

No. 14009

Supreme Court of Illinois

DeLaponte

vs.

Hutchinson

71641  7

DeSapoule
H
Hutchinson. } Appeal from Jo. Davies.

This was an action of debt commenced by Hutchinson against Maps and DeSapoule - The declaration contained two counts; the first, on a promissory note; the second, for money had and received - Process was served on DeSapoule only - He filed a plea to the first count, alleging, in substance, that at the time of the execution of the note it was understood by the parties, that DeSapoule was to be liable for its payment only in the event it could not be collected of Maps; and then averring, that no effort had been made to collect payment from Maps - There was a demurrer to this plea, which the court sustained - A judgment was then entered in favor of the plaintiff for \$206, in the form of a judgment entered in a promissory note - DeSapoule moved for an appeal.

The decision of the circuit court sustaining the demurrer to the plea is assigned for error - A plea is to be construed most strongly against the party pleading it - On this principle, as well as from the phraseology of the plea, we are bound to regard the agreement set up by it, as one resting in fact - If otherwise, the plea should have averred -

By this plea, the defendant seeks to avail himself of a parol agreement respecting the note, made at the time of its execution. The rule of law is, that where a contract is reduced to writing, the writing affords the only evidence of its terms and conditions. It cannot be contradicted or varied by the previous or contemporaneous verbal agreement of the parties. These are all regarded as merged in the written contract.

Greenleaf's Ev. Sec. 275 & by
Law on Shap's 3 Sec. 556.

The note declared on is, on its face, the joint obligation of Maps and De Sapoule. Both are liable to the payee as principals. The parol agreement would most materially change the terms of the contract, and the rights and liabilities of the parties. It would make it the note of Maps only. De Sapoule would be but a guarantor, responsible for its payment only on the happening of a contingency. The plea is clearly bad, and the circuit court committed no error in sustaining the demurrer.

It is contended, that the plaintiff discontinued his suit, by omitting to take judgment by nil dicit on

the record count of the declaration,
before tendering a demurrer to the
plea; and the case of Womack v. Allen
3 Sumner 38, is cited to sustain this
position. In that case, the plea, and
= moved but a part of the declara-
= tion, and after issue on the plea,
the defendant moved the court
for a discontinuance. The plain-
= tiff at the same time entered a
= cess motion for judgment by nil
dict on so much of the declara-
= tion as remained unanswerd.
The circuit Court decided that the
action was discontinued, and
overruled the cess motion. This court
reversed the judgment on the ground,
that the plaintiff had the right to
amend his case at any time before
final judgment, on the payment
of costs, and that the cess motion
was therefore properly made. It
was not decided in that case, that
the failure to take the proper judg-
= ment by nil dict, could be taken
advantage of on error. The case of
the opinion that it cannot, when,
as in this case, ~~not~~ the objection
= ^{was} not made in the circuit Court.
It is too late to raise it for the first
time in this court. If insisted on
in the Court below an opportunity

nity is afforded the plaintiff of
avoiding the effect of his omission,
either, by taking the appropriate
judgment on the part of the decla-
ration unadvised, or by withdraw-
ing this portion of his declaration
entirely from the case -

It is a signed for error that the
judgment is erroneous - This
objection is fatal - This court has
repeatedly decided that it is
enough to enter up judgment
in damages in an action of
debt. The judgment in this form
of action must be for the amount
of the original indebtedness estab-
lished on the trial, or the debt,
and the damages for the detour
thereof, which is usually the
interest - The judgment ought not
to be general for the amount of the
principal and interest, but must
specify what portion is the debt,
and what is given as damages.
The judgment in this case is for
damages only - This was no doubt
the error of the clerk, and it is to
be regretted that the judgment
must be reversed - This is not one
of those cases in which the proper
judgment can be entered in this
court - The evidence on which the

damages - The case of *Key* vs
Stapp 3 Scammon 95 is to the
point -

The judgment of the Circuit
Court is reversed with costs,
and the cause is remanded
for further proceedings -

De Laporte

by

Hutchinson

Spencer
Treat. J.

Filed 26th July 1846

Copied & compared

Moyer et al } In Supreme Court
v. }
Hutchinson } Sec. Term 1845.

And now comes the said defendant
and moves the Court here to dismiss
the appeal herein, for the reasons,
1st. That the appeal bond was not
entered into by the defendant taking
the appeal, but purports to have
been entered into by his atty. at law.
2^d. That the authority of the attorney,
if he had any, was not filed in the clerk's office
at the time the appeal was taken.
3^d. For other reasons.

