accrued when said plaintiff took up and paid his note, given to Allen, and if the jury find that said note was taken up five years prior to February 5, 1861, then the jury will find for the defendants.

4. If the jury find from the evidence that the friends of S. M. Hitt settled said suit at Rockford, as stated in the deposition of T. J. Turner, and that said plaintiff gave this note to perfect said settlement, then the defendants are not liable for the same, unless the plaintiff has also proved a promise or agreement of said S. M. Hitt, made within five years prior to February 5, 1861, to pay said note.

24

The fourth instruction was refused, to which defendants (appellants) excepted.

ERRORS ASSIGNED ARE :—

1. Admitting improper testimony.
2. Excluding proper testimony.
3. Giving improper instructions asked by plaintiff.
4. Repressing instructions asked by defendants.
5. Overruling motion in arrest and for new trial.
6. Judgment is against the law and the evidence.

H. A. MIX,

AND

LELAND & BLANCHARD,

For Appellants.

106-34

Supreme Court of Illinois,
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VS.

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ABSTRACT OF RECORD.

LELAND & BLANCHARD,

ATTORNEYS FOR APPELLANT.

Filed April 22, 1863
L. Leland
CM

OREGON:

PRINTED AT THE OGLE COUNTY REPORTER OFFICE.

1863.

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106 34

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Filed April 22^d 1863
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 21 SAMUEL M. HITT, IMPEADED WITH
 NATHANIEL SWINGLEY. }

By agreement of parties herein, as per stipulation filed, it is ordered that this cause be dismissed, and that the plaintiff pay one-third of the costs herein, and that the defendant pay two-thirds of the costs herein. It is therefore ordered and considered by the said plaintiffs have and recover of the said defendant two-thirds of the costs herein, and that he have execution therefor.

21 The above was all the evidence introduced on the trial.

The following instruction was given for plaintiff:

If the jury believe from the evidence that Sharer signed said note, in fact, as security to Allen for the benefit of Hitt, and that Hitt was to pay the same, Sharer is entitled to recover the amount of Hitt or his estate, if the jury believe that said Sharer paid said note or any part thereof, within five years next preceeding the filing of said claim in the Probate Court, February 6, 1861.

Defendant excepted to the giving of said instruction.

The following instruction were given for defendant:

23 In order to maintain this action, the plaintiff must prove to the satisfaction of the jury, either that he became liable to Allen for the amount agreed upon in settlement of the suit in Winnebago county, at the express request or agreement of S. M. Hitt, or that said Hitt expressly agreed or promised to pay said note, given by the plaintiff, or to indemnify him against the same.

2. If the jury find from the evidence that the plaintiff gave his note for the settlement of the suit in Winnebago county, voluntarily, without the request of Hitt, then the giving of such note created no legal liability against said S. M. Hitt, and unless the proof shows a

promise or agreement of said Hitt, to pay the same the jury will find for the defendant.

3. That, if the jury find that the plaintiff ever had a legal claim against said S. M. Hitt, arising out of the transaction, given in evidence by the plaintiff, it accrued when said plaintiff took up and paid his note, given to Allen, and if the jury find that said note was taken up five years prior to February 5, 1861, then the jury will find for the defendants.

4. If the jury find from the evidence that the friends of S. M. Hitt settled said suit at Rockford, as stated in the deposition of T. J. Turner, and that said plaintiff gave this note to perfect said settlement, then the defendants are not liable for the same, unless the plaintiff has also proved a promise or agreement of said S. M. Hitt, made within five years prior to February 5, 1861, to pay said note.

The fourth instruction was refused, to which defendants (appellants) excepted.

24

ERRORS ASSIGNED ARE:—

1. Admitting improper testimony.
2. Excluding proper testimony.
3. Giving improper instructions asked by plaintiff.
4. Repressing instructions asked by defendants.
5. Overruling motion in arrest and for new trial.
6. Judgment is against the law and the evidence.

H. A. MIX,

AND

LELAND & BLANCHARD,

For Appellants.

