No. 14021

Supreme Court of Illinois

Turner

---

vs.

Kinney et al

71641  7

State of Illinois } Sct.
Adams County }

Pleas before the Honorable Onias C. Skinner.

At a circuit holden at the Court House in Quincy within and for the said County of Adams on Monday the Fifteenth day of March and continued from day to day until the Eighth day of April in the year of our Lord one thousand eight hundred and fifty two.

Present the Honorable Onias C. Skinner Judge of the Fifteenth Judicial Circuit of said State
J. M. Stewart Stewart States Attorney
Peter Sott Clerk of said Circuit Court of Adams County
Abner V. Humphrey Sheriff of Adams County.

Avery Turner Plaintiff
vs } In debt.
Benjamin Kinney, George High, William W. Robertson and John B. Creighton Defendants.

Be it remembered, That heretofore, to wit, on the Twentieth day of May in the year of our Lord one thousand eight hundred and fifty one, the said Plaintiff by his attorney filed in the said Circuit Court, in the Clerks office thereof, his declaration, copy of notes sued on, and precipe for summons in the words and figures following, that is to say:-

State of Illinois- Adams County and Circuit, Sct.- June Term 1851.

Declaration. Benjamin Kinney, George High, William W. Robertson and John B. Creighton were summoned to answer unto Avery Turner of a plea that they render unto him the sum of Two Hundred dollars, which to him they owe, and from him unjustly detain. And thereupon the said Avery Turner by his Attorney, complains, For that whereas, the said defendants, heretofore, to wit, on the 16th day of February 1848 at Quincy, to wit, at the County aforesaid by their certain promissory note of that date by them subscribed

(the said defendant William W. Robertson Subscribing said note by the description of Wm W. Robertson) jointly and severally promised to pay to the said Plaintiff, or bearer, the sum of One hundred dollars, on the first day of March, one thousand eight hundred and forty nine with interest after due for value received, by means whereof the said defendants then and there became liable to pay the Plaintiff the said sum, according to the tenor and effect of the said promissory note, parcel of the said sum of money above demanded.

And whereas also the said defendants, afterwards, to wit, on the 6th day of February 1848, at Quincy, to wit, at the County aforesaid, by their certain other promissory note of that date by them subscribed (the said defendant, William W. Robertson subscribing said note by the description of Wm W. Robertson) jointly and severally promised to pay the said Plaintiff or bearer, the sum of One hundred dollars on the first day of March One thousand eight hundred and forty nine with interest after date for value received, and then and there delivered the said promissory note to the said Plaintiff, by means whereof the said defendants then and there became liable to pay to the said plaintiff the said sum of money according to the tenor and effect of the said last mentioned promissory note, parcel of the said sum of money above demanded; yet, although the said sums of money have been long since due and payable, and although requested, the said defendants have never paid the said sums, or any part thereof, but have refused, and still do refuse so to do, whereby an action hath accrued to the Plaintiff to demand and have of the said defendants, the said sum of $200. which they owe and unjustly retain, to the damage of the said Plaintiff $100. and therefore he sues. Browning & Bushnell pfs.

The following are copies of the notes sued upon.

Copy of notes.

Quincy, Feb. 6th 1848.

We or either of us promise to pay Avery Turner, or bearer, the

sum of One hundred dollars, on the first day of March one thousand eight hundred and forty nine, interest after due, for value received.

Benjamin Kinney
George High
Wm W. Robertson
John B. Creighton

Quincy Feb. 6th 1848.

We or either of us promise to pay Avery Turner or bearer the sum of One hundred dollars, on the first day of March one thousand eight hundred and forty nine, interest after date, for value received.

Benjamin Kinney
George High
Wm W. Robertson
John B. Creighton.

This is an action of debt for $200. Damt. $100.

Precipe. The Clerk will issue Summ. against Defts. to Sheriff of Adams County returnable to June Term 1851. Browning & Bushnell pqr.