E. B. Moulton
For Hutchinson

Hoyes et al
v

Hutchinson

Motion to discontinue
Appeal

120
Filed 12th Dec 1845

Wick
Alb

Wm. W. Wick
Alb

Francis De Lapoule
vs
Messrs. Bernard Magier
Appellant

2,

Benjamin Hutchinson
Appellee

Appeal from
the District Circuit Court

And the said Appellant complains and says that in the records and proceedings aforesaid there is manifest error, in this, to-wit, that by the said records and proceedings the said Circuit Court rendered a judgment against the said Appellant and in favor of the said Appellee whereas by the law of the land the said Court should have rendered judgment in favor of the said Appellant and against the said Appellee.

And the said Appellant also assigns for error the following to-wit,

1st The Court erred in sustaining the demurrer to the Defendant's special plea.

2^d The Court erred in permitting the Plaintiff to proceed in any other manner, after the interposition of his demurrer to the Defendant's plea, than to move for judgment or by nil dicit on that point of the declaration not assumed by the Defendant.

3^d The Court erred in permitting judgment generally, in the cause after the same was discontinued by the act of the Plaintiff, in demurring to the Defendant's plea which only purported to answer the Court on the note in Plaintiff's declaration & left the common money counts therein unanswered.

4th The Court erred in pronouncing final judgment upon the merits at the time of deciding the demurrer, without motion for it by Plaintiff, and thus preventing Defendant from making an application to amend.

5th The Court erred in fixing the amount of the Piffs claim, without a previous reference to the Clerk for appointment, there being no consent that the court should open the same.

6th

The Court erred in giving judgment in damages in an action of debt in manner & form as set forth in the record thereof.

For the above & other errors apparent on the aforesaid record, the appellants pray a reversal of said judgment.

O. C. Hall

Atty for appellants

And the appellee comes & says that, in the record and proceedings, &c, there is no error, and prays that the judgment of the Court below may in all things be affirmed.

By Washburne & Gilman his
attys

Filed 13th Dec 1845
Clerk
W. G.

State of Illinois
Sixth Judicial Circuit

Now in the circuit Court begun and
held within and for the County of La Salle
aforesaid on the second Monday of March A.D.
1845 before the Honorable Thomas C. Brown one
of the Associate Justices of the Supreme Court
and presiding Judge of the Sixth Judicial Circuit
in said State Alexander Young Sheriff, William H. Bradley Clerk

Benjamin Hutchinson, Plaintiff

vs.

Bernard Mayer &
Francis LeSapant) Defendants

So it remembered that heretofore
to wit on the 29th day of October A.D. 1844, the above
named Plaintiff Benjamin Hutchinson by his attorney filed
in the Office of the Clerk of the Circuit Court for
said La Salle County a bond for costs which said
bond is in the words and figures following to wit
Bond for Cost

State of Illinois

La Salle County Circuit

Benjamin Hutchinson

vs.

Bernard Mayer &

Francis LeSapant

October Term 1844

E. Cost

I hereby enter myself security for
costs in this cause and acknowledge myself bound to pay
all costs which may accrue in this action either to the
opposite party or to any officer of this Court in performance

of the laws of this State

Ino M. Angliss. (Seal)

Dated this 27th day of October. 1844
appeared John H. Bradley Clerk
for Wm. C. Postwick Dep

Endorsed Filed Oct 27th 1844

John H. Bradley Clerk
for Wm. C. Postwick Dep

And on the same day to wit on the 29th day of Oct
1844 the said Plaintiff by his attorney filed in the
Office of said Clerk of said Court an affidavit which
is in the following words and figures to wit.

State of Illinois
County of Hancock

Benjamin Hutchinson being duly
sworn states upon oath that he is about to sue out of the
circuit Court of the County and State a writ of scire facit
ad satisfaction for Bernard Mays and Francis Co. Sheriff
for that they are indebted to this affiant in the sum of
Two Hundred Dollars in a certain promissory note signed
by them and payable to this affiant of which the following
is a copy \$200.00 Given July 27th 1844. on or before the
first day of October next I promise to pay to the order
of Benjamin Hutchinson the sum of Two Hundred Dollars
for value received without defalcation Signed Bernard Mays &
Francis Co. Sheriff of Hancock

and this affiant further swears that he fears that said
Two Hundred dollars will be lost and the benefit of what
ever judgement may be obtained will be in danger

unless said Bernard Mays and Francis Le Sapsant
be held to bail, wherefore this affiant prays that a Capias
may issue &c according to law & Benjamin Hutchinson
Sworn and Subscribed before

me this 26th Oct 1844

Geo W Mitchell JP (SS)

Entered Filed Oct 29th 1844

Wm H Bradley Clerk

for Wm C Postwick Esq

And afterwards to wit on the 25th day of October 1844
the said Plaintiff by his attorney sued out of the office
of the Jail Clerk of Jail Court a writ of Capias ad
respiciendum against the said defendants which
said writ is in the words and figures following to wit.

