

72899-9000

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

~~1441~~

No. 164

Conkline

H. B.

tail

1859

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, 1862, AT OTTAWA.

HENRY R. CONKLING }
 ^{vs} } *Appeal from La Salle.*
JOHN W. VAIL. }

BRIEF OF APPELLANT.

The only question in this record is, whether, if the allegations in the 3d plea are true, the defendant ought to pay the note declared upon? The question is simply this: If A owes B a sum of money, and C, to whom A owes nothing, can deceive A so as to make him give him, (C), a note for it, without the consent of B, and without any discharge by B of A's liability to him, can B and C both collect the \$100 of A, or can B only collect it? The giving a note by A to C for a debt A owes B, does not, of course, discharge A from the debt to B; and if so, it seems clear that there is no consideration for A's promise to C; otherwise, A can be compelled to pay twice. The gist of the plea is this: The Moores held the title to a quarter section of land, as security for a sum of money due them from Edgerton. Vail paid the Moores \$400 for Edgerton, and the Moores thereupon conveyed to Vail the south-half of the quarter, and Vail gave Edgerton a bond to convey it to Edgerton when he paid the \$400. Edgerton contracted to sell the whole quarter to defendant (Conkling). The conveyance of the north half was, of course, to come from the Moores, and that of the south half from Vail; and Vail and the Moores were respectively to be paid their debts. All that Vail was entitled to was \$400. He made Galusha his agent and nominal grantee. Galusha, for Vail, conveyed to Conkling, and the latter paid him the \$400. Vail, therefore, by his agent, thus received all that was due him. Galusha entrusted the money to Edgerton, and the latter, instead of sending it to Vail, spent it. Edgerton, by false pretence, caused Conkling (the defendant) to give the note and mortgage to him, for the debt due the Moores, and immediately assigned them to Vail, and thus made up \$350 of Vail's money which Edgerton had spent, and left Conkling still indebted to the Moores \$350. The receipt of the \$400 by the agent of Vail is distinctly

alleged, and it also clearly appears by the plea that this was all to which he was entitled. The giving the note to Edgerton was, then, clearly without consideration, and Vail had no right to it, under the assignment, because his agent (Galusha) had already received the \$400. Vail, by Galusha, his agent, received his \$400, and of course legally had notice, when the note was assigned to him, that he had no right to a note and mortgage for a debt previously paid to him, and that Edgerton had no legal right to take a note and mortgage for a debt not due him. Suppose Vail did not actually know his \$400 had been paid to Galusha for him, he had actually legally received it himself, because the payment by the defendant to Galusha was, in law, a payment to Vail himself. It may be possible, but it is not probable, that Vail did not know that Galusha had received and paid over to Edgerton the \$400. Vail and Edgerton were brothers-in-law, and Galusha trusted to Edgerton to send Vail his money, and he omitted to do it, and it slipped away from him. Hence the dodge in Atherton's office. We rely upon the fact that payment to the agent is payment to the principal. The facts, as they can be proved, are stated in the 3d plea. If they furnish no defence, the defendant must pay the \$350 twice. It seems to us that the facts in the plea constitute a good defence, and that there was no consideration for the note given Edgerton, and that Vail having once been paid his debt, cannot recover it again. His agent was authorized to receive the money, and did receive it, and Conkling should not pay it twice, because Galusha did not see that his principal got his \$400. The common counts were not prossed, and the other pleas were withdrawn, so that the single question could be presented, whether the facts alleged in the 3d plea show that there was no consideration. The motives and circumstances under which the note was given, are stated, and it is alleged that there was no other consideration for giving it.—When any supposed defects in the plea, which we have not discovered, shall have been pointed out, we will endeavor to answer them.

LELAND & BLANCHARD,

For Appellant.

128

164

129

193

Countdown

as

vail

appellants Brief

Filed April 23-1862

L. Lorland

Clark

1937
194
of last term.

Conclie is bail
same is same

Petition for rehearing

I ask the court to review the decision in these cases because it is manifest that the decision was made under a misapprehension of the facts,

In each case the question turns solely upon the sufficiency of the special plea (alike in both cases) to which the circuit court sustained a demurrer

The Court after reciting the substance of the plea says. "This plea sets forth the fact that the defendant had once paid the debt he owed on the land to pttp agent afterwards at the solicitation of Edgerton defendant made his note for same amount to Edgerton who who immediately assigned it to plaintiff (bail)," and the plea is good because it avers that the debt for which the note was given was paid before the execution of the note

I submit that the court has utterly misapprehended the allegations of the plea. If it had been averred that Edgerton was bail's agent then unquestionably the

reasoning of the Court would be conclusive but there is no allegation or pretence of an allegation in the plea that Edgerton was the agent of Vail for any purpose whatever

It is averred that O. B. Galusha was the agent of Vail for a certain purpose to wit that Vail conveyed the land to Galusha and Galusha to Concliy the debt. That in receiving the deed from ~~Gal~~ Vail and in conveying to Concliy Galusha acted as agent for Vail and was a mere nominal holder of the title for convenience in making the transfer and that when Galusha conveyed to Concliy Concliy paid him \$400. which was all he owed to Vail for the land.