And afterwards, to wit, on the Sixteenth day of June A.D. 1851. the said Sheriff returned into the said Circuit Court, a Summons issued in this cause, which with the endorsements of said Sheriff thereon, is in the words and figures following, to wit:-

State of Illinois } ss. The People of the State of Illinois
Adams County } To the Sheriff of said County, Greeting:

Summons. We command you to summon Benjamin Kinney, George High, William W. Robertson and John B. Creighton if to be found in your County, to appear before the Circuit Court of said County of Adams, on the first day of the next term thereof, to be holden at the Court House in Quincy, on the third Monday in the month of June next to answer Avery Turner of a plea that they render unto him the sum of Two hundred dollars which to him they owe and from him unjustly detain, to his damage the sum of One hundred dollars as he says. And have you then there this writ, and make return thereon in what manner

you execute the same. Witness Peter Sott Clerk of our Said Circuit Court, at Quincy, this Twentieth day of May in the year of our Lord one thousand eight hundred and fifty one. Peter Sott Clerk

By Geo Veech Depty.

I have served the within Summons by reading the same to the within named Benjamin Kinney and William W. Roberson this Twenty seventh day of May A.D. 1851.

A. V. Humphrey Sheriff Ad. Sec.

By R. P. Coats Deputy.

I cannot in my county, find the within named George High a John B. Creighton, May 27. 1851. A. V. Humphrey Sheriff Ad. Sec.

By R. P. Coats Deputy.

And afterwards, to wit, on the Eighteenth day of June in the year of our Lord last aforesaid (1851), the said defendants, Benjamin Kinney and William W. Roberson, by their attorneys, filed in the said Circuit Court, their pleas in the words and figures following:

Pleas. 1. And the said defendants Benjamin Kinney and William W. Roberson come and defend the wrong and injury when &c and say that they do not owe the said plaintiff the said debt in the said declaration mentioned in manner and form as the said plaintiff has complained against them. And of this they put themselves upon the Country &c.

And the plaintiff likewise Williams & Laurence

Browning & Bushnell pq. Attys for Defts.

2.- And the said defendants for further plea herein say, the said plaintiff actio non, because they say, said promissory note mentioned in the said declaration mentioned was made and executed by the said defendants and placed in the hands of one Edward Turner to be delivered to the said Plaintiff, when he should execute and deliver to the said Edward Turner for the said defendants a general warranty deed conveying to the said defendants and John B. Creighton and George High the full,

free and exclusive right and privilege of using, keeping and running, in Township Three South and Range Five West of the Fourth principal meridian, Page's portable saw mill and not before. And the said defendants aver that the said plaintiff has never executed and delivered the said deed to the said Edward Turner or to any other person, and that they, the said defendants, never delivered the said note or consented to the delivery thereof, except as aforesaid, And this they are ready to verify, wherefore they pray judgment &c.

Williams & Laurence atty for Defts.

3.- And the said defendants for a further plea herein, say the said plaintiff action non, because they say, that just before and at the time of the execution of the said promissory note in the said declaration mentioned, at the County and State aforesaid, the said plaintiff contracted and agreed to sell and convey to the said defendants by general warranty deed, the full, free and exclusive right and privilege of using, keeping and running, in Township Three South and Range Five West of the Fourth principal meridian, Page's portable saw mill. And the said defendants aver that the said note was made and executed by them in consideration of the said sale and for no other consideration whatever. And the said defendants further aver that after the execution of the said promissory note, the said plaintiff wholly failed and refused to make said general warranty deed and still refuses so to do. And this the said defendants are ready to verify, wherefore they pray judgment &c.

Williams & Laurence Atty's for Defts.

4. 4.- And the said defendants, for a further plea herein, say the said Plaintiff action non, because they say, that just before, and at the time of the execution of the promissory note in the said declaration mentioned, the said plaintiff represented to them that he had the free, full and exclusive right and privilege of keeping, using and running, in Township Three South

and Range Four West of the fourth principal meridian, Page's portable Saw mill, and agreed to convey the same to them by general warranty deed. And the said defendants execu=ted the said promissory note in consideration of said representation and agreement and for no other consideration whatever. And the said defendants aver that the said plaintiff has not convey=ed the said right to them by general warranty deed, and that he has no title or right to the exclusive use of the said saw mill in the Township and Range aforesaid. And this the said defen=dants are ready to ~~xxxx~~ verify. Wherefore they pray judgment &c

Williams & Laurence Atty's for Defts.

And afterwards, to wit, on the 30th day of the same month and year last aforesaid Orders are entered upon the records of the said Circuit Court in the words and figures following, Viz:

Motion.- overruled. &c. Now comes the said Plaintiff by his Attorney and enters his motion for leave to reply double to the said defendants' pleas Whereupon all and singular the premises being seen, heard and by the Court here fully understood, said motion is overruled.