THE SUPREME COURT
OF THE
STATE OF ILLINOIS;
THIRD GRAND DIVISION, APRIL TERM, A. D. 1863.

ANDREW M. HITT, ET AL.,
EXECUTORS OF SAMUEL M. HITT, APPELLANTS,
vs.
HENRY SHARER, APPELLEE. } APPEAL FROM OGLE.

BRIEF OF THE APPELLANTS.

With no other means of arriving at the truth, except from the meagre, loose and disjointed evidence in this record, it seems to us that this is one of those unjust and fictitious claims, which are too frequently trumped up to defraud the estate of the departed.

We think it is fairly to be inferred from the evidence, that Sharer received the consideration for giving the note to Allen for Hitt, at, or about the time it was given, and that the consideration Sharer received, was a deed or contract for ten acres of land at \$20 per acre.

The deceased, Hitt, as appears by the evidence of McCoy, (Record p 15) had reserved from the contemplated sale of a tract of land to one Thompson, ten acres for Sharer, letting Thompson have the tract minus the ten acres, and Sharer the ten acres. McCoy says Hitt did not say for what purpose or object he was going to let Sharer have the land; he mentioned the land in conversation about the Rockford settlement; and McCoy says he inferred it was for this matter. By this matter, he evidently means, that Hitt let Sharer have the ten acres, because Sharer had given his note to Allen for the \$200.

It also appears from McCoy's evidence that Hitt claimed that he had paid Allen his share of the amount due Allen for teaching school, and that the balance which Allen claimed belonged to Swingley to pay.

The facts appear to us clearly to be, that Hitt and Swingley were to pay Allen for teaching a school. Hitt had paid half, and Hitt and Swingley were sued by Allen for the other half. By the evidence of Swingley, it appears that Hitt

called upon him for the \$200, (the Swingley share, because Hitt had paid his part before suit,) and that Hitt then and there told him that he, Hitt, had to pay the note, and that he had settled the matter with Sharer, in the sale of land, and that the money was coming to him, Hitt. The expression, "had to pay the note," when construed by the light of the context, clearly means that Hitt had paid the note by the ten acres of land, which he had let Sharer have. By changing the expression to the first person, it would be substantially this: I got Sharer to give the note to Allen; I had to pay it; I settled the note with Sharer in the sale of land; now, Swingley you ought to pay me the \$200 I thus paid for you! Swingley says that he therefore did pay Hitt the \$200, and that the latter manifested no further interest in his health, &c.

Would this claim of a security for cash paid for a principal, have been left standing five years and more? No! The death of the principal rendered it safe to try to get a second payment of it. Why did Sharer give his individual note to Allen? Why did not Hitt give his own note? We are not disposed to adopt the theory of the defence in the court below. Sharer did not volunteer to give Allen a note for \$200, without a *quid pro quo*. The *quid pro quo*, was a deed of ten acres of land, or a contract for a deed of it, or some other *quid pro quo* growing out of the sale by Hitt to Thompson, and the reservation of ten acres for Sharer. If Hitt gave Sharer a contract to convey him land, in consideration that he should give his note to Allen for his debt, this would substitute the remedy of Sharer upon the contract for that of one to collect the money of Hitt, what Sharer should pay for him on the note to Allen, and this would be an answer to the claim for the money paid for Hitt.