At that time there was due from Concliy to Edgerton on the land \$350, and Edgerton owed the same sum to Moore, and it is averred that it was agreed by Concliy Edgerton & Moore, that Moore should have the notes and mortgages which Concliy was to give for the \$350. It is not agreed that the mortgage notes were to be made by Concliy direct to Moore, and the written agreement which is set out shows that the

mortgage was ^{to} made to Edgerton, of Conkling

It is averred that Galusha let Edgerton have the \$350. which he had received from ~~and~~ Conkling for bail and that Edgerton afterwards prevailed upon Conkling to make the mortgage for the \$350. which was unpaid and which it had been agreed that Moore was to have direct to him Edgerton and then assign it to bail to pay the \$400. which he had received from Galusha of bail's money

This plea is certainly not good, because 1st It does not aver that Galusha was the agent of bail to receive the \$400. but only to receive and convey the title, It may be that bail directed the money to be paid to himself or to some other person than Galusha

The fact that Galusha was the agent to convey the title does not necessarily imply that he was the agent to receive the money, if it was so it should have been so averred The plea is to be taken most strongly against the pleader

There is then no averment in the plea that bail had ever been paid the \$400 coming

to him,

But if there is such an agreement take the agreement to be that the \$400. was paid to bail, the plea is then not good, for these notes were not given for the \$400. (as the Court seem to have supposed) on the contrary the notes in suit two notes each for the sum of \$175. were given for the sum of \$350, still owing by Conkling for the land. It is true the plea avers that it had been agreed by Edgerton, Conkling & Moors, that Moors should have the notes lent bail had no notice of this agreement the plea then avers that Edgerton prevailed on Conkling to execute the ~~said~~ notes to Edgerton and fraudulently to transfer them to bail in place of the \$400 of bail's money which Edgerton had received from Calushu but it does not aver that bail was a party to such fraud or had any notice of it

The gist of the plea is that Edgerton owed bail \$400. which he had received from Calushu which was bail's money - he also owed Moors \$350. Conkling owed Edgerton \$350. for which he was to give notes & a mortgage, and Edgerton Conkling and Moors, had agreed that Moors

should have the notes and Mortgage in payment of the \$350. which was due to them Edgerton violated this agreement and turned out the notes and Mortgage (before due) to bail to pay the debt he owed to bail there is no agreement that bail when he received the notes and mortgage had any notice whatever of the agreement between Edgerton, Conkling, & Moore

In other words bail received the notes from Edgerton before due for a valuable consideration but can not collect them on account of Equities existing between Edgerton and Moore, of which he had no notice whatever

I am so certain that this plea can not be sustained when properly understood that I respectfully and confidently ask the court to reverse the decision which is manifestly based upon an entire misapprehension of what the allegations of the plea really are and this probably has arisen from confounding the two names Galusha & Edgerton

B L Cook

for bail

State of Illinois
LaSalle County

B. C. Cook being first duly sworn
saith that more than 30 days prior to this
date he notified E. J. Selame the atty for
Corkley the appellat in the above
entitled cases that he should present
a petition for a rehearing in said cases
at the April term 1863 of this court that
said notice verbal and that said
Selame expressly waived a written
notice of such application

B. C. Cook

Subscribed & sworn before
me this 20th day of April 1863.

L. Selame Clk
by J. B. Rice Deputy

128, 164 & 165
129

Counting

Mail

Petition for re-
hearing —

Filed Apr 21, 1863

S. J. [unclear] Clerk

all over

Countling }
as } No 164 & 165 -
Bail }
}

Arguments of Deland & Blauvelt
for appellants -

The decision of the court at the last term was clearly right. Bail was only entitled to receive \$400 for his interest in the land and he has received it by his agent Galusha not Edgerton. It is not alleged that the latter was Bail's agent to receive the money. Bail had contracted to sell his interest to Edgerton for \$400. Edgerton had contracted to sell to Countling. Bail did not know the name to insert as grantee & therefore made a forwarding to Galusha a conveyance to him; the latter to convey to the proper grantee. Galusha therefore was the agent of Bail to convey as clearly as though he had a power of attorney. Galusha occupying this position executed and delivered to Countling a deed & received for Bail from Countling the \$400. It was the duty of Galusha to have sent

the money to Bail. It did not do it but without authority made Edgerton a subagent to do it. Edgerton as the subagent of Galusha appropriated the money to his own use.

An order to make up the money in fact - which Galusha should have sent Bail himself instead of entrusting it to Edgerton. The latter obtained notes from Contring for the consideration due from Contring to Moore & sent them to Bail. Bail therefore has by his agent - Galusha received every dollar due him for the conveyance of his land to Contring and if Galusha has not accounted for it - he is liable for the omission of his subagent to send it. It has in contemplation of law been paid to Bail. Bail has actually received the identical money for a portion of which the notes were given afterwards.

The opinion of the court is not based upon the idea of a receipt of money by Edgerton as the agent of Bail. If Galusha was authorized by Bail to pay the money to Edgerton then Bail by Edgerton has received it there is no point of view which can be

31 1 2 J.

taken which will not amount to a payment of the \$400 to Bail. And Bail having been paid shall not collect notes for the money which has been paid to him. If Galusha was not authorized to pay the money to Edgerton he is still liable to Bail. If he was authorized, then Bail has by Edgerton received the money and has it. We think it not improbable that Bail may have expected to receive notes & mortgage instead of money because it was expected that the Moores should receive all money instead of part cash part mortgage but when looking paid cash to Galusha the mortgage was to go to the Moores. This however would make no difference because Bail actually received cash not securities. But it is gravely said that Galusha was only the agent of Bail to convey the land not to receive the consideration money on price of the land. That seems to us a strange idea, and this seems to be the only way of escape by the affeller. Receiving the price must be a necessary incident to the power to convey the land by Galusha. Suppose

the deed sent to Galusha had been filled up with the name of Combs as grantee & contained a consideration of \$400. would not authority to deliver the deed be authority to receive the price. Suppose a power of Attorney had been sent by mail to Galusha would he have authority to receive the price? of course he would & this transaction amounts to the same thing, whether Bail expected all cash all notes & mortgages, a part cash & part securities is no matter. He has received actually all his purchase money in legal contemplation and the court is strictly accurate in saying that the defendants had over paid the debt. He owed Bail (i.e. the \$400. consideration money) to Bail's agents (Galusha meaning not Edgerton) and thus the debt for which the notes were given was paid before the execution of the notes.

