No. 12717

Supreme Court of Illinois

Bradley

---

vs.

Stevens

71641 7

220 105

Leonidus C. Bruny

vs

Talmadge Sturges

220

1277

368

220

Leonidus C Bradley

vs

Talmadge Stevens.

Transcript.

Filed April 12th 1859

L Leland

Clk

10 25

Page 1

United States of America

STATE OF ILLINOIS, COUNTY OF COOK, S. S.

Pleas, before the Honorable George Manierre Judge of the Seventh Judicial Circuit of the State of Illinois, and Sole Presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the First Monday, (being the First day) of May in the year of our Lord one thousand eight hundred and Fifty Eight and of the Independence of the said United States the Eighty Second

Present, Honorable George Manierre Judge of the 7th Judicial Circuit of the State of Illinois.

Carlos Haven States Attorney.

John L. Wilson Sheriff of Cook County.

Attest: Wm L. Church Clerk.

[12717-1]

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Be it remembered. that heretofore, to-wit: on the 31 day of January in the Year of Our Lord One Thousand Eight Hundred and fifty Seven. Leonidas M Bradley to the use of Bela S Hunt. by E W Gracy his attorney sued out of the office of the Clerk of the Court aforesaid against Talmadge Stevens. defendant. the Peoples writ of attachment. directed to the Sheriff of Cook County to execute. and clothed in the words and figures following to-wit:

State of Illinois } ss
Cook County }

The People of the State of Illinois to the Sheriff of said County Greeting:

Whereas. Leonidas M Bradley hath complained on oath. to William S Church. Clerk of the Circuit Court of Cook County. that Talmadge Stevens defendant. justly indebted. to the said Leonidas M Bradley. who sues for the use of Bela S Hunt. in the sum of One Thousand Eight Hundred and forty One dollars and Seven Cents, and oath having also been made. that the said Talmadge Stevens, resides out of this State, so that the ordinary process of law cannot be served upon him. but has property and effects within this State liable to attachment; And the said Leonidas M Bradley. having given bond and security. according to the act in such case made and provided;

We therefore Command you that you attch. so much of the estate, real and personal, of the said defendant to be found in your County, as shall be of value.

S1979-83

sufficient to satisfy the debt and costs, according to the said complaint and such estate so attached in your hands to secure, or so to provide that the same may be liable to further proceedings thereupon, according to law, at a term of the Circuit Court, to be holden at Chicago within and for the County of Cook, on the First Monday of March next: So as to compell the said Salmadge Stevens to appear and answer the complaint of the said plaintiff:

And that you also summon Samuel Hall, and Julius White the Equitable Fire Insurance Company, the North Western Insurance Insurance Company, and the State Mutual Fire and Marine Insurance Company of Pennsylvania, as garnishees, to be and appear before the said Court on the First Monday of March, then and there to answer, what may be objected against them, when and where you shall make Known to the said Court, how you have executed this writ, and have you then and there this writ.

Witness William S Church, Clerk of our said Court and the Seal thereof, at Chicago, this Thirty First day of January in the year of Our Lord One Thousand Eight Hundred and fifty Seven.

Seal

Wm S Church
Clerk

And afterwards, to-wit on the 6th day of February in the year last aforesaid, said writ was returned into the Court aforesaid by the Sheriff aforesaid, Endorsed as

follows. to-wit:

$17.30. G a

4 Fees ~~125~~ Pd.

I have executed this writ. by levying on a stock of Boots & Shoes. and by reading to the within named Talmadge Stevens. also summoned as garnishees Samforth G Hall & Julius White. by reading this writ to them & Talmedge Stevens. in whose possession the said property was found, having given me a bond as herewith returned, I allowed the same to remain in his possession, this 6 day of Feby 1857

John L Wilson Sheriff

By George Anderson. Deputy

And afterwards-to-wit: on the 16th day of March in the year last aforesaid. said plaintiff by his attorney filed in the office of the Clerk of the Court aforesaid, his original declaration in said Cause, and afterwards to-wit: on the 3d day of July in the same year, refiled the same as amended. (amendments shown here in red ink) which original declaration and amendments are in the words and figures following. to-wit:

State of Illinois } ss { Cook County Circuit Court
Cook County } { of the March Special Term AD 1857

Leonidas C Bradley the plaintiff in this suit. who sues for the use of Bela S Hunt, by E W Tracy his Attorney. complains of Talmedge Stevens. the defendant in this suit. who is summoned in a plea of trespass on the case upon promises;

For that whereas heretofore. to-wit on the Twenty

5— ninth day of December, A.D. 1856, at the County of Cook aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, sold and delivered to him, the said defendant, a certain quantity of goods, to-wit: all and singular the entire certain large amount and stock of goods, consisting of Boots and Shoes, of leather, India Rubber, and other materials, which was an extensive and large Stock and quantity, then being at and in a certain building and store, which was then rented and occupied, by the said plaintiff as a merchant and dealing in the Boot and Shoe business, situate in the City of Chicago, in the County of Cook aforesaid, at a certain price then and there agreed upon, between the said plaintiff and the said defendant, to-wit: at the price of Six thousand Eight Hundred and forty one Dollars and Seven Cents, he the said defendant undertook and then and there faithfully promised to pay him for the said goods, by forthwith assigning to assigning and conveying to him the said plaintiff a certain leasehold interest and estate which the said defendant then owned, had and held in and to a certain piece, tract and parcel of land situate in the City of Chicago aforesaid, abutting on the Chicago River; together with a certain building then situate standing and being on said piece of land; at a certain price then and there, to-wit: at the County aforesaid, agreed upon, between the said plaintiff and the said defendant, to-wit: at the price of —

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five thousand dollars, and by also causing to be made and procuring, obtaining and delivering, to the said plaintiff, within one week then next to elapse, nine promissory notes in writing, to bear date as at Chicago in the County aforesaid, and as at or about the seventh day of December A.D. 1856, and made and signed by the said defendant, and endorsed by one Asa Slocum of Beaver Dam in the State of Wisconsin, One of said notes to be for the sum of five hundred dollars, and to be made payable to the order of the said plaintiff two months after the date thereof; one for the like sum to be made payable to the order of the said plaintiff three months after the date thereof; one for the like sum to be made payable to the said plaintiff four months after the date thereof; one for the like sum to be made payable to the order of the said plaintiff five months after the date thereof; one for the like sum to be made payable to the order of the said plaintiff six months after the date thereof; one for the like sum to be made payable to the order of the said plaintiff seven months after the date thereof; one for the like sum to be made payable to the order of the said plaintiff eight months after the date thereof; one for the like sum to be made payable to the order of the said plaintiff nine months after the date thereof; and one for the sum of five hundred and forty one dollars and seven cents to be made payable to the order of the said

7 plaintiff ten months after the date thereof,

And the said plaintiff in fact saith, that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to-wit: on the said twenty-ninth day of December, A.D. 1856, at the county aforesaid, sell and deliver the said quantity of goods, to the said defendant on the terms aforesaid. And although the said defendant in part performance of his said promise and undertaking, afterwards, to-wit: on the day and year last aforesaid, at the county aforesaid, assigned transferred and conveyed, to the said plaintiff, the said leasehold, interest and estate, in and to the said tract and parcel of land, and the said building, at and for the price of Five Thousand Dollars, as agreed upon, as aforesaid, in and as part payment for said goods, and although the said plaintiff afterwards, to-wit: at the time of the expiration of one month next elapsing after the said twenty-ninth day of December A.D. 1856, and on divers other days afterwards, and before the commencement of this suit, at the county of Cook aforesaid, requested the said defendant, to cause to be made, and procure & obtain and deliver, to the said plaintiff the said five promissory notes in writing, so agreed to be made and signed and endorsed as aforesaid and so agreed to be, for the respective sums, respectively, aforesaid and so agreed to be dated respectively, as aforesaid, yet the said defendant, not regarding his

said promise and undertaking, but contriving and
fraudulently and unjustly intending, craftily and
subtilly to deceive and defraud the said plaintiff in
that behalf, did not nor would, when he was so
requested as aforesaid, or at any time before or after-
wards, cause to be made or procured and obtain or deliver
to the said plaintiff, the said promissory notes in
writing, or any one or any part thereof, or any such
or similar note or notes, but hath hitherto wholly
neglected and refused, and still neglects and refuses
so to do; and by reason thereof, he the said plaintiff
hath lost and been deprived of the use and benefit
of the said notes, which he the said defendant
ought to have caused to be made, obtained, pro-
cured and delivered to him the said plaintiff, as
aforesaid, to-wit, at the county of Cork aforesaid.