Let us now admit, for the sake of the argument, that Sharer never did receive any consideration for giving his note for \$200 to Allen, and that he really had a claim against Hitt, for money paid to Allen for him. We think our clients have the legal and moral right to urge that the case was barred by the statute of limitations. They occupy the position of fiduciaries, whose duty requires it. They believe the claim to be unjust, and it was for a shield in just such cases, as they believed this to be, that the statute was made. There is no doubt as to the time when Sharer took up the note. Allen says distinctly, that if the suit was dismissed in the fall of 1854, the settlement with Sharer, when the note was taken up, was in the fall of 1855, (Record p. 16.) The time when the suit was dismissed is fixed clearly by the date of the order of dismissal, on the 27th of September 1854, (Record p. 21.) This suit for money paid by Sharer for the deceased, was commenced in February, 1861—the summons bears date on the 5th, and it was served on the 8th, (Record p. 2.) The bar is clearly five years—(Purple's statutes p. 731). The cause of action accrued when Sharer took up the note in the fall of 1855, and the five years elapsed in the fall of 1860. We suppose it may be said upon the other side, that though the note was taken up in the fall of 1860 that there was an amount of \$7 which was permitted to remain in the form of an account, as Allen calls it, and which was subsequently paid in flour. Whatever might be the effect of the balance of \$7 remaining unpaid till within the five years, if the payment had been endorsed and Allen still retained the note, with seven dollars due upon it, it is, we think, exceedingly plain that a cause of action accrued against Hitt in favor of Sharer for the whole amount due on the note, the

moment the latter took up the note from Allen. The fact that Allen took a parole or written promise of Sharer to pay the \$7 at a future time, as part of the payment of the note, would be of no consequence, as between Allen and Sharer, and of course, as between Hitt and Sharer. Sharer had paid and taken up the note, and it would have been no defense as to the \$7, in an action by the latter against Hitt, before Sharer had paid Allen the \$7, for Hitt to say that Sharer had not yet paid the \$7, and therefore, he could not recover it. Allen could not have recovered the \$7 in an action against Sharer, *on the note*, after Sharer had taken it up, and Sharer could have sued Hitt and recovered the whole amount of the note immediately after the note was so taken up by Sharer. Sharer's cause of action therefore accrued in the fall of 1855, and it was barred in the fall of 1860. Suppose Sharer had never paid Allen the \$7, could he never have recovered of Hitt, neither the sum he actually did pay Allen, nor the amount due according to the tenor of the note. It must be that he could have recovered the whole of the note of Hitt, whether he had or had not paid the \$7, and that his cause of action for the whole accrued the day he took up the \$200 note. If Sharer could have a cause of action against Hitt for money paid on the note, for each item of cash paid, then the law is well settled that the items paid within the five years would not be barred and those paid before the five years would be barred. In case of mutual running accounts, the items within the five years would drag within the five years the other items. When they are not mutual accounts, or in other words when the account is *all on one side*, those only within the five years can be recovered—(Angell on Limitations, 135, sec 6.) Therefore, the whole claim, or all of it older than five years was barred.

A word as to the evidence about the \$7 item, and we have done: All the evidence on the subject of the \$7, being paid within the five years, is as follows: The witness, Allen, was asked "if he did not see, on the trial below, on Sharer's books, charges of flour delivered in the summer of 1856. He does not even say that he saw such charges. He says: "if so, it was the flour delivered on the \$7 balance charged in account." The account of the plaintiff itself containing such charges, would not prove the fact. How can the "if so" of Allen amount to proof of the fact that the flour was delivered within the five years. Therefore, as the cause of action of Sharer for all, or a large part of the amount of the note, (and we think for all,) accrued before the five years, the judgment should be reversed. The first instruction of the plaintiff is wrong, because it may all be true, and yet if Hitt actually paid Sharer in land, or by a contract for land, he cannot recover, and there is evidence tending to establish this hypothesis. The part of the instruction in the words "or any part thereof," was calculated to mislead the jury. This payment of the \$7 after the note had been paid and taken up was not a payment of part of the note, and there is no evidence upon which to base that part of the instruction. This instruction conflicts with the third instruction of the defendants, which is right. Though we do not adopt the theory that the giving the note by Sharer was without expectation on the part of Sharer, to be repaid if he paid it, it may well be that Sharer gave the note for Swingley, not for Hitt, for the reason before stated, and that Hitt never did expect to pay it, except he did it for Swingley, and get the amount of him as he did. Whether Sharer got the land or the contract for it at the time he