And now again comes the said plaintiff by his Attorneys and as to the pleas of the said defendants filed herein files his replication and demurrer. And by agreement of the parties now here, it is ordered that this cause be continued.

Which said replication and demurrer of the said plaintiff is in the words and figures following, to wit:

Replication. And for replication to the plea of the said defendants Kinney and Robertson, by them secondly above pleaded, the said plaintiff, by leave of the Court first had and obtained, say precludi non because he says, that after the execution of the said note in the plaintiff's declaration mentioned, to wit on the Seventh day of February A.D 1848, he, the said plain=tiff did execute his certain deed of conveyance of that date, and which said deed, being in the possession of the defendants, the plaintiff cannot produce to the Court, whereby

the Plaintiff purported to remise, release and forever quit-claim unto the said defendants and George Heigh and John B. Creighton their heirs, executors, administrators and assigns the full free and exclusive right and privilige of using, keeping and running in the Township in said plea mentioned and not elsewhere, "Page's portable saw mill" describa in the said deed as patented at the proper office in Washington, District of Columbia United States on the 18th day of July A.D 1841 for and during the term of fourteen years from the date last aforesaid, To have and to hold the above mentioned right, use, privilige and patent for said township during said term unto the said defendants and George Heigh and John B. Creighton, their heirs executors, administrators and assigns forever, and which said deed the plaintiff afterwards, to wit, on the day and year aforesaid, caused to be delivered to the defendants and George Heigh and John B. Creighton in pursuance of and in full discharge, on his part, of the contract for a deed in the said plea mentioned, and which said deed so delivered to them, the said defendants and the said George Heigh and John B. Creighton then and there accepted and received from the plaintiff for and on account and in lieu of the said warranty deed in the said plea mentioned, and this the plaintiff is ready to verify, wherefore the plaintiff prays judgment &c.

Browning & Buchnell Pq.

And for a further replication to the plea of the defendants Benjamin Kinney and William W. Robertson by them thirdly herein pleaded, the said plaintiff, by leave of the Court first had and obtained, says precludi non, because the plaintiff says, that after the making of the promissory note in the declaration mentioned, to wit, on the Seventh day of February A.D 1848, in pursuance and in execution of the contract for a deed to be executed by him as in the said plea mentioned, executed and caused to be delivered to the said defendants

and George High and John B. Creighton his certain deed of conveyance of that date, and which said deed being in the posession of the defendants, the plaintiff cannot produce to the Court, whereby the said plaintiff purported to remise, release and forever quit claim unto the said defendants and George High and John B. Creighton, their heirs, executors, administrators and asigns the full, free and exclusive right and privilige of using, keeping and running in the Townships in the said plea mentioned and not elsewhere, "Pages portable Saw mill" in the said deed describe as patented at the proper office in Washington, District of Columbia, United States on the 18th day of July A.D. 1841 for and during the term of fourteen years from the date last aforesaid. To have and to hold the above mentioned right, use, privilige and patent for said Townships during said term unto the said defendants and George High and John B. Creighton their heirs, executors administrators and asigns forever. and which said deed the said defendants and George High and John B. Creighton accepted and receive of and from the plaintiff in the place and in lieu of the deed in the said plea mentioned and this the plaintiff is ready to verify. Wherefore the plaintiff prays judgment &c. Browning & Bushnell for plaintiff.

Demurrer. And as to the Fourth plea by the defendants, the Plaintiff says precludi non, because he says that the said plea and the matters therein contained and the manner and form as the same are therein set forth, are not sufficient to bar or preclude the plaintiff's action, and this the Plaintiff is ready to verify. Wherefore the plaintiff prays judgment &c.

And for causes of demurrer the plaintiff says the said plea is double and sets up two distinct defences in this, 1.- That the said plea sets up as one defence that the plaintiff had no title to the machine in the plea mentioned and

2.- That the Plaintiff had not executed a warranty deed for the machine, and Whereas the defendants ought to rely on the one or the other of said defences and not on both in the same plea.

Browning & Bushnell for Plaintiff.