And whereas also heretofore, to-wit, on or about
the twenty fifth day of December, in the year of our Lord
One thousand Eight hundred and fifty six, at the
county of Cork aforesaid, the said defendant in con-
sideration that the said plaintiff, at the special
instance and request of the said defendant, would
sell, and upon said defendants delivering to said
plaintiff, the several notes at the time hereinafter
mentioned, would deliver to him the said defendant
a certain quantity of goods, to-wit, all and singu-
lar, a certain stock of goods, consisting of boots and
shoes of leather, india rubber and other materials,
then being at and in a certain building at that time

used and occupied by the said plaintiff. as a mer-
chant. for the sale of boots and shoes. situated in
the City of Chicago in said County. at a certain
prices. then and there agreed upon. by and be-
tween the said plaintiff and the said defendant
to=wit. for the price of Six Thousand Eight hundred
and forty one dollars and seven Cents: Undertook
and then and there faithfully promised to pay him
for the said goods. by forthwith assigning and trans-
ferring. to him the said plaintiff. a certain leasehold
interest and estate. which the said defendant
then owned and held in a certain piece of land. situ-
ated in the City of Chicago aforesaid. abutting on
the Chicago River. together with a certain building then
being thereon. at a certain prices. then and there agree
d upon between them. to=wit: at the price sum of
five thousand dollars. and by also causing to be made
and procuring and delivering to the said plaintiff.
on or before the twenty ninth day of that month.
nine promissory notes in writing. to be made and
signed by the said defendant. and endorsed by
Alb Sucker. of Beaver Dam. Wisconsin. and all to
be made pay able to the Order of said plaintiff.
of which said note. One was to be for the sum of
Three hundred Dollars. pay able. two months after
date: One for the like sum to be made pay able
three months after the date thereof: one to be made
pay able for the like sum four months after the
date thereof: one to be made pay able for the like sum

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of money. five months after the date thereof: one to be made payable for the like sum of money six months from the date thereof: one to be made payable for the like sum of money seven months from the date thereof: one to be made payable for the like sum of money eight months after the date thereof: one to be made payable for the like sum of money nine months after the date thereof: one for the sum of three hundred and forty one dollars and seven cents ten months after the date thereof; And Whereas the said defendant failed to keep and perform his promise and agreement, so as aforesaid, made and entered into by him with the said plaintiff, in respect of the procuring and delivering of the said promissory notes, so as aforesaid, to be procured and delivered by him to the said plaintiff, the said defendant in consideration that the said plaintiff would then sell said stock of goods aforesaid, to him the said Stevens, and would then forthwith deliver possession thereof to him, without any further delay: then and there undertook, and then and there faithfully promised the said plaintiff, that he the said defendant would procure and deliver, or cause to be delivered to said plaintiff, within the space of one week from that time, the said several promissory notes above described and embraced in the said agreement between the said parties, first above set forth:

And the said plaintiff in fact saith that he

confiding in the said promise and undertaking of the said defendant: so as aforesaid made and set forth, did afterwards to=wit: on the twenty ninth day of December in the year first aforesaid. forthwith without delay, to=wit: at the County aforesaid, sell and deliver possession of said stock of goods, unto the said defendant upon the terms Conditions and agreement last aforesaid. who did then and there accept and receive possession of said stock of goods, and although the said defendant in part performance of his said promise and agreement first above mentioned and set forth, did afterwards to=wit: on the day and year aforesaid, at the County aforesaid assign transfer and convey to the said plaintiff, the said leasehold interest and estate in the said tract or lot of land and the said building, at & for the price and sum of five thousand dollars, as agreed upon as first aforesaid, in and as part payment for said goods, and although the said plaintiff afterwards to=wit: at the time of the Expiration of the One week next after the said twenty ninth day of December A.D. 1806 and divers other days afterwards, and before the commencement of this suit, at the County aforesaid, requested the said defendant, to procure and to deliver to him, the said plaintiff, the said nine promissory notes in writing, so agreed to be made and signed and endorsed as aforesaid, And so agreed

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to be for the same and respective sums and terms as aforesaid. being the same nine promissory Notes in writing first agreed upon by and between the said parties and above set forth. and yet the said defendant not regarding his said promise and undertaking last above mentioned and set forth. but contriving and intending craftily and subtilly to deceive and defraud the said plaintiff in that behalf did not nor would when he was so requested or at any time before or afterwards procure or deliver to the said plaintiff the said nine promissory Notes in writing or any one or any part thereof or any such or similar Note or Notes. but hath hitherto wholly neglected and refused and still doth neglect and refuse so to do: whereby the said plaintiff hath lost and been deprived of the use and benefit of the said Notes which which he the said defendant ought to have procured and delivered to the said plaintiff as aforesaid. to-wit: at the County of Cook aforesaid:

And whereas also the said defendant afterwards to-wit: on the Seventieth day of January in the year of Our Lord One Thousand Eight Hundred and Fifty Seven. to-wit: at Chicago in the said County became indebted unto the plaintiff in a large sum of money to-wit: the sum of Twelve Thousand dollars. for money before that time lent and advanced and paid laid out and expended for said defendant by said plaintiff

at said defendants request and for money before that time had and received by said defendants to and for the use of said plaintiff: and also in a like sum for goods wares and merchandise before that time sold and delivered by said plaintiff to said defendant at like special instance and request: and also in a like sum for the labor care and diligence of said plaintiff before that time done and performed by said plaintiff for said defendants and at the like instance and request of said defendants: And also in the like sum for money found to be due from the defendants to the plaintiff on an account then and there stated between them and being so indebted said defendants in consideration thereof then and there undertook and promised to pay to said plaintiff said last mentioned sum of money when thereunto afterwards requested:

Yet the said defendants not regarding his said promises and undertakings but contriving &c although often requested so to do has not paid said plaintiff either of said sums of money or any part thereof but so to do has hitherto wholly neglected and refused and still doth neglect and refuse:

Wherefore the said plaintiff saith that he is injured and hath sustained damages to the amount of Three Thousand Dollars: and therefore he brings his suit &c

E W Craven
Plf Atty

"Copy of Amount declared on"

14 . Salmadge Stevens. to S. C Bradley Dr

1857
January 20th

To Goods wares & merchandise
Sold and delivered to you 1 D/ 000 #
To Money found due from
you. the Amount Stated. 1 D/ 000

And afterwards. to=wit: on the 11th day of april. in the year last aforesaid. the said defendant by Matter Saft and King his attorneys. filed in the court aforesaid. his certain plea to the said plaintiffs declaration: which is in the words. and figures following to=wit:

Salmadge Stevens
ads
Leonidas C Bradley
for the use of Bela S Hunt

} Cook County Circuit Court

And the said Salmadge Stevens, defendant in this suit: by Matter Saft & King his attorneys. comes & defends the wrong and injury, when &c: And says that he did not undertake or promise, in manner and form as the said plaintiff. hath above thereof complained against him; And of this he puts himself upon the country. and the said plaintiff doth the like &c;

Mather Dafr & King
Defts Attorneys

And the said plaintiff doth the like.
by E V Gracy
attorney for said plaintiff.

And afterwards - to-wit: on the 13th day of July in the year last aforesaid, the said defendant by Mather Daft and King his attorneys filed in the court aforesaid his certain other plea to the said plaintiffs original and amended declaration, which is in the words and figures following to-wit:

Cook County Circuit Court

Salmadge Stevens
ads
Leonidas C Bradley
for the use of Beda & Hunt

And for a further plea in this behalf the said defendant says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said plaintiff, the said Leonidas C Bradley, before and at the time of the commencement of this suit, to-wit: at the County aforesaid was and still is indebted to the said defendant in a large sum of money, to-wit: the sum of Twelve Thousand Dollars, for the work and labor, care, diligence, and attendance of the said defendant by the said defendant and

his servants. before that time done performed
16 and bestowed, in and about the business of the
said plaintiff, and for the said plaintiff, and
at his request, and for divers materials and
other necessary things, by the said defendant
before that time found and provided and used and
applied in and about the said work and labor
for the said plaintiff, and at his like request
and for divers goods wares and merchandize
sold and delivered by the said defendant, to the
said plaintiff, and at his like request and for
money by the said defendant before that time
lent and advanced to, and paid, laid out, and
expended, for the said plaintiff, and at his like
request, and for money by the said plaintiff
before that time had and received, to and for
the use of the said defendant, and for money due
and owing from the said plaintiff to the said
defendant, for interest upon, and for the forbear-
ance of divers large sums of money, due and
owing from the said plaintiff, to the said defen-
dant, and by the said defendant forborne to
the said plaintiff for divers long spaces of time
before then elapsed, and for money due and
owing from the said plaintiff to the said de-
fendant upon an account stated between them
Which said sums of money so due and
owing to the said defendant as aforesaid
& made the damages sustained by the said

[illegible]

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plaintiff by reason of the non performance by the said defendant of the said several supposed promises and undertakings in the said declaration mentioned, and out of which said sums of money so due and owing from the said plaintiff to the said defendant, the said defendant is ready and willing, and hereby offers to set off, and allow to the said plaintiff, the full amount of the said damages, according to the form of the Statute in such case made and provided;

And this the said defendant is ready to verify, whereupon he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him;

Walter Sapp & King
(R) Sapp Atty

"Copy of Account of set off"

Leonidas B Bradley
Dr Salvadge Stevens & Co

Dr Work and labor	$	12 00
Dr Goods sold and delivered		12 00
Dr Money lent you		12 00
Dr Money had & received by you		12 00
Dr Money paid for you for interest		12 00
Dr Money found due on an account stated		12 00

And afterwards, to=wit, on the 16th day of July in the year last aforesaid, the said plaintiff by A. W. Arndett his attorney filed in the court aforesaid his certain replication, which is in the words and figures following, to=wit:

18

Circuit County Circuit Court
June Spl Term A.D. 1857

Secundus C. Bradley use &c
v
Salmadge Stevens

And as to the said plea of the said defendant by him lastly above pleaded, the said plaintiff saith that he by reason of anything by the said defendant in their plea above alleged, ought not to be barred from having and maintaining his said action thereof against him; because he saith that he was not nor is indebted to the said defendant in manner and form as the said defendant hath in his last said plea above alleged. And this the said plaintiff also prays may be enquired of by the Country &c

E. W. Gracy
Arthur W. Arndett
Atty for Plff

July 16, 1857

And afterwards, to=wit: at the November term of said Court for the year 1857, to=wit on the 9th day of January A.D. 1858, the following among other proceedings were had and entered of record therein to=wit:

19

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Leonidas C Bradley
use of Peter D Hunt
v
Salmadge Stevens
} Attachment.

This day came the said parties by their Attorneys, and issue being joined herein, it is Ordered that a Jury come: Whereupon come the Jurors of a Jury, of good and lawfull men to=wit:

Wm Vaughn. James Rossland. B Johnson.
B Chase. Adam Miller. W Pyrtle.
H Banks. Wm Simmons. W M Horton.
J D Moore. J Pownal. O W Keaton.

who being duly elected tried and sworn well and truly to try the issue joined aforesaid, after hearing the Allegations and proofs submited by said parties, arguments of Counsel and instructions of the Court, retire to consider of their verdict. And afterwards come into Court and say, We the Jury find for the plaintiff, and assess his damages herein to the sum of Sixteen Hundred and Fifty One Dollars and Fifty three Cents.