gave the note, or afterwards is not clear, but it is clear that he received a consideration for giving the note, either at the time, or afterwards. The fourth instruction asked for defendants, and refused, may be objectionable, on account of its reference to the evidence of Turner, instead of stating the fact in it. We tried unsuccessfully, in the case of Schoonover *vs.* Myers, at the last term, to convince the Court that a reference to the declaration for facts, was not proper in an instruction. We do not readily see why a reference to a deposition, is any more improper. The facts in Turner's deposition are that Hitt absolutely refused to acquiesce in the settlement; that he did not consider that he owed Allen and would not give a dollar; that if his friends did it, they did it on their own responsibility, &c. If this was so, Hitt was not liable, unless he promised, or agreed within five years, to pay the amount of the note, which Swingley ought to pay, if anybody.

H. A. MIX, AND
LELAND & BLANCHARD,
For Appellants.

106-34

Witt et al

by
Shaver

Appts Brief

Filed May 4, 1863

Filed
CLM

SUPREME COURT OF ILLINOIS:

THIRD GRAND DIVISION.

April Term, A. D. 1864.

ANDREW M. HITT, *et. al.* }
 vs. } Appeal from Ogle,
HENRY SHARER. }

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If the jury believe from the evidence that Sharer signed said note in fact as security for Allen for the benefit, and that Hitt was to pay the same, Sharer is entitled to recover the amount of Hitt or his estate, if the jury believe that said Sharer paid said note or any part thereof within five years next preceding the filing of said claim in the Probate Court, Feb. 5th, 1861.

No objection is stated to this instruction by appellant in his brief, and we submit that none can be stated, if Sharer gave his note for Hitt's debt and as security for Hitt, and Hitt was to pay the debt. Then Sharer, if he was compelled to pay the amount, had a cause of action against Hitt or his estate until it should be barred by the statute of limitations.

The only instruction asked by defendant and refused was the 4th, which is—

If the jury find from the evidence that the funds of said S. M. Hitt settled said suit at Rockford as stated in the deposition of I. I. Turner, and that said plaintiff gave his note to perfect said settlement, then the defend-

ants are not liable for the same unless the plaintiff has also proven a promise or agreement of said S. M. Hitt, made within five years prior to Feb. 5th, 1861, to pay said note.

This can't be the law, if Hitt's friends settled the suit at Rockford with Allen, and Sharer gave his note to Allen for \$200, with the knowledge of Hitt and his assent, express or implied, or a promise on Hitt's part to pay the note, either express or implied. Then Sharer might recover the amount at any time within five years, not from the time he gave the note and Hitt gave the promise, but within five years from the time when he, Sharer, had the note to pay.

If it be contended that the instruction is based upon the assumption that Sharer gave the note on his own responsibility, then the instruction was properly refused because the same had been already given for the 2d instruction which was given covers the point exactly.

Montag v. Linn, 23d Ill. 551.

4th. In overruling motion for new trial. This assignment of error can not be considered by the court, because there is in the record no exception preserved to the overruling of the motion for a new trial, and it can not be presented here, and this answer is conclusive upon this assignment of error.

Boyle v. Levings, 28 Ill. 316.

But the verdict was in accordance with the testimony. It is clear from the testimony of Allen that Sharer gave his note for \$200 to him, Allen, for the debt of Hitt and secured the claim of Allen vs. Hitt, and to settle the suit between them.

2. The testimony of Sevingly shows that Hitt got Sharer to give the note, and that he was to pay it.
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4. The statute of limitations did not begin to run as against Sharer until he had paid the whole note, but these questions can not be here considered because there is no exception by which the question is preserved.

GLOVER, COOK & CAMPBELL.

Hitt
v.s.
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Argt for Appellee

Filed May 6, 1864
J. L. Carra ckr

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If the jury believe from the evidence that Sharer signed said note in fact as security for Allen for the benefit, and that Hitt was to pay the same, Sharer is entitled to recover the amount of Hitt or his estate, if the jury believe that said Sharer paid said note or any part thereof within five years next preceding the filing of said claim in the Probate Court, Feb. 5th, 1861.