Rejoinder. And the said defendants, for a rejoinder to the said replications of the said Plaintiff to their said second and third pleas, say that the said plaintiff ought not, by reason of any thing by him in those replications alleged, to have or maintain his aforesaid thereof against them (the said defendants), because they say, that the said defendants and George Bligh and John B. Creighton did not accept and receive of and from the said Plaintiff the said deeds in the said replications mentioned in the place of and in lieu of the said deeds in the said pleas of the said defendants mentioned in manner and form in the said replications respectively alleged and set forth, and of this the said defendants put themselves upon the Country. &c.

Williams & Laurence Attys. for Defts.

And afterwards, to wit, on the Seventh day of November A.D. 1837, orders are entered upon the records of the said Circuit Court, in the above entitled cause, in the words following to wit:

Demurrer sustained. This cause now coming on to a hearing on the Plaintiffs demurrer to the plea of the defendants fourthly pleaded herein; Whereupon all and singular the premises being seen and by the Court here fully understood, and mature deliberation being thereupon had, it appears to the Court here, that the said plea by the said defendant fourthly herein pleaded and the matters and things therein contained are not sufficient in law to bar and preclude the said Plaintiff from having and maintaining his aforesaid action against the said defendants.

And afterwards, to wit, on the 15th day of the same month and year last aforesaid, an order is entered upon the records in the words following, to wit:

Continuance. On motion of the said Plaintiff and by consent, Ordered that this cause be continued.

And afterwards, to wit, on the Twenty fifth day of March in the year of our Lord one thousand eight hundred and fifty two, orders are entered upon the records of the said Circuit Court, in the above entitled cause, in the words and figures following, that is to say:-

Jury.- Trial. Now come the said parties by their attorneys and to try the issue joined, come also the jurors of a jury, to wit:-

Balmuna Morton	George Mulan	John Whips
Clement Nance	Edward Fox	Elijah Rhodes
J. M. Willing	E. L. Gosh	E. L. F. Trimble
John Kern	A. P. Heath	Nathaniel Summers

who having been duly elected, tried and sworn, well and truly to try the issue joined, retire to consider of their verdict.

And afterwards, to wit, on the Twenty sixth day of the same month and year last aforesaid, orders are entered upon the said records in said above entitled cause in the words and figures following, that is to say;-

Verdict and Motion for a new trial. Now come again as well the said parties by their attorneys as the said jurors of a jury herein empannelled. Whereupon the said jurors, upon their oaths, do say, "We the jury find that the said defendants do owe the said Plaintiff the sum of One hundred dollars their debt in their declaration mentioned, and assess his damages, on occasion of the detaining the said debt, to Eighteen dollars and thirty five cents". And hereupon come the said defendants, by their attorneys, and enter their motion for a new trial herein.

And afterwards, to wit, on the Third day of April in the year of our Lord last aforesaid, an order is entered upon the records of said Circuit Court, in the above entitled cause, in the words and figures, following, to wit:-

affidavit and Reasons. Now come the said defendants by their attorneys and file their affidavit and reasons in support of their motion for a new trial.

And afterwards, to wit, on the 8th day of the same month and

year last aforesaid, orders are entered upon the records of said Circuit Court, in the above entitled cause, in the words and figures following, to wit:-

Motion overruled. This cause now coming up for a hearing on the said defendants motion for a new trial, whereupon all and singular the premises being seen, and by the Court here fully understood and mature deliberation being thereupon had, it appears to the Court here, that the said verdict is not contrary to the law and the evi=-dence, and that the said affidavit by the said defendants here=-in filed, and the matters and things therein contained are not sufficient in law to set aside the verdict aforesaid. And

Judgment. said defendants having nothing further to urge why the verdict aforesaid should be set aside. It is therefore considered by the Court that the said plaintiff do recover against the said defendants as well his said debt of One hundred dollars as his said damages to eighteen dollars and thirty five cents, by the jurors aforesaid in form aforesaid assessed, as his costs in this behalf expended, and that he have execution therefor.

And thereupon come the said defendants by their said attorneys

Appeal. and pray an appeal to the Supreme Court of this State, Where=-upon, It is ordered, with the consent of said plaintiff, that an appeal be allowed to the Supreme Court of this State, on condition that the said Benjamin Kinney or George M. High do, within thirty days from this date, file in the office of the Clerk of this Court an appeal Bond conditioned according to law with Christopher Beison, a such further security as the Clerk may approve as security, in the penal sum of Two hundred and fifty dollars.-

And afterwards, to wit; on the Twelfth day of April ~~in the Twelfth day of April~~ in the year last aforesaid, the said defendants by their Attorneys filed in the said Circuit Court their Bill of exceptions, which said Bill of exceptions is in the words and figures following, that is to say:-

Bill of Exceptions.