If Edgerton was the agent to receive the money, then Bail has once been paid & there should not be a second recovery. If Edgerton was not the agent of Bail but Galusha, then Bail has received the \$400

It should not again be paid by collecting
these notes. Bail should not be
allowed to receive the money by
Galusha and then because of his
adoption of Edgerton as the under
agent of Galusha claim to collect the
notes which a sub agent of his
adoption has received for the same
debt which Counting has once
paid to Galusha. He cannot
adopt the latter act of Edgerton in
receiving for him the notes & repu-
diate him as an agent to receive
the money. That would be very
unfair. If he adopts Edgerton
let him adopt both his acts. That by
which he once received the money
as well as that by which he took &
assigned the notes. If Bail receives
the notes for the amount of money
Edgerton received for him. By Edger-
ton he has got it twice. By Edgerton
as the sub agent of Galusha he
should have it but once. It was
not for the money improperly
appropriated by Edgerton that Counting
gave his notes but for part of the \$400
he had once paid. to Bails agent
could Galusha defend a suit by

proof that he had paid the money to
Edgerton without Authority, if Bail
had sued Galusha instead of Conneling,
certainly not, then if he adopts Edgert-
ton acts let him adopt them all not
just

Selander & Blumhans

Attorneys for Appellants

1040105-

128

129 Coupling

as

Bail

Argument for

Appellant

Leland Blanchard

Fri May 12. 1863

L. Leland Clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, 1862, AT OTTAWA.

HENRY R. CONKLING }
 ^{vs} } *Appeal from La Salle.*
JOHN W. VAIL. }

BRIEF OF APPELLANT.

The only question in this record is, whether, if the allegations in the 3d plea are true, the defendant ought to pay the note declared upon? The question is simply this: If A owes B a sum of money, and C, to whom A owes nothing, can deceive A so as to make him give him, (C), a note for it, without the consent of B, and without any discharge by B of A's liability to him, can B and C both collect the \$100 of A, or can B only collect it? The giving a note by A to C for a debt A owes B, does not, of course, discharge A from the debt to B; and if so, it seems clear that there is no consideration for A's promise to C; otherwise, A can be compelled to pay twice. The gist of the plea is this: The Moores held the title to a quarter section of land, as security for a sum of money due them from Edgerton. Vail paid the Moores \$400 for Edgerton, and the Moores thereupon conveyed to Vail the south-half of the quarter, and Vail gave Edgerton a bond to convey it to Edgerton when he paid the \$400. Edgerton contracted to sell the whole quarter to defendant (Conkling). The conveyance of the north half was, of course, to come from the Moores, and that of the south half from Vail; and Vail and the Moores were respectively to be paid their debts. All that Vail was entitled to was \$400. He made Galusha his agent and nominal grantee. Galusha, for Vail, conveyed to Conkling, and the latter paid him the \$400. Vail, therefore, by his agent, thus received all that was due him. Galusha entrusted the money to Edgerton, and the latter, instead of sending it to Vail, spent it. Edgerton, by false pretence, caused Conkling (the defendant) to give the note and mortgage to him, for the debt due the Moores, and immediately assigned them to Vail, and thus made up \$350 of Vail's money which Edgerton had spent, and left Conkling still indebted to the Moores \$350. The receipt of the \$400 by the agent of Vail is distinctly

alleged, and it also clearly appears by the plea that this was all to which he was entitled. The giving the note to Edgerton was, then, clearly without consideration, and Vail had no right to it, under the assignment, because his agent (Galusha) had already received the \$400. Vail, by Galusha, his agent, received his \$400, and of course legally had notice, when the note was assigned to him, that he had no right to a note and mortgage for a debt previously paid to him, and that Edgerton had no legal right to take a note and mortgage for a debt not due him. Suppose Vail did not actually know his \$400 had been paid to Galusha for him, he had actually legally received it himself, because the payment by the defendant to Galusha was, in law, a payment to Vail himself. It may be possible, but it is not probable, that Vail did not know that Galusha had received and paid over to Edgerton the \$400. Vail and Edgerton were brothers-in-law, and Galusha trusted to Edgerton to send Vail his money, and he omitted to do it, and it slipped away from him. Hence the dodge in Atherton's office. We rely upon the fact that payment to the agent is payment to the principal. The facts, as they can be proved, are stated in the 3d plea. If they furnish no defence, the defendant must pay the \$350 twice. It seems to us that the facts in the plea constitute a good defence, and that there was no consideration for the note given Edgerton, and that Vail having once been paid his debt, cannot recover it again. His agent was authorized to receive the money, and did receive it, and Conkling should not pay it twice, because Galusha did not see that his principal got his \$400. The common counts were not pressed, and the other pleas were withdrawn, so that the single question could be presented, whether the facts alleged in the 3d plea show that there was no consideration. The motives and circumstances under which the note was given, are stated, and it is alleged that there was no other consideration for giving it.—When any supposed defects in the plea, which we have not discovered, shall have been pointed out, we will endeavor to answer them.

LELAND & BLANCHARD,

For Appellant.

128

194/64

129

Conklin

vs.