Whereupon the said defendant moves the Court for a new trial of this Cause, and leave is given him, on motion, to file Bill of Exceptions herein by Jany 27th in case of motion for new trial being overruled:

And afterwards, to=wit, at the March term of said Court, to=wit, on the 23d day of March A D 1858

the following, among other proceedings, were had and entered of record therein, to-wit:

20

Leonidas O'Bradley
use of Bela S Hunt
v
Salmadge Stevens
} Attachment

8-439

This day come the said parties by their Attorneys, and it appearing to the Court that said plaintiff has surrendered the original Notes at the time of rendering of the verdict for cancellation, It is therefore ordered that the said defendants motion for a new trial in this cause be overruled, upon plaintiff remitting One hundred and fourteen dollars, and seventy five cents, improperly assessed and included in verdict as interest;

Whereupon comes the said plaintiff and enters his remittitur for the amount aforesaid;

Therefore it is considered that said plaintiff do have and recover of said defendant his damages of Eighteen hundred and Thirty Six Dollars and Seventy Eight Cents, in form as aforesaid assessed, together with his costs and charges by him in this behalf expended, and have Execution therefor;

$1836.48

Whereupon, said defendant prays an appeal to the Supreme Court of the State of Illinois which is granted on condition that said defendant file his appeal bond herein within twenty days, in the penal sum of Three Thousand Dollars, with David Myers as surety thereon, conditioned

according to law. And it is further ordered that said defendant have twenty days. to file his Bill of Exceptions herein;

And afterwards. to=wit: on the 24th day of March A.D. 1858. the said defendant by his attorneys Matter and Sapp. filed in the Court aforesaid. his certain Bill of Exceptions. which is in the words and figures following. to=wit:

'In the Circuit Court of Cook County. Illinois

Leonidas B. Bradley Impleaded
for the use of Peter S. Hewitt

v

Solmadge Stevens

This cause was tried a second time. before the Hon George Manierre. Circuit Judge of Cook County. and a jury duly empaneled for that purpose. at the Court House in Chicago. on the Eighth day of January A.D. 1858. Messrs Tracy & Knight for the plaintiff. Matter & Sapp for Defft;

The plaintiff offered as a witness on his part. Thomas L. Porter. who being first duly sworn testified as follows: That he was acquainted with the parties, & was so prior to. 29th Dec 1856;

That the plaintiff Bradley for two years prior to the last named date. had been Engaged in the Shoe business. at No. 16. Lake Street Chicago.

That at the date last named. Bradley

sold to Stevens. his entire stock of goods in the Boot & Shoe business aforesaid, amounting in all to Six Thousand
22 Eight hundred and forty one Dollars 07/100:
Five Thousand Dollars thereof was at that time paid down by Stevens. by a conveyance or assignment of Real Estate in Chicago, or some interest therein & the residue Eighteen hundred forty one 07/100 Dollars, was to be paid in Nine promissory Notes, the first in Sixty days for Two Hundred Dollars, the next Seven Each for the same amount: payable at the End of Each month thereafter consecutively, and the last or Ninth, one month after the last of said Seven for Two Hundred & forty One 07/100 Dollars:
That Invoice Book containing the Schedules or Invoice Bill of said Goods, was here offered in evidence; At the foot of the bill of said goods, was the following receipt in writing. Signed.
" Recd, Chicago December 29th 1856, from —"
"S Stevens. Five Thousand Dollars, it being in part"
payment for the foregoing Invoice of Goods:
" Recd" Chicago December 29th 1856 from S —
Stevens, Six Thousand Eight Hundred Forty One 07/100
Dollars, it being in full payment for the foregoing
Invoice of Goods, and possession given this day:
L A Bradley
A & N Chichester
Witness Swears to it, Says it is correct, Rec in full at the
Time, & was made at the time, Signed by Bradley & Chichester; Witness Says: Mr Chichester was a witness

[illegible]

as I suppose: Mr Stevens was present: Bradley asked Chichester to sign it as a witness & it was done as above: Chichester signed his name directly under Bradleys. It was not claimed that Chichester had any interest in the property. The surplus over $1600. was all to be put in one note, i.e. the last or ninth Note to be $ 211.07/100, the Others $ 200. Each.

After the purchase I acted as clerk & agent for Mr Stevens, Mr Bradley called on me for the Notes several times, I did not deliver them because they were never there; These papers, (Invoice of Goods & Memdm of Repts) were all the memorandas made at the sale; Stevens said, some two or three days after the time of signing invoice, that the Notes had been sent to Beaver Dam Wisconsin, to be Endorsed by Mr Sucker, who was by the agreement to endorse them as security. and the Notes so endorsed, were to be delivered before Stevens took possession: Stevens said he wanted to go to New York that night & wanted the possession of the goods & and it was agreed that the Notes should be back at any rate in a week from that time, endorsed by Sucker, & he agreed to give his individual note, till the others should come from Beaver Dam: And they both agreed to that:

Being here asked by plaintiffs Counsel, if the Notes were to be back in a week, the witness answered that they were to be: It was objected on the part of the defendants Counsel that this answer

was to a leading question + not proper evidence
The Court notwithstand the objection, suffered
24 the question and answer to go to the Jury as evidence
in the manner above stated;
Witness proceeds. Mr Stevens was also Stevens Clerk;
The Notes were to be sent from Beaver Dam to
me as I understood it. I never have received
them, they were not sent. Stevens said the Notes had
been sent to Beaver Dam for Decker to endorse them
Stevens said he had signed them for Decker to en-
dorse; These interviews were all at the store 76
Lake Street on the 29th December 1856, and all
the agreements I know anything about, were on this
day: I saw the defendant Execute the collateral
Notes, and they were delivered to me by him;
They were delivered to me by Stevens and I
put them in the Safe;
I gave the Notes up to Bradley who took them
from me; Mr Bradley said to defendant that
he didn't want to give possession of the Goods, be-
cause he didn't know Stevens + was not acquainted
with him much and did not know whether he
was responsible, But he did not allude to any
prior understanding as to the giving of the Notes;
"Cross Examined" by Defendants Counsel"
Refers Papers shown to witness;
The signatures are in the hand writing of Bradley
of Chichester; Chichester name as afore.
I was a witness on a former trial of this cause

25— I did not say as I recollect on the former trial that I did not recollect anything that was said on the receipt being signed;

I don't remember swearing on the former trial that I did not know how Bradley came in possession of the notes; I was at Bruce Hayes Office on Dearborn Street after defendant returned from New York. Mr Salt was also there also Mr Thomas

I did not there say, as I remember that no time was fixed as I understood it: when the notes aforesaid to be endorsed by Sucker, were to be returned from Beaver Dam endorsed by him. I did not tell Thomas that I didn't see why in hell Bradley had commenced this suit, for that he had done all he had agreed to, I never told him any such thing. Chichester had a small sign up on that store, he had been in the store six or eight months, he exercised no care or oversight: but sold goods, received cash gave receipts therefor; Bradley was there also — most all the time, Chichester had no other store in town, I know nothing about any sale of these goods by Bradley to Chichester, I never heard of such a thing; The attention of witness, being here called to the conversation between Bradley & Stevens respecting the notes, stated as follows, That Stevens said he had sent the notes made by him to Sucker at Beaver Dam to be endorsed & he expected they would be back in a week. Witness then stated in answer to

plaintiffs Counsel (objection thereto by defendants counsel being overruled by the court) that Chichester told witness he put up his sign there because having been in Central Rail Road employ. and wished to notify people where he was, that he had no interest in the goods.

"Was the plaintiff arrested"

The Counsel for defendant here moved the court to exclude the evidence already given from the jury, on the ground that the plaintiff had failed to make out a cause of action and because he could not in any court recover in the case under his declaration without returning to Stevens or offering to return to Stevens, his individual Notes, which it appeared the plaintiff had received & for ought that appeared, still held or had put in Circulation:

The court overruled the motion and defendants Counsel excepted thereto:

Defendants Counsel then called as a witness Marshall H Thomas, who being duly sworn deposes as follows by his testimony, that is to say, that he had lived in Chicago, about One and an half years, with Mr Doggett merchant, before the sale of these goods, & was present at the former trial & heard the witness Baker, who has just testified, give his testimony on said former trial in July last the then stated in his testimony, that at the time of the receipt being signed at the foot of the invoice of the goods, he did not recollect of any thing being said between the parties

He also swore. He did not know how the notes in question got into the possession of Bradley (the individual notes of Stevens) I had one key to the safe and Porter had another. I was also present at Orrin T Hayes Office on the occasion alluded to by witness Porter in his testimony. Porter then stated in answer to Stevens that there was no stated time set in the original negotiation between Stevens and Bradley for Stevens to return from New York

Porter said on that occasion that the notes alluded to were to be exchanged on Stevens return from New York. But that he did not understand that any time was fixed for his (Stevens) return or getting back from New York. After the commencement of this suit & after the fire. while I was at my Lake Street, I asked witness — Porter. what Bradley had commenced this suit for. Porter answered. (to me his own expressions) He did not know what in hell Bradley meant for he had got everything from Cap. which witness explained by saying. "that was his mode of familiarly naming Stevens meaning Captain Stevens" that he had agreed for: Witness testified that he knew Stevens. He came with witness to Chicago from Beaver Dam Wisconsin on the 24th of December AD 1856 in the morning