Be it remembered, That on the trial of this cause the plaintiff to sustain on his part, read to the jury the following note - "Quincy, Feb. 6th 1848. - We or either of us promise to pay Avery Turner or bearer, the sum of One hundred dollars, on the first day of March One thousand eight hundred and forty nine, interest after due ~~until paid~~ for value received.

Benjamin Kinney
George High
Wm W. Robertson
John B. Creighton."

and called Edward Turner as a witness, who being duly sworn stated, that at the time of the making of the said note, the Plaintiff contracted and agreed to and with the defendants and John B. Chaton and George High to sell and convey by general warranty deed the exclusive right and privilege of using, keeping and running, in Township Three South and Range Five West of the fourth principal meridian, Page's Patent Saw mill". - The note was executed in consideration of said contract and by mutual agreement between the parties was placed in his (witness's) hands, to be delivered to the plaintiff when he, Plaintiff, should deliver to him, said witness, for the makers of said note, a warranty deed as above stated. That a few days afterwards, the said Plaintiff did deliver to him said witness, the following deed:

"Know all men by these presents, that I, Avery Turner of the County of Adams and State of Illinois, in consideration of the sum of One hundred dollars to me in hand paid by Benjamin Kinney, George High, Wm W. Robertson and John B. Creighton all of Highland County and said State, the receipt of which is hereby acknowledged, have bargained, sold and quit-claim-ed and by these presents do remise, release and forever quit-claim unto the said Benjamin Kinney, George High Wm

W. Robertson and John B. Creighton their heirs, executors, administrators and assigns the full, free and exclusive right and privilege of using Keeping and running in Township Three (3) South of the base line and Range Four (5) West of the fourth principal meridian in said State and not elsewhere, "Page's Portable Saw mill", patented at the proper office in Washington, District of Columbia, United States on the Eighth day of July A.D. 1841 for and during the term of Fourteen years from the date last aforesaid. To have and to hold the above mentioned right use, privilige and patent for said described Township in said State, during said term, unto the said Benjamin Kinney George Weigh, Wm. W. Robertson and John B. Creighton their heirs executors, administrators and assigns forever. In witness whereof, I the said Avery Turner, have hereunto set my hand and seal this Seventh day of February A.D. 1848.

Signed, Sealed and delivered Avery Turner (Seal)"
in presence of Asa Turner

which he accepted without objection, and then delivered said note to said Plaintiff; and within the course of two or three weeks thereafter, he, said witness delivered said deed either to Creighton or Weigh, one of the makers of said note, which, he could not remember - but no objection was made to said deed when it was so delivered. That witness was a manufacturer of "Page's portable saw mills", and the makers of said note contracted with him for one of said mills, but owing to some delay in making it, they did not get it for five or six weeks, he thought in May 1848 - That they took it to Township Three South, Range Four West, and commenced the use of it, and that last fall some of the makers of said note had purchased of him another of said mills, which they had, as he believed erected in said Township and were using and running it there. On cross examination he said he did not deliver said deed to either of the said defendants, Kinney or Robertson and he did not

know that either of them had ever seen it, or knew of its delivery as aforesaid - He was not sure who it was, he delivered the deed to: It might have been the brother of John B. Creighton but he believed it was either John B. Creighton or George Haigh, he could not say which, but whoever it was he delivered it to, no objection was made to it when it was so delivered.

That neither of the makers of said note had ever, so far as he knew, agreed to accept it in lieu of the warranty deed which the plaintiff had agreed to make - and in answer to a question whether the makers of said note had not, at all times, refused and objected to receiving from said plaintiff any sort of deed except a general warranty, he said they had so far as he knew - Here the counsel for the plaintiff interposed, and enquired if the objections had ever been made to the plaintiff, or in his presence, and the witness said that they had not, and that he had never seen the parties together since the making of the note, and thereupon the counsel of the Plaintiff objected to his stating any thing the makers of the note had said in the absence of the plaintiff after the delivery of the deed. The Plaintiff then read in evidence to the jury without objection, the original deed from the plaintiff to the defendants Kinney and Robertson and John B. Creighton and George Haigh, which has been herein before already set out at length and which said original deed was produced by the defendants counsel on the trial of this cause on notice served on them by the plaintiffs counsel for that purpose, the said defendants' counsel protesting at the time of so producing said deed, that it was not received by them from either of the defendants, but from one Creighton the brother of the said John B. Creighton.