Paul

Appellants Brief

Filed April 23-1862

L. Garland

clerk

Wail is Conkling

No 164, 165, on P Shearing

It seems to my mind to be capable of demonstration that the pleas in these cases are not good and if the pleas had not been so loaded with impertinent matter it would never have been seriously claimed that they were good. Let us strip them of the irrelevant matter which has been thrown around them to prevent their real meaning from being understood and test them by the ordinary rules of pleading

When the notes were made Edgerton the payee owed to John & Horace Moore \$350. a portion of the purchase money of the land which he had bought from them and sold to Conkling

Edgerton also owed to Wail \$400. for that amount of Wails money which had been received by him from Galena Wails agent

Conkling owed to Edgerton on the land \$350. and was to give notes and mortgages to secure the payment of that sum

and it had been agreed ~~that~~ by the Moors
Edgerton & Co. that the Moors
should have the notes and mortgage
to be given by Edgerton for the \$350.
which he owed on the land.

Edgerton in violation of his agreement
with Moors, assigned the notes and
mortgage to bail before they became
due and bail had no notice that there
was any agreement that the notes
should have been made or transferred
to ~~and~~ Moors

It can not be denied
that the foregoing is a fair statement
of the facts and of all that is
material in them.

The averment of the plea is that
Edgerton had applied to his own use
the \$400 which belonged to bail and
which Galusha had permitted him
to take, and that Edgerton assigned
to bail these notes, to make good
in part the money of bail so
appropriated by Edgerton to his own
use. I have quoted the words of the
plea.

and now why might not Vail receive
these notes of Edgerton to make good
~~the~~ in part the money of Vail so as
prop^{er}ly by Edgerton to his own use

Because it is said that both Edgerton
& Conkling ^{and you that moves} should have these notes
an agreement of which Vail had
no notice when he took the notes
before they were due

There pleas are so bad that a clear
statement of what they contain is
the strongest argument that can
be made against them. I affirm
that they can not be sustained without
overturning principles of law which are
so entirely settled that no argument
and no citation of authorities could
strengthen them a whit

It has been suggested that if Vail took
these notes in payment of a preexisting
debt which Edgerton owed him he took
them subject to all the Equities existing
between Conkling & Edgerton. But this
view is not insisted upon by Judge Selwinn
and is not the law

Bank of Republic vs Carrington & Rhode Island

Wenzel as Judge	1 Bosworth N.Y.	335
Robbins as Richerson	2 Bosworth	248
Holmes as Smythe	4 Shufley	177
Payne as Bensley	8 Cal	260
Carleton as Winkler	11 Ohio	172
Boyd as Cummings	17 N.Y. & Smith	101
New York Iron Works	4 Ver	362
Young as Sege	5 th Ver	260
Scate as Pitts	Keill & Lewis	363
Atkinson as Brooks	36 Vt.	569
Blanchard as Cushing	3 Cushing	162
Sweet as Tyson	16 Peters	1
Brush as Scribner	11 Conn B	388

In this last case the English cases are all examined and the American cases are cited in a very able opinion of Chief Justice Williams.

The Court in their opinion of last term place the reversal of the Judgment upon the ground that bail through his agent had been paid the \$400. for which the notes were given. This is insisted upon by Judge Selmon in his written argument filed here with as the true construction of the plea. Now it is a mystery to me, how this idea of the plea, was ever originated, it is not stated or intimated in the plea that

these notes were given for the \$400. due to
vail on the land but it is stated that they
were given for the \$350. due to Morris

It is not stated that the notes
were assigned by Edgerton to vail to
pay him or to receive to him the sum
which was due him on the land
but it is expressly stated that they
were assigned to him to pay him
money which Edgerton had received
to his use

It might as well be argued
that because that \$400. has been once
paid on that land, that if he should
loan the money he could not recover it
back, or if it was taken from him
he could not recover it again
when we say we want the money which
Edgerton took belonging to vail what
answer is it to say, You got them pay
for the land

They apply the same rule to
us that the man receive upon when he
called for a glass of cider and when it
was furnished concluded to exchange
it for crackers which he ate, the Landlord
wanted pay for the crackers & it seems he
gave the cider for them, and then pay for
the cider, Because I had got the cider

You have got it yourself

Judge Selace says it was not for the money improperly appropriated by Eegytou that Conkling gave his notes but for part of the \$400. he had once paid to Vails agent

The first answer is the plea says that Conkling gave the notes for the \$350. due to Mooris, and not for any part of the \$400 due to Vail

The second answer is that it is no matter what the notes were given for the question is what did Vail give for them what ~~did~~ were they assigned for, and the plea says they were assigned for the \$400. which Eegytou owed Vail for money which he had used belonging to Vail

It is said Galusha had no business to let Eegytou have Vails money and Vails can recover it from Galusha. That is all assumed, for all that appears in the plea the money was loaned by Vail to Eegytou the plea says "the notes were assigned to make good money along

ing to void which Galusha had permitted
Edgerton to take, whether Galusha acted
of his own direction or consent does not appe-
ar, and that said cause recovery of him
is pure assumption and if he recovers
it does not make any difference so case
cautiously recover of Edgerton if his plea
is true and he pay these notes

I have been told by the Court that I could
take issue on these pleas. This would require
me to run the risk of meeting a state of
facts of which my client and myself
are equally ignorant. My client lives
in Vermont is entirely ignorant in
relation to the matters set up in
this plea, and insists that he purcha-
sed these notes in good faith for
a valuable consideration, and with
no notice of any defect to them

Notwithstanding I have been twice
gravely disappointed in this case
I still hope that it will be held to
be the law in this Court that where
a negotiable note is purchased for a
valuable consideration before it is due
and the purchaser has no notice of
any equities between the maker and
payee

that he can collect the note and
the maker and payee must settle
their equities between themselves

B. C. Cook

upon looking over my printed brief
filed a year ago I think it presents
the question fully & briefly and attack
it to this argument and respectfully
ask the attention of the Court to it

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, 1862, AT OTTAWA.