Hay learned he said that Bradley the plaintiff had a stock of goods to sell & they went there. i.e. to his Store No 46. Lake Street

that day in the afternoon to see him;
Stevens offered some Real Estate in part pay. to the amount of Five Thousand Dollars on the purchase of the Grist & for the balance or Excess which the invoice then & there immediately to be made should show above said sum of Five Thousand Dollars he agreed to give his note.
They then proceeded to take an account of Stock. I wrote it myself, commenced the invoice on the 26th of December 1856 & completed the same on the evening of the 28th. Bradley proposed to Stevens to give some endorser besides his own note, Stevens then proposed to Bradley. to give for the Excess aforesaid (the whole amounting by invoice to the sum of $ 6841 04/100). Notes made by A.P. Sucker of Beaver Dam Wisconsin and Endorsed them himself. Bradley replied to this that he would Enquire & let him Know Soon. and did so, & on the same Evening returned for answer to Stevens. that he consented to take Suckers Note Endorsed by Stevens. Stevens then said, he would send to Sucker for them & they would probably be there before they got through the invoice. I think this occurred on the Evening of the 26th the day they commenced invoicing & two days before the completion of the same: On the Evening of the 28th the invoice being completed. the notes had not yet come to hand. but Stevens wanted to go on to New York & wished to arrange so that he might go directly on & get have possession

of the goods for purposes of Sale. Bradley said they could arrange it so & he need not wait for the return of the Notes. I left Chicago for Beaver Dam on the morning of the 30th December 1856, no arrangement between Stevens & Bradley had then been closed. I left Stevens there to go to Beaver Dam & get those Notes for Stevens & bring them back immediately. I was to return & go on in the Store there as agent for Stevens. I was acting in this matter for defendant. I may gone just one week. On my return. I went into the Store & asked when Stevens left. Bradley replied that he left for New York in the afternoon of the same day. that I left.

I asked Bradley how they had arranged it. Bradley said Stevens gave his own Notes to him & that Stevens was to endorse Suckers Notes on his return from New York & thereby take up his own.

Bradley then asked me if I had brought Suckers Notes with me. I told Bradley. Suckers Notes had been sent under cover to Stevens, directed to him at the Fremont House in Chicago:

I then went immediately across the road to the Fremont House & got the letter & opened it, found the Notes of Sucker & gave them over to Bradley. I asked him if they were all right, he said they were & they were more in number and amount than he wanted, thinks there were 12 or 15 Notes sent, Bradley took the Nine Notes

first due + gave them to Porter. (the first witness in this case) + told him to put them in the safe till
30 Stevens return from New York:

I asked Bradley if I should not send them forward to New York for Stevens endorsement + so take up + exchange for the Notes, Bradley replied No. he said it made no Odds. Stevens he said would be back in a week or two. (he had then been gone 1 week) + it could then be done. He also said. Stevens was not to be gone over 3 or 4 weeks, that he had gone to attend a law suit + it was some uncertain when he would be back. Bradley subsequently told me that Stevens first set of notes. his individual notes) were in the Bank. This was some time after my first return + when I had a second conversation with him about sending forward to New York to get Stevens Endorsement.

This suit now pending, was commenced by attachment previous to Stevens return from New York:

I was present on Stevens return from New York at Brewer + Thayers store on Randolph Street. Stevens + Bradley were both present. Stevens said to Bradley. I am ready to do as I agreed as to giving my Endorsement on Suckers notes taking up my own. Bradley said but little on that occasion;

"Cross examined by Counsel for plaintiff"

I arrived at Beaver Dam. the same day I left Chicago. arrived in the evening of that day. My impression was that I started on the morning of Wednesday 30th Dec 1856. but am not certain whether it was 29th or 30th. Cant tell the day of the week. I think it was Wednesday. I left Beaver Dam to return the next Sunday morning — I think the inventory was finished on the evening of the 28th Stevens & I arrived in Chicago. before the sale & purchase of the goods on the 24th of Dec 1856. the day before Christmas. left Chicago as above stated on the next day. or next but one after closing the invoice. of my own knowledge I dont know what defendant left for N York.

The first agreement between Bradley & Stevens made before invoice was made. agreement was for Stevens to give his own note. for the excess over Three Thousand Dollars. while invoice was making defendant said he had sent for the notes:

The agreement as to Suckers notes to be endorsed as above was afterwards & on the 26th as I think.

When I got to Beaver Dam. I called on Sager & he had not sent the notes. Before I left defendant expressed his surprise that the notes had not arrived:

There were 12 or 13 notes sent by Sucker endorsed from Beaver Dam. amounting to three Thousand Dollars in all. bearing date Dec 31st 1856. The other notes over & above the

mine which Bradley received from me. I kept and finally placed in the safe. I took immediate possession of the stock and commenced doing business there for the defendant, and so continued till the store was burned by fire, the latter part of January 1857. defendant had not then returned. Bradley took the mine notes. he said he believed they were all right. They were Two Hundred Dollars each signed by Sucker and amount filled in by Sucker. They had no payee in them but were perfect in other respects.

We informed Stevens of the fire by telegraph to New York, & he returned immediately to Chicago.

The conversation with Porter was at ch. 4 Sucker & Breck, the Sheriff being in possession of the goods were saved from the fire. After defendant returned from New York. I read the Sucker notes to him myself. they were in the safe and I had taken them. The payees name was not in the Sucker notes, they were blanks in that respect. the date of them was 1st Dec 1856. Mr Bradley remarked at the time that he believed that all was right.

On Stevens return from New York, the Sucker notes were by me returned to Stevens from the safe, where they had been put.

I do not remember whether or not I kept silence at Bryan & Stiger. on being asked by Stevens to state the facts. But I think Bradley asked me some question about this business which

I did not answer.

Bradley did not ask me to make a general statement of the business, but asked some questions which I declined to answer. I have Sucker's letter at home enclosing his notes, but it is not present.

The Counsel for plaintiff then moved to exclude the testimony of the witness Thomas, connected with the notes & letter, because of the non production of that letter and the notes, that part evidence could not be received, which motion was overruled by the Court, & the plaintiff excepted:

The conversation about sending for the notes to Beaver Dam, came up on the 26th., the first day of invoicing: The notes were to be for the balance of excess of the invoice over $5000. Dr. Was then Stevens offered to give Sucker notes & endorse them himself, He said I will give you them and endorse them myself:

The fire which destroyed No 46 Lake Street was about the 21st of January. 11 weeks later than the purchase: I was present when defendant said, he had sent for the notes. I think he said so on the 26th Dec. The agreement that Sucker notes should be given me on 26th but the trade was concluded on evening of 21st

Stevens left me in charge of every thing here and Porter only a clerk. Know nothing of his giving him any directions concerning business:

R. K. Swift a witness sworn on the part of the

9

34

Defendant testified, that he was a witness on the former trial in July last: I then brought some notes into Court. I found them in my possession, they were left at my Bank by Bates & Hunt.

They were left as a special deposite and not as collateral security on any account. but as I should say and I think, they were left for collection. I cannot say how they were Endorsed, nor do I know to whom they have been delivered. they were not left with me as collateral security but for collection, or to be returned to whom had left them. I was a Banker then in 1856 + 1857, My memory is refreshed now, by the recollection of what I then swore to on former trial. there were several of these but I cannot say how many.

I could not be positive whether they were left for collection or as a special deposite:

Upon the Witness Thomas J Porter, being asked the question; replied. that the notes produced by Swift on the former trial & which he now refers to were the same identical nine notes made by Stevens & delivered to Bradley just before Stevens leaving Chicago to go to New York on or about the 30th December 1856. I swore to the same on the former trial when Swift produced them in Court.

The witness Thomas being then interrogated. stated in answer thereto. that Stevens received notice of forfeit on some of these notes. but they

have never been returned to him so far as he knew:

Levi B Salyer. a witness produced & sworn. on the part of the defendant testified. that during the former trial he asked the witness Thomas I Porter what was said at the time of signing the receipt by Bradley Mchichester & he answered that he did not remember anything that was then said.

I asked him what had become of Stevens notes when Bradley came in possession of them:

He answered that he did not know how Bradley came by them. nor what had become of them.

Marshal B Thomas recalled by defendant: Stated that on the former trial in July last: plaintiff was then cuited before his testimony (i.e. the testimony of this witness) was finished

Thomas I Porter recalled by the plaintiff.

I never heard of any other notes except those I testified to; never heard of any notes to be made by Sucker & endorsed by Stevens.

Defendant visited to hire me to go on with the Store & he told me I could have full charge there if I would stay. he told me Thomas would be there as a clerk but I had the management for the defendant.

I think now on further reflection. I did hear something said before close of the inventory. about other notes. but nothing binding or definite:

That Store & Stock of goods was burned.

prejudiced if he is entitled to recover on the evidence by a failure to render them to the defendant as this remark:

3d. Each and every one of these instructions given for and by the request of the plaintiffs Counsel, the Counsel for the defendant then and there excepted;

"Defendants Instructions"

The judges gave the following certain instructions to the jury by request of defendants Counsel.

1st. If the jury believe from the evidence, that Stevens was to give the Notes of Sucker & Endorse them on his return from New York & then exchange them for his own notes, then the jury will find for the defendant:

2d. If the jury believe from the evidence, that the Notes of Stevens were to be exchanged for the Sucker Notes, when Stevens returned from New York & that such was the agreement, they will find for the defendant;

3d. That to entitle the plaintiff to recover in this suit he is bound to prove his case in substance as alleged in his declaration — that the said sale was made and possession delivered upon a condition or agreement, that the defendant should give to the plaintiff, nine Notes for the residue of the purchase money, to be signed by the defendant & endorsed by one A. Sucker of Sturgis Dam & deliver the same to the plaintiff, within one year from the time the agreement was made, and

that such condition or agreement never was performed within the time & according to such agreement.