No objection is stated to this instruction by appellant in his brief, and we submit that none can be stated, if Sharer gave his note for Hitt's debt and as security for Hitt, and Hitt was to pay the debt. Then Sharer, if he was compelled to pay the amount, had a cause of action against Hitt or his estate until it should be barred by the statute of limitations.

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If it be contended that the instruction is based upon the assumption that Sharer gave the note on his own responsibility, then the instruction was properly refused because the same had been already given for the 2d instruction which was given covers the point exactly.

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4. The statute of limitations did not begin to run as against Sharer until he had paid the whole note, but these questions can not be here considered because there is no exception by which the question is preserved.

GLOVER, COOK & CAMPBELL.

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Book 27 Volume 28 pp 314

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Filed May 6, 1864
J. Seland Clerk

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4th. In overruling motion for new trial. This assignment of error can not be considered by the court, because there is in the record no exception preserved to the overruling of the motion for a new trial, and it can not be presented here, and this answer is conclusive upon this assignment of error.

Boyle v. Levings, 28 Ill. 316.

But the verdict was in accordance with the testimony. It is clear from the testimony of Allen that Sharer gave his note for \$100 to him, Allen, for the debt of Hitt and secured the claim of Allen vs. Hitt, and to settle the suit between them.

2. The testimony of Sevingly shows that Hitt got Sharer to give the note, and that he was to pay it.
3. It is claimed that Hitt had paid Sharer in land. Where is the evidence? What land? It would have been easy to have shown that Hitt had conveyed to Sharer any land, if he had no such evidence was given. There is proof by McCoy, the first witness, that Hitt said that he was going to let Sharer have a certain piece of land, but there is no proof that he ever did let him have it. The jury could not have found that Hitt had paid Sharer.
4. The statute of limitations did not begin to run as against Sharer until he had paid the whole note, but these questions can not be here considered because there is no exception by which the question is preserved.

GLOVER, COOK & CAMPBELL

Hitt

v. S.

Shaver

Arg^t for app^{ee} Lee

O'NEAL, COOK & CAMPBELL

because there is no exception to which the doctrine is here applied.

4. The statute of limitations did not begin to run as against Shaver until long after.

ever did he give him. The jury could not have found that Hitt had to let Shaver have a certain piece of land, but there is no finding that he there is proof by McCoy the first witness that Hitt said that he was buying land and sold it to Shaver and that he had no such intention. And Shaver's answer is that he had no such intention. It is claimed that Hitt had told Shaver in 1847. Where is the evidence that he was to pay it.

5. The testimony of Shaver's answer that Hitt had told Shaver to give him some of the land between them.

6. The date of Hitt's and secured the claim of Hitt and to secure the testimony of Hitt that Shaver gave him note for \$200 in 1847.

7. The date of Hitt's and secured the claim of Hitt and to secure the testimony of Hitt that Shaver gave him note for \$200 in 1847.

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10. The date of Hitt's and secured the claim of Hitt and to secure the testimony of Hitt that Shaver gave him note for \$200 in 1847.

11. The date of Hitt's and secured the claim of Hitt and to secure the testimony of Hitt that Shaver gave him note for \$200 in 1847.

Filed May 6, 1864
J. L. Caswell

THE SUPREME COURT
OF THE
STATE OF ILLINOIS;
THIRD GRAND DIVISION, APRIL TERM, A. D. 1863.

ANDREW M. HITT, ET. AL.,
EXECUTORS OF SAMUEL M. HITT, APPELLANTS,
vs.
HENRY SHARER, APPELLEE. } APPEAL FROM OGLE.

BRIEF OF THE APPELLANTS.

With no other means of arriving at the truth, except from the meagre, loose and disjointed evidence in this record, it seems to us that this is one of those unjust and fictitious claims, which are too frequently trumped up to defraud the estate of the departed.

We think it is fairly to be inferred from the evidence, that Sharer received the consideration for giving the note to Allen for Hitt, at, or about the time it was given, and that the consideration Sharer received, was a deed or contract for ten acres of land at \$20 per acre.