CONKLING }
vs. } No. 193 AND 194.
VAIL. }

POINTS FOR APPELLEE.

These two cases are exactly alike, and depend upon the sufficiency of appellant's 3d plea (record page 7).

The plea states, in substance, that Moores had the title to NE $\frac{1}{4}$ of section 9, which they held as security for a debt due them from Edgerton.

That by an agreement between Moores, Edgerton and Vail, the S $\frac{1}{2}$ of the quarter was conveyed by Moores to Vail, for \$400. That Vail gave a bond to Edgerton to convey the same to him upon the re-payment of the \$400. This took place Jan. 1st, 1850. July 28, 1851, Edgerton sold to Conkling the whole qr. sec. for \$1150, to be paid—\$800 Oct. 1st, 1851; the balance in two annual payments, to be secured by mortgage on the premises. (The agreement is set out in *haec verba* in the plea, and nothing is said therein indicating that the mortgage therein provided for was to be made to Moores; on the contrary, by the terms of the agreement, the mortgage must have been made to Edgerton. No mortgage, except one running to Edgerton, would be a compliance with this agreement.)

August 2, 1851, Conkling paid Edgerton on the land, \$100.

August 14, 1851, Vail conveyed to Galusha the S $\frac{1}{2}$ of the qr. sec.; but Galusha was merely the agent of Vail, and the conveyance was made to him merely for convenience in transacting the business, and without consideration.

Sept. 8, 1851, Galusha conveyed to Conkling the S $\frac{1}{2}$ of the qr. sec., and received \$400 for Vail, which sum Galusha entrusted to Edgerton, to be sent to Vail, but Edgerton did not send it, but appropriated it to his own use.

Sept. 26, 1851, Moores conveyed the N $\frac{1}{2}$ of the qr. to Conkling. There was then due from Edgerton to Moores, \$650, \$300 of which was then paid, and it was then agreed by and between Moores, Edgerton and Conkling, that the remaining \$350 due from Edgerton to Moores, "should be paid by letting Moores have the mortgage contemplated in the agreement between Edgerton and Conkling." (The mortgage contemplated in that agreement, was a mortgage from Conkling to Edgerton.)

Instead of paying Moores with the notes and mortgages, as he had agreed, Edgerton transferred the notes and mortgage to Vail, in part payment of the \$400 which he owed him for the money which he (Edgerton) had received of Galusha, and which belonged to Vail.

There is no averment in the plea, that it was ever agreed by any body that the notes and mortgage were to be executed by Conkling to Moores, and the plea is to be construed most strongly against the pleader; and it only appears that Edgerton agreed that he would pay Moores with the notes and mortgage to be executed to him by Conkling, according to their agreement, and that Conkling also agreed that Edgerton should make such payment. This is all there is of the plea, and the only reason given in the plea why the notes should not be paid, is that Edgerton violated the agreement made between Moores, Edgerton and Conkling, that Edgerton should pay his debt to Moores with the notes and mortgage.

There is this plain and sufficient answer—if any answer is needed—to the point made in the plea: Vail was no party to the agreement between Moores, Edgerton and Conkling. There is no allegation that he ever had any notice of it. The plea does show that the notes were assigned to him before they became due, and for a valuable consideration. The remedy of Conkling, if he has suffered from the failure of Edgerton to fulfill his agreement, is against Edgerton.

It nowhere appears in the plea that Edgerton's debt to Moores remained unpaid.

I ask the careful scrutiny of the plea by the Court, for there is so much in it besides the point made, that it requires care to determine what the real averments of the plea are.

B. C. COOK,
For Appellee.

1.

State of Illinois
Casalle County

Pleas before the
Honorable Madison C.
Hollister, Circuit Judge for the Ninth
Judicial District in and for said
state, and the presiding Judge of the
Casalle County Circuit Court, at a
term of said Court, commenced and
held at the Court House in Ottawa
on the first Monday in the month of
November the same being the first
day of November, in the year of Our
Lord one thousand Eight hundred
and fifty Eight and of the Independence
of the United States of America the
Eighty third

Present

The Honorable Madison C. Hollister, Presiding Judge
John F. Nash Clerk
Washington B. Burrell States Attorney
Eri L. Wuttman Sheriff

Be it remembered that heretofore
to wit: a "Declaration" was filed in the
office of the clerk of said Court,
on the 12th day of February 1858, and
is in the words & figures following
to wit:

State of Illinois }
 Grundy County } S.S.

John W. Tail
 vs
 Henry R. Conklin

In the Circuit Court
 of Grundy County of
 the term of March 1854

Henry R. Conklin was summoned to answer unto John W. Tail in a plea of Trespass on the Case upon promises and thereupon comes John W. Tail by B. M. Attention his Attorney and Complainant against the said Henry R. Conklin in a plea of Trespass on the Case upon promises, for that whereas the said Defendant heretofore to wit; on the first day of October in the year of our Lord Eighteen hundred and fifty one at said Grundy County made his certain promissory note in writing bearing date the year aforesaid and thereby then and there promised one ^{Daniel} ~~Daniel~~ W. Edgerton to pay to him or his order in two years after said date, the sum of One hundred and seventy five Dollars with interest annually, and then and there delivered said promissory note to the said ^{Daniel} ~~Daniel~~ W. Edgerton, and the said Daniel W. Edgerton to whom or to whose order the payment of the said sum of money and interest in the said promissory note specified ~~therein~~ was to be

made, after the making of said promissory note and before the payment of the said sum of money or interest specified therein was made to wit; on the seventeenth day of March in the year of our Lord Eighteen hundred and fifty two, at Grundy County aforesaid indorsed said promissory note by which said indorsement he the said Daniel W. Edgeston then and there ordered and appointed the said sum of money and interest therein specified to be paid to the said Plaintiff and then and there delivered the said promissory note so indorsed as aforesaid to the said Plaintiff. By means whereof and by force of the Statute in such case made and provided, the said Defendant then and there became liable to pay to the ^{said} ~~said promissory note~~ Plaintiff the said sum of money in the said promissory note specified with the interest according to the tenor and effect of ^{the} said promissory note and being so liable he the said Defendant in consideration thereof afterwards to wit; on the day and year last aforesaid at said Grundy County indid took and then and there faithfully promised the said Plaintiff to pay him the said sum of money and interest in said promissory note specified according to the tenor

and effect of said promissory note, and being so liable, he the said Defendant in consideration thereof afterwards to wit: on the day and year last aforesaid, at Grundy County aforesaid undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money & interest in the said promissory note specified, according to the tenor and effect thereof