4th. If the jury shall find from the evidence that the sale & transfer of the goods was made upon the agreement or condition alleged in the declaration & if the jury shall find that the performance of the agreement and condition was waived by the plaintiff & not insisted upon, then the defendant is entitled to a verdict;

5th. If the jury shall find from the evidence that there was no agreement or condition that the notes of Sucker were to be given within one week, then the plaintiff cannot recover,

6th. If the jury shall find from the evidence that Stevens said the Notes would be returned from Beaver Dam, if not if there was no agreement or condition of the sale that they should be back and delivered in a week & that the remark of Stevens was but an expression of defendants belief that they would be back in a week, then the jury will find for the defendant;

7th. The jury are the judges of the credibility of the witnesses & if there is any conflict in the testimony they are to reconcile the statements of the witness as if they can do so, & if not then it is then it is the province of the jury to determine which of the conflicting statements is most entitled to credit;

8th. If the jury shall find from the ev-

dence. that the goods in question were the joint prop
erty of Bradley & Chichester & that the sale to the
40 defendant was made by them jointly or as co-
partners, the jury will find for the defendant.
9th If the jury shall find from the evidence that
the plaintiff has parted with the title and trans-
ferred the notes delivered to him by the defendant
for a valuable consideration & has lost all control
there of, then the jury will find for the defendant.

The defendants Counsel requested the Court
to give to the jury the following instructions in
writing, which was handed in to the judge:

That unless the jury believe from the
evidence, that the notes given to Bradley by
Stevens, were delivered back to Stevens before
the commencement of this suit, they will find
for the defendant;

The Court refused to give such instruc-
tion & the defendants Counsel excepted thereto:

The Counsel for defendant above re-
quested the Judge, to give to the jury the following
instructions in writing, which was handed in for
the purpose,

That unless the jury believe from
the evidence, that the notes made by Stevens and
delivered to Bradley were delivered or tendered
to Stevens before or at the trial of this cause they
will find for the defendant.

This the Court refused to give to the

Stevens

jury, and the defendant excepted to such decision & refusal,

The Counsel for the defendant also requested the Court to give to the jury the following instructions in writing, which was handed in to the Judge,

That unless the jury find some evidence in the case, to show or that Mariah Bela & Hunt the person for whose use this suit is brought, has in this suit, they will find for the defendant;

The Court refused to give this instruction, and the Counsel for the defendant then & there excepted thereto,

The Counsel for the defendant also requested the Judge, to give to the jury the following written instruction, which was handed in for the purpose,

That if the jury believe from the evidence, that the plaintiff in this case, transferred or parted with the note, they will find for the defendant;

The Court refused to give such instruction & the Counsel for the defendant then & there excepted.

On the morning of the Ninth of January A.D. 1838, (the case having been given to the jury on the Evening of the 8th inst) the jury came into Court and rendered their verdict for the plaintiff for the sum of One Thousand Nine Hundred and

fifty One Dollars & fifty three Cents damages.

The Counsel for the defendant moved the Court to grant a new trial in the cause which motion the Court overruled and the said Counsel then and there Excepted to the Courts decision in so refusing a new trial.

And because none of the said Exceptions so offered & made to the opinions & decision of the said Circuit Judge do appear upon the Record of the said trial, therefore on the prayer of the said defendant by his said Counsel, the said Circuit Judge hath to this bill of Exceptions set his hand and seal according to the Statute in such case made and provided this 8th day of January AD 1858

O Evans Marina (Seal)
Judge 4th Judicial
Circuit Ills

And afterwards to wit on the 7th day of april AD 1858. the said defendant filed in the Court aforesaid his certain appeal bond, which is in the words and figures following to wit.

Know all men by these Presents. That we Saltmarsh Stevens and David A Gage. of the County of Cook and State of Illinois are held and firmly bound unto Leonidas Bradley for the use of Peter Blount also of the same county and State in the penal sum of Three Thousand Dollars

lawfull 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 this Seventh day of april AD 1858.

The Condition of the above obligation is such, That whereas the said Leonidas B Bradley for the use of Boland Hunt, did on the 24th day of March, AD 1858, in the Circuit Court, in and for the County and State aforesaid, and of the March Term thereof, A D, 1858, recover a judgment — against the above bounden Sallmadge Stevens, for the sum of One Thousand Eight Hundred and thirty Six Dollars and Seventy Eight Cents besides the costs of Suit: from which said judgment of the said Circuit Court, the said Sallmadge Stevens has prayed for, and obtained an appeal to the supreme Court of said State,

Now therefore if the said Sallmadge Stevens, shall duly prosecute his said appeal with effect, and 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:

Sealed & entered into before me at my office in Chicago this 7th day of April AD, 1858

Sallmadge Stevens (Seal)

D Allyaze (Seal)

Wm Schuck

State of Illinois, } s. s.
COUNTY OF COOK.

44

I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of the Judgment & all proceedings which has entered of Record together with the Bill of Exceptions & appeal Bond in a certain cause lately pending in said Court on the Common Law side thereof, wherein Semidus C Bradley use &c was Plaintiff and Talmadge Stevens was defendent

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the seal of our said Court at Chicago, this Twelfth day of March A. D. 1859

Fee for Record $10 85

Wm L Church Clerk.

Supreme Court
Talmadge Stevens appellant
vs
Semidus C Bradley appellee

Afterwards to wit at the third Monday of April A D 1859 before the Justices of the Supreme Court at the Court House in Ottawa Comes the said Talmadge Stevens by his attorneys Scates McAllister & Jewett his attorneys And says that in the Record and proceedings aforesaid and in giving the judgment aforesaid there is manifest Error in this to wit;

1st The Court Erred in overruling the motion to Expelinde the Evidence given on the part of the said plaintiff Semidus C Bradley.

2 Also in giving the instructions asked by the said Bradley & refusing those asked

by said Stevens.

3d Also in overruling the motion for a new trial made on the behalf of said Stevens

4th Also in giving the judgment aforesaid ~~for said~~ in favor of said Bradley when by the law of this State the same should have been given for said Stevens against said Bradley.

Whereupon for the Errors aforesaid and other Errors in the said Record & proceedings the said Stevens prays that the judgment aforesaid may be in all things reversed &c

Scates McAllister & Jewett
attys for appellt

And now comes the said appellee by his Attorney Arthur H. Windett and denies it to be true that in the Record & proceedings and judgment in the above entitled cause there is Error as above alleged - and prays that the said judgment of the Court below may in all things be confirmed.

Arthur H. Windett
Atty for appellee.

Printed by Jameson & Morse, 14 La Salle St., Chicago.

SUPREME COURT.

TALMADGE STEVENS,
Appellant.
vs.
LEONIDAS C. BRADLEY,
For the use, etc. Appellee.

APPEAL FROM COOK COUNTY CIRCUIT COURT.

ABSTRACT OF RECORD.

2, 3 This action was assumpsit, commenced in the Cook Circuit Court, on the 31st day of January, 1857, by attachment.

4 to 14 The declaration contains two counts upon a special executory contract for the sale of goods, and the common counts.

4 The first special count was, in substance, that on the 29th day of December, 1856, in consideration that the plaintiff, at the request of defendant, would sell and deliver to defendant a certain quantity of goods, viz:—all and singular, the entire stock of Boots and Shoes, then being in a certain building, occupied by plaintiff, in the City of Chicago, at a price then agreed upon of six thousand eight hundred and forty one
5 dollars, and seven cents, the said defendant undertook, &c. to pay for said goods by forthwith conveying to plaintiff his (defendant's) interest in certain real estate, situate in Chicago, with a certain building thereon, for five thousand dollars of the price of said goods, and by also making and procuring within one week from that time, nine promissory notes,
6 dated the 25th December, 1856, made by defendant, and endorsed by one A. M. Tucker of Beaver Dam, Wisconsin, payable to the order of plaintiff—the first of said notes to be for two hundred dollars, payable in two months from date; the second for same sum in three months; the third for same sum in four months; the fourth for same sum in five months; the fifth for the same sum in six months; the sixth for the same sum in seven months; the seventh for same sum in eight months; the eighth for same sum in nine months; the ninth for the sum of two hundred and forty one dollars and seven cents, payable in ten months from
7 said date. That on the 29th December, 1856, the plaintiff, under said agreement delivered the said goods to defendant, and defendant conveyed to plaintiff said real estate and building. That after the lapse of

one week the plaintiff requested defendant to make and procure to be endorsed, and deliver to plaintiff said nine promisory notes, that defend, ant refused and did not then or at any other time deliver said notes, or any or similar notes to plaintiff, and by reason thereof plaintiff had been deprived of the use and benefit of said notes.

The second count is like the first, except that it is averred that the said nine promissory notes were to be delivered to plaintiff on or before the 29th day of December 1856, and that it was thereafter agreed that if plaintiff would deliver the possession of said goods that defendant would procure and deliver said notes endorsed by Tucker within one week: breach the same as first count.

The defendant pleaded the general issue and a plea of set off. To which last mentioned plea the plaintiff replied by traversing the indebtedness.

On the 9th day of January 1858, the cause was tried before the court and a jury.

Upon the trial of said case the plaintiff called as a witness on his part Thomas J. Porter, who being sworn, testified that he was acquainted with the parties prior to the 29th December 1856. That the plaintiff had for 2 or 3 years prior to that date been engaged in Boot and Shoe business at No. 76 Lake St., Chicago. That at the date last named Bradley sold to Stevens his whole stock of goods in said business, amounting in all to six thousand eight hundred and forty-one dollars 7-100. Five thousand dollars thereof was at that time paid down by Stevens, by a conveyance of real estate in Chicago. Eighteen hundred and forty-one 7-100 dollars was to be paid in nine promissory notes; the first in sixty days for $200, the next seven, each for same amount payable at the end of each month thereafter consecutively, and the last or ninth, one month after the end of said seven for two hundred and fifty-one 7-100 dollars.

The Invoice Book containing the Invoice Bill of said Goods was here offered in evidence. At the foot of the bill of said goods was the following receipts in writing, signed:

"Received, Chicago, December 29, 1856, from T. Stevens, five thousand dollars, it being in part payment for the foregoing Invoice of goods.