The deceased, Hitt, as appears by the evidence of McCoy, (Record p 15) had reserved from the contemplated sale of a tract of land to one Thompson, ten acres for Sharer, letting Thompson have the tract minus the ten acres, and Sharer the ten acres. McCoy says Hitt did not say for what purpose or object he was going to let Sharer have the land; he mentioned the land in conversation about the Rockford settlement; and McCoy says he inferred it was for this matter. By this matter, he evidently means, that Hitt let Sharer have the ten acres, because Sharer had given his note to Allen for the \$200.

It also appears from McCoy's evidence that Hitt claimed that he had paid Allen his share of the amount due Allen for teaching school, and that the balance which Allen claimed belonged to Swingley to pay.

The facts appear to us clearly to be, that Hitt and Swingley were to pay Allen for teaching a school. Hitt had paid half, and Hitt and Swingley were sued by Allen for the other half. By the evidence of Swingley, it appears that Hitt

called upon him for the \$200, (the Swingley share, because Hitt had paid his part before suit,) and that Hitt then and there told him that he, Hitt, had to pay the note, and that he had settled the matter with Sharer, in the sale of land, and that the money was coming to him, Hitt. The expression, "had to pay the note," when construed by the light of the context, clearly means that Hitt had paid the note by the ten acres of land, which he had let Sharer have. By changing the expression to the first person, it would be substantially this: I got Sharer to give the note to Allen; I had to pay it; I settled the note with Sharer in the sale of land; now, Swingley you ought to pay me the \$200 I thus paid for you! Swingley says that he therefore did pay Hitt the \$200, and that the latter manifested no further interest in his health, &c.

Would this claim of a security for cash paid for a principal, have been left standing five years and more? No! The death of the principal rendered it safe to try to get a second payment of it. Why did Sharer give his individual note to Allen? Why did not Hitt give his own note? We are not disposed to adopt the theory of the defence in the court below. Sharer did not volunteer to give Allen a note for \$200, without a *quid pro quo*. The *quid pro quo*, was a deed of ten acres of land, or a contract for a deed of it, or some other *quid pro quo* growing out of the sale by Hitt to Thompson, and the reservation of ten acres for Sharer. If Hitt gave Sharer a contract to convey him land, in consideration that he should give his note to Allen for his debt, this would substitute the remedy of Sharer upon the contract for that of one to collect the money of Hitt, ~~what~~ Sharer should pay for him on the note to Allen, and this would be an answer to the claim for the money paid for Hitt. *which*

Let us now admit, for the sake of the argument, that Sharer never did receive any consideration for giving his note for \$200 to Allen, and that he really had a claim against Hitt, for money paid to Allen for him. We think our clients have the legal and moral right to urge that the case was barred by the statute of limitations. They occupy the position of fiduciaries, whose duty requires it. They believe the claim to be unjust, and it was for a shield in just such cases, as they believed this to be, that the statute was made. There is no doubt as to the time when Sharer took up the note. Allen says distinctly, that if the suit was dismissed in the fall of 1854, the settlement with Sharer, when the note was taken up, was in the fall of 1855, (Record p. 16.) The time when the suit was dismissed is fixed clearly by the date of the order of dismissal, on the 27th of September 1854, (Record p. 21.) This suit for money paid by Sharer for the deceased, was commenced in February, 1861—the summons bears date on the 5th, and it was served on the 8th, (Record p. 2.) The bar is clearly five years—(Purple's statutes p. 731). The cause of action accrued when Sharer took up the note in the fall of 1855, and the five years elapsed in the fall of 1860. We suppose it may be said upon the other side, that though the note was taken up in the fall of 1860 that there was an amount of \$7 which was permitted to remain in the form of an account as Allen calls it, and which was subsequently paid in flour. Whatever might be the effect of the balance of \$7 remaining unpaid till within the five years, if the payment had been endorsed and Allen still retained the note, with seven dollars due upon it, it is, we think, exceedingly plain that a cause of action accrued against Hitt in favor of Sharer for the whole amount due on the note, the