This was all the evidence offered by either plaintiff or defendant, Whereupon the Court instructed the jury, on motion of the Plaintiff as follows,-

"The court is asked to instruct the jury for the Plaintiff, that

if they believe from the evidence, that the defendants received the deed which has been given in evidence, and proceeded under that deed to use and enjoy the right conveyed by it, that then the jury may, from these facts presume that said deed was accepted in lieu of a warranty deed, and if they believe that it was so accepted, they will find a verdict for the plaintiff for the amount of the note and interest.

2. That an acceptance of the quit claim deed by one of the defendants would be binding upon them all, if the jury believe from the evidence that they proceeded, under said deed, to use and enjoy the right conveyed by it.

3. The court will instruct the jury for the Plaintiff, that if the jury believe from the evidence, that by a mutual arrangement between the Plaintiff and the defendants, the note sued on was by the defendants delivered to Mr Edward Turner to be by him delivered to the Plaintiff, on the plaintiffs delivering to said Turner a warranty deed to defendants for the right to use the machine mentioned in the deed given in evidence to Edward Turner for the defendants, and that he received said deed for the defendants and gave up to the plaintiff the note sued on, and that the defendants or any one of them, afterwards, accepted and received said deed from Edward Turner without any objection made at the time, and that the defendants acted under said deed and claimed, used and enjoyed the right purported to be conveyed by said deed - that from these facts, if proved to the satisfaction of the jury, they jury may presume and find that the defendants received and accepted said deed from the plaintiff in lieu of the warranty deed contracted for." to the giving of each of which said instructions, the defendant by his Counsel at the time excepted - the defendant then moved the Court to give the following instructions.

"The court instructs the jury for the defendants, that unless they believe from the evidence that Benjamin Kinney, William M. Robertson

George High and John B. Creighton accepted and received from the plaintiff a quit claim deed, the deed read in evidence, in lieu and place of a Warranty deed, they will find for the defendant.

2. Even if the jury believe from the evidence, that High and Crayton accepted and received from the plaintiff, the deed read in evidence, yet their acceptance of such deed is not binding on Kinney and Robertson, the defendants in this case: and unless the jury believe from the evidence that Kinney and Robertson, the defendants herein, accepted and received the quit claim deed read in evidence in lieu and place of a warranty deed, they will find for the defendant."

the first of which instructions was given as asked and the second modified by the Court as follows, "This instruction is given subject to be considered in connexion with Plaintiffs third instruction", and then given, to which modification by the Court, the defendant, by his counsel, at the time, excepted. Thereupon the jury retired and afterwards returned into Court with the following verdict: "We the jury undersigned, members of the jury find a verdict in favor of the plaintiff for ($118.35) One hundred and eighteen 35/100 and costs. A. P. Keith Foreman."

whereupon the defendant moved for a new trial for the following reasons and upon the following affidavit, " The defendant moves the Court for a new trial herein for the following reasons,

1.- Because the witness, Turner, was mistaken in a material portion of his testimony as appears by the affidavit of said witness filed herewith.

2.- Because the verdict was against the law and against the evidence.

3.- Because the Court erred in giving the instructions asked by the plaintiff and refusing those asked by the defendant, as the same were asked; and qualifying them by reference to the instructions given for Plaintiff.-

4.- Because the verdict was against the instructions of the Court.