Received, Chicago, December 29, 1856, from T. Stevens, Six thousand eight hundred forty-one 7-100 dollars, it being in full payment for the foregoing invoice of goods, and possession given this day.

L. C. BRADLEY.
A. E. W. CHICHESTER.

Witness swore to receipt, said it was correct. Receipt in full at the bottom was made at the time, signed by Bradley and Chichester: witness supposed Mr. Chichester was a witness. Mr. Stevens was present.—Bradley asked Chichester to sign it as a witness, and it was done as above. Chichester signed his name directly under Bradley's. It was not claimed that Chichester had any interest in the property. The surplus over $1,600 was all to be put in one note—that is the last or ninth note to be $241 7-100, the other $200 each. After the purchase witness acted as clerk and agent for Stevens. Mr. Bradley called on him for the notes several times. Witness did not deliver them because they were not there. These papers (Invoice of goods and Memorandum of receipts) were all the memorandum made of the sale. Stephens said two or three days after the time of singing invoices that the notes had been sent to Beaver Dam, Wis., to be endorsed by A. M. Tucker, who was by at the agreements to endorse them as security, and the notes so endorsed were to be delivered before Stevens took possession. Stevens said he wanted to go to New York that night and wanted the possession of the goods, and it was agreed that the notes should be back at any rate in a week from that time endorsed by Tucker, and he agreed to give his individual notes till the other should come from Beaver Dam, and they both agreed to that. Being asked by Plaintiff's counsel if the
24 notes were to be back in a week? the witness answered that they were to be.

Mr. Thomas was also Steven's clerk.

The notes were to be sent from Beaver Dam to him as he understood it; he had never received them. They were not sent. Stevens said the notes had been sent to Beaver Dam for Tucker to endorse them; Stevens said he had signed them for Tucker to endorse. These interviews were all at the store 76 Lake St., on the 29th December, 1857, and all the agreements I know anything about were on this day. I saw the defendant execute the collateral notes, and they were delivered to me by him. They were delivered to me by Stevens, and I put them in the safe. I gave the same up to Bradley who took them from me. Bradley said to defendant that he did not wish to give possession of the goods because he did not know Stevens and was not acquainted with him, and did not know whether he was responsible; but he did not allude to any prior understanding as to the giving of the notes. On cross-examination this witness stated that Stevens said he had sent the notes made by him
25 to Tucker at Beaver Dam, to be endorsed, *and he expected they would be back in a week.*

The Plaintiff rested his case and Defendant's Counsel moved to exclude the evidence from the jury on the ground that Plaintiff had not proved a cause of action, and had not offered to return the notes received of Stevens. The court overruled the motion and defendand excepted.

26 The defendant called as a witness, Marshall H. Thomas, who being
27 sworn testified that he knew Stevens, and came with him to Chicago, from Beaver Dam, Wis. on the 24th December, 1856, in the morning they learned that Bradley the plaintiff had a stock of goods to sell, and they went there to his store, No. 76 Lake St., that day in the afternoon to see him, Stevens offered some real estate in part payment to the amount of five thousand dollars on the purchase of goods, and for the balance or excess which the invoice to be made should show above that sum, he agreed to give his notes. They then proceeded to take an account of stock. I wrote it myself; commenced it on the 26th December, 1856, and completed it on the evening of the 28. Bradley proposed to Stevens to give some endorser besides his own notes, Stevens then proposed to Bradley, for the excess aforesaid (the whole amounting to
28 $6,841 7-100) notes made by A. M. Tucker, of Beaver Dam, Wis., and endorse them himself, Bradley replied that he would enquire and let him know soon, and did so, and on the same evening returned answer to Stevens that he consented to take Tucker's notes endorsed by Stevens, Stevens then said he would send to Tucker for them, and they would probably be there before they got through the invoice. I think this occurred on the evening of the 26th, the day they commenced the invoice, and two days before they completed the same. On the evening of the 28th the Invoice being completed the notes had not yet come to hand, but Stevens wanted to go on to New York, and wished to arrange so that he might go directly on and yet have possession of the goods for purposes of sale. Bradley said they could arrange it so, and
29 he need not wait for the return of the notes. Witness left Chicago for Beaver Dam, on the morning of the 30th December, 1856. No arrangement between Stevens and Bradley had then been closed. Witness left Stevens in Chicago, to go to Beaver Dam and get those notes for Stevens and bring them back immediately; witness was to return and go on in the store here as agent for Stevens, he was acting in the matter for defendant, he was gone just one week, on his return he went into the store and asked when Stevens left, Bradley replied that he left for New York in the afternoon of the same day that witness left, witness asked Bradley how they had arranged it? Bradley said Stevens gave his own notes to him and that Stevens was to endorse Tucker's notes on his return from New York and therewith take up his own, Bradley then asked witness if he had brought Tucker's notes with him, he told Bradley that Tucker's notes had been sent under cover to Stevens, di-
29 rected to him at the Tremont House, Chicago. Witness went to Tremont House, got the letter, opened it, found the notes of Tucker and gave them over to Bradley. *Witness asked Bradley if they were all right? He said they were, and they were more in number and amount than he wanted;* witness thought there were twelve or fifteen notes sent, Bradley took the nine notes first due and gave them to Porter and told him to put them into the safe till Stevens' return from New York. Witness
30 *asked Bradley if he should not forward them to New York for Stevens' indorsement and so take up and exchange for the others?* Bradley replied

no! he said it made no odds. Stevens he said would be back in a week or two; he had then been gone a week and it could then be done. Bradley also said Stevens was not to be gone over 3 or 4 weeks, that he had gone to attend a lawsuit and it was uncertain when he would be back. Bradley subsequently told witness that Stevens' first set of notes were in the Bank. This was sometime after witness' first return, and when he had a second conversation with B. about sending forward to New York to get Stevens' endorsement. This suit now pending was commenced by attachment previous to Stevens return from New York, at True and Thayers' store on Randolph Street, Stevens and Bradley were both present, Stevens said to Bradley "I am ready to do as I agreed as to giving my endorsement on Tuckers' notes, and taking up my own." Bradley said but little on that occasion.

On Cross-Examination witness further testified that the first agreement
31 between Bradley and Stevens was made before the Invoice was made; the agreement was for Stevens to give his own notes for the excess over five thousand dollars, while Invoice was making; defendant said he had sent for the notes. The agreement as to Tuckers' notes to be endorsed as above was afterwards, and on the 26th of December as he thinks.—there were 12 or 15 notes sent by Tucker from Beaver Dam, amounting to three thousand dollars in all, bearing date December 31st, 1856. The
31, 32 other notes over and above the *nine* which Bradley received from witness, witness kept, and finally placed them in the safe. Witness took immediate possession of the stock and commenced doing business there for defendant, and so continued there till the store was burned by fire, the latter part of January 1857; defendant had not then returned. Bradley *took the nine notes, he said he believed they were all right.* They were two hundred dollars each signed by Tucker and amount filled in by Tucker. They had no payee in them, but were perfect in other respects, We informed Stevens of the fire by telegraph to New York, and he returned immediately to Chicago.

The payee's name was not in the Tucker notes, they were blank in that respect, the date of them was 31st December, 1856. *Mr. Bradley*
32 *remarked at the time that he believed that all was right.* On Stevens' return from New York, the Tucker notes kept by witness and put into the safe were given to Stevens.

The conversation about sending for the notes to Beaver Dam came up on the 26th, the first day of Invoicing. The notes were to be for the balance of excess of invoice over $5,000. It was then Stevens offered to give Tucker's notes and indorse them himself. He said "I will give you them and endorse them myself." The fire was on the 24th of January, nearly four weeks after the purchase. Witness was present when defendant said he had sent for the notes, thought it was on the 26th.—The arrangement that the Tucker notes should be given was on the 26th. the trade was concluded on the 27th.

34 R. K. Swift was sworn for defendant, and testified that he was sworn on the former trial of this cause; that he then brought some notes into court, he found them then in his possession, they were left at his bank by Bela T. Hunt, they were left as a special deposit, and not as collateral security on any account; they were left for collection, can't say how many there were.

Here witness Porter on being asked, stated that the notes produced by Swift on the former trial were the same identical notes made by Stevens and delivered to Bradley just before Stevens left Chicago, about 30th December, 1856, for New York.

34 The witness Thomas further testified that Stevens received notice of protest on some of these notes, but they have never been returned to him so far as he knew.

35 Thomas J. Porter, was recalled by plaintiff and testified that he never heard of any other notes except those he testified to; never heard of any notes to be made by Tucker and endorsed by Stevens. Witness thinks now on reflection that he did hear something said before the close of the inventory, about other notes; but nothing binding or definite.

36 The foregoing is the substance of all the evidence given on said trial.

The defendant's Counsel moved the Court to exclude the plaintiff's evidence, on the same grounds as before mentioned, which the Court overruled and the defendant excepted.

The court instructed the Jury on behalf of plaintiff as follows:

37 If the Jury believe from the evidence that the sale of goods mentioned in the declaration was made as averred in the declaration, and that the nine notes were by the terms of that contract of sale, to be made and delivered in one week alleged in the declaration, and that said contract was broken on the part of defendant, and that said notes were not made and delivered as agreed upon nor any of them, within the period agreed upon, then the jury are to find for the plaintiff and the sale is to be treated as a cash sale, and the measure of damages is the sum total of all the notes so agreed to be delivered with interest from and after the lapse of the day when the contract was to have been performed.

If the Jury believe from the evidence, that Stevens was to give his own notes endorsed by Tucker, within the time stated in the declaration for $1,841 7-100 to Bradley, that Stevens failed to give these notes as agreed, the Jury must find for the plaintiff and treat the sale as a cash sale and assess the plaintiff's damages at the amount for which the notes

were to be given, with interest on that amount from the time when the contract was broken.