State of Illinois)
In Lewis County) ss

The People of the State of Illinois
To the Sheriff of the County of Lewis, Greeting
We Command you that you take Bernard Mays and
Francis Le Sapsant and them safely keep, so that you
have their bodies before the Circuit Court of Lewis
County at the next term to be holden at Galena on the
second Monday of March next to answer Benjamin
Hutchinson in a plea of debt damaged their several
Articles and have you show them this writ.

Witness William H Bradley Clerk of

The Circuit Court of Jo Daviess County Illinois at Galena
this 28th day of October A.D. 1844

W. H. Bradley Clerk

Attest Jy. Wm. C. Postwick dep

The Sheriff is directed to hold the defendant to bail in the
sum of two Hundred dollars

W. H. Bradley Clerk

Jy. Wm. C. Postwick dep

Endorsed Executed the within capias on Francis de Lapont by
reading and taking bond Oct 28th 1844

A Young Sheriff

Jy. E. H. Snow Deputy

The bail bond taken of the said defendant by the said
Sheriff as per his return and returned with the
said writ into the said Clerks Office is in the words
and figures following, to wit

Know all men by these presents that we Francis
de Lapont and Alexander Colard are held and firmly
bound unto Alexander Young, Sheriff of the County of
Jo Daviess and State of Illinois and to his Successor in
Office in the penal sum of Four Hundred Dollars and — cents
for the payment of which well and truly to be paid, we bind
ourselves our heirs executors administrators and assigns,
jointly severally and firmly. Signed with our names and
sealed with our seals this twenty eighth day of October 1844

The condition of the above obligation is such, that whereas
Benjamin Hutchinson has lately sued out of the Circuit
Court of the County of Jo Daviess a certain writ of Capias
ad respondendum in a certain plea of debt returnable
to the next term of the Circuit Court to be holden at Galena

on the second Monday of March next. Now if the said Francis Le Sapsant shall be and appear not the said Court to be holden at Gabon on the said 2nd Monday of March next, and in case the said Alexander Colard shall not be received as bail in this said action, shall put in good and sufficient bail which shall be received by the plaintiff or shall be adjudged sufficient by the Court or the said Alexander Colard being accepted as bail, shall pay and satisfy the costs and condemnation money which may be rendered against the said Francis Le Sapsant in the plea aforesaid, or surrender the body of the said Francis Le Sapsant in execution, in case the said Francis Le Sapsant shall not pay and satisfy the said costs and condemnation money or surrender himself in execution when by law such surrender is required, then this obligation to be null and void, otherwise to remain in full force and effect

Taken and entered into before me this twenty eighth day of October A.D. 1844.

Alexander Young

Francis Le Sapsant (Sdnt)

Sheriff St. Louis County Ill.

A. Colard (Sdnt)

By E. W. Snow Deputy

And afterwards to wit on the 24th day of February, 1845 the said Plaintiff by his attorney filed in the Office of the Clerk of the said Circuit Court his declaration against the said defaulters, which said declaration is in the words and figures following to wit.

State of Illinois } In Circuit Court March Term A.D.
County of St. Louis } 1845

Benjamin Hutchinson the Plaintiff in this suit complains of Bernard Mayer and Francis Le Sapsant

the defendants in this suit of a plea that they render
to the said Plaintiff the sum of two Hundred Dollars good
and lawful Money of the United States, which they owe and
unjustly detain from him, for that whereas the said defendants
heretofore to wit on the twenty third day of July in the year
of Our Lord One thousand Eight Hundred and forty four at
Galena in the County of LaSalle and State of Illinois made
their certain promissory note in writing bearing date a
certain day and year therein mentioned to wit the day
and year aforesaid and then and there delivered the said
note to the said plaintiff, by which said note they the
said defendants then and there promised to pay on or before
the first day of October next, (meaning the first day of Oct-
A.D. 1844) the sum of Two Hundred Dollars to the said
Plaintiff or order for value received without defalcation,
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 Plaintiff the said sum
of money in the said promissory note specified according
to the tenor and effect of the said promissory, and although
the said sum of money in the said promissory note specified
hath been long since due and payable according to the tenor
and effect of the said note yet the said plaintiff in fact
saith that the said defendants (although often requested so
to do) did not nor would pay the said sum of two Hun-
dred dollars in the said note specified or any part thereof
to the ^{said} plaintiff in manner aforesaid or otherwise howsoever,
but hath hitherto wholly neglected and refused so to do
whereby an action hath accrued to the said plaintiff
to demand and have of and from the said defendants the
said sum of Two Hundred Dollars in the said note specified
the said sum above mentioned, and whereas also the said
defendants afterwards to wit on the first day of October A.D. 1844