Also for that whereas the said Defendant heretofore to wit on the first of March in the year of our Lord Eighteen Hundred and fifty four was indebted to the plaintiff in three hundred dollars for money before that time lent ~~the plaintiff~~ by the plaintiff to the said Defendant at his request, and in three hundred dollars for money before that time paid by the said plaintiff for the use of the said Defendant at his request, and in three hundred dollars for money before that time received by the said defendant for the use of the said Plaintiff, and in three hundred dollars for interest of moneys before that time lent and received by the said Defendant of the said Plaintiff, and in three hundred dollars for money found to be due from

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the said defendant to the said plaintiff
 on an account stated between them, and
 whereas the defendant in consideration of the
 promises afterwards to wit on the day and year
 last aforesaid promised the said plaintiff to
 pay him the said several sums of money
 respectively on request

But the said defendant not regard-
 ing his said promises and undertakings
 but contriving and fraudulently, intending
 craftily and subtly to deceive and defraud
 the said Plaintiff in this behalf hath
 not yet paid the said sums of money or either
 of them or any part thereof to the said
 Plaintiff although often afterwards requested,
 but the said defendant to pay the same
 or any part thereof hath hitherto wholly
 refused and still refuses to the damage
 of the said Plaintiff of three hundred
 dollars and therefore he brings suit &c

B. M. Atherton, Plf. Attorney

Copy of note declared on record on which Common
 Counts are based

~~B. M. Atherton Plf. Attorney~~

"1 October 1851 For value Received I promised
 Daniel W. Edgerlow to pay him or order one
 hundred and ~~twenty~~^{seventy} five Dollars in
 two years from ^{this} date with interest annually"
 \$175 signed "Henry R. Conklin"

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Above note endorsed as follows

"Pay the within to John W. Bail or Order
J. W. Edgerton

Be it remembered that hereto-
fore To Wit: On the 5th day of November
AD 1860. "Pleas" were filed in the office
of the Clerk of Said Court, and is
in the words & figures following To Wit:

State of Illinois } Circuit Court of said
Safalle County }⁸⁰ County November
Term AD 1860.

John W. Bail }
vs } Assumpsit,
Henry R. Conklin }

Now comes the said
Defendant - by Deland & Deland his Attorneys
& defends & says action is because
he says that he did not undertake &
promise in manner & form as said
Plaintiff hath above thereof did and against
him & of this he puts himself upon the
County &c

Deland & Deland
Jefs Attys

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And for another & further plea in this behalf to the first Court by leave of Court &c. said defendant says actio non, &c. because he says that said note in the declaration mentioned was made & entered into without any good or valuable Consideration, & that at the time of the execution thereof the said Daniel Edgerton acted as the agent of the Plaintiff & as such agent received said note and assigned it to the plaintiff; & this he is ready to verify — wherefore he prays judgment &c.

And for another and further plea in this behalf to the 1st Court by leave of the Court &c. said defendant says actio non, &c. because he says that on or prior to the first day of January A.D. 1850. John Moore & Horace Moore were the owners in fee of the north East quarter of section nine (9) in township thirty four (34) north of Range seven (7) East of the Third Principal Meridian but although the legal title was in them they really held the same as security for an indebtedness from one Daniel W. Edgerton to them — on said first day of January A.D. 1850 by an arrangement between said Daniel W. Edgerton the said John Moore & Horace Moore, & the plaintiff in this suit

Said John Moore & Horace Moore in discharge of Four Hundred Dollars of the indebtedness of Edgerton to them — Conveyed by their deed of that date to said John W. Bail the south half of said quarter section of Land & the said Bail gave to said Edgerton a contract to convey the said south half to said Edgerton upon being paid said four hundred dollars — On the twenty Eighth day of July A.D. 1851, The legal title to said South half of said quarter section of land so being in said Bail & the legal title to the north half of said quarter section being still in said John & Horace Moore as security for the remainder of the debt due them from said Edgerton, The said Edgerton & this defendant made & returned into a contract in writing in the words & figures following — This agreement made this 28th day of July 1851, between David W Edgerton of Saratoga Grundy Co. & State of Illinois of the first part — and Henry R. Conklin of Saratoga Grundy Co. & State of Illinois of the second part, that the party of the first part doth bargain and sell unto the party of the second part, the North East quarter of

3.