If the Jury find from the evidence, that the notes given by the defendant to the plaintiff were within the power and controll of the plaintiff to be surrendered up and cancelled, and have not been transferred, then the rights of the plaintiff are not to be prejudiced, if he is entitled to recover on the evidence, by a failure to tender them to the defendant at this moment.

38 To the giving of which instructions and each of them the defendant then and there excepted.

The defendant's Counsel requested the court to instruct the jury as follows :

40 "That unless the Jury believe from the evidence that the notes given to Bradley by Stevens were delivered back to Stevens before the commencement of this suit, they will find for the defendant.

40 That unless the Jury believe from the evidence that the notes made by Stevens and delivered to Bradley, were delivered or tendered to Stevens before or at the trial of this cause, they will find for the defendant.

That if the Jury believe from the evidence that the plaintiff in this case, transferred or parted with the notes, they will find for the defendant."

41 The Court refused to give either of said instructions, and the defendant then and there excepted.

The Jury found for the plaintiff and assessed his damages at one thousand nine hundred fifty-one dollars and fifty three cents.

The defendant's counsel thereupon moved the court for a new trial, which motion the court overruled, and the defendant then and there excepted.

20 The defendant prayed an appeal to the Supreme Court which was allowed on his filing a bond for $3,000, with D. A. Gage as security,
42 within 20 days, which was done accordingly.

The appellant makes the following assignment of errors.

44 1st—The Court erred in overruling the motion to exclude the evidence given on the part of plaintiff below.

2—As in giving the instructions asked on the part of the plaintiff, and refusing certain instructions asked by defendant.

3—Also in overruling the motion for a new trial.

4—Also in giving judgment in favor of the plaintiff, and against defendant.

SCATES, McALLISTER & JEWETT,
Attorneys for Appellant.

APPELLANTS POINTS.

I.

The judgment in this case is manifestly unjust, contrary to law and the evidence, and the court should have allowed the motion for a new trial.

1st—This being a sale of goods to be paid for by note, payable at a future day, the vendor could not maintain assumpsit on the general count for goods sold and delivered, until the credit had expired. This sale was made on the 29th December, 1856. The first note was to be payable in *two* months, the last in *ten*. The suit was commenced 31st January, 1857. Therefore no recovery could be had upon the common counts for goods sold and delivered.

Hanna vs. Mills, 21 *Wend.* 90 *and cases there cited.*

2—The Plaintiff could not recover upon the common counts, as upon a rescision of the special contract, because he did not before suit restore the notes he received under said contract. He must rescind *in to to* or not at all.

Jennings vs. Gage, 13 *Ill.* 610, *and cases cited.*

3d—He could not recover upon the special executory contract set out in the first and second counts of the declaration, because the defendant proved a performance of that contract. The witness Thomas testifies that Tucker's notes were delivered to and accepted by Bradley. There was no conflict of evidence on the point that these notes were delivered to plaintiff, and he said it was all right, that he refused to have them sent to New York to be endorsed by Stevens. Thomas was in no wise impeached, and the jury were bound by his evidence. *Rankin vs. Crow*, 19, *Ill.* 630. If so, can the plaintiff retain those notes, and yet recover the full amount of them in this action?

If he received and accepted the Tucker notes, there was then no ground, so far as the case shows, upon which the plaintiff could rightfully rescind the contract. If he had ascertained that Tucker was insolent and he had been deceived into taking them, *that* perhaps would have authorised it; but even then, he should have restored the notes before bringing the suit, yet the court seemed to think (*see rec.*, *page* 20,) that it was sufficient to return them after verdict, which is clearly wrong.

II.

The court erred in the rule of damages laid down in the first and second instructions given on the part of plaintiff below, which was that if they found that the contract was made as alleged, and the notes were not given, then the sale was to be treated as a cash sale, and the measure of damages was to be the sum total of all the notes, which were to have been delivered, with interest from and after the day of such performance.

This contract was made while the interest laws of 1845 were in force. The notes were not to be upon interest; and by said statute, (*Purple's Stat. Vol.* 1. *Page* 633, *Sec.* 2,) no interest could be allowed.

But the true rule of damages, in action upon the special agreement to give notes, is the value of the goods, allowing a rebate of interest during the stipulated credit.

Hanna vs. Mills, et al, 21, *Wend.* 90.

III.

The Court erred in giving the third instruction on the part of the plaintiff, because such instruction was in effect that the Jury might find the fact of ownership and control of the notes in the plaintiff, when the only evidence there was on the subject, showed that the notes had been transferred and left by another party in a bank for collection.

Manswell vs, Briggs, 17, *Vermt.* 176.
1 *Penn., Stat. R.* 68. 8 *Miss.* 733.

IV.

The evidence showed, (and without any conflict on the point) that the plaintiff had transferred the Stevens notes taken as collateral to the performance of the contract. Such transfer is *prima facie* a satisfaction.

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Abstract

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T. Stevens appellant
vs
L. C. Bradley appellee
(Use of B. F. Hunt)

Brief & argument of
Mather & Taft
for appellants

Point first

No action can be maintained on the 2 first counts

Both of these counts are founded on the alleged non-delivery of Stevens notes as maker endorsed by Tucker in one week after the sale (i.e. for $1841 77/100 in 9 notes running from 2 to 10 months)

This contract is not proved

Thomas J. Porter does indeed, in the first instance, swear to such a contract

But, the testimony of Marshall H. Thomas shows conclusively, that as finally arranged, before the close of the inventory the Tucker notes to be obtained from Beaver Dam Wisconsin, were to be made by Tucker & endorsed by Stevens,

and that in this form the contract was executed & carried into effect as far as could be, (awaiting Stevens' return from N. York to add his endorsement.)

Bradley rec'd the Tucker notes from Thomas, declared them right & satisfactory, declined having the witness take the trouble of sending them on to N. York for Stevens' endorsement, because he said it made no odds; & it was just as well to have Stevens endorsement whenever he should return from N. York —

And on a conversation with Thomas afterwards, Bradley gave another conclusive reason

for not wishing Stevens endorsement in a hurry

The first set of notes made by Stevens for the same debt now in suit (given on the eve of Stevens leaving for N. Y.) as Bradley informed Thomas were gave from him & were in Bank

The testimony of R. H. Smith also shows the same & that they were left in his Bank for collection by Bela T. Hunt

After this proof the plff. recalled Thos. J. Porter to say that "he never heard of any other notes except those he testified to & that he never heard of any notes to be made by Nicker & endorsed by Stevens

And the witness does indeed make out to utter this negation of his memory But he adds after a little reflection, almost in the next words "I think now on further reflection I did hear some thing said before the close of the Interview about other notes but nothing binding or definite

Thus the court will see the testimony of M. H. Thomas is corroborated by T. J. Porter even as to this immaterial matter, wherein alone there is a seeming discrepancy between the two

But in matter of fact, there is nothing contradictory in any essential particular between the statements of these two witnesses

It was certainly a very immaterial point, which should be make & which endorser of the notes in question

And yet the verdict of the jury evidently hinges on this immaterial point

No doubt, as first arranged, it was expected

& so expressed between the parties that for the excess of the goods over & above the $5000 paid in real estate, Stevens notes were to be taken, & that without any provision made for any security or endorser whatever

By an after thought (as the testimony shows) after the inventory of the goods was commenced & was progressing Tucker's name & credit were to be added in some form (& immaterial in what form)

Between if for argument sake we should allow it was to be as endorser on notes made by Stevens, still That form of execution is entirely waived as immaterial by Bradley's actual acceptance of the notes with Tucker's name as maker all declared right & satisfactory by Bradley himself

Stevens returned from N. York in about one month, having been absent no longer than was expected by Bradley (as he informed Thomas before his return) — He left Chicago (as Bradley informed Thomas) with the express understanding that his endorsement on Tucker notes was to be deferred till his return, having deposited his individual notes ad interim & taken a receipt in full payment of the bill; And now, on his return, he offers at once to endorse Tucker notes as agreed upon —

Bradley refuses to take the endorsement & no reason is given — But the Testimony supplies 2 reasons

1. Bradley had commenced this suit before Stevens return
2. Bradley had passed off Stevens' notes

The attachment Suit was evidently an after thought, & an entire change on the part of Bradley of his plan of operation.

Down to the time of the fire it is evident, by his reception from Thomas of the Tucker notes & his declarations then made to Thomas, that he was in good faith awaiting Stevens' return from N. Y.; he understood both the causes of Stevens' detention in N. Y. than even Thomas himself. Can is evident by his explanations given. But made no complaint thereof, declaring on the contrary that it was a matter of no importance, & such was the fact, for the first due of the notes which he was to endorse was a two months note & had one month yet unexpired when Stevens actually returned. And besides he held Stevens individual responsibility on his own notes given before he left Chicago. The endorsement was not to add any new security, but solely to substitute Stevens first set of notes which were then of course to be surrendered.