at the County and State aforesaid had and received a certain other sum of money to wit the sum of two hundred dollars of like lawful money to and for the uses of the said Plaintiff and to be paid by the said Defendants to the said Plaintiff when the said Defendants should be thereto afterwards requested whereby and by reason of the last mentioned sum of money being and remaining wholly unpaid an action hath accrued to the said Plaintiff to demand and receive of and from the said Defendants, the said last mentioned sum of 200⁰⁰ other parcel of the said sum above demanded

Yet the said Defendants although often requested so to do have not as yet paid the said sum of Four Hundred dollars above demanded or any part thereof to the said Plaintiff but to do this have hitherto wholly refused and still do refuse to the damage of the said Plaintiff of four hundred dollars and therefore he brings his suit &c

I. M. Douglas atty for Plff

Copy note sued on

\$200.00 Galena July 23rd 1844 On or before the first day of October next I promise to pay to the order of Benjamin Hutchison the sum of two hundred dollars for value received without defalcation

(Signed) Bernard Mayer (Co. S)
Witness A. C. Curtis D. C. Supt

Endorsed Filed Feb 24th 1845

Wm H. Bradley Clerk

And afterwards to wit on the 26th day of March 1845 the Defendant ^{De LaPointe} by his attorney filed in the office of the Clerk of the said Circuit his ^{plea} answer to the Plaintiff's declaration which said ^{plea} answer is in the words & figures following

In Circuit Court
Francis DeSapoule et al

vs

March Term A.D. 1845

Benjamin Hutchinson

And the said defendant Francis DeSapoule comes and defends the wrong and injury, when &c and says that he admits the making, of the note set out as the Plaintiff's bill of particulars in the cause above entitled, but avers that at the time said note was drawn and signed and before the same was delivered to the said Plaintiff it was expressly understood and agreed by and between the said Plaintiff and the said defendant DeSapoule that the only undertaking on his part therein to the said Plaintiff was as security for the payment of said note after the same could not be enforced out of the said Bernard Meyer the real debtor therein by collection at Law or otherwise and he avers that collection of said note was not attempted by law or in any other efficient manner by the said Plaintiff or any one on his behalf prior to the commencement of this suit, all of which the said defendant is ready to verify and says that the same may be enquired of by the Country &c

O. Holt

Atty for DeSapoule

Endorsed Filed March 31st 1845

Wm H. S. Dudley, Clerk

And afterwards to wit on the 31st day of March A.D. 1845 the Plaintiff by his attorney, filed in the Office of the Clerk of the said Circuit ^{Court} his answer to the ^{plea} of the defendant which is in the words and figures following, to wit,

Hutchinson

vs

De Laporte and says that the above plea
is insufficient in law and therefore
prays judgment so

J. M. Douglass atty for Deft

The Deft De Laporte by counsel joins in the foregoing
demurrer and says that his plea heretofore pleaded by
him is insufficient in law to bar the plaintiffs action

Entered Filed March 31st 1845

Wm H Bradley Clerk

And afterwards to wit on the 31st day of March 1845
in the Circuit Court in the March term thereof
for A.D. 1845 in the records of said Court in said cause
is the following entry in the words & figures following to wit

Benjamin Hutchinson

vs

Francis De Laporte imple^{mt}
with Bernard Mayer

Debt

The Plaintiff by his attorney
demurs to the defendants plea which after argument by coun-
sel is sustained by the Court to which decision of the Court
the defendant by his attorney excepts, whereupon all and singular
the premises being seen heard and by the Court here fully un-
derstood and mature deliberation being thereupon had
It appears to the Court here that the said plea of the Defen-
dant as above pleaded and the matters therein contained
are not sufficient in law to preclude the said plaintiff

from having and maintaining his said action against the said defendant in manner and form as the said plaintiff has above alleged, Whereupon the said plaintiff ought to recover of the said defendant his damages on occasion of the premises and because it is suggested and proved and manifestly appears to the Court here that the said plaintiff hath sustained damages on occasion of the not performing the promises and undertakings aforesaid to the sum of Two Hundred and Six Dollars besides his costs and Charges in this behalf.

It is therefore considered by the Court that the plaintiff have and recover of the ^{said} defendant the said sum of Two Hundred and Six Dollars together with his costs by him about his suit in this behalf expended and that he have execution therefor and the defendant by his attorney prays an appeal to the Supreme Court.