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Section nine. Township Thirty Four
Range seven East 3rd T.M. in Grundy
Co and State of Illinois and also two
acres or more of timber land on sec 19,
Town 34, R. 8, East 3rd T.M. And all my
interest in the crops, and also the
abetiments and hereditament and
appurtenances therunto belonging consisting
of what timber and rails and posts &
boards now lying about on said lands
the party of the second part doth agree
to pay unto the party of the first
part. the sum of eleven hundred
and fifty dollars in payments to wit,
Eight hundred Dollars on or before the
first day of October Eighteen hundred
and fifty one and the balance to be
paid in two yearly equal installments
the interest on the last installment to
be paid yearly or annually to be secured
by a mortgage on said premises or lands
The party of the first part further agrees
to make unto the party of the second
part a good and sufficient title to the
premises or lands above described at the
time the party of second part shall
make the payments of the Eight
hundred dollars. The party of the
first agrees to give quiet and peaceable

possession of the above premises to the party of the second part on or before the second day of August 1851. on the payment of one hundred dollars which which is part payment of the Eight Hundred Dollars payments. In witness whereof we bind ourselves our heirs our executors and assigns to perform the Obligations herein set forth witness our hands and seals the year and month first above written;—

David W. Edgerton *Edgerton*
Henry R. Conklin *Conklin*

On the second day of August A.D. 1851. the defendant. paid to said Edgerton the said sum of one hundred dollars mentioned in said argument—

On the fourteenth day of August A.D. 1851 said John W. Vail then residing in the state of Vermont— by his deed of that date sold and conveyed to one Arson B. Galusha for the expressed consideration of Four hundred dollars the said south half of said quarter section

On the Eighth day of September AD 1854
said Galusha for the Consideration of four
Hundred dollars Conveyed said South
half of said quarter section to the defen-
dant in this suit

On the Twentieth day of September AD
1854. said John Moore & Horace Moore
by their deed of that date Conveyed
the north half of said quarter section
to the Defendant in said this suit
said deed from said Tail to said
Galusha was without Consideration
& the said Galusha in receiving the
Conveyance & Conveying to said Conklin
acted as the agent for said Tail & was
a mere nominal holder of the title for
the Convenience in transacting the business
of his agency. At the time of the Conveyance
to this defendant by said Galusha of the
title so nominally held by him as agent,
this defendant actually paid the said
sum of Four Hundred dollars in Cash
which sum was all the Consideration
to which said Tail was entitled as
aforesaid

There was due from said
Edgerton to said John & Horace Moore
at the time of the execution by them

of the deed to this defendant as aforesaid
 the sum of six hundred and fifty
 dollars & at the time the execution of
 said deed this defendant paid to said
 John & Horace Moore the sum of three
 hundred dollars in Cash. After the
 payment of said one hundred dollars
 to Edgerton. Four hundred dollars to Galusha
 for Bail & at the time of the payment of
 said three hundred dollars to said John &
 Horace Moore making eight hundred dollars
 it was agreed between said Edgerton
 John & Horace Moore & this defendant ^{and} that the
 remaining three hundred and fifty
 dollars mentioned in said agreement
 as that to be secured by a Mortgage &
 should be paid by letting the said John
 & Horace Moore have the Mortgage Contem-
 -plated in said agreement - the closing
 of said arrangement - by the preparation
 & execution of said Mortgage was
 carelessly neglected till sometime in
 March A.D. 1852. The said Edgerton in the
 meantime had applied to his own use
 the four hundred dollars which belonged
 to bail & which Galusha had perm-
 -itted him to take. Sometime in March
 A.D. 1852, said Edgerton ^{and} one B. W. Matherton
 a lawyer in Morris & in the office of

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said Atherton in Morris, insisted that it was necessary that the notes should run to Edgerton as the contract was made with him & prevailed upon this defendant to execute the Mortgage and notes (one of which is stated declared upon) to said Edgerton, instead of to said John & Horace Moore as had been agreed with the fraudulent motive on the part of said Edgerton to assign the notes & Mortgage to said Paul to make good in part the money of said Paul so appropriated by said Edgerton to his own use & it is upon the said Edgerton for no other consideration took & immediately assigned said notes to the Plaintiff & they were left with said Attorney Atherton to be collected for said Paul the Plaintiff, and this said defendant is ready to verify wherefore he prays judgment &c.

T. Leland & H. Leland
Attys for Plaintiff

Be it remembered that heretofore to wit: On the 9th day of November 1861 a "Demurrer" was filed in the office of the Clerk of said Court, in said cause which is in the words & figures following To Wit:

State of Illinois }
 Cassell County } and Circuit Court
 thereof To November Term
 A.D. 1861.

John W. Vail
 vs
 Henry R. Conkling
 Assumpsit

Now comes the said
 Plaintiff by Glover Cook & Campbell his Attys
 and as to the 1st Plea of said Defendant
 above pleaded which says prays may
 be enquired of by the Country Plff doth
 the like

And as to the said 2^d & said
 3^d Plea above pleaded, and as to each
 of them Plff says preclude now & because
 he says the same are not, nor are either
 of them sufficient in law to preclude
 the said Plaintiff from maintaining
 his said action & he is not bound by
 law to reply to the same & this he is
 ready to verify, whereupon he prays
 judgment.

Glover Cook & Campbell
 Atty for Plff

Be it remembered that here to a-
fore Do Wit: On Friday December
6th 1861, the same being one of the
days of the November Term of Said
Court for Said year, an order
was entered of record in Said
Cause, which is in the words and
figures following Do Wit:

John W. Gail }
vs } Assumpsit: —
Henry R. Crutkins }

This day comes the
Plaintiff by Glover Cook & Campbell
his attorneys and the defendant by
E. S. Heland his attorney, and after argu-
ment of Counsel the Court overule the
plaintiffs demurer to defendants second
plea and sustains said demurer as
to the third plea of said defendant. The
Plaintiff by his Attorneys now enters
a nolle prosequi herein as to the Common
Counts of his declaration, whereupon the
defendant by his Attorney withdraws
all his pleas herein except the third

It is therefore considered by the Court
that Judgment be entered herein against
the defendant by default for want of a
plea and it appearing to the Court

that this suit is founded on an instrument in writing for the payment of money only the Clerk is directed to assess the damages and report the same to this Court, which is done and found to be the sum of two hundred and Eighty one dollars and Eighty three cents, which is reported to and accepted by the Court.