Immediately on the occurrence of the fire (it Seems) Bradley started upon a new project. Stevens was a non resident of this State. Bradley therefore conceived the plan (which this suit developes) of getting his convenient non resident witness, Porter, to draw up the first Contract in the shape of a special agreement to deliver in due work Tucker indorsements on Stevens notes; to ignore & repudiate

the agreement made in presence of Thomas as stated to him by Bradley afterwards i.e. to get Tucker notes & endorse them himself on his return from N.Y. (his own notes taken instead at interim) ignoring & repudiating also his actual reception 1st of Stevens' own notes which he had already sold & 2d his actual reception as a substitute therefor of Tucker notes which Stevens was to endorse, on his return from N.Y. And now he says to himself — I will attach the remainder of the goods which the fire has spared, garnishee the Insurance companies & thus get rid of the long credit given for the goods & get ready pay out of this fire —

That such must have been the fraudulent motives actuating Bradley in commencing this suit is evident from all the testimony for no doubt is left, that Stevens had fully & honorably & punctiliously performed & appeared to perform his contract, in every part of it, to the full satisfaction of Bradley & Bradley so declared to the witness before this suit was commenced

We need not cite the numerous cases reported to show, that the Supreme Court will grant a new trial whenever a verdict of the jury is clearly against the weight of evidence for here a case is presented in which the verdict of the jury has really no evidence at all to sustain it but on the contrary the evidence in the case

shows a most perfect defence against this plaintiffs claim, a defence which stands undisputed by a single fact established on the part of plaintiff—

Point Second

The court erred in deciding that it was unnecessary for the plaintiff to surrender & give up the notes made provisionally by Stevens (individually) on his leaving Chicago for New York

When this suit was brought, it appears by the evidence of both Porter & Thomas, the plff had just before received from Stevens his individual notes, for the balance now claimed, on a credit of from two to ten months, on wh. credit the sale was made

See 2d Am. Leading Cases 190

"When a negotiable instrument is shown to have been
"taken on account of the debt put in suit it is not merely
"a suspension of the right of action until its maturity
"but a continuing bar which the plff. can only
"remove by showing conclusively that it is still
"within his control & possession, of which its
"production & cancellation at the trial is the best
"evidence

Dept. by the tenor of this authority had a right to insist even if the plff. were otherwise entitled to a recovery that he must on the trial (if not before) surrender & cancel Stevens individual notes which had been given for the same debt

Twice on the trial the Bill of Exceptions shows this surrender & cancellation to have been demanded & motion made to exclude the plff's evidence from the jury on the ground of the non surrender of those Notes

These motions the Court over rule and By the 3d Instruction on the part of the plff. the jury are told by the Judge that if the notes

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"are only in the plffs. power & under his control
"so that he can surrender them he is none the less
"entitled to a verdict because he wont surrender
"them now at this moment"

This is nothing less than telling the jury the plff. is not bound to surrender the notes at all

But again this instruction submits to the jury that they have a right to believe from the evidence that the notes in question are within the plaintiffs control & under his power to surrender" whereas in fact there is not in the case one particle of evidence on that subject making even the least pretence to show the notes to be under the plaintiffs Control But the most perfect evidence that they are not under his control, but are negotiated & were left in Bank for collection & protested for non payment by his Endorsee, & what has become of them since — how many times negotiated since — & to whom — does not appear.

This instruction is manifestly wrong because it submits to the jury that they must find for the plaintiff if they are satisfied from the evidence of the existence of facts which the plaintiff does not attempt to prove, but which the defendant fully disproves or proves not to exist

See Cooleys Michigan Reports Vol 1

"Where the court charge the jury as to the conclusive
"nature of a written Contract between the parties

"if they shall find such contract established by evidence
"& this is no proof in the case showing or tending
"to show a written contract of the kind mentioned
"in the charge, Such charge is improper as tending
"to mislead the jury"

In the Case C.R.I.& Q.R.R. vs George
19 Ill. Reports 518 } this court
reiterate the doctrine of the courts in which is your
The court say as to one instruction

"This was properly
"refused "because there was no evidence to base it upon"

Again as to another instruction

"The court properly refused this instruction as there was no
"evidence of negligence or want of care on the part of plff.

Again as to another instruction

"The court properly refused this as there was no evidence
"tending to show that they were entitled to the road, but all
"the evidence showed they were not entitled to the road
"when the collision occurred"

Again as to another instruction

"This was also properly refused. It assumes that the
"depts. were running on time when they were not &
"& there is not a particle of evidence tending to show they
"were running in conformity to the regulations of the road

"To have given any or all of these would have
"tended to mislead the jury & bring before them more
"abstract supposition."

We respectfully submit to the court
that the Instructions of which we complain in this
Case & in all similar Cases is equivalent to the Courts
Saying to the jury "If you believe from the
evidence, that which the evidence does not prove
or that respecting which there is no evidence, or that
which the evidence entirely disproves, then you must

find a verdict for the plaintiffs

The premises of such an instruction, "If you believe from the evidence" contain an implication that the jury have a right to believe from the evidence the position following—

But the positions that follow are such as the jury have no right to believe being either unsupported by or contrary to the evidence

But the jury are told they must on the big for therein given absurd & contradictory as it is, to itself & to the evidence find for the plaintiffs

How absurd & nonsensical, to instruct a jury that if they believe from the evidence that of which they have no evidence or if you believe in spite of & directly against the evidence, facts that are proved not to exist—find for the plaintiffs—

It is certainly very mild language to say, that such a charge tends to mislead the jury—

2 Am. Lead. Cases page 189 "In all cases where a negotiable "note is given on account of a debt a 3d ground of defence "may arise founded on the presumption that the "instrument may have been endorsed over by the "creditor to a 3d party— No recovery can "be had on the original demand without showing "what has become of the new cause of action & that it is "not in such a situation as to be susceptible of "being enforced against the debt.

3d Cranch 311, Norris v Johnstow

In this case a note against a 3d person had been rec'd on sale of goods for the amt. to apply as pay'ts. daily when paid

This note appeared to have been endorsed & passed from the hands of the purchaser (seller) of the goods who may sued for goods sold not having returned the note at the trial tho' he did after judgment"

C. J. Marshall says at page 319
"The court do not think the order for the return
"of the note to the dep't. below made after Judgt.
"was reduced can correct the error in
"misdirecting the jury
"The judgt. is to be reversed for the error
"in directing the jury that the action was maintain-
"able on the original contract after the note
"rec'd as conditional pay't. had been endorsed

In this case before your honors, no addition to the direct charge of the circuit judge, that it was unnecessary for the plaintiff to surrender Stevens note, dep't. counsel requested the court to charge (See 2d printed instruction for dep't.) that it was incumbent on the pltff. to surrender the Stevens note which he had taken before or at the trial which the court refused

In the same connection (3d printed instruction) court refuse to charge that in case plaintiff had transferred the notes of Stevens they must find for Dep't.

This in connection with the pltffs. neglect & refusal to surrender the note is certainly equivalent to instructing that tho' the note may have been transferred (as it was further this case) yet the pltff. may recover for goods sold this rendering it certain he must pay the debt twice —

We submit to the Court that the close of this trial has something of the appearance of an experiment with the jury as if the Court should say — We will allow the pltff. to try the experiment & see if he cannot get a verdict from the jury without surrendering the note, of Stevens "just at this moment" If he can succeed well — If not, why then he can hold on to his note!! — The note was on a credit by custom of both parties 2 to 10 months, to be endorsed & Stevens is ready to endorse them, Court pltff. wants his money now as on a cash sale and if the jury say so, why let him have it!! The court will try to see no injustice is done.

We submit to your honors that such kind of Law must amazingly puzzle a jury to understand the logic of it —

We submit whether it is consistent with the dignity & proprieties of a judicial investigation & decision

We submit indeed whether there is not a tendency in such proceedings to make a trial appear like a farce & to expose courts to contempt or something like it

Point 3d

3d The plaintiff cannot recover on the Common Counts for goods sold.

2c Am. Lead. Cas. 189 — When goods are to be paid for in a bill payable at a future day "whether (in such case) the note) be or be not delivered he can in no event be made answerable for the price of the goods in an action of indebitatus assumpsit —

15 Johns R. 241 —
6 Mass. 321 —
21 Wend. 90 — & cases there cited Hanna vs Mills
16 Vermont 108 — Martin vs Fuller

When a verdict is erroneous or manifestly against the weight of evidence a new trial should be granted Barker vs Pritchett 16 Ills. 66

When it is apparent that the jury misunderstood or disregarded the evidence or instructions of the court or neglected properly to consider the facts or overlooked some material & essential facts or points in them & have failed to do substantial justice the verdict will be set aside & a new trial granted

Higgins vs Lee 16 Ills. R 495.

Same case — a new trial will be granted for giving improper or withholding proper instructions from the jury

So too where the finding of the jury is manifestly against the evidence a new trial should be granted

13 Ills. 697 Schwab vs Fingerick
Do. Do. 13 Ills 699 Dafield vs Crow

(12717-48)

2 Amer Leading Cases 188

When by the terms of a contract of sale it is provided that a bill or ~~note~~ payable at a future day shall be taken in payment, the sale is regarded as made on credit & no suit can be brought for the purchase money even if the vendee fail to deliver the instrument until the period at which it would have reached maturity if delivered

Mussar vs Price 4 East 147
Lee vs Ryden 7 Taunton 188
Dutton vs Solomonson 3 Bos. & Pull 582
Campbell vs Sewell 1 Chitty 609
Ferguson vs Carrington 9 B. & C. 59
Allen vs Ford 19 Pick. 217
Coolidge vs Brigham 1 Met. 547
Martin vs Fuller 16 Ver. 168
Scott vs Montague do 162
Eddy vs Stafford 18 N. 205

Altho in such case an action of Special Assumpsit may be sustained for the non delivery, in which the price of the goods will be the measure of damages. (with a rebate of interest as some of the cases say)

Girard vs Taggart 1 S. & R. 19
Rinehart vs Olwine 5 W. & S. 159
Hanna vs Mills 21 Wendell 90

In this case the court say "Using as the special agreement the value of the goods allowing a rebate of interest is the measure of damages, but no action can be com. counts till credit is expired"

Yale vs Coddington 21 Wend 175

Point Fourth

The instructions for the plff. are wrong on the score of allowing Interest. Then should indeed as we have shown above have been a rebate or deduction instead of an allowance of Interest even if the plff. were entitled to recover at all

The two first instructions for plaintiffs by the terms stated, negate & exclude from the jury the consideration by them of the question whether the contract at first arranged was not waived by the plaintiff and performed in a modified or altered form agreed upon by the parties

Matthews & Tapp
Attys. & Counsel
for Stevens
Appellant

(12717-41)

Supreme Court

Talmadge Stevens
appellant

vs

Leonidas C. Bradley
use of &c
Appellee

Brief of

Mouton & Taft
for appellant