Affidavit. Edward Turner being duly sworn says, that he was a witness in the above entitled cause, at the trial thereof at the present term of this Court, and called by the Plaintiff, and on the trial of said cause, he, this affiant, testified to the jury that the quit-claim deed offered in evidence on the trial was left with him by the plaintiff and delivered by him to one of the makers of the note sued on, this affiant having stated in his said testimony that the said deed was delivered to John B. Creighton or George High. But this affiant, since said trial has reflected upon said transaction, and now clearly and distinctly ~~recollects~~ remembers, that said deed was not delivered either to said John B. Creighton or to George High or to any one of the makers of said note, but said deed was delivered by this affiant to one James H. Creighton and not to one of the makers of said note as incorrectly stated by this affiant on the trial of this case, and at the time this affiant delivered said deed to said James H. Creighton, there was not any of the makers of said note present; and on another trial of this case this affiant would state, in giving his testimony that said deed was delivered to James H. Creighton and not to one of the makers of said note, and not delivered in the presence of of any one of the makers of said note.

This affiant further says, that at the time he gave his said testimony, he, of course, supposed he was giving his said testimony correctly, but he remembered within two or three hours after said trial, and without conference with any one, that he was mistaken in his testimony, and at once went voluntarily to the Counsel for the defendants and told them of the mistake he had made in his testimony.

Edward Turner."

Subscribed and sworn to
before me April 3d. A.D. 1852
Peter Volt Clerk.

And afterwards, to wit, on the day of April 1852, the

Plaintiff filed the following affidavit.

"The above named Avery being first duly sworn, deposeth and saith that the note sued upon in this case was given to him by the parties thereto in consideration of the sale by this affiant to said parties of the right and privilege of using, keeping and running, in Township Three South Range Five West in Adams County, "Page's portable saw mill." That the contract between affiant and said parties was made on or about the 6th day of February 1848, on which day said parties made the note sued upon in this case, which by agreement between affiant and the parties to said note was left with Edward Turner (the witness who was examined on the trial of this cause) to be held by him until affiant should deliver to him said Edward, a deed conveying to the parties to said note the full, free and exclusive right and privilege of using keeping and running in Township Three South of the Baseline and range Five West of the fourth principal meridian in said State, and not elsewhere, Page's portable saw mills.

Affiant further says that on the 7th February 1848 he did, according to his contract, execute a deed accordingly, which is herewith filed and referred to, and which is the same deed which was used on the trial of this cause, which said deed so executed, he delivered to the said Edward Turner as he had contracted to do, to be held by him said Edward for the parties aforesaid, which said deed was accepted by the said Edward for said parties, and said note was at the same time delivered by the said Edward to this affiant. Affiant further says that said deed is precisely and exactly such a one, as, according to his understanding of the contract, he was to execute and deliver for the parties to said promissory note.

He further says, that he verily believes, that soon after said deed was delivered by him to said Edward Turner, the said deed came into possession of the parties to whom it was

made, and that they accepted the same without objection as a full and complete performance, on the part of your affiant of the contract which he had made with them - And he states as a fact, that said parties did, soon after the delivery of said deed procure one of "Page's portable saw mills," erect the same in Township Three South of the Base line and Range Five West of the fourth principal meridian in the State of Illinois, and commenced exercising the right of using the same in said Township, and that they have ever since continued and still do continue to exercise the right of using said saw mill in said Township, and that said parties have used and exercised said right under and by virtue of the deed aforesaid, and under no other right or authority whatever.

He further says that the parties to said note never pretended that the deed executed by your affiant to them was not in accordance with his contract with them, or make any objection whatever to said deed, until long after said note became due and payable, and your orator was about to take measures for its collection, and long after said note was due, and after said parties had been using the right conveyed to them by said deed for about eighteen months, and whilst they were still using the same, and after Affiant had applied to said parties for the payment of said note, to wit, on the 27th October 1849 John B. Creighton, one of the parties to said note and deed wrote to affiant, for himself and on behalf of his co-makers of said note, acknowledging the debt, apologizing for their delay in making payment, asking further indulgence, and promising to make payment thereof in a short time, all of which will more fully and at large appear by reference to the letter of said Creighton which is hereto attached, and prayed to be taken and considered as a part of this affidavit.

Affiant further says, that he is informed and believes that several of the parties to said note have been repeatedly in

the Court House since the trial of this cause, particularly John B. Creighton and Benjamin Kinney, and if said deed had not been in accordance with the contract made with your affiant, or if said deed was not in fact ever delivered to said parties, or if the said parties have not in fact had the full benefit and enjoyment of the right conveyed by said deed, it would have been easy for them to have made affidavit to that effect, but they have wholly failed, as affiant believes to present any affidavit whatever in the case.