moment the latter took up the note from Allen. The fact that Allen took a parole or written promise of Sharer to pay the \$7 at a future time, as part of the payment of the note, would be of no consequence, as between Allen and Sharer, and of course, as between Hitt and Sharer. Sharer had paid and taken up the note, and it would have been no defense as to the \$7, in an action by the latter against Hitt, before Sharer had paid Allen the \$7, for Hitt to say that Sharer had not yet paid the \$7, and therefore, he could not recover it. Allen could not have recovered the \$7 in an action against Sharer, *on the note*, after Sharer had taken it up, and Sharer could have sued Hitt and recovered the whole amount of the note immediately after the note was so taken up by Sharer. Sharer's cause of action therefore accrued in the fall of 1855, and it was barred in the fall of 1860. Suppose Sharer had never paid Allen the \$7, could he never have recovered of Hitt, neither the sum he actually did pay Allen, nor the amount due according to the tenor of the note. It must be that he could have recovered the whole of the note of Hitt, whether he had or had not paid the \$7, and that his cause of action for the whole accrued the day he took up the \$200 note. If Sharer could have a cause of action against Hitt for money paid on the note, for each item of cash paid, then the law is well settled that the items paid within the five years would not be barred and those paid before the five years would be barred. In case of mutual running accounts, the items within the five years would drag within the five years the other items. When they are not mutual accounts, or in other words when the account is *all on one side*, those only within the five years can be recovered—(Angell on Limitations, 135, sec 6.) Therefore, the whole claim, or all of it older than five years was barred.

A word as to the evidence about the \$7 item, and we have done: All the evidence on the subject of the \$7 being paid within the five years, is as follows: The witness, Allen, was asked "if he did not see, on the trial below, on Sharer's books, charges of flour delivered in the summer of 1856. He does not even say that he saw such charges. He says: "if so, it was the flour delivered on the \$7 balance charged in account." The account of the plaintiff itself containing such charges, would not prove the fact. How can the "if so" of Allen amount to proof of the fact that the flour was delivered within the five years. Therefore, as the cause of action of Sharer for all, or a large part of the amount of the note, (and we think for all,) accrued before the five years, the judgment should be reversed. The first instruction of the plaintiff is wrong, because it may all be true, and yet if Hitt actually paid Sharer in land, or by a contract for land, he cannot recover, and there is evidence tending to establish this hypothesis. The part of the instruction in the words, "or any part thereof," was calculated to mislead the jury. This payment of the \$7 after the note had been paid and taken up was not a payment of part of the note, and there is no evidence upon which to base that part of the instruction. This instruction conflicts with the third instruction of the defendants, which is right. Though we do not adopt the theory that the giving the note by Sharer was without expectation on the part of Sharer, to be repaid if he paid it, it may well be that Sharer gave the note for Swingley, not for Hitt, for the reason before stated, and that Hitt never did expect to pay it, except he did it for Swingley, and get the amount of him as he did. Whether Sharer got the land or the contract for it at the time he

gave the note, or afterwards is not clear, but it is clear that he received a consideration for giving the note, either at the time, or afterwards. The fourth instruction asked for defendants, and refused, may be objectionable, on account of its reference to the evidence of Turner, instead of stating the fact in it. We tried unsuccessfully, in the case of *Schoonover vs. Myers*, at the last term, to convince the Court that a reference to the declaration for facts, was not proper in an instruction. We do not readily see why a reference to a deposition, is any more improper. The facts in Turner's deposition are that Hitt absolutely refused to acquiesce in the settlement; that he did not consider that he owed Allen and would not give a dollar; that if his friends did it, they did it on their own responsibility, &c. If this was so, Hitt was not liable, unless he promised, or agreed within five years, to pay the amount of the note, which Swingley ought to pay, if anybody.

H. A. MIX, AND
LELAND & BLANCHARD,
For Appellants.

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Witt et al

vs

Shaver

Appellts. Brief

Incl May 4 1853

Leland
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