And Afterwards to wit on the 2nd day of April 1845 as yet in the March Term A.D. 1845 of the Circuit Court in the records of said Court in said Cause is the following entry in the words and figures following to wit,

Benjamin Hutchison }
vs } Debt
Francis Le Lapant imple }
with Bernard Mayer } The defendant by his attorney
prays an appeal to the Supreme

Court which is granted him by the Court conditioned that the said defendant enter into bond in the sum of Four Hundred Dollars with Alexander Colwell as security within fifteen days from the rising of the present term of this Court

And afterwards to wit on the 9th day of June A^d 1845 the defendant by his attorney filed in the Office of the Clerk of the Circuit Court his power of Attorney to C. C. Pratt which said Power of Attorney is in the words and figures following to wit

Know all men by these presents that I Francis De LaPonte of Beeton in the Territory of Wisconsin have made constituted and appointed and by these presents do make constitute and appoint Orville C. Pratt of Galena my true and lawful attorney for me and in my name to execute an appeal bond in a certain cause about to be appealed by me from the Circuit Court of St. Davids County wherein one Benjamin Hutchinson is Plaintiff and one Bernard Meyer and I are Defendants

I hereby authorize said Pratt to execute said appeal Bond in the form of law and to do all other acts and things in my name and with my seal as may be necessary to perfect said appeal from the Circuit Court aforesaid to the Supreme Court of the State of Illinois hereby ratifying and confirming all and whatsoever my said attorney may heretofore have done or may hereafter do in the premises connected with said appeal the making of the Bond &c

In witness whereof I have hereunto set my hand and seal at Galena in the State of Illinois this 2nd day of April A^d 1845

1845

F. de LaPonte (S.S.D.)

Enclosed Filed June 9th 1845

W. H. Badley Clerk

And also on the 15th day of April A^d 1845 the def^t by his attorney filed in the Office of the Clerk of the Circuit Court a certain writing obligatory commonly called an appeal bond which said bond is in the words and figures following to wit

Know all men by these presents that we Francis De
Lafont and Alexander Colard of the County of Jackson
and State of Illinois are held and firmly bound unto Ben-
jamin Hutchinson also of the the same County and State
in the penal sum of Four Hundred Dollars current mon-
ey of ^{the} United States for the payment of which well and
truly to be made, we bind ourselves our heirs exec-
utors and administrators, jointly, severally and jointly,
by these presents, witness our hands and seals this fifteenth
day of April A.D. 1845.

The Condition of the above obligation is
such that whereas the said Benjamin Hutchinson did on
the thirty first day of March A.D. 1845 in the
Circuit Court in and for the County and State aforesaid
obtain a judgement against the above bound
in Francis De Lafont impleaded with Bernard
Wagner for the sum of Two Hundred and Six dollars
damages and nine dollars and eighteen & 3/4 Cents
costs from which said judgement of the said
Circuit Court the said Francis De Lafont has prayed
for and obtained an appeal to the Supreme Court of said
State. Now if the said Francis De Lafont shall duly
prosecute his said appeal with effect and shall more-
over pay the amount of the judgement costs interest
and damages rendered and to be rendered against him
in case the said judgement shall be affirmed in the said Supreme
Court then the above obligation to be void otherwise to remain in full
force and virtue

Francis De Lafont (S)
By his atty. C. R. R. (S)

A. Colard (S)

Taken and entered into before me
at my office in Galena this 15th day
of April A.D. 1845

N. H. Bradley, Clerk
W. C. Brewster, Notary

Endorsed Filed April 15th 1845
W. H. Bradley Clerk

State of Missouri
Jackson County
I, William H. Bradley,
Clerk of the Circuit Court in and for said County,
do hereby certify the foregoing transcript to be
a true and correct copy from the record
of all the proceedings which were had in said
Circuit Court in the aforesaid case of Benjamin
Hutchinson vs Bernard Mayer and Francis C.
Lasant. In testimony whereof I have
hereunto set my hand and affixed
the seal of said Court at my Office
in Talena this 9 day of September
1845
Attest William H. Bradley Clerk

Fees for transcript	5.00
charges & seal	50
	<u>5.50</u>

Sup. Court

Francis De La Roche
~~1847~~

Benj. Hutchinson

Appraiser from to Dauphin

O. C. Pratt

Atty for Appellants

Bernard Mayer et al

~~1847~~

Benjamin Hutchinson

Manuscript

Filed 2^d Dec 1845

Beck
1846

14009

Recd \$500

Beck
1846