It is therefore considered by the Court that the plaintiffs have and recover of the defendant the said sum of two hundred and Eighty one dollars and Eighty three cents for his damages, also his costs and charges by him herein expended and that he have Execution therefor. The defendant now asks for an appeal herein to the Supreme Court which is granted by the Court upon condition that the said defendant shall on or before the first day of March next file with the Clerk of this Court a bond payable to the plaintiff in the penal sum of Three hundred dollars, which said bond shall be approved by said Clerk.

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Be it remembered that heretofore
 To Wit, On the 14th day of February
 1862, an "appeal Bond" was filed
 in the office of the Clerk of Said
 Court, and is in the words and
 figures following To Wit!

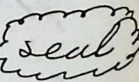
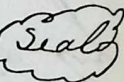
Know all Men by these presents
 that we Henry R. Conkling and Philip Collins
 are held and firmly bound unto John W.
 Bail in the penal sum of Three Hundred
 dollars for the payment of which well
 and truly to be made unto the said
 John W. Bail his heirs executors, and
 administrators or assigns be bind ourselves
 and each of our heirs, executors and
 administrators jointly and severally by
 these presents

Witness our hands and seals this tenth
 day of February A.D. 1862.

The condition of the above Obligation is
 such that whereas the said John W. Bail
 did at the November term A.D. 1861. of Caswell
 County Circuit Court obtain a judgment
 against the above bounden Henry R.
 Conkling for the sum of Two Hundred and
 Eighty one dollars and Eighty three
 cents and costs of suit from which
 judgment said Henry R. Conkling then

and there foreward an appeal to the Supreme Court of the State of Illinois

Now therefore if the said Henry R. Conkling shall prosecute his said appeal with effect and shall pay said judgment and costs and the interest thereon, and whatever damages may be awarded by the Court in ^{Case} said judgment shall be affirmed, then this obligation to be void. Otherwise to remain in full force and effect

Henry R. Conkling 
Philip Collins 

Filed and Approved by me this 14th day of Feby. 1862.

A. Belmore Clerk

State of Illinois }
Safalle County } ss. I, Abshalom B. Moore
Clerk of the Circuit Court
in & for said County, do hereby
certify that the foregoing, is a true full, and
perfect copies, of the declaration, Pleas, Demur-
-rer, & Appeal Bond, as now appear on file
in my office in said Cause, and also a full
and perfect copy of the Judgment in said Cause
as now appear of record, in said Court.

In testimony whereof I have hereunto set my hand
& seal of said Court this 5th day of April AD 1862

A. B. Moore Clerk

#7 164
~~193~~
128

129
Henry R Lunt
vs
John W Bail

Bail vs Bank
Copied & compared
Dec 4/1862

Filed April 22. 1862
L. Leland
Clerk

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102
106
133
297

Coultin. ~~Justice~~

~~Vail~~ - ~~Justice~~ delivered the opinion of the Court.

Mr. Chief-Justice

Watson, J. Upon a more careful consideration of the facts stated in this second plea, which are ^{some what complex,} we are satisfied now that ~~it does~~ ^{they} not present a defence to this action. ~~They~~ ^{They} show that bail had been paid the four hundred dollars due him on the land, and he had no further claim on Edgerton ~~for~~ upon the contract in reference to the land. That arrangement was ended, and for ever closed when Coultin ~~paid the~~ ^{and} as the debtor ^{and} agent of Edgerton paid the money to Galusha, ~~for~~ ^{and} the agent of bail, ^{and} received a conveyance from him. Then, we say, that debt was paid, ^{and} that matter ended. After that, Galusha ~~the agent of bail~~ ^{instead} of sending this money to bail, his principal, let Edgerton have it, who appropriated it to his own use. This made him the debtor of bail ^{anew,} but it did not revive the old indebtedness. He occupied the same position towards bail, that a stranger would, ~~to~~ ^{whom} Galusha had let have bail's money. There was really no necessity of complicating the case with a history of the previous transactions, so far as this matter was con-

Cerned. Then Conkling, who had by
 the previous wrongment become the
 debtor of the Moores for the \$350, which
 he had originally agreed to pay Edgerton
 for the land, whereby he had become by
 he the debtor of Edgerton, was persuaded
 to make these ~~notes~~ ^{and} his notes ^{and} mortgage to
 Edgerton for the \$350, instead of the Moores,
 and Edgerton then, before it was due,
 assigned this note to Vail, in part satis-
 faction of the four hundred dollars
 he owed him. To conceal the case
 still more - Edgerton owed Vail \$400 for
 money had ^{and} received. Conkling owed
 the Moores \$350 for which he had agreed to
 give them his land and mortgage - By means
 of improper ^{and} untrue representations, he was
 induced to make his notes ^{and} mortgage to Edgerton for
 the \$350 instead of ~~to~~ the Moores, hence these
 notes were without consideration. Edgerton
 assigned one of these notes to Vail before
 it was due ^{and} for a good consideration
 Now does this state of facts constitute
 a ^{valuable} defense to the note in the hands
 of Vail? He received it before due, and
 without notice, that it was given without
 consideration, ^{and} hence is entitled to receive
 upon it. The ~~pl~~ ^{was properly} ~~defence~~ ^{should have been} ~~was~~ ^{sustained}
 The judgment is ~~reversed~~ ^{affirmed} ~~the case~~ ^{remains} ~~remains~~ ^{affirmed}

In this opinion the whole Court concurred.

Judgment affirmed.

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Wair

Opinion
Lenton

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Revised Book 12

P 62,

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