Subscribed and sworn to before me this 7th day of Apl. 1852
Peter Lott Clerk
By C. M. Woods Deputy.

Avery Turner."

And on the 8th day of April 1852, said motion came on to be heard upon said reasons and affidavits, and said motion was overruled by the Court, to which decision of the Court, overruling said motion, the defendant, at the time, by his counsel excepted, and afterwards the Court gave judgment upon the verdict for the plaintiff, to which judgment of the Court, the defendant by his counsel, at the time excepted, and prays that this his bill of exceptions be signed and sealed by the Court which is accordingly done.

A. C. Skinner (Seal)
Judge.

And afterwards, to wit, on the Third day of May in the year of our Lord last aforesaid, the said defendants by their attorneys filed in the said Circuit Court, in the Clerks office thereof, their Appeal Bond in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents, that we Benjamin Kinney George M. High and Christopher Beasin of the County of Adams and State of Illinois are held and firmly bound unto Avery Turner of the County of Adams and State of Illinois in the penal sum of Two hundred and fifty dollars, Current money of the United States, for the payment of which, 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 at the Clerk's office in Quincy, this Third day of May A.D. 1832. The condition of the above obligation is such, that whereas the said Avery Turner did on the 8th day of April in the year of our Lord one thousand eight hundred and fifty two, in the Circuit Court, in, and for the County of Adams and State of Illinois, recover a judgment against the above bounden Geo. M. Bligh and Benjamin Kinney for the sum of One hundred dollars debt and eighteen dollars and thirty five cents damages, and dollars and cents costs; from which said judgment of the said Circuit Court, the said Benjamin Kinney and George M. Bligh have prayed for and obtained an appeal to the Supreme Court of said State. Now if the said George M. Bligh shall duly prosecute said Appeal with effect, and shall moreover pay the amount of the judgment, costs, interest and damages rendered and to be rendered against him, in case the said judgment shall be affirmed in the said Supreme Court, then the above obligation to be void, otherwise to remain in full force and virtue.

Taken and entered into before me at my office in Quincy this 3rd day of May A.D. 1832.

Attest Peter Sott Clerk C.
By C. M. Woods Deputy

George M. Bligh [L.S.]
Benjamin Kinney [L.S.]
C. Beisim [L.S.]

State of Illinois }
County of Adams } ss.

I, C. M. Woods, Clerk of the Circuit Court within and for the said County of Adams in the State of Illinois, do hereby certify, that the foregoing is a full, true and complete transcript from the records and files in the above entitled cause remaining in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Circuit Court at my office in Quincy this Tenth day of December in the year of our Lord one thousand eight hundred and fifty two.

C. M. Woods Clerk
By Geo. W. Leech Deputy.

And now comes the said appellant ~~and~~ ~~&~~ by his attys. and says that in the proceedings and there is manifest error in this to wit:

1. The court erred in sustaining the ~~Plaintiffs~~ demurrer to the 4th plea of the defendants.
2. The court erred in giving the 1st instruction asked by the plf.
3. The court erred in giving the 2nd instruction asked by the plf.
4. The Court erred in giving the 3rd instruction asked by the plf.
5. The Court erred in rejecting the second instruction asked by the defendant
6. The Court erred in overruling defendants motion for a new trial.

Wherefore said ~~&~~ appellant prays judgt &c.

Williams & Lamar
for ~~&~~ appellant.

Avery Turner

vs In Debt

Benjamin Kinney, George High, William W. Robertson and John B. Creighton

Transcript

1404

Filed Sept. 15. 1852

Wm B. Hammond

For defendants by Williams & Lawrence.

Wm B. Hammond

Prepaid

Clerk's Fees for transcript paid by defts $10.00

C. M. Woods Clerk

Beverly Oct 27th 1849.

Dear Sir.

I delayed writing to you longer than I expected on account of Mr. High being gone to Iowa. We are trying to get your money or a part of it which I think we will be able to do next week and if you dont hear from us before the tenth of next month we can't blame you for putting the note in a way for collection, as we have worn out your patience waiting. but I hope we will make it all right. Now please wait the until after the above time and I shall use all Effort to pay.

Truly yours
John B. Creighton

On the back of the above letter is the following direction -

"Mr. Avery Turner
Quincy Ills"

"Beverly Ills
Oct 28"

Part of bill of
Captain's by
agreement.